


AN EVALUATION OF CHAPTER 6 OF THE 2010 CONSTITUTION AND ITS
EFFECT ON CORRUPTION AMONG STATE OFFICIALS IN KENYA

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE
BACHELOR OF LAWS DEGREE

STUDENT'S NAME: ANAMPIO LAVINIA KARAMBU

STUDENT'S REGISTRATION NUMBER: 066287

SIGNATURE OF STUDENT:



DATE:

18TH APRIL, 2016

STRATHMORE UNIVERSITY LAW SCHOOL

NAME OF SUPERVISOR:

DR. JENNIFER GITAHI

SIGNATURE OF SUPERVISOR:



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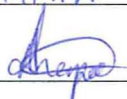
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DISSERTATION DECLARATION FORM

I declare that this dissertation is my original work, gathered and utilized especially to fulfil the purposes and objectives of this study, and has not been previously submitted to any other university for a higher degree.

NAME : LAVINIA ANAMPID

SIGNATURE : 

DATE : 18TH APRIL, 2016

ABSTRACT

This study assesses the progress of implementation of Chapter 6 and the extent of its effectiveness in curbing corruption among state officials. The research focuses specifically at state officials as defined in Article 260 of the 2010 Constitution of Kenya.

Regarding implementation, certain steps have been taken towards implementing the Chapter. These steps include the passing of various pieces of legislation by Parliament, the establishment of various institutions and the application of the law through the cases brought before the courts. Some of the legislations passed include the Leadership and Integrity Act 2012¹ and the Ethics and Anti-Corruption Commission Act 2011.² The institutions established include the Commission for Implementation of the Constitution (CIC) and the Ethics and Anti-Corruption Commission (EACC). Chapter 6 was found to have aided in the reduction of corruption cumulatively despite the increase in corruption in the year 2014 compared to 2013 and the numerous reports and corruption scandals reported in the media. However, despite this increase in 2014, corruption was found to have cumulatively reduced since 2010 thus showing the positive effect of Chapter 6.

Despite this success, there are areas of improvement that can be worked on. Firstly, robust laws need to be passed by Parliament to facilitate implementation. In addition, proper investigations need to be conducted in order to ensure successful cases against the individuals responsible. Lastly, the media needs to continue playing an active role in the fight against corruption.

¹ No. 19 of 2012.

² No. 22 of 2011.

LIST OF ABBREVIATIONS

KACC	Kenya Anti-Corruption Commission
CIC	Commission for Implementation of the Constitution
EACC	Ethics and Anti-Corruption Commission

LIST OF STATUTES

1. Constitution of Kenya (2010).
2. Leadership and Integrity Act No. 19 of 2012.
3. Public Officers Ethics Act No. 4 of 2003.
4. Ethics and Anti-Corruption Commission Act No. 22 of 2011.

LIST OF CASES

1. *CIC v National Assembly, the Senate and the AG* Petition 496 of 2013.
2. *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR.
3. *Benson Riitho Mureithi v J. W. Wakhungu & 2 others* [2014] eKLR
4. *Independent Policing Oversight Authority & another v Attorney General & 660 others* [2014] eKLR
5. *John Githinji Wangonde & 6 others v Nyeri South Sub-County Cooperative Officer & 3 others* [2015] eKLR
6. *Legal Advice Centre aka Kituo Cha Sheria v Attorney General & 3 others* [2015]eKLR
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CHAPTER 1: INTRODUCTION TO THE STUDY

Corruption has been a rampant problem in the African society. This is an issue that has persisted since independence and it has been a big issue in Kenya. A Transparency International poll carried out in 2001, showed that a quarter of Kenyans believed corruption to be the single most important issue facing the country, ahead of poverty and unemployment. Kenya was placed among the most corrupt countries in the world in Transparency International's 2010 Corruption Perceptions Index.³ According to the Eastern Africa Bribery Index 2012, Kenyan citizens confirmed the widespread experience of bribery, with the likelihood of bribery demand estimated at 29.5%.⁴ This shows the extent of corruption in the country. There have been many accounts of corruption cases and scandals in the country over the years such as in the importation of maize and oil and the embezzlement of the free primary education fund.⁵ Another famous corruption incident is the Anglo-Leasing scandal, which was the worst corruption incident of President Kibaki's regime.⁶ The study will look at the Kibaki regime and Uhuru regime.

In 1991, during President Arap Moi's regime, the United States and other aid-donor nations told Kenya to introduce political and economic reforms and improvements in human rights or face major cuts in aid in a period of six months. The warning to the government of President Daniel Arap Moi was due to the accusations of corruption and political repression in Kenya at that time.⁷ There have also been instances where funding by the World Bank has been suspended due to corruption and bribery incidents. An example of this is the Kenya Urban Transport Infrastructure Project was halted by the World Bank in 2001 after details of a bribery scandal came to light. This shows one of the effects of corruption in the Kenyan economy.⁸

³ Palmer A, 'A New future for Kenya?: Reforming a culture of corruption' *Harvard International Review* (2011),34.

⁴ Martini M, *Kenya: overview of corruption and anti-corruption*, Transparency International (2012), 3. Available at <http://www.u4.no/publications/kenya-overview-of-corruption-and-anti-corruption/> on 5 March 2015

⁵ Aketch M, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?' *Indiana Journal of Global Legal Studies* 18 (2011), 342.

⁶ Martini M, *Kenya: overview of corruption and anti-corruption* (2012), 2.

⁷ GreenHouse S, Aid donors insist on Kenya reforms, *The New York Times*, Nov.27 1991, Available at <http://www.nytimes.com/1991/11/27/world/aid-donors-insist-on-kenya-reforms.html> accessed on 5 March 2015.

⁸ Europa Publications, *Africa south of the Sahara 2004*, Psychology Press, 2003, 565 .

There have been attempts undertaken by the government to address this problem, but the attempted reforms do not seem to have been effective. Some of the attempted reforms include: constitutional reform, the encouragement of an active parliamentary culture, the reorganisation of the public service, the decentralization of decision making and service delivery, means to encourage civil society participation and an active media and the implementation of radical privatization programmes. There has also been an introduction of a large number of legal instruments to combat corruption such as the Anti-Corruption and Economic Crimes Act Chapter 65 and the Public Officers Ethics Act Chapter 183.⁹ Despite these attempted reforms corruption is still rampant in our society.

The new Constitution was promulgated in 2010 and with it the Kenyan citizens' hope for a different regime and radical changes in the country especially regarding corruption was renewed.

This dissertation looks at the effectiveness of Chapter 6 of the Constitution on leadership and integrity in curbing corruption among state officials in Kenya. It looks at the steps taken to implement provisions in the Chapter. In addition, it looks at the extent of implementation of the provisions of the same Chapter and whether implementation of these provisions has facilitated the curbing of corruption among state officials.

1.1 STATEMENT OF PROBLEM

The problem is evaluating the progress of implementation of Chapter 6 of the Constitution and its resultant effect on corruption among state officials. It is important to respond to the research problem because corruption has been a rampant problem in Kenya since independence. It has been one of the problems that has hindered growth in Kenya. Many efforts have been undertaken over the past years so as to provide a lasting solution to this problem but to no avail. However, with the promulgation of the 2010 Constitution, there has been a renewed expectation for a framework to deal with the problem permanently. This is especially due to the introduction of Chapter 6. It is therefore important to look at how effective this chapter has been and will be in dealing with corruption in the country.

⁹ Persson A, Rothstein B and Teorell J, *The failure of anti-corruption policies a theoretical mischaracterization of the problem*, Quest of Government, Working Paper Series 2010, 7.

Historically, state officers have been known for corruption, lack of accountability and lack of diligence in the undertaking of their duties. The Chapter was therefore introduced to curb this problem among state officers. The 2010 Constitution was promulgated in 2010 and thus a time period of 4 to 5 years may not be enough to gauge its effectiveness in a watertight manner. This is an important consideration in carrying out the research project.

1.2 JUSTIFICATION OF STUDY

Curbing corruption and ensuring accountability among state officers will be a direct result of the effective implementation of Chapter 6 of the 2010 Constitution. The Chapter is one of the new chapters introduced in the 2010 Constitution that deals with ensuring accountability among state officials. The Chapter was introduced as an attempt to break with a past plagued by mismanagement, misappropriation, nepotism and tribalism and abuse of power and impunity.¹⁰ The introduction of this new chapter in the Constitution has given Kenyan citizens aspirations of a more accountable and ethical government and state officials. This research project therefore, seeks to look at how effective the chapter has been (and will be) in curbing this problem.

1.3 STATEMENT OF OBJECTIVES

1.3.1 MAIN OBJECTIVE

To assess the progress of implementation of Chapter 6 and the extent of its effectiveness in curbing corruption in the country among state officials.

1.3.2 SPECIFIC OBJECTIVES

1. To find out what laws and institutions have been set up in order to facilitate the implementation of Chapter 6.
2. To find out how Chapter 6 and related laws have been applied and interpreted by the Courts to state officials specifically.
3. To compare the level of corruption before the 2010 Constitution and the level of corruption after its introduction so as to assess the resultant effect of Chapter 6 on corruption among state officials. This objective is made in line with the assumption that the change in corruption levels in the country among state officials is attributable to the introduction of Chapter 6.

¹⁰ Lumumba PLO and Franceschi L., *The Constitution of Kenya, 2010 An introductory commentary*, Strathmore University Press, 2014, 298.

1.4 RESEARCH QUESTIONS

1. What provisions of Chapter 6 have been implemented and applied among state officials?
2. What were the corruptions levels before the 2010 Constitution and the introduction of Chapter 6 and the levels of corruption after its introduction in the country?

1.5 HYPOTHESIS

The intended outcome of the study is that sufficient steps have been taken to implement Chapter 6 but this has not had a resultant positive effect on corruption among state officials.

1.6 RESEARCH DESIGN AND METHODOLOGY

1.6.1 METHODS OF DATA COLLECTION

Internet Searches

This will involve looking for online books, articles, journals, newspaper articles, reports and websites related to the research question.

Types of data

Secondary data was the main type of data used in the research and analysis. This data was obtained from books, reports, journals and newspaper articles. The data analysed was both qualitative and quantitative data. The quantitative data was obtained from reports and surveys carried out by different organisations and institutions. The quantitative data was used as a basis for analysing the effect of the implementation of Chapter 6 on corruption among state officials. The qualitative data was analysed by comparing the results of the different reports and surveys.

1.7 SCOPE

The dissertation will look specifically at State officers. Article 260 of the 2010 Constitution defines a State officer as a person holding a State Office. The Article further defines a State office as the following offices: President, Deputy President, Cabinet Secretary, Member of Parliament, Judges and Magistrates, Member of a commission to which Chapter Fifteen applies, holder of an independent office to which Chapter Fifteen applies, Member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government, Attorney-General, Director of Public Prosecutions, Secretary to the Cabinet, Principal Secretary, Chief of the Kenya Defence Forces,

Commander of a service of the Kenya Defence Forces, Director-General of the National Intelligence Service, Inspector-General, and the Deputy Inspectors-General, of the National Police Service and an office established and designated as a State office by national legislation.

The scope of the regime is the Kibaki regime and the Uhuru regime. This is between the year 2010 and the year 2014.

1.8 LIMITATIONS

1. The reports used to assess the corruption levels might contradict each other or may be biased depending on the criteria used.
2. The decrease or increase in corruption may not be solely attributable to the introduction of Chapter 6 but may be influenced by other factors such as the state of the economy.
3. The Constitution was promulgated in 2010 and thus a time frame of 4 to 5 years may not be adequate to gauge its effectiveness in a watertight manner.

1.9 CHAPTER BREAKDOWN

1. Introduction

This will provide a brief overview of the entire dissertation. It introduces the reader to the dissertation, background to the study, statement of the problem, objectives, research questions and the hypothesis.

2. Theoretical Framework and Methodology

This chapter will provide the theoretical or conceptual framework on which the dissertation is based on. Some of the theories relied on include the Natural Law Theory, the theory of justice and individualism,

3. Implementation of Chapter 6

The chapter will contain information relating to provisions of Chapter 6 that have been implemented and the relevant laws put in place to facilitate implementation of Chapter 6. It will also look at the institutions established to facilitate the implementation of Chapter 6. Case law will also be included to show the courts' interpretation and application of Chapter 6 and related laws.

4. Comparison and analysis of corruption levels in the country

The chapter will look at the corruption levels in the country before the promulgation of the 2010 Constitution and after. The chapter will compare the corruption levels and this will provide a basis for determining how effective Chapter 6 has been.

5. Findings, Recommendations and Conclusions

The chapter will have study findings and suggestions on what needs to be done in order to ensure that provisions of Chapter 6 are better implemented and applied to state officials.

CHAPTER 2: THEORETICAL FRAMEWORK

The question being tackled is how effective Chapter 6 of the 2010 Constitution has been in curbing corruption among state officials. The jurisprudential basis of the problem is the purpose of law in society. Natural law theory and positive theory are the major theories that expound on the different purposes of law.

Natural law theory has been expounded by scholars such as Aristotle and Thomas Aquinas. In the *Nicomachean Ethics*, Aristotle argued that law supports a virtuous existence, advances the lives of individuals and promotes the 'perfect community'.¹¹ He proposed that people should employ practical wisdom or active reason in order to behave in a way that is consistent with a virtuous existence.¹² In *The Politics*, Aristotle proposed that the law should function to promote the 'perfect community'.¹³ Aristotle's view of law is that it is supposed to ensure a virtuous life that is essential for the community. Law should therefore facilitate the practice of virtues by individuals in society.

St. Thomas Aquinas defines law as the ordinance of reason, for the common good issued by one who has care of the community and promulgated.¹⁴ Human law is rooted in natural law. He further states that human law is just not a mirror that reflects in whole or in part the demands of natural law.¹⁵ Human laws should not prohibit everything prohibited by natural law but only the more serious kinds of vice, from which most persons can abstain, and those that inflict harm on others, without the prohibition of which human society could not be preserved such as murder and theft.¹⁶ According to Thomas Aquinas, human law emerges when a public person entrusted with care of the community exercises human reason in order

¹¹ Himma K and Bix B, *Law and Morality*, Ashgate, 2005, 3-4.

¹² Leiboff M and Thomas M, *Legal Theories in Principle*, Lawbook, 2004, 54.

¹³ Vieru S, 'Aristotle's Influence on the Natural Law Theory of St Thomas Aquinas' *The Western Australian Jurist* (2010), 117.

¹⁴ Golding M and Edmundson W, *The Blackwell Guide to the Philosophy of Law and Legal Theory*, 2008, 16 Available at

https://books.google.co.ke/books?hl=en&lr=&id=TZwijHiVNcC&oi=fnd&pg=PA15&dq=natural+law+theory&ots=RwEtGxNtm&sig=hy3QyI2F8mI96dfVtvTOY0QweVE&redir_esc=y#v=onepage&q=natural%20law%20theory&f=false accessed on 2nd December, 2015.

¹⁵ Golding M, Edmundson W, *The Blackwell Guide to the Philosophy of Law and Legal Theory*, 17.

¹⁶ 'Classical Natural Law Theory, St. Thomas Aquinas (1227-1274) - the "Angelic Doctor", Law' Available at <http://home.wlu.edu/~mahonj/PhilLawLecture1NatLaw.htm> accessed on 5 March 2015.

to interpret the eternal law and create laws. A private person cannot make laws because he or she does not have coercive power, or the power to inflict penalties. A human law creates a moral obligation, if it has been promulgated to men by the law-maker and if it is just or consistent with divine reason, that is, if it promotes the common good. Aquinas acknowledges that man-made laws may be morally fallible and therefore unjust.¹⁷ Law does not prescribe all acts of the virtues rather some acts corresponding to each virtue.¹⁸

From these two theorists we can see that the purpose of law is to ensure the practice of virtues within the community and to ensure the attainment of the common good. The common good is dependent on the individuals within the community and can only be achieved once individuals in society practice virtues in their day to day lives. The virtues promoted in law are meant to ensure that society operates smoothly and no individual interferes with the rights of another person.

The Natural Law Theory is relevant to the study as it provides a basis for law being used as an instrument to promote virtues and ethics in the society as a whole. Law can thus be used to promote virtues such as accountability among the members of society, especially the leaders.

The social contract theory advanced by Thomas Hobbes, John Locke and Jean Jacques Rousseau is also relevant to this study. The three scholars looked at the theory from different perspectives. Thomas Hobbes stated that the state of nature made life poor, nasty, brutish and short and in order to avoid this fate, there must be guarantees that people will not harm one another. People must be able to rely on one another to keep their agreements. Only a government is capable of these two things and thus the need for a government. In establishing a government, people give up some of their personal freedom and give the government the authority to enforce laws and agreements. This forms the social contract. Those living under a government are parties to the social contract. Each person agrees to follow the laws of the state on the condition that everyone else does the same. In doing so, everyone is relatively safe from each other and benefit from the other social goods will result. The state exists to

¹⁷ Vieru S, 'Aristotle's Influence on the Natural Law Theory of St Thomas Aquinas', 120.

¹⁸ 'Aquinas on Law' Available at <http://people.wku.edu/jan.garrett/302/aquinlaw.htm> accessed on 5 March 2015.

enforce the rules necessary for social living. The government is given the duty to ensure the safety and provision of social goods of the people.¹⁹

However, Locke has a contrary view about the state of nature. He does not view the state of nature as miserable as Hobbes does. It was reasonably good and enjoyable, but property was not secure. He further says that the state of nature was a state of perfect and complete liberty to conduct one's life as one best sees fit. It was free from the interference of others. In that state of nature, all were equal and independent.²⁰ He argued that the obligation to obey civil government under the social contract was conditional upon the protection not only of the person but also of private property. If a sovereign violated these terms, he could be justifiably overthrown.²¹

Rousseau was of the opinion that in the state of nature man was unwarlike and somewhat undeveloped in his reasoning powers, sense of morality and responsibility. When, however, people agreed for mutual protection to surrender individual freedom of action and establish laws and government, they then acquired a sense of moral and civic obligation. In order to retain its essential moral character, government must thus rest on the consent of the governed, the general will.²²

Despite their varied views on the state of nature, they have a common view on the social contract and the obligation bestowed upon the government. The social contract theory provides a basis for accountability by leaders in carrying out the duties entrusted to them. In the event they do not fulfil their obligations, they can be elected out of office by the people. Therefore, leaders must undertake their duties and be accountable to the public.

John Rawls expounds on the theory of justice. According to him, justice is the first virtue of social institutions, as truth is of systems of thought.²³ Being first virtues of human activities,

¹⁹ 'Social Contract Theory' Available at <http://www.csus.edu/indiv/g/gaskilld/ethics/sct.htm> accessed on 29 November 2015.

²⁰ 'Social Contract Theory by Hobbes, Locke' Available at https://www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau accessed on 29 November 2015.

²¹ 'Social Contract Political Philosophy' Available at <http://www.britannica.com/topic/social-contract> accessed on 29 November 2015.

²² 'Social Contract Political Philosophy' Available at <http://www.britannica.com/topic/social-contract> accessed on 29 November 2015.

²³ Rawls J. *Theory of Justice* The Belknap Press of Harvard University Press Cambridge, Massachusetts, Revised Edition, 1999, 3

truth and justice are uncompromising.²⁴ The principles of justice apply to the basic structure of society. The principles of justice for the basic structures of society are the object of the original agreement. They are the principles that free and rational persons concerned with furthering their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements. They specify the kinds of social cooperation that can be entered into and the forms of government that can be established.²⁵ The principles of justice are the result of a fair agreement or bargain.²⁶

The first principle of justice states that each person is to have an equal right to the most extensive scheme of equal basic liberties. The second principle states that social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage, and attached to positions and offices open to all. The second principle applies to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility. While the distribution of wealth and income need not be equal, it must be to everyone's advantage, and at the same time, positions of authority and responsibility must be accessible to all. One applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits.²⁷

Finally, in regard to the second principle, the distribution of wealth and income, and positions of authority and responsibility, is to be consistent with both the basic liberties and equality of opportunity. All social values, liberty and opportunity, income and wealth, and the social bases of self-respect are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.²⁸

²⁴ Rawls, *Theory of Justice*, 4.

²⁵ Rawls, *Theory of Justice*, 10.

²⁶ Rawls, *Theory of Justice*, 11.

²⁷ Rawls, *Theory of Justice*, 53.

²⁸ Rawls, *Theory of Justice*, 54.

Aristotle defines justice as a state of mind that encourages man to perform just actions, just meaning lawful, fair and virtuous.²⁹ The theory of justice and its principles primarily apply to the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages.³⁰ It is necessary for social institutions and ensures that rights and duties are distributed fairly. This is especially in regard to positions of authority and responsibility. These positions should be open and ensure that everyone benefits. This responsibility is given to leaders to ensure that their positions are open to all and everyone benefits and not just a single individual. The need for accountability and the practice of virtues therefore arises in the course of ones duties to ensure that everyone benefits from the position of leadership and authority. The actions of the leaders in accordance with justice must therefore be fair and virtuous which is the basis of the research problem.

The theory of individualism is another relevant theory to the study. Corruption is defined as an extreme form of individualism. Individualism is defined as actions of self-rewarding agents aiming exclusively towards improvement of their personal welfare. Individualism is considered acceptable if it pursued in compliance with generally accepted fairness norms. Corruption therefore does not comply with the fairness norms.³¹ Individualism is an acceptable societal behavior if it conforms to the common fairness norms. Individuals have varying degrees of individualism. Despite these varying degrees of individualism among individuals there is an agreed standard on the fairness norms. The fairness norms may differ from one society to another depending on the societal values. There is a link between corruption and individuals. Individuals' desires to improve their personal welfare without regard for common fairness norms are what results in corruption. This theory is important and relevant to the study as it provides a basis for corruption in the society and shows the link between individuals and corruption.

²⁹ Thomson J, *The Ethics of Aristotle*, Penguin Classics, 1953, book V, 120-2.

³⁰ Rawls, *Theory of Justice*, 53.

³¹ Arghyrou M. G, '*Corruption as a form of extreme individualism: An economic explanation based on geography and climate conditions*' Cardiff Economics Working Papers (2010), 3.

CHAPTER 3: IMPLEMENTATION OF CHAPTER 6

3.1 INTRODUCTION

The 2010 Constitution introduces national values and principles of governance³² and further devotes a chapter on leadership and integrity. Absence of an adequate and enforceable code of ethics and normative standards for the public service has, since independence, created a public service weighed down by problems like rent seeking, corruption, poor governance, mismanagement of resources, tribalism, criminal conduct and impunity, among others. Constitutional implementation can be understood in two senses:

- i. the day-to-day process of fidelity to the text as well as principles that are legitimately derivable from the Constitution by all organs involved in the governance process and
- ii. operationalization of the Constitution during the transition period immediately after promulgation of that Constitution.³³

The effectiveness of Chapter 6 in curbing corruption among state officials and ensuring that the values and principles provided in the Chapter are adhered to is dependent on its implementation.

3.2 PROVISIONS OF CHAPTER 6

Chapter 6 provides guiding principles that are to be followed by leaders as they undertake their duties in their respective offices. It specifically applies to State officers. Article 260 of the 2010 Constitution defines a State officer as person holding a State Office.

The guiding principles of leadership include; selection on the basis of personal integrity, competence and sustainability; objectivity and impartiality in decision making; selfless service based on public interest; accountability to the public for decisions and actions and discipline and commitment in service to the people.³⁴

A State official is required to take and subscribe to an oath or affirmation before assuming a State office in the manner and form subscribed by the Third Schedule or by an Act of

³² Article 10, *Constitution of Kenya* (2010).

³³ Sihanya B, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects', FES Kenya Occasional Paper No. 5, 3.

³⁴ Article 73(2), *Constitution of Kenya* (2010).

Parliament.³⁵ A State officer is required to behave in public, official, private life and association with others in a way that avoids; conflict between personal interest and public or official duties, compromising any public or official interest in favour of a personal interest and demeaning the office the officer holds.³⁶

A State officer who contravenes Article 75(1), 76, 77 or 78(2) is subject to the relevant disciplinary procedures and may be dismissed or removed from office.³⁷ A person who has been dismissed or removed from office due to the disciplinary procedure is disqualified from holding any other State office.³⁸

A gift or donation to a State officer on a public or official occasion is a gift or donation to the Republic and must be delivered to the State unless exempted under an Act of Parliament.³⁹ This is to ensure that a State Officer is not bribed in the form of gift or donations. A bribe can easily pass unnoticed if it is given under the pretence of a gift or donation. A State officer cannot maintain a bank account outside Kenya except in accordance with an Act of Parliament or seek or accept a personal loan or benefit in circumstances that compromise the integrity of the State officer.⁴⁰ This provision is important as it avoids conflict of interest and ensures that the financial situation of the individual is transparent at all times. A full-time State officer is not allowed to participate in any other gainful employment.⁴¹ In addition, a State officer is not allowed to hold office in a political party.⁴² These two provisions are also a way of avoiding conflict of interest by the state officer and ensuring that he does not have loyalty to a specific party that might affect his duties. A person who is not a Kenyan citizen is not eligible for election or appointment to a State office.⁴³ This is a way of guaranteeing opportunities for Kenyan citizens.

Parliament is to enact legislation to establish an independent ethics and anti-corruption commission that will have the status and powers of a commission under Chapter Fifteen for

³⁵ Article 74, *Constitution of Kenya* (2010).

³⁶ Article 75(1), *Constitution of Kenya* (2010).

³⁷ Article 75(2), *Constitution of Kenya* (2010).

³⁸ Article 75(3), *Constitution of Kenya* (2010).

³⁹ Article 76(1), *Constitution of Kenya* (2010).

⁴⁰ Article 76(2), *Constitution of Kenya* (2010).

⁴¹ Article 77(1), *Constitution of Kenya* (2010).

⁴² Article 77(2), *Constitution of Kenya* (2010).

⁴³ Article 78(1), *Constitution of Kenya* (2010).

purposes of ensuring compliance with, and enforcement of the provisions of Chapter 6.⁴⁴ The legislation is to deal with, inter alia, the following issues;

- a) establishing procedures and mechanisms for the effective administration of this Chapter;
- b) prescribing the penalties, in addition to the penalties referred to in Article 75, that may be imposed for contravention of this Chapter;
- c) providing for the application of this Chapter, with the necessary modifications, to public officers;
- d) making any other provision necessary for ensuring the promotion of the principles of leadership and integrity mentioned in this Chapter and the enforcement of this Chapter.⁴⁵

The Sixth Schedule of the Constitution establishes the Constitutional Implementation Oversight Committee (CIOC) and the Commission for the Implementation of the Constitution (CIC). These two organs are responsible for the implementation of the Constitution, including Chapter 6.⁴⁶

A number of strides have been taken in order to facilitate the implementation of the Chapter. The two main ways is through passing of legislations and the establishment of various institutions.

3.3 LEGISLATIVE FRAMEWORK

3.3.1 Public Officers Ethics Act No. 4 of 2003

The Act was passed in 2003, prior to the promulgation of the 2010 Constitution. It applies to public officers and sets out a general code of conduct and ethics for public officers.⁴⁷ According to Article 260 of the 2010 Constitution, a public officer means any state officer or any person other than a state officer, who holds a public office. Public officer therefore covers a wider scope than a state officer.

⁴⁴ Article 79, *Constitution of Kenya* (2010).

⁴⁵ Article 80, *Constitution of Kenya* (2010).

⁴⁶ Section 4 and 5 of the Sixth Schedule, *Constitution of Kenya* (2010).

⁴⁷ Part III, *Public officers Ethics Act* (Act No. 4 of 2003).

It has provisions on conflict of interest, rule of law, professionalism and declaration of income, assets and liabilities of certain public officers. The Act provides guidelines of required professional and ethical conduct of public offices even before the promulgation of the 2010 Constitution. The Act works hand in hand with the Leadership and Integrity Act 2012.⁴⁸

3.3.2 The Leadership and Integrity Act No. 19 of 2012

This law was passed to give effect to and establish procedures and mechanisms for the effective administration of Chapter 6 of the Constitution; to promote ethics, integrity and servant leadership among state officers and to provide for the extension of the application of certain provisions of Chapter 6 of the Constitution.⁴⁹ It provides a general leadership and integrity code.⁵⁰ Unless otherwise provided, the provisions of the Public Officer Ethics Act 2003 shall form part of the Code.⁵¹ In the event the provisions of this Act are in conflict with the Public Officer Ethics Act, 2003, the former shall prevail.⁵² It contains provisions on professionalism, conflict of interest, rule of law, financial integrity, political neutrality, impartiality and conflict of interest among others.

A state officer is required to pay taxes within the required period.⁵³ This is necessary to ensure that all citizens in the country are equal including State officers who are required to pay taxes like any other citizen. This is especially important as there were laws passed previously that attempted to exempt certain State officers from paying taxes. State officer must respect the following values, principles and the requirements of the Constitution;

- a) the national values and principles provided for under Article 10 of the Constitution;
- b) the rights and fundamental freedoms provided for under Chapter Four of the Constitution;
- c) the responsibilities of leadership provided for under Article 73 of the Constitution;
- d) the principles governing the conduct of State officers provided for under Article 75 of the Constitution;
- e) the educational, ethical and moral requirements in accordance with Articles 99(1)(b) and 193(1)(b) of the Constitution;

⁴⁸ No. 19 of 2012.

⁴⁹ Sihanya B, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects', 10.

⁵⁰ Part II, *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵¹ Section 6(3), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵² Section 6(4), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵³ Section 33(1), *Leadership and Integrity Act* (Act No. 19 of 2012).

- f) in the case of County governments, the objectives of devolution provided for under Article 174 of the Constitution;
- g) the values and principles of Public Service as provided for under Article 232 of the Constitution.⁵⁴

The Ethics and Anti-Corruption Commission is required to come up with regulations for the better carrying out of the provisions of this Act.⁵⁵ The Commission referred to is the Ethics and Anti-Corruption Commission defined in section 2 of the Act. The Act has two Schedules; the First Schedule includes a Self-Declaration Form that must be completed by state officers, and the Second Schedule gives a list of interests all state officers should disclose publicly. Some of the interests that should be disclosed and registered include:

1. Directorships in public or private companies, whether or not remunerated.
2. Remunerated employment (including office, trade, profession or vocation which is remunerated or which the State officer has any pecuniary interest).
3. Contracts for supply of goods and services.
4. Public affairs advice and services to clients.
5. Land and property.
6. Gifts, benefits and hospitality (to a State officer or the State officer's spouse or partner or child or any other material benefit of a prescribed value, from a company, organization or person within Kenya or overseas, which relates substantially to the membership of a state office to a state office or Parliament or County Assembly).
7. Pending civil and criminal cases touching on the State officer or business associate or firm.
8. Possession of dual citizenship or pending applications for dual citizenship and the status of such application.

Each public entity is required to prescribe a specific Leadership and Integrity Code for the state officers in that public entity. The specific Leadership and Integrity Code prescribed by a public entity must include all the requirements in the general Leadership and Integrity Code under Part II of the Act and may provide the manner in which any requirements of the specific or general Code may be satisfied.⁵⁶ In the event a public entity has not prescribed a

⁵⁴ Section 3(2), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵⁵ Section 54(1), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵⁶ Section 37(1) & 37(2), *Leadership and Integrity Act* (Act No. 19 of 2012).

specific Leadership and Integrity Code, the general Code under Part II of the Act shall apply as though it were the specific Leadership and Integrity Code prescribed by the public entity.⁵⁷ A state officer is required upon appointment or election to sign and commit to the specific Leadership and Integrity Code issued by the relevant public entity at the time of taking the oath of office or within seven days of assuming a State office.⁵⁸

A breach of the Code by a state officer amounts to misconduct for which the state officer may be subjected to disciplinary proceedings.⁵⁹ Section 42 of the Act outlines the procedure for lodging complaints and investigations against a state officer. If upon investigation, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective state officer, the public entity shall refer the matter to:

- a) the Commission or the Attorney-General, with respect to civil matters;
- b) the Director of Public Prosecutions, with respect to criminal matters;
- c) any other appropriate authority⁶⁰

The prosecution of any state officer is not a bar to other steps that the Commission may consider necessary.⁶¹ Any person convicted of an offence under this Act, for which no penalty is expressly provided, shall be liable on conviction to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.⁶² The Commission shall submit an annual report, containing all the information relevant to the enforcement of and compliance with the provisions of this Act, to the President and Parliament.⁶³

There have been claims that Cabinet and Parliament adulterated the Leadership and Integrity Bill that had been drafted and approved by the Commission for Implementation of the Constitution (CIC). Some of the alleged changes include the vetting measures for individuals seeking elective posts. Stringent measures had been put in place; the Ethics and Anti-Corruption Commission was required to issue a Certificate of Compliance with Chapter 6 which would then clear them to vie. This provision was however removed by Cabinet which

⁵⁷ Section 38, *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵⁸ Section 40, *Leadership and Integrity Act* (Act No. 19 of 2012).

⁵⁹ Section 41(1), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁶⁰ Section 43(1), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁶¹ Section 43(5), *Leadership and Integrity Act* (Act No. 19 of 2012).

⁶² Section 47, *Leadership and Integrity Act* (Act No. 19 of 2012).

⁶³ Section 45(1), *Leadership and Integrity Act* (Act No. 19 of 2012).

cited time constraints and impracticability of the proposed vetting process as being among the reasons for the amendment.⁶⁴

Moreover, the original Bill made declaration of income, assets and liabilities of all state officers mandatory. Cabinet watered this down to a provision for an optional declaration of assets and liabilities.⁶⁵ This is an impediment to having all state officers accountable for their wealth and hinders discovery of fraudulent gain of personal wealth.⁶⁶ The Self Declaration Form provided in the First Schedule does not contain a provision for declaration of income, assets and liabilities.

There are also criticisms that the provisions on the participation of state officers in procurement are ambiguous and poorly drafted. The provisions requiring state officers to be of good standing in their professions are good but weak. Furthermore, there ought to be sanctions for state officers who give false information in the self-declarations required for elective officers under the First Schedule.⁶⁷

3.3.3 The Ethics and Anti-Corruption Commission Act No. 22 of 2011

The Act establishes the EACC pursuant to Article 79 of the Constitution. It provides for the functions and powers of the Commission, the qualifications and procedures for the appointment of the Chairperson and members of the Commission. The Commission is the successor to the Kenya Anti-Corruption Commission (KACC).⁶⁸

The Commission is composed of a chairperson and two other members in accordance with the Constitution and the Act.⁶⁹ Some of the functions of the Commission in addition to those set out in Article 252 of the Constitution include:

- a) receiving complaints on the breach of the code of ethics by public officers;

⁶⁴ Francis Mureithi; Cabinet dilutes Bill on integrity' *The Star*, Nairobi, 7 August 2012 Available at <http://www.the-star.co.ke/news/article-7181/cabinet-dilutes-bill-integrity> accessed on 27 November 2015.

⁶⁵ Bernard Namunane; Diluted Integrity Bill opens door to corrupt leadership' *Nation Media*, 14 August, 2012 Available at <http://www.kenyacentral.com/general/47888-diluted-integrity-bill-opens-door-to-corrupt-leadership.html?print> accessed on 27 November 2015.

⁶⁶ B. Sihanya, Constitutional implementation in Kenya, 2010-2015: Challenges and prospects, 11.

⁶⁷ 'Report of Implementation of chapter 6 of the Constitution', 5 Available at http://info.mzalendo.com/media_root/file_archive/Report_on_Implementation_of_Chap_6.pdf accessed on 24 November 2015.

⁶⁸ B. Sihanya, Constitutional implementation in Kenya, 2010-2015: Challenges and prospects, 9.

⁶⁹ Section 4, *Ethics and Anti-corruption Act* (Act No. 22 of 2011).

- b) investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics;
- c) recommending appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- d) overseeing; the enforcement of codes of ethics prescribed for public officers;
- e) advising, on its own initiative, any person on any matter within its functions;
- f) raising public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), as to confidentiality.⁷⁰

The Commission is required to keep proper books and records of account of the income, expenditure, assets and liabilities of the Commission.⁷¹ The Commission may request legal advice from the Attorney-General.⁷² The Commission may make regulations for the better carrying out of this Act, with respect to:

- a) the appointment, including the power to confirm appointments of persons, to any office in respect of which it is responsible under this Act;
- b) the disciplinary control and termination of appointments of employees of the Commission;
- c) the practice and procedure of the Commission in the exercise of its functions under this Act.⁷³

3.4 INSTITUTIONAL FRAMEWORK

3.4.1 Commission for Implementation of the Constitution (CIC)

Section 5(1) of the Sixth Schedule of the 2010 Constitution establishes the Commission. The Commission is subject to provisions of Articles 248 to 254 of the 2010 Constitution that applies to Commissions and Independent Offices. The Commission comprises of a chairperson and eight other members.⁷⁴

The functions of the Commission are to;

⁷⁰ Section 11, *Ethics and Anti-corruption Act* (Act No. 22 of 2011).

⁷¹ Section 26(1), *Ethics and Anti-corruption Act* (Act No. 22 of 2011).

⁷² Section 31, *Ethics and Anti-corruption Act* (Act No. 22 of 2011).

⁷³ Section 32, *Ethics and Anti-corruption Act* (Act No. 22 of 2011).

⁷⁴ Section 5(2) of the Sixth Schedule, *Constitution of Kenya* (2010).

- a) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution;
- b) Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement the Constitution;
- c) Report regularly to the Constitutional Implementation Commission Oversight Committee on progress in the implementation of this Constitution and any impediments to its implementation; and
- d) Work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.⁷⁵

Pursuant to its constitutional mandate, CIC has filed several suits seeking the court's intervention to ensure that Parliament enacts laws which are envisaged in the Constitution of Kenya 2010, and ensure due process is followed in the development of legislation and administrative procedures required to implement the Constitution. Further, CIC has also held Parliament accountable to enact the laws with specific deadlines as outlined in Chapter 4 and 5 of the Constitution.⁷⁶ In *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others*⁷⁷, the High Court dismissed a petition challenging the constitutionality of the Leadership and Integrity Act 2012. The Petitioner argued that the Parliament (1st Respondent) diluted and watered down the Bill prepared by CIC in consultation with stakeholders during the enactment process as a result of which the final product failed to meet the constitutional threshold as contemplated by Article 80 of the Constitution. Further, the Act as passed undermined the mandate of the EACC in as far as it failed to provide procedures and mechanisms for it to use in the enforcement of the Act. The Court held that these mechanisms were to be supplemented by rules and regulations passed by the EACC which had not at the time been enacted. The presumption was that the concerns would be dealt with by the rules and regulations.

In *CIC v National Assembly, the Senate and the AG*,⁷⁸ CIC filed this petition to challenge a Gazette Notice by which the National Assembly published Constitutional (Amendment) Bill, 2013. This Bill sought to amend Article 260 of the Constitution by deleting the offices of

⁷⁵ Section 5(6) of the Sixth Schedule, *Constitution of Kenya* (2010).

⁷⁶ 'Report of Implementation of chapter 6 of the Constitution', 12 Available at http://info.mzalendo.com/media_root/file_archive/Report_on_Implementation_of_Chap_6.pdf accessed on 24 November 2015.

⁷⁷ [2013] eKLR.

⁷⁸ Petition 496 of 2013.

Members of Parliament, Judges, Magistrates and Members of County Assemblies from the list of designated State Offices. The Bill was unconstitutional for, inter alia, purporting to remove the mentioned state officers from the ambit of Chapter 6 and exempting them from paying taxes. The Court agreed with CIC that the proposed amendments were unconstitutional although the petition was dismissed on the basis of separation of powers and that the judiciary could not issue an injunction to the legislature to prohibit it from discharging its mandate.

3.4.2 Ethics and Anti-Corruption Commission (EACC)

The EACC was created in 2011 by the Ethics and Anti-Corruption Commission Act 2011, replacing the former Kenya Anti-Corruption Commission with the mandate to investigate corruption and economic crimes as well as awareness-raising on the damaging impact of corruption. The EACC is mandated to combat and prevent corruption and economic crimes in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption.⁷⁹ Section 11 of the Ethics and Anti-Corruption Act 2011 sets out the functions of the EACC.

The Commission has recovered assets from corrupt public officials, including the Woodley Estate, Mombasa Recreational Beach and the Grand Regency Hotel (now the Laico Regency). The EACC had this money restored to the Central Bank of Kenya. It has also carried out research and monitoring of trends and public perception of corruption in public institutions, which has helped to expose rampant corruption as ranked by sectors, counties, public institutions and based on different offences. The EACC has spearheaded the drafting of regulations to Leadership and Integrity Act, 2012.⁸⁰

3.5 ROLE OF COURTS IN IMPLEMENTATION OF CHAPTER 6

In addition to pieces of legislation being passed by Parliament and institutions being set up to facilitate the implementation of Chapter 6, cases have been presented to Court in order to ensure compliance with provisions of Chapter 6 and related laws. The following cases are good illustrations;

⁷⁹ Report of Implementation of chapter 6 of the Constitution', 16, Available at http://info.mzalendo.com/media_root/file_archive/Report_on_Implementation_of_Chap_6.pdf accessed on 24 November 2015.

⁸⁰ No. 19 of 2012.

In *Benson Riitho Mureithi v J. W. Wakhungu & 2 others*,⁸¹ the basis of the petition was that the 1st respondent failed to take into consideration the provisions of Article 73 in Chapter 6 of the Constitution when making the said appointment. The petitioner avers that the Interested Party lacks integrity and it is therefore illegal and unconstitutional for him to hold such an office. The Interested Party was appointed Chairman of the Athi Water Services Board. The petitioner claimed that there were serious unresolved questions with regard to the integrity of the Interested Party which did not appear to have been considered by the 1st respondent in making the appointment. The Petitioner asserted that it was the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under Chapter 6 of the Constitution. The Court held that the 1st respondent's failure and omission to have regard to personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board was unlawful and unconstitutional and that the appointment of the Interested Party as Chairman of the Athi Water Services Board was therefore declared null and void.

In *Independent Policing Oversight Authority & another v Attorney General & 660 others*,⁸² the issue raised was concerning the police recruitment of 10,000 Police Constables country-wide. The recruitment was carried out on 14th July 2014 in various centers countrywide as designated by the National Police Service Commission (NPSC). Successful candidates were issued with Docket Numbers together with joining instructions. Complaints were however raised as to the recruitment and the Independent Policing Oversight Authority (IPOA) allegedly received evidence documenting credible widespread irregularities in the manner in which the exercise had been carried out. Based on the evidence it received, IPOA recommended to the NPSC and the National Police Service (NPS) the cancelling of the entire recruitment process and the carrying out of a fresh one. The NPSC declined to repeat the exercise but instead opted to form a Multi-Agency Working Committee to investigate the claims of alleged irregularities and misconduct during the said exercise. Claims were made that the recruitment did not follow any specific guidelines and were thus not transparent and accountable as required under Article 73 of the Constitution. The Court held that the recruitment was in contravention of Articles 10, 27, 73, 232, 244, 246 and 249 the

⁸¹ [2014] eKLR.

⁸² [2014] eKLR.

Constitution and Sections 10 and 12 of the National Police Service Commission Act and is thus illegal, null and void ab initio.

In *Legal Advice Centre aka Kituo Cha Sheria v Attorney General & 3 others*,⁸³ the petitioner challenged the nominations for appointment of the Petition Committee by the 2nd Respondent, the Cabinet Secretary for the National Treasury. The petitioner claimed that one of the nominees, Jackline Chepkemoi Kimeto had pending disciplinary proceedings before the Advocates Disciplinary Tribunal and is therefore unfit to hold public office under Chapter Six, Articles 10(2)(a) and 232(1)(a) of the Constitution. The Court held that Ms. Kimeto was not barred from holding public office as there was insufficient evidence to prove these allegations. The Court therefore dismissed the petition.

In *Marson Intergrated Limited v Minister for Public Works & Another*,⁸⁴ the petitioner alleged that the appointment of the Interested Party by the Minister was unprocedural. This is due to the fact that the Interested Party's nomination had been withdrawn. Further, the Interested Party did not meet the qualifications provided for under section 7 of the National Construction Authority Act of 2011 that require the individual to be a holder of a Higher Diploma in a relevant field and have at least 10 years' experience in the construction industry. The petitioner also contends that the appointment was in breach of Chapter 6 of the Constitution as the Interested Party does not meet the constitutional threshold for public officers. The basis of this contention is that the Certificate from the Kenya Polytechnic was falsified, as was the CV. The Petitioner also alleged that the Interested Party was involved in corrupt dealings. The Court held that the Interested Party did not meet the integrity threshold set out in Article 73 of the Constitution and his appointment did not accord with the national values and principles set out in Article 10 and declared the appointment of Kennedy Onditi by the 1st Respondent as a Board Member of the National Construction Authority null and void.

*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*⁸⁵ is an appeal case in the Court of Appeal. The Appeal is from a decision from the High Court setting aside the appointment of the appellant as the Chairperson of the Ethics and Anti-Corruption Commission on the basis that he did not meet the requirements in Article 73 of the

⁸³[2015]eKLR.

⁸⁴ [2012]eKLR.

⁸⁵ [2013]eKLR .

Constitution. The Court of Appeal reviewed the petition and supporting affidavit and concluded that respondent did not provide adequate particulars of the claims relating to the alleged violations of procedural requirements and integrity by the appellant provided in the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011. The Court of Appeal ruled in favour of the appellant and set aside the judgment and orders given by the High Court.

In *John Githinji Wangondu & 6 others v Nyeri South Sub-County Cooperative Officer & 3 others*,⁸⁶ the Petitioner seeks a declaration that the 1st, 2nd and 3rd Respondents are not fit to public offices as they have failed to abide by Articles 10 (1) and (2), 28, 47 and 73 of the Constitution of Kenya 2010. The 3rd Respondent, the Nyeri County Co-operative Officer was accused of conduct that contravenes Articles 10, 28, 47 and 73 of the Constitution as he was accused of failing to attend to their grievances, a behaviour not expected of him, hence unfit to serve as a public officer. The Court found that there was no allegation of misconduct within the meaning of Article 73 (1) (a) (i) to (iv) of the Constitution and thus no basis that the respondents are not fit to hold public office. The Court held that there was no supporting evidence to support the allegations and ordered that the petition be dismissed and the Petitioners pay the costs of the petition to the Respondents.

These cases illustrate the ways in which the Courts have interpreted provisions of Chapter 6 and the requirement by the courts for sufficient evidence to prove the allegations. These cases show a positive move towards implementing Chapter 6 and its provisions. However, despite these developments and strides made towards implementation there are still a number of cases where state officers are accused of violating provisions of Chapter 6 but no subsequent action has been taken.

Sometime in 2013 one of the Governors, Mr. Evans Kidero was recorded by the media slapping a Member of Parliament in full view of television cameras. Whereas the matter is said to have been settled out of court, the act by the Governor was clearly in breach of Chapter 6 which is unaffected by any private settlement. Sometime in 2013, an Executive Director of one of the political parties was roughed up and beaten and his property damaged by Members of the County Assembly who openly boasted about this “accomplishment”. Again this was done in full view of the media and was a clear violation of Chapter 6. A

⁸⁶ [2015] eKLR.

member of the Senate has on several occasions been recorded by the media traversing different parts of the City with armed bodyguards brandishing weapons in public view contrary to the law. The said bodyguards harass motorists and citizens generally ostensibly to protect the Senator. There have also been media reports of the said bodyguards harassing public servants in Mtwapa Mombasa on behalf of the Senator. These acts are not just unlawful but clearly offend the provisions of Chapter 6. In December 2014, during the debate on the Security Laws (amendments) Bill, there was general mayhem in the National Assembly where physical fights erupted, insults were traded liberally and property was destroyed by members of the National Assembly. The members who participated in this unruliness were clearly in breach of the provisions of Chapter 6 regarding the conduct of State officers. On 25th of January 2015, 2 members of the National Assembly were recorded harassing and intimidating public officers in the course of their duties at the Gilgil weighbridge. The members not only threatened the officers but used crude and insulting language on the officers contrary to the provisions of Chapter 6.⁸⁷

3.6 CONCLUSION

Despite steps being taken towards implementing Chapter 6, there are still a number of instances of misconduct by State officials and no subsequent actions have been taken against them evidencing laxity in implementation of Chapter 6. This shows an open disregard for the provisions of Chapter 6 and related laws which is a hindrance to its implementation.

⁸⁷ Statement on increasing breaches of chapter 6 on leadership and integrity by state officers'. Tuesday 27 January 2015 Available at <http://www.cickenya.org/index.php/newsroom/item/454-statement-on-increasing-breaches-of-chapter-6-on-leadership-and-integrity-by-state-officers#.V10xP3YrLIU> accessed on 29th November 2015.

CHAPTER 4: COMPARISON AND ANALYSIS OF CORRUPTION LEVELS

4.1 INTRODUCTION

Chapter 6 of the Constitution endeavours to uphold and restore the rule of law in Kenya by providing guidelines on leadership and integrity. The Constitution dedicates a whole chapter to making provisions that will ensure an effective administration that cuts across all leadership ranks.⁸⁸ Corruption can be defined as the abuse of entrusted power for private gain.⁸⁹ It can also be defined as an improbity or decay in the decision-making process in which a decision-maker consents to deviate or demands deviation from the criterion which should rule his or her decision-making, in exchange for a reward or for the promise or expectation of a reward, while these motives influencing his or her decision-making cannot be part of the justification of the decision.⁹⁰

Corruption can be classified into three categories; grand, petty and political depending on the amount of money lost and the sector where it occurs. Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies. Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.⁹¹

The chapter entails an analysis and comparison of the corruption levels in the country over the past ten years. In carrying out this analysis and comparison, two sources will be used; Transparency International Corruption Perceptions Index and the Ethics and Anti-Corruption Commission Annual Reports.

⁸⁸ 'Analysis of the Leadership and Integrity Bill' Available at <http://eacj.org/legislation/17-legislation-feature-articles/33-analysis-of-the-leadership-and-integrity-bill.html> accessed on 10 December 2015.

⁸⁹ 'What is corruption?' Available at <https://www.transparency.org/what-is-corruption/#define> accessed on 10 December 2015.

⁹⁰ 'What is corruption?' Available at <http://www.corruptie.org/en/corruption/what-is-corruption/> accessed on 10 December 2015.

⁹¹ 'What is corruption?' Available at <https://www.transparency.org/what-is-corruption/#define> accessed on 10 December 2015.

4.2 ANALYSIS OF CORRUPTION LEVELS

4.2 TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX

Transparency International started in 1993 when a few individuals decided to take a stance against corruption. It is now present in more than 100 countries, the movement works relentlessly to stir the world's collective conscience and bring about change. Through more than 100 national chapters worldwide and an international secretariat in Berlin, the organisation partners with government, business and civil society to put effective measures in place to tackle corruption.⁹²

The Corruption Perceptions Index was first launched in 1995 and has been widely credited with putting the issue of corruption on the international policy agenda.⁹³ The Corruption Perceptions Index measures the perceived levels of public sector corruption worldwide on a scale from 0 (highly corrupt) to 100 (very clean).⁹⁴ The number of countries that participate in the survey differ from one year to another.

Below is a table showing the statistics over the past 10 years in regards to Kenya.

YEAR	RANK	SCORE
2014	145/175	25 ⁹⁵
2013	136/177	27 ⁹⁶
2012	139/176	27 ⁹⁷
2011	154/183	2.2 ⁹⁸
2010	154/178	2.1 ⁹⁹

⁹² "Overview" Available at <https://www.transparency.org/whoweare/organisation/> accessed on 10 December 2015.

⁹³ "Corruption Perceptions Index" Available at <http://www.transparency.org/research/cpi/overview> accessed on 10 December 2015.

⁹⁴ "Corruption Perceptions Index 2014: Results" Available at <http://www.transparency.org/cpi2014/results> accessed on 10 December 2015.

⁹⁵ "Corruption Perceptions Index 2014: Results" Available at <http://www.transparency.org/cpi2014/results> accessed on 10 December 2015.

⁹⁶ "Corruption Perceptions Index 2013" Available at <http://www.transparency.org/cpi2013/results> accessed on 10 December 2015.

⁹⁷ "Corruption Perceptions Index 2012" Available at <http://www.transparency.org/cpi2012/results> accessed on 10 December 2015.

⁹⁸ "Corruption Perceptions Index 2011" Available at <http://www.transparency.org/cpi2011/results> accessed on 10 December 2015.

⁹⁹ "Corruption Perceptions Index 2010" Available at <http://www.transparency.org/cpi2010/results> accessed on 10 December 2015.

2009	146/180	2.2 ¹⁰⁰
2008	147/180	2.1 ¹⁰¹
2007	150/180	2.1 ¹⁰²
2006	142/163	2.2 ¹⁰³
2005	144/159.	2.1 ¹⁰⁴

Table 1

The score from 2005 to 2011 has been relatively stable. The increase or decrease in the score has been a margin of 0.1. From 2012 to 2014 the score has reduced by 2. This shows an increase in the perception of corruption in the country. The score over the past three years has been relatively stable except for the year 2014 that shows a decrease in the score by two. From the year 2010 until 2013, Kenya's ranking seems to have improved gradually. Kenya ranking was at its best in the year 2013. However, Kenya's ranking dropped in the year 2014 along with the decreased score which shows the perception of increased corruption within the country. The ranking prior to 2010 seems to be at its lowest in the year 2005 and 2006. The ranking however improved from 2007 and to 2009 but saw a drop in 2010 and 2011. Despite the drop in ranking, the score shows an increase of 0.1. It can thus be seen that from 2010, the perception of corruption within the country has been reducing. From 2010, Kenya's global ranking has been improving gradually and the score has been relatively stable. This shows that there has been an improvement despite the decreased score and a drop in Kenya's position in 2014. This drop may be attributed to the increased number of corruption cases and scandals reported in the media which in turn affected Kenyans' perspectives on corruption within the country.

4.2.2 ETHICS AND ANTI-CORRUPTION COMMISSION ANNUAL REPORTS

The Ethics and Anti-Corruption Commission is provided for under Article 79 of the 2010 Constitution and is subsequently established under section 3 of the Ethics and Anti-

¹⁰⁰ 'Corruption Perceptions Index 2009' Available at http://www.transparency.org/research/cpi/cpi_2009#results accessed on 10 December 2015.

¹⁰¹ 'Corruption Perceptions Index 2008' Available at http://www.transparency.org/research/cpi/cpi_2008/0/#results accessed on 10 December 2015.

¹⁰² 'Corruption Perceptions Index 2007' Available at http://www.transparency.org/research/cpi/cpi_2007/0/#results accessed on 10 December 2015.

¹⁰³ 'Corruption Perceptions Index 2006' Available at http://www.transparency.org/research/cpi/cpi_2006/0/#results accessed on 10 December 2015.

¹⁰⁴ 'Corruption Perceptions Index 2005' Available at http://www.transparency.org/research/cpi/cpi_2005/0/#results accessed on 10 December 2015.

Corruption Act, 2011. The Ethics and Anti-Corruption Commission prepares annual reports in compliance with section 27 of the Ethics and Anti-Corruption Act, 2011. The reports submitted contain information on investigations carried out in regards to corruption claims, steps towards corruption prevention, institutional capacity building, national and integration engagements, challenges encountered and auditor reports.

The tables below provide statistics on corruption reports reported to the Commission from the year 2013/2014 to the year 2010/2011.

OFFICE	NO. OF REPORTS
Nairobi	2,379
Kisumu	526
Mombasa	358
Eldoret	246
Nyeri	79
Garissa	88
Mobile Outreach (Outreach activities)	101
Huduma	229
TOTAL	4,006 ¹⁰⁵

Table 2:2013/2014

OFFICE	NO. OF REPORTS
Nairobi (Headquarters)	2,044
Kisumu Regional Office	659
Mombasa Regional Office	320
Eldoret Regional Office	227
Nyeri Regional Office	79
Garissa Regional Office	26
TOTAL	3,355 ¹⁰⁶

Table 3:2012/2013

¹⁰⁵ Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2013/2014*, 2014, 3.

¹⁰⁶ Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2012/2013*, 2013, 3.

OFFICE	NO. OF REPORTS
Nairobi (Headquarters)	3951
Kisumu	785
Mombasa	394
Eldoret	73
Nyeri	23
Garissa	4
TOTAL	5230 ¹⁰⁷

Table 4:2011/2012

OFFICE	NO. OF REPORTS
Nairobi	5890
Kisumu	290
Mombasa	926
TOTAL	7106 ¹⁰⁸

Table 5: 2010/2011

The number of reports received in 2009/2010 by the Commission was 4,372.¹⁰⁹ In 2008/2009, the number of reports received was 4,335 and in 2007/2008 4,485 reports.¹¹⁰¹¹¹ During 2006/2007, the Commission received 8,188 reports.¹¹² The number of reports received in 2005/2006 was 7,888.¹¹³ The Commission received 3,234 reports in the year 2004/2005.¹¹⁴

¹⁰⁷ Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2011/2012*, 2012, 3.

¹⁰⁸ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2010/2011*, 2011, 5.

¹⁰⁹ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2009/2010*, 2010, 18.

¹¹⁰ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2008/2009*, 2009, 22.

¹¹¹ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2007/2008*, 2008, 4.

¹¹² Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2006/2007*, 2007, 4.

¹¹³ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2005/2006*, 2006, 11.

¹¹⁴ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2004/2005*, 2005, 13

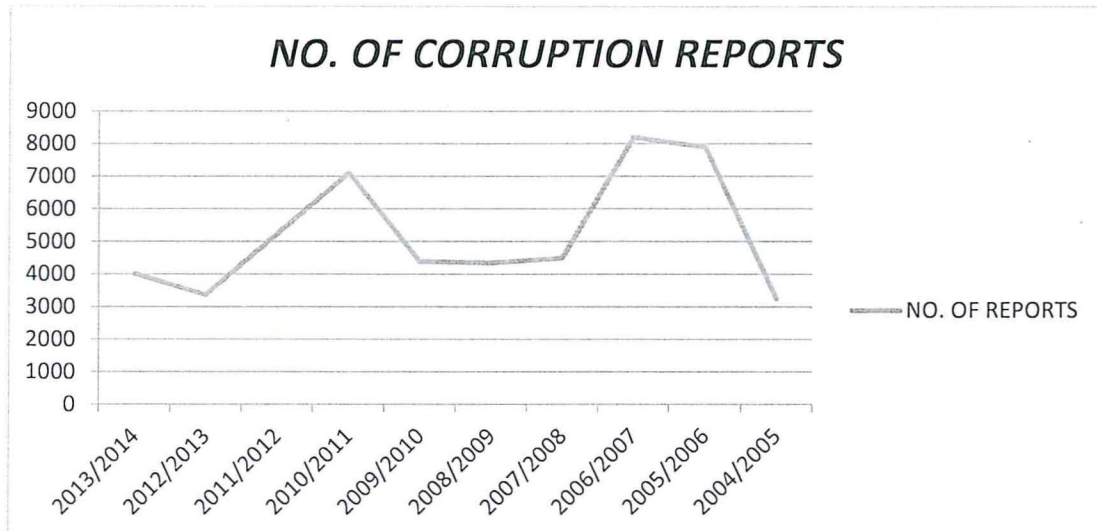


Figure 1, Source: Author

The graph above represents the number of corruption reports received over the last ten years by the Commission.

The number of reports in 2013/2014 increased by 19% from 2012/2013.¹¹⁵ The number of reports reported dropped by 36% in 2012/2013 compared to 2011/2012. This may be attributed to the reforms in government which have created institutions that complement the mandate of the Commission, for example the Commission on Administrative Justice (CAJ).¹¹⁶ The number of reports received by the Commission dropped by 26.4% in 2011/2012 compared to 2010/2011.¹¹⁷ The number of reports received by the Commission increased by 62.5% in 2010/2011 compared to 2009/2010. The increase can be attributed to; increased media publicity, regional expansion programme and intensified outreach program carried out around the country.¹¹⁸

¹¹⁵ Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2013/2014*, 2014, 3.

¹¹⁶ Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2012/2013*, 2013, 3.

¹¹⁷ Ethics and Anti-Corruption Commission (EACC), *Report of Activities and Financial Statements for the Financial Year 2011/2012*, 2012, 3.

¹¹⁸ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2010/2011*, 2011, 5.

The number of reports received in 2006/2007 increased by 3.8% in comparison to 2005/2006.¹¹⁹ There was an increase of 144% in the reports received by the Commission in the year 2005/2006 compared to 2004/2005.¹²⁰

The total number of reports received by the Commission from the period 2009/2010 to 2013/2014 are 24, 069 in comparison to 28,130 reports received between the year 2008/2009 and 2004/2005. This decrease in the number of reports may indicate reduced corruption. The year with the lowest number of reports is 2004/2005 and the highest in the year 2006/2007.

From the statistics given, the total number of corruption reports received by the Commission has reduced since the year 2009/2010 which indicates that the promulgation of the 2010 Constitution and the introduction of Chapter 6 in the Constitution has had a positive effect in reducing corruption among other factors.

4.3 CONCLUSION

The Transparency International Corruption Perceptions Index shows an improved ranking from the year 2010 to the year 2013. However, from the two sources we can see that corruption increased in the year 2014. The number of reports reported to the Commission increased compared to 2013 and the Corruption Perceptions Index score also reduced by two points. Despite the increase in the year 2014, corruption has cumulatively reduced from 2010 to 2014 compared to the period prior to 2010. This shows the positive effect of the introduction of Chapter 6 in curbing corruption. However, the number of corruption scandals and cases reported by the media seem to be increasing day by day. This may raise the question as to whether the level of corruption in the country has really reduced over the years since the promulgation of the 2010 Constitution and the introduction of Chapter 6.

¹¹⁹ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2006/2007*, 2007, 21.

¹²⁰ Kenya Anti-Corruption Commission (KACC), *Annual Report of Activities and Financial Statements for the Financial Year 2005/2006*, 2006, 21.

CHAPTER 5: FINDINGS, RECOMMENDATIONS AND COMCLUSIONS

5.1 SUMMARY

The previous chapters looked at the provisions of Chapter 6, the progress of its implementation and an analysis of corruption levels within the country before and after the promulgation of the 2010 Constitution. Regarding implementation, a number of laws have been passed by Parliament pursuant to the requirements set out in the Chapter. Some of these laws include the Leadership and Integrity Act 2012¹²¹ and the Ethics and Anti-Corruption Commission Act 2011.¹²² Institutions have also been set up to facilitate the implementation of the Chapter. These include the Commission for Implementation of the Constitution (CIC) and the Ethics and Anti-Corruption Commission.

The analysis of the corruption levels within the country was based on two sources; The Transparency International Corruption Perceptions Index and the Annual Reports published by the Ethics and Anti-Corruption Commission. The scope of the analysis was between the year 2014 and 2005. A comparison was made between the levels of corruption before and after the promulgation of the 2010 Constitution.

5.2 FINDINGS

In some cases, proper implementation of this Chapter depends on legislation, in others it will depend on honest courts.¹²³ Steps have been taken to facilitate the implementation of Chapter 6 through passing legislation, establishing institutions and applying these laws through various cases brought before the court. These steps have shown the governments' dedication towards implementing Chapter 6. However, the aim of the Chapter was to ensure integrity and accountability among leaders and consequently reduce corruption which has been a rampant problem in Kenya. Implementation is key in ensuring that the objects of the Chapter are achieved.

The analysis of the corruption levels showed that corruption has cumulatively reduced since the promulgation of the 2010 Constitution. However, the level of corruption increased in the year 2014 compared to 2013. This may indicate the lack of success of Chapter 6 in curbing

¹²¹ No. 19 of 2012.

¹²² No. 22 of 2011.

¹²³ Kenya's 2010 Constitution, Christina Murray Available at http://www.health.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf accessed on 15 December 2015.

corruption within the country. The number of corruption scandals reported by the media also seems to be increasing day by day. For example Kenya's anti-graft watchdog published a report detailing corruption allegations against 175 government officials, with some cases involving multi-billion-dollar Chinese-backed infrastructure projects.¹²⁴ The scale of Kenya's government corruption was exposed in a damning report by the country's auditor general, who revealed that about a quarter of Kenya's \$16 billion state budget was missing. The report also found that just 1% of Kenyan government spending was "incurred lawfully and in an effective way."¹²⁵ The increase of such reports and scandals raise questions as to the effectiveness of Chapter 6 in curbing corruption among state officials. The increased number of reports and corruption scandals reported by the media may be attributed to a more aware civil society that is bent on ensuring that integrity and accountability are upheld by the leaders.

However, from the statistics, corruption has cumulatively reduced from 2010 as compared to the period prior to the promulgation of the 2010 Constitution. This shows that Chapter 6 has indeed been effective in curbing corruption among state officials.

5.3 RECOMMENDATIONS

Chapter 6 can be seen to have had a positive effect on corruption within the country. Despite this success, more needs to be done as corruption scandals are still rampant within the country. Firstly, the pieces of legislations put in place need to be stringent. This means that the laws put in place need to provide for heavy penalties so as to deter individuals. Some of the legislations passed by Parliament are not robust enough to deal with corruption problem. For example the self-declaration form provided for in the Leadership and Integrity Act 2012 is only for certain state officers which limits the Act's effectiveness. The passing of robust laws is thus the first step towards proper implementation. However, this may not be adequate as the individuals themselves need to be ethical. Stringent penalties may not be enough if the individuals in office lack ethics.

¹²⁴ Edith Honan: Kenya corruption watchdog makes allegations against 175 officials' *Reuters*, 1 April 2015 Available at <http://www.reuters.com/article/2015/04/01/us-kenya-corruption-idUSKBN0MR1A120150401#9GxhoyTQzFo3O85M.97> accessed on 4 January 2016.

¹²⁵ Morgan Winsor: Kenya Government Corruption: State Budget Missing \$16B, 1 Percent Of Spending Is Lawful, Auditor General's Report Finds' *International Business Times*, 29 May 2015 Available at <http://www.ibtimes.com/kenya-government-corruption-state-budget-missing-16b-1-percent-spending-lawful-2030056> accessed on 4 January 2016.

Better investigations also need to be done in corruption cases. Poor investigations may be linked to institutional problems that need to be addressed. This may include lack of financing or poor structure of the organization. These issues need to be addressed first in order to facilitate proper investigations. Proper investigation is key to ensuring that the case against the individual is successful. The EACC is responsible for this and should therefore carry out in-depth investigations. Despite the many corruption cases reported to the EACC and the investigations carried out, there is no evidence of subsequent convictions. It is important for justice to be done and seen to be done. This boosts the confidence in the citizens in the justice system and the capability of the EACC. Collaboration between the different institutions is also important. Proper investigations subsequently lead to convictions as there is enough evidence to support the case.

The media needs to continue with its active role in exposing and reporting corruption scandals. This increases public awareness and puts pressure on the EACC and other institutions to look into the matter. It is a very important avenue for bringing to light corruption scandals and helping address the corruption problem in the country.

The culture of the society needs to change as a whole. There is a culture of impunity within our country that seems to be accepted by the people. Corruption is considered part of our culture and thus tolerated. This culture of impunity needs to be changed so as to ensure the leaders elected are aware that their duty is to serve the citizens of the country and not for personal gain. People need to be sensitized on this as individuals are linked to corruption and are also that comprise the different institutions. This can only be done by through instilling values of integrity, accountability and transparency to all citizens. This is easier said than done but this culture must be cultivated at a young age. This must begin at the lowest level of education as this is when children are formed. This is the most effective way of instilling these important values. This is a process that will take a long time but is essential in changing the society's outlook and value-system.

5.4 CONCLUSIONS

The hypothesis was not achieved. The hypothesis was that adequate steps had been taken to implement Chapter 6 and related laws but this did not result in a positive effect on corruption. The findings of the study were contrary to the hypothesis given. The findings showed that adequate steps had been taken to facilitate the implementation of Chapter 6, however, the resultant effects of these various steps is that corruption had cumulatively reduced from the

period of 2010 to 2014. This was despite the increase in corruption reports reported in the year 2014 and the increased number of corruption scandals in the media.

The statement of problem and the objectives of the study were adequately addressed. The first objective was to find out what laws and institutions have been set up in order to facilitate the implementation of Chapter 6. This was addressed by looking at the different laws and institutions that had set up in order to facilitate the implementation of Chapter 6. The laws passed include the Leadership and Integrity Act 2012¹²⁶ and the Ethics and Anti-Corruption Commission Act 2011.¹²⁷ The institutions set up include the Commission for Implementation of the Constitution (CIC) and the Ethics and Anti-Corruption Commission. The second objective was to find out how Chapter 6 and related laws had been applied and interpreted by the Courts to state officials specifically. A number of cases were given in line with this objective. The last objective was to compare the level of corruption before the 2010 Constitution and the level of corruption after its introduction so as to assess the resultant effect of Chapter 6 on s. corruption among state officials. The analysis and comparison was between the year 2005 and 2014. The two sources used were The Transparency International Corruption Perceptions Index and the Annual Reports published by the Ethics and Anti-Corruption Commission. These were the basis for analysis of the corruption levels in the country before and after the promulgation of the 2010 Constitution. The findings showed that corruption had cumulatively reduced despite the increase in corruption cases and scandals in in 2014.

¹²⁶ No. 19 of 2012.

¹²⁷ No. 22 of 2011.

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