

LEADERSHIP AND INTEGRITY



TOWARDS HAZY HORIZONS

Implementation of **CHAPTER SIX** of the Constitution of Kenya 2010

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► LIST OF STATUTES

1. Anti-Corruption and Economic Crimes Act of 2003
2. Constitution of Kenya 2010
3. Ethics and Anti-Corruption Commission Act
4. Judicial Service Commission Act
5. Leadership and Integrity Act
6. Public Officer and Ethics Act of 2003
7. Public Procurement and Disposal Act
8. Public Appointments (Parliamentary Approval) Act, 2011 Act
9. Vetting of Judges and Magistrates Act

► ABBREVIATIONS

BVR	Biometric Voter Registration
CID	Criminal Investigations Department
CoK	Constitution of Kenya
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
IEBC	Independent Electoral and Boundaries Commission
MDA	Ministries, Department and Agencies
NSSF	National Social Security Fund
OAG	Office of the Auditor General
PAC	Parliamentary Accounts Committee

1.0 INTRODUCTION

The Constitution of Kenya, 2010 provides, under Chapter 6, for leadership and integrity of all public officers. The Chapter is predicated upon the assumption that State officers¹ are the nerve Centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. This means that under the Constitution Kenyans decreed that those whose conduct does not bring honor, public confidence and integrity have no place in the management of public affairs. This is to ensure that those entrusted with the management of public affairs and resources are persons of good character, probity and uprightness.

The chapter lays down the principles upon which the State Officers should conduct themselves. According to Black's Law Dictionary², "As occasionally used in statutes prescribing the qualifications of public officers, trustees, etc., the term Integrity means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness."

Leadership primarily refers to the ability to influence others to act towards a desired goal.

Ciulla contends that ethics have always been a focal point in scholars' definitions of leadership³. Ethical leadership refers to leadership founded on values and that advances the public interest for the benefit of the majority. Its main characteristics are:

- It lays emphasis on moral conduct, duty and judgment.
- Leaders are people of the highest integrity, committed to building enduring organizations.
- Leaders have a deep sense of purpose and are true to their core values and have the courage to build organizations that meet the needs of their followers and recognize the importance of their service to society.
- Leadership impacts on organizational behaviour and on the surrounding society.
- Leaders make decisions with the knowledge that they are accountable for outcomes.
- It requires both ethical behaviour and ethical decision making and such conduct is required of both individuals and organizations.

Article 73 of the Constitution provides for the responsibilities of leadership and states that:

73. (1) Authority assigned to a State officer—
- (a) is a public trust to be exercised in a manner that— (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people;

¹ The Constitution defines State Officers as : State office" means any of the following offices— (a) President; (b) Deputy President; (c) Cabinet Secretary; (d) Member of Parliament; (e) Judges and Magistrates; (f) member of a commission to which Chapter Fifteen applies; (g) holder of an independent office to which Chapter Fifteen applies; (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government; (i) Attorney-General; (j) Director of Public Prosecutions; (k) Secretary to the Cabinet; (l) Principal Secretary; (m) Chief of the Kenya Defence Forces; (n) commander of a service of the Kenya Defence Forces; (o) Director-General of the National Intelligence Service; (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or (q) an office established and designated as a State office by national legislation; "State officer" means a person holding a State office

² 8th ed. (2004)

³ Ciulla J, Leadership Ethics: Mapping the Territory, Business Quarterly(1995), p.5:5-24

- (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
- (2) The guiding principles of leadership and integrity 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.

Before assuming a state office, a state officer is required to take an oath of office, under article 74 of the Constitution affirming their commitment towards serving the people in accordance with the provisions of the Constitution.

Chapter Six provides that power exercised by leaders is a public trust that is to be exercised to serve the people. In exercising this power, state officers are required to demonstrate respect for the people of Kenya, make decisions objectively and impartially, refuse to be influenced by favoritism

or corruption, serve selflessly and be accountable for their actions. The requirement for integrity in Leadership is as a result of the realization by Kenyans that only those with unquestionable track records can be trusted to bring this country forward.

The Constitution further demands that State officers behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties, compromising any public or official interest in favor of a personal interest. Persons who breach this chapter six will be subject to disciplinary procedures and where they are dismissed from office, they are barred from holding state offices again.

1.1: Historical background

Under the old Constitution, presidential control of the institutions of governance was exercised through unregulated powers of appointment and dismissal; the President could appoint and dismiss public servants in these institutions at will. Apart from giving the President significant patronage resources, these powers enabled him to ensure that these institutions would only do his bidding. As a result, while the public servants were accountable to the President, they did not think they were accountable to the public for the exercise of their powers. The absence of public accountability in the exercise of power also created an environment in which corruption, and impunity thrived.

The exercise of governmental power in Kenya was not fettered by any such standards in many cases. As a result, many public officers acted in any manner they deemed fit, irrespective of

existing statutory requirements. They did so largely because they believed their actions will not be sanctioned, given the absence or weakness of public accountability mechanisms.

In view of that, there was need to establish standards for the credibility of the future and the incumbent leaders of Kenya. Kenyans yearned to have confidence in the constitutional offices. The Constitution therefore dedicated a whole chapter to ensure an effective administration that cuts across all leadership ranks.

2.0 LEGAL FRAMEWORK

2.1: Constitution of Kenya, 2010

The Constitution of Kenya was to deal with a long legacy of impunity, institutional frailties and embedded corruption. The Centre-piece of anti-corruption and public integrity reform is Chapter Six of the Constitution, the Anti-Corruption and Economic Crimes Act and the Leadership and Integrity Act. The historical persistence of corruption and the government's abiding inability to do anything about it was the immediate trigger for the design of Chapter Six of the Constitution.

The Constitution of Kenya, 2010 provides for the National values and principles of governance binding to all State organs, State officers, and public officers whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

The chapter on Leadership and Integrity requires State officers to be guided in their day-to-day conduct by principles of leadership and integrity which, among other requirements, include: being objective and impartial in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; being selfless while rendering service solely on the public interest; demonstrating the commitment to the public interest through honesty in the execution of public duties and the declaration of any personal interest that may conflict with public duties and being accountable to the public for decisions and actions.

Article 232 of the Constitution of Kenya (2010) provides the values and principles of Public Service. These are: high standards of professional ethics; efficient, effective and economic use of resources, responsive, prompt, effective, impartial and equitable provision of services; accountability for administrative actions; involvement of people in policy making and transparency and provision to the public of timely, accurate information.

2.2: The Leadership and Integrity Act, No. 19 of 2012⁴

The fulcrum of anti-corruption and public integrity reform is Chapter Six of the Constitution and the Leadership and Integrity Act. The law operationalizes Chapter Six of the Constitution on Leadership and Integrity. The law is predicated upon the belief that State officers are the nerve centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach.

This Act of Parliament was meant to establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution; to promote ethics, integrity and servant leadership among State officers; to provide for the extension of the application of certain provisions of chapter six of the Constitution and for connected purposes.

⁴ Cap 182, Laws of Kenya

The Act includes provisions on enforcing Chapter Six as well as prescribing penalties for violators. The Act also provides a general Leadership and Integrity Code for State officers, which covers such issues as citizenship, public trust, and financial integrity.

Furthermore, the Act addresses personal behavioural issues of state officers like impartiality, bullying, and conduct of private affairs. It also outlines specific enforcement measures and penalties to ensure all state officers follow the Code. The Act has two Schedules: the First Schedule includes a “Self-Declaration Form” that must be completed by state officers, and the Second Schedule, which gives a list of “interests” all state officers should disclose publicly. This includes any existing contracts for goods and services held by a state officer, directorships in public or private companies, and land or property in their possession.

A review of the leadership and integrity law makes it clear that the hurried manner of enacting the Leadership and Integrity Act in 2012 compromised quality and detracted from careful consideration of its central provisions. The result was a law with many infirmities: poor design logic especially not evidently drawn from best practice; unconstitutional provisions, internal inconsistencies, formal failures such as mis-numbering of sections and just plain conceptual incoherencies and poor design.

Provisions of the Act which are in conflict with the constitution include those that bar people who hold dual citizenship from being state officers; those that ban state officers from furthering the interests

of foreigners on the pain of criminal penalties; those that impose confidentiality requirements on public information beyond the scope permitted by article 35 of the constitution.

Provisions on the participation of state officers in procurement are ambiguous and poorly drafted; those on conflict of interest have confounded the *raison d'être* of asset declaration with that for conflict of interest; the gifts to state officers rules need to be tempered with commonsense; provisions requiring state officers to be of good standing in their professions are good but weak; those sanctioning state officers for committing crimes ought to cover all crimes except traffic offences and there ought to be sanctions for state officers who give false information in the self-declarations required for elective officers under the First Schedule to the Leadership and Integrity Act.

There is potential inconsistency between provisions the Leadership and Integrity Act, 2012, holding state officers personally liable for certain violations and contrary ones in the Ethics and Anti-Corruption Act immunizing them from such liability. In terms of formalities, there are editorial errors in the numbering of sections and some of the provisions of the Public Officers Ethics Act relating to mechanisms for ethics enforcements are outdated.

Leadership and Integrity Regulations

The primary purpose of the Leadership and Integrity Act is to ensure that State Officers and indeed all Public Officers respect the values, principles and requirements of the Constitution. Specifically, Section 54, of the Act provides the basis for

development of the Leadership and Integrity Regulations. The Ethics and Anti-corruption Commission is mandated to make Regulations for effective enforcement of the provisions of the Leadership and Integrity Act. The regulations were to address;

- the limitations on the types of gifts that a State Officer can receive (Section 14);
- the maximum value of gifts (section 14);
- mechanisms for the receipt, collection, storage & disposal of gifts (Section 14);
- mechanism and procedure for the opening, maintaining & publicizing of registers of conflict of interest (Section 16);
- the grounds and conditions for opening, registering, maintaining, controlling and closing bank accounts outside Kenya (Section 19);
- Mechanisms on lodging of complaints, investigations, disciplinary processes and the enforcement of the Code under (Section 42);

2.3: The Anti- Corruption and Economic Crimes Act⁵

The Anti-Corruption and Economic Crimes Act, 2003 was enacted by Parliament to provide a legal framework to guide the fight against corruption and economic crimes in Kenya. The Act provides for a number of strategies to be employed in the fight against corruption. These include investigation, prosecution, prevention, education, and asset recovery.

The Act has far reaching changes on governance,

leadership, integrity in the anti-corruption regime. The Act makes the following key provisions in the investigation and punishment of corruption and economic crimes;

- a) establishment of Special Magistrates
- b) Investigation of corruption
- c) Definition of corruption offences and the applicable penalties
- d) Compensation and recovery of improper benefits
- e) Procedures for recovery of unexplained assets

The Anti-Corruption and Economic Crimes Act ought to be amended so as to consolidate the Laws relating to the Anti- Corruption agenda.

Currently, Anti-corruption laws come across as uncoordinated. The EACC simply sets up the institutional framework, leaving the legal framework to be determined by separate pieces of legislation such as the Leadership and Integrity Act, the Anti-Corruption and Economic Crimes Act as well as the Public Officer Ethics Act just to name a few. The consolidation here may mean the enactment of a new comprehensive and coordinated legal framework.

2.4: The Public Officers Ethics Act⁶

The Public Officers Ethics Act was enacted to advance the ethics and performance standards of public officers. This is because public officers occupy positions of authority and trust and control enormous public resources. The Act provides for a general code of conduct and ethics to be observed by all public officers in order to protect

⁵ Cap 65, Laws of Kenya

⁶ Cap 183, Laws of Kenya

the people's right to transparent, accountable, efficient and responsive service delivery. Public entities are expected to adopt the provisions of the code of conduct and customize them in the development of their respective codes of conduct and ethics.

Most provisions of this Act are in conflict with the leadership and Integrity and the ethics threshold required by this Act is lower than the threshold by the Leadership and Integrity Act. This Act does not put a special focus to State Officers who handle large sums of money and whose behavior should be beyond reproach. Enforcement of code of ethics is uncoordinated under this Act as it gives this mandate to responsible commissions that have not been able to execute this role very well. This Act became effective before the new constitution and needs to be amended or repealed to be in conformity with the new constitution.

2.5: Ethics and Anti-Corruption Commission Act, No. 22 of 2011

The Ethics and Anti-Corruption Commission Act establishes the Independent Ethics and Anti-corruption Commission (EACC) pursuant to Article 79 of the Constitution. It further provides for the functions and powers of the Commission, the qualifications and procedures for the appointment of the Chairperson and members of the Commission, and for other connected purposes.

The Act enumerates certain functions, in addition to the roles that the Constitution has already accorded the commission. A notable function under the Constitution is the power to oversee

the implementation process and compliance with the provisions of chapter six of the Constitution on leadership and integrity. The general functions of constitutional commissions as set out in the Constitution are also applicable to EACC⁷.

Additional functions of the commission under the Act are:

- a) 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 a breach of the code of ethics by public officers;
- 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 matters prescribed under the Act or any other law enacted pursuant to chapter six of the Constitution;
- e) Recommend appropriate action 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 to the requirements of the Anti-

⁷ The New Ethics and Anti-Corruption Commission: An analysis of its functions and administration By Willis Otieno

Corruption and Economic Crimes Act, 2003 on confidentiality;

- i) Subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and 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 recovering or protecting public property, or freezing or confiscating proceeds of corruption or those related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

The EACC lacks prosecutorial powers and has to forward all cases it has investigated to the Director of Public Prosecutions (DPP) for prosecution. The case for or against granting the powers to prosecute to EACC is controversial. The argument for granting prosecutorial powers was based on the view that the organization was hamstrung by its lack of 'teeth' and thus continued to place blame on the Attorney General and DPP for its poor performance.

Parliament declined to allow the EACC powers to conduct lifestyle audits. Lifestyle audits involve the interrogation of how closely the expenditure and official income of public officers match and is an instrument that many countries around the world, including the US, have used in the fight against corruption. Further, no proper provisions were made with respect to the transition of KACC to the EACC that would have guaranteed the protection of on-going investigations. This not only resulted

in virtually halting the Commission's momentum in on-going investigations of corruption but also created destabilizing uncertainty among its staff. According to the Commission, the failure to grant it the power to prosecute, to perform lifestyle audits and to use new investigative techniques was a blow to the Commission's desire to escalate the fight against corruption⁸.

2.6: Public Procurement and Disposal Act

Procurement is a key economic activity of any government that significantly impacts how taxpayers' money is spent and is a function that remains most vulnerable to corruption. Ordinarily, the Kenya Government does not use state-owned enterprises to manufacture goods and services that public authorities require to perform their duties. The government therefore has to purchase various goods and services from the supply market.

This purchasing process is regulated by the procurement law and regulations that provide for the conclusion of contracts between public entities and the providers of goods, works and services that set out required standards and procedures, oversight transparency and accountability mechanisms.

Article 10 of the Constitution provides that national values and principles of governance shall bind all state organs, state officers, public officers and all persons whenever any of them inter alia makes or implements public policy decisions. There is need to review the PPDA to incorporate these principles. The reviewed PPDA should provide that these principles will bind procuring entities and other agencies involved in public procurement.

⁸ <http://www.africog.org/sites/default/files/AGR%20Report.pdf/> Accessed 16, December 2014

Article 227(1) of the Constitution requires that state organs must procure in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Article 227 (2) requires Parliament to enact legislation that will prescribe a framework within which policies relating to procurement and asset disposal shall be implemented⁹.

The Constitution of Kenya, 2010 outlines the principles for Public Procurement and Disposal as:

- a. Fair
- b. Equitable
- c. Transparent
- d. Competitive
- e. Cost-effective

Despite the enactment of the Public Procurement and Disposal Act, 2005 and operationalization of various regulations, public procurement in Kenya continues to be marred by corruption scandals and losses amounting to billions of shillings according to the annual Auditor General reports. Cases of procurement malpractice including Anglo Leasing, the National Hospital Insurance Fund civil servants' medical cover scheme, IEBC BVR kits, the NSSF Tassia estate scandal, the standard gauge railway are among those that have dominated the media and public discourse.

These scandals among others point to inherent weaknesses in the law that must be addressed through the amendment of the law that allows corruption to thrive and defeat the objectives of procurement¹⁰. The Public Procurement and

Disposal of Assets Act also failed to provide strong enforcement mechanisms which resulted in non-compliance with the laws. This would necessitate a restructuring of the regulatory arm of the Public Procurement Oversight Authority.

In Kenya, the public procurement system has evolved from a largely unregulated system to a highly regulated system with the enactment of the Public Procurement and Disposal Act in 2005 and subsequent operationalization of the Public Procurement and Disposal Regulations in 2006.

Despite the progress made since then, the Kenyan procurement system still faces a myriad of challenges. In 2012 for instance, the then Permanent Secretary for Finance noted that up to 30 per cent of the national budget is lost in procurement related malpractices. In addition, the procurement law far from making procurement easier, it has made execution of public procurement inefficient. This has led to a low budget absorption hence hindering government's development agenda¹¹.

2.7: Public Appointments (Parliamentary Approval) Act, 2011

The Parliamentary approvals process is supposed to ensure that persons nominated and subsequently appointed to hold public office are appointed in accordance with the law and the stipulated procedure. The process also ensures that candidates meet the statutory requirements for appointment and that they are suitable for the office.

⁹ www.the-star.co.ke/news/article-132577/procurement-laws-review-key-success-devolution#sthash.jAPL2xKz.dpuf

¹⁰ <http://www.tikenya.org/index.php/press-releases/277-public-procurement-in-kenya-cash-cow-for-the-corrupt-or-enabler-for-public-service-delivery>

¹¹ <http://www.the-star.co.ke/news/article-132577/procurement-laws-review-key-success-devolution>

The Public Appointments (Parliamentary Approval) Act of 2011 requires the committee to inquire into the credentials, professional training, experience and personal integrity among qualities of a candidate for office. The Act provides that any appointment under the Constitution or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by Parliament in accordance with the Act.

Once a person has been nominated into a constitutional or statutory office, an appointing authority is required to notify the relevant House of Parliament accordingly. A notification of appointment shall be accompanied by information concerning the nominee. Thereafter, Parliament shall carry out an Approval hearing. An approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background. During the Approval hearing, the issues for consideration by the relevant House of Parliament in relation to any nomination shall be:

- the procedure used to arrive at the nominee;
- any constitutional or statutory requirements relating to the office in question;
- The suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.

At the conclusion of an approval hearing, the Committee shall prepare its report on the suitability of the candidate to be appointed to the office to which the candidate has been nominated, and

shall include in the report, such recommendations as the Committee may consider necessary.

This Act thus seeks to ensure that Parliament, through its oversight role appoints the right persons to positions of leadership in statutory and Constitutional bodies in Kenya.

Judges and Magistrates Vetting Act

The Vetting of Judges and Magistrates Act, 2011 which came into force on 22nd March, 2011 establishes an independent board Judges and Magistrates Vetting Board. The functions of the Board are, 'To vet judges and magistrates in accordance with the provisions of the Constitution and the Act'. The term 'vetting' is defined as 'the process by which the suitability of a serving judge or magistrate to continue serving in the judiciary is determined in accordance with this Act'

Section 9 of the Act lays out the powers of the Board to include the gathering of information considered relevant by the Board, including the requisition of reports, records, documents or any information from any source (including government sources), and to compel the production of the information when the Board deems that necessary. The Board can interview any person, groups or members of organizations or institutions and it can hold inquiries for the purposes of performing its functions. In addition, the Board is not subject to the direction or control of any person or authority.

The vetting procedures provided for in the Act allow the Board to divide its members into three panels which could work concurrently. Each panel is to be composed in such a way that it includes at least one judge, one lawyer and one non-lawyer respectively.

3.0 INSTITUTIONAL FRAMEWORK

The implementation process of the Constitution entails the reform of policies, legislation, subsidiary law and general administrative practice in a manner that upholds the letter and spirit of the Constitution. This path began on 27 August 2010 by dint of Section 7(1) of the Sixth Schedule of the Constitution which brought the entire Constitution into force with immediate effect, save for the cases where the Constitution and the existing law assigned responsibility to different organs as provided in Section 7(2) of that Schedule.

The Executive is the key implementer of the Constitution and other laws. Additionally, Article 3 of the Constitution assigns responsibility to all persons to defend the Constitution and Section 5 of the Sixth Schedule establishes the Commission for Implementation of the Constitution (CIC) to oversee and monitor implementation of the Constitution.

The implementation of the leadership and integrity provisions require the efforts of various state and non-state organs. Since the promulgation of the Constitution, several steps have been taken to implement Chapter 6. But there is a lot more to be done if the spirit of Chapter 6 is to be fully realized.

3.1: Commission for Implementation of the Constitution (CIC)

The CIC was established as an independent organ to monitor, facilitate and oversee the constitutional implementation process. Its mandate is set out in Section 5(6) of the Sixth Schedule and generally entails monitoring, facilitating and overseeing development of legislation and administrative procedures required to implement the Constitution

to bring them into compliance with the letter and spirit of the Constitution, coordinate with the Attorney General and Kenya Law Reform Commission in preparing legislation for tabling in Parliament and reporting on the progress in the implementation status and any impediments on the same. Further CIC is required to work with other constitutional commissions to ensure that the letter and spirit of the Constitution is upheld.

Under Article 249 the CIC, in common with other Chapter 15 constitutional Commissions, is also required to protect the sovereignty of the people, secure the observance by all state organs of the democratic values and principles and promote constitutionalism.

Section 15 (2) (d) enhances the functions with the empowerment of Parliament, by legislation, to provide mechanisms that ensure that the CIC can perform its role in monitoring the implementation of the system of devolved government effectively. Consequently Parliament enacted the CIC Act, 2010. Under Article 249 of the Constitution CIC is expected to be an independent Commission in the discharge of its mandate. The Article provides that the Commission is to be subject only to the Constitution and the law and, is independent and not subject to direction or control by any person or authority.

CIC has been working with players in the public service to ensure that the guiding principles of leadership and integrity as set out in Chapter Six of the Constitution and the values and principles of public service are guiding the conduct of

business in the public sector. CIC notes that success in the implementation of the Constitution will be demonstrated by the commitment of the public service to the adoption of the culture of constitutionalism. Laws outlined in the Fifth Schedule of the Constitution will be developed or reviewed where they already exist.

3.1.2: Achievements of the CIC

Pursuant to its constitutional mandate, CIC has filed several suits seeking the court's intervention to ensure that Parliament enacts laws which are in accordance with the Constitution of Kenya 2010, and that due process is followed in the development of legislation and administrative procedures required to implement the Constitution. Further, CIC has also held Parliament accountable to enact the laws with specific deadlines as outlined in Chapter 4 of the Constitution. In the case of the *Commission for the Implementation of the Constitution v Parliament of Kenya & Another*, the High Court dismissed a petition challenging the constitutionality of the Leadership and Integrity Act, No. 19 of 2012. The Petitioner argued that the Parliament (1st Respondent) diluted and watered down the Bill prepared by CIC in consultation with stakeholders during the enactment process as a result of which the final product failed to meet the constitutional threshold as contemplated by Article 80 of the Constitution. Further, the Act as passed undermines the mandate of the EACC in as far as it failed to provide procedures and mechanisms for it to use in the enforcement of the Act.

The Court in dismissing the petition held that Part IV of the Act provides procedures and mechanism for enforcement of the General Leadership and Integrity Code and by extension the principles set

out at Chapter Six. These mechanisms are to be supplemented by rules and regulations passed by the EACC which had not at the time been enacted. The presumption was that the concerns would be dealt with by the rules and regulations.

Part V of the Act provides criminal and civil penalties for infraction of the provisions of the Act. Apart from these, reference to the Public Officer Ethics Act, includes disciplinary action to an officer who contravenes not only the General Code on Leadership and Integrity but also the Code of Conduct and Ethics of the relevant public entity. Whether to have a "one stop-shop" or have a various public entities involved in the implementation of Chapter Six under the umbrella of EACC is a matter for the legislative policy.

In *CIC versus National Assembly, the Senate and the A-G, Petition 496 of 2013*, CIC filed this petition to challenge a Gazette Notice by which the National Assembly published Constitutional (Amendment) Bill, 2013. This Bill sought to amend Article 260 of the Constitution by deleting the offices of Members of Parliament, Judges, Magistrates and Members of County Assemblies from the list of designated State Offices. The Bill was unconstitutional for inter alia purporting to remove the mentioned state officers from the ambit of Chapter 6 and exempting them from paying taxes. The Court agreed with CIC that the proposed amendments were unconstitutional although the petition was dismissed on the basis of separation of powers and that the judiciary could not issue an injunction to the legislature to prohibit it from discharging its mandate.

CIC has also acted as amicus curie in matters to promoting implementation of the letter and the

spirit of the Constitution. Such matters include Petition No. 628 and 630 of 2014 challenging the Amendment of the Security laws and in the case of Timothy Njoya & 17 other versus the Attorney General and 4 others, where the Applicant sought a declaration that under the Constitution all State Officers, including Members of Parliament are under an obligation to pay tax and no one is exempt from the same.

CIC has also played a major role in ensuring that laws being passed conform to the letter and the spirit of the Constitution. These include review of legislative proposals such as the Public procurement and Disposal of Assets Bill, 2014, The Public Audit Bill, Health Bill, Water Bill, Mining Bill among others. The CIC also undertook a review of the draft Leadership and Integrity Regulations drafted pursuant to section 54 of the Leadership and Integrity Act which apply to public officers and state officers.

3.2: Commission on Administrative Justice (CAJ)

The Commission on Administrative Justice CAJ is also known as the Office of the Ombudsman. It is the successor of the Public Complaints Standing Committee PCSC formed in 2007 as a department in the Ministry of Justice, National Cohesion and Constitutional Affairs under the old constitution.

CAJ is the result of restructuring of the Kenya National Human Rights and Equality Commission under Article 59(4) of the Constitution and is established by the Commission on Administrative Justice Act, 2011.

3.2.1: Mandate of CAJ

The functions of the CAJ are provided for under Article 59(2) of the Constitution and more specifically under Section 8 of the CAJ Act, 2011.

The CAJ is mandated to address all forms of maladministration, promote good governance and efficient public service delivery by enforcing the right to fair administrative action. The CAJ is the body that any aggrieved member of the public can turn to for expeditious and impartial redress if they feel that a public officer or Office is guilty of misuse of office, corruption, unethical behaviour, breach of integrity, maladministration, delay in provision of necessary services, any form of injustice, discourtesy incompetence, misbehavior or any efficiency or ineptitude on the part of public officials. Looked at differently, the Commission is, in a sense, the supervisor of public bodies (including the Judiciary) and its officers in as far as efficiency, courtesy, and impartiality is concerned in order to guarantee specific rights to the citizen.

The Commission, like other Constitutional Commissions, is mandated under Article 249 of the Constitution to safeguard public interest by protecting the sovereignty of the people, securing the observance of democratic values and principles by State Organs and promoting constitutionalism. In addition, Article 59(2) of the Constitution and Section 8 of the Act empower the Commission to promote constitutionalism and good governance by ensuring ethical leadership and integrity by public officers. This is complementary to the roles of other public institutions in leadership and integrity. Specifically, Article 59(2)(h) of the Constitution and Section

8(d) of the Act empower the Commission ‘to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice.’ In addition, the Commission is empowered to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unresponsive official conduct and misbehavior in public administration.

Other functions of the CAJ include:

- a) Report to the National Assembly bi-annually on the complaints investigated and the remedial action taken thereon;
- b) Inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;
- c) Facilitate the setting up of , and build complaint handling capacity in the sector of public service, public offices and state organs;
- d) Work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;
- e) Recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;
- f) Provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;
- g) Promote public awareness of policies and administrative procedures on matters relating to administrative justice

- h) Ensure proper administration of Chapter 6 provisions including: that state officers conduct themselves with dignity,
- i) ensure decisions of State Officers are not influenced by nepotism, favoritism or other improper motives,
- j) ensure State Officers conduct themselves, in public or private, as to avoid demeaning the office, or conflict of interest and ensure no State Officer maintains a bank account outside Kenya,
- k) ensure no State Officer holds any other gainful employment, ensure no appointed State Officer holds office in any Political Party, ensure no State Officer or Member of the Defence forces holds dual citizenship,
- l) ensure any gift or donation to a public Officer is surrendered to the State and ensure Declaration of wealth by Public Officers is complied with (Public Officer Ethics Act) and that such Declarations are made available and accessible to the Public

Based on the foregoing, the Commission plays an important role in ensuring transparent governance, ethical leadership, good public administration and respect for human rights.

3.2.2: Achievements of the CAJ

The Commission has implemented a number of strategies to promote constitutionalism and good governance in Kenya which included the issuance of advisory opinions and recommendations, mediation and public interest litigation. Specifically, the Commission issued eight (8) advisories and recommendations on a number of matters of national importance such as the Draft Policy on

National Values System and the Truth, Justice and Reconciliation Commission and wealth declaration forms. The recommendations in these advisories were later adopted in subsequent actions by relevant public institutions.

In addition, the Commission has participated in a number of court matters of public interest which included the Supreme Court Advisory Opinion Reference No. 2 of 2012 on the application of the Gender Principle and the jurisdiction of the Supreme Court in relation to presidential elections. CAJ also took part in Constitutional Petition No. 284 of 2012 on the constitutionality of sections 14, 16 and 23 of the Supreme Court Act, 2011 as far as they sought to extend the jurisdiction of the Supreme Court beyond the constitution provisions; and Constitutional Petition No. 21 of 2012 on the applicability of the leadership and integrity provisions.

In addition, the Commission initiated measures to enforce compliance with leadership and integrity provisions in the Constitution. Notably, the Commission forwarded a list of 35 individuals to the Independent Electoral and Boundaries Commission recommending that they ought not to hold any public or elective offices based on their unsuitability; certified 109 judges and magistrates under the Vetting of Judges and Magistrates Act, 2011 and 60 applicants who sought judicial appointments as Judges of the High Court through the Judicial Service Commission; and certified 258 persons who sought appointive and elective offices.

Further, the Commission initiated a number of mediations to resolve disputes amicably in line with Article 252 of the Constitution and Section 8(f) of the Commission on Administrative Justice Act, 2011¹².

The CAJ has also made initiative in curbing corruption and abuse of office. In Kisii, the CAJ has aided repossession of seven plots belonging to Kisii Municipal Council which had been irregularly acquired. An investigation conducted by the Commission on the matter indicted four public officers who used their positions to acquire the land, and has found them culpable of abuse of power. Further, CAJ has been on EACC's case on corruption allegations within EACC and has requested Parliament to commence investigations into the matter.

The CAJ has also made efforts to decentralize its services for reach to the counties in light of the devolved governance structure. The CAJ has the main offices in Nairobi and branch offices in Mombasa and Kisumu. In conjunction with the Ministry of Devolution and Planning, it also has other offices within Nairobi, i.e. Huduma centres which are hosted with postal offices. This is in aid of bringing administration of justice closer to the people and to promote the spirit of devolution.

The Commission in collaboration with other Commissions and State organs ensures compliance with the leadership and integrity requirements of Chapter Six of the Constitution, the tenets of public

¹² Commission on Administrative Justice, Annual Report 2012: Abridged version: Accessed on http://www.ombudsman.go.ke/index.php?option=com_fsf&view=faq&catid=2&Itemid=448

service in Chapter Thirteen of the Constitution and the prescriptions in the Public Officers Ethics Act.

3.3: Ethics and Anti-Corruption Commission (EACC)

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

- develop and promote standards and best practices in integrity and anticorruption; develop a code of ethics;
- receive complaints on ethical breaches;
- investigate and recommend prosecution of violation of codes of ethics;
- oversee the enforcement of codes of ethics prescribed for public officers;
- educate and create awareness on ethical issues and dangers of corruption;
- Undertake preventive measures against unethical and corrupt practices; conduct investigations on its own initiative or on a complaint made by any person
- conduct mediation, conciliation and negotiation in relation to disputes within its mandate,
- Subject to Article 31 of the Constitution, 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

- 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

3.3.1: Achievements of the EACC

The Commission has recovered assets from corrupt public officials, including the Woodley Estate, Mombasa Recreational Beach and the Grand Regency Hotel (now the Laico Regency). The EACC had this money restored to the Central Bank of Kenya.

Research and monitoring of trends and public perception of corruption in public institutions: This helps to expose rampant corruption as ranked by sectors, counties, public institutions and based on different offences e.g. bribery. This research allows the EACC to target their work effectively.

The EACC has spearheaded the drafting of regulations to Leadership and Integrity Act, 2012. Some of the areas covered by the draft regulations include handling gifts given to public officers, declaration of conflict of interest, application to open, operate or control a bank account outside Kenya and the Procedure of lodging complaints. The regulations are awaiting debate in Parliament.

3.3.2: Setbacks of the Institutions in Implementing Chapter 6

The Institutions analyzed above, CIC, CAJ and EACC are the main commissions with the mandate to implement Chapter 6 of the Constitution and deal with corruption, administration of justice and related maladies. These institutions face certain challenges including:

- a) Political interference: There is interference from the government of the day in discharge of their mandate. This arises from the fact that the commissioners are appointive positions appointed subject to the approval of National Assembly. The Commissions also report to Parliament and the Appointing body, the Presidency, which is likely to interfere with their independence. In many instances, they may delay investigating personalities in government owing to the fact that they are answerable to parliament and can be removed from office in the same regard.
- b) Lack of political will: the government majorly lacks the will to fight corruption and promote enforcement of justice. In certain instances, the presidency appoints persons into public offices despite public outcry as to their character and integrity. Unless all government departments and institutions speak with a one united voice, right from the top, the fight against corruption will not be strong.
- c) Weak legislative framework: the legislative framework related to enforcement of Chapter 6 and the fight against corruption is weak and fragmented. For instance, the ACECA, EACC Act, Public Officer Ethics Act and the Leadership and Integrity Act are among such laws. These laws create

duplicity in some cases while they are inconsistent with each other in some cases. There is need to harmonize them and have one comprehensive legislative framework to guide integrity and leadership in Kenya. Moreover, both public and state offices should be covered with clarity.

- d) Weak enforcement mechanisms: The current system in Kenya is that investigations are carried out by the EACC but prosecutions must be brought by the Director of Public Prosecutions (DPP). There is thus a tag of war between EACC and DPP on delay in prosecutions which makes EACC lack accountability in as far as prosecutions are concerned yet this is among the main mechanisms of enforcement. Further, DPP in some cases commences investigations afresh causing more delay before a prosecution is commenced. There is evidence from other jurisdictions that suggests it may be more effective for the EACC to have the power to prosecute as well as to investigate.

The CAJ also has powers to make recommendations on remedial actions to be taken in cases of maladministration. However, to enforce such actions, CAJ has to go to court. CIC can only resort to court if its recommendations or advice is not taken up by Parliament even in clear cases of unconstitutionalism. The passing of a watered down Leadership and Integrity Act is a good example. This therefore necessitates the creation of an efficient mechanism of enforcement.

- e) Lethargic public perception: Participation of the public is key in changing a country's culture. The east Africa Bribery Index 2010-2011 indicate that about 90% of Kenyans do

not report corruption. 39% of these say that the reason is that they know nothing will be done about it. This is reinforced by evidence of mega corruption scandals whose the perpetrators are yet to be brought to justice such as the Anglo-leasing cases. More recently, the chicken-gate scandal involving printing tenders by KNEC and IIEC continue to build to the negative public perception. Even after the UK Southwark court passed judgment convicting the accused persons for giving bribes, EACC is still gathering evidence against Kenyans alleged to be involved and prosecution is far from commencing. EACC, CIC and CAJ have a lot to do in raising awareness and civic education to change perception of Kenyans to promote corruption reporting.

The transport sector and Police officers also indicate that the culture is far from changing. Police officers say they are offered bribes before even asking for them and matatu operators are frustrated by the police for failing to pay a bribe.

3.3.3: EACC in the news

There has been some disquiet on the handling of corruption related matters by the EACC. The Ethics and Anti-Corruption Commission was recently summoned by The National Assembly Justice and Legal Affairs committee to respond to questions regarding the ongoing and reported cases of massive corruption in the country.

The committee said there was need to probe the anti-corruption officials for failure to bring to book suspected culprits to end the ever-rising vice in both National and County governments. The committee's Chairman and Ainamoi MP, Samuel Chepkong'a claimed the EACC heads must be sleeping on the job when the media is exposing massive corruption of incidences ranging from land grabbing, misappropriation of public funds among others¹³.

The Ethics and Anti-Corruption Commission (EACC) has been investigating major corruption scandals that have rocked the country including the Anglo-leasing scandal and irregular sale of land in Nairobi.

4.0 ROLE OF THE 3 ARMS OF GOVERNMENT IN IMPLEMENTING CHAPTER 6 OF THE CONSTITUTION OF KENYA, 2010

4.1: Judiciary

The Judiciary is the custodian of the Constitution. It is mandated to ensure that the protection of the rights provided in the Constitution and polices the boundaries between the powers of the various state organs. In order to fulfill its inherent constitutional mandate, the Judiciary is independent from other organs of government¹⁴. The independence and accountability of the Judiciary is important for the realization of the rule of law, social, political and economic stability of any nation. In Kenya, the Constitution provides that judicial authority is derived from the people and exercise of the said authority is guided by the following principles¹⁵.

- Justice for all
- Expediency in delivery of justice
- Recognition of alternative dispute resolution mechanisms
- Observance and protection of the purpose and principles of the constitution
- Promotion of justice without undue regard for technicalities

Access to justice is further reinforced by provisions of article 48 of the constitution that is the right to access to justice for all persons. The content and scope of this right has been said to be far reaching, infinite and encompasses inter alia, the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights,

the equal access to all of judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within the judicial mechanism; easy availability of information pertinent to ones rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions¹⁶

4.1.1: Appointment of Judicial Officers

The Constitution establishes The Judicial Service Commission (JSC) in Article 171. JSC has the mandate to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. JSC is responsible for recommending the appointment of judges and judicial officers.

In the performance of its functions, the Commission is guided by the following

- (a) Competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and
- (b) The promotion of gender equality.

¹⁴ Constitution of Kenya, 2010, Article 160

¹⁵ Constitution of Kenya, 2010, Article 159

¹⁶ <http://kenyanjurist.blogspot.com/2011/07/kituo-cha-sheria-and-access-to-justice.html> as quoted in Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies Kariuki Muigua

The JSC was formed to enhance the independence of the judiciary. The JSC plays a very important role in implementing the provisions of the Constitution in relation to leadership and Integrity.

Post 2010, the Judicial Service Commission (JSC) conducted interviews to nominate persons for the positions of the Chief Justice, and the Deputy Chief Justice. These interviews were conducted and aired live by the media. In line with the 2010 Constitution, the public participated in the process by sending their questions, comments and opinions to the interview panel who then posed such questions or comments to the interviewees. Appointment of most constitutional office holders of in judiciary concluded. A Chief Justice (CJ), Deputy Chief Justice and the judges and magistrates were appointed after a rigorous, thorough, competitive and transparent recruitment process.

It has been instrumental in constitutional implementation by leading the process of recruiting a new Chief Justice, Deputy Chief Justice, and Chief Registrar in Kenya. JSC further led in nominating additional judges to the High court. Both nomination processes were competitive, transparent and open to the public. JSC has also facilitated public participation in the recruitment processes as required by the 2010 Constitution. The Judicial Service Commission has been under spotlight after the Public Service Commission termed as illegal the payment of sitting allowances salaried State officers.¹⁷

4.1.2: Vetting of Judicial Officers in Office

One of the unique features of the Constitution is the requirement of vetting of judicial officers who were serving in the Judiciary as judges or magistrates at the time of the adoption of the Constitution to determine their suitability to continue to serve in the Judiciary. This is a transitional provision that was informed by the views of Kenyans some of whom had sought the resignation of all the judicial officers upon the adoption of the Constitution. An enabling legislation, the Vetting of Judges and Magistrates Act, was passed in 2011 and a Vetting Board comprising of five Kenyans and three foreign nationals was established. Based on the vetting process, a number of Judges have been found to be unsuitable to continue serving in the Judiciary with the issues ranging from corruption, delay delivering judgments, insensitivity to litigants, subservience to the Executive, case mismanagement, abuse of judicial powers and unethical conduct.

4.1.3: Emerging Jurisprudence on leadership and integrity

The Judiciary has delivered several judgments that directly touch on leadership and integrity.

Thus the question is whether courts have established the standards of the integrity requirement under Chapter 6 of the Constitution.

“This question was put to test in *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others*,¹⁸ where the petitioners contended that the trial process of

¹⁷ <http://www.businessdailyafrica.com/-/539546/2054014/-/view/printVersion/-/14pk542/-/index.html>

¹⁸ *International Centre for Policy and Conflict* (n 4 above).

the third and fourth respondents before the ICC, up to confirmation of charges, met the necessary legal threshold required by law in Kenya to bar a person from being nominated to contest or assume state office. The third and fourth respondents, the current President of Kenya and his Deputy, are facing charges of crimes against humanity before the ICC.¹⁹ Although the High Court had declared that it had no jurisdiction to decide on the third and fourth respondents' qualification to participate in the presidential elections, it still established its jurisdiction to interpret the constitutional threshold of integrity in light of the dispute before it. The High Court observed that to interpret Chapter six of the Constitution, it would adopt a holistic and purposive interpretation that enhanced good governance, observance of the rule of law and human rights.²⁰ The Court acknowledged that the purpose of Chapter six is to set higher standards of integrity for persons seeking to serve as state officers. It defined integrity as the firm adherence to moral and ethical values in one's behavior. It further stated that:

*Integrity is therefore not only about an individual's own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar's wife: they must be beyond reproach.*²¹

To buttress its position, the court agreed with the integrity standard that was set out in *Trusted Society of Human Rights Alliance v The Attorney General and Others*,²² where the High Court observed that:

*...a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not...it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.*²³

The High Court in this case thus established that the integrity standard required of a person seeking to hold public office is that the individual should be beyond reproach, and should not have unresolved questions about his character and commitment to the national values in the Constitution.

Having adopted this standard of integrity, the Court further observed that the standard established by Chapter six must be weighed against the Bill

¹⁹ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11; *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11.

²⁰ *International Centre for Policy and Conflict* (n 4) para 130.

²¹ As above, para 131.

²² *Trusted Society of Human Rights Alliance* (n 5 above).

²³ As above, para 107.

of Rights in the Constitution. In this aspect, the Court was of the view that the Bill of Rights is a cornerstone of the Constitution and as a result, the rights that it protects ‘in particular Articles 38 and 50 in the unique circumstances of this case’ must prevail over the demands of Chapter six.

In *Luka Lubwayo and Another v Gerald Otieno Kajwang and Another*.²⁴ The High Court in this case also adopted the ‘unresolved issues of character’ as the threshold on integrity. The High Court made a finding that the first respondent, who was seeking an elective post as the Senator of the county of Homabay, had indeed been struck off the Roll of Advocates for misuse of clients’ funds while practicing as an advocate. At the time of the petition, the first respondent had already been reinstated into the Roll of Advocates and given some conditions to fulfill. The Court held that discipline by the Disciplinary Committee per se was not a ground for disqualification, once the disciplinary measures have been discharged and the first respondent reinstated to the Roll of Advocates.²⁵ The Court, to support its finding, relied on the logic that flows from a reading of Article 99 (2) of the Constitution, which provides that only a person subject to a sentence of at least six months does not qualify to run for a state or public office, which therefore implies that conviction as such is not a basis for disqualifying anyone from running for office.²⁶

In addition, the High Court made a distinction between appointive and elective positions. It noted that the only criteria set out for elective positions under Article 73 (2) (a) (ii) of the Constitution was that the elections should be fair. The Court observed that, ‘in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness²⁷’

In *Mumo Matemu v Trusted Society of Human Rights Alliance and Others*,²⁸ the appellant challenged the High Court’s decision to exercise its jurisdiction to adjudicate the petition that challenged his suitability for appointment to the office of the chairperson of the Ethics and Anti-Corruption Commission. The main contention by the appellant was that since his appointment had already been gazetted, the High Court could no longer exercise jurisdiction, and the only manner in which he could be removed from office would be through the procedures set out in Article 251 of the Constitution and section 42 of the Leadership and Integrity Act. The appellant asserted that the High Court had misapprehended the doctrine of separation of powers which divests the court of jurisdiction to review some decisions and actions of the other branches of Government.

The Court of Appeal, when looking into the issue of jurisdiction, disagreed with the appellant. It found that the petition before the High Court had

²⁴ *Luka Lubwayo* (n 12).

²⁵ As above, para 38.

²⁶ As above, paras 35-38.

²⁷ *Ibid*, para 40.

²⁸ *Mumo Matemu* (n 6 above).

challenged the constitutionality of the manner and process of the appellant's appointment and was not a removal procedure or a complaint against the appellant in his capacity as a state officer. The Court of Appeal stated that the nature of litigation is not determined by its outcome, but by 'its substance at the time of seizure and proceedings'.²⁹ In the circumstances, the Court found that an order setting aside the appellant's appointment would flow from a judicial finding that the process and manner of his appointment was unconstitutional and as such, the High Court had rightly exercised jurisdiction.

It is evident from the above cases that the question of jurisdiction is a key issue in cases relating to leadership and integrity. The courts acknowledge that generally, under Article 165 of the Constitution, the High Court's jurisdiction is broad enough to review the constitutionality or legality of any act carried out by other organs of Government.³⁰ Nonetheless, the High Court is required to exercise caution before exercising this jurisdiction. The High Court thus has jurisdiction

to inquire into matters of integrity relating to elective and appointive public office, but it must first give an opportunity to the relevant constitutional bodies or state organs to deal with any dispute on the same. This formula lends credence to the doctrine of separation of powers in the Constitution, allowing the courts to only intervene when the constitutionally designated organ fails to carry out its constitutional mandate, or carries out the mandate in a manner that contravenes the Constitution.

Further the courts have addressed the issue of appointment of officers into the public service in *Marson Integrated Ltd. v Minister for Public Works & Another*³¹ The issues in this cases were whether the Interested Party have the requisite academic and professional qualifications to be appointed to the Board of the National Construction Authority, whether the Interested Party meet the integrity test in Chapters 6 and 13 of the Constitution and Whether the Minister acted procedurally in appointing the Interested Party to the Board after his name had been withdrawn by the nominating professional body.

²⁹ As above, para 38.

³⁰ Article 165 of the Constitution partly provides:

(1) There is established the High Court, which—

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

³¹ Petition No 252 of 2012

The Court held that the National Construction Authority Act section 7(5) particularly in its use of the words in “a relevant field” required that anyone who was nominated by the professional organisations named in Part II of the First Schedule should have a minimum of a Higher National Diploma in the field to which the nominating organisation belongs. In the case of the Interested Party, he had been nominated by the Kenya Association of Building and Civil Engineering Contractors. ‘Relevant field’ with regard to this body would require that he had a minimum of a Higher National Diploma in the field of building or civil engineering. The Court held that the allegations by the Petitioner had a basis in fact, a basis that was sufficient for the nominating body, KABCEC, to withdraw the Interested Party’s nomination and submit another name. Based on those facts, the Interested Party did not meet the integrity threshold set out in article 73 of the Constitution and his appointment did not accord with the national values and principles set out in article 10.

In *Benson Riitho Mureithi V J. W. Wakhungu and 2 Others*³² the petitioner filed a petition challenging the constitutionality of the appointment of Ferdinand Waititu, the Interested Party as the chairman of the Athi Water Services Board by the 1st Respondent, a Cabinet Secretary. He argued that the respondent failed to take into consideration the provisions of Article 73 in Chapter 6 of the Constitution of Kenya, 2010 when making the said appointment. The petitioner enumerated incidents in which Interested Party was involved and which question his integrity. He cited among others the following incidences: at Umoja area he incited

members of the public to demonstrate violently against the police, leading to the injury of a police officer and propagating hatred against the Masai Community leading to the killing of three members of that community.

The court in quashing the appointment stated that the Cabinet Secretary failed to conduct an inquiry with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on her. That there were serious unresolved questions with regard to the integrity of the Interested Party which she failed to consider. It was hence her duty to make a determination of the suitability of the Interested Party in light of Chapter 6 of the Constitution.

4.2: Legislature

Article 93 of the Constitution establishes the Parliament of Kenya, which consists of the National Assembly and the Senate. It is the role of Parliament to protect the Constitution and promote the democratic governance of the Republic.

Parliament is a critical institution for democracy and citizens’ participation in political processes through its three pronged mandate of law-making, oversight of the executive arm of government, and representation. An effective and properly functioning legislature promotes and safeguards good governance and the values of accountability, transparency and participation.

Oversight and supervision of governance remain the most critical functions of Parliament. Parliament plays its accountability and oversight roles through

³² Petition No. 19 of 2014

a number of ways, for example, through proposals for action and through the actions of the various departmental committees³³.

4.2.1: National Assembly

The National Assembly comprises 290 members elected by registered voters from constituencies, 47 women elected by registered voters from the counties, 12 members nominated by parliamentary political parties to represent special interests of youth, persons with disabilities and workers, and the Speaker of the National Assembly.

Roles of the National Assembly

The members of the National Assembly represent the people of constituencies and as well as special interests (youth, women, persons with disabilities and workers) in the National Assembly.

The roles of the members of the national assembly are to:

1. Make laws,
2. Determine how resources are allocated between national and county governments,
3. Review the conduct of the state officers that include the president and deputy president,
4. Make and approve declarations of war,
5. Exercise oversight over national revenue,
6. Debate and provide solutions to issues that concern the people and exercise oversight over the state organs. State organs include commissions, offices and bodies established under the Constitution. The people can approach their representatives in the National Assembly to ask questions and debate issues that affect them in the Assembly.

4.2.2: Senate

The Senate consists of 47 members elected by registered voters of the counties, 16 women members nominated by political parties, 2 youth members (one man and one woman), two persons with disabilities (one man and one woman) and the Speaker of the Senate.

Role of the Senate

The members of the Senate represent the counties and their essence is to serve and protect the interests of the counties and counties governments.

The roles of the members of Senate are to:

1. Debate and approve laws that concern the counties,
2. Determine the allocation of national revenues to the counties,
3. Exercise oversight over state officers and determine any resolution to remove the President or deputy President.

The people can approach their representatives in Senate to ask questions and debate issues that affect them in the Senate.

4.2.3: Parliamentary Oversight Role

Parliamentary oversight is a core democratic role of Parliament. It entails holding the executive accountable for its actions and ensuring it implements policies in accordance with the laws and budgets passed by Parliament. Robust monitoring of the executive is an indicator of good governance as it ensures balance of power between the various organs of Government. The efficiency and effectiveness of Parliament's

³³ <http://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf>

oversight role depends on strong ethical grounding. Integrity of MPs strengthens their moral authority to question the actions of the government and public officers entrenching of integrity in the oversight role of parliament increases public confidence and participation.

Committees and their Significance in Parliamentary Oversight

A strong committee system is the hallmark of a dynamic legislature. Indeed, the debate in the parliamentary reform programme across the globe has been on how to strengthen the legislative committee system. This is based on the understanding that a vibrant committee system is a useful instrument for the House in charting policy direction upon those matters that come before it for consideration. For a Legislature to be independent of the Executive arm, it must have a strong internal mechanism to enable it carry out the complicated task of policy oversight that would otherwise not be possible in the plenary session. The advantage of having an effective parliamentary committee system is to ensure that different parliamentary interests and points of view are taken into account when the House makes its decisions. They provide avenues for meaningful probe and debates; management of complex parliamentary business and above all, mechanisms for parliamentary accountability.

Public Accounts Committee

The Public Accounts Committee (PAC) was established in 1948, when the UK Government passed a law (Orders-in-Council) for the colonial Government in Kenya to start accounting to the

Legislative Council, for the tax collected within as well as grants remitted from England. Since independence, the Public Accounts Committee (PAC), traditionally chaired by the leader of the official opposition in the House has been the key watchdog tool of budgetary oversight of Government ministries and departments. The mandate of the Committee as stated in the Standing Orders of the National Assembly is to examine the annual reports of the Office of the Auditor General (OAG) on the Central Government expenditure and fund accounts of ministries/ departments. The Committee may also examine special audit reports on current issues that may require urgent attention. Its work is mainly to undertake a post-mortem examination and follow up analysis of issues raised by the OAG, and make recommendations to the Executive to implement. However, over the years, the Executive branch has not always implemented resolutions of the House faithfully.

In ordinary circumstances, the Public Accounts Committee would be in the news regularly for taking a strong stand against public officials accused of stealing and misappropriating public resources and for helping to save taxpayers' money by halting the train of grand corruption.

Unfortunately, at a time when corruption in government is said to be back to Kanu-era levels, the PAC is itself the News and for all the wrong reasons.

Its chairman, Ababu Namwamba, finds himself in trouble with attempts to oust him for what fellow MPs claim is impropriety³⁴.

³⁴ <http://www.nation.co.ke/oped/Editorial/PAC-Ababu-Namwamba-Corruption-Oversight/-/440804/2631518/-/e1tpwiz/-/index.html>

4.2.4: Integrity issues in the Kenyan parliament

The current committee system in the Kenyan Parliament has been described as prone to kickbacks with the process of writing and adopting of key committee reports as most lucrative. This hampers the carrying out of the oversight role of parliament. There have been reports of abuse of committee trips, large sizes of delegations, poor management of trips, illogical and expensive routing- causing embarrassment to Parliament and the country.

The Kenyan Parliament has also been accused of a ‘Reward system’ in the composition of committees. There have been instances of Abuse of office by members of investigatory committees through harassment of public officers and soliciting favours. This in turn has led to an increase in corruption allegations in the operations of Parliament as has been witnessed recently.

Transparency International Kenya in a detailed report also lists flirtation between some chairs of committees and representatives of special interests & officials of transnational corporations when legislative measures affecting their interests are before Parliament as one of the integrity issues surrounding the Kenyan Parliament. Finally, there have been allegations of rampant horse-trading in committees where MPs agree to do something to further their personal, business or vested interests. All these have a negative impact on integrity of committees and Parliament as a whole³⁵.

Fundamental accountability and transparency concerns have been raised regarding Parliaments control over its own staffing and resources following the establishment of the Parliamentary Service Commission (PSC). The speaker of the national assembly recently rooted for increase in the MPs’ salaries and stated that he would be writing to the Salaries and Remuneration Commission requesting for the same. His argument was that MP’s deserve more pay considering the scope of the work they do. He also took comparison with the remuneration scales of commissioners in other state institutions that he stated to earn more than MP’s and yet parliament vets and holds into account these other office bearers.³⁶

Members of Parliament continue to enjoy privileged status on payment of taxes on allowances and other benefits. This issue goes to heart of integrity: - MPs enjoy the benefits of public revenue without sharing equitably in the burden of generating it. This raises the question - having not participated in the generation of the common revenue pool, do MPs have the moral authority to direct how it should be used or to question any excesses of the Executive?

In the new constitutional dispensation, Kenyan mps have tactfully refused to pay taxes as mandated and instead raided the National Contingency Fund which is money set aside for relief operations and other national emergencies to settle their taxes. The public kitty will also compensate mps for the income they will lose by paying taxes for the remaining part of their term.

³⁵ Transparency International(Kenya)- A Report on Integrity: A Study of the Kenyan Parliament, March 2010

³⁶ The Daily Nation

This manoeuvre is meant to give the impression that MPs are finally willing to pay the taxes while disguising the fact that they will be subsidized for loss of income. The contingency fund set aside for national emergencies like floods, fires and relief has thus been reduced to zero. This is against constitutional requirement that public money ought to be used in a prudent and responsible way under the constitution and using public coffers to offset MP's taxes is irresponsible.

The above came as reports emerged that MP's had hammered a deal with the Ministry of Finance allowing them to be compensated for agreeing to pay taxes. In the fund MP's were meant to make away with Kshs.2m in a deal meant to mollify MP's into approving treasury's proposals without severe amendments. The treasury has thus set up Kshs.2.4 Billion under a budget item entitled "Current grants to government agencies and other levels of government" to cater for this. This in itself raises serious integrity issues in the institution. Kenyans are usually treated to the theatre of the absurd parliament and the treasury. The house shares inexorably in the delay in passing of the Finance Bills. For instance, in the 2011 Finance Bill, the MP's had kicked in an amendment to the banking Act to control the interest rates.

The MP's tactfully used the Finance amendment route, knowing that treasury must get the latter approved before the end of that financial year. The amendments raised a lot of heat that saw the executive withdraw the bill twice. The debate preceding the voting showed MP's who had voiced

opposition to the bill had suddenly changed their positions and wanted the amendment dropped. There were allegations that treasury and some influential banks bribed MP's with lunch and MP's who were perceived to support the amendments pocketed Kshs.50, 000 each. The MP's further arm twisted the Finance Minister to factor in a severance pay of Kshs.3.7million for each MP. The question then bags, why did the executive find it that easy to award MP's this colossal sum of money yet it failed to meet demands of other civil servants?³⁷

In September 2012, the parliament again amended the 2012/2013 Finance Bill to include a Kshs.2billion severance pay that gives each of the 222 MP's Kshs.9.3 million. Kenyans and CSOs expressed outrage with MP's through protests in streets as this had come at a time when the Finance Minister had proposed to increase taxes to raise the money needed to meet the public servants wage demands. This public outcry led to the rejection of the amendments by the president on ground that it was unconstitutional and in the prevailing economic circumstances, it was unaffordable.

The parliament has also demonstrated its unwillingness to fight graft in many scandals that have happened recently that led to Kenya losing billions of shillings. The Foreign Affairs minister in 2010 was caught up in a scandal involving the purchase of land for the Kenyan embassy in Japan. The minister was accused of deliberately misleading the house by claiming that there was value for money in the purchase of the embassy

³⁷ The Standard Digital News

land while the government actually lost Kshs.1.1 billion in the Japan deal. The minister was also accused of misleading the house about the cost of hiring a lawyer for the transaction which he stated the lawyer could cost the government Kshs.45 million when in fact the fees could be Kshs.3.4 million. Also, the minister was alleged to have refused to accept an offer for free land from the government of Japan for the embassy and instead purchased a less suitable property. The minister also failed to ensure that the provisions of the Public Procurement & Disposal Act, 2005 were complied with in the purchase. The Minister and the Permanent Secretary in the Ministry of Finance bowed and resigned from their positions due to the above scandal. However, the two were reinstated in a mini cabinet reshuffle in September 2011 even before the investigations were fully complicated by the EACC. The prime minister in a statement to the house cleared the minister and the permanent secretary of any wrongdoing over the Tokyo scandal saying that they had been exonerated by five separate probes including a parliamentary select committee.

4.2.5: The People and the Parliament; Recall and Public Participation

The registered voters have a right to recall a member of National Assembly and Senate representing their constituencies or counties, before his or her term has ended. The Elections Act, in part IV (Sections 45, 46, 47 & 48) provides for the recall of Members of Parliament. Whereas the CIC has proposed that recall include provisions on performance related and will of the people based recall, the legislation as enacted

by Parliament only contemplated contravention of Chapter six as determined by a Court as a basis for recall.

The National Assembly and the Senate are required to conduct their business in public and enhance public participation while carrying out their functions. Although committee sittings are not open to members of the public, Parliament has frequently made advertisements calling for submission of written memorandum as well as inviting the public and stakeholders to participate in public hearings and debate.

4.2.6: Parliamentary initiatives

On various dates on the floor of parliament there were discussions touching on Leadership and Integrity; though there was no direct mention of Chapter 6 of the Constitution or on any statutes touching on integrity in some of these discussions, most of the contributors mentioned severally the term integrity. This is a clear demonstration of how popular this term has become in the country. Committee reports too mostly on vetting of nominees for various public office positions indicate the consideration by committee members of the integrity of the nominees. Here is a sample of committee and Hansard reports in the house of parliament touching on Integrity and Leadership.

On Wednesday 30th July 2014 there was a Motion on the adoption of the report of the Departmental Committee on Justice and Legal Affairs on the nomination of Members to the National Cohesion and Integration Commission. The house was notified that The Committee, considered the applications that were received and came up with

a criteria to consider all the applicants, which included meeting the requirements of Chapter Six of the Constitution on Leadership and Integrity³⁸.

On Wednesday, February 12, 2014 during the second reading of the National Police Service (Amendment) Bill- Hon. Baiya in contributing and supporting the amendment said it is important that the country settles the issue of the integrity of serving police officers. He recommended for the vetting of police officers and those who are found wanting in terms of integrity and in terms of adherence to professional ethics.

On the second report of the Committee on Appointments on the Vetting of the cabinet secretary nominees of 5th June, 2013, the Committee requested the Ethics and Anti-Corruption Commission, Kenya Revenue Authority (KRA) and the Higher Education Loans Board (HELB) to provide reports about the nominees on:

- Matters touching on integrity;
- Tax compliance;
- Loan repayments.

In response, the Ethics and Anti-Corruption Commission informed the Committee that there were no pending integrity related cases on the nominees.

On the first report of the Departmental Committee Agriculture, Livestock and Cooperatives on the Vetting of the Principal Secretaries Nominees of 24th June, 2013. The committee stated quite

clearly in its report that its focus would among others be on the integrity of the applicants. According to the report on 12th June, 2013, The Committee requested the Ethics and Anti-Corruption Commission, Kenya Revenue Authority (KRA) and the Higher Education Loans Board (HELB) to furnish it with reports about the nominees.

On the Report of the Departmental Committee on Administration and National Security on the Vetting of Mr. Francis Thuita Kimemia, Nominee for Appointment to the Position of Secretary to the Cabinet, the Clerk of the National Assembly on 16th May, 2013 wrote to Ethics and Anti-Corruption Commission seeking information on the integrity of the nominee. The nominee was also required to present his Certificate of Good Conduct. The Ethics and Anti-Corruption Commission, in response to the Clerk of the National Assembly's letter, wrote to the Committee, raising concerns that touched on the integrity of the nominee³⁹.

The Committee deliberated on the contents of the letter and resolved that, since the allegations raised were quite weighty, there was need to invite the Chief Executive Officer of EACC to a meeting in order for him to clarify some of the issues alluded to in the letter. Even so the committee went on to recommend that the National Assembly approves the nomination and subsequent appointment of Mr. Francis Thuita

³⁸ Republic Of Kenya Eleventh Parliament – Second Session National Assembly Votes And Proceedings Wednesday, July 30, 2014 Second Session Afternoon Sitting (No.72) (361) <http://www.parliament.go.ke/plone/files/folder/9bc4856a679a42c49a47f1ddc29d4e6dFILE1407293805134FNIX30072014pmpdf>

³⁹ <http://www.standardmedia.co.ke/article/2000084407/ethics-and-anti-corruption-commission-says-kimemia-not-fit-for-public-office>

On the departmental committee on Justice and Legal Affairs Report on the Approval for Appointment of Kagwiria Mbogori, Suzanne Shatikha Chivusia, George Morara Monyoncho, Vincent Suyianka Lempaa and Jedidah Wakonyo Waruhiu as chairperson and members of the

Kenya National Commission on Human Rights of 27th February, 2014 the committee stated that it was mandated to consider among others Ethics, Integrity and anti-corruption record of those who sought the various positions⁴⁰.

MP's contributions on the Political Parties Bill, 2011

Contributing MP	MPs Contributions
Hon. Ms. Karua	<ul style="list-style-type: none"> Supported even if it is a poor version of what is needed; needs to be improved in line with Article 91 of the Constitution Funding of parties to be tied to gender equity and equality; need for mechanism for ensuring constitutional gender requirement Strengthen the office of the Registrar of Political Parties Rethink about pre-election coalitions Language in the Act must be specific to leave no room for (mis)-interpretation Tighten law against party-hopping; punish party-hoppers Make the Bill in tandem with the Constitution
Hon. Wetangula	<ul style="list-style-type: none"> Needs better implementation mechanism Ensure RPP does not misuse the powers given Force party hoppers to resign Strengthen Speakers office to punish party-hoppers Rethink coalitions (current provisions are weak) Public Officers should not hold office in political parties
Hon. Mbadi	<ul style="list-style-type: none"> MPs must embrace real multipartyism Stop party hopping/party hoppers must resign Address party funding more clearly Pre-election coalitions are bad for the country
Hon. Kimunya	<ul style="list-style-type: none"> A strong political party regulatory mechanism will strengthen democracy Will reduce the influence of party founders on party matters Coalition agreements must be public and deposited with the RPP
Hon. Eseli	<ul style="list-style-type: none"> Institutionalization of political parties will bring stability to government Strengthen legislation on coalitions to ensure discipline and sanity in political parties

⁴⁰ Parliament Of Kenya The National Assembly Eleventh Parliament Second Session (2014), Departmental Committee on Justice and legal Affairs Report on the Nominees to the Chairperson and Members of KNCHR file:///C:/Users/UserPC/Downloads/Justice%20and%20Legal%20Affairs%20REPORT%20ON%20KNCHR%20NOMINEES%202014.pdf

Hon. Kiunjuri	<ul style="list-style-type: none"> • Strengthen the Bill • A good Political Parties Act will stabilize the country • Need to eliminate political merchants and party hoppers • The Bill should ensure parties have members not supporters • Need to separate elected from appointed public officers • Strengthen checks against misuse of public funds • Tighten law on party-hopping
Hon. Olago	<ul style="list-style-type: none"> • The Bill will strengthen Kenya's democracy • Increase penalty to disallow party hopping
Hon. Duale	<ul style="list-style-type: none"> • Political parties must be made accountable • The Bill must integrate intra-party democracy • Coalitions are not in the country's interests [are formed by political opportunists] • Strengthen parties as instruments of democracy
Hon. Noor	<ul style="list-style-type: none"> • Bill must reflect the Constitution and allow for affirmative action, promotion of minorities and the marginalized • Bill is good but needs to be strengthened • The ORPP must be given full independence
Hon. Chanzu	<ul style="list-style-type: none"> • Bill should discipline political parties • Ban party hopping
Hon. Orengo	<ul style="list-style-type: none"> • Bill must be in harmony with the Constitution • Bill must address the mischief of the past • Ban party hoppers • Must ensure parties stand for integrity and leadership
Hon. Mwiria	<ul style="list-style-type: none"> • Prohibit ethnic parties and ethnic coalitions • Political parties must be led by persons of integrity • Current political leaders are masters and lords of impunity. • The Bill must check self-serving legislations • Funding of parties should be linked to clean leadership
Hon. Muthama	<ul style="list-style-type: none"> • Independence of the RPP is vital in checking executive interference • Bill to regulate party registration and party hopping • Will eliminate multiple memberships
Hon. Kiuna	<ul style="list-style-type: none"> • Disciplined party system will reduce violence in politics. • Bill must reduce corruption in politics • Increase transparency
Hon. Kombo	<ul style="list-style-type: none"> • How do we ensure people of integrity are elected • Bill must increase transparency • Strengthen ORRP • Bill must make parties more national in outlook

Hon. Njuguna	<ul style="list-style-type: none"> • Need to ensure personal and party integrity • Prevent party-hopping/multiple memberships
Hon. Mbaya	<ul style="list-style-type: none"> • Reduce role of executive in party affairs • Create an independent ORPP • Ban ethnic parties
Hon. Mureithi	<ul style="list-style-type: none"> • Strengthen internal party democracy • Regulate party elections
Hon. Midiwo	<ul style="list-style-type: none"> • Independence of RPP will check against executive intimidation

4.3: Executive

The Constitution of Kenya, 2010 makes provisions on how the public service will be organized and operate. The Public Service Commission Act, 2012 was enacted in 2012. The Act seeks to influence the course of public service delivery, public administration and administrative justice in the emerging constitutional dispensation. Whether the Act will ensure managerial efficiency, public participation, and juridical due process in public service delivery and access to resources is a question for determination.

The Constitution provides for transparent and competitive process of appointment of individuals to State Offices. The process is rigorous and begins with the advertisement in the Daily Newspapers and in some cases on the relevant Websites; publication of names of the applicants in the Daily Newspapers where the public are invited to give comments on the applicants, if any; public interview of the applicants; appointment by the President vetting and approval of names by

Parliament; formal appointment and gazettment by the President; and swearing in before the designated officers. Some of the institutions where such process has been followed include the Judiciary, Constitutional Commissions and Independent Offices (except the Attorney General), Inspector-General of Police and his two Deputies. This is important since it instills professionalism, independence, transparency and accountability in the Public Service⁴¹.

Value based recruitment has so far been applied in the recruitment of state officers for Constitutional Commissions and holders of independent offices identified in the Constitution. Recruitment is often done by the Public Service Commission or by specially appointed selection panels. All vacancies are advertised widely and those intending to apply are required to get clearances on integrity from the Ethics and Anticorruption Commission (EACC), tax clearance from Kenya Revenue Authority (KRA) and clearance from Criminal Investigations Department and the Higher Education Loans

⁴¹ The Rule Of Law And Human Rights: A Case Study of Kenya" by Otiende Amollo, A Paper Presented To The Law Society Of Zimbabwe During The Walter Kamba Rule of Law Day In Harare – Zimbabwe, 06th December, 2012

Boards. They are often asked to attach these clearances to their application forms. All applicants are also expected to state their districts/counties of origin.

4.3.1: The Civil Service Code of Regulations of 2006 (Republic of Kenya, 2006)⁴².

This Code of Regulations provides the behavioral standards for all public servants during and after their service while safeguarding them from unfair labor practices. In particular, it expressly forbids public servants from engaging in businesses that may bring disrepute to the offices that they hold and the government in general. For example, in its preamble, the Code of Regulations avers that,

“Public servants will be guided and inspired by a shared vision that the Public Service will be an efficiently performing institution; committed to serving the Public with integrity and utmost courtesy and giving value to the tax payers’ money. (Republic of Kenya, 2006, preamble)”

At Section G, on Rules of Conduct, the Code of Regulations points out the regulations governing the conduct of public servants that is to be found in the Public Service Commission and the Public Officer Ethics Acts. It also clearly states that,

“Each civil servant occupies a special position within the Civil Service and ought to be proud of that position and ensure that his conduct both in public and in private life does not bring the Service into disrepute. It is, therefore, imperative that every civil servant adheres to these rules of conduct, and such other rules which may be promulgated from time to time. (Republic of Kenya, 2006: 64)”

Code of conduct

The Code of Conduct and Ethics for officers in the public service was reviewed to incorporate requirements of the Leadership and Integrity Act 2012. The revised code lays a foundation for compliance with the Values and Principles in Articles 232 of the Constitution. The revised code requires public officers to: a) carry out duties of the office in a manner that maintains public confidence in the integrity of the public office; b) treat the public and other officers with courtesy and respect; c) avoid discriminating against any person; d) maintain high standards of performance and level of professionalism; e) ensure efficient, effective and economic use of resources; f) ensure public participation in the process of policy making and implementation g) provide services promptly, effectively, impartially and equitably; h) be accountable for his or her own administrative acts; i) ensure transparency and provision of timely and accurate information to the public; j) maintain an appropriate standard of dress and personal hygiene; k) discharge any responsibilities in a professional manner; and l) if the public officer is a member of a professional body, he/she should observe and subscribe to the ethical and professional requirements of that body in so far as the requirements do not contravene the Constitution, the Leadership and Integrity Act, 2012, the Public Officer Ethics Act, 2003 and this Code. The code shall be enforced through the public service disciplinary mechanism, and other legal means as necessary.

⁴² Kenya, Republic of. (2006). Code of Regulations. Nairobi: Ministry of Public Service

According to the Public Service Compliance with Values and Principles in Articles 10 and 232 of the Constitution Evaluation Report 2014, out of the 168 Ministries, Departments and Agencies (MDAs) covered, 115 of them in the category of State corporations (89.1 per cent) and three in the category of Independent Commissions and Offices had developed institutional codes

of ethics. Ordinarily, the Commission issues a general code of conduct and ethics for the public service under Parts Two and Three of the Public Officer Ethics Act Cap. 183. The code issued by the Commission is applicable to all public officers for which PSC is designated as the responsible institution by the law⁴³.

⁴³ <http://www.shitemi.com/wp-content/uploads/2015/01/Public-Service-Evaluation-Report-2014.pdf>

5.0 THE CIVIL SOCIETY

Kenya has a relatively strong and vibrant civil society, which plays a very important role in implementing the provisions of Chapter 6 of the Constitution on leadership and integrity. Civil society has repeatedly criticized the Kenyan president for lack of visible progress in combating corruption and the impunity of senior officials. The Civil society plays a major role in raising awareness on corruption and building demand for accountability.

Civil society has been widely recognized as an essential ‘third’ sector. Its strength can have a positive influence on the state and the market. Civil society is therefore seen as an increasingly important agent for promoting good governance like transparency, effectiveness, openness, responsiveness and accountability. Civil society can further good governance, first, by policy analysis and advocacy; second, by regulation and monitoring of state performance and the action and behavior of public officials; third, by building social capital and enabling citizens to identify and articulate their values, beliefs, civic norms and democratic practices; fourth, by mobilizing particular constituencies, particularly the vulnerable and marginalized sections of masses, to participate more fully in politics and public affairs; and fifth, by development work to improve the wellbeing of their own and other communities⁴⁴. The Civil Society has played a key role in exposing a number of corruption incidences in the country.

5.1: Electoral Reforms

The strengthening of democratic governance requires more than well-functioning elections, parliaments, an independent judiciary and other institutions and processes. It calls for a strong culture of democracy, in particular, robust, transparent, internally democratic and accountable political parties. Political parties represent a keystone of democratic governance. They provide a structure for political participation; serve as a training ground for future political leaders and seek to win elections in order to enter government. Whether inside or outside of government, political parties exist to transform aggregated social interests into public policy. In the legislature, political parties play an important role in shaping the relationship between the executive and the legislature and in prioritizing the legislative agenda⁴⁵.

The Constitution of Kenya, 2010 introduced various changes to the electoral system. The Independent Review Commission (IREC) put together to inquire into all aspects of the 2007 General elections recognized the role played by the failure of various institutions to faithfully carry out their mandates with respect to the elections and the need for fundamental change in the way elections are conducted. Accordingly, its recommendations were factored into the CoK which now provides for the establishment of a new, independent electoral commission.

⁴⁴ Role of civil society organizations in participatory and accountable governance: Dr. Aisha Ghaus-Pasha 6th Global Forum on Reinventing Government Towards Participatory and Transparent Governance 24 – 27 May 2005, Seoul, Republic of Korea

⁴⁵ Kemal Dervis, “Foreword” in UNDP, A Handbook on Working with Political Parties (New York: United Nations Development Programme.

Further, it required that new legislation on electoral units, nomination of candidates, registration of voters, efficient supervision of elections and regulation of political parties be passed. The Constitution also seeks to enhance the independent administration of elections and ensure fair resolution of electoral disputes. Article 86 requires the Independent Electoral and Boundaries Commission to ensure that voting during elections adheres to the principles of simplicity, accuracy, verifiability, security, accountability, and transparency⁴⁶.

5.2: Political Parties

Political parties are identified by the constitution as playing a very important role in governance. They are an important vehicle for mobilization of the people and public opinion. They nominate candidates for election to various elective and appointive offices. Marginalized groups and women gain representation and participation to certain important institutions such as parliament and the county assemblies as well as the cabinet and the executive committee at the county level through nomination by political parties. Parties form government at both the national and county levels and therefore drive the process of formulation of the governance and development policies and priorities.

However, experience shows that political parties in Kenya are not formed on the basis of ideology. They have not themselves developed principles of democracy and good governance. Internal discipline and democracy are lacking.

5.3: Political Parties' Nomination Process

Political parties are considered one of the key political actors in modern democracies. They create a link between voters and politicians and provide the organizational infrastructure needed to enter and participate in political life. In the context of elections for public office, a candidate who has been selected by a political party is normally said to be the nominee of that party. The party's selection (i.e., the nomination) is typically accomplished during one or more primary elections or by means of a political party convention or caucus, according to the rules of the party and any applicable election laws.

The form of nominating system is dependant mainly on the party itself. Nonetheless, nominations are a critical part of elections. Candidate nomination in Kenya has been haphazard, majorly relying on the wishes of the party leader or the presidential candidate. During the one party rule, it was common to see, say, former President Daniel arap Moi go to Kasarani Sports Stadium where KANU supporters had been ferried from different regions the whole night and declare by a show of hands or loud shouts who the next presidential candidate was going to be.

Apparently, the history of political parties' nomination processes is replete with corruption, parochialism, securing of the interest of the party leader(s), rigging, and failure to observe meritocracy, thereby denying people of good standing opportunity to ascend to leadership positions. This denies the citizens an opportunity

⁴⁶ Kenya Institutional Reform in the New Constitution of Kenya Dr. Migai Akech, International Center for Transitional Justice <http://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>

to get good leaders. Yet for a democratic country to get good leaders, who in turn promote good governance, the manner in which political parties conduct nominations is critical.

5.4: Role of Political Parties in Enforcing Chapter 6 of the Constitution

The Political Parties Act 2011, under Article 7(2) (e), obligates the Registrar of Political Parties to only give full registration to a political party whose governing body has met the requirements of Chapter Six of the constitution (on leadership and integrity) and the laws relating to ethics. The Political Parties Act is accompanied by a code of conduct in the First Schedule. The code under Article 1 obligates the political parties to subscribe and observe the code of conduct in pursuant to Articles 91 and 92 of the constitution and section 8 of the Act. Article 2 of the code of conduct states clearly that its role is to regulate the behaviour of members and office holders of political parties, aspiring candidates, candidates and their supporters, promote good governance and eradicate political malpractices.

Therefore, nurturing good leadership is a combination of a number of factors and processes, among them the following:

- Adherence to the Kenyan constitution
- Adherence to accompanying legislations that regulate political parties
- Adherence to international standards set out for elections and respect for the respective electoral processes

- Introduction of respectable and independent intra-party nominations including a trial at party primaries of one type or other
- Finally, the individuals selected or elected must meet the leadership and integrity test under Chapter 6 of The Kenya Constitution 2010.

It is both the responsibility of the political party to vet their members and for the offices of the Registrar of Political Parties and the Kenyan Election Management Body to enforce adherence⁴⁷.

5.5: The Political Parties Dispute Tribunal

Section 39 of the Political Parties Act (Act No. 11 of 2011) establishes the Political Parties Disputes Tribunal (PPDT) whose members are appointed by the Judicial Services Commission. Under Section 40, the jurisdiction of the Tribunal includes the mandate to resolve disputes between members of a political party; disputes between a member of a political party and a political party; disputes between political parties; disputes between an independent candidate and a political party; disputes between coalition partners; and appeals from the decisions of the Registrar under the Act. According to Section 41(1), all such disputes must be determined within a period of three months. The decisions of the Tribunal are not final; Section 41(2) provides that aggrieved parties have the option of appeal to the High Court on points of law and further appeal to the Court of Appeal and the Supreme Court. The rules of evidence under the Evidence Act and the Civil Procedure Act are to apply to the Tribunal with the necessary modifications, while ensuring that its proceedings do not

⁴⁷ http://www.cmd-kenya.org/files/Political_Parties_Quest_for_Good_Leadership.pdf

give undue regard to procedural technicalities (Section 41(4)). The Act however requires that, where matters are internal to a political party, that the Tribunal's jurisdiction only crystallizes once a party invoking the said jurisdiction demonstrates that he/she has exhausted all internal dispute resolution mechanisms.

5.6: Independent Electoral and Boundaries Commission (IEBC)

Article 88 of the Constitution establishes IEBC as the independent body responsible for conducting and supervising any election. The IEBC Act, among other things, specifically:

- provides for the operations, powers, responsibilities and functions of IEBC to supervise elections and referenda at the national and county levels
- establishes legal framework to identify and appoint the Commission's chairperson, members and secretary;
- prescribes the manner in which the Commission will exercise its powers, responsibilities, and functions.

The IEBC is responsible for conducting or supervising referenda and elections of any elective body or office established by the Constitution, and any other elections as prescribed by law.

The Leadership and Integrity Code is a useful tool for voters when deciding which candidates are likely to serve them best. The Act requires candidates for State office to submit to the public specific pieces

of personal information. Section 13(2) of the Act states that candidates for elected State office must submit a self-declaration form to the IEBC. Found in the First Schedule of the Act, the self-declaration form collects several pieces of relevant information from a candidate including marital status, country of birth, and educational qualifications. It also asks a series of yes or no questions on moral and ethical issues. By completing this form, candidates are giving important details about their lives, experiences and interests, which will provide a greater level of transparency on candidates vying for elected office.

The IEBC's recent handling of the procurement of expensive biometric voter registration kits, however, as well as its inability to enforce new rules on political parties during their registration and the controversy over the elections date, appear to have somewhat eroded its solid reputation.¹⁰⁴ The bungled procurement process in particular, although the IEBC was not solely responsible, exposed its inexperience and weakness⁴⁸.

A London court recently found two Britons to have corruptly got tenders from IEBC in what has become known locally as chicken gate. After British Crown Court found the printing company Smith and Outman directors guilty of paying immense bribes to IEBC high-level officials, it strips Mr. Hassan any iota of integrity and credibility to hold position of Chairman of the discredited IEBC. The reputation and integrity of IEBC and Commissioners has sunk so low. It fails to master

⁴⁸ Kenyans' faith in the Independent Electoral and Boundaries Commission's (IEBC) ability to conduct free and fair elections has dropped from 83 per cent in March this year to 76 per cent by last month, according to the latest opinion poll survey". Peter Obuya, "Public trust in IEBC plummets over BVR saga – poll", The Nation, 11 November 2012.

integrity and leadership threshold of Chapter Six of the Constitution⁴⁹.

5.7: Registrar of Political Parties

The office of the Registrar of Political Parties (RPP) is established by the Political Parties Act.; The Registrar of Political Parties (RPP) is the principal officer in charge of regulating political parties. The office of the RPP is composed of the Registrar assisted by three Assistant Registrars. The Registrar has power to deregister any party that contravenes the Constitution and the Code of Conduct for Political Parties.

Given the instrumental role of the office of the RPP in upholding the Constitution, there has not been any report from the office of the RPP actually deregistering any party that violated the law, despite several publicly known reports and mentions of

parties' misdemeanors. The nomination exercise at the 2013 General Elections was one such instance that showed clear flouting of the law and nomination rules by political parties.

While IEBC had the role of regulating the nominations, the office of the RPP is not recorded as having exacted consequences against offending parties after the fact. Similarly, no action was taken to address claims that parties submitted fraudulent membership details at the time of their registration. The office of the RPP put in place a mechanism for members of the public to verify their membership status in political parties, which led to many discovering they had been included as party members without their knowledge or consent. However, even when parties blatantly flouted the law as in this instance, there have been no consequences enforced by the RPP.

⁴⁹ <https://www.kenya-today.com/news/iebc-image-dented-beyond-repair-london-court-finds-chickengate-officials-guilty>

6.0 SETBACKS EXPERIENCED IN IMPLEMENTING SOUND LEADERSHIP AND INTEGRITY

6.1: Slow Pace of Institutional Reforms

Apart from judicial reforms, other governmental institutions are lagging behind in the reforms mandated by the 2010 constitution. The Public service ought to carry out restructuring in light of the Constitution of Kenya, 2010. The restructuring of the public service ought to be done to secure at least three objectives: First, ensure that the power of the Public Service commission (PSC) is enhanced and rationalized and that PSC is secured from inefficient and inequitable control by the higher executive bureaucracy. Second, establish standards, criteria and rules on appointment, promotion, transfer, demotion and related discipline etc, of public servants. This is important in ensuring transparency, fairness and due process. Third, ensure that the public service upholds the text or letter and intent or spirit of the 2010 constitution especially as regards competence and integrity of persons before being appointed to the public service⁵⁰.

6.2: Low Level of Awareness

A major obstacle to implementation of Chapter 6 of the Constitution is lack of awareness on the implications of the Constitution. In order for the Constitution to function properly and deliver visible results, the citizens must have a full understanding of the Constitution. The most effective way to ensure citizens understand the Constitution is through civic education. Citizen

participation in governance is another feature that runs through the whole Constitution. All of these mechanisms are useful in ensuring the provisions of the Constitution in relation to leadership and integrity are adhered to.

6.3: Passive Citizenry

A major challenge to transition is the inaction of citizens in the affairs of governance. The Constitution requires full participation of the citizens on all aspects of governance processes. However, not all citizens can organize themselves to participate effectively. Minimal participation by citizens means less vigilance in preventing those opposed to the Constitution from undermining its full implementation

6.4: Sustained Culture of Impunity

There has been resistance to change and a sustained culture of impunity by the Kenyan leaders. These issues as canvassed in the report have been a major stumbling block and a hindrance to the effective implementation of chapter 6 of the Constitution on leadership and integrity

6.5 Lack of Goodwill from the Government

The enforcement of Chapter six has been fought from all directions with the leadership of government of the day glowing hot and cold on its support. This can be traced from the time the Bill

⁵⁰ Constitutional implementation in Kenya, 2010-2015: Challenges and Prospects Prof Ben Sihanya, A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, FES Kenya Occasional Paper, No. 5

was discussed in parliament to the appointments made post enactment. What the governments has registered in alarming number is the rants about their commitment which has never been followed by actions. The body charged with its enforcement is under political arrest and cannot touch senior government officials because the Commission risk being disbanded and the Commissioners sent packing.

6.6 Disregard of court rulings by the legislators

Members of the Senate, voted unanimously for the creation of an 11-member committee to investigate allegations of misappropriating public funds leveled against the governor of Embu County, Martin Wambora. In doing so, it disregarded a court order by Justice David Majanja that had barred the Senate from investigating the governor until the courts had ruled on the correct procedure that should be followed⁵¹.

6.7 Corruption

The judiciary has also been plagued with allegations of impropriety a case in point being October 2013, when the judiciary's then registrar, Gladys Shollei, was sacked for alleged mismanagement and abuse of office. Following her dismissal, the press got hold of internal emails that ostensibly detailed a plot to get rid of Shollei. On March 7 2014, the Industrial Court, which deals with labor disputes, ruled that Shollei's dismissal was unfair and a breach of her constitutional rights. In his ruling, Justice Nduma Nderi said Shollei was entitled to compensation Further Kakai Kissinger, deputy chief registrar in the national judiciary; its director of human resources, Dismas Obondo; the director of supply-chain management, Martin Okwata; and the director of information, communication and technology, Thomas Atak, were temporarily relieved of their duties on April 3 2014 by Chief Justice Willy Mutunga⁵². This served to dilute confidence in the judiciary.

⁵¹ <https://iwpr.net/global-voices/public-confidence-kenyas-judiciary-plummets> accessed on 23rd March 2015
<http://www.bu.edu/today/2014/former-prime-minister-talks-about-kenya-challenges-future/>

⁵² Ibid

7.0 RECOMMENDATIONS

7.1: Performance Contracting

Some recently introduced practices in the public service are yet to be institutionalized in Kenya including performance contracting. Although this has been seen to work well where officers have set targets to achieve within agreed upon timelines, it is yet to be cascaded to the lowest levels of public service.

It is expected that cascading the idea to the lowest cadre of the public service will substantially improve public service delivery and in the process institutionalize transparency and accountability ideals.

7.2: Empowering the Legislature

In order to improve Parliament's oversight capacity, there is a need to train and support MPs to ensure they acquire knowledge on budgets and budgetary processes. In addition, the Legislature should be more open to the media and civil society to ensure effective parliamentary oversight. In addition, parliamentary committees should have adequate resources to deliver on their mandate. A strong and independent media is necessary to support committees in their oversight work on executive actions. In addition, a strong civil society can also ensure that weaknesses are identified and pressure brought to bear on the government to implement recommendations.

The leadership of the crucial parliamentary committees should possess the relevant competence that enables them to understand complex matters. They should be supported by well-trained staff, including researchers.

7.3: Judiciary's Role in Implementing Leadership and Integrity Provisions

The Judiciary should interpret the Constitution faithfully considering its letter and structure. Thus the Judiciary is expected, while interpreting the Constitution, to ensure that its supremacy is not compromised and further to declare void any legislation or conduct that is inconsistent with the Constitution. The Judiciary should enforce the provisions of the Constitution on leadership and integrity through decisions or orders in instances where there has been blatant disregard or neglect in enforcing the Constitution

7.4: Independent Constitutional Commissions in Constitutional Implementation

Article 248 of the 2010 Constitution establishes nine commissions and independent offices. These include the Kenya National Human Rights and Equality Commission, the Independent Electoral and Boundaries Commission, the Commission for Revenue Allocation, the Parliamentary Service Commission, the Judicial Service Commission, and the Public Service Commission. These commissions differ from commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of Government and they are textually (although not practically), administratively and financially delinked from the executive.

7.5: Civil Society Organizations

Article 1 of the Constitution, vests all sovereign power in the people of Kenya, and in Articles 10, 129 and 232, which provide for the participation

of the people in all facets of law execution, including in policy making. The people” in the 2010 Constitution is largely embodied in civil society. Civil Society Organizations should take the front line in making the voice of the people heard in matters of leadership and integrity. This is because the citizens by themselves may not have the necessary financial muscle to make the Government account when it violates salient provisions with regards to leadership and integrity of state and public officers. This will go a long way in ensuring a system of checks and balances with regards to public appointments is observed.

7.6: Media

The media plays a crucial role in shaping a healthy democracy. A vibrant media is the backbone of a democracy. The Media makes the public aware of various social, political and economic activities happening within the state and also outside. Many consider the media as a mirror, which shows the public or strives to show the state the bare truth and harsh realities of life. The media has undoubtedly evolved and become more active over the years. With regard to elections, the media assists the public, especially the illiterate, in making choices e.g. in the elections. The media, have made a significant achievement in improving the awareness of people on all socio-political and economic issues. Coverage of exploitative malpractices of leaders has helped in providing bases for prosecuting or taking stringent actions against them through public censorship or through other means. The media also exposes loopholes

in the democratic system, which ultimately helps government in filling the gaps identified and making the system of governance more accountable, responsive and citizen-friendly. Information technology has enhanced information flow to people in all walks and spheres. The perfect blend of technology and media has opened the state to public scrutiny especially on issues of corruption in politics and society⁵³.

The Constitution of Kenya 2010 has provided for a comprehensive Bill of Rights that anchors freedom of expression and freedom of the media⁵⁴. Every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.

7.7: Parliamentary Service Commission should draft and enforce of Code of Conduct for Parliamentarians

The Public Officers Ethics Act provides that responsible commissions shall come up with relevant codes of conduct to govern the behaviours of its members and PSC is one such responsible Commission which should set up its regulatory codes for its employees.

7.8: Regulation of Political Parties

There is need to address the problems faced by political parties to ensure that the gains of the new constitution are not undermined by the poor practices of political parties. As we implement

⁵³ Kenya, Democracy and Political Participation. A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi, Karuti Kanyinga March 2014

<http://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf>

⁵⁴ Article 34, Constitution of Kenya, 2010

leadership and integrity, we should place some obligations on political parties to ensure that in nominating candidates to leadership positions, they play a role and ensure that the country and the counties get leaders of very high integrity standards.

7.9: Passing of Important Laws by Parliament

7.9.1: Public Audit Bill

The Public Audit Bill (2014) was published on December 8, 2014 by the National Assembly and is scheduled for debate in February 2015. Section 40 of the new Bill prohibits the Auditor General from making public “particular information in a public report if it would prejudice the security, defense or international relations of the Government of the Republic of Kenya.” This new provision represents a major departure from the present, where the Auditor General’s reports are publicly subjected to scrutiny by Parliament through standing House committees. Instructively, information on security and defense, which the Auditor General was compelled to redact, triggered alarm bells on massive wastage in the Department of Defence (DoD). Revelations of procurement anomalies have been a source of poisoned relations between the DoD and the National Audit Office. The Bill comes against a backdrop of audit queries in the current Auditor General’s report which raises serious procurement questions about the acquisition of several armored personnel vehicles for more than Sh8 billion and the transfer of Sh800 million from the Ministry of Defence to National Intelligence Service months before the last General Election.

7.9.2: Procurement and Asset Disposal Bill, 2014

The Commission for the Implementation of the Constitution is currently reviewing the Procurement and Asset Disposal Bill, 2014. The draft Bill seeks to outline the public procurement system and to align it with the letter and spirit of the Constitution of Kenya 2010.

The Bill seeks to reform the procurement laws of Kenya by making provisions for the following in keeping with the principles of good governance, such as accountability, transparency, integrity and value for money:

- public procurement and the retention
- disposal of public property

The Public Procurement and Asset Disposal Bill 2014, which aims at speeding up public procurement, contains wide ranging provisions, including penalties of between Sh4 million and Sh10 million for State officers and bidders who flout laid down procedures for selfish gain.

7.10: Training

There is significant level of compliance with the requirement for high professional and ethical standards in the public service. However, it should be noted that training for professionalism and ethics targets only favours senior officers. Measures are needed to train lower cadres who are the majority in order to institutionalize and entrench professional and ethical practices in the public service. Further, there is a need to increase the number of officers who are members of professional bodies and upscale training in ethics with a view to establishing an ethical culture.

Training would also be essential in equipping judges, magistrates and other judicial officers with the pertinent knowledge and skills in discharging their responsibilities more efficiently.

7.11 Fidelity to the Constitution

Kenya has a progressive Constitution save for its implementation. The government and its agencies should exercise fidelity to the implementation of the Constitution for Kenyans to enjoy the fruits of its promulgation.

7.12 Leadership and Integrity Act

The leadership and integrity law should be amended to provide for vetting standards matching the spirits of chapter six.

7.13 Ethics and Anti-Corruption Commission Act 2011

The Act is simply an institutional framework and has to rely on other laws pertaining to anti-corruption so as to carry out its mandate. Provisions relating to what constitutes corrupt practices are not defined in the Act. The legal framework relating to anti-corruption is uncoordinated and not as comprehensive.

- Amend to increase the number of commissioners from three to seven to allow the Commission to function efficiently and effectively.
- Amend to provide for part time Commissioners and a full time CEO who reports to the Commission to do away with structural conflict from a full time Commissioner and a CEO.
- Amend to establish an ethics and integrity department to deal specifically with integrity matters.

- The law should be amended to take into consideration; public procurement; ,public participation, right of access to information and devolution

7.14 Public Procurement and Disposal of Asset

The Act by virtue of section 4, sets apart the private sector by providing that the Act applies with respect to procurement by public entity. The language and style of the PPDA 2005 law was only sounds like it caters for the needs of the national government and needs to respect and accord with the existing structures of the count governments. The right of access to information as prescribed by article 35 requires the dissemination of information to the public for the protection or exercise of any other right. The lack of financial independence by the Public Procurement Oversight Authority also negatively impacts service delivery. The complexities that come with procurement especially to the disadvantaged groups in the society that the constitution has addressed as a matter of policy have to be streamlined in the procurement law. For example, the current law has no avenue to accommodate youths, women and people living with disabilities.

The real need is to realign the procurement framework to be in cohesion with the Constitution and post-promulgation legislation such as the Public Finance Management Act 2012 which also provides guidance on the running of county and national governments.

