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OUT CORRUPTION CASES**

**Joachim Njagi**



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## LEGAL GAPS FACING IMPLEMENTATION OF EACC MANDATE ON WEEDING OUT CORRUPTION CASES

**Joachim Njagi (LLB)**

**Advocate of the High Court, Kenya**

**Advocate: Capital Markets Authority, Kenya**

**Email: joachim.njagi@gmail.com**

### **Abstract**

**Purpose:** The main purpose of this study was to determine the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases.

**Methodology:** The study employed a desktop descriptive survey research design thus presenting a methodological gap.

**Results:** The results conclude that lack of EACC based courts, lack of prosecutorial powers, lack of general good will, bureaucracy had a significant effect on EACC mandate on weeding out corruption cases. The study thus recommends for more rigorous revaluation for its mandate. Thus further studies should be based on the role of parliament in strengthening EACC Mandate on Weeding out Corruption Cases

**Unique Contribution to Theory, Practice and Policy:** The study thus recommends for more rigorous revaluation for its mandate. Thus further studies should be based on the role of parliament in strengthening EACC Mandate on Weeding out Corruption Cases.

**Keywords:** *EACC, Legal Gaps, implementation, corruption*

## 1.1 INTRODUCTION

Corruption remains a major problem affecting the political, social and economic development in Kenya. It is identified under Vision 2030 and Medium Term Plan (2008-2012) together with governance as one of the challenges besetting socio-economic transformation. Corruption stifles growth and investment and has disproportionate distortionary effects on all productive and service sectors of the economy. It distorts public sector choices and decision making with undesirable consequences such as poor service delivery. By its very nature, corruption is hidden and entails deception and unethical conduct. Furthermore, uncertainty associated with economic transition, unstable social safety nets, and widespread state capture by various interest groups, has created an open environment for corrupt practices (Kenya Anti-Corruption Commission Strategic Plan 2009/2013).

While corruption was once a taboo subject, in the last decade fighting corruption has emerged as a worldwide movement encompassing a range of organizations and tools. NGOs such as Transparency International (TI) and Global Witness exert influence through advocacy efforts, corruption indices, and broad awareness building, while bilateral and multilateral efforts like the U.N. Convention against Corruption, the Organization for Economic Cooperation and Development (OECD), and the World Bank Institute (WBI) have heightened global commitment to anti-corruption work. Existing resources that influence corporate work against corruption include TI's National Integrity System framework, WBI's Business Fighting Corruption portal, and the joint publication-Business against Corruption: A Framework for Action. Further, collective action efforts, such as the United Nations Global Compact (UNGC), the World Economic Forum's Partnering Against Corruption Initiative (PACI), and the Extractive Industries Transparency Initiative (EITI) have emerged within the last 10 years and succeeded in getting countries and corporations to sign on to efforts for reform and collaboration (Hills, Fiske & Mahmud, 2009).

Since Kenya gained independence from Britain in 1963 and until the political violence that followed the disputed 2007 elections exposed the fragility of the state, the country was considered one of the most stable in Africa (IDASA country profile). After independence, founding President Jomo Kenyatta (1963/1978) and his successor Daniel Arap Moi (1978/2002) established and sustained an increasingly corrupt one-party authoritarian rule under the Kenya African National Union (KANU) (Lansner, 2012).

The commitment to fight corruption was strongly articulated by the National Rainbow Coalition (NARC) during the electoral campaign that brought it to power in December 2002, and featured prominently immediately after the elections. In May 2003, the Parliament passed Kenya's main anti-corruption legislation, that is, Anti-Corruption and Economic Crimes Act (ACECA) establishing the defunct Kenya Anti-Corruption Commission (KACC). The speedy enactment of the legislation, the establishment of an anti-corruption department within the government (under the Permanent Secretary/Presidential Advisor, Ethics and Governance) and Kenya being the first

country to sign and ratify the UNCAC in December 2003, were all cited as evidence of renewed commitment to the fight against corruption

Since independence, the regime has been largely characterized by a centralized state with a dominant executive presiding over a patronage network that benefits mostly ethnically defined elites (IDASA country profile). The regime was further characterized by, systematic looting of state's assets, economic mismanagement and authoritarian rule, respecting few civil liberties and civil rights and occasionally violently suppressing opposition (Lansner, 2012). A report by international risk consultants Kroll commissioned by the government to investigate claims of corruption carried out by Mr Moi's regime and delivered in April 2004 alleges that more than £1 billion of government money was stolen during his 24-year rule and details assets still allegedly owned by the Moi family in 28 countries<sup>1</sup> (The Independent, 2007).

In the 1990s, Kenya transitioned towards a functional but weak multi-party democracy, but it was not until 2002 that the opposition party, the National Rainbow Coalition (NARC) managed to win the elections against Moi and nominated Mwai Kibaki, a former top KANU leader as President. Mwai Kibaki was elected on an anti-corruption platform and the regime change raised tremendous hope in the country for ending corruption and impunity in Kenya. In January 2003 Kibaki appointed John Githongo, formerly of Transparency International, as his personal advisor on AntiCorruption and Good Governance.

In 2010, a constitutional referendum overwhelmingly approved the radical revision of the Constitution, strengthening systems of checks and balances, significantly constraining executive powers and enhancing the protection of basic rights. The new constitution promotes principles of transparency, integrity and accountability and has raised hopes for inaugurating a new era of democratic rule in the country. However, implementation has been slow, uneven and incomplete, including with regards to anticorruption efforts that still meet elite resistance (Lansner, 2012).

### **1.1.1 Kenya Ethics and Anticorruption Commission**

The Ethics and Anti-Corruption Commission (EACC) is a statutory body established under the Ethics and Anti-Corruption Act, No. 22 of 2011 (hereinafter referred to as —the EACC Act). It replaced the Kenya Anti-Corruption Commission (KACC) after the Constitution of Kenya, 2010 provided for the establishment of an independent Ethics and Anti-Corruption Commission (Matemu, 2012-2013). Parliament enacted the Ethics and Anti-Corruption Commission Act 2011 and Leadership and Integrity Act, 2012. These Acts provide for the functions and powers of the Ethics and Anti-Corruption Commission (EACC) inter alia implementation of Chapter Six of the Constitution. The Acts are being implemented alongside the Anti-Corruption and Economic Crimes Act (ACECA) of 2003. The mandate of the EACC is to combat corruption and economic crime in Kenya through law enforcement, prevention, public education and promotion of sound ethical standards and practices (Matemu, 2012-2013)

According to the Kenya Anti-Corruption and Economic Crimes Act 2003, corruption means an offence that involves bribery, fraud, embezzlement or misappropriation of public funds, abuse of

office, breach of trust; or an offence involving dishonesty- in connection with any tax, rate or import levied under any Act; or under any written law relating to the elections of persons to public office; (The Anti-Corruption and Economic Crimes Act, 2003:4f).

## **1.2 Problem Statement**

As noted in the background to this study, continued cases of corruption in Kenya are causing great concern. Despite the numerous anti-corruption initiatives, cases of corruption continue to abound. According to Njoroge (1988), nations have been observed to falter in their development, not because of lack of knowledge and technology, but due to defects in human character.

According to Transparency International's Global Corruption Report 2009, the cost of corruption is a serious deterrent to potential investors and a major impediment for existing and new businesses (Global Corruption Report, 2009). Accordingly, business executives continue to perceive corruption as a major obstacle for business operations, with 21% of the companies interviewed within the framework of the World Economic Forum's Global Competitiveness report 2011-2012 naming corruption at the top of the list of obstacles for doing business in the country. This is consistent with findings from the World Bank and IFCE enterprise survey 2007, in which 38% of the companies surveyed reported corruption to be a major constraint to their operations

Kumba (2013) assessed the challenges of curbing corruption in Kenya especially over the period from 2008 to 2012 with a focus on how the Ethics and Anti-Corruption Commission has positioned itself to overcome those challenges. Results revealed that EACC faces a number of challenges ranging from lack of political will and government commitment to lack of prosecutorial powers to manage any given case from beginning to its logical conclusion.

According to the United Nations (2001), corruption can be found in all walks of life. It hinders economic development, diverts investments in infrastructure, institutions and social services and also undermines efforts to achieve other country specific targets. As a result, the UN notes that the international community has become increasingly concerned with the problem of corruption and its negative impact on economic growth and poverty alleviation (UN, 2001:112).

As observed by Heidenheimer and Michael (2002), there is now increasing recognition throughout the public and private sector that corruption is a serious obstacle to effective government, economic growth and stability. Consequently, effective anti-corruption policies and legislations are urgently required at the national and international level. In spite of the anti-corruption body taking many forms and names subject to enhance its core mandates the commission has only netted the so called small fish, on top of that the public confidence is low. Thus the study wants to address this shortcomings by determining the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases.

## **1.3 Research Objectives**

The general objective of the study was to determine the Legal Gaps Facing Implementation EACC of Mandate on Weeding out Corruption Cases.



### 1.3.1 Specific Objective

The specific objective of the study was to:

- i. To determine the effect of lack of EACC based courts system on the Implementation of EACC Mandate on Weeding out Corruption Cases.
- ii. To determine the effect of lack of prosecutorial powers by the chief commissioner on the Implementation of EACC Mandate on Weeding out Corruption Cases.
- iii. To determine the lack of general good will by the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases.
- iv. To determine the effect of bureaucracy in the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases.

## 2.0 Literature Review

### 2.1 Theoretical review

A theory is a set of interrelated concepts, definitions, and propositions that present a systematic view of events or situations by specifying relations among variables, in order to explain and predict the events or situations (Van Ryn & Heaney, 1992). Theories are formulated to explain, predict, and understand phenomena and, in many cases, to challenge and extend existing knowledge, within the limits of the critical bounding assumptions.

#### 2.1.1 PRINCIPAL-AGENT MODEL

The predominant theory of corruption within both political science and economics today is the *Principal-agent model*, popularized especially by the work of Susan Rose-Ackerman (1978) and Robert Klitgaard (1988). The principal-agent theory situates the analysis of corruption in the interaction and interrelations that exist within and without public bodies and is based on two key assumptions: 1) that a goal conflict exists between so-called *principals* (who are typically assumed to embody the public interest) and *agents* (who are assumed to have a preference in favor of corrupt transactions insofar the benefits of such transactions outweigh the costs), and; 2) that agents have more information than the principals, which results in an *information asymmetry* between the two groups of actors (Klitgaard 1988; Williams 1999). More specifically, according to this view, a collective body of actors is assumed to be the principal who delegate the performance of some government task to another collective body of actors; the agents. As in any situation where authority is being delegated, the problem from the perspective of the principal is that the agents may acquire specific information about the task at hand that they are not willing to disclose to the principal, or that they have private motivations other than the goal of performing the delegated task. Thus, in short, from the perspective of the principal-agent framework, corruption occurs when an agent betrays the principal's interest in the pursuit of his or her own self-interest. This betrayal is in turn made possible by the information asymmetry between the two groups of actors.

Depending on perspective, who is the agent and who is the principal in the principal-agent model may differ. In the classical treatment – which refers to situations of bureaucratic corruption – rulers

are the principal and the bureaucracy the agent (Becker & Stigler 1974; Van Rijckeghem and Weder 2001). The problem here arises when the ruler cannot perfectly observe which lawenforcers behave honestly since they do not possess all the relevant information that the agents have. For example, tax collectors are often better informed about the revenue potential of a particular tax base than is the top management of the Treasury. This, in turn, opens up for the opportunity for bribery. In line with the less classical perspective, on the other hand, it is not primarily the bureaucrats who need to be controlled, but the ruling elite. In this model – which mainly refers to situations of political corruption – rulers are hence modelled as agents and citizens as principals (Persson & Tabellini 2000; Adserà *et al.* 2003; Besley 2006).

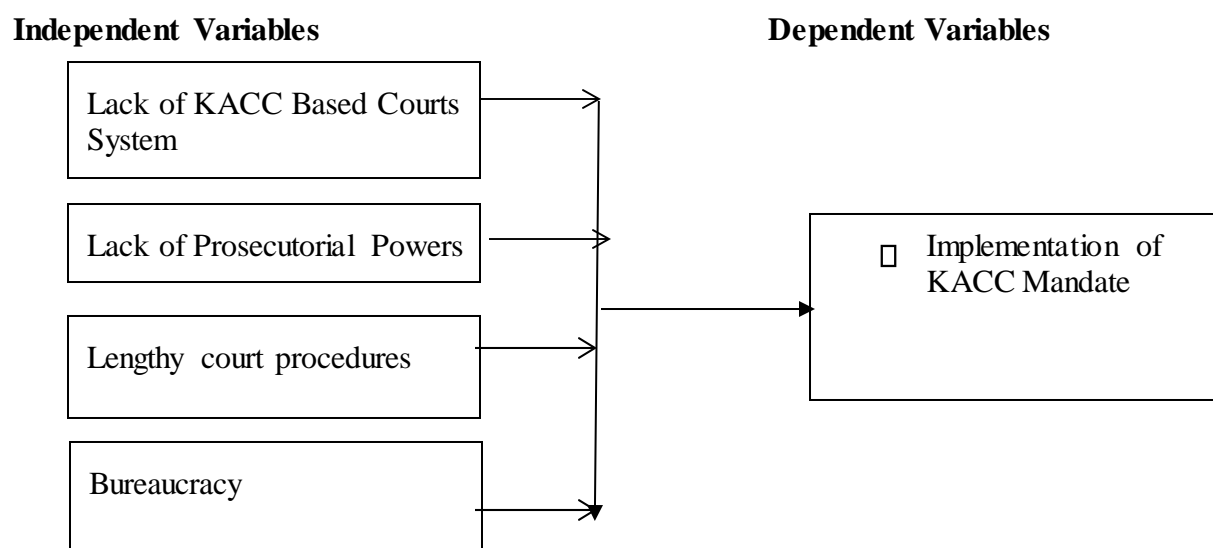
### 2.1.2 Institutional Theory

Institutional theory attends to the deeper and more resilient aspects of social structure. It considers the processes by which structures, including schemas, rules, norms, and routines, become established as authoritative guidelines for social behavior. It inquiries into how these elements are created, diffused, adopted, and adapted over space and time; and how they fall into decline and disuse. Although the ostensible subject is stability and order in social life, students of institutions must perforce attend not just to consensus and conformity but to conflict and change in social structures. The basic concepts and premises of the institutional theory approach provide useful guidelines for analyzing organization-environment relationships with an emphasis on the social rules, expectations, norms, and values as the sources of pressure on organizations. This theory is built on the concept of legitimacy rather than efficiency or effectiveness as the primary organizational goal (McAdam and Scott, 2004). The environment is conceptualized as the organizational field, represented by institutions that may include regulatory structures, governmental agencies, courts, professionals, professional norms, interest groups, public opinion, laws, rules, and social values. Institutional theory assumes that an organization conforms to its environment. There are, however, some fundamental aspects of organizational environments and activities not fully addressed by institutional theory that make the approach problematic for fully understanding NGOs and their environment: the organization being dependent on external resources and the organization's ability to adapt to or even change its environment (McAdam and Scott, 2004). Researcher such as Meyer and Rowan (1991), DiMaggio and Powell (1983) are some of the institutional theorists who assert that the institutional environment can strongly influence the development of formal structures in an organization, often more profoundly than market pressures. Innovative structures that improve technical efficiency in early-adopting organizations are legitimized in the environment. Ultimately these innovations reach a level of legitimization where failure to adopt them is seen as "irrational and negligent" (or they become legal mandates). At this point new and existing organizations will adopt the structural form even if the form doesn't improve efficiency.

### 2.2 Conceptual Framework

According to Bogdan and Biklen (2003) a conceptual Framework is a basic structure that consists of certain abstract blocks which represent the observational, the experiential and the

analytical/synthetically aspects of a process or system being conceived. It is a concise description of the phenomenon under study accompanied by a graphical or visual depiction of the major variables of the study (Mugenda, 2008). According to Young (2009), conceptual framework is a diagrammatical representation that shows the relationship between the dependent variable and independent variables. The purpose of a conceptual framework is to assist the reader to quickly see the proposed relationship and hence its use in this study.



**Figure 1: Conceptual Framework 2.3 Empirical Literature**

The EACC may also continue face similar impediments encountered by the KACC during its existence, especially, in the areas of systemic and self-inflicted bottlenecks encountered by the KACC in its quest to fulfill its mandate. For instance, the apathy of the executive and the legislature to allow the EACC autonomy over its operations is bad signal that portends failure (Kwayera,



2012). Moreover, the manoeuvring of parliamentary bills to reduce any powers and by ensuring that the new agency does not have the powers that might make the law makers susceptible to investigations for alleged corrupt practices is an ominous sign. It has been observed that the goal is to “clip the commission’s wings even before its establishment” (Kwayera, 2012). As a matter of this fact, the EACC’s lack of prosecutorial power parading it as a toothless bulldog like its predecessor remains the most serious impediment to its anti-corruption strategies. Therefore, any remedial policies must firstly tackle how to overcome this snag by ensuring that the EACC is granted prosecutorial powers protected by the constitution.

KACC (2008) notes that efforts towards capacity building to combat corruption are still in their infancy stages in most countries, and reliable information about the nature and extent of domestic and transnational corruption is difficult to obtain. The problems of corruption are compounded by the very broad nature of the phenomenon and lack of consensus about legal or criminological definitions that could form the basis of international comparative research.

In spite of the various accomplishments of the KACC, there were major impediments on its way which prevented it from reaching its potentials and its bid to fully fulfill its mandate. Absence of policy and legislative framework was one of such impediments. Lack of a national anti-corruption policy to guide the fight against corruption and economic crimes cannot be overlooked. In addition, the anti-corruption legislative framework remained weak in various aspects, particularly the lack of power by the Commission to prosecute persons for crimes falling within its ambit. Many constitutional references filed by persons charged with corruption and those against whom the Commission had instituted civil suits continued to delay the finalization (Lasner 2012)

Absence of prosecutorial and enforcement preventive recommendations is also a major setback. Lack of prosecutorial powers by the defunct KACC hampered the crusade against graft. Upon identification of corruption loopholes after examining systems, the Commission ordinarily made recommendations for remedial measures to be undertaken by the concerned institutions. The lack of legal sanction and powers to ensure compliance with the recommendations thus hampered the agency’s efforts in preventing corruption (KACC, 2012)

Aside the judicial challenges presented earlier relating to the recovery of assets of corruption, the judiciary presented a profound challenge in the enforcement of anti-corruption laws generally. The agency found itself on the receiving end of adverse judicial interpretations of its powers. The first assault on the agency was the Judiciary’s interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force varied and the courts did not interpret the law correctly on the matter. Although Section 42(k) of Limitations of Actions Act was introduced, it could not help the Commission in cases which were already before the courts before it was enacted.

Constitutional references impediments could also be viewed as an impediment to the KACC’s anti-corruption strategies. KACC often cited the multiplicity of constitutional references filed by corruption suspects as a hindrance to its work. In its view, Constitutional Courts, which should be the courts of last reference, were often misused by corruption suspects to delay and ultimately

subvert justice. The 2007/08 Annual Report listed over 37 such applications. In 2008/09, the Commission reported nine significant cases. Again, the poor presentation of information from year to year made it difficult to make conclusive assessments on the number and impact of these challenges.

Just like the defunct KACC, the EACC Act gives the anti-corruption body no teeth to bite and hesitates on the question of fines and penalties denying the organisation prosecutorial powers. In Section 11 of the Act, the Commission is empowered only to do such mundane things as developing and promoting standards and best practices; developing a code of ethics; receiving complaints; investigating and recommending to the Director of Public Prosecutions any acts of corruption...also advise; oversee and raise public awareness; establish strategic linkages and partnerships...Where is action here? To paraphrase Winston Churchill, the answer remains a riddle, wrapped in a mystery, inside an enigma!

Finally, the KACC's anti-corruption was criticised for being a 'grafting' approach, referring to the weak institutional and legislative ties between the anti-corruption efforts and other parts of the public system. The numerous shifting of anti-corruption agencies during the last decade points to a symptom of this absence of lack of institutional anchorage. Contending agency mandates also led to antagonistic relationships between KACC and other quasi anti-corruption bodies that desperately required the opposite if they were to be result oriented. What is to be added here is that the EACC needs to go all out to ensure that the spillover effects of the identified impediments that have frustrated the KACC operations do not affect its anti-corruption strategies. This can be done by addressing all the contending issues raised that are begging for attention.

## **2.4 SUMMARY OF RESEARCH GAPS**

### **2.4.1 Conceptual Gap**

As observed by Heidenheimer and Michael (2002), there is now increasing recognition throughout the public and private sector that corruption is a serious obstacle to effective government, economic growth and stability. Consequently, effective anti-corruption policies and legislations are urgently required at the national and international level.

### **2.4.2 Methodological Gap**

Kumba (2013) assessed the challenges of curbing corruption in Kenya especially over the period from 2008 to 2012 with a focus on how the Ethics and Anti-Corruption Commission has positioned itself to overcome those challenges. Results revealed that EACC faces a number of challenges ranging from lack of political will and government commitment to lack of prosecutorial powers to manage any given case from beginning to its logical conclusion. The study used secondary data. The current study used desktop study research design.

### **2.4.3 Scope Gap**

The general objective of the study was to determine the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases. This study primarily looked at EACC. However there are other oversight authorities in Kenya.

### **3.0 Research Methodology**

The study employed a desktop descriptive survey research design thus presenting a methodological gap.

## **4.0: CONCLUSION AND POLICY IMPLICATION FOR FURTHER STUDY 4.1:**

### **Conclusions**

Based on the study it was concluded that of lack of EACC based courts system hampered the Implementation of EACC Mandate on Weeding out Corruption Cases. ) Moreover, the manoeuvring of parliamentary bills to reduce any powers and by ensuring that the new agency does not have the powers that might make the law makers susceptible to investigations for alleged corrupt practices is an ominous sign. It has been observed that the goal is to “clip the commission’s wings even before its establishment

Based on the study it was concluded that lack of prosecutorial powers by the chief commissioner hampered the Implementation of EACC Mandate on Weeding out Corruption Cases. In addition, the anti-corruption legislative framework remained weak in various aspects, particularly the lack of power by the Commission to prosecute persons for crimes falling within its ambit. Many constitutional references filed by persons charged with corruption and those against whom the Commission had instituted civil suits continued to delay the finalization

Based on the study it was concluded that the lack of general good will by the judiciary on the Implementation of EACC Mandate hampered Weeding out Corruption Cases. The agency found itself on the receiving end of adverse judicial interpretations of its powers. The first assault on the agency was the Judiciary’s interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force varied and the courts did not interpret the law correctly on the matter. Although Section 42(k) of Limitations of Actions Act was introduced, it could not help the Commission in cases which were already before the courts before it was enacted.

Finally the study concluded that the effect of bureaucracy in the judiciary on the Implementation of EACC Mandate affected Weeding out Corruption Cases. The numerous shifting of anticorruption agencies during the last decade points to a symptom of this absence of lack of institutional anchorage. Contending agency mandates also led to antagonistic relationships between KACC and other quasi anti-corruption bodies that desperately required the opposite if they were to be result oriented

## 4.2 Recommendations

This study provides implications for both policy and practice. What is to be added here is that the EACC needs to go all out to ensure that the spillover effects of the identified impediments that have frustrated the KACC operations do not affect its anti-corruption strategies. This can be done by addressing all the contending issues raised that are begging for attention.

## 4.3 Area for Future Studies

The general objective of the study was to determine the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases. The specific objective of the study was to: determine the effect of lack of EACC based courts system on the Implementation of EACC Mandate on Weeding out Corruption Cases, to determine the effect of lack of prosecutorial powers by the chief commissioner on the Implementation of EACC Mandate on Weeding out Corruption Cases, to determine the lack of general good will by the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases and finally to determine the effect of bureaucracy in the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases. In addition, the study examined only four government incentives affecting performance of SMEs. Further studies should expand the scope and consider the effect of other government incentives affecting performance of SMEs. Thus further studies should be based on the role of parliament in strengthening EACC Mandate on Weeding out Corruption Cases.

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