

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**VIABILITY OF LIFESTYLE AUDITS AS AN ANTI-CORRUPTION STRATEGY IN
KENYA: A CRITICAL ASSESSMENT OF THE POLICY, LEGAL AND
ADMINISTRATIVE FRAMEWORK**

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**A Thesis submitted to the University of Nairobi Law School in partial fulfilment of the
requirements for the award of the Degree of Master of Laws (LLM)**

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DECEMBER, 2019

Declaration

I, **NGUMBI ERIC MUNYAO**, do hereby declare that this thesis is my own original academic work in substance, form, and style and has never been submitted to any other University or learning institution for the award of a degree or other qualification. I also declare that all the sources of my secondary information used in this study have been duly acknowledged.

Signature.....

Date.....

16/12/19

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Acknowledgements

I convey my gratitude to the Almighty God, Creator of the universe and enabler of all positive actions of the humankind. He granted me the requisite intellectual, emotional and physical strength that culminated into successful completion of this project.

Special thanks go to Professor Ben Sihanya, JSD (Stanford), Department of Commercial Law, University of Nairobi Law School, who meticulously and critically guided me in the entire research and writing process. Your intellectual prowess coupled with your extensive scholarly work in constitutional democracy in Kenya and Africa tremendously inspired this work. This is in addition to your ardent phobia for constitutional defilement which generated your interest in my topic of study.

It is through your mentorship, tenacity and professorial guidance that this work was promptly completed. This laid bare your appreciation of the urgency with which Kenya needs revamped anti-corruption strategies such as the study herein. May your efforts and belief in constitutionalism illuminate the role of public intellectuals in the fight against corruption and inspire other scholars to similar action. I shall forever be indebted to you.

Similar gratitude is extended to Dr. Nancy Baraza and Dr. Jackson Bett both of the University of Nairobi Law School. Your guidance, objective critique and input to this thesis during the defence was useful and is highly appreciated.

I must thank various authors of books, chapters, journals and articles on constitutional governance and the fight against corruption in Kenya and Africa. These materials escalated my thirst for enhancing the existing knowledge on what has ailed Kenya's anti-corruption discourse since independence and the way forward. May your quest for good governance through scholarly work come to fruition.

Further recognized in this thesis are two Judges of the High Court of Kenya. These are the Honourable Mr. Justice George Vincent Odunga and the Honourable Lady Justice Mumbi Ngugi. The two Judges' approach to constitutional interpretation has shaped my school of thought in the application of Kenya's Constitution in addressing contemporary challenges.

In particular, I have found their consistent advancement of the concept of public interest in constitutional interpretation to be a key strategy in the fight against corruption. I thank Your Lordship and Ladyship.

To the people of Kenya, your increasing clamour for good governance and anti-corruption reforms was both important and timely. It summoned me to the full realization that each individual in Kenya ought to fight corruption using the arsenal at their disposal. This enhanced my desire to research and write on the topic herein as my personal contribution to Kenya's fight against corruption.

Jackson Mue, Ellyjoy Bundi and Timothy Irungu of the Ethics and Anti-Corruption Commission (EACC), your support and facilitation of the research and writing process is highly appreciated.

Deep appreciation goes to my family and friends. You individually and collectively offered me great emotional support. I thank you for your patience and understanding.

Finally, I thank everyone who in one way or another aided my successful completion of this study. May the Lord our God bless you all.

Dedication

I dedicate this work to my late mother, Mrs. Agnes Nduku Ngumbi, who inculcated in my upbringing the values of integrity, responsibility and honest living. This, you continued until I buried you, mum, on 23rd August 2019 while undertaking this study. Through untold suffering amid sickness, you brought me this far. I shall forever cherish your struggles to provide me with formal education which culminates into this thesis. Once again, may your soul rest in eternal peace.

The study is also dedicated to the people of Kenya who are the ultimate victims of corruption. Let it be a useful social accountability tool in your quest to slaughter the dragon of corruption which has adversely affected your livelihoods. May the study invite and incite you to proactively participate in governance processes and demand accountability from those to whom you have delegated your sovereignty.

Further dedication is made to the anti-corruption law enforcement agencies in Kenya including the Ethics and Anti-Corruption Commission (EACC), Office of the Director of Public Prosecutions (ODPP), Office of the Attorney General and Department of Justice (OAG&DoJ), Judiciary, Parliament, and Constitutional Commissions. May this study invite you to re-evaluate your anti-corruption strategies and approaches with the result that corruption is effectively nipped in the bud.

Similarly, the author dedicates this thesis to the International Organizations supporting good governance programs in Kenya, civil society groups, and public spirited media organizations. May this work inspire you to more vigorously champion the quest for good governance in Kenya till we fully subdue the corrupt.

Summary of the Thesis

This study sought to assess the viability of lifestyle audits as a strategy for combating and preventing corruption in Kenya. It primarily entailed a critical assessment of the policy, legal and administrative framework in relation to lifestyle audits as currently obtaining. The study stemmed from the background of widespread and deeply entrenched corruption in Kenya amid continued development and implementation of strategies geared towards taming it.

In conceptualizing the study, it was noted that whereas the business of fighting corruption in Kenya dates back to the colonial period and has continued through successive governments using a host of legal strategies, corruption still remains a major challenge. The vice has permeated every sector of Kenya's economy with debilitating effects to citizens. This state of affairs is despite diverse strategies contained in Kenya's anti-corruption laws, including a new and progressive Constitution. Among the avalanche of legal strategies that have failed to effectively respond to the high levels of corruption in Kenya over the years are lifestyle audits.

The study relied on qualitative methods of data collection and primarily involved review of law and policy, as well as both local and international literature from various books, book chapters, journals, articles, Government reports and development blue prints. It is from a critical analysis of this data that the key research questions on the efficacy of lifestyle audits as an anti-corruption strategy in Kenya were answered.

The study made several key findings. Significantly, although various arguments have previously been advanced to the effect that Kenya has no legal framework for lifestyle audits, the study established that indeed, Kenya has in place various legal frameworks that embody lifestyle audits. The key frameworks include the wealth declaration system under the Public Officer Ethics Act, 2003 (POEA), forfeiture of unexplained assets under the Anti-Corruption and Economic Crimes Act, 2003 (ACECA), regulation of bank accounts held outside Kenya under the Leadership and Integrity Act, 2012 (LIA), and the integrity vetting framework contemplated under Chapter 6 of the Constitution.

In addition, the study identified other frameworks related to the anti-corruption regime, with salient provisions that could be developed to enhance lifestyle audits in Kenya. These include the income tax reporting framework administered by the Kenya Revenue Authority (KRA), anti-money laundering framework under the Proceeds of Crime and Anti-Money Laundering Act, 2017 (POCAMLA) and the Prudential Guidelines of the Central Bank of Kenya.

Notably, it is a finding of the study that chapter 6 of the Constitution envisages comprehensive frameworks for its implementation including lifestyle audits, and integrity vetting for public officials as well as persons seeking election or appointment to office. However, the statutory framework that was enacted to operationalize Chapter 6 of the Constitution, namely the Leadership and Integrity Act, 2012 does not provide for such mechanisms. The insufficiency of the statute remains the greatest obstacle to effective implementation of Chapter 6 of the Constitution.

The above challenge is further compounded by the fact that Courts are yet to unlock Chapter 6 of the Constitution through the requisite purposive interpretation and development of jurisprudence to enable its effective application. It is noted that the decisions made so far are contradictory, inconsistent and incoherent, and do not offer any clear or conclusive determination of the proper test for integrity under the Chapter. As a result, it remains unknown what the fit and proper test for the integrity threshold contemplated under Chapter 6 of the Constitution is, ten years on.

Similarly, the study found that the provisions relating to lifestyle audits under POEA, ACECA and LIA are too weak and insufficient as to make lifestyle audits an effective tool against the runaway corruption in Kenya. For example, Kenya's wealth declaration system which is the primary embodiment of lifestyle audits, and the main focus of this thesis, has loopholes of monumental magnitude that defeat the very purpose of providing for wealth declaration in the country's law books.

The Lifestyle Audit Bill, 2019 on its part falls short of the basic elements that are necessary for an ideal lifestyle audits framework. In addition, some of the proposals in the Bill conflict with existing laws while others do not accord to the legislative intent of the Bill. If the Bill is

enacted into law in its current form, the ensuing legislation will severely weaken the fight against corruption in Kenya.

It is a further finding of this study that lifestyle audits are indeed a viable anti-corruption tool if effectively implemented through strong frameworks. The study narrowed down to lifestyle audits through wealth declaration systems and found that the same have indeed succeeded in other jurisdictions including Ukraine and Rwanda through effective monitoring of public officials' wealth. The robust wealth declaration systems of these two countries offer useful lessons that Kenya could adopt as best practice in reforming its weak wealth declaration framework.

Based on the above findings, the study concludes that Kenya's policy, legal and administrative framework for lifestyle audits, as fragmented in various statutes, is insufficient, weak and disproportionate to the nature and extent of corruption in Kenya. Without appropriate reforms therefore, lifestyle audits cannot be viable as a strategy in the fight against corruption.

Flowing from the above conclusion, the study thus makes several constitutional, statutory and other general recommendations for reform. On constitutional reforms, the study recommends amendments to the Constitution of Kenya, 2010 to, *inter alia*, provide for removal from office of state and public officers in violation of Chapter 6 of the Constitution vide a High Court declaration; prescribe the integrity threshold contemplated under Chapter 6 of the Constitution to address the existing jurisprudential confusion; strengthen EACC by enhancing its independence and making its recommendations binding on all public entities and state officers, and expressly limit the constitutional rights to bail; privacy; silence and presumption of innocence where a person is facing investigations and prosecution for mega corruption and economic crime. The wider public good and interest in a corruption free country should be elevated to supersede individual rights and freedoms, especially considering that corruption itself is an obstacle to the realization of other constitutional rights.

In addition, it is recommended that the Constitution be amended to elevate the current High Court Anti-Corruption Division to a full-fledged Anti-Corruption Court with the status of the High Court, akin to the Employment and Labour Relations Court or the Environment and

Land Court; and further empower the High Court to invalidate statutes that do not meet the threshold of the intent and standards of the constitutional provisions they are meant to operationalize.

Further related to the Constitution, the study recommends that an audit of the first 10 years of implementation of the Constitution of Kenya (2010-2020) be undertaken to identify and address the challenges that may have impeded effective implementation. This includes obstacles to the full realization of the inherent accountability objectives. The study noted that that despite 10 years of implementing the Constitution of Kenya, 2010, the nation still suffers serious deficits on leadership and integrity among state and public officials.

In respect to statutory reforms, the study makes a broad recommendation for enactment of a new legislation, to be referred to as the Public Officer Lifestyle and Wealth Audit Act, with sufficient focus on effective monitoring of a public officer's wealth as the key driver of individuals' lifestyles. It is recommended that the proposed legislation consolidates all the substantive provisions on lifestyle audits fragmented in various statutes. In doing so, the legislation should also address the weaknesses in the existing frameworks as analyzed under chapter 3, incorporate the best practice identified under Chapter 4 and take into account any other relevant issues of interest in the conduct of lifestyle audits.

The proposed consolidated law should sufficiently address the question of integrity of the wealth acquired or held by public officials, through inquiries into their lifestyles. This is a departure from most of the current anti-corruption strategies which primarily focus on the integrity of the systems of public entities on one hand, and the integrity of public officials on the other.

Some of the specific recommendations on statutory reform include an overhaul of Kenya's wealth declaration system under POEA through: unrestricted public access to declarations, abolishment of "responsible Commissions" established under section 3 of POEA and designation of EACC as the central depository for wealth declarations for all state officers with power to delegate functions in relation to public officers, automation of the wealth declaration system, widening the scope of declaration to include non-financial interests and wealth kept in foreign countries, and change from biennial to annual declarations.

Further, the study recommends development of a framework for continuous integrity vetting targeting all elected and appointed public officials as envisaged under Chapter 6 of the Constitution, custodial sentences for corruption related offences without the option of fines, and periodic publication of a national list of shame for persons convicted for corruption.

Conscious that sound laws on their own cannot be a panacea for corruption, the study makes various general recommendations. Among them are enhancement of the purposive approach to interpretation of the Constitution, 2010, and implementation of measures to promote patriotism, national values and ethos, and depoliticisation of anti-corruption initiatives. Learning institutions should, on their part, continuously inculcate ethics and integrity among learners through a curricular approach. Specifically, the study recommends that Universities, Colleges and all institutions of higher learning in Kenya do offer compulsory courses on ethics and integrity.

Also recommended is the strengthening of the institutional capacity of anti-corruption law enforcement bodies, cultural and attitude change among citizens, empowerment of the public to proactively participate in governance processes, reward of integrity and honest living, and making corrupt practices a high risk venture in Kenya.

The study notes that despite the drawbacks experienced in the fight against corruption in Kenya, significant effort has been made and notable progress realized by the relevant state agencies. However, much more remains to be done by all actors including the state agencies, citizens, leaders and other stakeholders in the quest for effective deployment of lifestyle audits to curb corruption.

Remarkably, Kenya has the potential to successfully tame corruption in the context of the Constitution, 2010. With full implementation of this Constitution through effective statutory frameworks, this goal is achievable. Indeed, the country has fought and largely won other wars before. Examples of such wars include the colonial rule defeated in 1963, single party regime in 1992, poor constitutional framework in 2010, and political instability in 2018.

With effective strategies and approaches, coupled with commitment by all actors, corruption could one day be defeated. This author looks forward to that day.

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Abbreviations and Acronyms

ACECA	Anti-Corruption and Economic Crimes Act, 2003.
AG	Attorney-General
AUCPCC	African Union Convention on Preventing and Combating Corruption
CAJ	Commission on Administrative Justice
CASB	County Assembly Service Board
CBC	Civil Service Bureau
CBK	Central Bank of Kenya
CEC	County Executive Committee
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CPI	Corruption Perception Indices
CPSB	County Public Service Board
CRA	Commission for Revenue Allocation
DCI	Directorate of Criminal Investigations
DPP	Director of Public Prosecutions
EACC	Ethics and Anticorruption Commission
EAPCP	East African Protocol on Combating and Preventing Corruption
FRC	Financial Reporting Centre
IAD	Income and Asset Declaration
IEBC	Independent Electoral Boundaries Commission
JSC	Judicial Service Commission
KACA	Kenya Anti-Corruption Authority (defunct)
KACC	Kenya Anti-Corruption Commission (defunct)
KANU	Kenya African National Union
KLRC	Kenya Law Reform Commission
KNHRC	Kenya National Human Rights Commission
KNHREC	Kenya National Human Rights and Equality Commission
KRA	Kenya Revenue Authority
LPC	Law on Prevention of Corruption
LSK	Law Society of Kenya

LSRC	Legal Sector Reform Coordinating Committee
MAT	Multi Agency Team
MP	Member of Parliament
NARC	National Rainbow Coalition
NASA	National Super Alliance
NCC	National Constitutional Conference
NCIC	National Cohesion and Integration Commission
NTSA	National Transport and Safety Authority
OAG	Office of the Auditor-General
OAG&DoJ	Office of the Attorney General and Department of Justice
PAGC	President Anti-Graft Commission (PAGC),
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
PSC	Parliamentary Service Commission
PSC	Public Service Commission
PULP	Pretoria University Law Press
SALN	Statement of Assets, Liabilities and Net
SARS	South Africa Revenue System
SCK	Supreme Court of Kenya
SRC	Salaries and Remuneration Commission
TJRC	Truth, Justice and Reconciliation Commission
TSC	Teachers Service Commission
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme

List of Constitutions and Constitutional Instruments

Constitution of Kenya, 2010

Constitution of Kenya, 1969

Constitution of Rwanda, 2003

Constitution of South Africa, 1993

Constitution of Ukraine, 1996

List of Transnational Legal Instruments

African Union Convention on Preventing and Combating Corruption (AUCPCC)

East African Protocol on Combating and Preventing Corruption (EAPCP)

United Nations Convention against Corruption (UNCAC)

List of Kenyan Statutes

Anti-Corruption and Economic Crimes Act, 2003

Anti-Money Laundering and Proceeds of Crime Act, 2009

Bribery Act, 2016

Commission for the Implementation of the Constitution Act, 2010

Commission on Administrative Justice Act, 2011

Commission on Revenue Allocation Act, 2011

Leadership and Integrity Act, 2012

Proceeds of Crime and Anti-Money Laundering Act, 2009

Public Officer Ethics Act, 2003

Public Procurement and Disposal Act, 2005

Public Service (Values and Principles) Act, 2015

List of Foreign Statutes

Law No. 25 of 2003, Rwanda

Law No. 76/2013, Rwanda

Law on Prevention of Corruption, 2014, Ukraine

Prevention and Combating of Corrupt Activities Act, 2004, South Africa

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Independent Electoral and Boundaries Commission (IEBC) v. National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR.

International Centre for Policy and Conflict & 5 others v. Attorney General & 5 others [2013] eKLR.

Moses Kasaine Lenolkulal v. Director of Public Prosecutions [2019] eKLR, Criminal Revision No. 25 of 2019

Muhammed Abdalla Swazuri & 16 others v Republic [2018] eKLR, Criminal Revision No. 13 of 2019.

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Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another [2006] eKLR

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Philomena Mbete Mwilu v. Director of Public Prosecutions and 4 Others, Petition No 295 of 2018

Republic v. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

Republic v. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-parte George Saitoti [2006] eKLR

Stephen Mwai Gachiengo & Another v. Republic, High Court Miscellaneous Application No. 302 of 2000.

Tom Ojienda t/a Tom Ojienda & Associates Advocates v. Ethics and Anti-Corruption Commission & 5 others [2016] eKLR Petition No.51 of 2015

Trusted Society of Human Rights Alliance v. Attorney General & 2 Others [2012]

CHAPTER 1

INTRODUCTION

1.1 Background to the Study

For many years, corruption in Kenya has been a major set-back and hindrance to good governance.¹ Although Kenya has made several policy, legal and administrative milestones and strategies to address corruption, there has been little or insignificant impact in the anti-corruption discourse. Corruption has instead continued to deepen its roots in every sector of Kenya's economy. This is despite the notable efforts made by the state agencies vested with the responsibility to tame the vice.²

Corruption broadly means abuse of public office for private gain and is categorized as either petty or grand corruption.³ Since 2014, levels of both petty and grand corruption in Kenya have continued to advance, which fact has been acknowledged by the Government itself.⁴ This is further evidenced by the Annual National Surveys on Corruption and Ethics undertaken by EACC⁵ and other global surveys such as the Corruption Perception Index (CPI) survey undertaken by Transparency International (TI) Kenya.⁶

¹ See generally Musambayi Katumanga and Mary Omosa (2007) "Leadership and Governance in Kenya," in Peter Wanyande, Mary Omosa and Chweya Ludeki (eds) *Governance and Transition Politics in Kenya*, University of Nairobi Press, 55-78; See also EACC Annual Baseline Surveys on Corruption and Ethics Reports 2015, 2016, 2017 and 2018 at <http://www.eacc.go.ke/about-us/> (accessed 18/10/2019).

² Despite the deeprooted and wide spread nature of corruption in the public sector, the Government has through the Executive, Parliament, Judiciary, Ethics and Anti-Corruption Commission (EACC) and Office of the Director of Public Prosecutions (ODPP), since 2017 recorded notable milestones in the fight against corruption within their respective mandates. However, levels of corruption still remain high due to the challenges discussed later in this thesis.

³ Transparency International (2018) "What is Corruption," at <https://www.transparency.org/what-is-corruption> (accessed 17/10/19); The African Centre for Economic Growth (2000) "The Link Between Corruption and Poverty : Lessons from Kenya Case Studies," at <http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN005215.pdf> (accessed 14/10/19).

⁴ Uhuru Kenyatta (2018) "President's speech of 1st June 2018 during Madaraka Day Celebrations held in Meru County," at www.president.go.ke/2018/06/01/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-2018-madaraka-day-celebrations-on-friday-1st-june-20/ (accessed on 10/10/2019). See also See the Sworn affidavit by Karanja Kibicho, Principal Secretary for the Ministry of Interior and Coordination of National Government dated 8th June 2018 in, *Okiya Omtatah Okiiti v Joseph Kinyua & 2 Others*, Petition 51 of 2018, *op. cit.* See also https://www.the-star.co.ke/news/2018/06/09/corruption-has-grown-240-over-5-years-ps-kibicho_c1770543. The affidavit was in response to a decision by the Employment and Labour Relations Court to set aside Government's decision to suspend all Heads of Procurement and Accounting Units in Ministries, Departments, Agencies (MDAs) and State Corporations.

⁵ EACC (2016), National Survey on Corruption and Ethics Report, 2015, at <http://www.eacc.go.ke/> (accessed 18/10/2019). See also Ethics and Anti-Corruption Commission (2018) "National Ethics and Corruption Survey,

Corruption has been identified as the main hindrance to the realization of good governance and sustainable development.⁷ It is in this context that calls have been made for corruption to be recognized as a “crime against humanity.”⁸ In Kenya, corruption has further been equated to a cancer which robs the society in general but more particularly the poor who are the majority of the population.⁹

The high prevalence of corruption has over the years earned Kenya a pride of place when illuminating on the most corrupt countries in the world.¹⁰ For instance in 2009, Hillary Clinton, the former US Secretary of State noted in reference to Kenya that “the absence of strong and effective democratic institutions in the country has permitted on-going corruption, impunity, politically motivated violence and lack of respect for the rule of law.”¹¹

Due to its harmful effects experienced in the country, corruption could rightly be regarded as the main reason why, Kenya, a country endowed with numerous resources continues to wallow in poverty even after fifty six (56) years of independence.¹² Corruption continues to undermine Kenya’s human rights, democracy, socio-economic well-being, growth and development and national peace and stability.¹³

Generally, the fight against corruption has been ongoing for much of Kenya’s post-independence history. Kenya has all along had in place mechanisms aimed at taming corruption. However, the strategies deployed against the vice over the years have not been sufficiently effective despite their continued implementation. This is partly shown by the institutionalized and widespread nature of the vice.

2017,’ EACC Research Report No. 6 of May 2018, at <https://www.eacc.go.ke/wp-content/uploads/2018/11/EACC-ETHICS-AND-CORRUPTION-SURVEY-2017.pdf> (accessed 20/11/2019).

⁶ *Ibid.*

⁷ See Transparency International (2005) “Millennium Development Goals are unreachable without commitment to fighting corruption,” Berlin, Germany, September 14, 2005. See also Commission for Africa (2005) “Our common interest: Report of the Commission for Africa,” Commission for Africa, London, 28.

⁸ Bantekas Ilias (2006) “Corruption as an international crime and crime against humanity: An outline of supplementary criminal justice policies,” Vol. 4 Issue 3, *Journal of International Criminal Justice*, 466-486.

⁹ *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* [2006] eKLR.

¹⁰ Kempe Hope (2013) “Tackling the corruption epidemic in Kenya: Toward a policy of more effective control,” 38(3), *Journal of Social, Political and Economic Studies*, 287–316.

¹¹ Hillary Clinton (2009) “Remarks at the 8th forum of the African Growth and Opportunity Act,” at <http://www.state.gov/secretary/rm/2009a/08/126902.htm>. (accessed 14/8/19).

¹² See Makau Mutua (2008) “Why Corruption is the Root Cause of Poverty,” *Sunday Nation*, 7/9/2008, at 18.

¹³ See Charles Hornsby (2012) *Kenya: A History Since Independence*, I.B. Tauris, London.

The Constitution of Kenya, 2010 significantly altered governance structures and brought a paradigm shift on how public affairs are managed. The Constitution introduced an aura of far reaching changes in Kenya's constitutional architecture on the fight against corruption.¹⁴ Notably, the Constitution entrenches high standards of integrity for state and public officers,¹⁵ national values and principles of governance,¹⁶ and values and principles of public service¹⁷ among others.¹⁸

Today, the fight against corruption in Kenya is anchored in the Constitution, the supreme law of the land. Various statutes have also been enacted including the Bribery Act, 2016, Leadership and Integrity Act, 2012 (LIA), Public Officers Ethics Act, 2003 (POEA) and the Anti-Corruption and Economic Crimes Act, 2003 (ACECA).¹⁹ The relevant constitutional provisions and statutes have been tested and interpreted by Courts leading to development of elaborate jurisprudence useful in the fight against corruption.²⁰

Despite the above developments, levels of corruption in Kenya remain high.²¹ This logically means that the strategies adopted against corruption in Kenya so far are not fully effective and that their review is long overdue.²²

¹⁴ Ben Sihanya (2013) "Constitutional Commissions: Experiences, Challenges and Lessons," Paper presented at the Conference on State Implementation of the Constitution since 2010, Laico Regency, November 20, 2013; *op.cit.*

¹⁵ See Chapter 6 of the Constitution generally and Article 73(2)(d).

¹⁶ Article 10 of the Constitution.

¹⁷ Article 232 of the Constitution.

¹⁸ See extensive discussions on these provisions in Chapter 2 of this Thesis.

¹⁹ These and other policy and administrative measures are discussed in detail in Chapter 2 and 3 of this thesis.

²⁰ Some of the major cases in which relevant jurisprudence has been developed include: *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR; *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR Civil Appeal No. 290 of 2012; *Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* [2006] eKLR; *Njuguna S. Ndung'u v. Ethics & Anti-Corruption Commission (EACC) & 3 Others* [2014] eKLR; *Okiya Omtatah Okioti v. Joseph Kinyua & 2 Others*. Petition 51 of 2018; *Philomena Mbete Mwilu v. Director of Public Prosecutions and 4 Others*, Petition No 295 of 2018; *Republic v. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-parte George Saitoti* [2006] eKLR.

²¹ The Ethics and Anti-Corruption Commission (EACC) Baseline Surveys on Corruption and Ethics, 2016, 2017, and 2018 record over 70% of Kenyans citing levels of corruption in the country to be high. Reports of the Auditor general for the cited years have in each year stated that public funds equivalent to over a third of Kenya's annual budget are not accounted for.

²² Stephen Nduvi (2017) "Is Wealth Declaration a Means to an End or an End in Itself in Curbing Corruption?" at <https://kippra.or.ke/is-wealth-declaration-a-means-to-an-end-or-an-end-in-itself-in-curbing-corruption/> (accessed 11/8/2019).

Lifestyle audits are one of the strategies that have failed to effectively respond to the increasing levels of corruption in Kenya. As discussed in Chapter 2 of this thesis, lifestyle audits are used to determine whether the lifestyle of an employee or state official corresponds to their known legitimate sources of income.²³ Where the subject of the audit is found to be living well beyond their known means, then that forms a good basis for investigators to suspect illicit or illegal sources of income through corruption.

Lifestyle audits are premised on the belief that one's quality of life and level of affluence are greatly informed by their financial capacity.²⁴ Any indication of incongruity between an individual's income and their lifestyle should therefore call for investigations and possible recovery of the proceeds of corruption²⁵

The lifestyle audits strategy gained more attention in Kenya when President Uhuru Kenyatta announced in June 2018 that all Government officials and their families would undergo lifestyle audits, an exercise that would begin from himself first, followed by his deputy William Samoei Ruto.²⁶

In the middle of the political conundrum that has often characterized the fight against corruption in Kenya, significant concerns were raised on the need for a specific legal framework for lifestyle audits.²⁷ The lifestyle audit exercise was commenced and finalized in respect to 600 public procurement and accounting officers serving in all public entities. It is reported that majority of these officers were cleared to return to office.²⁸

²³ See the Economics Dictionary available at <http://www.economics-dictionary.com/definition/lifestyle-audit.html> (accessed 2/6/11).

²⁴ *Ibid.* See also Jill Cottrel Ghai (2018) "Lifestyle audit and the Constitution," *Katiba Institute, op.cit.*

²⁵ *Ibid.* See also the case of *Njuguna S. Ndung'u v. Ethics & Anti-Corruption Commission (EACC) & 3 Others* [2018] eKLR; *Kenya Anti-Corruption Commission v. Stanley Mombo Amuti* [2011] eKLR; and others discussed in Chapter 2 of this thesis.

²⁶ Uhuru Kenyatta (2018) "President's speech of 1st June 2018 during Madaraka Day Celebrations held in Meru County," at www.president.go.ke/2018/06/01/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-2018-madaraka-day-celebrations-on-friday-1st-june-20/ (accessed on 10/10/2019).

²⁷ Oscar Obonyo (2018) "Legal hurdles stand in way of lifestyle audit," *Daily Nation*, Nairobi, 1/7/2018, at <https://mobile.nation.co.ke/news/politics/3126390-4640330-format-xhtml-5bqp70z/index.html> (accessed 14/10/19).

²⁸ Jeremiah Wakaya (2018) "400 procurement, accounting heads cleared in vetting," *Capital News*, Nairobi, at <https://www.capitalfm.co.ke/news/2018/08/400-procurement-accounting-heads-cleared-in-vetting/> (accessed 18/10/19).

In a related development, the Governor of Machakos County, Dr. Alfred Mutua voluntarily submitted to EACC records and details of his wealth and those of his County Executive Committee (CEC) Members seeking lifestyle audits by EACC.²⁹ The Governor's action signified that lifestyle audits are acknowledged as a viable mechanism for curbing illicit enrichment by public officials, through plunder of the public resources at their disposal.³⁰

In view of the above, there is a good case for urgent review of Kenya's anti-corruption frameworks focusing on lifestyle audits as a measure towards an effective war against corruption, which goal has remained elusive for decades.

1.2 Statement of the Problem

Whereas the business of fighting corruption in Kenya dates back to the colonial period and has continued through successive governments using a host of legal strategies contained in international treaties, the Constitution, Statutes, Regulations, policy frameworks and National Development blueprints, no meaningful progress has been made. Instead, corruption has become institutionalized and a way of life among citizens.³¹ This is despite enactment of a new and reformist Constitution with an avalanche of far reaching changes in Kenya's constitutional architecture governing the fight against corruption.³²

Lifestyle audits, which, even though not provided for in a dedicated legislation but are anchored in fragmented provisions in various statutes, form part of those strategies that have failed in the quest for a corrupt free Kenya.³³ For example, the wealth declaration system under POEA,³⁴ which is the primary framework embodying lifestyle audits has failed to save

²⁹ Standard Reporter (2015) "Machakos Governor Alfred Mutua submits details of his wealth to EACC," *The Standard*, Nairobi, 16/11/2015 at <https://www.standardmedia.co.ke/article/2000182735/machakos-governor-alfred-mutua-submits-details-of-his-wealth-to-eacc> (accessed 19/10/19).

³⁰ Walter Menya (2018) "Moment of truth for hundreds of county staff as audit begins," *Daily Nation*, 8/7/2018, at <https://www.nation.co.ke/news/Moment-of-truth-for-hundreds-of-county-staff-as-audit-begins/1056-4652022-6eowjnz/index.html> (accessed 20/10/2018).

³¹ See Ethics and Anti-Corruption Commission (2018) "National Ethics and Corruption Survey, 2017," EACC Research Report No. 6 of May 2018, *op.cit.*

³² Ben Sihanya (2013) "Constitutional Commissions: Experiences, Challenges and Lessons," Paper presented at the Conference on State Implementation of the Constitution since 2010, Laico Regency, November 20, 2013; *op.cit.*

³³ See Chapter 3 generally on the existing framework for lifestyle audits.

³⁴ The declaration of income, assets and liabilities under Part IV of POEA is popularly known in Kenya as "wealth declaration."

Kenya's public sector from its integrity quagmire. Similarly, lifestyle audits under other frameworks have not sufficiently reduced the levels of corruption in the country.

To this end, this study explores the viability of lifestyle audits as a strategy for combating and preventing corruption in Kenya by assessing the efficacy of the existing policy, legal and administrative framework.

1.3 Research Objectives

The objectives of the study are divided into two: the general or overarching objective, and the specific objectives.

1.3.1 General Objective

The general objective of this study is to examine the policy, legal, and administrative framework for lifestyle audits as an anti-corruption strategy in Kenya and recommend appropriate reform measures to enhance the fight against corruption.

1.3.2 Specific Objectives

The study focuses on four specific objectives as follows:

First, to explore the concept of lifestyle audits and their viability as an anti-corruption strategy.

Second, to analyze the policy, legal and administrative framework for lifestyle audits in Kenya and identify any weaknesses impacting on their effectiveness.

Third, to undertake case studies on the conduct of lifestyle audits in Ukraine and Rwanda and draw lessons for Kenya.

Fourth, to recommend appropriate reforms to the lifestyle audits policy, legal and administrative framework in Kenya to enhance the fight against corruption.

1.4 Research Questions

This study explores the following four (4) closely-related research questions:

First, conceptually, are lifestyle audits a viable strategy for fighting corruption?

Second, how effective is Kenya's existing policy, legal and administrative framework for lifestyle audits in combating and preventing corruption?

Third, what lessons can Kenya draw from the lifestyle audit frameworks of Ukraine and Rwanda as contained in their wealth declaration systems?

Fourth, what policy, legal, administrative and related reforms are required to enhance Kenya's framework for lifestyle audits as an anti-corruption mechanism?

1.5 Hypotheses

The research hypotheses of this proposed study are twofold:

First, that Kenya's anti-corruption efforts since independence have largely failed to deliver significant impact in the quest for corruption intolerance through various initiatives, which include lifestyle audits.

Second, Kenya's policy, legal and administrative framework for lifestyle audits as currently obtaining is a weak and insufficient tool that cannot be deployed as an effective anti-corruption strategy in Kenya.

1.6 Literature Review

This section reviews the literature as well as law and policy on the deployment of lifestyle audits as a mechanism to combat corruption in Kenya. These are discussed under two (2) broad themes: First, the legal and policy framework on lifestyle audit in Kenya. Second, the political economy and anatomy of corruption in Kenya. In each case, the study reviews the existing literature on the effectiveness or otherwise of lifestyle audits.

The study analyses the existing law and policy as well as arguments and proposals of authors of various books, chapters and Journal articles whose work is relevant to this study. A more comprehensive review of the literature is in the subsequent chapters of the study.

1.6.1 Law and Policy on Lifestyle Audits

While it has been argued that there is no solid legal basis for lifestyle audits in Kenya, especially following the announcement by President Uhuru Kenyatta that all state officers in

Kenya were to be audited from 2018,³⁵ it is imperative to note that there are salient constitutional and statutory provisions which arguably form the basis.

The Constitution of Kenya 2010 mainly forms the legal basis for all actions in the fight against corruption.³⁶ The Constitution has several articles which are general and specific in establishing the legal foundation for mechanisms of fighting corruption in Kenya.

The Constitution embodies what has been termed as “normative” and “institutional” safeguards. Normative safeguards include the values and principles of governance, and they serve the purpose of limiting governmental power and ensuring that the Government exercises power responsibly.³⁷ Institutional safeguards entail the establishment of agencies. Relevant to this thesis is the establishment of the Ethics and Anti-Corruption Commission under the Constitution³⁸ and the Ethics and Anti-Corruption Commission Act, 2011.³⁹

Corruption has been said to be most prevalent in public procurement which is regulated by the Public Procurement and Assets Disposal Act, 2015. It is estimated that over 70% of corruption cases investigated by EACC are procurement related.⁴⁰ The main purpose of the Public Procurement and Assets Disposal Act, 2015 is to maximize economy and efficiency as well as to increase public confidence in the procurement procedures. But all of these and other constitutional and statutory provisions have been breached, ignored or overlooked in many instances. It is these violations that call for lifestyle audits in order to determine whether or not the concerned public officers are engaging in illicit enrichment.

³⁵ Uhuru Kenyatta (2018) “President’s speech of 1st June 2018 during Madaraka Day Celebrations held in Meru County,” at www.president.go.ke/2018/06/01/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-2018-madaraka-day-celebrations-on-friday-1st-june-20/ (accessed on 10/10/2019).

³⁶ See Yash Ghai (2016) ‘The vision of chapter six of the Constitution of Kenya,’ *Katiba Institute, op.cit.*

³⁷ Ben Sihanya (forthcoming 2019) “Constitutional values and principles of governance in Kenya and Africa,” *op. cit*, at 8.

³⁸ Article 79 of the Constitution.

³⁹ Section 3(1) of the Ethics and Anti-Corruption Commission Act, 2011.

⁴⁰ See Edwin Mutai (2016) “EACC to carry out lifestyle audits on county officials,” *Business Daily*, Nairobi, 15/12/2016, *op. cit.* For more information on prevalence of corruption in public procurement, see also Report of the Ethics and Anti-Corruption on Corruption in Public Procurement, 2015 at <https://www.eacc.go.ke/wp-content/uploads/2018/09/Evaluation-of-corruption-in-the-public-procurement.pdf> (accessed 19/10/2019).

Several other statutes are also relevant to this discussion. These include the Leadership and Integrity Act, 2012 (LIA), Public Officer Ethics Act, 2003 (POEA), Anti-Corruption and Economic Crimes Act, 2003 (ACECA), Proceeds of Crime and Anti-Money Laundering Act, 2017 (POCAMLA), and the Public Service (Values and Principles) Act, 2015. Although these statutes have given relative authority and power to state agencies such as EACC to implement frameworks related to lifestyle audits, there is still no elaborate framework in a dedicated legislation for the conduct of lifestyle audits in Kenya.⁴¹

It is believed that the Constitution of Kenya 2010, as far as it establishes values and principles of governance, and as far as it entrenches chapter 6 on leadership and integrity, is elaborate enough to form the legal basis for lifestyle audits in Kenya.⁴² However, clear mechanisms and procedures are needed in the relevant statutes meant to give effect to these constitutional provisions.

As Ben Sihanya argues, some of the founding values at independence and those in the Constitution of Kenya 2010 have been corrupted and as such, constitutional implementation has been compromised. Sihanya captures the implementation challenge in Kenya in the following words:

“Deep seated interests pose three types of threats or challenges to the implementation of the Constitution of Kenya 2010. These interests seek to retain the *status quo*, reverse the gains, or manipulate the content, direction and pace of reform or implementation. Opportunities lie in focusing on the key agents of reform in the form of core institutions, agencies, organs, officials and individuals in Government, the political process, the academy, the private sector, civil society and international community.”⁴³

⁴¹ See Chapter 3 for extensive discussions and review of the statutes.

⁴² The question as to whether a constitutional provision can be implemented without an enabling Act of Parliament to operationalize the constitutional provision was extensively discussed in *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. In this case, the Petitioner, challenged the manner in which the IEBC sourced for a supplier of Election Materials and Ballot papers for the general elections, and, particularly the Presidential Elections scheduled for 8th August 2017. The Applicant wanted the decision by IEBC to award the tender for the printing of Election Materials and Ballot Papers for the Presidential Elections to Al Ghurair Printing and Publishing LLC, a printing company, quashed. The main argument was that IEBC awarded the tender in total disregard of National Values and Principles in Article 10 of the Constitution, specifically, public participation since members of the public and relevant stakeholders were not granted their constitutionally guaranteed opportunity to contribute to the said decision. Had IEBC involved the Applicant and other stakeholders, the Petitioner argued, it would not have arrived at the impugned decision. In quashing the decision, the High Court (Odunga, Ngugi & Mativo JJ) ruled that the enforceability of constitutional provisions does not depend on whether or not Parliament has enacted a facilitative legislation, guidelines or framework. The provisions are themselves justiciable whether or not there is a facilitative legislation, guidelines or framework.

⁴³ *Ibid.* See also Ben Sihanya (2012) “Constitutional implementation in Kenya, 2010-2015: Challenges and prospects,” FES Kenya Occasional Paper, No. 5, available at

The fight against corruption is therefore not possible without a more elaborate effort on implementation of the Constitution by all stakeholders.⁴⁴

Remarkably, a task force on the review of the legal, policy and institutional framework for fighting corruption in Kenya, was established vide Gazette Notice No. 2118 of March, 30, 2015. One of the key observations was that Kenya did not have in place an ethics and anti-corruption policy to guide an effective war against corruption.⁴⁵ Consequently, in October 2018, the National Ethics and Anti-Corruption Policy was published by the Attorney General and approved by the National Assembly on July 30, 2019.

The National Ethics and Anti-Corruption Policy 2019 acknowledges that there has been lack of clear mechanisms for lifestyle audits in Kenya. It thus provides for the development of such framework. However, the Policy does not profile lifestyle audits one of the major strategies required for revamping the fight against corruption in Kenya in line with the spirit of the new policy.

Jill Cotrel Ghai in her article on *Lifestyle Audits and the Constitution* argues that while lifestyle audits in Kenya do not have to be a voluntary process, it is also not necessary to have a substantive law to guide the “the obvious lifestyle issues.”⁴⁶

According to Ghai, a legal process would only be necessary to guide the access to other details such as bank accounts and M-Pesa transactions. She concedes that although there is

<http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/38845/full%20text%20.pdf?sequence=1> (accessed 13/7/2018); revised version in Ben Sihanya (2019) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 2*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁴⁴ *Ibid.*

⁴⁵ See Republic of Kenya (2015) “Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, at <https://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf> (accessed 19/11/2019).

⁴⁶ Jill Cottrel Ghai (2018) “Lifestyle audit and the Constitution,” Katiba Institute, 27/6/2019, at <https://www.katibainstitute.org/lifestyle-audits-and-the-constitution/> (accessed 15/10/19). This Article was in response to the assertions by Elgeyo Marakwet Senator Kipchumba Murkomen who was quoted saying that lifestyle audit is not investigations and it’s not compulsory. According to him, lifestyle audit should be a voluntary moral process and to make it legal would require some legal framework and even with that, what’s established cannot be used for prosecution. Mr. Murkomen’s views were however countered by Siaya Senator James Orenge who argued that the law has adequate provisions on lifestyle audits under section 55 of the ACECA.

some legal framework on lifestyle audits such as the Anti-Corruption and Economic Crimes Act, 2003 which allows EACC to go to court over “unexplained assets,” the law is still inadequate. Ghai notes that lifestyle audits alone are not enough in proving corruption since the law requires that the acquisition of the assets must have happened around a time when a person is suspected of being involved corruption.⁴⁷

Ghai also finds that many countries commonly carry out such exercises only for fairly senior staff in government as it would be inefficient and challenging to conduct the audits on all public officers. She concludes thus:

“As so often, we have a lot of law, but it is not really enforced. We need more than “lifestyle audits” and other gimmicks to make a difference.”

Ghai’s article is useful in informing the discussion in chapters 2 and 3 of this thesis on the effectiveness of lifestyle audits in Kenya. This study seeks to argue for a substantive legal regime for lifestyle audits far much beyond the proposals advanced by Ghai.

In reference to the lifestyle audits commissioned by Uhuru Kenyatta in 2018, Ben Sihanya has argued that the process was not fair as it appeared selective and in contravention of the law. Sihanya has argued thus:

“Life style audit was not done at all on some officers or within the framework of Chapter 6 of the Constitution on leadership and integrity. Most of the “anti-corruption” measures have been undertaken in a manner that fails to comply with fair administrative action, natural justice, due process and the rule of law under the Constitution.”⁴⁸

This raises the pertinent question in this thesis on whether or not Kenya has a clear framework on lifestyle audits, and whether lifestyle audits can effectively be deployed to combat corruption.⁴⁹

1.6.2 Political Economy of Corruption and Lifestyle Audits in Kenya

Many legal and political analysts in Kenya agree that the challenge of corruption in Kenya is not only attributable to an inadequate legal or policy framework, but implementation. David

⁴⁷ Section 55 of the Anti-Corruption and Economic Crimes Act, 2003.

⁴⁸ See Ben Sihanya (forthcoming 2019) “Amending the Constitution of Kenya 2010 Post 2017,” in Ben Sihanya (2019) *Constitutional Democracy in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁴⁹ See analysis of the legal framework on lifestyle audits in Kenya in Chapter 3.

Ndii has argued that although Kenya has employed the “most elaborate legal and institutional anti-corruption infrastructure in the world,” no difference has been realized.⁵⁰

According to Ndii, the fight against corruption is not a hardware problem, but a software problem. Scandinavian countries which are renowned for honest governments are not distinguished by anti-corruption infrastructure. Rather, the institutional framework for accountability comprised of such institutions as Government audit departments, Parliament, police and the courts can suffice in addressing the corruption menace.⁵¹

Making reference to the work of Nigerian scholar Peter Ekeh,⁵² David Ndii sums up the challenge of corruption in Kenya as follows:

“Corruption is a *sine qua non* of the post-colonial African State. You, ladies and gentlemen, are its handmaidens. Its unwritten law is that it is legitimate to rob the civic public in order to strengthen the primordial public. Until this law is repealed, so it will remain.”

This study illuminates the main political question on the fight against corruption in Kenya, presenting the practical realities behind the quest to reduce corruption through lifestyle audits. The study will inform this discourse, particularly in answering the research question on the viability of lifestyle audits in the context of Kenya’s political economy.

On Ndii’s conclusive remark that Kenya has elaborate anti-corruption laws, this thesis slightly differs with that assertion, especially in the context of the use of lifestyle audits in Kenya whose legal framework is still wanting.⁵³ This thesis argues that it is one thing to have legal frameworks on paper, and a totally different matter for the frameworks to realize the objectives of their enactment. Basically, the existence of anti-corruption laws is not a panacea to corruption in the absence of effective enforcement.⁵⁴

⁵⁰ David Ndii (2018) “Corruption and the two publics: An address that will not be given at the Anti-Corruption Convention,” *The Elephant*, Nairobi, 4/8/2018, at <https://www.theelephant.info/op-eds/2018/08/04/corruption-and-the-two-publics-an-ad-dress-that-will-not-be-given-at-the-anti-corruption-convention/>. (accessed 19/10/2019).

⁵¹ *Ibid.*

⁵² Peter Ekeh (1975) “Colonialism and the two publics in Africa,” *Comparative Studies in Society and History*.

⁵³ See analysis on the legal foundation of lifestyle audits in Chapter 3.

⁵⁴ See Chapter 3 generally.

Willy Mutunga has observed that lifestyle audits are properly anchored in the Constitution and relevant statutes.⁵⁵ According to him, for lifestyle audits to be successful, there is need to bring foreign audit firms and prescribe strict time frames for the conduct of lifestyle audits.⁵⁶ Such firms and/ or persons to conduct the audits, according to him, should be appointed by Parliament and the Judiciary and not the Executive which is always at the centre of focus. Both arms could appoint them from the corporate, private, faiths and civil society sectors as well as international participants. This thesis will enrich this discourse by exploring the extent to which the Constitution envisages lifestyle audits and critically analyse the efficacy of the lifestyle audit provisions in the current statutes.

What factors prompt, encourage or promote corruption in Kenya to warrant lifestyle audits as a mitigation measure? Some scholars have argued that historically, the centralization of power and administration of resources which was as a result of constitutional amendments from 1964 gave rise to misappropriation of resources at the expense of development.⁵⁷ However, in the wake of a devolved system of government under the Constitution of Kenya 2010, it has also emerged that devolution of power has resulted to devolution of corruption.

Prof Yash Pal Ghai had predicted this in his journal article on the structure of devolution in Kenya in 2015 when he wrote:⁵⁸

“Kenya’s politics is about greed for state office, thirst for money, and little regard to constitutional values and principles. There are no stable parties with meaningful commitment to policies. In general, where the national political parties also play a role at the county level, there is likely to be greater integration between the central and county governments — but here parties do not matter. This state of affairs may pose a threat to the proper working of devolution, for, as we have already seen, selfish interests of relevant actors determine what happens.”

Ben Sihanya, Joshua Kivuva, Obuya Bagaka had also raised the concern of the possibility of transfer of national level corruption to subnational levels.⁵⁹ County governments have since

⁵⁵ Willy Mutunga (2018) “How to do lifestyle audit, *The Elephant*, 4/8/2018, at <https://www.theelephant.info/op-eds/2018/08/04/how-to-do-the-lifestyle-audits/> (accessed 15/10/19).

⁵⁶ Willy Mutunga (2018) “How to do lifestyle audit, *The Elephant*, 4/8/2018, *Ibid*.

⁵⁷ H.W.O Okoth-Ogendo, (1999) ‘The Quest for Constitutional Government’, in Goran Hyden, Dele Olowu and Okoth-Ogendo H.W.O. (eds.) *African Perspectives on Governance*, 33–59, Trenton, New Jersey: Africa World Press.

⁵⁸ Yash Ghai (2015) “Comparative theory and Kenya’s devolution,” in Conrad N. Bosire and Wanjiru Gikonyo (eds) *Animating Devolution in Kenya: The Role of the Judiciary*, International Development Law Organization (IDLO) and Judicial Training Institute (JTI) and Katiba Institute, at 37.

become a subject of the corruption discourse in Kenya from their inception in 2013.⁶⁰ Some scholars have therefore argued that devolution widened the scope and opportunities for corruption in Kenya.

Kivutha Kibwana, Smokin Wanjala and Okech Owiti⁶¹ argue that corruption in Kenya is propped up by imperial presidential powers, and manifests itself in patrimonial rule, and also along ethnic dimensions in Government. The authors recommend the introduction of a Code of Conduct or ethics for leaders and public servants, *inter alia* set rules for obligatory disclosure of assets and investments above a certain threshold (including those of dependants). The authors basically advance lifestyle audits through a wealth declaration system.

In response to the enforcement problem that has plagued Kenya's anti-corruption campaign, the authors recommend that a commission for the enforcement of the leadership code be set up to operationalized and enforce the code. This study departs from theirs in the sense that it explores life style audits as a proactive way of monitoring the individual's lifestyle for corruption indicators as opposed to the passive manner advanced by the authors, where individuals would be asked to give information on their lifestyles through declaration of their wealth.⁶²

Further, considering that this work was published in 1996, and that since, then, there have been new constitutional and legislative developments in the anti-corruption crusade, the instant study provides a current statement on how lifestyle audits could be implemented to curb corruption taking into account Kenya's current social, cultural and political landscape.

Migai Akech attributes corruption in the Kenyan Government to predominance of arbitrary power, in the statutory order of the nation whose design grants the key actors in Government

⁵⁹ Ben Sihanya & Dr. Obuya Bagaka (2011) "Devolution: Concept, rationale and experiences," in Othieno Nyanjom (eds) *Devolution in Kenya's new Constitution*, SID Constitution Working Paper No. 4, at 8.

⁶⁰ See Auditor General Reports of 2015-2018. See also George Omondi (2019) "All counties failed tender rules, warns regulator," *Business Daily*, Nairobi, at <https://www.businessdailyafrica.com/economy/All-counties-failed-tender-rules/3946234-5180552-p8a8uuz/index.html> (accessed 18/10/19).

⁶¹ Kivutha Kibwana, Smokin Wanjala and Okech Owiti (1996) *The Anatomy of Corruption in Kenya: Legal, Political and Socio-economic Perspectives*, Claripress Limited, Nairobi, *op.cit.*

⁶² This is the current practice under the Public Officer Ethics Act, 2003.

wide range of powers without attendant mechanisms for checks and balances.⁶³ He argues that in absence of effective regulation, law often aids the abuse of power and corruption.

The author argues that the envisaged improved Government accountability under the Constitution 2010 would only be achieved if the statutory order is first aligned to the values and principles in the Constitution. Whereas Akech focuses on systems integrity only, this study mainly examines corruption as a personal integrity issue which is at the very centre of the lifestyle audits discourse.

Gerald Acquaaah-Gaisie traces the genesis of political corruption in post-independence Kenya to the accumulation of state resources by top state officials.⁶⁴ In addition, he comments that an ostentatious lifestyle often accompanies corruption, whereby elites have access to monies beyond their salaries. He opines that effective fight against political corruption is hampered by the fact that political actors are elites who, by virtue of their lifestyles, command wide respect. This makes the law enforcement agencies to turn a blind eye to their lifestyles.

He proposes that given the unlikelihood of prosecuting high profile personalities locally, there is need for the tougher international laws requiring wealth and conflict of interest disclosures including declarations relating to the state officials' spouses and their dependants. The point of departure from the work of this author is that while he argues for enforcement of international laws on lifestyle audits, this study focuses on local legal and administrative frameworks for mainstreaming lifestyle auditing.⁶⁵

1.7 Justification, Significance and Contribution of the Study

This study is of utmost importance as it seeks to explore a strategy that could be developed or strengthened in Kenya to effectively combat and prevent corruption. Kenyans continue to

⁶³ Migai Akech (2011) "Abuse of power and corruption in Kenya: Will the new Constitution enhance Government accountability?" at SSRN: <http://ssrn.com/abstract=1838102> (accessed 14/10/19), *op.cit.*

⁶⁴ Gerald Acquaaah-Gaisie (2004) "Combating Third World Corruption", Presented at the Quest for Good Global Governance workshop in August 2004, at <http://www.buseco.monash.edu.au/mgt/research/governance/pdf-downloads/g-acquaah-wshop.pdf> (accessed 14/10/19).

⁶⁵ In stead of relying on declarations made by public officials regarding their assets, this study argues for proactive measures to obtain the information required, which would form the basis for investigations. The study proposes mechanisms for proactively monitoring the lifestyle of individuals and how various stakeholders including the civil society and the public in general can be involved. This shifts the focus to make it a demand side mechanism, contrary to the supply side mechanism proposed by the author.

lose billions of shilling and worthwhile properties to perpetrators of corruption who often escape penalties, courtesy of weak anti-corruption frameworks.⁶⁶ This study is therefore timely and will positively impact on the fight against corruption in at least five critical ways:

First, the study responds to the challenge of absence of effective frameworks for implementation of Chapter 6 of the Constitution as anticipated under Article 80 of the Constitution.⁶⁷ The study therefore informs the current debate and public clamor for effective enforcement of Chapter 6 of the Constitution.⁶⁸

Second, although Kenya has put in place various pieces of anti-corruption legislation, corruption continues to thrive.⁶⁹ This study argues that corruption remains the biggest threat to Kenya's prosperity and in this regard, any study probing corruption in Kenya with a view to reinvigorating the anti-corruption strategies is of paramount importance and ought to be encouraged.

The study therefore contributes to Kenya's anti-corruption policy, legal and administrative framework by sufficiently mainstreaming lifestyle audits into the governance process. In doing so, the study is timely as it comes in the wake of increasing public clamor for eradication of corruption on one hand, and Government's demonstrated political will to tackle corruption on the other hand.⁷⁰

⁶⁶ See Makau Mutua (2019) "Legal formalism is the pagan's sword against war on corruption," *Sunday Standard*, Nairobi, 1/20/2019; Makau Mutua (2018) "To end corruption, Uhuru should ban harambees by state officials," *Standard on Sunday*, 2/12/2018.

⁶⁷ Chapter 6 of the Constitution provides for leadership and integrity. See also *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR ; Ben Sihanya (forthcoming 2019) "Constitutional values, principles and policies: agency and structure in Kenya and Africa," in Ben Sihanya (2019) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁶⁸ The debate on implementation of life style audits to curb rampant corruption among public officials has gained momentum since 2018. This is discussed earlier in this Chapter and further in Chapter 3.

⁶⁹ EACC (2019) Annual Report of the Ethics and Anti-Corruption Commission for the Financial Year 2018/2019.

⁷⁰ See Makau Mutua (2018) "Anti-graft mood prevailing in Kenya should be clad in iron," *Daily Nation*, Nairobi, 18/8/2019, at <https://www.nation.co.ke/oped/opinion/Anti-graft-mood-prevailing-in-Kenya-should-be-clad-in-iron/440808-5239414-59xu5h/index.html> (accessed 18/10/19). The Jubilee Government under President Uhuru Kenyatta has been quoted in several instances as expressing an intention to fight corruption. See the President's State of the Nation address on March 26, 2015 when he asked senior government officials including his cabinet secretaries to step aside for investigations. See also the Madaraka Day speech in 2018 when he reaffirmed his commitment to the fight and asked heads of accounting and procurement units in Government to step

Third, corruption is a persistent challenge and existing literature should be consistently reviewed to align anti-corruption strategies to emerging trends. This is the gist of this study, given the scarcity of literature and jurisprudence on lifestyle audits as a strategy against corruption.

Fourth, the study draws lessons and best practice from other jurisdictions which have done better than Kenya in the deployment of lifestyle audits through various frameworks.⁷¹ Such lessons are necessary in addressing the gaps that have impeded effective enforcement of Kenya's law.

Fifth, the study constitutes the researcher's personal contribution to the war against corruption ensuing from the responsibility of each individual citizen to participate in governance processes and defend the Constitution.

1.8 Conceptual and Theoretical Framework

This section discusses the conceptual and theoretical framework for the study.

1.8.1 Conceptual Framework

The conceptual framework defines two related concepts on the theme. These are: lifestyle audits and corruption.

1.8.1.1 Conceptualizing Lifestyle Audits

According to Jill Cottrel Ghai, a lifestyle audit is an inquiry into a person's living standards to determine if it is consistent with their reported income. The objective of lifestyle audits is to identify pointers to corruption or other unlawful practices that may have enabled the person being audited to live beyond their means.

According to Willy Mutunga, lifestyle audits are also about "conspicuous consumption reflected in expenditures of expensive capitalist toys, travel, residential housing, skyscrapers,

aside for lifestyle audits. ; Makau Mutua "President Uhuru Kenyatta's corruption war is a landmine, will he stay the course," *Sunday Standard*, Nairobi 12/4/2015.

⁷¹ These 3 countries have vibrant regimes for lifestyle audits through effective management and monitoring of assets declarations by public officials.

charity and philanthropy, investing abroad, food and booze, and day to day expenses incurred in carrying out a particular lifestyle.”

Lifestyle audits, according to Mutunga, seek to find out where the money to sustain such lifestyle comes from. If it is found to be proceeds of corruption, the public officer involved is held criminally liable.

Chapter 2 of this thesis explores this concept in more detail.

1.8.1.2 Conceptualizing Corruption

Corruption is an elusive term to define but incredibly easy to recognize.⁷² It is derived from a Latin word *corruptus*, which means to destroy. The term has many definitions based on context. However the globally accepted definition is the abuse of public power or authority to advance a private interest or an unlawful act that involves abuse of public resources for a private gain.⁷³ World Bank defines corruption as abuse of public authority for the purposes of acquiring personal gains.⁷⁴

Under section 2 of ACECA, “corruption” has at least seven connotations. First, it means an offence under any of the provisions of sections 39 to 44, 46 and 47 of the ACECA. Second, it means bribery. Third, it means fraud. Fourth, it means embezzlement or misappropriation of public funds. Fifth, it refers to abuse of office. Sixth, it means breach of trust. Seventh, it refers to an offence involving dishonesty in connection with taxes, rates and levies under any under any written law.

ACECA also makes reference to an economic crime. Under section 2 of ACECA, ‘economic crime’ means (a) an offence under section 45; or (b) an offence on dishonesty under any written law providing for the maintenance or protection of public revenue. Analysis of an economic crime shows that it focuses on fraudulent acquisition of public revenue and

⁷² See Aaron Ringera (2011) Speech delivered at the Commonwealth Lawyers Conference, Nairobi, at <http://www.kacc.go.ke/archives/speeches/Commonwealth-Conference.pdf>. (accessed on 16.08.2019).

⁷³ Rose Ackerman “Corruption and Democracy,” (1996) 90 *American Society of International Legal Proceedings* 83.

⁷⁴ David Kaufmann (2004) “Corruption, Governance and Security: Challenges for the Rich Countries and the World,” World Bank Global Competitiveness Report 2004/2005 at http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf (accessed 16/8/2019).

property as opposed to other corruption offences. The statutory definition under ACECA shows that corruption is multi-faceted and has many ingredients.⁷⁵

This study adopts the definition under ACECA for the purposes of the discussion herein.

1.8.2 Theoretical Framework

There are several theories that offer credible insights on corruption. For the purposes of this study, two theories will be deployed. First, the study considers the rational choice theory. Second, the study discusses the institutional theory.

1.8.2.1 Rational Choice Theory

The rational choice theory was first developed by economic theorists including Adam Smith.⁷⁶ The theory states that individual choices are guided by an individual's pursuit of best interests and that an individual applies rational calculations to make rational choices which are aimed at achieving outcomes aligned to their personal goals.⁷⁷

The gist of this theory is that people's choices over the available alternatives are guided by a set of preferences and each preferred choice is ordinarily geared towards maximizing gain while mitigating loss. This means that a preference to a particular choice would be because the preferred choice has more benefits than its costs. It is those rational choices by individuals which direct or govern their conduct.

This theory presumes existence of rational actors which are the individuals in an economy making rational choices based on rational calculations and rationally available information.⁷⁸ In respect to the study herein, it argued that more often than not, individuals occupying state and public offices have incentives to pursue their own self-interest, rather than work with

⁷⁵ The Bribery Act, 2016 also makes reference to the definition in the Anti-Corruption and Economic Crimes Act, 2003.

⁷⁶ William H. Riker (1995) "The Political Psychology of Rational Choice Theory," Vol. 16, No. 1, *Political Psychology*, Blackwell Publisher, Cambridge.

⁷⁷ *Ibid.*

⁷⁸ Akhilesh Ganti (2019) "Rational Choice Theory," *Investopedia*, at <https://www.investopedia.com/terms/r/rational-choice-theory.asp> (accessed 19/10/19).

others in the respective institutions towards the collective good of the country and the people they are entrusted to serve.⁷⁹

However, there are valid arguments against this theory. For instance, individuals do not always make rational utility-maximizing decisions.⁸⁰

The rational choice explanations for corruption also form the basis for the principal agent theory approach. Under this approach, citizens are the principals and they give power to political leaders or bureaucrats (agents) to act on their behalf.⁸¹ The leaders are put in positions where they are expected to work for the benefit of the public, for instance to make and implement laws, provide services and protect the country.

Agents are more likely to act in ways that maximize their own interests rather than those of the principal.⁸² This happens especially when information asymmetries exist and the principal cannot fully monitor the agent's behaviour.⁸³ The assumption that individuals are rational actors gives opportunities for leaders to make self-benefiting decisions using their positions.

Corruption in Kenya's public sector is linked to the greed of individuals occupying positions of authority who often make decisions aimed at securing personal interests.⁸⁴ The study on lifestyle audits on the said individuals is therefore be enriched by this theory.

⁷⁹ See Kendra Dupuy (2000) "Functionalist and rational choice theories of corruption," Anti-Corruption Resource Center, *Cognitive Psychology of Corruption*, U4 - Chr. Michelsen Institute, at <https://www.u4.no/methodology-of-the-u4-issue-on-the-cognitive-psychology-of-corruption> (accessed 19/10/19).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.* See also Javlon Juraev (2018) "Rational choice theory and demand for petty corruption," Vol.5 No.2, *Journal of Eastern European and Central Asian Research*, Norwegian Institute of International Affairs, Norway.

⁸⁴ See George Kegoro (2013) "By conduct, we have repudiated the Constitution," *Daily Nation*, Nairobi, 19/10/2013, at <https://mobile.nation.co.ke/blogs/We-have-repudiated-the-Constitution/1949942-2039424-format-xhtml-13962v8z/index.html> (accessed 18/10/19).

1.8.2.2 Institutional Theory

The institutional theory, as advanced by Scott focuses on the processes by which social structures or frameworks including rules, norms, and routines, become established and recognized as authoritative benchmarks for social behavior.⁸⁵

The theory argues that the frameworks are continuously under renewal and transformation through socialization processes.⁸⁶ It is the progressive development, adoption and implementation of these frameworks over a period of time which culminates into institutions. Scott indicates that in order to survive, institutions must conform to the rules and belief systems prevailing in the environment. Because of structural and procedural institutional isomorphism, the organization subsequently earns legitimacy.⁸⁷

Kenya's strategies to curb corruption revolve around institutions such as EACC, Judiciary, DPP, and DCI. Kenya's social, political and economic set up since independence has been designed to institutionalize corruption and embed it in the deep roots of many government agencies.⁸⁸

This theory provokes the debate on how social norms and cultures in Kenya should be redefined, as a way of re-orienting the "software" challenge on corruption as conceptualized by David Ndii.⁸⁹

1.9 Research Methodology and Techniques

This thesis primarily relied on data obtained through study, review and analysis of available information and literature on the use of lifestyle audits as a strategy to combat and prevent corruption. The focus was mainly on Kenya.

⁸⁵ Scott Robert (1987) "The adolescence of institutional theory," *Administrative Science Quarterly*, Vol. 32, 493-511.

⁸⁶ *Ibid.*

⁸⁷ Scott Robert (1987) "The adolescence of institutional theory," *ibid.*

⁸⁸ See Alan Doig (1995) "Good government and sustainable anti-corruption strategies: A role for independent anti-corruption agencies?," *Public Administration and Development*, VOL. 15, 151-165

⁸⁹ See Literature review above.

The literature sources include: First, textbooks, journals, reports, reports of Commissions of Inquiry, Government Development blueprints, bibliographic databases and internet search engines targeting both published and unpublished materials on the research subject that focus on Kenya. Newspaper and magazine articles with current and historical information about Kenya and political corruption which cover relevant expert, policy and public debates are also analyzed.

Second, the Constitution of Kenya 2010 and the statutes enacted to operationalize various provisions of the Constitution on integrity, good governance and the fight against corruption are extensively analyzed. So is the case law on anti-corruption issues in Kenya focusing more on the emerging jurisprudence on judicial interpretation of the anti-corruption law, where appropriate.

Third, reference is also made to the literature, law and policy of Ukraine and Rwanda whose lifestyle audits frameworks through wealth declaration systems are discussed as case studies in Chapter 4 of this thesis. The lessons and best practice identified inform proposals and recommendations on how Kenya could reform its lifestyle audits framework for a better approach to combating and preventing corruption.

After reviewing the relevant literature, law and policy as shown above, the process of writing and submission in preparation for dissemination ensued.

1.10 Challenges

The main challenge experienced in this study was the scanty substantive literature on the subject of lifestyle audit in Kenya. This study therefore contended with the available academic authorities and made appropriate deductions from judicial authorities, as well as case studies of Ukraine and Rwanda where lifestyle audits through wealth declaration systems have worked with relative success.⁹⁰

⁹⁰ See more detailed discussion in Chapter 4 of this thesis.

1.11 Delimitation of the Study

This study only focused on lifestyle audits as a strategy to combat and prevent public sector corruption in so far as they have been implemented as such. The study mainly delved into the four major frameworks in Kenya that embed lifestyle audits but with a specific focus on Kenya's wealth declaration system. Similarly, lessons drawn from two selected jurisdictions namely Ukraine and Rwanda mainly focused on wealth declaration systems which are the main form of lifestyle audits in Kenya and the selected countries.

The study also considered tax administration by the Kenya Revenue Authority (KRA) and monitoring of financial transactions of individuals under the Proceeds of Crime and Anti-Money Laundering Act, 2017 (POCAMLA) as important tools with aspects of lifestyle audits.

1.12 Chapter Outline

The thesis is organized in five chapters as follows:

1.12.1 Chapter 1: Introduction

This chapter is an introduction to the research topic, statement of the research problem, objectives, research questions, hypotheses, conceptual and theoretical framework, literature review, research methodology and scope of the study.

1.11.2 Chapter 2: Role of Lifestyle Audits in the Fight Against Corruption

The chapter presents the philosophical underpinning of lifestyle audits as a strategy for combating and preventing corruption. It conceptualizes lifestyle audits and provides the process, methods, merits and demerits of lifestyle audits as an accountability tool in public service.

The Chapter further explores the rationale of lifestyle audits using various frameworks and discusses the viability of the strategy in the context of Kenya's political economy of corruption.

1.11.3 Chapter 3: The Policy, Legal and Administrative Framework for Lifestyle Audits in Kenya

This chapter critically analyses the lifestyle audit aspects in the existing policy, legal and administrative frameworks for the fight against corruption in Kenya. The chapter points out key weaknesses in the Constitution, POEA, ACECA and LIA among others in so far as they envisage or provide for lifestyle audits. Special focus is given to the wealth declaration system in Kenya under POEA as the primary embodiment of lifestyle audits.

Further discussed in this Chapter is the President's Proclamation of 1st June 2018 requiring all heads of accounting and procurement units in Kenya to undergo lifestyle audits. Kenya's Lifestyle Audit Bill, 2019 is also critically appraised under this Chapter.

The chapter also notes the potential of the tax administration regime under the auspices of the Kenya Revenue Authority (KRA) and monitoring of financial transactions under POCAMLA, in enhancing lifestyle audits.

1.11.4 Chapter 4: Best Practice from Other Jurisdictions on Lifestyle Audits as an Anti-corruption Strategy

This chapter explores the conduct of lifestyle audits as an anti-corruption strategy in Ukraine and Rwanda, and draws lessons that Kenya could adopt as best practice in reforming its lifestyle audits through the wealth delaration framework.

1.11.5 Chapter 5: Conclusion and Recommendations

This Chapter contains the conclusion of the study as informed by the findings and makes recommendations for reform of the lifestyle audits framework in Kenya. The Chapter further gives general recommendations to complement the lifestyle audit framework.

In addition, the chapter identifies future research areas drawing from critical issues related to the study which emerged during the research process.

CHAPTER 2

ROLE OF LIFESTYLE AUDITS IN THE FIGHT AGAINST CORRUPTION

2.1 Introduction

This Chapter explores and argues for the proposition that lifestyle audits are an effective tool for combating and preventing corruption. The Chapter presents a background on the practice of lifestyle audits as conceptualized by different authors and considers their viability as a strategy in the fight against corruption in Kenya in the context of Kenya's political economy of corruption.

2.2 The Concept of Lifestyle Audits

Lifestyle audits have been christened as audits consisting of analysis of amalgamated reports from various databases regarding the living standards and assets or income worth of an individual.⁹¹ As discussed earlier in Chapter 1,⁹² the primary goal of a lifestyle audit is to detect corrupt conduct by ascertaining if the living standard of an individual is commensurate to or in tandem with their income stream.⁹³ The audits appeal to common sense that abnormal expenditure of a lot of money should imply that such money is coming from somewhere.⁹⁴

In cases where the lifestyle audits reveal a significant gap between an employee's income and the lifestyle the employee leads, then further inquiry on the sources of the income supporting such lifestyle is done.⁹⁵ This inquiry may well extend to any other gainful economic activities that such employee may be engaged in as well as any opportunities for possible corruption within the organization that may be open to them.⁹⁶

Lifestyle audits primarily involve an investigation into the ways of living or lifestyle of a public officer to determine consistency with their income.⁹⁷ This is premised on the belief that public officials living extravagantly beyond their means may be involved in corruption.⁹⁸

⁹¹ Steven Powell (2011) "Lifestyle audits are a critical management tool to identify fraud," at <http://documents.lexology.com/ae0e573a-4da1-41e1-9a50-7278870d4796.pdf> (accessed 25/10/2019).

⁹² Chapter 1.1 and 1.6.

⁹³ Steven Powell (2011) "Lifestyle audits are a critical management tool to identify fraud," *op. cit.*

⁹⁴ *Ibid.*

⁹⁵ Steven Powell (2011) "Lifestyle audits are a critical management tool to identify fraud," *op. cit.*

⁹⁶ *Ibid.*

⁹⁷ Steven Powell (2011) "Lifestyle audits are a critical management tool to identify fraud," at <http://documents.lexology.com/ae0e573a-4da1-41e1-9a50-7278870d4796.pdf> (accessed 25/10/2019).

⁹⁸ *Ibid.*

The lifestyle audits illuminate the public officers' properties, income and standards of living.⁹⁹

It is however noteworthy that lifestyle audits alone are not an exact indicator that corruption is occurring.¹⁰⁰ They are thus not conclusive evidence of corruption and are therefore not on their own fully effective in arresting incidences of corruption.¹⁰¹ Indeed, the results of such an audit must be complemented with further evidence for any conclusive finding on corruption to be made.

This is particularly so because an individual may sustain a flamboyant and ostentatious lifestyle as a result of inherited wealth, a family member who provides financial support or otherwise by the grace of God. Nevertheless, lifestyle audits are a justifiable and effective barometer of the extent of corruption risk within an organization.¹⁰²

Kenya's Lifestyle Audits Bill of 2019 also defines lifestyle audits. The Bill refers to a "lifestyle audit" as "an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income."¹⁰³ It is particularly noted that this proposed legal definition in Kenya adopts the phrases "lawfully obtained" and "reported income."

This study finds the two phrases in the definition of lifestyle audits to be of utmost importance in the sense that the phrase "lawfully obtained" signifies that the law does not criminalize wealth creation and accumulation by any Kenyan so long as the same is done within the law. It therefore means that the law will only be applied where a public officer is unable to account for what they possess.¹⁰⁴ This appears to be the gist of the Bill.¹⁰⁵

⁹⁹ See general Jill Cottrel Ghai (2018) "Lifestyle Audit and the Constitution," *Katiba Institute*, 27/6/2019, at <https://www.katibainstitute.org/lifestyle-audits-and-the-constitution/> (accessed 15/10/19).

¹⁰⁰ Coenen. Thomas (2009) "Expert fraud investigation," Hoboken, NJ Wiley.

¹⁰¹ Van Rooyen (2008) *The practitioner's guide to forensic investigation in South Africa*, Henmar, Pretoria, at 96.

¹⁰² Steven Powell (2011) "Lifestyle audits are a critical management tool to identify fraud," *op. cit.*

¹⁰³ Lifestyle Audit Bill 2019, sec 2 at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/TheLifestyleAuditBill_2019.pdf (25/10/2019). See analysis of the Bill in Chapter of this thesis.

¹⁰⁴ Haggard Sila and Robert Kaufman (1995) *The Political Economy of Democratic Transitions*, Princeton University Press, New Jersey, USA; Rotberg, R. I., (2017) *The Corruption Cure: How Citizens and Leaders Can Combat Graft*, Princeton, NJ, Princeton University Pres, 223.

On the other hand, the phrase “reported income,” implies that the law is not concerned with the wealth that is lawfully created and accumulated so long the relevant taxes are duly paid and requisite returns made through reporting to the agencies established by law for that purpose. The Bill therefore defines lifestyle audits to mean that failure to fully report one’s income through tax returns or other prescribed modes could imply possible tax evasion, money laundering and other illicit activities constituting corruption.¹⁰⁶

As discussed later in this Chapter, South Africa has prominently applied the approach of “reported income” as envisaged in Kenya’s Lifestyle Audits Bill 2019, as a strategy for prevention of tax evasion.

2.3 Grounds for Initiating Lifestyle Audits

The question of what would trigger a lifestyle audit on a person is important. Given that lifestyle audits are an intrusive investigative tool, there must be a proper basis for subjecting a person to this process lest the constitutionally protected right to privacy would be violated.¹⁰⁷

This position was aptly captured by the Court in *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* where the Court held that sections 26, 27 and 28 of ACECA which had been challenged for violating the right to privacy are proper investigative provisions aimed at saving time for EACC.¹⁰⁸

There appears to be a general consensus that before undertaking a lifestyle audit on a person, there ought to be certain circumstances that attend to a particular transaction or activity that point to possible corruption warranting the conduct of a lifestyle audit.¹⁰⁹ This standard is perhaps informed by the fact that a lifestyle audit is a complex, cumbersome and expensive

¹⁰⁵ See Clause 3 of the Lifestyle Audit Bill 2019.

¹⁰⁶ See Chapter 1 on conceptualization of the term “corruption.”

¹⁰⁷ Article 31 of the Constitution of Kenya 2010.

¹⁰⁸ *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* [2006] eKLR Civil Application 43 of 2006. See Chapter Two.

¹⁰⁹ See generally Purchasing and Procurement Center (2017) “Purchasing and Procurement Ethics, Gifts & Gratuities,” at <https://www.purchasing-procurement-center.com/purchasing-and-procurement-ethics.html> (accessed 4/5/2019).

process which also abridges the privacy rights of the individual who is the subject of the lifestyle audit.¹¹⁰

Notwithstanding the above, I argue to the contrary that in a country such as Kenya, where most public officers are inherently corrupt,¹¹¹ there need not to be a consideration of a strong basis before undertaking a lifestyle audit on a corruption suspect. Subject to the Constitution, the lifestyle audit tool should be applied proactively on all public officers randomly especially those working in corruption prone areas as a measure to pre-empt engagement in illicit enrichment.

2.4 Objective of Lifestyle Audits

Investigators, forensic auditors and management of organizations occasionally employ lifestyle audits to detect incidences of corruption in their organizational structures.¹¹² Where lifestyle audits are conducted on employees, it is also usually referred to as “suspect employee profiling” or even euphemistically called business intelligence.¹¹³

The overriding objective of lifestyle audits is to provide a corruption detection and prevention mechanism.¹¹⁴ These audits enable investigators to get information relating to an individual, sometimes in a discreet manner, which make corruption investigations more effective.¹¹⁵ In the end, lifestyle audits serve the legitimate purpose of ensuring that employees do not use their positions of trust for self-gain to the detriment of their employers.¹¹⁶

2.5 Lifestyle Audit Methods

Law enforcement agencies in various countries employ various mechanisms and methods to determine whether or not monies or income due to an individual has originated from illicit

¹¹⁰ Steven Powell (2011) “Lifestyle audits are a critical management tool to identify fraud,” *op. cit.*

¹¹¹ See Ethics and Anti-Corruption Commission (2018) “National Ethics and Corruption Survey, 2017,” EACC Research Report No. 6 of May 2018, *op.cit.* See also Wachira Maina (2018) *State Capture: Inside Kenya’s inability to fight Corruption, op.cit.*

¹¹² Steven Powell (2011) “Lifestyle audits are a critical management tool to identify fraud,” *op. cit.*

¹¹³ *ibid.*

¹¹⁴ F Kass-Shraibman & VS Sampath (2011) *Forensic accounting for dummies*, Indianapolis, IN Wiley, at 180.

¹¹⁵ *Ibid*, at 180.

¹¹⁶ *ibid.*

activities.¹¹⁷ The ensuing sections discuss the three (3) main methods deployed in the conduct of lifestyle audits.

2.5.1 Net-worth Analysis Method

The net worth method¹¹⁸ of conducting lifestyle audits focuses on the known assets and liabilities of an individual and the changes that may have occurred over the years particularly during the period of interest.¹¹⁹

In the application of this method, investigators compare the income and expenses of an individual by subtracting one's liabilities from their assets to get their net worth for a specific period.¹²⁰ Once this net worth is obtained, it is compared with the known income of the individual over the period under consideration.¹²¹

If a difference is found to exist between the individual's net worth and the legitimately known income of the individual, the additional assets are deemed to have been acquired from unlawful or unknown sources which may point to corruption unless otherwise explained.¹²²

The net worth method of lifestyle audits has been reported as the most basic and most commonly used method of conducting the audits.¹²³ In addition to helping investigators to make sense of one's lifestyle as pointed out earlier, the method gives circumstantial evidence of any income that may be hidden.¹²⁴

¹¹⁷*Ibid.*

¹¹⁸ The net worth of an individual is arrived at after subtracting the grand total of their liabilities from the grand total of their assets.

¹¹⁹ Association of Certified Fraud Examiners (2012) *Fraud examiners manual*, Austin, TX: The Association, at 821.

¹²⁰ Coenen, T.L. (2009) *Expert fraud investigation*. Hoboken, NJ: Wiley.

¹²¹ The analysis may involve scrutinizing public records and legitimately acquired private records. The investigator assembles information such as known purchases of real estates, automobiles, personal possessions and other assets. Examples of liabilities that could be considered include mortgages, personal loans, personal credit cards and trade credits.

¹²² TL Coenen (2009) *Expert fraud investigation* (Hoboken, NJ: Wiley, 172.

¹²³ J Madinger & SA Zalopany (1999) *Money laundering –a guide for criminal investigations* (Boca Raton, FL: CRC Press, at 149.

¹²⁴ JE Turner (2011) *Money laundering prevention: deterring, detecting and resolving financial fraud*, Hoboken, NJ: Wiley.

This study has established that Kenya is yet to adopt this method which could have been applied in the monitoring of declaration of wealth of public officers were it not for the challenges in the legal framework discussed in Chapter 3 of this thesis.¹²⁵

2.5.2 Surveillance Method

The other method of conducting lifestyle audits is through surveillance. Surveillance involves a physical visit, sometimes discreetly, and use of sophisticated technological equipment, with a view to gathering information about the person being audited or their affairs.

Unlike the net worth analysis method which is rarely conducted in Kenya,¹²⁶ the surveillance method of lifestyle audits is the most common method which is applied by law enforcement agencies as they execute their mandates.¹²⁷ The surveillance method has been deployed by governments for several decades and though arguably unethical and illegal in some situations, it still presents an avenue through which useful and valuable financial information for curbing corruption is obtained.

2.5.3 Administration of Lifestyle Questionnaires

The administration of a lifestyle questionnaire is another important method of conducting lifestyle audits. In this case, the questionnaire asks various questions about one's lifestyle, how one maintains it and where they get the requisite funds from. The issuance of questionnaires may be triggered by various incidents including the submission of incorrect tax returns to the revenue authority or due to reporting of any suspect corruption transactions such as possession of unexplained wealth.¹²⁸

For instance, lifestyle questionnaires are used in South Africa to shed light on whether one's living expenses on a monthly basis can be supported or accommodated within their income.

¹²⁵ See Chapter 3.

¹²⁶ The net worth analysis method is anticipated under the Public Officer Ethics Act, 2003 in the verification of wealth declaration forms submitted by public officers. However as seen in Chapter 3 of this thesis, declaration of wealth in Kenya is a ritual with little law enforcement value. Public officers submit wealth declaration forms that are stored without any analysis undertaken.

¹²⁷ See the Ethics and Anti-Corruption Commission Act, 2011 and the National Intelligence Service Act, 2012. See also discussions in Chapter 3.

¹²⁸ S Temkin (2011) "Lifestyle audits for ordinary citizens too," *Business Day Online*, 8/9/2011.

In the South Africa's case, the questionnaires are normally completed by taxpayers who are subjects of the audit.¹²⁹ This is discussed in more detail later in this Chapter.

In Kenya, similar questionnaires were administered during the lifestyle audit of senior procurement and accounting officers in Government Ministries, Departments and Agencies (MDAs).¹³⁰

2.6 The General Lifestyle Audit Process

Lifestyle audits usually occur routinely, in specific periods when there have been instances of corruption within an organisation or government entity or when there are individuals who appear to be living beyond their means.¹³¹ The process targets all forms of income, assets and liabilities of an individual, the modes of acquisitions and the lifestyle that the individual leads.¹³² An ideal lifestyle audit process has six stages as discussed in the sections below.

2.6.1 Identification of the Subject of the Audit Process

Accurate identification of the subject of the lifestyle audit process¹³³ is the first step investigators engaged in lifestyle audits ought to take. The process begins with investigation of the most logical subjects, those whose lifestyle does not appear to match with their known income. Thereafter, the process may be extended to the less obvious subjects.¹³⁴

2.6.2 Suspect Profiling

The second step in the lifestyle audit process is the profiling of the subject who has been identified as most likely to have engaged in corruption. The main business at this stage is to gather information about the suspect, most of which is basic in nature.¹³⁵ This includes the suspect's residence, identity such as names including their initials, abbreviations, variations,

¹²⁹ See chapter 2.5.5 below.

¹³⁰ See chapter 3.

¹³¹ See Willy Mutunga (2018) "How to do lifestyle audit, *The Elephant*, 4/8/2018, at <https://www.theelephant.info/op-eds/2018/08/04/how-to-do-the-lifestyle-audits/> (accessed 15/10/19), *op.cit.*

¹³² Madinger, J. & Zalopany, S.A. (1999) *Money laundering – a guide for criminal investigations*, Boca Raton, FL: CRC Press.

¹³³ Jackson, J.L. & Bekerian, D.A. (eds.) (1997) *Offender profiling: Theory, research and practice*, Wiley, Chichester.

¹³⁴ Kass-Shraibman & Sampath, *op.cit.*, at 184.

¹³⁵ Deloitte (2002) *The asset forfeiture unit guide on introduction to tracing assets*, Deloitte, Johannesburg, 34.

full names; date of birth; last known address; identity number or passport numbers and telephone numbers.¹³⁶

During suspect profiling in respect to property ownership, forensic investigators need to accurately identify where to commence their investigations.¹³⁷ This requires an investigator to know where the suspect conducts their affairs.¹³⁸ Given that property ownership can transcend jurisdictional areas or even national boundaries as well as the fact that even cross-border and global transactions take place, it is important for investigators to extend their focus beyond the obvious places and horizons.¹³⁹

Other relevant information for suspect profiling includes professional licences, financial information, criminal records, hobbies, education, bankruptcy and insolvency records; business relationships employment history; probate and death records, wills, family relationships including maiden names, marriage and present intimate relationships.¹⁴⁰

The information collected at this profiling stage should also include patterns of behaviour exhibited by the suspect.¹⁴¹ The rationale of the profiling at this stage is to give each suspect their uniqueness and distinguish them from one from the other.¹⁴²

2.6.3 Identification of all the Individual's Assets and Liabilities

The third step following suspect profiling is to identify all the individual's assets against the liabilities.¹⁴³ Assets in this context mean all valuable items including cash at hand, cash at the bank, receivables and all forms of valuable property.¹⁴⁴ Liabilities on the other hand connote

¹³⁶ *ibid.*

¹³⁷ Van Rooyen, H. (2008) "The Practitioner's Guide to Forensic Investigation in South Africa," Pretoria, Henmar

¹³⁸*ibid.*, at 35. See also Jackson, J.L. & Bekerian D.A. (eds.) (1997) *Offender profiling: theory, research and practice*. Chichester, Wiley.

¹³⁹*ibid.*

¹⁴⁰ Willy Mutunga (2018) "How to do lifestyle audit, *The Elephant*, 4/8/2018. See also Jackson, J.L. & Bekerian, D.A. (eds.) (1997) *Offender profiling: Theory, research and practice, op.cit.*

¹⁴¹ Jackson, J.L. & Bekerian, D.A. (eds.) (1997) *Offender profiling: Theory, research and practice, op. cit.* at 192.

¹⁴² See the process in Kenya in 2018, Geoffrey Mosoku (2018) "Officers' horror as audit includes lie detector test," *The Standard*, Nairobi, 28/11/2019 at <https://www.standardmedia.co.ke/article/2001287821/revealed-details-of-secret-lifestyle-audit> (accessed 28/11/2019).

¹⁴³ JL Jackson & DA Bekerian (eds.) (1997) *Offender profiling: Theory, Research and Practice, ibid.*, at 3.

¹⁴⁴ See also discussions in Chapter Three of this thesis.

items and monies owed by the individual to others and thus includes debts or loans whether short term or long term, losses made among others.

2.6.4 Identification of all Income Sources of the Individual

The fourth step of the lifestyle audit process involves the identification of all income sources of the individual during the period under review. In this stage, investigators ought to consider all the lawful and known sources of income however large or small. Income includes all money or things of value received in exchange for supply of goods or services but does not include assets. Income may however be generated from assets such as rent paid on rented properties and which counts as passive income.

The time period within which forensic investigators confine themselves is usually during what may be said to be periods of interest, that is, when the individual being audited or profiled changed their lifestyle inexplicably or bought properties that may not be explained by their known income.¹⁴⁵ Certainly, there has to be a timeframe within which the audit is being conducted as it cannot legitimately be in an open-ended fashion.¹⁴⁶

2.6.5 Identification of all the Expenses for the Individual

The fifth step and which is in tune with the fourth one is the identification of all the various expenses for the individual during the period under review. Expenses here again are normally afforded a liberal definition and largely refer to payments made by the individual for personal and business reasons and even payments for consumables. Liabilities are not included as expenses though liabilities may lead to expenses being paid out. A good illustration of an expense is maintenance or insurance premium paid on a car.

2.6.7 Suspect's financial profile

The sixth step is juxtaposing the income and expenses, and analysis of the financial information as mapped out.¹⁴⁷ The financial profile developed for analysis at this final stage

¹⁴⁵ See Niven R. Canlapan, "Investigative practice in immigration corruption cases in the Philippines," at 2, www.unafei.or.jp/english/pdf/PDF_GG7_Seminar/philippines.pdf (accessed 6/11/2019).

¹⁴⁶ David Burbidge (2015) *The Shadow of Kenyan Democracy: Widespread Expectations of Widespread Corruption*, Ashgate Publishing. UK.

¹⁴⁷ Association of Certified Fraud Examiners, *Fraud examiners manual* (Austin, TX: The Association, 2012) 3. 823.

depicts one's income, expenses, sources of income, assets and when they were acquired, from whom and for how much as well as liabilities, the purpose of the liabilities as well as the lender, security given and any documentation in support of the liability among other relevant details.¹⁴⁸

2.7 Rationale of Lifestyle Audits as an Anti-corruption Strategy

Increasingly, a number of countries are beginning to adopt lifestyle audits in light of the increasing incidences of corruption within Governments. For example, in recognition of the potential efficacy of lifestyle audits to tame runaway corruption, Kenya and South Africa have pronounced themselves on the need for comprehensive lifestyle style audits anchored in law through dedicated legislation.

In launching lifestyle audits in South Africa, President Ramaphosa established a Technical Task Team comprising of himself as President, Auditor-General, South African Police Service, South African Revenue Service, State Security Agency, Anti-Corruption Task Team, Office of the Public Service Commission and Financial Intelligence Centre to make recommendations on dealing with graft including coming up with a legal framework to enable the conduct of lifestyle audits.¹⁴⁹

According to President Ramaphosa, the audits would help strengthen financial disclosures among Ministers and civil servants thereby helping in the fight against corruption.¹⁵⁰ As discussed in Chapter 1 of this thesis, similar measures to strengthen lifestyle audits on the recognition of their efficacy have been attempted in Kenya. President Uhuru Kenyatta has made consistent proclamations on the role of lifestyle audits in the fight against corruption since 2015.¹⁵¹

The above developments in Kenya and South Africa affirm that lifestyle audits are indeed a viable strategy for combating and preventing corruption.

¹⁴⁸*ibid.*

¹⁴⁹*Ibid Note 145.*

¹⁵⁰*ibid.*

¹⁵¹ See discussions in Chapter Three. Infact, corruption is one of the 9 agenda points in the Building Bridges Initiative by Uhuru Kenyatta and Raila Odinga.

2.8 Lifestyle Audit Frameworks

While there is general consensus by authors on the important role of lifestyle audits in the fight against corruption, this study did not find any country that has developed a comprehensive legislation specifically dedicated to lifestyle audits.

Kenya has on the other hand experienced intensive debate on the need to develop a comprehensive legal framework on lifestyle audits. This has seen Kenya's Senate publish the Lifestyle Audits Bill, 2019 which was pending consideration in the Senate at the time of writing this thesis.

This study has found that in many countries, including Kenya, lifestyle audits are mainly embedded in the larger frameworks for the fight against corruption in public service, tax administration tools, frameworks on anti-money laundering, procedures for recovery of unexplained wealth held by public officers, and monitoring of local and foreign bank accounts.

The ensuing sections consider each of these frameworks and how they embody lifestyle audits.

2.8.1 Wealth Declaration Systems

Wealth declaration has been globally adopted as an accountability tool in public service.¹⁵² This is in line with UNCAC which stipulates that all signatories to the Convention should put in place structures and frameworks to compel public officials to “report to appropriate authorities their outside activities, employment, investments, assets and substantial gifts of benefits.”¹⁵³

There are however no prescribed international standards on how such systems should be developed. Different countries have therefore established diverse assets disclosure mechanisms *albeit* bearing similar core principles.

¹⁵² See World Bank Public Sector and Governance Group (2013) “Financial disclosure systems declarations of interests, income, and assets,” at <https://agidata.org/pam/> (accessed 6/11/2019).

¹⁵³ Article 8, UNCACA.

This study argues that the wealth of a person forms a critical component of their lifestyle. This is because logically, one's living standards are primarily pegged on income and material possessions. Wealth declaration therefore provides useful information for law enforcement agencies. The information helps in determining whether the assets worth of the declarant is commensurate with their legitimately known sources of income. Through monitoring, law enforcement agencies can detect unusual fluctuations and assess them vis-a-vis the legitimate income of the declarant. It is the monitoring aspect of the public officer's wealth that constitutes lifestyle audits.

Notably, there are two types of disclosure systems: First, those which focus on declaration of conflict of interest in order to flag up and manage potential conflicts of interest among public officers.¹⁵⁴ Second, those which provide for disclosure of the income and assets of public officials as a mechanism for preventing illicit enrichment¹⁵⁵

Disclosure regimes which focus on the income and assets of the public officers are the backbone of lifestyle audits. This is achieved because the system enables verification of reported income against other records or registers in Government's custody, for instance the land register at the Ministry of Lands, tax records at revenue authorities, as well as vehicle registers.¹⁵⁶

Available literature indicates that an effective income and assets declaration regime can enhance the fight against corruption as it can control abuse of power and increase public accountability.¹⁵⁷ According to study reports, levels of corruption are perceived to be lower in countries where there are frameworks for disclosure of wealth and assets, and the subsequent verification and public access to the said declarations.¹⁵⁸

¹⁵⁴*Ibid.* See also Richard Messick (2009) "Income and assets declarations: Issues to consider in developing a disclosure regime," Anti-Corruption Resource Centre, Paper prepared for Conference on Evidence-Based Anti-Corruption Policy organised by Thailand's National Anti-Corruption Commission (NACC) in collaboration with the World Bank, 5 – 6 June 2009, Siam City Hotel, Bangkok, Thailand.

¹⁵⁵ Matthew Jenkins (2015) "Income and Asset Disclosure Topic Guide," *op.cit.*

¹⁵⁶ See chapter 3 of this thesis.

¹⁵⁷ Marie Chêne (2008) "African experience of asset declarations," *Transparency International*, at <https://www.u4.no/publications/african-experience-of-asset-declarations.pdf> (accessed 3/11/2019).

¹⁵⁸*Ibid.* See also Richard Messick (2009) "Income and assets declarations: Issues to consider in developing a disclosure regime," Anti-Corruption Resource Centre, Paper prepared for Conference on Evidence-Based Anti-Corruption Policy organised by Thailand's National Anti-Corruption Commission (NACC) in collaboration with the World Bank, 5 – 6 June 2009, Siam City Hotel, Bangkok, Thailand.

Prevention of illicit enrichment through wealth declaration as discussed above is realized through monitoring of the periodic declarations by public officers through systematic analysis of the data collected from the declaration forms.¹⁵⁹ This in itself can occasion deterrence of theft of public resources.¹⁶⁰

The wealth declaration systems constitute a global mechanism that is applied in the prevention of illicit enrichment by public officers using their positions of trust over public resources.¹⁶¹ Whereas this thesis acknowledges the other mechanisms embodying lifestyle under this part, wealth declarations stand out as the universal mechanism that embodies lifestyle audits targeting public officials.¹⁶²

2.8.2 Forfeiture of Assets

Assets forfeiture is one of the strategies adopted by countries in developing anti-corruption legislation. The forfeiture could either be criminal or civil in nature. Criminal forfeiture of assets occurs during or after a criminal trial where the accused is ordered by the court to forfeit to the state the assets in question if such assets are connected with the offence.

On the other hand, the focus of civil forfeiture is the property as opposed to the person in possession of the property. For example, a person may be required pursuant to a law to forfeit to the state assets that are unlawfully in their possession.

In the context of the fight against corruption, many countries have enacted laws that provide for presumption of corruption where a public official is found to be in possession of assets that they cannot account for and which are disproportional to their legitimately known

¹⁵⁹ See discussion in Chapter 3.

¹⁶⁰ Ruxandra Burdescu, Gary J. Reid, Stuart Gilman and Stephanie Trapnel (2009) "Income and Asset Declarations: Tools and Trade-offs," World Bank Stolen Asset Recovery (StAR) Initiative, at https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Income_and_Asset_Declarations.pdf (accessed 3/11/2019).

¹⁶¹ Matthew Jenkins (2015) "Income and Asset Disclosure Topic Guide," Compiled by the Anti-Corruption Helpdesk, Transparency International. See also David Burbidge (2015) *The Shadow of Kenyan Democracy: Widespread Expectations of Widespread Corruption*, *op.cit.*

¹⁶² OECD (2011) "Asset Declarations for Public Officials: A Tool to Prevent Corruption," OECD Publishing, at <http://dx.doi.org/10.1787/9789264095281-en> (accessed 4/11/2019).

sources of income.¹⁶³ The person in possession of such assets may be compelled to forfeit them to the state.¹⁶⁴ As discussed in detail under Chapter 3, this is the case for Kenya.¹⁶⁵

The rationale behind presumption of unlawful acquisition of the assets in question is that public officers' control and access to public resources puts them at a position of advantage and opportunity which a corrupt public officer may utilize for their private gain against public trust.

What constitutes lifestyle audits under the assets forfeiture framework is the investigations that precede the determination of whether or not the suspect is in possession of unlawfully acquired assets which ought to be forfeited to the state. The investigations process involves an inquiry into the various aspects of the living standards and material possessions of the suspect which aspects are the gist of lifestyle audits.

2.8.3 Integrity Vetting

The term "vetting" is derived from the word 'vet' which means "to make a critical and careful examination of something."¹⁶⁶ The term is used in different contexts but popularly to describe the process of assessing the character of a person including their previous dealings.¹⁶⁷

In the context of the public sector, vetting is the process of assessing individual integrity to determine one's suitability for employment or other consideration where the integrity of an individual is in issue. Individual integrity refers to the person's compliance with relevant standards of human rights and professional conduct, including a person's financial propriety.¹⁶⁸

¹⁶³ Jean Pierre Brun Larissa Gray, Clive Scott & Kevin Stephenson (2011) "*Asset Recovery handbook: A guide for practitioners*," The International Bank for Reconstruction and Development, Washington.

¹⁶⁴ See discussion in Chapter 3 in relation to unexplained wealth under Kenya's ACECA.

¹⁶⁵ Section 55 of ACECA

¹⁶⁶ A.S. Hornsby (2010) *Oxford Advanced Learner's Dictionary*, Oxford University Press, at 1655.

¹⁶⁷ See Geoffrey Silas Imende (2012) "Vetting of Judges and Magistrates in Institutional Transformation: Lessons from Kenya," Thesis Submitted in fulfilment of the requirement of Master of Laws, School of Law, University of Nairobi.

¹⁶⁸ EACC (2013), "Vetting Guidelines for Public Officials", EACC, Nairobi.

Vetting consists of background verification that attempts to determine whether past behaviour is a matter of concern for future reliability, loyalty, and trustworthiness of an individual.¹⁶⁹ The process seeks to exclude from public service persons with integrity deficits so as to strengthen the legitimacy of the institutions in the eyes of the public.¹⁷⁰ Determination of suitability is not an end in itself but part of the broader institutional reforms to address governance challenges in public institutions.

Given that the vetting process involves inquiry into the conduct of the individual being vetted, lifestyle audits form a critical component of any vetting process. If properly anchored in a legal framework, vetting has the potential to address governance challenges through deterrence of corrupt conduct.¹⁷¹

2.8.4 Monitoring of Financial Transactions

Countries often establish frameworks to monitor financial transactions of individuals and organizations in local and foreign bank accounts for various purposes.¹⁷² One of the major reasons for monitoring bank accounts could be to detect and prevent illicit financial flows in the prevention of corruption and other criminal activities such as financing of terrorism, money laundering, and tax evasion.¹⁷³

For example, Kenya is among the countries that have in place such frameworks. Under the Kenya's Proceeds of Crime and Anti-Money Laundering Act, 2017, (POCAMLA), Reporting Institutions under the Act, are required to "monitor on an ongoing basis all complex, unusual, suspicious, and large or other transactions as may be specified in the regulations," and to

¹⁶⁹ *Ibid.*

¹⁷⁰ See generally the provisions of Chapter 6 of the Constitution and the Leadership and Integrity Act, 2012. This presents an example of prescribed standards of conduct to which vetting may apply.

¹⁷¹ See Ben Sihanya (forthcoming 2019) "Constitutional Values, Principles and Policies: Agency and Structure in Kenya and Africa," in Ben Sihanya (2019) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, *op. cit.*

¹⁷² See Western Balkans Recommendation, *ibid.*, E.7: "Banking secrecy should not be an obstacle to using banking data for verification purposes." See also World Bank (2013) *Conflicts of Interest, A Background Primer*, available at <https://agidata.org>, (accessed 1/11/2019).

¹⁷³ See Open Society Justice Initiative (2015) "Repatriating Stolen Assets: Potential Funding for Sustainable Development," at <https://www.justiceinitiative.org/uploads/59e79b54-69fa-46fd-a9d7-7699729ed8c4/repatriating-stolen-assets-background-20150727.pdf> (accessed 10/11/2019).

report these transactions to the Financial Reporting Centre (FRC)¹⁷⁴ established under the Act. FRC is an independent body whose principal objective is to assist in the identification of the proceeds of crime and combating money laundering.¹⁷⁵ Its mandate include provision of financial information to investigative agencies.

Further, the Central Bank of Kenya (CBK) has formulated Guidelines relating to “hard” currency payments out of Kenya that are relevant to lifestyle audits. Pursuant to these Regulations, payments out of Kenya below US\$ 10,000.00 can be made freely. Payments out of Kenya between USD 10,000.00 and US\$ 499,999.00 require evidence of the purpose of the payment being made to be provided to the remitting bank.¹⁷⁶

Related provisions in the Kenyan case are constitutional and statutory provisions on financial probity and monitoring of bank accounts held outside Kenya by public officers¹⁷⁷ discussed in detail in Chapter 3 of this thesis.

This study argues that provisions of this nature can form a good basis for lifestyle audits of persons suspected of corruption and other forms of crime in both the public and the private sector.¹⁷⁸

2.8.5 Tax Administration Regimes

Governments primarily generate revenue through collection of taxes. In order to prevent pilferage of government revenue through tax evasion and other corrupt practices, there ought to be appropriate mechanisms established within the tax administration regime for that

¹⁷⁴ An independent body established under section 21 of POCAMLA to assist in the identification of the proceeds of crime and combating money laundering. Its mandate include provision of financial information to investigative agencies

¹⁷⁵ Established by Section 21 of Proceeds of Crime and Anti-Money Laundering Act, 2017.

¹⁷⁶ Central Bank of Kenya (2013), “Prudential Guidelines on Minimum Security Standards,”CBK, Nairobi.

¹⁷⁷ Article 76 of the Constitution of Kenya as read with section 19 of the Leadership and Integrity Act, 2012.

¹⁷⁸ Other relevant laws in this area include the Central Bank of Kenya Act, the Banking Act and the Income Tax Act. The Central Bank of Kenya (CBK) has formulated ‘Prudential Guidelines on Minimum Security Standards’ relating to “hard” currency payments out of Kenya that are relevant to lifestyle audits. Pursuant to these regulations, payments out of Kenya below US\$ 10,000.00 can be made freely. Payments out of Kenya between USD 10,000.00 and US\$ 499,999.00 require evidence of the purpose of the payment being made to be provided to the remitting bank. Payments out of over U.S\$ 500,000.00 have to be notified by the remitting bank to the CBK. Under the Income Tax Act, the Commissioner of Income Tax is empowered to investigate the sources of income of a person suspected of evading taxes, whereby his income tax returns do not correspond to his lifestyle.

purpose.¹⁷⁹ Such mechanisms mainly target the systems of the tax administration regime, officers involved in tax collection and persons liable to pay taxes.

One of the mechanisms for accountability in a revenue management regime is the administration of a lifestyle questionnaire as has effectively been implemented in South Africa. Despite the absence of a specific framework on lifestyle audits, the South Africa Revenue Service (SARS), which is the equivalent of Kenya's KRA, regularly administers lifestyle questionnaires on tax payers including individuals, charities and businesses.¹⁸⁰

In this case, the tax agency conducts audits on taxpayers, business trusts and individuals to determine if the living expenses and practices of the tax payers are consistent with the declared income and assets in the names of the taxpayers.¹⁸¹ This helps to certify that each taxpayer is fully remitting their taxes¹⁸²

In Kenya, although KRA does not have a similar mechanism, KRA provides useful information obtained from its tax administration data to law enforcement agencies such as EACC under the auspices of the multi-agency framework to facilitate lifestyle audits.¹⁸³

KRA has the capacity to detect corruption while executing its mandate of assessment, collection and accounting for public revenue. KRA thus plays a central role in facilitating lifestyle audits in Kenya. In this regard, it is viable to develop a lifestyle audits approach from the tax reporting procedures.

2.9 Merits and Demerits of Life Style Audits in Fighting Corruption

Lifestyle audits have significant advantages in law enforcement. Lifestyle audits generally and through wealth declaration are crucial methods of identifying hidden assets and

¹⁷⁹ See World Bank at <https://www.worldbank.org/en/country/kenya>. (accessed 17/8/2019.)

¹⁸⁰ S Temkin (2012) "Long arm of the SARS lifestyle audit police," (Business Day, 2012).

¹⁸¹ *Ibid.*

¹⁸² Temkin, S. (2012) "Long arm of the SARS lifestyle audit police," *Business Day*, 6 August. From: <http://allafrica.com/stories/201003010914.html> (accessed 16 August 2019).

¹⁸³ The Multi-Agency Team (MAT) is comprised of various law enforcement agencies including Office of the Director of Public Prosecutions (ODPP), National Intelligence Service (NIS), National Police Service (NIS), Financial Reporting Centre (FRC), EACC, KRA and the Immigration Department. The forum aims at enabling a multi-agency approach to combating corruption by addressing unnecessary bureaucracy and red-tape in government operations. The multi-agency and multi-disciplinary approach utilizes the strengths of the various institutional mandates to jointly trace and freeze assets, investigate and prosecute suspects of corruption.

misappropriated funds through tracing. This is made possible by the background investigations that are normally done by investigators following the profiling of a suspect.

Background investigations that follow wealth declarations help investigators to get tip-offs in the direction of misappropriated funds and hidden assets for easier recovery processes.¹⁸⁴ Locating assets hidden in the names of relatives and associated entities can quickly help to narrow the list of possible suspects by shining spotlight on those living beyond their known financial means.¹⁸⁵ This constitutes intelligence led investigations, a fundamental tool in the fight against corruption.¹⁸⁶

Lifestyle audits are however not entirely foolproof and reliable or without challenges, principally owing to their nature. First, lifestyle audits through wealth declarations involve an examination and inquiry into an individual's personal and commercial affairs, which in the general state of affairs tend to be and ought to be private. Privacy rights are normally protected constitutionally in most jurisdictions, and therefore a legal challenge can arise where lifestyle audits are not conducted properly or may even be prevented through a court order especially where there is no proper legal framework providing for such audits.¹⁸⁷

The second demerit is that, given that most individuals who engage in financial crimes including corruption are sophisticated and able to hide their assets in foreign jurisdictions, lifestyle audits can prove to be quite an expensive affair. The implication of this is that a state agency charged with conducting lifestyle audits must be properly resourced, both financially and technically.

Third, lifestyle audits are best suited for grand and political corruption cases which involve huge sums of money, money laundering and other illicit activities where significant amounts of money are involved. Lifestyle audits can be counterproductive and of little economic sense if conducted on an individual who may have engaged in malfeasances leading to loss of small

¹⁸⁴ Madinger, J. & Zalopany, S.A. (1999) *Money laundering – a guide for criminal investigations*. Boca Raton, FL: CRC Press.

¹⁸⁵ Kass-Shraibman, F. & Sampath, V.S. 2011. *Forensic accounting for dummies*. Indianapolis, IN: Wiley.

¹⁸⁶ Deloitte & Touche, *Canadian Forensic Services Methodology Training Manual* (Toronto: Deloitte & Touche LLP, 2002).

¹⁸⁷ See Chapter 2.5 on cases where the process has been challenged on grounds of violation of privacy rights.

amounts of money as the cost of the process may be more than what is recovered. More importantly, lifestyle audits hardly uncover small currency transactions such as those of consumables or one-time medical bills.¹⁸⁸

Fourth, lifestyle audits are never conclusive or dispositive of the commission of a financial crime or corruption.¹⁸⁹ This is because in some occasions, the apparent flamboyant lifestyle that appears disproportionate to one's income may be explained away and may be for good reason. It is entirely possible that one has some other income which is not known by the investigators and which may be lawful and legitimate.

2.10 Lifestyle Audits and the Political Economy of Corruption in Kenya

The roots of corruption are embedded deeply in political and bureaucratic institutions and its effects on development vary from one country to another.¹⁹⁰ The discussion on the role of lifestyle audits in this Chapter points to their efficacy in curbing institutionalized corruption. This makes lifestyle audits relevant to Kenya's situation where corruption is systemic and occurs at both personal and institutional levels.¹⁹¹

Today, corruption is so institutionalized in Kenya's public sector that despite existence of a plethora of legal and institutional frameworks to curb it, eradicating corruption has remained an elusive goal for the Government.¹⁹² After attaining independence, the political elite in Kenya, like in many African states, divorced from their minds the concept of constitutional implementation. Instead, they embarked on, and succeeded in making numerous constitutional amendments whose overall objective was to consolidate state power and authority in the Executive arm of Government, and in particular the Presidency.¹⁹³

The centralized presidential power under Presidents Jomo Kenyatta and Daniel Arap Moi regimes led to the supremacy of the state under the constitutional dispensation that did not

¹⁸⁸ Association of Certified Fraud Examiners. 2012. *Fraud examiners manual*. Austin, TX: The Association.

¹⁸⁹ Coenen, T.L. 2009. *Expert fraud investigation*. Hoboken, NJ: Wiley.

¹⁹⁰ World Bank, 1997.

¹⁹¹ See Michela Wrong (2009) *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*, Harper, New York.

¹⁹² Patrick Owiny (2009) *Efficacy of the Policy, Legal and Institutional Frameworks for Combating Corruption in Kenya*, A Thesis submitted in partial fulfilment of the requirements for the award of the degree of Master of Laws at the University of Nairobi.

¹⁹³ Yash Ghai (2017) "Constitutionalism: African Perspective," in Patricia Kameri-Mbote & Collins Odote (eds) (2017) *The Giant Academic, Essays in Honour of H.W.O. Okoth Ogendo*, University of Nairobi, 149-170, at 160.

adequately provide for checks and balances in the exercise of executive authority.¹⁹⁴ Over time, this culminated into neopatrimonialism that strongly held the economic and political levers of power. It is through this power that corruption was institutionalized since it was the central point for decision making and patronage.¹⁹⁵ During this period, lifestyle audits did not exist as an anti-corruption strategy since they were first provided for under POEA and ACECA which were enacted in 2003.

Under the Jomo Kenyatta and Moi regimes, the state of patrimonialism did not tolerate any form of opposition. The regimes established “imperial presidency.”¹⁹⁶ This is in sync with Prof. Ghai’s observation that unlike in Europe where constitutionalism was tied to relations between the growth of the market economy where “entrepreneurs were in the private sector and wanted a reliable legal framework for their plans and contracts, in Africa the entrepreneurs were those who used state mechanisms which they did not want fettered or questioned, and preferably not accountable to any legal regime for selfish gain.”¹⁹⁷

In respect to the Moi regime, it is reported that the regime centrally controlled the state as a means to entrench an ethnically defined political class and to ensure its enrichment.¹⁹⁸ Laws that were used for colonial oppression were retained and others introduced to support the State’s excesses.

It is indeed during the pre-2010 Constitution that Kenya witnessed some of the monumental plunders of its resources through corruption. The country experienced rampant economic mismanagement and embezzlement of national resources.¹⁹⁹ It is during this period that illegal and irregular allocation of public land which had begun during the Kenyatta regime

¹⁹⁴ See Ben Sihanya (2011) “The Presidency and Public Authority in Kenya’s New Constitutional Order,” Constitution Working Paper Series No. 2 Society for International Development (SID) Eastern & Central Africa, The Regal Press Ltd, Nairobi.

¹⁹⁵ David Bach (2011) “Patrimonialism and Neopatrimonialism: Comparative Trajectories and Readings,” 49(3), *Commonwealth & Comparative Politics*, 275–294.

¹⁹⁶ Ben Sihanya (2011) “The Presidency and Public Authority in Kenya’s New Constitutional Order,” *ibid*.

¹⁹⁷ *Ibid* at 9.

¹⁹⁸ Susanne Mueller (2008) “The political economy of Kenya’s Crisis,” 2(2), *Journal of Eastern African Studies*, 185–210.

¹⁹⁹ Gilbert Khadiagala (2009) “Transparency and accountability in Kenya’s Budget Process,” in D. de Ferranti, J. Jacinto, A. Ody, & G. Ramshaw *How to improve governance: A new framework for analysis and action*, 127–141, Brookings Institution Press, Washington, DC.

intensified.²⁰⁰ State power control meant control of public wealth leading to looting, bribery and patronage.²⁰¹ Public and private interests were intertwined and government officials plundered the Treasury and embezzled state assets.²⁰²

The system of patronage thrived and corrupt behaviour was cascaded down to the society at large.²⁰³ For example, it is estimated that the Golden Berg scandal cost Kenyans more than \$600 million²⁰⁴ while Anglo leasing on the other hand cost Kenyans 30m euros (\$33m; £21m).²⁰⁵ Being part of a particular grouping during the Moi regime became a more acceptable qualification for state appointments, than the actual capabilities one possessed.²⁰⁶

Stemming from the above, institutionalized corruption made citizens to lose respect for the Constitution and confidence in Government.²⁰⁷ One of the manifestations of this state of affairs is low level of legitimacy of state institutions and their inability to resolve differences among the people or political parties.²⁰⁸

Subsequent governments after Moi presidency were also caught up in the now entrenched system of corruption in Kenya.²⁰⁹ In the 2002 presidential elections, Mwai Kibaki sought election on the platform of zero tolerance to corruption and was overwhelmingly elected as the 3rd president of the Republic of Kenya.²¹⁰ His victory marked the first transfer of power through elections since Kenya's independence in 1963 and ushered in serious anti-corruption and other institutional reforms.

²⁰⁰ Republic of Kenya (2004) « Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission Report), » 2004.

²⁰¹ National Anti-Corruption Plan Secretariat (2012) *National Anti-Corruption Plan* at <http://www.kacc.go.ke/Docs/Ntional%20Anti-%20Corruption%20Plan.pdf> (accessed 16/8/19).

²⁰² Report of the Judicial Commission of Inquiry into the Goldenberg Affair, Gazette Notice No. 1237 of February 24, 2003.

²⁰³ Hope Kempe (2012) *The Political Economy of Development in Kenya*, Bloomsbury Publishing, New York.

²⁰⁴ John Kamua (2013) "The hatching of Goldenberg grand scheme," *Daily Nation*, Nairobi, 7/10/2013, at <https://mobile.nation.co.ke/lifestyle/The-hatching-of-Goldenberg-grand-scheme/1950774-2020832-format-xhtml-pa3ttyz/index.html> (accessed 20/11/2019).

²⁰⁵ *Ibid.*

²⁰⁶ Koigi wa Wamwere (2019) "Moi, Nyayoism and spread of dictatorship and corruption," *Daily Nation*, Nairobi, 9/3/2019, at <https://www.nation.co.ke/oped/opinion/Nyayoism-and-spread-of-dictatorship-and-corruption/440808-5016022-juhrkc/index.html> (accessed 20/11/2019).

²⁰⁷ Republic of Kenya (2005) Report of the Constitution of Kenya Review Commission, 2005.

²⁰⁸ This was demonstrated in December 2007 post-election violence in Kenya when the opposition parties refused to challenge contested presidential elections due to lack of confidence in Kenya's Judiciary.

²⁰⁹ Michela Wrong (2009) *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*, *op.cit.*

²¹⁰ He garnered 62% of the all the votes cast.

Today, public sector corruption in Kenya is an organized crime with very strong corruption cartels.²¹¹ The cartels are sophisticated in their operations which makes detection and investigations into their conduct complex.²¹² This is because the cartels, more often than not, include key actors in the political class and the administrative bureaucracy who wield immense power necessary to facilitate seamless operations of the cartels including waiver of formal procedures.²¹³ This has partly exacerbated the challenges affecting effective implementation of the Constitution, 2010 to fight corruption.²¹⁴

As noted in Chapters 1 and 3 of this thesis, POEA and ACECA which were enacted in 2003 provided for aspects of lifestyle audits within the larger framework of fighting corruption. The two statutes are currently implemented in the context of the Constitution of Kenya, 2010 whose Chapter 6 envisages progressive anti-corruption mechanisms such as lifestyle audits. However, ineffective implementation of the Constitution in its letter and spirit is part of the major reasons for the little progress in the anti-corruption war.²¹⁵

While Kenya's Constitution was celebrated as progressive in entrenching good governance, the transformation envisaged in that Constitution is far from being realized 10 years after its adoption.²¹⁶ There has been absence of commitment to faithfully implement the Constitution in both letter and spirit.²¹⁷ This is what Okoth Ogendo referred to as a constitution without constitutionalism.²¹⁸

²¹¹ Criminal cartels are organized establishments with networks within and outside Government structures. Like in any other form of crime, criminal cartels exist in the perpetuation of corruption and economic crime. Each mega scandal involves various actors in the transaction chain including politicians, public officials, private sector actors such as bankers and private persons both in the national and international spheres. An effective anti-corruption strategy must include a component of early detection and disruption of corruption networks.

²¹² Jackson Mue (2019) "Corruption and Criminal Cartels: Their Impact on National Security," Presentation Paper at the National Intelligence Service, on 16th October 2019, Nairobi.

²¹³ Transparency International – Kenya (2009) "Corruption trends analysis: Tracing corruption trends in Kenya's public sector, Nairobi.

²¹⁴ See some of the challenges discussed in Ben Sihanya (2019) "Securing judicial independence and accountability in Kenya," Vol 10, Issue No 11, Nairobi Law Monthly, 38-43.

²¹⁵ See Grace Injene (2014) "Challenges faced by the Kenya Ethics and Anti-Corruption Commission in Implementing the Strategies recommended by United Nation Convention Against Corruption in Kenya," a Research Project submitted in partial fulfillment of the requirement for the award of the Degree of Master of Business Administration Degree, of the University of Nairobi.

²¹⁶ Yash Ghai (2010) "Kenyan Constitution: History in the Making: The Challenges of Implementation," *Pambazuka News*, at www.pambazuka.org/en/category/features/66501 (accessed on 13/10/2019).

²¹⁷ Yash Ghai, Constitutionalism: African Perspective in *The Giant Academic, Essays in Honour of H.W.O Okoth Ogendo*.

²¹⁸ Goran Hyden, Dele Olowu & H.W.O. Okoth-Ogendo (1999) *African Perspectives on Governance*, Africa World Press, Trenton, 33-60.

That the road towards realization of the values and ideals embedded in Kenya's Constitution 2010 is a rocky and bumpy one was aptly captured by the 2nd Chief Justice of the Republic of Kenya and President of the Supreme Court Hon. Justice David Maraga as follows:

“Left on their own, the Legislative and Executive Arms of Government, often comprised mainly of politicians and the political elites, will implement the Constitution in an arbitrary manner, cherry-picking the easier and non-contentious provisions but always safeguarding their personal or sectarian interests. And that is exactly what they have done in Kenya.”²¹⁹

This study concurs with the President of the Supreme Court when he says that any Constitution is as good as its implementation. In abstract, a constitution is a dead document unless it achieves some measure of constitutionalism.²²⁰

Despite the above, the Jubilee administration under President Uhuru Kenyatta has profiled lifestyle audits as one of the Government strategies for tackling corruption now institutionalized in Kenya.²²¹ Although notable efforts have been made under the Jubilee government regime, this has not reduced the levels of corruption in the country.²²² During the national celebration of Madaraka Day on 1st June 2018, President Uhuru Kenyatta decried high levels of corruption in Kenya in the following words:

“As we celebrate the good that has been achieved over the decades since independence, we know there are areas where we have not done well. We must be truthful to ourselves and admit that, in the past few decades, a few of us have failed their motherland. Some of those trusted to run and manage institutions, resources and safeguard the public interest have turned predators. Through their selfishness, greed and misuse of authority, Kenyans have been denied critical public services and development.”²²³

This thesis argues that given the deep rooted nature of corruption in Kenya as per the above averments by none other than the Head of State, a successful anti-corruption war is a task requiring well thought out mechanisms such as lifestyle audits, and cannot be fought by

²¹⁹ David Maraga (2019) “The Quest for Constitutionalism in Africa: A Reflection on the Interface between Institutions, Leadership, and Faith,” Speech delivered at the Oxford Union Conference, on June 4, 2019, Oxford University, United Kingdom, available at <https://www.judiciary.go.ke/download/remarks-by-chief-justice-david-maraga-at-the-oxford-union-conference-4th-june-2019-oxford-university-united-kingdom/>. (accessed 14/10/2019).

²²⁰ *Ibid.*

²²¹ See detailed discussion in Chapters 1 and 3 of this thesis.

²²² See EACC Annual Baseline Surveys on Corruption and Ethics Reports 2015, 2016, 2017 and 2018. In each of these reports, over 70% of Kenyans have cited levels of corruption in the country to be high. The high prevalence of corruption in public service is further highlighted in the Annual Reports of the Auditor General and Parliamentary Watchdog Committees which point to massive loss of public funds through corruption.

²²³ Uhuru Kenyatta (2018) “President’s speech of 1st June 2018 during Madaraka Day Celebrations held in Meru County,” at www.president.go.ke/2018/06/01/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-2018-madaraka-day-celebrations-on-friday-1st-june-20/ (accessed on 10/10/2019).

grand gestures.²²⁴ This should be undertaken alongside other key reform measures such as the review of the existing policy legal and administrative frameworks.²²⁵

In addition, there ought to be measures designed to inculcate integrity among public officers as well as targeting the integrity of systems, policies, procedures and methods of work in the management of public affairs.²²⁶ This underscores the need for strong lifestyle audit frameworks in Kenya.

2.11 Summary of Key Findings and Conclusion

This Chapter has attempted to generally explore the rationale behind lifestyle audits as a strategy for fighting corruption. This has also been contextualized to the political economy of corruption in Kenya. There are two major findings in this Chapter.

First, lifestyle audits are indeed an effective strategy for combating and preventing corruption and this could be undertaken through various mechanisms such as effective regimes for wealth declaration, tax administration, monitoring of bank accounts held by public officials in foreign countries, integrity checks for public officials and monitoring financial transactions of persons of interest.

Second, institutionalization of corruption in post-colonial Kenya started upon attainment of independence way back in 1963 and has been not only cultivated but also tolerated by successive government regimes from 1963 partly due to absence of lifestyle audits as an anti-corruption strategy.

²²⁴ Ben Sihanya (2013) “Constitutional Commissions: Experiences, Challenges and Lessons” Paper presented at the Conference on State of Implementation of the Constitution since 2010, Laico Regency, November 20, 2013, at 2, revised as Ben Sihanya (due 2019) “Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities,” Chapter in Ben Sihanya (due 2019) *Constitutional Democracy in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya.

²²⁵ *Ibid.*

²²⁶ Eric Ngumbi (2011) “Fighting Corruption and impunity demands more than the Constitution,” *Daily Nation*, Nairobi, 26/6/2011, at <https://www.nation.co.ke/oped/opinion/440808-1189374-en2cuqz/index.html> (accessed 9/10/2019).

The Chapter has also established some merits and demerits of lifestyle audits generally. These inform the cross-cutting theme of this thesis on the use of lifestyle audits as a strategy to combat corruption.

It is concluded under this Chapter that lifestyle audits frameworks, if effectively, implemented could be a viable strategy in combating and preventing corruption.

Chapter 3 of this thesis specifically focuses on how lifestyle audits have been conducted in Kenya. The Chapter critically examines the policy, legal and administrative framework relating to lifestyle audits in Kenya as currently obtaining.

CHAPTER 3

THE POLICY, LEGAL AND ADMINISTRATIVE FRAMEWORK FOR LIFESTYLE AUDITS IN KENYA

3.1 Introduction

This Chapter argues that, save for the Lifestyle Audits Bill published by the Senate on 6th September 2019, Kenya does not have any legislation specifically dedicated to the conduct of lifestyle audits as a strategy in the fight against corruption. What obtains is that lifestyle audits in Kenya are envisaged under Chapter 6 of the Constitution and embedded in piecemeal provisions in the general policy, legal and administrative frameworks for the fight against corruption.²²⁷

This chapter therefore critically analyses the salient features of the Constitution, Public Officer Ethics Act, 2003 (POEA), Anti-Corruption and Economic Crimes Act, 2003(ACECA), and the Leadership and Integrity Act, (2012) (LIA) in so far as they envisage or embody lifestyle audits. Lifestyle audits are underpinned in these anti-corruption frameworks because their enforcement involves interrogation of the lifestyles of the concerned public officers to determine whether or not they have engaged in illicit enrichment or other corrupt practices.

The study acknowledges that besides the above anti-corruption frameworks which inform the topic under study, there are other frameworks under different laws in Kenya, which underpin some aspects relevant to lifestyle audits. These include the laws governing Kenya's tax regime as implemented by KRA, anti-money laundering framework under the Proceeds of Crime and Anti-Money Laundering Act, 2017 (POCAMLA), and monitoring financial transactions by the Central Bank of Kenya.²²⁸

The four main types of lifestyle audits in Kenya include: First, lifestyle audits through declaration and verification of income, assets and liabilities by public officers.²²⁹ Second,

²²⁷ See discussion in Chapter 2 of this thesis.

²²⁸ See Chapter 2 of this thesis on the various frameworks on lifestyle audits as adopted by various countries including Kenya.

²²⁹ Provided for under Part IV of POEA as read with Public Officer Ethics (Management, Verification and Access to Financial Declarations), Regulations 2011.

lifestyle audits through investigations into possession of unexplained wealth.²³⁰ Third, lifestyle audits through monitoring of bank accounts held outside Kenya by public officers.²³¹ Fourth, lifestyle audits through vetting of public officers for compliance with Chapter 6 of the Constitution.²³²

In respect to vetting of public officials, this Chapter particularly analyzes the aspects of lifestyle audits in the vetting of three categories of public officers that has been undertaken in Kenya. These are: Judges and Magistrates,²³³ National Police Service officers (NPSC)²³⁴ and staff of the Ethics and Anti-Corruption Commission (EACC).²³⁵ As argued later in this Chapter, this is the only vetting that has been expressly anchored in law.

Related to this discussion, the study revisits the “lifestyle audit” ordered by the President of the Republic of Kenya on 1st June 2018 targeting all heads of the procurement and accounting units in Government.²³⁶ The Presidential proclamation was not anchored under any of the above legal frameworks that contemplate lifestyle audits on public officers. It was rather through an Executive Order which was implemented through an administrative Government Circular.²³⁷

In the ensuing sections, each of the frameworks above that embed aspects of lifestyle audits is analyzed and its weaknesses laid bare. Special focus is given to the wealth declaration system in Kenya under POEA. This is because lifestyle audits in Kenya are primarily embodied in

²³⁰ Provided for Under Anti-Corruption and Economic Crimes Act, 2003, (ACECA).

²³¹ Provided for under Article 76(2)(a) of the Constitution as read with Section 19 of the Leadership and Integrity Act, 2012 (LIA) and Part IV of the Leadership and Integrity Regulations, 2015. It will be argued in this respect that lifestyle audits form a critical component of the vetting process.

²³² section 23 of the Sixth Schedule to the Constitution and the Judges and Magistrates Vetting Act

²³³ Section 23 of the Sixth Schedule to the Constitution as read with the Vetting of Judges and Magistrates Act, No. 2 of 2011.

²³⁴ National Police Service Commission Act, 2011.

²³⁵ Section 34 of the Ethics and Anti-Corruption Commission Act, 2011.

²³⁶ See Uhuru Kenyatta (2018) “President’s speech of 1st June 2018 during Madaraka Day Celebrations held in Meru County,” at www.president.go.ke/2018/06/01/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-2018-madaraka-day-celebrations-on-friday-1st-june-20/ (accessed on 10/10/2019).

²³⁷ Circular Reference Number OP/CAB.39/1A of 4th June 2018 signed by Joseph Kinyua in his capacity as the Head of Public Service. It was addressed to the Attorney General, all Cabinet Secretaries, all Principal Secretaries/Accounting Officers (with sufficient copies for Chief Executives, State Corporations), Comptroller of State House, the Clerk of the National Assembly, the Clerk of the Senate, the Chief Registrar of the Judiciary, the Director-General of the National Intelligence Service; the Controller of Budget; The Auditor General, and, Independent Offices and Commissions.

the implementation of the wealth declaration regime as an anti-corruption strategy. It is the only mechanism whose framework is fairly clear, sufficiently entrenched and universally applied across Kenya's public service. On this ground, the wealth declaration system will be used as the main parameter for drawing lessons from other jurisdictions under Chapter 4 of this thesis.

3.1 Constitutional Underpinning of Lifestyle Audits

Chapter 6 of the Constitution prescribes the standards of conduct that serving state and public officers must comply with.²³⁸ For example, the Chapter provides that state officers shall, whether in official and public life, private life or in association with other persons, behave in a manner that does not compromise public interest or demean the offices they hold.²³⁹

For persons seeking public appointments, the Chapter requires persons to be appointed to office only on the basis of personal integrity.²⁴⁰ It is not clear why for elective offices, Chapter 6 only prescribed free and fair elections as the yardstick.²⁴¹ It could be argued that a free and fair election is in itself a vetting process by voters.²⁴²

This study argues that Chapter 6 of the Constitution envisages comprehensive mechanisms for inquiry into the conduct of public officials including lifestyle audits and vetting. If this were not the case, how then would an appointing authority arrive at a conclusion on whether or not a candidate seeking public office has the personal integrity contemplated under Article 73(2) (a) as earlier discussed in this part? Similarly, how can EACC in enforcing Article 75, as mandated, determine whether a serving state officer's personal conduct and association with other persons is guided by the prescribed standards?²⁴³

²³⁸ Article 75 of the Constitution. The Article is one of the provisions under Chapter 6 on leadership and integrity.

²³⁹ Article 75 of the Constitution.

²⁴⁰ Article 73(2)(a) of the Constitution.

²⁴¹ *Ibid.*

²⁴² See Ben Sihanya (forthcoming 2019) "Constitutional Values, Principles and Policies: Agency and Structure in Kenya and Africa," in Ben Sihanya (2019) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, *op. cit.*

²⁴³ See generally Wachira Maina (2019) "State Capture: Why Kenya Has Been Unable to Slay the Corruption Dragon," *The Elephant*, *op. cit.*

The Leadership and Integrity Act, 2012 (LIA) which was enacted to operationalize Chapter 6 of the Constitution does not sufficiently provide for the required mechanisms.²⁴⁴ It is a very weak legislation. For example, there are no clear and effective mechanisms for removal of appointed state officers from office for violation of Chapter 6 as envisaged under Article 75(2) (b) of the Constitution. In relation to elected state officers, the provisions on removal from office through impeachment have in the past proved futile due to their rigorous and political nature thus permitting elected state officials with integrity issues to remain in office and be further re-elected.²⁴⁵

With respect to public appointments, it is left for EACC to rely on the good will of public entities or appointing authorities to secure compliance with the Commission's recommendations on the integrity suitability of candidates for appointment. On the other hand, there are no clear frameworks to enable IEBC to determine compliance with Chapter Six of the Constitution as a mandatory requirement in the clearance of candidates for election to public office. Neither is there any enabling provision to empower EACC to delve into the matter of integrity suitability of persons seeking clearance from IEBC to run for office, despite Article 79 of the Constitution. Consequently, Chapter 6 of the Constitution is therefore yet to be fully operationalized to the tune anticipated in its provisions, 10 years on.

This study argues that the obstacles to effective implementation of Chapter 6 of the Constitution are further compounded by the fact that Courts are yet to unlock the Chapter through the requisite interpretation and development of jurisprudence to enable effective application. The decisions made by Courts so far are contradictory, inconsistent, and incoherent and do not offer any clear or conclusive determination of the proper test for integrity under the Chapter. As a result, it remains unknown what the fit and proper test for the integrity threshold contemplated under Chapter 6 of the Constitution is.

²⁴⁴ Ben Sihanya (2011) "Constitutional Implementation in Kenya: Challenges and Prospects" *op. cit.*

²⁴⁵ See Ben Sihanya (forthcoming 2019) "Conceptualising sovereignty, constitutions, states and governments in Kenya and Africa," in Ben Sihanya (2019) *Constitutional Democracy in Kenya and Africa Vol. 2: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, at 3.

Equally worthy this academic scrutiny is the question as to why EACC, the body responsible for implementation of Chapter 6 the Constitution, is established under an Act of Parliament vide a Constitutional reference and not expressly accorded the character and status of other Constitutional Commissions.²⁴⁶ As currently established, the Commission remains subject to parliamentary control and manipulation ostensibly due to the political sensitivity of its functions the Constitution and relevant statutes.

This study finds no justification as to why some Constitutional Commissions such as the Teachers Service Commission (TSC)²⁴⁷ and Commission on Revenue Allocation,²⁴⁸ whose functions are not sensitive to the extent of requiring constitutional safeguards, are expressly provided for, and listed under Chapter 15 while EACC is not. EACC requires more constitutional safeguards than some of Chapter 15 Commissions due to the nature of its mandate.

Absence of such protection leaves EACC vulnerable and subject to political machinations by deliberately providing room for skewed statutory amendments to the constituting Act. This has the potential to compromise the independence of the Commission in the performance of its duties.²⁴⁹ For example, the Ethics and Anti-Corruption Commission Act, 2011 was amended in 2015 to convert the terms of service of its Commissioners from full time to part time²⁵⁰ yet other Commissions with lighter functions have full time members.²⁵¹ This could be construed to mean converting the war against corruption from a full time to part time business.²⁵²

²⁴⁶Section 3 of the Ethics and Anti-Corruption Commission Act, 2011 as read with Article 79 and Chapter 15 of the Constitution.

²⁴⁷ Article 237(1) of the Constitution.

²⁴⁸ Article 215 (1) of the Constitution.

²⁴⁹ Persons serving in office with the knowledge that their offices may at any time cease to exist by operation of the law may compromise personal and institutional independence at the altar of political or other sectarian interests thus impeding an effective war against corruption. This may be so especially when considering matters involving those who make the law.

²⁵⁰ The amendments were done through Ethics and AntiCorruption Commission (Amendment) Bill, 2015, as contained in the Special Issue of the Kenya Gazette Supplement No. 87 (National Assembly Bills No. 33).

²⁵¹ Commissions with fairly lighter duties include CRA whose functions are to divide revenue; TSC who manage teachers, CAJ on maladministration. This study holds that the weight of the functions of these duties are far much below than the weight and magnitude of fighting corruption in Kenya.

²⁵² Section 3 of the Ethics and Anti-Corruption Commission (Amendment) Act, 2015.

Another constitutional provision relevant to lifestyle audits is the decree that all international and regional instruments that Kenya has signed and ratified form part of Kenyan laws.²⁵³ One of such instruments is the United Nations Convention against Corruption (UNCAC), which also provides for wealth declaration by public officers.²⁵⁴ UNCAC form part of Kenya's law pursuant to Article 2(6) of the Constitution²⁵⁵

3.2 Lifestyle Audits under the Public Officer Ethics Act, 2003

Part IV of the Public Officer Ethics Act, 2003 (POEA) as read with the Public Officer Ethics (Management, Verification and Access to Financial Declarations), Regulations 2011 provide the legal framework for wealth declaration in Kenya embodying lifestyle audits.

It is noteworthy that the framers of the Constitution had consistently entrenched into the Constitution periodic declaration of income, assets and liabilities by state and public officers in the initial drafts.²⁵⁶ For instance, the *Bomas* Draft Constitution, 2004 provided as follows:

“A state officer shall submit a written declaration to the Ethics and Integrity Commission in the manner and form determined by the Commission, declaring the properties, assets, and liabilities of the state officer, the state officer's spouse and the state officer's unmarried children who have not attained the age of eighteen years – (a) immediately upon becoming a state officer; (b) every year while a state officer; and (c) on ceasing to be a State officer.”²⁵⁷

The above provisions of the *Bomas* Draft were progressive and sought to give wealth declaration constitutional prominence as a mechanism for accountability in governance. However, these provisions were deleted in subsequent constitutional reviews and were thus not part of the adopted Constitution in 2010.

The centrality of wealth declaration in promotion of good governance is evident in other countries such as Nigeria, Ghana, and Ukraine which have anchored their wealth declaration

²⁵³ Article 2(5) & (6) of the Constitution of Kenya.

²⁵⁴ See Article 8 of the United Nations Convention Against Corruption. See also Ben Sihanya (2013) “The United Nations Convention Against Corruption Implementation: Review on Kenya,” (2013) a presentation at the civil society retreat on the United Nations Convention Against Corruption review; November 6-9, 2013 at Brakenhurst Hotel, Limuru.

²⁵⁵ See also the Treaty Making and Ratification Act No. 45 of 2012.

²⁵⁶ For an account of the *Bomas* Constitution making process, see Jill Cottrell & Yash Ghai (2007) “Constitution Making and Democratization in Kenya (2000–2005),” Volume 14, *Democratization Journal*.

²⁵⁷ Article 97 of the Draft Constitution of Kenya 2004, adopted by the National Constitutional Conference on 15th March 2004 at http://www.katibainstitute.org/Archives/images/3-Bomas_draft.pdf (accessed 30/10/2019).

systems in their respective Constitutions.²⁵⁸ In this regard, failure by Kenya to anchor its wealth declaration regime in the Constitution denies it the constitutional weight and enforcement impetus accorded to Chapter 6 and related provisions of the Constitution.²⁵⁹

Curiously, the provisions on wealth declaration in Kenya are missing in the primary statutory framework that was enacted to operationalize Chapter 6 of the Constitution.²⁶⁰ This is therefore a major setback in the realization of the objectives for which such declarations are made.²⁶¹ The sections below discuss the various components of the wealth declaration system as contained in POEA.

3.2.1 Institutional Framework for Wealth Declarations

The law has vested EACC with the overall responsibility to oversee and enforce implementation of POEA provisions including the wealth declaration system.²⁶² Section 6(3) of the Leadership and Integrity Act, 2012 (LIA) incorporates all the provisions of POEA by reference to form part of LIA. It is in the exercise of its oversight and enforcement powers that EACC administratively requires the “responsible Commissions” discussed in the ensuing section to submit annual returns detailing the extent to which the public officers under them have complied with the wealth declaration requirements.²⁶³

The other form of institutional framework for the management of Kenya’s wealth declaration regime are designated agencies referred to as “responsible Commissions.”²⁶⁴ These agencies are designated for various categories of public officers under the Act.²⁶⁵

²⁵⁸ See detailed discussion and comparative Study on wealth declarations as a component of lifestyle audits in Chapter 4 of this thesis.

²⁵⁹ Related provisions in the promotion of transparency and accountability include Article 10, Chapter 6 and Chapter 13 of the Constitution.

²⁶⁰ The Leadership and Integrity Act, 2012 is enacted to provide procedures and mechanisms for effective administration of Chapter 6 of the Constitution.

²⁶¹ See Wachira Maina (2019) “State Capture: Why Kenya Has Been Unable to Slay the Corruption Dragon,” *The Elephant*, Nairobi, at <https://www.theelephant.info/features/2019/08/22/state-capture-why-kenya-has-been-unable-to-slay-the-corruption-dragon/> (accessed 10/11/2019).

²⁶² Section 4 of the Leadership and Integrity Act, 2012.

²⁶³ See Fredrick Obura (2017) “EACC: You have up to end of year to declare your income,” *The Standard*, Nairobi, 9/11/2017, at <https://www.standardmedia.co.ke/article/2001259736/eacc-issues-deadline-for-wealth-declaration> (accessed 28/11/2019).

²⁶⁴ The Act defines a responsible Commission in relation to a public officer to mean “the Commission determined under section 3 of the Act to be the responsible Commission in relation to that public officer,” or the body prescribed by regulation under section 3(10) the Act.

²⁶⁵ Section 3 of POEA.

A major gap that this study found in the institutional framework for implementation of POEA is that the Act, which was enacted in 2003, has never been amended to align it to the Constitution, 2010. Following adoption of the Constitution 2010, Kenya's governance structures were altered with the result that new offices were established in the public service. Consequently, POEA ought to have been subsequently amended to prescribe responsible Commissions for the new offices which were not hitherto prescribed under POEA.

Although POEA provides that PSC shall be the responsible Commission for public officers for which no other responsible Commission is prescribed²⁶⁶, it must be noted that the establishment of 47 county governments altered governance structures in a manner that defeated application of this provision. It is therefore not anticipated in law that officers in county governments would report to PSC on the subject of wealth declarations, when the counties have similar entities namely County Public Service Boards (COPBs) and County Assembly Service Boards (CASBs).

In view of the above, it can be safely concluded that the law is yet to expressly designate responsible Commissions for public officers serving in the new offices established pursuant to the Constitution, 2010. This means that there are no legally known entities to manage and monitor declaration of wealth by the said public officers. The consequence of this failure is that the public officers without designated responsible Commissions may fail to make their wealth declarations for want of a supporting institutional framework. For example, Governors do not have any responsible Commissions to which they can make their declarations.

In respect to the other functions of responsible Commissions in exercising disciplinary control over state and public officers, the importance of these agencies cannot be gainsaid. In *Philomena Mbeti Mwilu v. Director of Public Prosecutions and 4 Others*,²⁶⁷ the Court determined that before a Judge or Magistrate is subjected to a criminal trial through ODPP, they must first be taken through the disciplinary process under their responsible Commission, in this case JSC.²⁶⁸

²⁶⁶ Section 3(11) of POEA.

²⁶⁷ *Philomena Mbeti Mwilu v. Director of Public Prosecutions and 4 Others*, Petition No 295 of 2018

²⁶⁸ See Havi Law and Justice Foundation (2019) "Hearing of Hon Philomena Mwilu v DPP & Others: Prof Ben Sihanya," at https://www.youtube.com/watch?v=Lj_ffBIM-lc (accessed 28/11/2019).

3.2.2 Obligation to Make Periodic Declarations of Wealth

As discussed earlier in this Chapter, the legal framework for declaration of income, assets and liabilities by public officers (popularly known as wealth declaration) is the cornerstone for lifestyle audits in Kenya. It is the periodic declaration of wealth by public officers that provides information on the lifestyle of a public officer and which upon audit should disclose whether or not the public officer is abusing their office for private material gain.

Under Part IV of POEA, every public officer is required to submit a declaration of the income, assets and liabilities of himself, spouse or spouses and dependent children under the age of 18 years.²⁶⁹ The declarations are to be submitted in December of every declaration year.²⁷⁰

Analysis of available data reveals that despite these express provisions of the law on wealth declaration, compliance levels in Kenya remain low. More often than not, no action is taken against the non-compliant public officers. For instance, in the 2017 declaration year, only 50% of the responsible Commissions in the National Government submitted compliance returns to EACC.²⁷¹ According to EACC, only 5 responsible Commissions in the National Government reported that all the public officers for which they are responsible submitted their declaration forms in the 2017 declaration year.²⁷²

3.2.3 Contents of the Declaration Form

The declaration form is set out in the Schedule to POEA. The form is inadequate in terms of scope. There is no obligation to declare wealth of the public officer held in trust by close relatives and siblings, or held outside Kenya. The particulars regarding assets to be declared

²⁶⁹ Section 26 (1) of POEA.

²⁷⁰ Section 27 of POEA.

²⁷¹ Margaret Kobia (2019) “Key Note Address during the EACC Workshop on Validation of Administrative Procedures on Declaration of Income, Assets and Liabilities for Responsible Commissions in the National Government,” held at the Kenyatta International Convention Centre, on Thursday, 11th April 2019 from 9:00 a.m.

²⁷² These are: National Police Service Commission, Independent Policing Oversight Authority; Teachers Service Commission; Commission on Revenue Allocation; Office of Attorney General and Department of Justice; and the Judicial Service Commission. The other six had approximately 50% compliance level.

are ambiguous and incapable of supporting a sufficient audit that can lead to effective detection of illicit wealth possessed by the public officer.²⁷³

Critical details such as dates of acquisition of each property, cost of acquisition and market value are not part of Kenya's wealth declaration form. Their incorporation would have made the declaration form progressive.²⁷⁴ In its current structure therefore, Kenya's wealth declaration form falls below the standards expected for lifestyle audits as a mechanism for combating and preventing corruption.

3.2.4 Mode of Submission of Wealth Declaration Forms

The submission of wealth declarations by public officers is done manually.²⁷⁵ Manual submission of the declaration forms makes the process inefficient and time consuming. Manual handling of the declaration forms also makes it difficult to accurately and efficiently monitor public officers' wealth as compared to electronic submissions.²⁷⁶

3.2.5 Frequency of Declarations

The law prescribes three types of declarations namely initial declaration, biennial and final declaration.²⁷⁷ On the initial declaration, a public officer is required to declare their wealth within thirty days after becoming a public officer²⁷⁸ while the final declaration is made within thirty days of exiting public office.²⁷⁹

²⁷³ Africa Centre for Open Governance (AfriCOG) (2014) "Implementation of Chapter Six of the Constitution of Kenya 2010," Report prepared under a joint initiative of the Parliamentary Initiatives Network, Transparency International-Kenya, Kenyans for Peace with Truth and Justice (KPTJ) and Africa Centre for Open Governance (AfriCOG), at <https://africog.org/wp-content/uploads/2015/10/Implementation-of-Chapter-Six-of-the-Constitution-of-Kenya-20101.pdf> (accessed 28/10/19)

²⁷⁴ See Business Anti-Corruption Portal (2011) "Kenya Country Profile," at <http://www.business-anti-corruption.com/countryprofiles/sub-saharan-africa/kenya/> (accessed 28/11/2019).

²⁷⁵ Section 23 and Part IV of POEA only require state officers to submit. It does not specify whether it is manual or electronic. The practice has been that officers submit the declaration forms manually. See Chapter 4.8 on Phillinies.

²⁷⁶ See closing remarks by Justice Ringera, during the Retreat on Enforcement of the Public Officer Ethics Act, 2009. Philippines, Ukraine and Rwanda use electronic systems to transmit declarations. See comparative Study in Chapter 4 of this thesis.

²⁷⁷ See Fredrick Obura (2017) "EACC: You have up to end of year to declare your income," *The Standard*, Nairobi, 9/11/2017, *op.cit.*

²⁷⁸ Section 27 (3) of POEA.

²⁷⁹ *Ibid*, section 27 (4).

It is the view of this Researcher that the interval of two years between one declaration year and the subsequent one hampers effective monitoring of changes in a public officer's wealth because any change can only be detected during a subsequent declaration year. Shorter intervals could have allowed early detection of unusual increase in wealth to inform investigations into whether or not the increase is as a result of corrupt conduct.

3.2.6 Access to Wealth Declaration Forms

The Act prohibits access to the wealth declaration forms except with authority of the relevant responsible Commission.²⁸⁰ A person seeking access must demonstrate to the satisfaction of the responsible Commission that they have “a legitimate interest and good cause in furtherance of the objectives of the Act.” The law does not prescribe what standard would constitute “satisfaction” to the responsible Commission that a person seeking access to a declaration form indeed has the required legitimate interest.

The law further requires that a public officer whose declaration is sought should be granted an opportunity to make representations on the request. Since POEA is silent on the substance of the representations to be made by the public officer, it is not farfetched to infer that such representations may include refusal of access.

It cannot be logically expected that a person under corruption investigations will readily permit access to their declaration form that would incriminate them especially when there are no prescribed sanctions for refusing to grant such access.²⁸¹ The only recourse for a person or agency that has been denied access to a wealth declaration form is an appeal to the Cabinet Secretary.²⁸² It is not stated what the Cabinet Secretary would do in considering the appeal. It cannot be understood why such review power was not vested in court in line with practice in other laws.²⁸³

²⁸⁰*Ibid*, section 30 (1).

²⁸¹ POEA does not provide sanctions for a public officer who declines to grant access to the declaration form. There are similarly no sanctions for a responsible Commission that has failed to facilitate access to a declaration form.

²⁸² Regulation 8 of the Public Officer Ethics (Management, Verification and Access to Financial Declarations) Regulations, 2011.

²⁸³ Related provisions in section 4 of the Leadership and Integrity Act, 2012 vest review powers in the High Court. This section provides that where public entities have failed to comply with directives of EACC, EACC may seek appropriate orders in the High Court to compel action.

To further restrict access to the declarations, POEA makes it criminal for anyone to disclose the contents of a declaration without authority of the responsible Commission²⁸⁴ Stringent criminal sanctions are prescribed for anyone who publishes or in any way makes public the contents of a declaration. Curiously, the offence of disclosing the contents of declaration carries a more severe penalty than the offences relating to compliance with the declaration requirements.²⁸⁵

It is appalling that the restriction of access to wealth declaration forms applies to all persons including law enforcement bodies such as EACC, DCI and KRA which, ideally, should have unrestricted access to wealth declarations by virtue of their mandates.²⁸⁶ The challenges faced by law enforcement bodies in accessing wealth declaration forms for purposes of investigations have been raised by the Public Service Commission (PSC). In respect to one of the requests made by EACC to access a wealth declaration form for a Cabinet Secretary, PSC commented as follows:

‘The restriction of access to wealth declaration forms coupled with the lack of clarity on responsible Commissions for Cabinet Secretaries presented a challenge during the recent investigations into the NYS scandal. There was back and forth correspondence involving EACC, PSC, Cabinet Office and the National Assembly trying to find out which entity was responsible for the declaration form for the Cabinet Secretary. For us at PSC, we stated categorically that we are not the responsible Commission for Cabinet Secretaries. Even if we were, PSC could not automatically issue the form to EACC unless they follow the prescribed procedure for access to declaration forms. I don’t know if EACC finally got the Cabinet Secretary’s declaration form or not.’²⁸⁷

This statement is a perfect example of the drawbacks experienced in the fight against corruption due to the restrictions that POEA provides regarding access to wealth declaration

²⁸⁴ Section 30 (2) of POEA.

²⁸⁵ Section 32 of POEA provides that the offence of unauthorized disclosure of the contents of a declarations imprisonment for five years or to a fine not exceeding five hundred thousand shillings, while the offence of failing to make or making a false declaration attracts a to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.

²⁸⁶ An amendment to the Public Officer Ethics Act in 2007 removed the provision for direct access by police and law enforcement agencies, and instead introduced a blanket provision which states that the declarations are accessible to any applicant “who shows to the satisfaction of the responsible commission that he or she has a legitimate interest and good cause ins such a declaration.” The amendment further stated that before the responsible commission decides on whether to allow access, it must invite the person who made the declaration and give him or her an opportunity to make a representation of the matter. And if access is allowed, such information should not be published or in any way made public except with prior written authority of the responsible commission. A breach of this requirement attracts a penalty of imprisonment of five years or a fine not exceeding 500,000. This is as good as telling the public to keep away from the declarations.

²⁸⁷ Wesley Kipng’etich (2018) “Procedures for Declaration of Income, Assets and Liabilities: Best Practice, Emerging Issues and Challenges,” Presentation during a Capacity Building workshop for Managers of Declaration of Income, Assets and Liabilities, held at Mombasa Beach Hotel, on 5th September, 2018.

forms. It is remarkable that the report of the Building Bridges Initiative (BBI) Task Force²⁸⁸ released on 27th November 2019 recommended that wealth declaration forms be made public in order to effectively tackle corruption. If implemented, this will greatly boost the fight against corruption through verification of the contents of wealth declaration forms.

3.2.7 Verification of Declaration Forms

The Act mandates responsible Commissions to verify the declarations made by public officers. In order to facilitate the verification process, responsible Commissions are mandated to request public officers to submit any clarifications required in relation to the wealth declarations. The clarifications may be in regard to information that may have been omitted or discrepancies and inconsistencies in the declarations.²⁸⁹

The verification process including processing of any clarifications received should be undertaken within 6 months from the date of the declaration.²⁹⁰ It is this verification process that mainly constitutes lifestyle audit of the wealth of the public officer. It is however noteworthy that in Kenya, once public officers submit their declarations, verification is largely not done in practice.²⁹¹ The declaration forms are stored without any significant action thus making the declaration process a mere ritual. In most instances, the forms are filed and public officers who have submitted presumed to be fully compliant with the law at that stage.²⁹² This negates the essence of the wealth declaration system as a tool for transparency and accountability in public service.

As a result of the failure to conduct verifications of the wealth declarations, which is largely informed by the restrictions on access as discussed earlier in the preceding section,²⁹³ the wealth declaration regime in Kenya cannot be effective as a platform for lifestyle audits. An

²⁸⁸ Presidential Taskforce on Building Bridges to Unity Advisory (2019) “Building Bridges to a United Kenya: From a nation of blood ties to a nation of ideals,” Kenya International Convention Centre, Nairobi.

²⁸⁹ Section 28(2) of POEA.

²⁹⁰ *Ibid*, section 28.

²⁹¹ See See Closing Remarks by Justice Ringera, during the Retreat on Enforcement of the Public Officer Ethics Act, 2009.

²⁹¹ See EACC Report on the Status of Compliance by Responsible Commissions in Submitting Returns to EACC.

²⁹² See Report of the Task Force on Review of Policy, Legal and Administrative Framework for Fighting Corruption available online.

²⁹³ Chapter 3.2.8

effective mechanism for verifying the declarations would enable detection of possession of unexplained wealth and form a ground for investigations.

3.2.8 Requirement for Administrative Procedures

The Public Officer Ethics Act, 2003 (POEA) provides that before a public officer can be required to declare their wealth under the Act, the Responsible Commission must have in place administrative procedures developed and published in the Kenya Gazette for that purpose.²⁹⁴ The Act provides that where a responsible Commission has not developed such administrative procedures, no public officer under that responsible Commission shall be required to make their wealth declaration.²⁹⁵

The import of this provision is that in absence of administrative procedures, no legal action can be taken against a non-compliant public officer. This has largely been the case in Kenya because majority of the responsible Commissions have not developed such administrative procedures.²⁹⁶ It is reported by EACC that as at 30th June 2017, no administrative procedures had been developed to govern declaration of wealth by public officers serving in the offices established following the Constitution, 2010.²⁹⁷

While the administrative procedures could provide useful guidelines, there is no justifiable cause to make it a prerequisite for public officers to comply with the law on declaration of wealth.

3.2.9 Enforcement of Wealth Declaration Requirements

The Public Officer Ethics Act (POEA) vests the first hand responsibility to enforce the declaration requirements in the responsible Commissions.²⁹⁸ Where a breach is alleged, the responsible Commission is required to conduct investigations and take appropriate

²⁹⁴ Section 33(1) of POEA.

²⁹⁵ Section 33(4) of the Public Officer Ethics Act, 2003.

²⁹⁶ Sophia Lepuchirit (2018) “Keynote Address during the Workshop on Declaration of Income, Assets and Liabilities for Managers of Responsible Commissions in the National Government,” held at the Mombasa Beach Hotel (MBH) in Mombasa on Wednesday, 5th September 2018.

²⁹⁷ See EACC (2019), “Report on the status of compliance by responsible Commissions in submitting compliance returns,” EACC, Nairobi.

²⁹⁸ Section 5 of POEA.

disciplinary action.²⁹⁹ EACC is empowered to exercise oversight over how responsible Commissions enforce the wealth declaration requirements.³⁰⁰

In respect to sanctions for violation of the wealth declaration requirements, the law is silent on the disciplinary action to be taken by a responsible Commission under section 36 of POEA. However, the law criminalizes failure to declare wealth and making of false declarations.³⁰¹ In spite of the provisions on sanctions, the study found that no person in Kenya has ever been charged with the offence of failure to make declarations despite evidence of high levels of non-compliance.³⁰²

It is also arguable as to whether responsible Commissions have the requisite technical capacity for the conduct of investigations. Notably, the investigations envisaged under the Act are comprehensive and specialized law enforcement functions that are outside the domain and ordinary business of responsible Commissions.

The other notable weakness in these enforcement provisions is that in performing its oversight functions, EACC has to rely on unverified periodic reports from the responsible Commissions since it has no direct link to the public officers.³⁰³ The law does not provide for what further action EACC can take when a responsible Commission has failed to execute its functions in relation to the declarations.³⁰⁴ This is an ineffective enforcement approach that requires urgent review to ensure efficiency.³⁰⁵

²⁹⁹ Section 36 of the Public Officer Ethics Act, 2003.

³⁰⁰Section 4(2) as read with 6(3) of the Leadership and Integrity Act, 2012.

³⁰¹ Section 32 of the Act prescribes a penalty for disclosing the contents of declaration carries imprisonment for five years or to a fine not exceeding five hundred thousand shillings, while the offence of failing to make or making a false declaration attracts a to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both. One wonders why the penalty for disclosing the contents of a declaration is more severe than that of non-compliance with declaration requirements. Logically, it should be the other way round taking into the account the purpose for which declarations are made.

³⁰² See EACC Report on the Status of Compliance by Responsible Commissions in Submitting Returns to EACC. See also EACC Annual Reports from the Financial Year 2013/2014- 2018/2019.

³⁰³ See EACC Report on the status of compliance by Responsible Commissions in submitting returns to EACC.

³⁰⁴ See Lando Victor Okoth Ogwang (2007) "Rethinking Kenya's Anti-Corruption Strategies: Lessons from Botswana," a Dissertation Submitted to the Faculty of Law, University of Pretoria, and in partial fulfilment of the requirements for the Degree of Masters of Laws.

³⁰⁵ *Ibid.*

3.3 Lifestyle Audits under the Anti-Corruption and Economic Crimes Act, 2003

The Anti-Corruption and Economic Crimes Act, 2003 (ACECA) provides for civil forfeiture of public officers' unexplained wealth to the state as an anti-corruption strategy.³⁰⁶ Unexplained wealth refers to a person's assets that are not commensurate with the person's legitimately known sources of income, and which were acquired at or around the time the person was reasonably suspected of corruption or economic crime.³⁰⁷ A person in possession of such assets is presumed to have acquired them through corruption if no satisfactory explanation is given for the disproportionality.

Where a public officer is suspected to be in possession of unexplained assets, EACC is mandated to carry out investigations to verify the allegations.³⁰⁸ If the public officer is unable to explain the disproportion between their wealth and their legitimately known sources of income, it is concluded that the unexplained assets were acquired as the result of corrupt conduct and accordingly ordered to surrender the same to the state.³⁰⁹

The above is what happened in *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission (Amuti case)*³¹⁰ and *Ethics and Anti-Corruption Commission v. Jimmy Mutuku Kiamba & 4 others*.³¹¹ Significantly, the Court of Appeal in the *Amuti case*³¹² settled the law on unexplained wealth by affirming its framework as contained in ACECA.³¹³

3.3.1 Statutory Notices on Submission of Property Statements

In conducting investigations into alleged possession of unexplained wealth, EACC is empowered to issue a written notice to any public officer suspected of corruption to submit a written statement in relation to their property.³¹⁴ However, EACC must specify in the

³⁰⁶ See Oliver Mwangi (2008) "Political corruption, party financing and democracy in Kenya," at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=1874784&jid=MOA&volumeId=46&issueId=02&aid=1874776> (accessed 28/11/2019).

³⁰⁷ Section 2 of the Anti-Corruption and Economic Crimes Act, 2003. Further, section 27(1) of ACECA provides that unexplained wealth held by an associate of a person suspected of corruption fall within the meaning of "unexplained wealth assets" under ACECA.

³⁰⁸ Section 11 of the Ethics and Anti-Corruption Commission Act, 2011.

³⁰⁹ Section 55 of the Anti-Corruption and Economic Crimes Act, 2003.

³¹⁰ *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2019] eKLR, Civil Appeal No. 184 of 2018.

³¹¹ *Ethics and Anti-Corruption Commission v. Jimmy Mutuku Kiamba & 4 Others* [2018] eKLR.

³¹² *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission*, (2019), *ibid.*

³¹³ Section 55 of the Anti-Corruption and Economic Crimes Act, 2003.

³¹⁴ Section 26 of ACECA.

statutory notice the property it suspects of unlawful acquisition, reasons why the public officer is suspected to be linked to the unlawful acquisition and the period when the public officer is suspected to have unlawfully acquired the suspected property.

Where the wealth in question is held by an “associate”³¹⁵ of the public officer rather than the suspect themselves, ACECA requires EACC to obtain a court order requiring the person to provide a statement in relation to the property.³¹⁶ Such a statement should include the times at which it was acquired and the mode of acquisition.³¹⁷ The purpose of these statements is to provide information that EACC can analyze in determining whether or not the suspect is in possession of unexplained wealth.³¹⁸

There are glaring weaknesses in these provisions that could cause inefficiency in law enforcement. First, the requirement for EACC to first identify, on its own, and state in the statutory notice what specific assets out of the public officer’s entire wealth, are suspected of unlawful acquisition is a tall order. This is because EACC may genuinely have reason to suspect a person of possession of unexplained wealth but may not have the means to fully identify exactly what the suspect has unlawfully acquired.

It is rather the public officer with all the information regarding the property in their ownership or possession including information on the modes of acquisition of such property.³¹⁹ This study takes the view that the proper approach would have been to require a suspect to submit a statement enumerating all the wealth in their possession or ownership. A thorough audit would then determine if any of the stated properties indeed falls within the purview of unexplained wealth as defined in the Act.³²⁰

³¹⁵ Section 27 (2) of ACECA defines who an “associate of a suspected person” to mean “a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.

³¹⁶ Section 27 (1) of ACECA.

³¹⁷ Section 27 of ACECA requires this statement to clarify whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

³¹⁸ See Mackenzie, G. Calvin, Hafken Michael (2002) *Scandal Proof: Do Ethics Laws Make Government Ethical?* Brookings Institution Press.

³¹⁹ EACC (2019) “Asset Recovery a Key Strategy in Graft Fight,” accessed 28/11/2019).

³²⁰ Ivana M. Rossi, Laura Pop, and Tammar Berger (2017) “Getting the Full Picture on Public Officials: A How-to Guide for Effective Financial Disclosure,” at <file:///C:/Users/user/Downloads/eath%20Declaration-%20Best%20Prctice.pdf> (accessed 28/11/2019).

Second, the requirement that EACC must obtain a court order to require an “associate” of a person suspected of corruption to submit a statement relating to their property places unnecessary hurdles in the investigation process. It could have been more effective if the associate of the suspect is directly issued with a statutory notice by EACC without the necessity of a court order. In any case, suspicion of custody of corruptly acquired property by any person should in itself be a fair ground for a direct issue of a statutory notice.

The above challenges are compounded by the fact that Kenya does not have a central database of everything that a citizen owns. Furthermore, persons who plunder public resources are clever and will most preferably register those properties in the names of individuals other than themselves.

Law enforcement bodies may never know such individuals. Perhaps the proposed *Huduma* Number initiative³²¹ that was launched in Kenya in 2019 would seal this gap by ensuring establishment of a central storage for all information about a citizen including everything they own.

3.3.2 Requirement for “Reasonable Suspicion”

The Court of Appeal in *Christopher Marathi Murungaru v. Kenya Anti-Corruption Commission & Another*³²²(*Murungaru* case) addressed the need for reasonable suspicion on the part of EACC before a statutory notice is issued.

The court rendered itself thus:

“We pause here to point out that in order to issue a notice under this section (section 26), the Commission (KACC) and its Director must be in possession of some material from which it is REASONABLY SUSPECTED that the person to whom the notice is being issued has been involved in corruption or economic crime. In the absence of reasonable suspicion of involvement in corruption or economic crime, the Commission and its Director would have no power to issue a notice under section 26 of the Act.”

The court went ahead to explain the meaning of reasonable suspicion, citing the case of *Hussein v. Chong Fook Kam*³²³ where it was stated that “suspicion in its ordinary meaning is

³²¹The *Huduma Namba* initiative was a national drive to have all Kenyan citizens undergo fresh registration and have all their details registered and stored under one system and a single identification number issued. See the website at <http://www.hudumanamba.go.ke/> (accessed 10/11/2019).

³²² *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* [2006] eKLR. See discussion in Chapter 2.5.2

a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove. Suspicion arises at or near the starting point of investigation of which obtaining of *prima facie* proof is the end.”³²⁴

Courts have also thwarted other challenges to the powers of EACC to investigate matters under ACECA³²⁵ signifying the importance of the provisions of ACECA in fighting corruption³²⁶

The problem with the requirement for “reasonable suspicion” is that EACC must state in the statutory notice the reasons why the public officer is suspected of corruption. Ideally, the reasons for suspecting a person of corruption should be largely preceded by some preliminary inquiry or investigations in order to link them with the suspected corrupt conduct. This is the very essence of seeking information through the statutory notice. Requiring EACC, therefore, to state the reasons for suspecting a public officer of corruption beforehand amounts to putting the cart before the horse, and is therefore an obstacle to effective investigations.

This study finds that the prerequisite requirement for EACC to state the reasons for the suspicion of corrupt conduct is an unnecessary burden which places hurdles in the effective enforcement of the law. It is the view of this study that legal bottlenecks of this nature in the Kenya’s anti-corruption laws have made corruption a low risk venture due to the low chances of a suspect getting sanctioned, even in instances of clear display of illicit enrichment.

3.3.3 Proceedings for Forfeiture of Unexplained Wealth

Proceedings for unexplained wealth under ACECA are civil in nature. Evidence gathered during the lifestyle audit may not be used in criminal proceedings against a person, except in

³²³ *Hussein v. Chong Fook Kam* [1969] ALL E.R 1626.

³²⁴ See Donald Menzel (2007) *Ethics Management for Public Administrators: Building Organizations of Integrity*. M.E. Sharpe, Armonk, New York.

³²⁵ The Petitioners were *Okiya Omtatah Okioti & 2 Others v. Attorney General & 4 Others*, Petition 109 of 2016 & 8 of 2017 (Consolidated).

³²⁶ *Ibid.* The Court held at paragraph 129 that the institutional of as constitutional petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

certain limited circumstances including prosecution for perjury.³²⁷ This is what the Court of Appeal declared in *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission*.³²⁸

The study faults the Court of Appeal in this regard. Gaps of this nature in Kenya's law books and judicial precedents have the effect of shielding persons who have been found in possession of unlawfully acquired wealth from criminal sanctions. The most important question is, if a public officer is unable to explain how they acquired their material possessions, then how else did they acquire them other than by corrupt conduct by virtue of their offices? Why would one not be able to know and account for how they acquired what they own or possess?

In order for Kenya is to register meaningful success in the fight against corruption therefore, radical measures must be introduced in our laws including the Constitution.³²⁹ Continued existence of anti-corruption laws that do not match the deep rooted nature of corruption in Kenya can only make corruption to remain a "well-paying venture" devoid of effective legal consequences.

3.3.4 Emerging Jurisprudence on Lifestyle Audits under ACECA

As noted earlier in this Chapter, the law on forfeiture of unexplained assets was settled by the Court of Appeal in May 2019 in *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission*³³⁰ following a protracted legal tussle; twice in the High Court and twice in the Court of Appeal. The proceedings commenced in the High Court in *Kenya Anti-Corruption Commission v. Stanley Mombo Amuti*.³³¹

It was noted that before the Court of Appeal, in the *Amuti* case, pronounced the law on the importance of section 55 of ACECA in combating corruption through investigations into unexplained wealth, the case had begun in the High Court in 2007, 12 years before the Court of Appeal decision. In the High Court, Justice Rawal (as she then was), had faulted section 55

³²⁷ Section 30 of ACECA.

³²⁸ *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2019] eKLR.

³²⁹ See Kenya National Commission on Human Rights (2016) "National values & principles of governance : An alternative report of state compliance on obligations under Article 132 (C) (I), Constitution of Kenya 2010 on realization of Article 10," *op.cit.*

³³⁰ *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2019] eKLR, Civil Appeal No. 184 of 2018.

³³¹ *Kenya Anti-Corruption Commission v. Stanley Mombo Amuti*, Civil Suit 448 of 2008 [2011] eKLR

of ACECA on recovery of unexplained wealth terming is offensive to the former Constitution. In the *Amuti* case before the High Court, the Court had dismissed a case filed by EACC (then Kenya Anti-Corruption Authority) seeking recovery of unexplained wealth from Mr. Amuti.

This thesis singles out the High Court decision by Justice Rawal (much as it was years later overturned on appeal), as one that severely impeded the fight against corruption in Kenya.³³² It is noteworthy that the decision hampered effective enforcement of section 55 of ACECA during the critical period in the anti-corruption discourse when Kenya was establishing county governments.³³³ Strong accountability measures were necessary at this time given that devolution was characterized by transfer of massive resources to the counties.³³⁴ Absence of effective anti-corruption law enforcement mechanisms due to challenges such as demonstrated by Justice Rawal's decision in this case was a major blow to the fight against corruption.³³⁵

The ACECA provisions on unexplained wealth were further affirmed in *Jimmy Mutuku Kiamba & 3 others v. Ethics & Anti-Corruption Commission & 4 Others*,³³⁶ where the petitioner had argued that section 55 of ACECA violated the right to fair hearing and the right to privacy under the Constitution.

To the precedent set by the Court of Appeal in the *Amuti* case, this study adds that the fight against corruption would be significantly enhanced if, where evidence of criminal conduct is revealed during the proceedings for forfeiture of unexplained wealth, the Defendant is, in

³³² See the challenges harboring an effective war against corruption in EACC Annual Reports for the Financial Years 2010/2011, 2011/2013 and 2013/2014. In a big way, the decision frustrated the war against corruption since from the date of that judgment in 2011 until 2015 when it was reversed by the Court of Appeal, section 55 of ACECA on recovery of unexplained assets largely remained moot.

³³³ This was especially so given that in the period 2011 to 2015 when section 55 remained largely moot. In this period, county governments were at their infancy and it is logical to expect that they did not have in place sufficient accountability measures to protect the massive public resources transferred to them. It is thus reasonable to argue that the high levels annually reported by EACC, the Office of the Auditor General and other media regarding county governments has over the years deepened its roots largely due to ineffectiveness in Kenya's anti-corruption framework on illicit enrichment.

³³⁴ Constitution and Reform Education Consortium (2014) "Corruption Biggest Threat to devolution", available at <http://crecokenya.org/new/index.php/news/106-corruption-biggest-threat-to-devolution> (accessed on 29/11/2019).

³³⁵ EACC (2015) "Report on Corruption and Ethics Survey in Devolved Governments," EACC, Nairobi.

³³⁶ *Jimmy Mutuku Kiamba & 3 others v Ethics & Anti-Corruption Commission & 4 others* [2018] Eklr.

addition to forfeiting the unexplained wealth, subjected to criminal sanctions. This would be necessary to deter illicit enrichment by public coffers. Absence of this aspect in the existing law is an impediment to effective lifestyle audits through the unexplained wealth provisions.

3.4 Lifestyle Audits under the Leadership and Integrity Act, 2012

Lifestyle audits through monitoring of bank accounts held by public officers outside Kenya are provided for under Article 76(2)(a) of the Constitution as read with Section 19 of the Leadership and Integrity Act, 2012 (LIA), and Part IV of the Leadership and Integrity Regulations, 2015. Chapter 6 of the Constitution prohibits state and public officers from holding bank accounts outside Kenya³³⁷ except in the manner prescribed in LIA.

LIA provides that any person seeking to operate a bank account outside Kenya should seek approval from EACC and further submit bank statements to EACC at the end of each year.³³⁸ The Regulations prescribe an instrument which a holder of a bank account outside Kenya is required to execute authorizing EACC to verify any information in relation to the bank account including obtaining information from the bank where the account is held.³³⁹

In order to facilitate monitoring of all bank accounts outside Kenya, the Regulations require EACC to open and maintain a database of all state and public officers operating such bank accounts³⁴⁰ LIA criminalizes a public officer's failure to disclose to EACC any operation of a bank account outside Kenya.³⁴¹

It is noted that the existing framework for monitoring bank accounts outside Kenya has weaknesses that impede its effectiveness. First, there is no mechanism prescribed in law to enable EACC determine whether a public officer operates an approved bank account or not and further, no provisions in law that would empower EACC to develop such mechanisms

³³⁷ Article 76(2)(a) of the Constitution

³³⁸ Section 19 of LA.

³³⁹ *Ibid.*

³⁴⁰ Regulation 21 of the Leadership and Integrity Regulations, 2015, *op.cit.* See also See Kenya National Commission on Human Rights (2016) "National values & principles of governance : An alternative report of state compliance on obligations under Article 132 (C) (I), Constitution of Kenya 2010 on realization of Article 10," *op.cit.*

³⁴¹ Section 19(5) of the LIA provides that the offender is, upon conviction, liable to imprisonment for a term not exceeding five years, or a fine not exceeding five million shillings, or both.

administratively³⁴² This also frustrates the ability of EACC to develop and maintain a database for all public officers operating bank accounts outside Kenya as envisaged under the Regulations.

Similarly, the law does not envisage that a public officer could still engage in corruption through a bank account held in trust for them outside Kenya by a person who is not a public officer or indeed by a foreigner.³⁴³

Second, the requirement to submit to EACC annual bank statements and authorize their verification has no legal value because the law does not state what EACC is to do with the submitted bank statements upon receipt.³⁴⁴ It can only be implied that the annual bank statements are submitted for the purpose of auditing to determine if the account holder is in possession of unlawfully acquired money or is otherwise using the bank account to advance corrupt practices.

Notably, most of the annual bank statements are submitted in foreign language which can frustrate any initiative to analyze. Neither the Act nor the Regulations provide for the language in which the statements are to be submitted. The upshot is that in the absence of clear enabling provisions on verification, the statements may be submitted for storage purposes only.

Third, while it is a criminal offence for the failure of a public officer to disclose operation of a bank account outside Kenya, it is ridiculous that no similar criminalization has been provided for in respect to the failure to seek approval of EACC, yet this is the gist of these approval requirements.

In this regard, nothing stops a public officer from merely notifying EACC that they operate a bank account outside Kenya without necessarily seeking any approval. Equally missing are

³⁴² It is only public officers under the employ of the Ministry of Foreign Affairs who serve in foreign Missions and Embassies that EACC can hold to account in respect to these provisions. This is because their records are available and the officers are expected to operate bank accounts in their respective foreign countries of service.

³⁴³ See Kenya National Commission on Human Rights (2016) “National values & principles of governance : An alternative report of state compliance on obligations under Article 132 (C) (I), Constitution of Kenya 2010 on realization of Article 10,” *op.cit.*

³⁴⁴ See Chapter 4 on best practice from other jurisdictions.

sanctions for the failure to submit annual bank statements which are the tools for the envisaged lifestyle audits.

It is a finding of this study that the provisions on regulation of bank accounts outside Kenya constitute a reasonable initiative for lifestyle audits if the loopholes identified were addressed.³⁴⁵ This is because as a matter of common sense, no reasonable public officer would stash their stolen funds in a bank account either locally or overseas while aware that the bank accounts are within the reach of law enforcement bodies.

3.5 Lifestyle Audits through Vetting under Chapter 6 of the Constitution

As noted in the introductory discussion in this Chapter, LIA does not provide for a vetting framework. What is currently obtaining is that the Act provides for a general submission of self-declaration forms to EACC for persons seeking appointment³⁴⁶, and to IEBC for those seeking elective positions.³⁴⁷ LIA has no provisions on what EACC and/or IEBC should do upon receipt of the self-declaration forms. Clearly, the self-declarations in relation to an individual's integrity cannot constitute the vetting contemplated under Chapter 6 of the Constitution.

In determining the integrity suitability of persons, EACC uses guidelines it has administratively developed to inquire into the integrity status of individuals then forwards its recommendations to the public entities seeking to appoint persons.³⁴⁸ In relation to elective positions, EACC submits recommendations to IEBC which is mandated to determine if aspirants for political positions meet integrity requirements. However, the recommendations of EACC on integrity of persons seeking office are not binding on any entity and there are no sanctions provided in law for non-compliance with recommendations of the Commission. This remains a major obstacle to effective implementation of Chapter 6 of the Constitution.

Separately, there are other statutes which, although not enacted pursuant to Chapter 6 of the Constitution, provide for vetting of specific categories of state and public officers. Following

³⁴⁵ *Ibid.*

³⁴⁶ Section 12A of the Leadership and Integrity Act, 2012.

³⁴⁷ Section 13 of the Leadership and Integrity Act, 2012.

³⁴⁸ Ethics and Anti-Corruption Commission (2018) "National Ethics and Corruption Survey, 2017," EACC Research Report No. 6 of May 2018, *op.cit.*

promulgation of the Constitution 2010, three (3) categories of public officers were subjected to vetting to determine, *inter alia*, their integrity suitability to continue serving in their respective offices. As discussed in the introduction to this Chapter, the categories include: Judges and Magistrates, police officers; and staff of EACC.³⁴⁹

Unlike the weak vetting framework under LIA discussed earlier in this Chapter, vetting for these categories of state and public officers was properly anchored in law. However, it was a one-off exercise, only targeting the persons in office at the commencement of their respective statutory vetting frameworks.

In addition, lifestyle audits through vetting of public officers have also been done through a Presidential Proclamation. President Uhuru Kenyatta has during his second and final term in office, 2017-2022, attempted to implement lifestyle audits as a measure to curb runaway corruption. The President announced that all Government officials and their families would undergo a lifestyle audits³⁵⁰ to combat corruption that was reaching alarming levels in Kenya. He said thus:

“My Administration is taking measures to bring accountability to the Public Service. These include the fresh vetting of all senior Accountants and Procurement Officers, and enhanced lifestyle audits. We have also provided resources to the investigatory agencies that are working to bring cases against the corrupt in order to deter these crimes. To consolidate the gains we are making, the E.A.C.C. should promulgate regulations and guidelines to enable all investigative agencies to access Wealth Declarations of all State and Public Officers.”³⁵¹

Consequently, all heads of accounting and public procurement units in the public service were taken through the lifestyle audit process by a Panel constituted from the Office of the President. This was a personalized rigorous process that involved impromptu interviews, intensive grilling³⁵² and polygraph testing.³⁵³

³⁴⁹ See introductory discussions at chapter 3.1 of this Chapter.

³⁵⁰ See Chapter One of this Thesis.

³⁵¹ Uhuru Kenyatta (2018) “Speech during Mashujaa Day Celebrations,” 20/10/2018.

³⁵² Standard July 2018.

³⁵³ Jeremiah Wakaya (2018) “400 procurement, accounting heads cleared in vetting,” *Capital News*, Nairobi, at <https://www.capitalfm.co.ke/news/2018/08/400-procurement-accounting-heads-cleared-in-vetting/> (accessed 18/10/19).

The vetting was undertaken using a self-assessment tool issued by the Head of Public Service through a Circular entitled “Presidential proclamation on fresh vetting of public officers.”³⁵⁴ This circular was challenged in the High Court in *Okiya Omtatah Okiiti v. Joseph Kinyua, Public Service Commission & Attorney General*³⁵⁵ (*Okiya Omtatah* case) but the court permitted the vetting to continue.³⁵⁶

It is a finding of this study that although the vetting exercise was not anchored in any known law, the exercise was well intended and constitutes the much needed lifestyle audits to address corruption in public service. As discussed in Chapter 1 of this thesis, this vetting did not achieve much since only less 20 out of the 600 officers vetted failed the vetting exercise.

As recommended later in Chapter 5 of this thesis, the most significant feature of this process was the elaborate nature of the self-assessment tool which, if anchored into law, could greatly facilitate the standard of lifestyle audits required in Kenya.

3.6 Appraisal of Kenya’s Lifestyle Audit Bill 2019

The principal purpose of the Bill, as stated in its memorandum of objects is to provide a legal framework for lifestyle audits. The Bill seeks to incorporate the Values and Principles of Governance under Article 10 of the Constitution in the performance of public duties.

This study notes that although the Bill presents a significant attempt to respond to the increasing public clamour for enhanced mechanisms for fighting corruption, the Bill falls short of the ideals of an effective lifestyle audits framework that is commensurate with the nature and extent of corruption in Kenya. The study identified 10 weaknesses in the Bill.

³⁵⁴ The Circular directed all Heads of Accounting Units and Heads of Procurement Units to immediately hand over to their deputies and thereafter proceed on compulsory leave for 30 working days. However, the officers would continue to earn their salaries and allowances during this period. This is an aspect of the circular that was subject to a successful challenge in Court as discussed below. Further, during the leave period, officers were not allowed to leave the country without requisite clearance by the Head of Public Service. The officers were further required to fill and submit to the Head of Public Service a detailed self-assessment tool to facilitate vetting.

³⁵⁵ *Okiya Omtatah Okiiti v. Joseph Kinyua, Public Service Commission & Attorney General*, Petition No. 53 of 2018, *eKLR*.

³⁵⁶ The court held that the circular was illegal and unconstitutional only to the extent that by designing and prescribing imposition of a compulsory leave with full pay the circular thereby contravened Articles 47(1), 41(1), 129(2), and 232(1) (b) of the Constitution of Kenya, 2010 and only to that extent, the circular was rendered null and void. The court held that the mass suspension of the public servants, and paying them salaries at the same time, was not only unconstitutional but injurious to taxpayers.

First, as expressed in the long title, the Bill seeks to give effect to Article 10 of the Constitution. No similar attribution is made to Chapter 6 of the Constitution despite that lifestyle audits are part of the anti-corruption law enforcement mechanisms contemplated under Article 80 for implementation of Chapter 6 of the Constitution. The scope of the Bill should have incorporated Chapter 6 under which such mechanisms are more prominently envisaged. Such incorporation of Chapter 6 on leadership and integrity should also have trickled down to the Bill provisions.

Second, the Bill defines a “lifestyle audit” as “an investigative audit of a person's living standards to ascertain consistency with the person's lawfully obtained and reported income.” It is however not clear what “reported income” refers to given that there exists different regimes for reporting income including tax returns to KRA and wealth declarations under the Public Officer Ethics Act, 2003 (POEA). There is therefore need for clarity and widening of the scope beyond a person’s income as known in Government records, and the obvious display of opulence to include other forms income that may be unreported, unregistered properties or wealth that is kept in foreign countries or held in trust by others.

Third, Clause 5 of the Bill makes a blanket provision that the new Act shall apply to the various statutes listed thereunder including ACECA, POEA, LIA and POCAMLA. The Bill is silent on how its provisions shall apply to these listed statutes without any provision harmonizing the Bill to the provisions relating to lifestyle audits under the existing law. This is a recipe for conflict of laws and more challenges in the implementation of anti-corruption laws. Harmonization with existing frameworks as discussed in Chapter 3 of this thesis would have been a better approach. For example, clauses 7-17 of the Bill provide for investigation procedures without any reference or harmonization with the existing similar framework under sections 24-29, and 55-56B of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA).

Fourth, the Bill under Clause 6 provides the institutional framework for implementation of lifestyle audits. In doing so, the Bill designates EACC, KRA and responsible Commissions established under section 3 of POEA as the investigative agencies. The agencies are put on the same pedestal without regard to their diverse mandates and functional focus. For

example, EACC has supervisory and oversight jurisdiction over the said responsible Commissions under existing laws.³⁵⁷ Significantly, this provision ignores the fact that there is already in existence a Constitutional and statutory framework for implementation of anti-corruption law enforcement mechanisms such as lifestyle audits.³⁵⁸

Further, as discussed under Chapter 3 of this thesis, the current framework of responsible Commissions in Kenya under section 3 of POEA is incomplete and ineffective making the entities ill equipped for the task assigned under the Bill. In any case, the nature of the lifestyle audit processes envisaged under the Bill are comprehensive law enforcement functions including investigations, searches and litigation, which are outside the domain and ordinary business of responsible Commissions.

In addition, requiring responsible Commissions to undertake lifestyle audits means that there would be over 100 entities in Kenya conducting investigations through lifestyle audits at both levels of Government in an uncoordinated manner, devoid of uniform standards, specialized investigative skills, experience and consistency in the application of the law.

Fifth, under clauses 19 and 20, the Bill makes provisions for the production of information by persons other than a person suspected of being in possession or ownership of unexplained wealth. However, the Bill does not similarly consider the important value of the information held by various public institutions regarding the wealth of a person under investigations. For instance, the Bill fails to provide how Kenya's tax administration regime by KRA could be utilized to facilitate lifestyle audits through detection of corruption through reported income.

Other vital agencies which are custodians of critical information that could give indications on an individual's wealth or financial transactions include the Ministry of Lands, Registrar of Companies, Financial Reporting Centre (FRA), National Transport and Safety Authority (NTSA) and Responsible Commissions. As such, provisions requiring these agencies to proactively provide such information should have been made.

³⁵⁷ See sections 4(2-5), 5, 6(3) and 52(2) of the Leadership and Integrity Act, 2012.

³⁵⁸ Section 3 of the Ethics and Anti-Corruption Act, 2011 as read with Articles 79 and 80 of the Constitution.

Sixth, Part II of the Bill, which covers clauses 22-36 introduces an elaborate prosecution framework namely “Deferred Prosecution Agreements.” Whereas the Bill is intended to provide procedures for conducting lifestyle audits which are in the domain of investigations, the DPA framework substantially shifts the legislative focus of the Bill. Clearly, this framework is misplaced in the Bill and should have been separately considered under the Office of the Director of Public Prosecutions (ODPP) Act, 2013.

Seventh, clause 37 of the Bill requires the Director of Public Prosecutions (DPP) to make Regulations for the better carrying out into effect of the Act. Notably, the Bill provides for matters that cut across the functions of various Constitutional and statutory bodies. For this reason, an appropriate approach could have been to vest the responsibility of making Regulations in the Cabinet Secretary for the time being responsible for matters connected to anti-corruption, ethics and integrity, but in consultation with the relevant agencies including ODPP, EACC, KRA among others.

Eighth, the Schedule to the Bill prescribes the information required for conducting a lifestyle audit. However, the schedule is limited in scope in the sense that it enumerates the various forms of information in a general manner without their parameters of disclosure. While this gap could arguably be subsequently cured through Regulations, this thesis argues that there could have been more legislative value in expressly defining the parameters of disclosure in the Bill. Additionally, the Bill is silent on wealth declaration forms under Part IV of POEA where such information is also disclosed.

Ninth, under the Memorandum of Objects and Reasons, it is erroneously stated that there is no legal framework in Kenya on how lifestyle audits are to be carried out. In this statement, the Bill fails to recognize the existing framework for lifestyle audits as earlier discussed under Chapter 3 of this thesis.

Tenth, the Bill has not addressed the issue of verification and review of wealth declarations under POEA and regulation of bank accounts held outside Kenya by public officers under section 19 of LIA, which are crucial frameworks in the lifestyle auditing discourse.³⁵⁹ This is

³⁵⁹ See Chapter 3.3 above on the weaknesses of POEA and LIA.

a loophole which has been exposed previously and ought to have been covered or addressed through this Bill.

Based on the above observations, it is the view of this study that although the enactment of the proposed lifestyle audits law is a timely and significant development in strengthening Kenya's anti-corruption regime, there is a compelling case to first address the implementation gaps in the existing frameworks that contain provisions relating lifestyle audits as identified in Chapter 3 of this thesis.

The need to remedy the insufficiency and weaknesses in the existing frameworks is largely informed by the fact that the proposed Lifestyle Audit Act will have to be read together and applied contemporaneously with the existing frameworks. While it is acknowledged that not all the challenges in the fight against corruption could be fully resolved through the instant Bill, the need for the focus and content of the Bill to be informed by the prevailing situation cannot be gainsaid.

3.7 Summary of Key Findings and Conclusion

This Chapter has critically analyzed the legal framework on lifestyle audits in Kenya. It is clear from the foregoing analysis that lifestyle audits is not sufficiently anchored in law in Kenya. Apart from the elaborate constitutional framework, several pieces of statutes, regulations and rules have to be read together in order to give lifestyle audits a meaning. The laws have weaknesses that impede effective implementation.

In respect to Kenya's wealth declaration system under POEA, the key finding is that the attendant legal framework has major weaknesses which hamper effective enforcement. Significantly, absence of responsible Commissions for some public officers, restrictions on access to declaration forms and the waiver of the obligation of public officers to declare wealth if their responsible Commissions have not developed administrative procedures negates the very essence of transparency and accountability.

On the conduct of lifestyle audits under the ACECA provisions relating to unexplained wealth, the stringent prerequisite requirements that EACC must comply with before issuing a statutory notice defeat the very purpose of the statutory notices. In particular, requiring

EACC to first identify what part of a public officer's wealth is suspect, why the public officer is suspected of having stolen and what specific period relates to the suspicion are major hurdles in the tracing and recovery of unexplained wealth.

This study holds that even if the prerequisite conditions to the issue of a statutory notice are aimed at safeguarding constitutional rights such as presumption of innocence or right to silence, there is a larger public interest in effectively eradicating corruption in Kenya given the harm that it continues to cause to citizens.³⁶⁰

As recommended in Chapter 5 of this thesis, the high levels of corruption in Kenya and insufficiency of previous anti-corruption mechanisms constitute a proper case for Kenya to revisit its Constitution and review the Bill of Rights to subject some of the unlimited individual rights and freedoms to important public interest pursuits such as the fight against corruption.³⁶¹

In respect to the framework for monitoring of bank accounts outside Kenya, this Chapter found that although the framework is a significant move towards enhancing lifestyle audits, its weaknesses as discussed therein defeat the very purpose of regulating bank accounts outside Kenya.

Regarding vetting for compliance with Chapter 6 of the Constitution, it was established that LIA falls short of the requirement to provide vetting procedures with the result that persons with questionable integrity continue to join and remain in public service without consequences.³⁶²

On the Lifestyle Audits Bill, 2019, the finding of this Chapter is that the Bill, in its current form, does not meet the threshold of an ideal lifestyle audits framework capable of effectively

³⁶⁰ See generally Chapter 2 of this Thesis on the high magnitude of corruption in Kenya. It is argued in Chapter 2 that existing anti-corruption mechanisms have largely failed since independence partly due to the constitutional safeguards on the rights of individuals at the expense of the larger public that suffers due to actions of those individuals.

³⁶¹ See Paul Ogemba (2019) "Suspect faults EACC in graft case," *The Standard*, Nairobi, 14/8/2019, at <https://www.standardmedia.co.ke/article/2001338050/suspect-faults-eacc-in-graft-case> (accessed 28/11/2019).

³⁶² Wachira Maina (2019) "State Capture: Why Kenya Has Been Unable to Slay the Corruption Dragon," *The Elephant*, *op. cit.*

responding to the needs that inform its enactment. Enactment of the Bill into law, as per its current proposals, does not therefore provide appropriate solutions to the challenges in Kenya's lifestyle audit framework. This conclusion leads to the recommendation made under Chapter 5 in respect to the nature of the ideal legislation suitable for Kenya in respect to lifestyle audits.

From the analysis of this Chapter, the study concludes that Kenya cannot make any significant progress in the deployment of lifestyle audits in the quest to curb corruption unless the attendant legal framework as contained in the existing statutes is strengthened through legislative interventions, and thereafter effectively enforced.

Chapter 4 of this thesis narrows this discussion to consider the implementation of lifestyle audits through wealth declarations in selected jurisdictions namely Ukraine and Rwanda and draws best practice that Kenya could adopt in reforming its lifestyle audits framework, in so far as it relates to wealth declarations.

CHAPTER 4

BEST PRACTICE FROM OTHER JURISDICTIONS ON LIFESTYLE AUDITS AS AN ANTI-CORRUPTION STRATEGY

4.1 Introduction

This Chapter focuses on identification of best practice from other jurisdictions. The Chapter discusses the legal frameworks on lifestyle audits through wealth declaration systems in selected two (2) countries namely Ukraine and Rwanda, and singles out various aspects of those frameworks which the study considers useful lessons for Kenya.

Ukraine and Rwanda have been selected for this study due to their vibrant and progressive lifestyle audits aspects of their wealth declaration frameworks and their general success in taming corruption. This is elaborated in the ensuing discussion under this Chapter.

According to the Transparency International's Corruption Perception Index Report of 2018 Ukraine was ranked at number 32 out of 180 countries.³⁶³ On the other hand, Rwanda was ranked number 48 globally making it the fourth least corrupt country in Africa.³⁶⁴ On its part, Kenya was ranked number 144 out of 180. This makes Ukraine and Rwanda unique to showcase their milestones in fighting corruption. The World Bank has partly attributed the two countries relative success to their effective wealth declaration systems.³⁶⁵

The wealth declaration systems in Ukraine and Rwanda are comprehensive in nature and are robustly implemented.³⁶⁶ The rankings by TI indicate that the strategies deployed by the two countries in fighting corruption, including lifestyle audits through wealth declarations, are effective thus suitable for case study to draw lessons for Kenya.

³⁶³ *Ibid.*

³⁶⁴ Transparency International (2018) "Corruption Perception Index," https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2018. Accessed on 20.08.2019. According to the Corruption Perception Index, ranking is presented in the hierarch of least corrupt to most corrupt.

³⁶⁵ World Bank (2013) "Income-and-Asset-Disclosure-Case-Study-Illustrations," <http://documents.worldbank.org/curated/en/664561468340842190/pdf/Income-and-asset-disclosure-case-Study-illustrations.pdf>. (accessed on 20.08.2019). *op. cit.*

³⁶⁶ *Ibid.*

Significantly, Ukraine and Rwanda, just like Kenya, are signatories to the United Nations Convention against Corruption (UNCAC)³⁶⁷ which, *inter alia*, requires each state party to promote integrity, honesty and responsibility among its public officials through effective assets disclosure systems. The wealth declaration systems of the three countries present several key lessons for Kenya.

Chapter 2 of this thesis identified diverse mechanisms through which various countries undertake lifestyle audits in fighting corruption. It was established in Chapter 2 that wealth declaration is the universal tool for accountability across the globe.³⁶⁸ Unlike the other frameworks identified, wealth declaration by public officials is the bedrock of lifestyle audits across various countries in the world and the one with the widest scope of application in each country's public sector.³⁶⁹ This is the case for Ukraine and Rwanda which have comprehensive and effectively enforced lifestyle style audits frameworks under their wealth declaration regimes.

As discussed in Chapter 3, wealth declaration by public officials is also the main vehicle for lifestyle audits in Kenya. The study has also noted that like it is in Kenya, the 2 countries studied for best practice also have legal provisions on inquiries into possession of unexplained wealth. These provisions are largely similar Kenya's thus leaving their wealth declaration systems as the most appropriate frameworks for case study under this Chapter. It is also appreciated that the wealth of an individual is the most prominent component of a lifestyle audit in the sense that living standards are pegged on material possessions.

Consequently, the discussion under this Chapter in the pursuit of best practice for Kenya in the reform of its lifestyle audits framework primarily focuses on wealth declarations as the parameter of study.

³⁶⁷ See article 8 of Chapter II of the Constitution of Philippines.

³⁶⁸ World Bank (2014) "Asset Declaration Systems", at <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1233946247437/5810405-1399294268994/AD-International-and-Regional-Trends.pdf> (accessed 28/11/2019).

³⁶⁹ World Bank (2013) "Income-and-Asset-Disclosure-Case-Study-Illustrations," <http://documents.worldbank.org/curated/en/664561468340842190/pdf/Income-and-asset-disclosure-case-Study-illustrations.pdf>. Accessed on 20.08.2019.

The sections below discuss the wealth declaration systems of Ukraine and Rwanda in relation to Kenya's similar system under POEA and draw lessons for Kenya.

4.2 Lifestyle audits through wealth declarations in Ukraine

Ukraine's wealth declaration regime is anchored under the Law on Prevention of Corruption (LPC) which was adopted in Ukraine in October 2014.³⁷⁰ The Law serves two purposes: preventing and detecting illicit enrichment, and preventing conflicts of interest among public officials. This is in contrast to Kenya where part IV of the Public Officer Ethics Act, 2003 (POEA) which focuses more on detecting illicit enrichment without any regard to conflict of interest, a critical issue of focus in the conduct of lifestyle audits.

In Ukraine, wealth declarations are submitted, managed and monitored electronically and from a unified electronic register,³⁷¹ a sharp contrast to Kenya where public officers make and submit their declarations manually. Storage, analysis and retrieval of the declarations in Kenya is also manual thus making the system ineffective.³⁷²

Remarkably, in respect to contents of a declaration, LPC in Ukraine specifies ceilings for expenditures of a public officer and value of movable assets that a public officer should declare.³⁷³ It is not open ended like the Kenya's system where a public officer declares everything including low level assets such as clothing, mobile phones and household goods. The Ukraine's case is a unique feature in the law that addresses the challenges of lifestyle audits associated with dishonesty in declarations.

Further on the content of a wealth declaration, LPC requires disclosure of information relating to non-financial interests such as employment and memberships to help in declaring conflict of interests by indicating money spent, as well as an interest in a given company ownership.³⁷⁴ This aspect of disclosing non-financial interests in other entities so as to detect

³⁷⁰ Section VII of the Law on Prevention of Corruption.

³⁷¹ See Article 54 LPC. See also World Bank (2013), *Conflicts of Interest, A Background Primer*, available at <https://agidata.org>, (accessed 1/11/2019).

³⁷² See Chapter 3.

³⁷³ *Ibid.*

³⁷⁴ Article 46 (11 and 12) of the LPC. See also World Bank (2013), *Conflicts of Interest, A Background Primer*, available at <https://agidata.org>, accessed 29 September 2016.

or curb conflict of interest is not explicit in Kenyan laws which only require public officers to generally state the business entities they are affiliated to.³⁷⁵

Most public officers in Kenya do not declare their business interests leaving it to detailed investigations by law enforcement bodies through collaboration with agencies such as KRA, Registrar of Companies and others to unmask the interests of public officers.³⁷⁶

LPC provides that public officers should notify the National Agency in case of any major change in the officer's assets within ten days from the receipt of income or purchase of property by writing to the National Agency.³⁷⁷ This enhances the process of declaration and monitoring of the public officers since the duration is short to fabricate an excuse.

Further, the law requires public officers in Ukraine to notify the National Agency within ten days if one of their family members opens a foreign currency account in a non-resident bank.³⁷⁸ This discourages public officers from transferring ill-gotten wealth to safe havens abroad.

All the above features on the prompt notification of changes in a public officer's wealth are not present in Kenya's legal framework.³⁷⁹ In case one's assets change significantly, the Responsible Commission or EACC only gets to know about it when the subsequent declaration is made, two years later.

On the frequency of declarations in Ukraine, declarations of assets are made when a person is seeking public office, annually during office tenure and after leaving office.³⁸⁰ In Kenya, declarations of assets are submitted at the commencement of one's term in office and biennially, signifying a major difference in terms of frequency of submissions. Short

³⁷⁵ See Part IV of POEA.

³⁷⁶ See Chapter 3. A State House Summit on Corruption was hosted in State House in October 18, 2016. There was also a Multi-Sectoral National Anti-Corruption Conference in Bomas in January 25, 2019 led by President Uhuru Kenyatta. See Edwin Okoth (2019) "Kenyans now wait for action as graft summit ends," *Daily Nation*, Nairobi, 27/1/2019, at <https://www.nation.co.ke/news/politics/Kenyans-now-wait-for-action-as-graft-summit-ends/1064-4953114-13y1qyo/index.html> (accessed 10/11/2019).

³⁷⁷ Article 52 of LPC.

³⁷⁸ Article 52 of LPC.

³⁷⁹ See Chapter 3.

³⁸⁰ Article 45 of LPC.

intervals between declaration periods are key in ensuring early detection of corruption relating to public officer's wealth.³⁸¹

The National Agency responsible for wealth declaration in Ukraine is empowered to conduct the verification of declaration forms through direct access to data bases of state authorities. It also has the right to access information held by citizens, associations, business organizations and entities.³⁸² The National Agency also has the right to seek and get written clarifications and explanations on the truthfulness and credibility of information provided by public officers in their declarations.³⁸³

In principle, there is a ground for asking for banking information since financial institutions are part of business entities.³⁸⁴ Ease of access to the public officer's banking information is important for the agency charged with investigation of corrupt practices.³⁸⁵ In Kenya, there are restrictions to the access of declared information. Similarly, access to a public officer's bank account in Kenya can only be through a court order. The wide scope of verification of declarations done in Ukraine is thus unavailable in the Kenyan case.

The law in Ukraine provides for selective monitoring of the lifestyle of the public officers who make declarations in order to establish conformity between the living standards of the officers as well as their family members and the declarations made.³⁸⁶ Such initiative is unavailable in Kenya's wealth declaration system thus an important lesson to draw.

LPC provides for on-site-inspection and observation of properties declared by public officers to verify the actual value of the properties as compared to what has been declared.³⁸⁷ This guards against undervaluation of declared property in a bid to hide the actual assets worth of

³⁸¹ See Stephen Nduvi (2017) "Is Wealth Declaration a Means to an End or an End in Itself in Curbing Corruption?" at <https://kippra.or.ke/is-wealth-declaration-a-means-to-an-end-or-an-end-in-itself-in-curbing-corruption/> (accessed 11/8/2019).

³⁸² Article 56 of LPC.

³⁸³ Article 12 (9) of LPC.

³⁸⁴ Article 12 (8) of LPC.

³⁸⁵ Western Balkans Recommendation, *ibid*, E.7: "Banking secrecy should not be an obstacle to using banking data for verification purposes." See also World Bank (2013) *Conflicts of Interest, A Background Primer*, available at <https://agidata.org>, (accessed 1/11/2019).

³⁸⁶ Article 51 of LPC.

³⁸⁷ Western Balkans Recommendation, *ibid*.

an individual. Such provisions are not contemplated in Kenya's POEA which further dents credibility of declarations made by its public servants.

In Ukraine, a declarant is allowed to submit a corrected declaration within 7 days of submission of the required declaration.³⁸⁸ This gives an opportunity window for one to disclose any forgotten information. Kenyan legal framework under POEA has no room for such corrections after closure of the declaration period.

Another key feature of the Ukraine's wealth declaration is that the LPC of Ukraine provides a framework for multistage verification of declared assets which include: submission timelines, accuracy and completeness, logical and arithmetic control and full audit by making comparison of declared data with other sources of data bases.³⁸⁹ In Kenya, wealth declaration is a ritual involving mechanical submission of declarations with no notable subsequent action thus adding little value to ant-corruption law enforcement.

4.3 Lifestyle audits through wealth declarations in Rwanda

Rwanda's wealth declaration regime, just like Kenya's, is mainly used for detecting illicit enrichment among public officials. What differs between the two countries on this point is the levels of enforcement with Kenya lagging behind in the enforcement of POEA.³⁹⁰ However, wealth declarations for the two countries have significant differences that provide useful lessons for Kenya.

In Rwanda, the Office of the Ombudsman manages the Income and Assets Declaration (IAD) system.³⁹¹ The office of the Ombudsman has within its organizational structure a distinct Department for the management of assets disclosures in the public service.

Regarding the scope of application of the law relating to declaration of wealth in Rwanda, only top government officials are required to make declarations of their wealth.³⁹² The

³⁸⁸ Article 45 of LPC.

³⁸⁹ See *Western Balkans Recommendations*, at www.respaweb.eu (accessed 2/11/2019).

³⁹⁰ EACC Annual Report 2018/2019 available at www.eacc.go.ke.

³⁹¹ Article 182 of the Constitution of Rwanda, 2003. Law No. 76/2013 establishes the organization and functioning of the Office of the Ombudsman.

³⁹² *Ibid.*

declaration requirements apply to the President, Members of Parliament, Ministers, selected high ranking civil servants, together with their spouses and children under 18 years of age to declare their income and assets.³⁹³ This is in sharp contrast to Kenya where declarations are made by all public officers.

Although public access to declarations in Rwanda is limited, the Office of the Prosecutor General, Office of the Ombudsman and Police directly use the information in the declarations of persons under investigations.³⁹⁴ Chapter 3 of this thesis elaborates the challenges that Kenya's law enforcement agencies face whenever they seek to access declarations in pursuit of investigations owing to the unreasonable restriction of access.

On the enforcement of declaration requirements, Rwanda has prosecuted high-ranking officials for corruption based on investigations stemming from the verification process of IAD.³⁹⁵ As demonstrated in Chapter 3 of this thesis, Kenya is yet to prosecute any high ranking or indeed any other public official for matters related to wealth declaration.

In respect to contents of the wealth declaration form, Rwanda's wealth declaration law requires specific types of income and assets to be declared.³⁹⁶ These include: movable assets, real estate and cash investments.³⁹⁷ It is not left open to all public officers to declare as the case is in Kenya. The focused approach in Rwanda bolsters efficiency in the administration of the system to promote its accountability objectives.

Regarding the frequency of declarations, Rwanda requires public officers to make declarations within one month upon assumption of office, annually thereafter and final declarations within 15 days of leaving office.³⁹⁸ This is largely the case in Philippines, Ukraine and Hong Kong. In Kenya, declarations are done within 30 days of assuming office, after every two years and final declarations within 30 days of leaving offices.

³⁹³ Law No. 25 of 2003.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ Law No. 25 of 2003. See also Law No. 76/2013

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

As noted in the Ukraine's case, the importance of shorter intervals for wealth declaration promotes enforcement efficiency. There is therefore a strong case for Kenya to reconsider its declaration intervals.

Rwanda's Office of the Ombudsman, through its Assets Declaration Unit, effectively verifies the declarations to detect irregularities that may raise suspicion on the wealth of the declarant.³⁹⁹ These approaches are in practice missing in Kenya's regime but are necessary in the reform of Kenya's wealth declaration framework which does not have such progressive provisions.⁴⁰⁰

In view of the above progressive features, Rwanda joins Ukraine in providing useful lessons for Kenya on establishment and effective management of wealth declaration systems.

4.4 Best Practice on Lifestyle Audits through Wealth Declaration

As already illustrated in Chapter 2, lifestyle audits through wealth declaration are useful anti-corruption tools.⁴⁰¹ Although there are no international standards on how income, assets and liabilities should be declared and monitored, there are basic practices, structures and systems that underscore best practice as revealed by the case studies targeting Ukraine and Rwanda.

The two countries have established lifestyle audit provisions anchored in the wealth declaration frameworks that stem from constitutional provisions and Acts of Parliament.⁴⁰² These systems reveal a certain degree of uniformity in fundamental principles for effective wealth declaration systems.⁴⁰³ The case studies reveal at least eight (8) core principles on wealth declarations that constitute reasonable best practice for adoption by Kenya.

First, an effective assets declaration regime should provide for a proper mechanisms of monitoring of a public officer's unusual fluctuation of wealth and acquisition of large

³⁹⁹Under Law No.25 of 2003. *Ibid.* See also Office of the Ombudsman Website, at <https://ombudsman.gov.rw/en/?Declaration-of-Assets-Unit> (accessed 6/11/2019). See also Transparency Rwanda (2009) "Corruption and Governance in Rwanda: Final Report," at https://www.tirwanda.org/IMG/pdf/corruption_and_governance.pdf (accessed 3/11/2019).

⁴⁰⁰ See elaborate discussion on weaknesses of Kenya's wealth declaration system in Chapter 3 of this Thesis.

⁴⁰¹ See chapter 4.5

⁴⁰² *Ibid.*

⁴⁰³ For instance Hong Kong, Ukraine and Phillipines.

investments within a very short time. For instance, in Ukraine, public officers are required to notify the National Agency in case of significant change in their assets situation within ten days from the receipt of income or purchase of property. This facilitates timely monitoring of unusual fluctuations in wealth and ensures timely detection of illicit enrichment.⁴⁰⁴

The framework in Kenya falls short of these standards. The wealth of Kenyan public officers is only expected to be monitored and investigated after two years.⁴⁰⁵ These are among the issues Kenya should review to ensure efficacy in the wealth declaration regime.⁴⁰⁶

Second, in relation to scope and coverage of the disclosure requirement, the case studies reveal that where disclosure is only limited to selected public officers who wield power and influence, the smaller number of declarants ensures efficient and effective management of the declaration regime.⁴⁰⁷

This is unlike in Kenya where all persons serving in the public service declare their wealth making the exercise counterproductive and inefficient. This study argues that the zeal to fight corruption should not outweigh the need to consider other relevant factors such as the institutional capacity to handle disclosures of an entire public service effectively.

Generally, it is recommended that the wealth declaration system focuses on top officers in the executive, legislative and judicial arms of the Government and selected officers working in

⁴⁰⁴ See Richard Messick (2009) "Income and assets declarations: Issues to consider in developing a disclosure regime," Anti-Corruption Resource Centre, Paper prepared for Conference on Evidence-Based Anti-Corruption Policy organised by Thailand's National Anti-Corruption Commission (NACC) in collaboration with the World Bank, 5 – 6 June 2009, Siam City Hotel, Bangkok, Thailand. See also Matthew Jenkins (2015) "Income and Asset Disclosure Topic Guide," *op.cit.*

⁴⁰⁵ See Chapter Three of this Thesis.

⁴⁰⁶ See Hope Kempe (2013) "Tackling the corruption epidemic in Kenya: Toward a policy of more effective control" *op. cit.* On June 1, 2018, the President also announced that all state officers starting from the President and his Deputy will be vetted. See Presidency (2018) "President Kenyatta Announces New Measures To Fight Graft as he Leads Kenyans in Marking Madaraka Day," at <http://www.president.go.ke/2018/06/01/president-kenyatta-announces-new-measures-to-fight-graft-as-he-leads-kenyans-in-marking-madaraka-day/> (accessed 10/11/2019).

⁴⁰⁷ See Matthew Jenkins (2015) "Income and Asset Disclosure Topic Guide," *op.cit.* See also Richard Messick (2009) "Income and assets declarations: Issues to consider in developing a disclosure regime," *op. cit.*

corrupt prone areas due to their ease of access and control over public resources.⁴⁰⁸ This is the case in Philippines, Ukraine and Rwanda.⁴⁰⁹ Rwanda offers a useful lesson in this regard.

Third, this Chapter also established best practice in respect to the contents of a declaration. The scope of declaration should be wide enough to include both financial and non-financial interests.⁴¹⁰ The study has established that Kenya's declaration form is insufficient and does not contain the basic elements of an effective disclosure tool in line with the standards in Ukraine and Rwanda.⁴¹¹

Fourth, electronic wealth declaration systems are effective and efficient. The case studies have revealed that unlike in Kenya where declarations are submitted, stored, managed and retrieved manually, Ukraine and Rwanda use electronic systems to transmit and manage wealth declarations.

Fifth, the frequency of filing should be at reasonably short intervals. The study on Ukraine and Rwanda indicate that ideal disclosure systems require periodic declarations at least annually, at any time that a public officer is called upon to do so especially if under investigations, and when there is a significant change in the public officer's net worth, or periodically.⁴¹² Ukraine and Rwanda have such short declaration intervals that make their systems efficient.

Sixth, there is need for a dedicated agency to manage and monitor wealth declaration. Ideally, income and assets should be declared to centralised, independent and well-resourced agencies

⁴⁰⁸ These may include the President, Deputy President, Cabinet Members, Permanent Secretaries, Chief Administrative Secretaries, parastatal heads, among other in the Executive; and the Speakers of both Houses of Parliament, Members of Parliament, Clerks; and Judges and Magistrates including senior administrative officials in the Judiciary; among others.

⁴⁰⁹ African countries that require public declaration for some or all their top officials include South Africa, Liberia, Cape Verde, Sao Tome and Principe and the Central African Republic. See <https://www.u4.no/publications/african-experience-of-asset-declarations.pdf> (accessed 3/11/2019), at 5.

⁴¹⁰ See Richard Messick (2009) "Income and assets declarations: Issues to consider in developing a disclosure regime," *op. cit.*

⁴¹¹ The wealth declaration form is provided as a schedule to the Public Officer Ethics Act, 2003.

⁴¹² World Bank Stolen Asset Recovery Initiative (2012) "Public office, private interests: Accountability through income and asset disclosure," at 16.

or Departments able to competently monitor and enforce compliance with declaration requirements.⁴¹³

Seventh, the case studies have established that for an assets disclosure regime to be effective, it should have a robust verification system.⁴¹⁴ Agencies tasked with scrutinising declarations must therefore be empowered to access relevant information from other government agencies relating a public officer's assets worth and interests.⁴¹⁵ Information sharing in this regard could enable comparison of what the public officer has declared with data from other sources. This was identified as one among the problematic aspects of Kenya's wealth declaration system in Chapter 3. Ukraine offers best lessons in this regard.⁴¹⁶

Eighth, there should be effective enforcement and sanctioning. For an assets and income declaration system to be truly effective, it must establish a credible threat of punitive sanctions for corrupt officials.⁴¹⁷

4.5 Summary of Key Findings and Conclusion

The practices in the studied countries reveal a common thread in the drive to fight corruption through wealth declaration as a central element for lifestyle audits. The study has shown that countries that have been ranked relatively well in the Corruption Perception Index have better implementation mechanisms for their legal frameworks.

The Chapter concludes that, from the countries studied, Kenya can draw useful lessons that could inform an overhaul of its legal framework in pursuit of an effective war against corruption through lifestyle audits.

Chapter Five of this thesis provides the conclusion and recommendations on reform of Kenya's lifestyle audits framework to enhance the fight against corruption.

⁴¹³ See Matthew Jenkins (2015) "Income and Asset Disclosure Topic Guide," *op.cit.* See also World Bank Stolen Asset Recovery Initiative (2012) Public office, private interests: Accountability through income and asset disclosure.

⁴¹⁴ *Ibid.*

⁴¹⁵ Matthew Jenkins (2015) "Income and Asset Disclosure Topic Guide," *op.cit*

⁴¹⁶ See chapters 4.5 1, 4.5.2 and 4.5.3 above.

⁴¹⁷ For instance, the summoning of Governor Mike Sonko by EACC on November 4, 2019 on inaccurate/false declaration can be seen as a good strategy on enforcement and sanctioning.

CHAPTER 5

CONCLUSION AND RECOMENDATIONS

5.1 Introduction

The overarching argument in this study was that although Kenya has since attainment of independence put in place numerous policy, legal and administrative strategies to curb corruption, corruption still remains a major challenge. In particular, lifestyle audits, which are an efficient and effective anti-corruption tool, have not been effectively deployed in Kenya's quest for a corruption free society, or at least in a manner commensurate with the nature and magnitude of corruption in the country.

This study sought to answer four closely linked questions. First, are lifestyle audits a viable strategy in the fight against corruption? Second, how effective is Kenya's policy, legal and administrative framework for lifestyle audits in combating and preventing corruption? Third, what lessons or best practice can Kenya draw from Ukraine and Rwanda on the conduct of lifestyle audits through wealth declaration systems? And fourth, what policy, legal, administrative and other reforms are required to enhance Kenya's framework for lifestyle audits as an anti-corruption strategy?

The study has answered the first three questions in Chapters 2, 3 and 4 respectively. Accordingly, in this final Chapter, the study presents a conclusion based on those findings and proceeds to make recommendations in response to the fourth research question.

5.2 Conclusion of the Study

From the findings streaming from the analyses in Chapters 2, 3 and 4, this thesis makes a conclusion in three (3) limbs as follows:

First, corruption is deeply institutionalized in Kenya's public sector and has permeated the body public and also internalized as a way of life by public officers and Kenyans at large. Despite this state of affairs, lifestyle audits are a viable strategy to tame or at least reduce it to manageable levels if effectively deployed.

Second, Kenya's existing policy, legal and administrative framework for lifestyle audits as currently obtaining under piecemeal provisions fragmented in various statutes, is a weak and insufficient tool that cannot be effectively deployed as an anti-corruption strategy, unless appropriate reforms are made. For instance, Kenya's wealth declaration regime, whose objective is to facilitate lifestyle audits, has loopholes of monumental magnitude that defeat the very purpose of providing for wealth declarations in the country's law books.

Third, Lifestyle audits in Ukraine and Rwanda, largely conducted through effective implementation of robust wealth declaration systems, provide useful lessons that Kenya can adopt as best practice in reviving its weak framework for wealth declarations under part IV of the Public Officer Ethics Act, 2003 (POEA).

Accordingly, the two hypotheses upon which this study proceeded are answered in the affirmative. That is, first, anti-corruption strategies in Kenya have not been sufficiently effective due to various weaknesses in the attendant legal frameworks, and second, the policy, legal and administrative framework for lifestyle audits as currently obtaining in Kenya is too weak and insufficient as to be deployed as an effective strategy against the rampant corruption in the country.

5.3 Recommendations for Reform of Lifestyle Audits Framework

From the findings and conclusion of this study, it is clear that urgent and decisive reform measures are required. Consequently, the following constitutional, statutory and other general recommendations are made.

5.3.1 Recommendations on Constitutional Reform

In order to uproot corruption through effective lifestyle audits, this thesis recommends the following eight (8) reform measures to be effected through review of the Constitution of Kenya, 2010:

- An audit of the first 10 years of implementation of the Constitution of Kenya (2010-2020) be undertaken to identify the challenges that may have impeded effective implementation including obstacles to the full realization of the accountability objectives in the Constitution. This should subsequently inform appropriate response interventions to ensure that the ideals and values embedded in the Constitution are sufficiently realized through effective implementation.
- Chapter 10 of the Constitution be amended to establish a full-fledged Anti-Corruption Court with the status of the High Court, akin to the current Employment and Labour Relations Court and the Environment and Land Court. The rationale is to elevate the current High Court Anti-Corruption Division to a stronger judicial anti-corruption framework of a High Court status. The great national importance and overwhelming public interest in an effective war against corruption are sufficient grounds in this regard.

Corruption, being the biggest threat to the national economy and the welfare of the Kenyan people, deserves more prominent response measures including stronger frameworks. A specialized framework of anti-corruption courts from the Magistrate's Court to the High Court would therefore bolster efficiency and responsiveness in the determination of anti-corruption cases.

- While acknowledging the sacrosanct nature of constitutional rights and freedoms, the individual rights to privacy, bail, presumption of innocence and silence under Articles 31, 49(1)(h), 50(2)(a) and 50(2)(i) of the Constitution respectively should be reviewed to expressly provide for their limitation in instances where a person is facing investigations or prosecution for serious economic crimes.

The identified constitutional provisions have proved to be an impediment to effective anti-corruption law enforcement in Kenya, unlike in jurisdictions where public officers are fairly ethical, disciplined and have significant respect for public property. Limitation of these rights, in appropriate cases, would therefore facilitate effective investigations and prosecution,

making corruption a high risk venture in Kenya. This study holds that the wider public good and interest in a corruption free country should supersede individual rights and freedoms, especially considering that corruption itself is an obstacle to the realization of other constitutional rights.

- A provision be incorporated in the Constitution to the effect that where Parliament is required to enact a statute for implementation of a provision of the Constitution, the court can declare the ensuing statute unconstitutional if the statute does not meet the standards and intent of the constitutional provision it is meant to operationalize. A case in point is the Leadership and Integrity Act, 2012.
- Appropriate provisions be incorporated in the Constitution prescribing the threshold of the personal integrity envisaged under Chapter 6 of the Constitution to cure the existing jurisprudential confusion that courts have not addressed to date. It is a recommendation of this study that the spirit of the integrity standard developed by the High Court in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*⁴¹⁸ be adopted in this regard.
- EACC be expressly established under the Constitution, its functions and powers prescribed therein, and the agency listed alongside other Constitutional Commissions under Chapter 15 of the Constitution. This would strengthen its independence through constitutional safeguards against the threats that would ordinarily attend to establishment under an Act of Parliament. The importance of the Commission in the overall national economy and realization of other Constitutional objectives is a key consideration in this regard.
- EACC be empowered through appropriate constitutional amendments to make all its directives and recommendations made to public entities, state officers and public officers in

⁴¹⁸ *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.

furtherance of Chapter Six of the Constitution and related laws binding and with consequences for non-compliance.

- Appropriate provisions be made in the Constitution preferably under Chapter 6 to anchor Kenya's wealth declaration system for top state officers in the manner proposed in the *Bomas* Draft during the enactment of the Constitution, 2010.

5.3.2 Recommendations on Statutory Reform

The findings and conclusion of this study call for enactment of a new statutory framework and strengthening of the existing ones in order to align them to the Constitution, incorporate best practice and address existing challenges.

Broadly, it is recommended that a new Act of Parliament to be referred to as the *Public Officer Lifestyle and Wealth Audit Act* be enacted, consolidating all the legal provisions relating to lifestyle audits currently fragmented in various statutes. In consolidating the fragmented provisions into a single lifestyle audits framework, the law should address the weaknesses in the current statutes discussed under chapter 3, incorporate the best practice identified under Chapter 4 and take into account any other contemporary issues on the conduct of lifestyle audits.

In particular, it is recommended that the proposed legislation takes on board, with appropriate enhancement, the provisions on wealth declaration under Part IV of POEA, regulation of bank accounts held outside Kenya under section 19 of LIA, and unexplained wealth under section 55 of ACECA. In addition, Kenya's tax reporting regime as administered by KRA and financial reporting under POCAMLA should, of necessity, form part of the proposed new legislation on lifestyle audits.

The proposed consolidated law should sufficiently address the question of integrity of the wealth acquired or held by public officials, through inquiries into their lifestyles. This is a departure from most of the current anti-corruption strategies which primarily focus on the integrity of the systems of public entities on one hand, and the integrity of public officials on the other.

Specifically, in order to address the weaknesses of Kenya's wealth declaration regime, this study makes the following ten (10) recommendations:

- The responsible Commissions established under section 3 of POEA for the purpose of managing wealth declarations be abolished and EACC made the central depository for wealth declarations of all state officers, and empowered to delegate functions in relation to public officers through a notice in the Gazette as may be appropriate.
- Electronic mechanisms be adopted as the mode of submission, management and monitoring of wealth declarations. The electronic systems should be designed to detect inconsistencies in the income and properties as reported or registered in other government agencies such as KRA, NTSA, Ministry of Lands and the Registrar of Companies. This automation should permit sharing of information among law enforcement agencies.
- Unrestricted public access to all wealth declaration forms be allowed and measures provided in law to have declarations published in digital media.
- The frequency of wealth declarations be changed from biennial to annual and at any other time that a public officer is called upon by EACC to make declarations. Further, a provision requiring public officers to give notifications of significant increase in their income or acquisition of large investments, as per reasonable prescribed thresholds, should be incorporated in the law.
- The wealth declaration form prescribed under the Schedule to POEA be enhanced to widen the scope of declaration content to include non-financial interests, costs of acquisition of the assets declared and mechanisms for detecting conflict of interest.
- Ceilings for value of assets to be declared should be prescribed to cure the open ended nature of the current declaration regime which leaves room for declaration of low value assets such as clothing and household items.

- A robust mechanism for verification and continuous monitoring of wealth declarations be anchored in the declaration system including mechanisms for comparing declared information with data held by other public institutions.
- The provision under section 33 of POEA requiring development of administrative procedures as a prerequisite for making declarations be deleted. Similar fate should be visited upon section 32 of POEA which criminalizes disclosure of the contents of a declaration.
- A Scheme of Service for Ethics/Integrity Officers should be established in the public service. The officers should be based in each public entity to provide technical capacity to their institutions and public officers in the institutionalization of ethics and compliance with anti-corruption laws.
- Criminal and administrative sanctions relating wealth declarations and corruption be enhanced in order to make violation a high risk venture. The provisions on sanctions should also target Accounting Officers under whose docket malpractices occur in order to ensure leadership accountability in the fight against corruption.

Further, the study makes six (6) recommendations for statutory reform on other aspects related to lifestyle audits in Kenya as follows:

- A comprehensive integrity vetting framework be developed and anchored in law and the vetting made a continuous exercise targeting all appointed and elected state and public officers.
- Anti-corruption laws be reviewed to provide for custodial sentences without the option of fines in all corruption related offences to in order to deter corrupt practices. Further, vacation from office during investigations, where appropriate, and suspension from office when charged in court should target all state officers. A mechanism for vacation from office by elected state officers should be clearly spelt out in the law.

- Appropriate legal amendments be made to ACECA to permit evidence of possession of unexplained wealth in civil proceedings for forfeiture of assets to be relied upon to concurrently impose criminal sanctions on persons found to have unexplained wealth.
- The self-assessment tool used in the vetting of accounting and procurement officers pursuant to the Presidential Proclamation of 1st June 2018 be adopted and anchored into Kenya's lifestyle audits framework due to its comprehensive and progressive nature.
- EACC be empowered to directly administer administrative sanctions for ethical breaches. Due to the enhanced quasi-judicial functions, the EACC Act may be amended to provide that the Chairperson shall have qualifications equivalent to those of a Judge of the High Court.
- EACC be empowered through appropriate legal provisions to once each year, publish a list of shame enumerating all state and public officers who have been convicted for corruption, subject to exhausting all avenues of appeal. The list should form part of the EACC Annual report at the end each financial year and further published in the Kenya Gazette and at least two newspapers of national circulation.

5.3.2 General Recommendations

This study acknowledges that good laws on their own cannot lead to an effective fight against corruption. Laws are given effect through implementation and enforcement by human beings. Similarly, no anti-corruption agency, however independent and well-resourced, can succeed in combating corruption on its own.⁴¹⁹

In this regard, this study makes the following general recommendations targeting key political, social and cultural factors that are pertinent in ensuring a successful fight against corruption through lifestyle audits and other strategies.

⁴¹⁹ Eliud Wabukala (2019) *Speech Delivered to the Forum of Constitutional Commissions and Independent Offices*, held at Kericho Green Stadium in Kericho county n 16th October 2019.

- Measures be taken to empower citizens with capacity to effectively discharge their civic responsibilities, participate in governance processes and effectively demand accountability from holders of public office.
- Courts do enhance innovative approaches to constitutional interpretation especially where enabling statutory frameworks are not clear so as to ensure uniform and sound jurisprudence capable of supporting effective anti-corruption strategies. This should be premised on the understanding that enactment of a Constitution does not stop at promulgation but continues through construction of the document based on a country's changing needs and historical experiences.
- Learning institutions should continuously inculcate ethics and integrity among learners through a curricular approach. Specifically, the study recommends that Universities, Colleges and all institutions of higher learning in Kenya do offer compulsory courses on ethics and integrity.
- Mechanisms be put in place to reward integrity and honest living in order to encourage growth of an ethical culture while severely sanctioning unethical conduct so as to promote deterrence of corrupt practices. This should be done in all sectors including schools, organizations and families.
- The institutional capacity of EACC be enhanced through establishment of more regional offices owing to the widespread nature of corruption and absence of physical accountability frameworks in some regions.
- Appropriate measures be taken to enhance implementation of Article 10 of the Constitution on National Values and Principles of Governance in order to accelerate repair of the country's shattered values system, enhance patriotism and address the challenge of politicization of anti-corruption initiatives.

In the end, this study represents that despite the challenges in Kenya's fight against corruption, the Constitution of Kenya 2010 provides within its letter and spirit adequate arsenal that Kenya could deploy in taming corruption. It is the lack of effective implementation of this Constitution that has failed the anti-corruption regime.

Some of the reasons for such failure could be entrenched culture of impunity among public officials, ineffective mechanisms for political accountability, public apathy, weaknesses in statutory frameworks, and delay by some actors in the implementation process to adjust themselves from the previous constitutional dispensation to the dawn ushered in by the progressive Constitution of Kenya, 2010.

This study further argues that in order for Kenyans to effectively fight corruption as envisaged in the Constitution and this thesis, genuine commitment by all citizens, leaders and stakeholders is required. The war is a collective responsibility and national duty. To the citizens, it is argued that while sovereign power is vested in the people, it cannot activate itself. Citizens must therefore do their part. They must elect only leaders of integrity and hold them to account. They must not only shun corruption, but also refuse to tolerate it.

Parents and older members of the society must inculcate positive values among children. Religious leaders must also do their bit. They should not only pray but also rebuke corruption, as a sin, from the pulpit. The civil society and media should illuminate government malpractices, shame corrupt public officials, and rally the country behind the fight against corruption.

Learning institutions should inculcate positive values among their learners and incorporate into their curricula relevant content on desired values, ethics and integrity. For instance, universities and colleges could develop and administer a compulsory ethics and anti-corruption course. Scholars should on their part. They should research, write and guide the country on this discourse.

Despite the above, this study concedes that although the fight against corruption is a responsibility for all, much higher responsibility lies in the men and women to whom public authority is vested. They are public trustees in the implementation process. Each person to whom public power is vested to enforce or implement the Constitution should, as a matter of duty, rise to the occasion, as demanded by needs of the prevailing circumstances and proclaim what the Constitution requires in those circumstances.

This should be done with due regard to public interest at all times. Any action to the contrary is a betrayal of public trust and makes the enforcer no better than the person alleged to have violated the Constitution. Such a state officer is unfit for exercise of public power because their actions betray the very public trust they are summoned to protect on behalf of the people, at an expense to the people.

Based on the findings of this study, it is contended that Kenya needs to review how it has proceeded with its anti-corruption discourse over the years, and adopt a paradigm shift in the context of the Constitution, 2010.

Undoubtedly, Kenya is capable of winning the war against corruption, just the same way it has won other wars before. Such other successful fights include the war against colonialism won in 1963, single party regime in 1992, poor constitutional framework in 2010 and political instability in 2018. With effective strategies and approaches, coupled with commitment by all actors, corruption in Kenya could one day be defeated. This author looks forward to that day.

5.4 Future Research Areas

As noted in Chapter 1, this study only focused on lifestyle audits as a strategy to combat and prevent corruption. There are other methods and strategies for fighting corruption that can be studied further, and that could even be more effective.

This study also narrowed down and concluded that Kenya's wealth declaration system is the primary framework which embodies lifestyle audits in the country. There are possibilities that lifestyle audits under other legal frameworks could be more relevant, and this is an open area for research.

The wider thematic area for this study was the accountability of public officials that the people of Kenya desired when they enacted and gave unto themselves, and their future generations, a new Constitution in 2010. Given the prevalence of corruption despite 10 years of existence of this Constitution, there is need for further research to evaluate the effectiveness of the various accountability mechanisms prescribed or contemplated under the Constitution of Kenya, 2010.

Further identified for future research is the independence of law enforcement agencies. This includes how independence can be realized in the context of the politicization and ethnicization of anti-corruption initiatives that often confront the work of those agencies.

Another area for future academic scrutiny is the place of Presidential Proclamations in law considering that the Head of State has a cardinal role of defending the Constitution. There is need to examine these Proclamations in the context of the solemn responsibility of the Executive to protect public interest, which may, in proper cases, call for Executive Orders.

Further suitable for future research is the adoption of multi-agency approaches in the fight against corruption. Given the inter-dependent nature of the institutions whose distinct functions are relevant to an effective fight against corruption, there is need to establish through research how an effective multi-agency approach could be legally structured and deployed towards taming corruption in Kenya.

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