

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION OF KENYA:**

**A CRITICAL STUDY**

**Research paper submitted in partial fulfilment of the requirements for the award of Masters  
of Law degree**

**Transnational Criminal Law and Crime Prevention**

**An International and African Perspective**



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**2016**

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## Declaration

I, **Donnet Rose Adhiambo Odhiambo**, declare that **The Ethics and Anti-Corruption Commission of Kenya: A Critical Study** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

**Student: Donnet Rose Adhiambo Odhiambo**

Signature:

Date:

**Supervisor: Professor Raymond Koen**

Signature:

Date:



## **Acknowledgments**

Special gratitude to the Almighty Father for the gift of life and health, without which I would not be where I am today.

My sincere gratitude goes to the following: Professor R Koen, my supervisor, who read all my drafts and offered constructive ideas; the German Academic Exchange Service (DAAD) for funding my LLM; the programme directors and co-ordinators, Professor Gerhard Werle, Professor Lovell Fernandez and Dr Moritz Vormbaum; to Divya Mungar and all my classmates for the immense help offered.



## **Dedication**

To my parents, Mr and Mrs Odhiambo, my husband and my son, Jamal, I forever remain grateful.



## Abbreviations and Acronyms

ACA	Anti-Corruption Agency
ACECA	Anti-Corruption and Economic Crimes Act
ACPU	Anti-Corruption Police Unit
AU Convention	African Union Convention on Preventing and Combating Corruption
CPI	Corruption Perceptions Index
DPP	Director of Public Prosecutions
EAAACA	East African Association of Anti-Corruption Authorities
EACCA	Ethics and Anti-Corruption Commission Act
EACC	Ethics and Anti-Corruption Commission
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
FATF	Financial Action Task Force
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
LOK	Laws of Kenya
NACSC	National Anti-Corruption Steering Committee
NACP	National Anti-Corruption Plan
OECD	Organisation for Economic Co-operation and Development
PPOA	Public Procurement Oversight Authority
SADC Protocol	Southern African Development Community Protocol against Corruption
UNCAC	United Nations Convention against Corruption

## **Key Words**

Accountability

Agency

Anti-Corruption

Commission

Corruption

Investigation

Prosecution

Public office

Transparency



## CHAPTER ONE

### BACKGROUND TO THE STUDY

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#### 1.1 Introduction

The Kenyan media, currently ranked as “partly free”,<sup>1</sup> for at least a decade have played a key role in exposing corruption scandals in the country. This is evident from the fact that it is the media which brought to the public’s attention the infamous 1990s Goldenberg and the Anglo-Leasing scandals. These were made public by courageous reporters despite the best efforts of the respective sitting governments to suppress the information by any means necessary. However, this exposure has not ended or decreased corruption.<sup>2</sup>

At the domestic level, the Kenyan legal and institutional framework in place to combat corruption is very elaborate. With more than a dozen pieces of legislation and five administrative bodies that work alongside the Ethics and Anti-Corruption Commission (EACC),<sup>3</sup> one wonders why the fight against corruption has not been successful. At the international level, Kenya ratified the United Nations Convention against Corruption (UNCAC) on 9 December 2003,<sup>4</sup> and on 3 February 2007 it ratified the African Union Convention on Preventing and Combating Corruption (AU Convention).<sup>5</sup> Regionally Kenya is a partner state to the East African Community and has expressed support for the draft East African Community Protocol on Preventing and Combating Corruption. The EACC is also member of the East African Association of Anti-Corruption Authorities. As of July 2014, Kenya’s national assembly had passed laws to domesticate both UNCAC and the AU Convention.

Despite all the legislative activity and the ratification of international instruments, corruption in Kenya remains endemic. In their campaigns, politicians often make the prevention, suppression

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1 Freedom House (2016).

2 Afrimap (2015).

3 EACC (2011).

4 United Nations Convention against Corruption: Status.

5 African Union Convention on Preventing and Combating Corruption: Status.

and punishment of corruption a part of their manifesto when seeking votes from the public.<sup>6</sup> However, soon after elections are over and they assume office, their anti-corruption campaign promises often collapse and are sidelined until the next campaign period.

The Ethics and Anti-Corruption Commission was established, pursuant to the Constitution of 2010,<sup>7</sup> as an investigative body to prevent and fight corruption. Its powers, structure and mandate are set out in detail in the Anti-Corruption and Economic Crimes Act of 2003. However, the EACC has not realised its mandate fully due, among other things, to political interference, lack of financial resources and understaffing.<sup>8</sup>

This research paper will evaluate critically the history of the EACC's establishment, while discussing certain best practice standards that, when incorporated into the management of the Commission, could lead to reducing corruption in the country. The research will end with recommendations relating to areas that need to be improved in order to achieve a higher success rate in the fight against corruption.

## **1.2 Objectives of the Study**

Whereas the general purpose of the study is to examine the role of anti-corruption agencies in the fight against corruption, this paper will focus on Kenya's Ethics and Anti-Corruption Commission.

The paper will review the legal and institutional framework governing the Commission. It will attempt to identify issues pertaining to the effective administration of an anti-corruption body. Key issues in this regard are whether the institution enjoys the necessary independence and autonomy to carry out its functions, and whether it has been established merely to appease international donors or actually to seek durable solutions to the problem of corruption. The financial resources of the Commission will be reviewed in an effort to determine whether it is funded adequately. The staffing and human resources of the Commission will be analysed also,

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6 See Jubilee Manifesto.

7 Article 79 of the Constitution of Kenya.

8 Afrimap (2015).

with attention being given to the mode of appointment and security of tenure of the office holders in order to assess the level of integrity amongst both its top officials and its junior staff.

In addition, best practice standards for an anti-corruption commission will be evaluated critically, with a particular reference to the Jakarta Statement on Principles for Anti-Corruption Agencies. This analysis will be undertaken in an attempt to identify good practice guidelines for the EACC.

### **1.3 Scope of the Study**

This paper is limited to the situation in Kenya and to the Ethics and Anti-Corruption Commission. It is concerned with the law, strategy and powers being used by the Commission. In this regard, specific attention will be afforded to the Ethics and Anti-Corruption Commission Act of 2011.

Reference will be made also to the Jakarta Statement on Principles for Anti-Corruption Agencies as well as to other anti-corruption agencies to the extent that they may be relevant and helpful in analysing the EACC. The study will consider also the domestic and international instruments that are relevant to the execution of the Commission's mandate.

### **1.4 Research Questions**

The study seeks to answer and find solutions to the following questions:

- What role does the Ethics and Anti-Corruption Commission of Kenya play in combating corruption?
- What are some of the challenges facing the Ethics and Anti-Corruption Commission?
- How best can the Ethics and Anti-Corruption Commission perform its functions?

### **1.5 Significance of the Study**

One of the biggest problems facing Kenya is corruption and its effects on the country's economy are devastating. Kenya's response to the problem of corruption, prompted in part by international pressure, was to pursue the establishment of an anti-corruption agency.<sup>9</sup> A

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9 Afrimap (2015).

process of formation, restructuring and renaming culminated in the establishment in 2011 of the EACC as a national dedicated anti-corruption body with the sole mandate of fighting corruption.

As an institution, the EACC is charged with the responsibility of investigating and recommending corruption cases for prosecution. It also raises public awareness through education and training on the negative effects of corruption as well as on prevention, risk assessment and asset recovery.

From its mandate, it is clear that the EACC occupies a critical role in the Kenyan anti-corruption agenda. It is important thus that the institution performs its functions competently if headway is to be made against corruption. There is, therefore, an urgent need to look at the structure of the Commission, at the challenges it is facing, and at its powers, duties and functions in a bid to establish how best it would be able to perform its mandate and what, if anything, needs to be done in order to improve its performance.

## **1.6 Methodology**

The study is qualitative in nature. It employs the desktop data collection method to analyse critically the relevant primary and secondary sources in order to develop answers to the research questions.

## **1.7 Historical Overview**

Corruption and anti-corruption in Kenya date back to the colonial era.<sup>10</sup> This is evident from stories about the struggle for independence, of home guards who were not involved actively in the Mau Mau rebellion “selling” freedom fighters to the colonial administration for petty favours.<sup>11</sup> This, among other acts, is seen as the earliest form of corrupt practices amongst the native Kenyans. However, corruption and corrupt practices were also common amongst officials of the colonial government. Although not documented in official surveys, legislative

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10 Loughran (2010).

11 Munyai & Lesetedi (1998).

instruments and historical works, the extent of corruption during Kenya's pre-independence era may be deduced from individual memoirs and autobiographies of the period.<sup>12</sup>

The Prevention of Corruption Ordinance of 1956 was the first piece of anti-corruption legislation passed by the colonial government. This law may be taken as the country's initial response to the problem of corruption.

The Prevention of Corruption Ordinance of 1956 became the Prevention of Corruption Act (Cap 65, LOK) at independence. As the country settled down to self-government, corruption continued to rise and the public started taking an interest in corruption and demanding that perpetrators of corruption be prosecuted. After an amendment to the Prevention of Corruption Act, the first Anti-Corruption Squad was created in 1991.<sup>13</sup> The Anti-Corruption Squad was a department within the Kenya Police and was headed by a senior police officer. Its main function was to enforce the Prevention of Corruption Act by conducting investigations relating to allegations of corruption and then recommending appropriate cases for prosecution. The Anti-Corruption Squad was answerable to the Criminal Investigative Department and was disbanded in 1995 before it could make any significant impact on the fight against corruption.

The failure of the Anti-Corruption Squad may be credited to the fact that, even to date, the Kenyan public views the police as the most corrupt department of government. This perception is supported by various rankings and surveys.<sup>14</sup> With an already negative public perception regarding its integrity, it was almost impossible to expect that the Anti-Corruption Squad could make much progress in investigating corruption cases.

A further amendment to the Prevention of Corruption Act led to the creation of the Kenya Anti-Corruption Authority (KACA).<sup>15</sup> The KACA was given the mandate to investigate offences of corruption and take necessary measures to prevent corruption in the public and private sectors. Various criticisms have been levied regarding the timing of the creation of the KACA.<sup>16</sup> It was a

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12 Anderson (2006) 49.

13 EACC (2011).

14 *Daily Nation* (2016).

15 Section 11B of the Prevention of Corruption Act (Cap 65, LOK, repealed).

16 Gathii (2010) 35.

common view across the Kenyan public that the KACA was created to appease donors who, at the time, had suspended the issuing of funds to the country. The Authority's first director, who was a political aspirant and a former police inspector, was appointed in December 1997. However, after only six months in office, he was suspended and later in 1998 was removed by a Judicial Tribunal, appointed by the then President, Daniel Arap Moi. The Tribunal recommended the director's removal for having acted *ultra vires*.<sup>17</sup>

In March 1999, the second director of the KACA was appointed. The new appointee was a judge of the High Court who commanded much respect from the public. His appointment revived hopes in the KACA's quest to fight and reduce corruption. However, in the year 2000 a High Court ruling abolished the KACA, bringing to an end its efforts to fight corruption.<sup>18</sup> Then, in 2001, the Anti-Corruption Police Unit (ACPU) was created by executive order. The ACPU operated under the auspices of the Criminal Investigations Department (CID) of the police and it took over and performed the functions of the KACA.

Following Kenya's transition to a functional multi-party democracy, in 2002 Mwai Kibaki was elected president on an anti-corruption platform. The new government enacted the Anti-Corruption and Economic Crimes Act No 3 of 2003 to replace the Prevention of Corruption Act which had been operating from August 1956 to May 2003.<sup>19</sup> Subsequently, the Kenya Anti-Corruption Commission (KACC) was established under the Anti-Corruption and Economic Crimes Act to replace the Anti-Corruption Police Unit. The Anti-Corruption and Economic Crimes Act prescribed the composition of and conferred powers and functions on the KACC. The Act also established the Kenya Anti-Corruption Advisory Board.<sup>20</sup> The Advisory Board was empowered to make recommendations for the appointment of the Director and Assistant Directors of the KACC. It also was tasked with advising the KACC generally on the exercise of its powers and the performance of its functions.

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17 Mutonyi (2005) 79-83.

18 *Stephen Mwangi Gachiengo & Another v Republic* (2000).

19 Transparency International (2012) 348.

20 Section 16 of the Anti-Corruption and Economic Crimes Act 3 of 2003.

After the 2010 referendum, Kenya started operating under a new Constitution. The new Constitution contains principles that promote transparency, integrity and accountability. It also made provision for a new independent anti-corruption agency.<sup>21</sup> Consequently, the country's Parliament disbanded the KACC in 2011, in line with the requirements of the new Constitution, and created the Ethics and Anti-Corruption Commission (EACC).

The EACC has been operational since its inception in 2011. It is the only agency in the country charged with the mandate of fighting corruption. It investigates allegations of corruption, and educates and sensitises the general public on the negative effects of corruption. It also forwards cases for prosecution to the Office of the Director of Public Prosecutions (ODPP). However, the EACC, despite constitutional backing and a series of legislative provisions that support its mandate, still struggles with the huge task of loosening the grip of corruption on the country.

From the findings of various corruption surveys, Kenya continues to be ranked among the most corrupt countries in the world. According to the Transparency International's Corruption Perceptions Index (CPI) of 2015, the level of corruption in Kenya continues to be perceived as high. The table below shows Kenya's score and ranking in the CPI from 2010 (one year before the EACC was established) to 2015.<sup>22</sup>

Year	CPI Score	Ranking/Number of Countries
2010	21	154/178
2011	22	154/183
2012	27	139/176
2013	27	136/177
2014	25	145/175
2015	25	139/168

Kenya's dismal performance in the Transparency International surveys is confirmed at the domestic level by the EACC itself. According to its *National Survey on Corruption and Ethics*

21 Article 79 of the Constitution of Kenya, 2010.

22 Transparency International CPI (2010-2015).

conducted for the year 2014/2015, the level of corruption in the country was found also to be unacceptably high,<sup>23</sup> with 74 percent of the respondents perceiving it to be very high as opposed to only 5.6 percent thinking it is low. The survey also compared the current level of corruption in the country to that of the previous year, and found that 50.4 percent of the respondents said that corruption had increased.

The establishment of the EACC, as a national dedicated anti-corruption agency with the mandate to investigate corruption and economic crimes as well as to raise awareness about the damaging impact of corruption, continues to be an important milestone in the fight against corruption in Kenya. The Commission plays a critical role in combating corruption and its success remains an important part of the country's anti-corruption agenda.

This paper will review critically the following matters in an attempt to determine the efficiency and effectiveness of the Ethics and Anti-Corruption Commission of Kenya:

- the composition of the Commission;
- the functions of the Commission and its investigative and prosecutorial powers;
- the appointment of the Commission's members;
- staffing, recruitment and tenure of members of the Commission;
- the financial resources of the Commission;
- the reporting mechanism of the Commission; and
- the stability of the Commission.

In reviewing the above items, the paper will discuss other variables that are considered to be international best practice standards.

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23 National Ethics and Corruption Survey (2015).

## **1.8 Outline of the Remaining Chapters**

This research paper is composed of five more chapters as follows:

### **Chapter Two**

This chapter will analyse the legal, policy and institutional framework that governs the EACC. It will explore the relationship between the domestic laws and the international instruments on the effective and efficient operation and management of anti-corruption agencies.

### **Chapter Three**

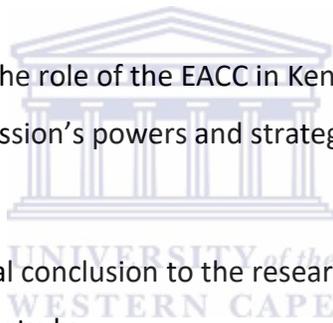
This chapter will discuss the international best practice standards that promote and strengthen the effectiveness of anti-corruption agencies. Also factors proposed by the Jakarta Statement on Principles for Anti-Corruption Agencies will be reviewed.

### **Chapter Four**

This chapter will analyse critically the role of the EACC in Kenya, its mandate and its operational structure. It will review the Commission's powers and strategies in the fight against corruption.

### **Chapter Five**

This chapter will comprise a general conclusion to the research paper. It will discuss and make recommendations drawn from the study.



## CHAPTER TWO

### LEGAL FRAMEWORK FOR PREVENTING AND COMBATING CORRUPTION

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#### 2.1 Introduction

There is a consensus that corruption is a problem of international concern.<sup>1</sup> It has far-reaching consequences for the political, economic and social environment of a country. It affects the entire social fabric of a nation.<sup>2</sup> Economically, corruption leads to the depletion of national wealth, an increase in the cost of goods and services, and to the conversion of public wealth into private and personal property. Politically, it impedes democracy and the rule of law. Socially, it leads to frustration among the public, which results in a weak civil society. The negative effects of corruption eventually widen the gap between the rich and the poor.<sup>3</sup> Corruption in one sector of the economy impedes development in all of them.<sup>4</sup>

Corruption alters its character in response to changing socio-economic, cultural and political factors. All these factors affect corruption, and so does corruption affect them.<sup>5</sup> Because of the multifaceted effects of corruption, a country may choose to respond to the problem in various ways. The most popular anti-corruption tools employed by states include signing and ratifying international anti-corruption legislation, drafting domestic legislation to help curb corruption and adopting policies to reform public administration, public expenditure management, procurement procedures, auditing procedures, and specific rules governing conflicts of interest.<sup>6</sup>

Regulatory and institutional anti-corruption activity increased tremendously in the 1990s and included the rise of specialised anti-corruption bodies. Although the first such body was established in Singapore in October 1952 already, they became popular only in the last two

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1 Bukovansky M (2006) 1.  
2 Doig & Theobald (2000) 1.  
3 Transparency International (2012).  
4 Amukowa (2013) 34.  
5 Doig & Riley (1998) 49.  
6 Heilbrunn (2004) 1.

decades.<sup>7</sup> International actors such as the United Nations have played a key role in making anti-corruption agencies a norm. Initiatives at the regional and international level have increased also.

Kenya has not been left behind in this regard. As noted in Chapter One, it established the EACC to help curb corruption in the country. For the purposes of this research, the instruments forming the international anti-corruption legal framework will be reviewed to the extent that they apply to Kenya and call for the establishment of specialised anti-corruption bodies.

This chapter will review also various regional and domestic legislation that affects the functioning of Kenya's EACC. It will highlight the different standards which international legal instruments advocate, with a view to establishing a common standard for addressing corruption at the domestic level by using anti-corruption agencies. The chapter concludes by discussing the role of various stakeholders in the fight against corruption in Kenya.

## **2.2 International Anti-Corruption Instruments**

### **2.2.1 United Nations Convention against Corruption**

On 9 December 2003, when UNCAC was opened for signature and ratification in the city of Merida in Mexico, Kenya became the first state party to the Convention.<sup>8</sup>

Article 6(1) of the Convention provides, *inter alia*, that each state party shall ensure, as a matter of principle, the existence of a body or bodies that prevent corruption by such means as implementing policies and increasing and disseminating knowledge about the prevention of corruption.<sup>9</sup> Article 6(2) provides further that each state party shall grant its anti-corruption body or bodies:

- the necessary autonomy and independence and shall ensure that the body or bodies are free from any undue influence;
- the necessary material resources;

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7 De Sousa (2009) 6.

8 Afrimap (2015) 7.

9 See Article 6(1) (a) & (b) of UNCAC.

- the specialised staff with the training needed to ensure that they carry out their functions.

The spirit of Article 6 is expressed further in Article 36, which is a similar provision. However, the two articles differ in the sense that Article 6 aims at creating a body or bodies that prevent corruption while Article 36 calls for the existence of a body or bodies that combat corruption through law enforcement.

It is necessary to note that Kenya's main anti-corruption strategies were devised before the adoption of UNCAC. It is also worth recalling that the country's anti-corruption legal and institutional framework dates back to the colonial era. Kenya's responsibility under UNCAC is to ensure that the EACC is independent, well-resourced financially and provided with trained staff to help in the fight against corruption.

Since the ratification of UNCAC, Kenya has adopted many anti-corruption initiatives within and outside the purview of the Convention. According to the 2009 gap analysis report, Kenya's goal was to implement UNCAC fully before the end of the year 2012, in line with its medium-term plan under its Vision 2030.<sup>10</sup> The report shows that Kenya has complied fully with a large number of measures required by UNCAC. For example, the country has passed laws that domesticate the Convention as a whole and has created a large number of offences specified in Chapter 3 of the Convention. The question that then lingers in one's mind is why the levels of corruption in the country have not been reduced noticeably?

### **2.2.2 African Union Convention on Preventing and Combating Corruption**

The AU Convention aims at establishing effective measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa. Kenya not only has signed and ratified the AU Convention but also is in the process of implementing it.<sup>11</sup> The AU Convention also forms part of the laws of Kenya under the Constitution of 2010.<sup>12</sup>

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10 UNCAC Gap Analysis Report and Implementation Plan (2009).

11 Afrimap (2015) 7.

12 Article 2(6) of the Constitution of Kenya.

Article 5(3) of the AU Convention calls upon member states to “establish, maintain and strengthen independent national anti-corruption authorities or agencies”. Article 20 sets out a standard for the administration of anti-corruption agencies. It states that a national anti-corruption authority shall be accorded the necessary independence and autonomy to enable it to perform its duties effectively.<sup>13</sup> The article further provides that the agency should be specialised in combating corruption by, among other things, ensuring that the staff is trained and motivated to perform their duties successfully.<sup>14</sup>

### **2.2.3 Southern African Development Community Protocol against Corruption**

The SADC Protocol is open to member states of the Southern African Development Community and came into force in 2005. Article 4(1) (g) of the Protocol creates an obligation for states parties to create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption. Although the SADC Protocol does not affect Kenya directly, it has persuasive weight regarding the establishment, management, and administration of anti-corruption agencies. Kenya’s EACC has a similar operational structure to the Directorate on Corruption and Economic Crimes of Botswana, which is a member of SADC.<sup>15</sup>

## **2.3 Domestic Anti-Corruption Legal Framework**

### **2.3.1 Constitution of Kenya, 2010**

The Kenyan Constitution is the supreme law of the land, and was enacted on 27 August 2010 to replace the old Constitution that had been operative since Independence in 1963. It establishes the structure of the Kenyan government and defines the relationship between the government and the citizens of Kenya.

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13 Article 20(4) of the AU Convention.

14 Article 20(5) of the AU Convention.

15 Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015) 28.

Article 79 of the Constitution provides for the EACC in the following terms:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of this article.

The Constitution stipulates further that the EACC shall be an independent and autonomous body, not subject to direction by any person or authority.<sup>16</sup> It states also that parliament shall provide and allocate adequate funds to enable the EACC to perform its functions effectively.<sup>17</sup>

The EACC is to consist of at least three but not more than nine members who are to be nominated according to national legislation, and who are to be appointed by the President with the approval of the National Assembly. Article 250(6) (a) of the Constitution gives the members of the EACC a single term of six years in office.<sup>18</sup>

The powers of the EACC to investigate public complaints, issue summons to witnesses and appoint its own members of staff are outlined in Article 252 of the Constitution. Article 253 confers upon the EACC its corporate personality, along with the ability to sue and be sued in its own name. Further, under article 252(1) of the Constitution, the EACC is required to submit a report on any particular issue to the President and the National Assembly.

It is important to note that Article 80 of the Constitution provides that parliament must enact legislation to give effect to the provisions of Chapter 6 of the Constitution. Article 70 of Chapter 6 prescribes the constitutional standards of leadership and integrity in public office. It further sets out the responsibilities of leaders, provides for a code of conduct, prescribes the oaths of office, and lays down rules of financial probity in respect of state officers. In response, the National Assembly enacted the Ethics and Anti-Corruption Commission Act (EACA) in 2011, which established the EACC to replace the Kenya Anti-Corruption Commission (KACC).

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16 Article 249(2) (b) of the Constitution of Kenya.

17 Article 249(3) of the Constitution of Kenya.

18 See generally Article 250(1)-(12) of the Constitution of Kenya.

### **2.3.2 Ethics and Anti-Corruption Commission Act, 2011<sup>19</sup>**

The Ethics and Anti-Corruption Commission Act (EACA) not only establishes the EACC but also provides for its administration and codifies its functions and powers. Different aspects of this Act will be evaluated critically in the next chapter.

### **2.3.3 Anti-Corruption and Economic Crimes Act, 2003**

Enacted by Parliament to provide a legal framework for the fight against corruption and economic crimes in Kenya, the Anti-Corruption and Economic Crimes Act (ACECA) creates and defines and punishes corruption and economic offences.<sup>20</sup> It also provides for a number of strategies to be employed in the fight against corruption. These include investigation<sup>21</sup> and asset recovery.<sup>22</sup>

Section 16 of the ACECA establishes an Anti-Corruption Advisory Board and confers on the Board the function of advising the EACC on the exercise of its powers and the performance of its functions.

Sections 23-28 of the Act generally provide the procedure for the EACC to use in conducting its investigations. The Act requires the EACC to report to the ODPP on the outcome of its investigations and to make recommendations as to whether a person is to be prosecuted for corruption.<sup>23</sup>

### **2.3.4 Public Officer Ethics Act, 2004**

This Act is divided into six parts. Part I contains the preliminary provisions. Part II establishes specific codes of conduct.<sup>24</sup> Part III establishes general codes of conduct and ethics for public officials.<sup>25</sup>

This specific code calls for selflessness, financial probity, integrity, transparency, and accountability. The general codes in the Act call for instilling public confidence in public office,

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19 Act No 22 of 2011.

20 Section 2(1) of the ACECA.

21 Section 24 of the ACECA.

22 Section 55 of the ACECA.

23 Section 35 of the ACECA.

24 Section 5 of the Public Officer Ethics Act, 2004.

25 Sections 7-25 of the Public Officer Ethics Act, 2004.

avoiding conflicts of interest, observing work hours, respecting constitutionalism and the rule of law and not compromising the public interest.<sup>26</sup>

Part IV is dedicated to the declaration of income, assets and liabilities by every public official.<sup>27</sup>

Part V deals with enforcement of codes of conduct and ethics.<sup>28</sup> The Act concludes with Part VI which contains the general provisions.<sup>29</sup>

### **2.3.5 Leadership and Integrity Act, 2012**

This Act provides regulations that enforce standards of ethics and integrity amongst public entities, state officers and public officers.<sup>30</sup> Its intention is to establish and give effect to procedures and mechanisms for the effective administration of Chapter 6 of the Constitution of Kenya.<sup>31</sup>

## **2.4 Regional Ant-Corruption Institutions**

### **2.4.1 East African Association of Anti-Corruption Authorities**

The East African Association of Anti-Corruption Authorities (EAAACA) was launched in November 2007 and the Kenyan EACC is a member.<sup>32</sup> The vision of the EAAACA is to promote

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26 Afrimap (2015) 19.

27 Sections 26-34 of the Public Officer Ethics Act, 2004.

28 Sections 35-39 of the Public Officer Ethics Act, 2004.

29 Sections 40-42 of the Public Officer Ethics Act, 2004.

30 Afrimap (2015) 17. The Act obligates state officers: to respect and abide by the Constitution and the law, and provides that the public trust and the authority and responsibility vested in a state officer must be exercised in the best interests of the people of Kenya; to take personal responsibility for the reasonably foreseeable consequences of any acts or omissions arising from the discharge of the duties of the office; to carry out the duties of the office efficiently and honestly, and in a transparent and accountable manner; to observe, and subscribe to, ethical and professional requirements; not to use the office unlawfully to enrich themselves or any other persons; not to engage in activities that amount to abuse of office; not to misuse public resources.

31 Chapter 6 provides guiding principles on leadership and integrity including: selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties; the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions; and discipline and commitment in service to the people.

32 Other members of the EAAACA include: Tanzania's Prevention and Combating of Corruption Bureau, Uganda's Inspectorate of Government, Rwanda's Office of the Ombudsman, Burundi's Special Brigade of Anti-Corruption Commission, South Sudan's Anti-Corruption Commission, Djibouti's Inspector General, and Ethiopia's Federal Ethics and Anti-Corruption Commission. See Afrimap (2015).

the spirit of zero tolerance towards corruption and to encourage regional co-operation in preventing and combating corruption. Some of its objectives are:<sup>33</sup>

- To promote, facilitate and regulate co-operation among the Partner States and to ensure the effectiveness of measures and actions to prevent, detect, investigate, punish and eradicate corruption;
- To afford to one another mutual legal assistance regarding detection, investigations, prosecutions, identifications, tracing, freezing, seizure, confiscation, and repatriation of property, instruments or proceeds obtained or derived from corruption;
- To conduct research on new and best practices and innovations to improve and enhance the effectiveness of Anti-Corruption Authorities in East African Region;
- To stimulate public awareness about the dangers of corruption.<sup>34</sup>

The EAAACA participated in the drafting of the East African Community Protocol on Prevention and Combating Corruption, the adoption of which its members are called upon to promote.

The EAAACA conducts training for investigators from all its Partner States. The training offered is geared at specialisation in the investigation of corruption matters. By conducting research on new and best practices and innovations to improve and enhance the effectiveness of its Partner States, the EAAACA ensures that all bodies established by said states, including Kenya's EACC, are keeping up with international standards on the management and administration of anti-corruption commissions in the fight against corruption.<sup>35</sup>

The aforementioned serves to strengthen the EAAACA's legislative and institutional commitment to the fight against corruption not only at the domestic level but also at the regional level.<sup>36</sup>

#### **2.4.2 Eastern and Southern Africa Anti-Money Laundering Group**

Corruption and money laundering enjoy a symbiotic relationship. The presence of one creates and facilitates the other. Corruption generates a substantial amount of criminal proceeds which has to be laundered.<sup>37</sup> The Financial Action Task Force (FATF)<sup>38</sup> makes recommendations on

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33 Kigali Communiqué at the EAAACA, 2013.

34 Rutemarara (2011) 4.

35 Rutemarara (2011) 7.

36 Rutemarara (2011) 6.

37 Chaikin & Sharma (2009) 1.

38 The FATF is an inter-governmental body that sets standards and promotes effective implementation of legal, regulatory and operational measures to combat money laundering, terrorist financing and other

how countries can combat money laundering and terrorist financing, and these recommendations are important tools in the fight against corruption. The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is a regional FATF-styled body of which Kenya is a member.<sup>39</sup> This means that the EACC implements the anti-corruption initiatives recommended by the FATF.<sup>40</sup>

## 2.5 Other Stakeholders in the Fight against Corruption

In 2003, under Kenya's five-year national anti-corruption campaign, the government adopted a "zero tolerance to corruption" policy.<sup>41</sup> Soon after adoption, it became evident that for this policy to be effective and for progress to be made in the war against corruption, there was a need for a radical transformation in the mindset of Kenyans. This realisation led to the formation of the following institutions.

### 2.5.1 National Anti-Corruption Steering Committee

The priority of the National Anti-Corruption Steering Committee (NACSC) is to lead reform initiatives, among them the enactment and application of laws relating to corruption as well as the formulation of anti-corruption policies. In short, the NACSC is a civil society body that plays a leading role in fighting corruption through public education, sensitisation and awareness raising for the ordinary Kenyan.

The mandate of the NACSC has been renewed regularly via various special gazette notices. Currently, the President has the power to establish the NACSC and to appoint its members.<sup>42</sup> The NACSC, in its campaigns, aims at effecting fundamental changes in the attitude, practice

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related threats to the integrity of the international financial system. See <http://www.fatf-qafi.org/about/> (accessed 29 September 2016).

39 FATF regional styled bodies disseminate FATF international standards in the different regions of the world. Its members and co-operating partners are available at <http://www.esaamlg.org/mcp/index.php> (accessed 29 September 2016).

40 FATF recommendations are soft law. However, by virtue of the economic sanctions imposed on non-compliant states, they are seen as "mandatory recommendations".

41 Transparency International (2013).

42 See Gazette Notice No 6707 of 26 September 2014.

and culture of Kenyans regarding corruption.<sup>43</sup> It is one of the key anti-corruption bodies and works closely with the EACC.

Together with the EACC, the NACSC conducts campaigns to disseminate anti-corruption messages through the radio, television and local newspapers. These campaigns help to create awareness of corruption and to sensitise the public to corruption.<sup>44</sup> The campaigns employ a value-based anti-corruption strategy with a view to promoting national values provided for under Article 10(2) of the Constitution of Kenya.<sup>45</sup> The campaigns link the increased incidence of corruption to the non-practice of national values. They call upon members of the public to embrace and practice national values by refusing to participate in corrupt activities.

In addition to public campaigns, the EACC and the NACSC conduct training of various anti-corruption stakeholders within the national government<sup>46</sup> who, in turn, conduct anti-corruption sensitisation of government officials at the county level.

### **2.5.2 Office of the Director of Public Prosecution**

The Office of the Director of Public Prosecution (ODPP) plays one of the most important roles in the fight against corruption in Kenya. This role is linked to the fact that the EACC does not have prosecutorial powers. The primary function of the ODPP is to exercise state powers of prosecution, as provided for under Article 157(6) of the Constitution of Kenya. The ODPP institutes and undertakes criminal proceedings against any person. Further, under Article 157(9) of the Constitution, the ODPP may instruct any other prosecutor to institute criminal proceedings.

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43 NACSC Vision, Mission and Mandate, available at <http://www.naccsc.go.ke/index.php/about-us/vision-mission-mandate> (accessed 29 September 2016).

44 NACSC Progress Report (2015) 4.

45 Some of the national values include good governance, transparency, accountability, integrity and patriotism.

46 For example, the County Anti-Corruption Civilian Oversight Committee that is in charge of conducting anti-corruption sensitisation amongst members of the county assembly. See NACSC Progress Report (2015) 5.

The ODPP and the EACC co-operate when it comes to matters corruption.<sup>47</sup> Once the EACC finalises its investigations and concludes that a case warrants prosecution, it will send the file and a report to the ODPP recommending the matter for prosecution. The decision to prosecute is vested solely in the ODPP. The ODPP has the discretion to initiate the prosecution of a matter investigated by the EACC, to return the file to the EACC for further investigation or to recommend the closure of the file.<sup>48</sup> The ODPP issues guidelines on the prosecution of investigated cases. This ensures that any decisions made regarding the prosecution of corruption are underpinned by unified standards.<sup>49</sup>

In order to enhance the quality of the prosecution of corruption and economic crimes, the ODPP produces various reports and guidelines to elaborate the framework on the prosecutorial process, from pre-trial to appeals level. The ODPP has the power to direct and guide the EACC to investigate alleged corruption crimes.<sup>50</sup> The EACC is bound to follow the advice of the ODPP as to the nature of charges and the conduct of the prosecution. The ODPP and the EACC co-operate during pre-trial conferencing and preparation of witnesses. The two have a joint case management system that enables both institutions to track files moving between them.<sup>51</sup>

The ODPP and the EACC hold monthly meetings to discuss, evaluate and address issues regarding on-going investigations and prosecutions. The meetings give them a platform to discuss administrative and legislative challenges and any other matter of mutual interest.<sup>52</sup>

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47 Afrimap (2015) 36.

48 ODPP Report on Organisational Structure and Staffing Levels (2015) 2.

49 Guidelines for prosecuting corruption and economic crimes seek to generate and sustain a good working relationship between the EACC and the ODPP. They also assist in determining whether criminal proceedings should be commenced, what charges should be brought before court, and whether commenced proceedings should be continued or discontinued. See [www.odpp.go.ke](http://www.odpp.go.ke) (accessed 28 September 2016).

50 Section 5(2)(b) of the Office of the Director of Public Prosecutions Act, 2013.

51 Afrimap (2015) 36.

52 Guidelines for Prosecuting Corruption and Economic Crimes, available at [www.odpp.go.ke](http://www.odpp.go.ke) (accessed 28 September 2016).

### **2.5.3 Commission on Administrative Justice**

Commonly known as the office of the Ombudsman, the Commission was created by the Commission on Administrative Justice Act of 2011.<sup>53</sup> The Commission enjoys constitutional safeguards, powers, and functions similar to those enjoyed by commissions established under Chapter 15 of the Constitution of Kenya.<sup>54</sup>

The Commission draws its mandate from the Constitution and the Commission on Administrative Justice Act.<sup>55</sup> Its functions include the investigation of improper conduct and abuse of power in the public service. It promotes constitutionalism and the adoption of Kenyan national values within state organs. Its investigatory role complements that of the EACC.

### **2.5.4 Public Procurement Oversight Authority<sup>56</sup>**

The Public Procurement Oversight Authority (PPOA) is responsible for ensuring the soundness of the country's procurement system.<sup>57</sup> It not only implements and monitors laws relating to public procurement but also offers advice and training on matters of procurement. It helps in the fight against corruption by protecting the integrity of the tendering and procurement process.



### **2.5.5 Controller of Budget**

The work of the Controller of Budget is critical to preventing and combating corruption. The main mandate of the Controller of Budget is to oversee implementation of the national budget and to authorise withdrawals from public funds after ascertaining that such withdrawals are permitted by law. The Controller submits reports to the National Assembly on implementation of the budget.<sup>58</sup> In the case of misuse of funds allocated in the budget, the Controller of Budget can formulate appropriate recommendations for action by the EACC.

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53 Section 3(1) of the Commission on Administrative Justice Act establishes the Commission.

54 See Sections 4, 5(a) & 5(b) of the Commission on Administrative Justice Act.

55 See Article 252 of the Constitution of Kenya and Section 8 of the Commission on Administrative Justice Act.

56 Established under Section 8(1) of the Public Procurement and Disposal Act of 2005.

57 Transparency International "Overview of Kenya Corruption and Anti-Corruption" (2012).

58 Task Force Report (2015) 43.

### **2.5.6 Office of the Auditor General**

The core mandate of the Office of the Auditor General is to monitor the governmental financial management and to carry out audits of all governmental entities and public sector companies in the country.<sup>59</sup>

### **2.5.7 Role of the President in the Fight against Corruption**

Under the Constitution, the President of the Republic of Kenya plays a critical role in the fight against corruption. He leads in providing the necessary political will for fighting corruption and setting the country's agenda for good governance and anti-corruption.<sup>60</sup>

The President is required to report to the nation once every year on the measures taken and the progress achieved in the realisation of Kenya's national values.<sup>61</sup> It is worth noting that the national values include accountability, integrity, good governance and transparency.

The EACC, in terms of Article 254(1) of the Constitution, is required to make reports at the end of every financial year to the President and to Parliament.

### **2.5.8 The Judiciary**

The anti-corruption strategy employed by Kenya is such that the EACC investigates, the ODPP prosecutes and the judiciary adjudicates cases of corruption and economic crimes.<sup>62</sup> The Constitution establishes the judiciary as an independent custodian of justice in Kenya. Its primary role is to exercise judicial authority over the people of Kenya.<sup>63</sup> The Chief Justice is charged with the responsibility of appointing special magistrates to adjudicate prosecutions involving corruption and economic crimes.<sup>64</sup>

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59 Task Force Report (2015) 41.

60 Task Force Report (2015) 17.

61 Article 132(1) (c) (I) of the Constitution of Kenya.

62 Task Force Report (2015) 28.

63 See generally Chapter 10 of the Constitution of Kenya.

64 Section 3(1)(a) of Anti-Corruption and Economic Crimes Act (2003).

## 2.6 Role of Non-State Actors in the Fight against Corruption

A successful war against corruption requires that the role of non-state actors such as the media, civil society, religious organisations and the private sector in the anti-corruption agenda is credited. This role is recognised under the National Anti-Corruption Plan (NACP). The NACP provides a co-ordinated and unified approach to the fight against corruption. It acknowledges the participation and co-operation of all Kenyans. Further, it provides an environment that enables different stakeholders to contribute to the anti-corruption agenda.<sup>65</sup> The NACP recognises the role of the media in exposing corruption and in keeping the executive, the legislature, the judiciary and the public sector carefully monitored for corruption malpractices.<sup>66</sup> The civil society organisations create and mobilise pressure for reforms. The government partners with civil society in disseminating information, and in creating and increasing public awareness of anti-corruption.<sup>67</sup>

## 2.7 Conclusion

The establishment of anti-corruption bodies has enjoyed significant legislative support. Various international and regional legal instruments require their member states to establish specialised bodies to fight and prevent corruption. As discussed above, besides ratifying the international and regional anti-corruption instruments, Kenya has enacted various domestic statutes to strengthen the EACC's fight against corruption.

However, merely strengthening legislation that governs institutions is not sufficient to control corruption effectively. Mechanisms need to be put in place to secure the necessary funding and resources implement anti-corruption legislation and to train the persons managing the anti-corruption institutions.

The next chapter will review the mechanisms designed to enhance the performance of the EACC in preventing and fighting corruption.

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65 National Anti-Corruption Plan, available at [www.eacc.go.ke/Docs/Ntional%20Anti-%20Corruption%20plan.pdf](http://www.eacc.go.ke/Docs/Ntional%20Anti-%20Corruption%20plan.pdf) (accessed 28 August 2016).

66 National Anti-Corruption Plan 25.

67 National Anti-Corruption Plan 26.

## CHAPTER THREE

### INTERNATIONAL BEST PRACTICE STANDARDS FOR ANTI-CORRUPTION AGENCIES

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#### 3.1 Introduction

The causes of corruption differ from one country to another and the various systems have different ways of handling corruption.<sup>1</sup> However, if there is a common feature across different countries, it has been the establishment and development of anti-corruption agencies (ACAs) over the years.<sup>2</sup> De Sousa defines an ACA as:

A public (funded) body of a durable nature, with a specific mission to fight corruption and reduce the opportunity structures propitious for its occurrence in society through preventive and/or repressive measures.<sup>3</sup>

Regarding ACAs as the ultimate institutional response to corruption, De Sousa argues that some of the earliest agencies were born as a response to the first wave of corruption scandals in the 1980s and early 1990s.<sup>4</sup> Subsequently, ACAs have continued to mushroom throughout the world. Their establishment follows a perceived failure of conventional law enforcement bodies such as the police and the judiciary or they are the product of legal and institutional responses to the challenges of corruption.

There appears to be an incessant call for the establishment of these specialised agencies at both the regional and international levels. This is evident in the common provisions of UNCAC and the AU Convention, as well as of various domestic and regional laws and bodies. The

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1 Babu R (2006) 3.

2 Heilbrunn (2004) 2.

3 De Sousa (2010) 1.

4 These early agencies either were created by the declining European powers as an attempt to clean up the not-so-clean reputation of their colonial administrators or were put in place by the newly independent governments as part of their political agenda within the framework of self-determination. See De Sousa (2010) 1.

popularity of the ACA suggests that the institution plays a critical role in anti-corruption strategy.<sup>5</sup>

According to the Organisation for Economic Co-operation and Development (OECD), the motive behind the establishment of specialised ACAs is the expectation that, unlike other state institutions, such agencies will not be tainted by political influence, can centralise information and intelligence about corruption, and can assert leadership in the anti-corruption agenda.<sup>6</sup>

Regrettably, despite their steady development, very few ACAs succeed.<sup>7</sup> Reasons for their failure include lack of independence from other arms of government, inadequate funds to conduct their investigations, lack of political will to enable them to fulfil their mandate, lack of public trust, and poor staffing.

This chapter will discuss different models of ACAs in an attempt to classify Kenya's EACC. Where relevant, examples of successful ACAs will be cited in order to highlight factors which contribute to the effective administration and operation of ACAs in general.

The chapter will discuss also international best practice standards on promoting and strengthening the effectiveness of ACAs. Further, factors that may bolster the functioning of ACAs, as proposed by the Jakarta Statement on Principles for Anti-Corruption Agencies, will be considered.

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5 Despite varying in scope, legal status, membership and implementation mechanisms they all aim at establishing common standards for addressing corruption through establishment of anti-corruption institutions. OECD (2008) 17.

6 They help overcome the inefficiency of conventional law enforcement agencies in coping with the growing sophistication of corrupt mechanisms and transactions. OECD (2008) 23.

7 Heilbrunn (2004) 2.

## 3.2 Drivers of Success for ACAs

### 3.2.1 Choosing the Right Model of ACA

Analysts classify ACAs differently, depending on their functions and the arm of government to which they report.<sup>8</sup> For example, the OECD classifies agencies into three categories, based on their different purposes viewed through their functions. First are the multi-purpose agencies which have preventive and repressive powers. They are involved in policy analysis, counseling and technical assistance, information dissemination, ethics monitoring and training. Second are the law enforcement type agencies which combine detection, investigation and prosecution in one body. They may also incorporate prevention, co-ordination and research functions. The third model includes the preventive, policy development and co-ordination agencies which focus on one or more corruption prevention functions.

Notwithstanding the existence of several types of ACAs, there is no universally accepted model which constitutes a one-size-fits-all remedy and which can be transposed from one country to the other. The success of Hong Kong's Independent Commission against Corruption and the Singapore's Corrupt Practices Investigation Bureau have attracted and encouraged attempts by most countries developing new ACAs to replicate these models almost in their entirety.<sup>9</sup>

However, this practice has attracted a lot of criticism. For example, Doig argues that the problems faced by most ACAs in developing countries are associated with the apparent success of the Hong Kong Independent Commission against Corruption (ICAC). According to him, agencies that are modelled after the Hong Kong Commission carry a great weight of expectation but often are poorly designed and malfunctioning agencies in more hostile political and economic environments. To make matter worse, the agencies commonly are given a vague and broad remit covering investigation, prosecution, prevention and education. They usually lack the capacity and resources to perform any one of those functions well. Therefore, mission

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8 Heilbrunn (2004) 3 differentiates amongst four types of anti-corruption commissions: the universal model with investigative, preventive and communicative function; the investigative model that has investigations as its primary function; the parliamentary model which accounts to parliament; and the multi-agency model that involves a range of agencies which work together to fight corruption.

9 Doig *et al* (2007) 252.

overload and diversification make failure almost inevitable.<sup>10</sup> Moreover, institutional transplants from foreign systems are likely to fail if they do not adapt to a country's social, cultural, historical, political and legal background. Thus, before establishing an ACA, a country needs to make a realistic assessment of the organisational maturity, capacity and environmental constraints in order to make sure that the ACA fits functionally within the local context.<sup>11</sup>

Anti-corruption agencies need to be specialised. Specialisation takes different forms and is achieved through the different functions of an ACA. It is the responsibility of individual countries to find the most effective institutional solution appropriate to the local context, level of corruption and existing national institutional and legal framework.<sup>12</sup> In an attempt to specialise the fight against corruption, Kenya's EACC was modelled after the multi-purpose agency. In Hong Kong, ICAC investigates cases while the Department of Justice undertakes the prosecutions.<sup>13</sup> The Kenyan arrangement mirrors Hong Kong in that the EACC investigates allegations of corruption and the ODPP prosecutes certain of the cases investigated.

### **3.2.2 Legal Framework**

The first key element in the establishment of a successful ACA is ensuring that the necessary legal framework exists. Without the legal tools needed to pursue venal officials, an ACA cannot succeed.<sup>14</sup> It needs a proper and stable legal framework that establishes, maintains and regulates its powers and functions. The laws must deal with such matters as the main attributes of the agency, its powers and its accountability structures.<sup>15</sup>

The nation's legal and constitutional configuration should be examined with a view to removing any barriers that may exist, including any conflicts of interests between the new agency and existing institutions. The ACA should be founded upon the rule of law and the constitutional

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10 Doig, Watt & Williams (2005) 6.  
11 OECD (2008) 24.  
12 OECD (2008) 23.  
13 Task Force Report (2015) 27.  
14 Heilbrunn (2004) 15.  
15 EPAC/EACN (2011) 3.

principle of legality in order to safeguard its permanence. This will help it survive political turbulence and *ad hoc* legislation that may be annulled easily.

In Kenya, Section 3 of the Ethics and Anti-Corruption Commission Act, Section 6 of the Anti-Corruption and Economic Crimes Act and Article 79 of the Constitution collectively establish the Commission. These legislative provisions not only warrant the permanence of the EACC, but they also provide, *inter alia*, for its functions, mandate, independence, appointment procedures and reporting structure.

### 3.2.3 Independence

For an ACA to be successful it must be independent. UNCAC considers an agency independent when it is free from all undue influence, and has the necessary material resources and specialised staff, as well as the capacity to provide the training required by the staff to carry out their functions.<sup>16</sup>

A successful ACA is dependent upon insulation from politics. The agency must be able to operate without interference from the executive and the legislature, as well as from other authorities. When an agency is seen to be independent it achieves legitimacy in the eyes of the public. The staff of the agency must be protected from possible reprisal or fear of reprisal. The institutional setting and the organisational structure of an agency must permit independent and impartial work.<sup>17</sup> Independence should be protected both in law and in practice. Legislation should establish, for example, accountability mechanisms between the executive and those charged with the responsibility of managing the agency. It should also outline procedures relating to the appointment and removal of the agency's top executives.<sup>18</sup>

An agency should enjoy the kind of political and operational independence which allows for the investigation even of those at the highest level of government.<sup>19</sup> However, the difficulties of

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16 Article 6(2) of UNCAC.

17 EPAC/EACN (2011) 3.

18 Gregory (2005) 127-128. According to EPAC/EACN (2011) 22-23, independence includes transparent recruitment based on merit, ability to make decisions on investigations without any interference, and ability to co-operate and liaise with similar organisations without the need for prior consultation or approval.

19 Pope & Vogl (2000) 8.

securing complete independence from outside intervention must be faced. The work of ACAs often excites and elicits political concerns, and hence great political pressure. It is impossible to expect the law fully to eliminate areas of possible undue influence, especially through backdoor channels.<sup>20</sup>

### **3.2.4 Accountability Mechanism**

The independence of ACAs ought not to be absolute. Whilst it is necessary to allow them to operate without undue influence from other authorities, they nonetheless need to be accountable for their work. The system must allow for the checks and balances essential to democratic governance.<sup>21</sup> There should be internal and external oversight of their work and performance. An ACA should be accountable for how it discharges its duties and for how it conducts itself. Accountability ensures public confidence and cushions the agency from suspicions of impropriety that may be levied against it by its enemies.<sup>22</sup>

Accountability can reside in the requirement that an ACA submits annual reports and/or internal and external audits of its performance to the executive, the legislature or a specialised committee. For example, the New South Wales ICAC operates under the supervision of two committees, a Parliamentary Joint Committee and an Operations Review Committee.<sup>23</sup>

Accountability should be tailored to suit the powers and functions of the agency.

Accountability and independence reinforce each other and should be used for the proper governance and administration of the ACA. Accountability may be classified as either external or internal. Internal accountability is where agencies develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimise any misconduct and abuse of power by its members. External accountability requires that the

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20 Gregory (2005) 127-128.

21 OECD (2008) 26.

22 EPAC/EACN (2011) 4.

23 See Heilbrunn (2004) 8 & 15.

agency strictly adheres to the rule of law and be accountable in terms of mechanisms established to prevent any abuse of power.<sup>24</sup>

### **3.2.5 Financial and Human Resources**

The need to have ACAs adequately funded and suitably staffed cannot be overemphasised. The proper financing of ACAs is an obligation placed on states by international legal instruments. In order for an agency to perform its functions efficiently and effectively, the amount of funds allocated to it must be commensurate with its size and objectives.<sup>25</sup> Lack of resources invariably hinders the performance of an ACA. This, in turns, lowers the level of public confidence in the institution.<sup>26</sup> An sufficiently financed agency will allow for the employment of well-trained staff with appropriate remuneration packages.<sup>27</sup>

### **3.2.6 Recruitment and Appointment of Staff**

The staff of an ACA should be highly qualified individuals, possessing the relevant skills, training, and experience.<sup>28</sup> In order to foster and increase public confidence in the establishment and work of an ACA, appointments should be objective, transparent and merit-based. Appointment of top management should be based on high-level consensus on the candidates selected by different power holders.<sup>29</sup> There should be public involvement in every stage of the process. The staff of the agency must be trained regularly in a wide range of skills needed for them to be able to fight corruption. Personnel should enjoy job security founded in law and removal from office of heads of ACAs should occur through legally established procedures.<sup>30</sup> Removals should not be politically instigated. Such safeguards will protect the agency personnel against unfounded dismissals.

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24 Jakarta Statement on Principles for Anti-Corruption Agencies (2012).

25 OSCE (2016) 50.

26 OECD (2008) 27.

27 EPAC/EACN (2011) 7.

28 EPAC/EACN (2011) 8.

29 OECD (2008) 26.

30 Jakarta Statement on Principles for Anti-Corruption Agencies (2012).

### 3.2.7 Integrity

Members of the ACA need to set an example regarding the values they seek to promote and enforce. This can be done through the adoption of codes of conduct requiring the highest standards of ethical behaviour from agency staff.<sup>31</sup> Values such as honesty and integrity should be employed by agency personnel in the discharge of their duties.

### 3.2.8 Collaboration and Co-operation

ACAs are part of the institutional framework designed to fight corruption. They should not operate in isolation as they share their competencies with other government agencies. An institutional framework which lacks the support of other key stakeholders will fail.<sup>32</sup> Therefore, ACAs should have a good working relationship with the media and civil society, as well as with other state agencies such as the police and the judiciary.<sup>33</sup>

Through smooth and fruitful co-operation, an agency can, in a timely manner, obtain quality information and data; access operational support and joint investigative activities; gather intelligence and evidence related to corruption offences including, where appropriate, the identification and recovery of the proceeds of corruption. Co-operation should facilitate the exchange of best practice, standards, experiences and lessons learned. It also represents a safety net and a mutual support network for the agency in the face of difficulties.<sup>34</sup>

UNCAC recognises the importance of co-operation and calls for the participation of civil society, non-governmental organisations and community-based organisations in the prevention of and the fight against corruption.<sup>35</sup> Also, ACAs should enter into international co-operation networks to help address the growing sophistication and globalisation of corruption transactions.<sup>36</sup>

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31 Integrity can be achieved through use of code of ethics, code of conduct, mission statement, best practice or other instruments. See EPAC/EACN (2011) 5.

32 OECD (2008) 28.

33 Jakarta Statement on Principles for Anti-Corruption Agencies (2012).

34 EPAC/EACN (2011) 8.

35 See generally Article 13 of UNCAC.

36 Co-operation and collaboration help in knowledge transfer across different institutions through formation of groups, such as the International Association of Anti-Corruption Authorities, which organise training for anti-corruption officials and conduct seminars and conferences that are good networking opportunities for sharing best practice standards. See De Sousa (2009) 8.

### **3.2.9 Mandate Competencies**

There are numerous ways to fight corruption, and therefore ACAs have a broad range of activities in which they can engage.<sup>37</sup> They can adopt various methods that may include anti-corruption policy development and co-ordination, research and analysis, public outreach activities (including education and awareness raising), monitoring, and investigation and prosecution of corruption cases. The ACA should have a clear and well-defined mandate to enable it tackle corruption.<sup>38</sup> Lack of mandate clarity creates turf wars between different institutions purporting to perform similar functions.

### **3.2.10 Political Will**

The success of an ACA largely depends on the political will of the government to fight corruption. Where there is low level of political commitment to reduce corruption there is likely to be a high level of political resistance to anti-corruption initiatives. Political will fosters a good working relationship between state agencies, the private sector and the ACA. It ensures, among other things, that an agency has the necessary resources, accountability mechanisms, independence and personnel to fight corruption. Political support should not come only from the presidency but also from all top political leaders in a country.<sup>39</sup> Lack of political support robs an ACA of its ability to obtain mutual legal assistance in areas such as the extradition and asset recovery.

### **3.2.11 Availability of Key Performance Indicators**

ACAs need to have appropriate, accurate and adequate methods of measuring their performance.

Processes of performance measurement based upon injudiciously-chosen performance indicators have not only resulted in the inaccurate assessment of anti-corruption agencies' "success" but have led anti-corruption agencies in the direction of "failure".<sup>40</sup>

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37 OSCE (2016) 47.

38 Jakarta Statement on Principles for Anti-Corruption Agencies (2012).

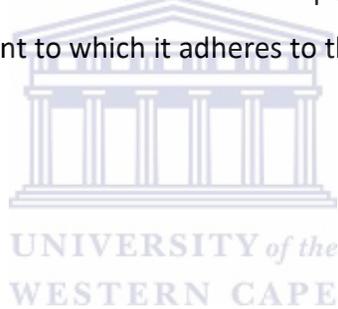
39 Doing, Watt & Williams (2005) 12 & 42.

40 Doing, Watt & Williams (2005) 40.

The methods of measuring their performance need to be commensurate with the work they perform. Assessments should focus on outputs, turnover of staff and length of programmes, and the impact of programmes in the longer term. The objectives of an agency need to be reviewed annually in order to establish its success or otherwise.

### **3.3 Conclusion**

The best practice standards discussed in this chapter are not comprehensive. They are limited to the factors stipulated in the Jakarta Statement on Principles for Anti-Corruption Agencies. Various other factors could be cited to enhance the performance of ACAs. It is worth mentioning that there is no legally binding instrument that provides for best practice standards. However, lessons from successful ACAs indicate that applying some of the above elements and recommendations will enhance performance. The next chapter will introduce and discuss the structure of the EACC and the extent to which it adheres to the standards discussed in this chapter.



## CHAPTER FOUR

### THE ETHICS AND ANTI-CORRUPTION COMMISSION OF KENYA

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#### 4.1 Introduction

Corruption remains a big problem in Africa. Indices, such as those of Transparency International, highlight African countries as poor performers in reducing corruption. Nevertheless, the reliance upon anti-corruption agencies (ACAs) in the fight against corruption in Africa has continued to grow over the years. It thus is imperative to analyse Kenya's EACC in order to assess its role in the fight against corruption.

This chapter will examine the organisational structure of the EACC. Different features, including the appointment of its executives and members of staff, its powers and duties, its independence, its accountability and its funding will be discussed. The chapter will conclude by considering the achievements of the Commission in its fight against corruption.

#### 4.2 Organisational Structure of the EACC

As discussed in the previous chapter,<sup>1</sup> the EACC is modelled after the OECD's multi-purpose agency with preventive and repressive powers. The top management of the EACC consists of a Chairperson and two Commissioners. The Commission has a secretariat that is headed by a Secretary and two Deputy Secretaries, with one deputy acting as the Director of Technical Services and the other as Director of Corporate Services.<sup>2</sup> It also has staff recruited by the EACC itself, staff from its predecessor institution (the KACC) and staff seconded from the Public Service Commission at the request of the EACC.<sup>3</sup> The members of staff are spread across different departments, namely, investigations, asset recovery, prevention and education; finance and planning; and human resource and administration. The Commission's Secretary is its chief executive officer and accounting officer and is responsible for carrying out of the

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1 See §3.2.1 above.

2 Reporting to the Director of Technical Services are Directors of Preventive Services, Legal Services, Investigations Ethics and Leadership. The Director of Corporate Services oversees Directors of Finance and Planning and of Human Resources and Administration. See EACC Annual Report (2014-2015) 13.

3 Task Force Report (2015) 22.

decisions of the Commission, the day-to-day administration and management of the affairs of the Commission, and the supervision of other employees of the Commission, as well as the performance of such other duties as may be assigned by the Commission.<sup>4</sup> Kenya has forty-seven counties. The Commission has its headquarters in Nairobi city and it has nine regional offices spread across the counties of the Republic.

### **4.3 Mandate, Powers, and Duties of the EACC**

The EACC has a clear and well-defined mandate that helps it fight corruption. Its powers and duties are derived from Article 252 of the Constitution, from Sections 11 and 13 of the Ethics and Anti-Corruption Commission Act and from the Anti-Corruption and Economic Crimes Act.

Article 252 of the Constitution gives the EACC the power to:

- conduct investigations on its own initiative or on a complaint made by a member of the public;
- use alternative dispute resolution mechanisms such as conciliation, mediation, and negotiation;
- recruit its own staff;
- perform any function and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution; and
- summon witnesses to assist with investigations and institute court proceedings.

In addition, the Commission can monitor the practices and procedures of public bodies to detect corrupt practices and to amend methods of work or procedures that may be conducive to corrupt practices.

- (a) Alongside the Constitutional provisions, Section 11 of the EACCA provides for the following functions of the Commission: in relation to state officers—
  - (i) develop and promote standards and best practices in integrity and anti-corruption;
  - (ii) develop a code of ethics;
- (b) Work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
- (c) Receive complaints on the breach of the code of ethics by public officers;

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4 Section 16(1)-(7) of the EACCA.

- (d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed by this Act or any other law enacted pursuant to Chapter Six of the Constitution;
- (e) Recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- (f) Oversee the enforcement of codes of ethics prescribed for public officers;
- (g) Advise, on its own initiative, any person on any matter within its functions;
- (h) Raise 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 as to confidentiality;
- (i) Monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- (j) Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

Section 13 of the EACCA empowers the Commission to:

- (a) educate and create awareness on any matter within the Commission's mandate;
- (b) undertake preventive measures against unethical and corrupt practices;
- (c) conduct investigations on its own initiative or on a complaint made by any person; and
- (d) conduct mediation, conciliation and negotiation.

From the powers and duties listed above, it is evident that the EACC is tasked with fighting corruption through investigations, prevention, education, alternative dispute resolution and asset recovery.

#### **4.3.1 Investigations**

The Commission conducts investigations of its own accord or upon receipt of a complaint from a member of the public.<sup>5</sup> The Commissioners enjoy the powers, privileges and immunities of police officers for any investigations they undertake. The findings of such investigations are admissible in court and can be used also for asset recovery and compensation.<sup>6</sup> In discharging its investigatory function, the Commission employs integrity tests for officials as well as “tap” and “sting” operations in which investigators stage-manage the payment of bribes to officials who ask for them.<sup>7</sup>

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5 Section 24 of the Anti-Corruption and Economic Crimes Act, 2003.

6 EACC Annual Report (2012/2013) 4.

7 EACC Report of Activities 2014/2015.

#### **4.3.2 Prevention**

The Commission prevents corruption by examining systems, policies, procedures and practices in public and private sector agencies with a view to identifying corruption loopholes and recommending measures for sealing such loopholes. It also offers training to integrity assurance officers in the public and private sectors. Further, the Commission develops codes of conduct and helps institutions form corruption prevention committees. Upon request, the Commission offers advisory services to organisations, agencies, departments and other institutions on anti-corruption and good governance measures.

#### **4.3.3 Education**

The Commission is charged with the mandate of educating the public on the dangers of corruption. It also designs, develops and implements ethics and integrity programmes to be applied in all public and private educational institutions. Similarly, it develops and circulates anti-corruption information and communication materials throughout the country and carries out anti-corruption research. The findings of the research are published in reports which inform the country's anti-corruption strategy.<sup>8</sup>



#### **4.3.4 Asset Recovery**

The EACC conducts asset tracing investigations involving property, land and money. It uses non-conviction based asset recovery by instituting civil proceedings on behalf of public and private bodies to recover benefits improperly obtained by third parties. The Commission also seeks preservation orders from the court to ensure that the assets under investigation are not sold, disposed of or transferred.

#### **4.3.5 Alternative Dispute Resolution Mechanisms**

The Commission employs mediation, conciliation and negotiation to settle less contentious civil matters. As a result, substantial amounts of stolen assets have been recovered.<sup>9</sup>

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8 EACC Annual Report (2012/2013) 3.

9 EACC Annual Report (2012/2013) 6.

Amnesty has been used by the EACC to settle some corruption cases. This allows suspects, who have been involved in corrupt practices, to come forward and seek immunity from prosecution on condition that they disclose all facts pertaining to their corrupt acts and the benefits arising from such acts and that they return and surrender their illegally acquired assets.<sup>10</sup>

#### **4.3.6 Summation**

The country has adopted a multi-agency approach to fighting corruption, with the functions of the Commission running through different legislative provisions. There is clear duplication in the aforesaid provisions. The absence of an overarching statute may pose a challenge to the performance of the Commission's tasks, especially those that require co-ordination across various agencies. The EACC has a clear mandate regarding prevention, education and sensitisation of the public on corruption matters and asset recovery. However, as discussed in the previous chapter, it lacks prosecutorial powers. The inability of the Commission to prosecute persons for corruption crimes is criticised constantly as the weak link in its fight against corruption.

Overcoming the EACC's lack of prosecutorial powers requires co-ordination of the activities of the various agencies involved in the performance of the different anti-corruption functions. However, achieving collaboration between the traditional law enforcement agencies and the EACC may be a tall order.

#### **4.4 Staff Recruitment and Tenure**

The appointment of the Chairperson, the two Commissioners, and the Secretary of the EACC occurs pursuant to the Constitution of Kenya, the EACCA and the Public Appointments (Parliamentary Approval) Act.

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10 The Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulation L.N 4 2011.

The Constitution requires that for a person to be appointed as Chairperson of, Member of or Secretary to the Commission, he must meet the requirements of the principles of leadership and integrity as contained in Article 73(2).<sup>11</sup>

The qualifications for appointment as Chairperson, Commissioners and Secretary are found in Section 5 of the EACCA. They are essentially similar, with the major difference being that the Chairperson must have knowledge and experience of not less than fifteen years while the Commissioners and Secretary must have at least ten years' experience. The rest of the requirements include being a holder of at least a degree from a university recognised in Kenya and having a distinguished career.<sup>12</sup> Members of a governing body of a political party, undischarged bankrupts, felons and persons removed from public office for contravening the Constitution or any laws of Kenya are not eligible for appointment.<sup>13</sup>

The procedure for the appointment of the current Chairperson and Members of the Commission are outlined in Section 6 of the EACCA. It includes the President constituting a selection panel,<sup>14</sup> which will advertise the positions of Chairperson and Commissioners in two local daily newspapers, inviting applications from persons who qualify for nomination and appointment to the office. The panel then considers the applications received, shortlists candidates and publishes the names of those shortlisted in the daily newspaper, inviting them for interviews. After conducting the interviews, the panel recommends three applicants for the post of Chairperson and three for the post of Members of the Commission, and forwards its recommendations to the President.

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11 They include: (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices; (c) selfless service based solely on the public interest, demonstrated by (i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and (e) discipline and commitment in service to the people.

12 See Section 5(1)(c) of the EACCA.

13 See Section 5(3) of the EACCA.

14 The selection panel consists of members from each of the following bodies: the Office of the President; the Office of the Prime Minister; the Ministry responsible for ethics and integrity; the Judicial Service Commission; the Commission for the time being responsible for matters relating to human rights; the Commission for the time being responsible for matters relating to gender; the Media Council of Kenya; the joint forum of religious organisations and the Association of Professional Societies of East Africa.

The President selects the Chair and Commissioners from the names forwarded to him by the panel and then transmits his selections to the National Assembly for approval. The National Assembly conducts approval hearings under the Public Appointments (Parliamentary Approval) Act, which lays down criteria for the vetting and approval of nominees for appointment to public office by parliament.<sup>15</sup> Section 7 of the EACCA affords the Chair and members of the Commission a term of six years in office.<sup>16</sup> The six-year term of office is intended to grant the Commission's officers security and stability.

The Commission's staff are appointed on renewable contracts. Their appointment procedure follows a robust human resources and administrative process. The approved staff of the EACC numbers 2 246. However, as of June 2015, the Commission is reported to have a staff of only 440.<sup>17</sup> It is submitted that this staff shortage hampers the work of the EACC and leads to a backlog in the investigation of cases. However, the appointment procedure of the EACC staff is transparent and there are enough legislative guidelines to ensure meritorious appointments.

#### **4.5 Capacity**

The Commission's headquarters are in the country's capital, Nairobi. In addition, the Commission has a regional body in five different counties. However, this is not ideal since the Constitution of 2010 provides for a devolved government.<sup>18</sup> This has resulted in the decentralisation of public resources and functions of state organs.<sup>19</sup> In the allocation of functions provided in the Fourth Schedule to the Constitution, the functions of the anti-corruption have been omitted. The Constitution is unclear as to which between the central and county governments has the mandate to carry out anti-corruption functions.

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15 Sections 6 and 7 of Public Appointments (Parliamentary Approval) Act.

16 Following the enactment of the Ethics and Anti-Corruption Commission (Amendment) Act in 2015, the recruitment procedure of EACC staff members has changed. The amendment vests the responsibility to recruit the Chairperson and Commissioners in the Public Service Commission, as opposed to a Selection Panel, after which names of qualified candidates are forwarded to the President for consideration. The names of President's preferred candidates are transmitted to Parliament for approval, after which the President would appoint the approved candidates. See Task Force Report (2015) 21.

17 Task Force Report (2015) 22.

18 Afrimap (2015) 29.

19 Article 174 of the Constitution of Kenya.

For the fight against corruption to be effective, the staff of the Commission requires adequate training. The EACC indicates in its annual reports that it was involved in the training of its staff in collaboration with the government and other agencies such as the World Bank.<sup>20</sup> A critical analysis of the training shows that it is *ad hoc* and only initiated at the request of employees who are seeking to obtain professional accreditation. For example, investigators and prosecutors who are also advocates are required to attend the Council of Legal Education training courses in order to renew their practicing certificates. The reports of the Commission indicating where the training took place and the attendees reveal that lawyers and accountants attend training offered by their professional bodies.<sup>21</sup>

Clearly, there is a huge gap in the capacity of the Commission's staff. There is a need to enhance the skills of the staff members at a practical level.

#### 4.6 Integrity

In order to lead in the war against graft, the Commission and its members must be above reproach. The integrity of the Commission affects the general perception and trust of the citizens in its work. The chairperson and the two members of the Commission are required, under the Leadership and Integrity Act, to sign the Leadership and Integrity Code for State Officers.<sup>22</sup> Breach of the code amounts to misconduct which may result in disciplinary proceedings, culminating in removal from office. The code of conduct only applies to the chairperson, members and the secretary of the Commission.<sup>23</sup> The Third Schedule to the EACCA contains the code of conduct that must be signed by members and employees of the Commission.<sup>24</sup> Despite the existence of the code of conduct, it is submitted that the biggest challenge facing the Commission is to protect its reputation.

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20 The number of personnel trained amount to 499. See EACC Annual Report (2011/2012) 42.

21 A large number of the training sessions attended are those offered by the Council of Legal Education courses for lawyers and the Institute of Certified Public Accountants of Kenya for accountants. See EACC Annual Report (2012/2013) 45-50.

22 Section 40 of the Leadership and Integrity Act, 2012.

23 Section 3 of the Leadership and Integrity Code.

24 Section 21 of the EACCA.

The initial appointment of Commission office holders was mired in a lot of controversy that involved lengthy parliamentary debates and ultimately led to a high court challenge to the constitutionality of the appointment of Mumo Matemu as chair of the Commission.<sup>25</sup> The high court held that Matemu was unsuitable for the position. Subsequently, Matemu escalated the matter to the court of appeal, which overturned the decision of the high court.<sup>26</sup>

Surprisingly, Mumo Matemu was forced to resign in May 2015 because of allegations of corruption, after being suspended by the President on the recommendation of the National Assembly. His successor also resigned for similar reasons in August 2016 (after being in office for 8 months) when the National Assembly's Justice and Legal Affairs Committee recommended his removal from office.<sup>27</sup> The integrity of the top managers of the Commission has remained questionable and frequently are faced with several corruption allegations, leading to their resignation or removal from office. The Commission has been without a chair since 18 October 2016 following the resignation of its embattled chairperson who was ushered out of office on allegations of corruption.<sup>28</sup>

This paper submits that there is a need to focus on the integrity of the persons being appointed as top office holders of the EACC. This will ensure that the stability which the Commission requires to perform its functions. It is impossible to expect the leaders of the EACC to fight corruption successfully when they themselves face allegations of corruption.

The situation is so serious that even the appointment of the chairperson of the EACC is based on a shaky jurisprudence of the court of appeal, which essentially upheld the view that serious allegations are of no consequence in the vetting of public officials and that only convictions by a court count. The court of appeal may have believed that it was raising the standard high enough to protect potential appointees against frivolous and vexatious allegations, which is not an unmeritorious intention, but what it ended up doing was lowering the bar for candidates suitable for public office so patently low that any unconvicted criminal, no matter how notorious their crime, is now eligible for the highest office in the Republic of Kenya.<sup>29</sup>

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25 *Trusted Society of Human Rights Alliance v Attorney General and Two Others* [2012] eKLR.

26 *Mumo Matemu v Trusted Society of Human Rights Alliance and Five Others* [2013] eKLR.

27 Simiyu 'Kinisu bows to pressure, resigns as EACC chairman', available at <http://www.nation.co.ke/news/Ethics-Anti-Corruption-Commission/1056-3364272-xedwjez/> (accessed 10 October 2016).

28 *Daily Nation* (August 2016).

29 Afrimap (2015) 44.

Comments and observations such as these will recede only if much attention is paid to the Integrity of both the top management and of other appointees to the Commission.

#### 4.7 Independence

Independence of an ACA ensures that there is no interference by any arm of government and by any person in its activities. It protects the operations of the ACA from any undue influence. Article 79 of the Constitution of Kenya requires parliament to enact legislation to establish an Independent Ethics and Anti-Corruption Commission. The Commission, in the performance of its functions, is not subject to the direction and control of any person or authority.<sup>30</sup> However, this is an ideal that exists only on paper. In practice, the Commission has been criticised for following political direction on how and when to conduct its investigations. For example, the Commission summoned the former Prime Minister for questioning on allegations relating to graft. Later on the Commission agreed to admit a statement from the former premier's lawyers. When put to task, it failed to explain why it had replaced the summons with a mere statement.<sup>31</sup>

In addition, the Commission's independence is subject to interpretation as it is not specifically listed amongst the independent institutions established under the Constitution.<sup>32</sup> As discussed in the previous chapter, the Commission receives instructions from the ODPP about conducting investigations. The ODPP also has the power to make *nolle prosequi* decisions in relation to any prosecutions initiated on the instructions of the EACC.<sup>33</sup> The ability of the ODPP to interrupt the work of the EACC has to be seen as interference.

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30 Section 28 of the EACCA.

31 *Business Daily* (2015).

32 Article 248 stipulates that the independent commissions are: the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; and the National Police Service Commission. The independent offices are the Auditor General and the Controller of Budget.

33 Article 157(6)(c) of the Constitution of Kenya.

#### **4.8 Accountability of the EACC**

The EACC is accountable to the President and the National Assembly. It submits reports at the end of every financial year, containing its financial statements, descriptions of its activities, identification of any impediments to the achievement of its objects and other appropriate information relating to its functions.<sup>34</sup>

The Commission posts its monthly, quarterly and annual reports on its website to enable the public view its work.<sup>35</sup> Its interaction with the public through its website and social media supports not only dissemination of information but also reporting on corruption. There has been an increase in the use of the EACC's website, which is an indication that Kenyans are keen to view the work and reports of the Commission. During the reporting period of 2013/2014, the EACC announced that its website had reached 364 159 hits, with an average of 998 hits per day. This is high when compared to the initial report of 111 223 hits, with an average of 304 hits per day.<sup>36</sup>

Other than the reporting requirement, there are no constitutional or legislative provisions that obligate the EACC to account to an oversight body. Indeed, there are no checks and balances to prevent misconduct by staff of the Commission. The EACC does not have any internal or external accountability mechanism. This is a significant omission. Having the Commission account to an independent oversight body would allow its work to be scrutinised and assessed critically.

#### **4.9 Funds of the Commission**

Financial resources play an important role in ensuring that the operations of an ACA run smoothly. For an ACA to exercise its mandate well, it must be funded well. It must be noted that maintaining and managing an ACA is expensive.

In Kenya, the main source of funds of the EACC is money allocated by parliament. The Commission, along with other agencies and ministries, bids for a desired budget from the

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34 Section 27 of the EACCA.

35 See EACC Annual Report (2014/2015).

36 EACC Annual Report (2013/2014) 57 and EACC Annual Report (2011/2012) 69.

government.<sup>37</sup> Grants, gifts, loans and donations also constitute funding as long as they are disclosed to the National Assembly and made public before being used.<sup>38</sup>

The bulk of the EACC's budgetary allocation goes towards settling salaries and rent.<sup>39</sup> This leaves but little resources to devote to anti-corruption initiatives. It is recognised widely that the Commission should be funded better to enable it to roll out effective anti-corruption strategies.

#### **4.10 Collaboration and Co-operation**

The Commission works closely with non-state actors including civil society organisations, non-governmental organisations, the media and religious groups to disseminate anti-corruption messages and to help inculcate moral and ethical values in the people with whom they interact.

Thus, for example, the EACC works with the media to disseminate information by press releases, briefings and coverage of court proceedings. This partnership ensures that activities of the EACC are publicised well.<sup>40</sup> Also, collaboration initiatives between the ODPP and the EACC involve joint training and investigations aimed at the prosecution of corruption and other economic crimes. As a result, guidelines for the investigation and prosecution of these crimes have been developed and implemented.<sup>41</sup>

Furthermore, the EACC is a member of the Integrated Public Complaints Referral Mechanism (IPCRM), which is a joint initiative of different agencies, including the Kenya National Commission on Human Rights, the National Anti-Corruption Steering Committee, the Commission for Administrative Justice, and Transparency International – Kenya. The main objective of the IPCRM is to strengthen the partnership between state oversight bodies in

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37 Afrimap (2015) 37.

38 Section 22(1) & (2) of the EACCA.

39 Task Force Report (2015) 22.

40 UNCAC Country Review Report (2015) 71.

41 Task Force Report (2015) 98.

managing and disposing of complaints received from members of the public relating to corruption. The mechanism supports online anonymous online corruption reporting.<sup>42</sup>

The Financial Reporting Centre, which is Kenya's financial intelligence unit, contributes to the fight against corruption through the sharing of information relating to corruption investigations. The EACC and the Financial Reporting Centre have a memorandum of understanding to facilitate the receipt and dissemination of information.<sup>43</sup>

Regionally, as discussed in the previous chapter, Kenya works closely with other anti-corruption bodies, including those in the East African region under the auspices of the East African Association of Anti-Corruption Authorities (EAAACA). The latter brings together ACAs in the Eastern African region and provides a platform for co-operation among them in the fight against graft. Globally, the EACC is represented in the Stolen Assets Recovery Initiative (StAR) and actively participates in the various fora organised by that body.<sup>44</sup>

The major challenge experienced in effective co-operation and collaboration in the fight against corruption is turf wars. The main cause of turf wars is inadequate legal and administrative framework, overlapping mandate, lack of structured work plan, high leadership turnover, and competition over which agency gets credit over certain results and competition for publicity.<sup>45</sup>

The EACC is perhaps "over collaborating". It has to work with so many institutions that it finds itself conflicted by the overlapping mandates of its various partner agencies. The legal framework of collaboration should be refined and reinforced to curb such conflicts.

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42 Task Force Report (2015) 99.

43 Task Force Report (2015) 99.

44 EACC Annual Report (2011/2012) 7.

45 Task Force Report (2015) 102.

#### 4.11 Performance of the EACC

Year	Complaints			Prosecutions
	Received	Investigated	Recommended for Prosecution	
2010/2011 <sup>46</sup>	7 106	2 512	113	101
2011/2012 <sup>47</sup>	5 230	2 663	73	43
2012/2013 <sup>48</sup>	3 355	1 423	26	28
2013/2014 <sup>49</sup>	4 006	1 950	43	58
2014/2015 <sup>50</sup>	5 660	2 743	74	99
<b>Total</b>	<b>25 357</b>	<b>11 291</b>	<b>329</b>	<b>329</b>

The above table gives details on the investigatory work of the Commission. The data show that a huge number of corruption complaints are received and investigated by the EACC.

Unfortunately, however, only a handful of cases are recommended for prosecution. Although their outcomes are unreported, the ODPP has prosecuted the cases recommended to it by EACC. Reports indicate that the Commission is affected adversely by slow adjudication and court processes. Persons charged with corruption employ the best lawyers who delay cases using constitutional references, numerous judicial review applications and frequent adjournments.<sup>51</sup>

Case backlog also delays the Commission's efforts at asset recovery. Still, the efforts by the EACC to recover and trace public assets through prosecutions and out-of-court settlements are laudable. The Commission is reported to have recovered assets valued at approximately USD 6.6 million during 2012/2013, which is an increase over the collection of USD 6.19 million

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46 EACC Annual Report (2010/2011) 5,7,20.  
 47 EACC Annual Report (2011/2012) 3, 6, 29.  
 48 EACC Annual Report (2011/2012) 3.  
 49 EACC Annual Report (2013/2014) 3, 22.  
 50 EACC Annual Report (2014/2015) 14, 15, 40.  
 51 EACC Annual Report (2014/2015) 75.

during 2011/2012.<sup>52</sup> Similarly, in the preceding year, 2010/2011, the Commission was able to recover a total of USD 484 519 of public assets.<sup>53</sup>

The Commission has been engaged also in a number of education, training and public awareness programmes. It conducts anti-corruption out-reach programmes and disseminates anti-corruption action plans throughout the counties of Kenya.<sup>54</sup> It has trained 450 community-based anti-corruption monitors, who track and disrupt corrupt and unethical practices in the community. As to anti-corruption sensitisation, the Commission has been involved in the distribution of large amounts of anti-corruption material, including manuals, brochures and posters. It also conducts nationwide surveys on corruption, integrity, and ethics.<sup>55</sup>

#### **4.12 Conclusion**

Since its inception in 2011, the EACC has spearheaded the anti-corruption agenda in Kenya. Its mandate is to investigate corruption and to educate and sensitise the country on anti-corruption. The Commission is funded well. However, its work has not been without shortcomings. While the Commission has received a considerable number of reports and subsequently carried out investigations, the recorded number of prosecutions and convictions has been negligible. The sensitisation and education programmes have been ineffective because Kenya continues to be ranked as highly corrupt according to various corruption perceptions indices. In addition, the integrity of the Commission is constantly under attack due to corruption allegations levelled against its executive members.

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52 For the reporting period of 2012/2013. See Afrimap (2015) 42.

53 EACC Annual Report (2013/2014) 23.

54 EACC Annual Report (2014/2015) 52.

55 EACC Annual Report (2012/2013) 37. See also EACC Annual Report (2013/2014) 37.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

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#### 5.1 Conclusion

This paper has analysed the Ethics and Anti-Corruption Commission (EACC) of Kenya. This research begun by discussing the historical background of the EACC, and observations regarding its existence and stability were made. It also examined the relationship between the Kenyan leadership and the post-independence ACA in an attempt to highlight the role of politics in the success or failure of said agency. It reviewed international and national anti-corruption legal framework providing for the establishment of ACAs.

The study found that ACAs are a matter of international concern. This is reflected in international conventions such as UNCAC and the AU Convention creating an obligation for their states parties to establish an anti-corruption body or bodies. Kenya is a state party to both conventions. It also has domesticated these conventions and created its own ACA.

The study also found that there are various models of anti-corruption bodies. The specialisation of such bodies depends on their functions. They can be endowed with investigative, preventive, educative, and prosecutorial powers. However, despite the existence of an ample legal framework calling for the creation of anti-corruption bodies at international, regional and national level, there is no edict on the model to be adopted. Individual states have to select a suitable model for their national context. Further, the legal framework pertaining to ACAs is silent on their administration and management.

Factors that can boost the effectiveness of ACAs, as advocated by international bodies, were discussed. These factors include the need to have adequate laws, independence and accountability, adequate financial resources and staff capacity, co-operation with other key institutions, and political will.

Kenya's ACA has been in existence for over a decade. The body has undergone rebranding several times to become the current Ethics and Anti-Corruption Commission. The EACC has

been in operation for five years. It is the subject of copious legislative provisions. The research concluded that the EACC does not suffer for want of legal authority, but that it faces a serious problem of impunity and of implementation. Also, the absence of an overarching policy impairs the fight against graft, particularly in relation to issues that require a policy position.

The recruitment and vetting of the executives to the EACC follow an elaborate and rigorous process that is advertised. A major challenge here is the appointment of executives whose integrity is impeccable. Since the inception of Kenya's ACA, none of its chairpersons has survived the integrity test. All have been removed for lack of integrity. The commissioners of the EACC enjoy security of tenure. However, the secretary of the Commission, who is in charge of its day-to-day running operations, does not have security of tenure. The independence of the EACC is guaranteed constitutionally. However, it would be misleading to assert that the Commission is fully independent as claims of interference from the executive remain common. The Commission accounts to the President and the National Assembly by way of annual reports. Again, this form of accountability is incomplete as there is no oversight mechanism to keep the Commission in check regarding its day-to-day activities.

Corrupt practices and perpetrators of corruption are found in both the public and the private sector. The EACC's mandate and jurisdiction, however, only extends to public sector corruption. This limits its ability to prevent and tackle corruption across all sectors in the country. The EACC enlists the support of partners such as the media, NGOs, civil society and other non-state actors in the fight against corruption. It is also a member of various international organisations and regional anti-corruption initiatives. In discharging its duties, the EACC employs a multi-agency approach. The Commission is required to co-ordinate the activities of various agencies in order to avoid duplication of functions. However, due to the large number of agencies, such co-ordination is difficult. The challenges result in turf wars between the Commission and other stakeholders.

Although the EACC has made substantial efforts in the fight against corruption, its overall performance in reducing corruption is dismal, as appears from indices, such as those of Transparency International, which rank the country's corruption levels as high. The EACC's

initiatives have faced a number of challenges at policy, legislative and institutional level. The Commission's initiatives have been affected also by adverse judicial decisions. The courts have set unfavorable judicial precedent with acquittals founded upon technicalities. They have been criticised also for being slow in the adjudication of corruption cases and thereby delaying and impeding the Commission's initiatives on asset recovery.

The Commission examines the operational systems and procedures of various government departments, identifies the loopholes for corruption and makes recommendations for corrective measures to be taken by the reviewed institution. However, since it lacks enforcement mechanisms, the Commission cannot use legal sanctions to ensure compliance with its recommendations. Again, this omission impedes the Commission's overall efforts to prevent corruption.

The Commission's lack of prosecutorial powers has slowed down the pace of corruption prosecutions in Kenya, as much time is lost on consultations with the ODPP as to whether or not a matter should be investigated. The arrangement of having the EACC investigate allegations of corruption and the ODPP prosecute such investigated matters delays the prosecution of cases.

The Commission also suffers from a lack of adequate person power. Its current staff complement is below the recommended and approved number. This hampers the operation of the Commission and increases its case investigation backlog. The fiscal autonomy of the Commission is wanting also. It lacks the ability to roll out effective anti-corruption programmes because the resources it receives is only enough to cater for rent and salaries, leaving very little for operational expenses.

## **5.2 Recommendations**

In order to strengthen the role of EACC in fighting corruption, the following changes are recommended.

- The National Assembly should promote constitutional amendment to include the EACC amongst the independent commissions under Article 248 of the Constitution of Kenya.

This will avoid any misinterpretations regarding the classification (by inference) of the EACC as an independent commission under the Constitution.

- There is a need to harmonise the legal frameworks regulating corruption and the EACC. Harmonisation will ensure that each government agency which performs any anti-corruption function has a clearly defined mandate. This will reduce the turf wars and enhance inter-agency co-operation in the fight against corruption.
- Currently, the EACA only provides for the general functions of the commission and stipulates that the secretary is in charge of the day-to-day management of the EACC. The EACA should be amended to provide for the mandate of the executives, commissioners and the secretariat. Such inclusion will clarify matters and reduce any conflicts of interests that may arise in the discharge of the Commission's functions.
- In order to boost its performance, the Commission should be given prosecutorial powers in terms of Article 157(12) of the Constitution which allows the National Assembly to delegate such powers.
- The secretary of the Commission should be granted security of tenure to protect him or her from any threat that may hinder the discharge of the functions of the office without fear or favour.
- There is a need for an independent oversight body to hold the EACC accountable for its work and overall performance.
- The EACC should use technology to enhance its fight against corruption. The use of mobile phone applications linked to its website will enhance corruption reporting and learning. The website should be updated regularly to ensure that it reflects the current situation regarding corruption in the country.
- The government should provide adequate financial support to the EACC to enable it to combat corruption effectively and timeously at both the national and county levels. In particular, the Commission currently has only five regional offices, and it should be capacitated to open offices and investigatory services in the remaining 42 counties of the Republic.

- The Commission's budgetary allocation should be sufficient to achieve the optimal recommended staffing level.
- Currently, the public makes a caricature of the EACC because of the allegations against the integrity of its staff and top executives. As the country's main ACA, the EACC must ensure zero tolerance of corruption amongst its staff. It must put in place the necessary preventive measures and conduct regular integrity testing with a view to ensuring that its staff is are beyond reproach. Where allegations of impropriety are raised against Commission staff, investigations must be expeditious and disciplinary action must be taken where necessary. The Commission should adopt a Code of Conduct for its investigators.



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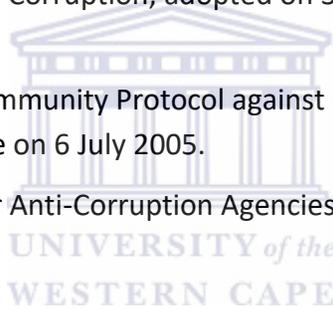
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