

CHAPTER 20

CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES IN KENYA AND AFRICA: EXPERIENCES, CHALLENGES AND OPPORTUNITIES¹

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20.1 Problem Statement on Kenyan Constitutional Commissions and Independent Offices

Why have the Constitutional Commissions and independent offices CCIOs not delivered on the constitutional promise of popular sovereignty, liberty, service delivery and constitutional democracy? Why does tribal colonialism, tyranny and hegemony persist in elections, appointments, contracts, tenders, service delivery and manipulation and intimidation especially in public service in spite of the constitutional commissions and independent offices? In the ensuing sections of this Chapter, an Afro-Kenyanist conceptualisation and problematisation is used in analysing constitutional commissions and independent offices. I have also discussed some of the debates regarding CCIOs in the context of Building Bridges Initiative (BBI) 2019 and 2020 reports, and the Constitution of Kenya (Amendment) Bill 2020.

Sovereignty has at least three components under the Constitution of Kenya 2010 and in constitutional theory and practice. First, sovereignty is the constitutive power including constitution making and constitutional amendment. Second, sovereignty is the power to elect, impeach or recall governors or rulers. Third, sovereignty is the power to monitor and evaluate the government, governors or rulers, governance and to hold them accountable.

This chapter assesses the meaning, mandate, operation and significance of constitutional commissions and independent offices. What are their contributions? What challenges do they face in their interactions with the other arms of government, the private sector and civil society (organizations)? What are the prospects of constitutional commissions and independent offices?

¹ This Chapter 20 builds on and supersedes the brief talking points published as Ben Sihanya (2013) “Constitutional Commissions in Kenya: Experiences, Challenges and Lessons,” Friedrich Ebert Stiftung (FES-Kenya) Working Paper, at <http://www.fes-kenya.org/media/publications/Constitutional%20Commissions%20-%20Prof.%20Ben%20Sihanya.pdf> (accessed 24/4/2017). It had been presented at the Conference on State Implementation of the Constitution since 2010, at Laico Regency, 20/11/2016, Sihanya Mentoring (SM) & Prof Ben Sihanya Advocates. Mr Mbori Otieno, Mr Erick Naibei and Ms Irene Mukumu, then of IL & SM, helped in the first three page think piece or syllabus of issues or talking points in 2016. I am grateful to Mr Erick Naibei then of Sihanya Mentoring (SM) & Prof Ben Sihanya Advocates for excellent research assistance during this revision.

20.2 Research Questions and Arguments of Constitutional Commissions and Independent Offices in Kenya and Africa

This chapter seeks to review the potential and prospects for the future and make recommendations based on the lessons Kenyans have learnt especially in the context of a movement for reform in the post-Kenyatta era. It seeks to answer the following three related research questions.

First, what are Constitutional Commissions and independent offices? What functions do they perform and what services do they deliver? What typology do they fall under in the government structure and how can they be distinguished one from another?

Second, how efficient and equitable are the Commissions and independent offices in service delivery under the Constitution of Kenya 2010?

Third, how efficient and effective are the Commissions and independent offices in promising popular sovereignty including security, liberty and limiting (arbitrary) power? To what extent have they advanced constitutional democracy? What recommendations would secure appropriate reforms to realize the constitutional promise regarding the constitutional commissions and independent offices?

20.3 Objectives, authority and funding of constitutional commissions and independent offices in Kenya as Africa

The constitutional commissions and independent offices were established to secure specific constitutional objectives. These objectives are stated in Article 249(1) as follows:

- “To protect the sovereignty of the people
- (a) To secure the observance by all State organs of democratic values and principles; and
- (b) To promote constitutionalism.”

In order to guarantee the implementation of these objectives, Art 249(2) stipulates a balance between independence and the constitutionality, legality or the rule of law:

- “(2) The commissions and the holders of independent offices:
- (a) are subject only to this Constitution and the law; and
- (b) are independent and not subject to direction or control by any person or authority.”

Moreover, Article 249(3) states that Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

The funds used by Constitutional Commissions are a charge from the Consolidated Fund.² Article 249(3) provides that Parliament shall allocate adequate funds to enable each commission

² The Consolidated Fund is established under Article 206. Cf. Section 99–105 of the 1969 Constitution.

and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

20.4 Typology of Constitutional Commissions and independent offices in Kenya and Africa

[to integrate typology or classification of CCIOs by or in the administrative bureaucracy, funding, precedence...]

Proponents of classical or strict limitation or separation of powers envisioned a neat typology of the three arms of government, that is legislative, the executive, judicial powers and functions and personnel. These are to be exercised by Parliament, executive and Judiciary respectively.³ In this scheme, there is hardly any room for any other agency to exercise public powers or perform public functions. And public servants are assumed to neatly belong to any one of these arms of government.

This scheme is mainly attributed to the work of the French philosopher, Baron de Montesquieu (1689-1755). In his work, *The Spirit of the Laws* (1748),⁴ he defined the three functions and arms of government then made a case for the separation of the three public powers or functions. He argued that the *concentration* or *fusion* or *joinder* of public power in the hands of one individual or entity would lead to tyranny:

“If the executive and legislative powers are united in the same person or same body of persons, there is no liberty, because of the danger that the same monarch or the same senate may make tyrannical laws and execute them tyrannically. If the judicial powers were joined to the legislative power, then the life and liberty of the people would be exposed to arbitrary control for the judge would be the law-maker.”⁵

He further stated, using a hyperbole, that:

“when all the three powers are combined in the same hands, there will be an end of everything.”⁶

But Montesquieu was not the only thinker on the question of separation of powers. Public powers now have the three (3) arms, especially the nomenclature that has been universally accepted historically. For instance, John Locke, the British philosopher advanced arguments on the significance of administrative powers.⁷ Significantly, the constitutions of the leading

³ See Table 17.1: Sihanya Mentoring matrix on constitutional commissions and independent office: Theory, history and practice, below.

⁴ Baron de Montesquieu (1748) *The Spirit of the Laws*, J. Collingwood, London. Cf.....

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Cf John Locke (1824) *Two Treatises of Government*, *op. cit.*... Richard Ashcraft, F.C & J Rivingtine, London. (1969) “Political theory and political reform: John Locke's essay on Virginia,” 22(4) *The Western Political Quarterly*, 742-758. See also Lord Lloyd of Hampstead (1972) *Introduction to Jurisprudence*, Stevens & Sons, London.

democracies have categorically stated that government or public powers are neatly divided into three arms only.

The Constitution of Kenya 2010 provides for the three arms of Government, namely the Legislature, Executive, and the Judiciary.⁸ It also provides for 14 constitutional commissions and two (2) independent offices.⁹ In Kenya and especially from about 1990s, some problematically argued that commissions are the fourth arm of government.¹⁰ Significantly, it was always that the executive powers exercised by the imperial Presidency under Jomo Kenyatta (1963-78), Daniel Arap Moi (1978-2002) and Mwai Kibaki (2002-2016) posed a threat to liberty, and constitutional democracy.

The reality and fears of tyranny and the quest for independent institutions remained under Uhuru Kenyatta in the 2016-17 period, and beyond. Thus it was hoped that constitutional commissions and independent offices would help secure popular sovereignty, liberty and service delivery as well as help limit arbitrary and oppressive powers of the Government.¹¹

Article 248 under Chapter Fifteen of the Constitution specifically establishes ten (10) commissions and two (2) independent offices which we conceptualise and contextualise below. The constitutional commissions fall under a three-pronged typology. First, there are commissions which are specifically established and named in Art 248(2) of the Constitution. Second, there are constitutional commissions whose mandates are provided for under other provisions of the Constitution, even though they are not specifically named. Third, while the majority of the commissions are permanent, some are not.

First, the following constitutional commissions are named under Article 248 (2). These are:

1. Kenya National Human Rights and Equality Commission (KNHREC);¹²
2. National Land Commission (NLC);
3. Independent Electoral and Boundaries Commission (IEBC);
4. Parliamentary Service Commission (PSC);

⁸ Chapters 9, 10 and 11 of the Constitution on national symbols and national days, national values and principles of governance and culture, respectively.

⁹ Articles 248-252. This received wisdom is debatable. The Office of the Director of Public Prosecutions (ODPP) is textually and by intent an independent or autonomous office.

¹⁰ Sihanya, Chapter 4 and 6 of CODRALKA 1, revised from Ben Sihanya (2011) “The Presidency and public authority in Kenya’s new constitutional order”, Constitutional Working Paper No. 2, *Society for International Development* (SID), at 23. See also Chapter 3 of Sihanya, CODRALKA 2 on Mediating Kenya’s Post-Election crises: The Politics and Limits of Power Sharing Agreement.

¹¹ This would be laudable.

¹² Kenya National Human Rights Commission (KNHRC) is established under the Bill of Rights (Chapter 4 of the Constitution) and section 3 of the Kenya National Commission on Human Rights Act, 2011.

5. Judicial Service Commission (JSC);
6. Commission on Revenue Allocation (CRA);
7. Public Service Commission (PSC);
8. Salaries and Remuneration Commission (SRC);
9. Teachers Service Commission (TSC); and
10. National Police Service Commission (NPSC).

Second, the mandates of the following commissions are provided for in the relevant constitutional provisions, even though their detailed functions composition and names are supplied by Parliament in the relevant statutes. These are:

1. Commission on the Implementation of the Constitution established under; the Sixth Schedule to the Constitution; under Article 261 on transitional and consequential provisions and sec 5 of the Commission on the Implementation of the Constitution Act, 2010.
2. Ethics and Anti-Corruption Commission EACC under; Article 79 of the Constitution and section 3 of the Ethics and Anti-Corruption Commission Act, 2011.¹³
3. Commission on Administration of Justice (CAJ) under Article 59 (4) and section 3 of the Commission on Administration of Justice Act, 2011.¹⁴
4. National Gender and Equality Commission (NGEC) under Article 59(4) and section 3 of the National Gender and Equality Commission Act, 2011.
5. Third, some commissions were established to perform functions that focus on implementing transitional and consequential provisions of the Constitution. The main example is the Commission on the Implementation of the Constitution (CIC).¹⁵

Significantly, there are numerous statutory commissions and institutions or offices which were also intended to enjoy relative independence and autonomy.

What are independent offices? How do independent offices differ from constitutional commissions?

There is a three-pronged typology on the independent offices. First, the office is established by the Constitution, statute, or through the participation of at least two agencies of Government, for instance, the President and the Public Service Commission (PSC) (under Article 162). The

¹³ Article 79 states that “Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”

¹⁴ Article 59(4) states: “Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.” This is in the context of the establishment of the Kenya National Human Rights and Equality Commission (KNHREC) under Article 59 (1).

¹⁵ Part 6 of the Sixth Schedule on Administration of Justice, Section 25(1)....

appointment of the officer also requires a dual or multi-agency process. Second, the operation of the office is subject to the Constitution and the law. The officer is not subject to daily micro-management. Only the usual oversight applies, for instance annual reporting to Parliament. Third, the office can only be abolished through constitutional amendment, legislative process litigation or a related multi-agency process. And the officer can only be disappointed for cause after due process, requiring a tribunal. Thus the officer does not serve at the pleasure of the President.

Under Article 248(3), the only two (2) independent offices named are the office of the Auditor-General and the Controller of Budget. These used to be part of the office of the Controller and Auditor General under section 105 of the 1969 Constitution.¹⁶ On the basis of constitutional text, intendment, public discourse, as well as our foregoing methodology, the following are some of the independent offices: Auditor General, Director of Public Prosecution, the Attorney-General and Inspector General of Police. The independence is nuanced.

Second, the main similarity between the commissions and independent offices is that both are required and expected to be independent (from the three arms of Government and other Commissions and offices). Moreover, these commissions are incorporated and enjoy security of tenure. Article 254 requires that the commissions and independent offices be held accountable by submitting an annual report to the President and Parliament. They are also required to submit a report to the President on particular issues on demand by the National Assembly and Senate; and that the report is to be published and publicised. The commissions and independent offices are also subject to financial audits.

Significantly, they are also subject to the High Court’s inherent and original jurisdiction (Article 165), the rules of fair administrative action (Article 47), natural justice (Article 22(3) (d)), access to justice (Article 48) and fair hearing (Article 50). Moreover, the decisions, actions and commissions are subject to review by the tribunals and to the foregoing grounds among others.

Table 20.1: Sihanya Mentoring Matrix on the Theory, Text, History and Practice on Constitutional Commissions and Independent Offices: The “Fourth Arm” Conundrum

	3 Arms only	4th Arm possibility¹⁷
Theory	Montesquieu ¹⁸ and numerous leading scholars	John Locke and other scholars discussed

¹⁶ Sec 105 (1) provided thus: “There shall be a Controller and Auditor-General whose office shall be an office in the public service.”

¹⁷ we will in the near finalize details. Discuss contention whether the media would be the 4th arm (in the USA etc); or whether NGOs would be the 4th arm in Kenya and Africa? Or whether the media and NGO (or CSOs generally?) would be the 4th, 5th or 6th arms of the Government.

¹⁸ Baron de Montesquieu (1748) *The Spirit of the Laws*, *op. cit.*

	<p>are emphatic on three types of Governmental functions: legislative, executive, judicial.</p>	<p>“administrative” functions.¹⁹ Some had focused on two public functions: legislative and executive/administrative.</p>
	<p>Montesquieu and numerous leading scholars mentioned only three arms of government: legislature (or parliament), executive, judiciary (or judicature and tribunals)</p> <p>Prof Yash Ghai and others have argued that as a matter of fact, the commissions and independent offices are controlled by the other arms. Prof Yash Ghai has argued that commissioners are appointed and dismissed through legislative processes that again give the President and the National Assembly major roles and that this majorly compromises their independence.²⁰</p>	<p>Some influential judges, scholars²¹ and publicists have mentioned the fourth and even fifth arm of Government such as the media, (constitutional) commissions, independent offices; Non-Governmental Organisations (NGOs) or Civil Society Organisations (CSOs,) or Public Benefit Organisations (PBOs).</p> <p>The Constitution has changed the locus of sovereignty (ultimate source of power; or “law giver”) from first, the historical focus on the monarch (King or Queen); second, to Parliament in terms of theory, text and practice; third, to the president in African states. Fourth, to popular sovereignty. The Constitution can change and intended to change the structure or arms of Government so that the three</p>

¹⁹ Cf. John Locke (1986) *The Second Treatise on Civil Government*, Prometheus Books, Amherst, New York; Richard Ashcraft (1969) “Political theory and political reform: John Locke's essay on Virginia,” *Western Political Quarterly*, 22(4), *op. cit.*, 742-758. Cf. debate on executive v. administering powers and functions of the President in South Africa....

²⁰ This critique focuses on practice, with some implications for theory or praxis.

²¹ Scholars like Prof Yash Ghai have also attempted to loosely categorize constitutional commissions as “the fourth arm” of government. See Yash Pal Ghai (2016) “All you need to know about independent commissions, offices,”

		<p>arms do not control the Commissions or Independent Offices. The control that the Kibaki and Kenyatta II (+) administrations exercised as a matter of fact over commissions like Independent Electoral and Boundaries Commission (IEBC), Commission on the Implementation of the Constitution (CIC), Judicial Service Commission (JSC), National Land Commission (NLC) has been unconstitutional and unjustified.</p>
<p>Text</p>	<p>1 Most constitutions make provisions on only the three arms of Government.</p> <p>2 Chapters 7, 8 and 11 provide for the legislature, executive and judiciary, respectively.</p> <p>The powers and functions of the three arms of Government in Kenya may be divided into four powers and functions:</p> <p>1. Powers and functions</p>	<p>1 Most constitutions do not mention “three arms” of Government; nor do they expressly exclude “the fourth arms”</p> <p>2 Article 249(2) provides that the commissions and the holders of the independent offices</p> <p>“(a) are subject only to this Constitution and the law;</p> <p>(b) are independent and not subject to directing or control by any person or authority”</p> <p>(i.e. not even the</p>

Star, Nairobi, March 9, 2016, at www.the-star.co.ke/news/2016/03/09/all-you-need-to-know-about-independent-commissions-offices_c1608782 (accessed 4/6/2017).

	<p>exclusive to the 3 arms</p> <p>2. Powers and functions concurrent to any two or all of the three arms and to commissions and independent offices.</p> <p>3. Powers and functions exclusive to the commissions and independent offices.</p> <p>4. Powers and functions not allocated to either</p> <p>5. Arts 1, 2 and 3 of the US Constitution provide for the Legislature (House of Congress), the Executive (especially the President and Vice President), and the Judiciary, respectively</p> <p>6. Chapters 4, 5 and 8 of the Constitution of the Republic of South Africa provide for Parliament, President and the National Executive, and the Courts and Administration of Justice, respectively.</p> <p>7. Chapters I, II and V of the Constitution of the Federal Republic of Nigeria have provisions on the executive, legislature and judiciary.</p>	<p>president/executive or any other arm).</p> <p>3 The Kenyan, South African and Nigerian constitutions were adopted in the context of professional, popular and political dissatisfaction with the performance of the three arms of government.</p> <p>6. Partly because of a structural deficit in the Constitution, an <i>ad hoc</i> mechanism has been developed to coordinate the activities of commissions and offices.²³</p>
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²³ For instance, did the overall Chair or Convener of the Constitutional Commissions and independent offices rotate among the Commission Chairs?

	<p>8. Structurally, the three arms of government are organised around a relatively clear structure or organogram from the national level to the grassroots, for instance, the executive has the President, ministries, departments, agencies (MDAs); the 47 counties consisting of Governors, County executive committee members and ward-level officials. Courts and tribunals consist of Supreme Court, Court of Appeal, High Court, Magistrate Court and Kadhi’s Court, as well as judicial (and quasi-judicial?) tribunals.²²</p>	
<p>History</p>	<p>The three arms argument has a long history (at least since 1740s.)</p>	<p>The four arms argument enjoys increasing direct and indirect usage, e.g. emphasis on “independence” and on the progressive role of commissions and independent offices.</p>
		<p>The powers and functions of commissions and independent offices fall under a similar typology. Remarkably, there is legitimate expectation that</p>

²² The challenge in Kenya in the post-2010 dispensation has been to define and operationalize judicial, quasi-judicial and executive or administrative tribunals. What lessons can Kenya learn from the administrative court and the administrative regulatory process in France and the US?

		most of the commissions should observe a high degree of equity, transparency, accountability, independence and non-partisanship.
Practice, Tradition or Custom²⁴	The Kenya Government has largely followed the US and British practice of focusing powers and functions as well as accountability requirements on the three arms.	Upon the promulgation or adoption of the Constitution of Kenya on August 27, 2010 and subsequently Kenyans have demanded greater government accountability by focusing on the role and performance of the commissions and independent offices, and general loss of confidence in the 3 arms.
	There are powers and functions that belong to the exclusive mandate of the three arms of government.	There are areas that belong to the exclusive mandate of the relevant constitutional commission or independent office.

Source: Sihanya (Mentoring) Research on Constitutional Democracy in Kenya and Africa, 1989-2021 (See Bibliography and preliminary materials in this book and in the list on CODRALKA Library, School and Movement).

As stated earlier, these commissions differ from previous commissions under the 1969 Constitution. There is an express provision outlining their core powers and independence.²⁵ As indicated above, the ten (10) expressly constitutional commissions are: The Ethics and Anti-Corruption Commission (EACC), Independent Electoral and Boundaries Commission (IEBC), Parliamentary Service Commission (PSC), Kenya National Human Rights and Equality Commission (KNHREC), National Land Commission (NLC), Judicial Service Commission (JSC), Commission on Revenue Allocation (CRA), Public Service Commission (PSC), Salaries and Remuneration Commission (SRC) and the National Police Service Commission (NPSC).

As noted above, the “two” independent offices so called in the Constitution are: Office of the Auditor-General and the Controller of Budget.

²⁴ Cf. President Kenyatta 2’s rejection of “4th arm”... See...

²⁵ Chapter Fifteen (Article 248-254) of the Constitution, *ibid.*

The commissions and independent offices are expected to check presidential, executive and public authority at two levels. First, the general constitutional mandate of all commissions under Article 249 is to protect the sovereignty of the people, secure the observance of democratic values and principles, and promote constitutionalism.

Second, the commissions have been mandated with specific constitutional powers that, under the 1969 Constitution, were presidential powers, or were statutory powers usurped by the President. These include regulating, supervising and conducting elections and referenda; constituting and abolishing offices in the public service; alter administrative boundaries; revenue allocation; and financial and administrative powers over Parliament, the Judiciary and the Executive.²⁶

To what extent have these commissions applied the principles of New Public Management (NPM), of technical and economic efficiency, political popular participation, and juridical due process? We now discuss some of the commissions using a three pronged typology: sovereignty, liberty and service delivery. I have previously argued that the 2010 Constitution seems to create constitutional commissions that are not to be controlled or checked by the three arms of Government. Thus the commissions enjoy independence based on a new model and according to the principles of separation of powers and checks and balances.²⁷

20.4.1 A “Fourth Arm” of Government-Kenya as Africa

As I have argued in this book,²⁸ while classical proponents of separation or division of powers had envisioned a neat typology of three arms of government, some argue that a fourth arm is emerging in Kenya’s constitutional framework as already stated. This proposition has evoked debates and controversies among some legal analysts in Kenya and elsewhere. The thesis or this argument is at least three pronged: First, that Article 248 of the 2010 Constitution specifically establishes ten (10) commissions and two (2) independent offices.

Moreover, as discussed above, it is argued that Article 248 and other provisions of the Constitution generally recognize five other commissions, namely: Commission on the Implementation of the Constitution (CIC); Ethics and Anti-Corruption Commission (EACC); Commission on Administration of Justice (CAJ); National Gender and Equality Commission (NGEC); and the Kenya National Commission on Human Rights (KNHRC).

Second, that the people and the Constitution were aware of the existence of the powers, functions and general mandate of the three arms of Government. Third, that the commissions and other offices which substantially differ from commissions in the 1969 Constitution. The commissions under the Constitution of Kenya 2010 have an express provision outlining their independence

²⁶ *Ibid.*

²⁷ See Chapter 6 CODRALKA 1 on “Fusion and Separation of Powers, and Checks and Balances and Devolution in Kenya and Africa.”

²⁸ See Chapter 6, *ibid.*

from other arms of government. Article 249 (2) lists the objects of commissions and independent commissions to include:

- “(a) protect the sovereignty of the people;
- (b) secure the observance by all State organs of democratic values and principles; and
- (c) promote constitutionalism.

Moreover, under Article 249(2),

- “(2) The commissions and the holders of independent offices—
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.”

Fourth, that the commissions and independent offices are administratively and financially delinked from the executive. In fact, Article 249(3) stipulates that:

“Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.”

What are the theoretical, textual, historical and practical or operational questions regarding the respective commissions and independent offices? We begin with the mandate, then assess the performance in the light of constitutional criteria, especially promoting popular sovereignty, liberty and service delivery. The Kenya National Human Rights and Equality Commission (KNHREC) Human rights has been strengthened in the Constitution especially under Chapter Four (the Bill of Rights) as a basis for realising popular sovereignty, liberty and service delivery. The Kenya National Human Rights and Equality Commission (KNHREC) is established under Article 59 of the Constitution.

The Commission is charged with 11 functions.²⁹ I group these functions into two, following the chronology in the Constitution:

- “(a) to promote respect for human rights and develop a culture of human rights in the Republic;
- (b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
- (c) to promote the protection, and observance of human rights in public and private institutions;
- (d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
- (e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
- (f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs...”

KNHREC’s other functions are:

²⁹ Article 59(2) of the Constitution of Kenya, 2010.

- “(g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
- (h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;
- (i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;
- (j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and
- (k) to perform any other functions prescribed by legislation.”

Most of these functions are now performed by the Kenya National Commission on Human Rights (KNCHR) which was established by the Kenya National Commission on Human Rights Act, 2011. KNCHR is a successor to a previous KNCHR established by an earlier Act of Parliament in 2002. Following the promulgation of the Constitution on August 27, 2010, KNCHR was legally reconstituted as the Kenya National Human Rights and Equality Commission (KNHREC). Article 59(5) of the Constitution is instructive.

The core functions of this commission include the promotion of respect for human rights, gender equality and equity.

Pursuant to Article 59, KNHREC was restructured into three related commissions: First, the enactment of the Kenya National Commission on Human Rights Act led to the establishment of the Kenya National Commission on Human Rights.³⁰ Second, the enactment of the National Gender and Equality Commission Act 2011 established the National Gender and Equality Commission (NGEC).³¹ Third, the enactment of the Commission on Administrative Justice Act 2011 established the Commission on Administrative Justice (CAJ).³²

These commissions are crucial if the Bill of Rights in Chapter 4 of the Constitution is to be promoted and protected.

Kenya National Commission on Human Rights (KNCHR) has faced major challenges from the Government including in the appointment of commissioners and limited funding. There was a leadership crisis in 2016 where some of the former commissioners’ terms ended shortly before or after the 2016 General Elections but the Kenyatta II administration appointed new commissioners in 2014, one year later.³³ Subsequently, advertisements for the new positions

³⁰ Part II of the Kenya National Human Rights Act, 2011.

³¹ Part II of the National Gender and Equality Commission Act, 2011.

³² Part II of the Commission on Administrative Justice Act 2011.

³³ Francis Khayundi (2016) “The need for proper leadership to guide the Kenya National Commission on Human Rights in Promoting and Protecting Human Rights in Kenya,” *AfricaLaw* 11/11/2016, at <https://africlaw.com/2016/11/11/the-need-for-proper-leadership-to-guide-the-kenya-national-commission-on-human-rights-in-promoting-and-protecting-human-rights-in-kenya/> (accessed 26/4/2017).

were published in the *Kenya Gazette* but it was contended that due process had not been followed in selection, interview and appointment of the commissioners.³⁴

Scholars and analysts have opined that the splitting of Kenya National Human Rights and Equality Commission (KNHREC) into three other commissions (namely the Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission (NGEC), and Commission on Administrative Justice (CAJ) referred to earlier) has helped boost efficiency and performance in the respective areas of concentration. NGEC and CAJ are discussed briefly in the ensuing parts of this Chapter.

20.6 The National Land Commission (NLC) in Kenya and Africa[...]

The National Land Commission (NLC) is established under Article 248(2) (b) and Article 67 of the Constitution. The elaborate provisions on NLC are stipulated in the National Land Commission Act, No. 5 of 2012.

The mandate of NLC is largely three or four pronged in Article 67(2) of the Constitution and includes: to manage public land on behalf of the national and county governments, to recommend a national land policy to the National Government; and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

The National Land Commission (NLC) was established amidst a lot of controversy. First, there was a standoff between the then President Mwai Kibaki (of the Party of National Union (PNU)) and former Prime Minister Raila Odinga (of the Orange Democratic Movement ODM). The main source of the disagreement was the move by the acting Head of Public Service and former Secretary to the Cabinet, Francis Kimemia, to replace a nominee who had not been agreed on by the two principals as stipulated in the National Accord and Reconciliation Act, 2008 and relevant laws.³⁵

Even after the members were approved by Parliament in August 2012, the names were not published until after High Court Judge David Majanja directed President Kibaki to release the names by February 11, 2016.³⁶

³⁴ See *Brian Weke & Another v. Attorney General & Another* [2014] eKLR, Petition No. 502 of 2013; personal communication.

³⁵ Allan Kisia and Peter Opiyo (2012) "Standoff may delay formation of land commission," *Standard Digital News*, Nairobi, 12/5/2017, at http://www.standardmedia.co.ke/?articleID=2000063087&story_title=Standoff-may-delay-formation-of-land-commission (accessed 19/11/2016). The move angered the then Prime Minister Raila Odinga who recorded his displeasure in Parliament. Who was Kimemia especially in Kibaki to Kenyatta II succession?

³⁶ Lucianne Limo (2016) "High Court orders Kibaki to gazette land team officials," *Standard Digital News*, at <http://www.standardmedia.co.ke/?articleID=2000076645> (accessed 19/11/2016). Cf. Ben Sihanya address on the land and National Land Commission question in a KTN Newslines with Louis Otieno on Land and Poverty, Feb 16,

Second, due to delays in appointing the commissioners, the formulation of appropriate legislation and policies as well as some land transactions stalled, including the acquisition of land for the construction of infrastructure like the Ngong' Road.³⁷

Third, under the Kenyatta II administration, the Ministry of Lands took over a lot of responsibilities of National Land Commission (NLC) including land transactions, and appointment of some officers. Some of these disputes were litigated in the Supreme Court. An example is *In the Matter of the National Land Commission* [2015] eKLR.³⁸

This reference was moved by the National Land Commission and the issues for determination were about four (4): First, what meaning is to be assigned to the words “to manage” and “to administer” public land, unregistered trust land, and unregistered community land?³⁹ Second, whether Land Registrars (recorders of titles) and Land Surveyors answerable to the National Land Commission (NLC), or to the Cabinet Secretary of the Ministry.

Third, a determination on which functions that were previously performed by the Ministry before the creation of the National Land Commission, had now been transferred to the National Land Commission (NLC). Fourth, when Article 62(2) and (3) of the Constitution, and section 5(2)(b) of the National Land Commission Act provide that the NLC is to administer public land “on behalf of” the National and County Governments, do these provisions envisage an agency relationship between the National and County Governments, the latter being the principals?

Significantly, in this case, the Supreme Court sought to explain and determine the proper relationship between the mandate of National Land Commission (NLC) and the Ministry of Land, Housing and Urban Development. It ruled, *inter alia*, that issuance of land title deeds is a preserve of the Ministry of Lands. According to the Supreme Court, National Land Commission (NLC) has a mandate in various land registration and management processes but has no mandate to issue land title deeds. NLC can monitor registration of land but it cannot take an active role in registration. The Supreme Court further stated that NLC and the Lands Ministry should operate under the checks and balances model of separation of powers.

This decision is largely counter or unconstitutional. The Supreme Court’s finding largely endorsed the historical and emerging practice that the Executive through the Ministry of Lands exercises extra-constitutional powers on land matters and had a regrettable impact on how

2016 at, <http://www.youtube.com/watch?v=HlAaYTs4hb5A&list=UUKVdsde0HExltrWMuK0hOWmg&index=1> (accessed 25/3/2016).

³⁷ Emma Nzioka (2012) “Appoint National Land Commission, Kibaki and Raila told,” *Daily Nation*, Nairobi, November 22, 2012, at <https://www.nation.co.ke/News/Appoint-land-commission-Kibaki-and-Raila-told/-/1056/1626684/-/d9ye4l/-/index.html> (accessed January 5, 2021)....

³⁸ *In the Matter of the National Land Commission* [2015] Advisory Opinion Reference 2 of 2014, eKLR....

³⁹ By virtue of Articles 62(2), 62(3), 67(2) (a) and 67(3) of the Constitution of Kenya; and Sections 5(1) (a) and 5(2)(e) of the National Land Commission Act, No. 5 of 2012 [NLC Act].

Kenyatta II should control key matters on land governance, administration and management.⁴⁰ Thus the Supreme Court found it necessary to dismiss the independence of the National Land Commission, including the power to “recruit or recount its own staff.

Fourth, the National Land Commission’s operations have been stifled by underfunding and delayed disbursements. Parliament proposed to allocate the National Land Commission (NLC) 4% of its budget for the 2016/2014 fiscal year which was greatly inadequate.⁴¹ This trend was replicated in the 2014/2015, 205/2016 and 2016/2017 financial years.

Fifth, and even more crucial, the Commission for Implementation of the Constitution (CIC) faulted the National Land Commission (NLC) over powers to prepare and sign title deeds and instead said the powers lay with the Land Registrar, who should be appointed by the Public Service Commission.⁴² This was in line with President Kenyatta’s position on NLC which was later on rubber-stamped by the unconstitutional Supreme Court in the advisory opinion referred to in point three above. President Kenyatta used the Commission for Implementation of the Constitution (CIC) and the Ministry of Lands under Cabinet Secretary Mrs Charity Ngilu,⁴³ Dr Fred Matiang’i (in acting capacity)⁴⁴ and later Prof Jacob Kaimenyi to undermine the role of the National Land Commission (NLC).

What is the role of the NLC vis-à-vis the Ministry of Lands and Physical Planning on the controversial renewal of leases? How have such disputes between the NLC and the Ministry of Lands and Physical Planning been resolved after the Supreme Court of Kenya (SCOK) decision? How should the internal disagreements and corruption in the National Land Commission (NLC) be addressed?⁴⁵

⁴⁰ Titling is key to land governance, administration and management.

⁴¹ Rajab Ramah (2016) “Under-funding Kenyan land commission could set back reforms,” at http://sabahionline.com/en_GB/articles/hoa/articles/features/2016/05/30/feature-01 (accessed 19/11/2016).

⁴² Patrick Beja and Philip Mwakio (2016) “CIC says National Land Commission should not sign land title deeds,” *Standard Digital News*, Nairobi, 21/10/2017, at http://www.standardmedia.co.ke/?articleID=2000096440&story_title=cic-says-national-land-commission-should-not-sign-land-title-deeds&pageNo=1 (accessed 19/11/2016).

⁴³ Mrs Charity Ngilu was Lands Cabinet Secretary from 2013 to 2015. Prof Jacob Kaimenyi served as Cabinet Secretary Lands.... He had been the Education Cabinet Secretary from April 2013 to 2015.... See Stephen Makabila (2013) “Education Cabinet Secretary for Kenya Jacob Kaimenyi vows to ensure quality amid nagging setbacks,” *Standard*, Nairobi, July 7, 2013, at <https://www.standardmedia.co.ke/education/article/2000087753/kaimenyi-vows-to-ensure-quality-amid-nagging-setbacks> (accessed January 5, 2021).

⁴⁴ Dr Matiang’i served as the acting Cabinet Secretary for Lands and was succeeded by Joe Mucheru as the ICT Cabinet Secretary, and then later became the Education Cabinet Secretary. He was later appointed the Interior Cabinet Secretary.

⁴⁵ *R v. Swazuri*, Chief Magistrate Anti-corruption and Economic council (ACEC) No. 6 of 2019; *Muhammad A. Swazuri & 23 Others v. R.* [2019 eKLR] (Crim. Revision No. 16 of 2019).

The Presidency and the Executive generally should respect the Constitution and let the National Land Commission (NLC) perform its functions, including in addressing the historical and continuing land injustices. This is mainly because land is a major electoral and governance.

20.7 Independent Electoral and Boundaries Commission (IEBC) in Kenya (equivalents in Africa? SA, INEC, Uganda, Tanzania, Ghana, Senegal)

The Independent Electoral and Boundaries Commission (IEBC) is established by the Constitution of Kenya 2010 and operationalised by the Independent Electoral and Boundaries Commission Act 2011.⁴⁶ Its role is fundamental in helping secure key components of popular sovereignty and in shaping the present and the future of Kenya in terms of helping realise popular sovereignty through elections, nominations and referenda. IEBC's predecessor, the Interim Independent Electoral Commission of Kenya (IIEC) and the Interim Independent Boundaries Commission (IIBC) had previously been formed in 2008 to replace the Electoral Commission of Kenya (ECK) which was blamed for fraud, incompetence and hence violence following 2007 General Elections.⁴⁷

These reforms are considered in the context of three material materials for an Electoral Management Body (EMB). First, the US and the UK adopt a "Government" model where IEBC has the Chairperson and eight other members appointed under article 250 (4). Its mandates include⁴⁸ the continuous registration of voters and revision of the voter's roll, delimitation of constituencies and wards and settlement of electoral disputes arising out of nominations.

20.7.1 Role of the Independent Electoral and Boundaries Commission Chairperson v. Commissioners v. Chief Executive Officer v. Secretariat

During the transition period of the first IEBC Commissioners in 2016, there arose a debate on the role of the Commissioners vis-a-vis that of the Secretariat that is headed by the Chief Executive Officer (CEO). Does IEBC function without commissioners? Constitutionally, commissions consist of at least three, but not more than nine members.⁴⁹ Its existence is mainly pegged on the presence of commissioners. Without at least three commissioners, the Commission cannot be said to exist. Section 11A of the Independent Electoral and Boundaries Commission (IEBC) Act states as follows regarding the role of the Commission and the Secretariat:

“For the effective performance of the functions of the Commission —

⁴⁶ Independent Electoral and Boundaries Commission (IEBC) Act, 2011, as amended in 2016 and 2017.

⁴⁷ IREC (2008) *Report of the Independent Review Commission (IREC) on the General Elections held in Kenya in December 27, 2007*, issued on 17/9/2008, Government Press, Nairobi.

⁴⁸ Article 88(4) of the Constitution of Kenya, 2010.

⁴⁹ Article 250 (1) of the Constitution, “(1) each commission shall consist of at least three, but not more than nine, members.”

(a) the chairperson and members of the Commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and

(b) the secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission.”

This debate was in the context of activities that IEBC continued to undertake even when the offices of the Commissioners had been declared vacant, for instance, procurement of Biometric Voter Registration (BVR) kits, ballot papers, election results declaration forms and poll registers.

It was correctly argued in *Republic v. Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others*⁵⁰ that once the offices were declared vacant, there was a vacuum in the commission⁵¹ and the purported decisions of the outgoing commissioners were unconstitutional. The decisions included authority to Ezra Chiloba,⁵² to sign a procurement contract for the supply and delivery of ballot papers for elections, election results declaration forms and poll registers.⁵³

20.7.2 Effectiveness of the Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission (IEBC) has systematically committed, promoted or suffered numerous acts of non compliance with the Constitution, illegality and irregularities. It has been ineffective and capable of promoting credible elections on a continuous and sustainable basis. This is mainly related to and perpetuated by how it was infiltrated and compromised as it presided over the 2016 General Elections, through the influence of the Kibaki-Kenyatta II system. What have been the challenges and lessons?

20.7.3 Reforming the Independent Electoral and Boundaries Commission

To have free, fair, transparent, verifiable and accountable elections in Kenya, IEBC had to be restructured and the Commissioners replaced. That was necessary. Was it sufficient? Once Kenyans had raised doubts and genuine concerns over the operation of this crucial commission, nothing would restore their confidence unless a new commission was established or commissioners and the relevant purveyors of electoral impunity replaced. However, the replacement of the commissioners in 2017 was not a guarantee or a panacea for free, fair, accurate, verifiable, transparent, and accountable elections.

⁵⁰ *Republic v. Independent Electoral and Boundaries Commission & Another ex parte Coalition for Reform and Democracy & 2 Others*, Miscellaneous Application 637 of 2016 [2017] eKLR (per George V. Odunga, J.).

⁵¹ Per the provisions of Article 250(1) of the Constitution and section 5 of the Independent Electoral and Boundaries Commissions Act, 2011.

⁵² The Independent Electoral and Boundaries Commission (IEBC) Chief Executive Officer (CEO).

⁵³ These violate Articles 2(1) and (2), 3(1) and 10(1) of the Constitution of Kenya.

As I have argued elsewhere, the criteria, process of selection, choice, appointment and conduct of the Chair and IEBC Commissioners in Kenya as well as the retention of the staff largely fail to meet the constitutional standards.⁵⁴ Yet these are key factors that would determine whether Kenya holds just, free, fair, accurate, verifiable, credible, transparent, accountable and hence peaceful presidential or General Elections. Stakeholders emphasized that the slightest demonstration of compromise or bias could always provoke violence or chaos worse than the 2007/2008 Post-Election Violence (PEV).⁵⁵

To secure electoral justice, the process of selecting and conduct of IEBC Commissioners must be fair, participatory and transparent. Largely, this was not the case in 2017. Most have argued that the commissioners appointed in January 2017 were products of political manipulation and impunity. Most of the selection panel's questions were shallow. Stakeholders opine that some panelists were overbearing and preferred commissioners affiliated to President Uhuru Kenyatta or the Jubilee system in terms of political, tribal or business affiliation. There were no clear competency or moral-ethical social benefits in spite of including some specific religious leaders in the panel.⁵⁶ And President Kenyatta ignored the list that embodied merit, diversity, public participation and the recommendation of a legally constituted and politically accredited panel.⁵⁷ Kenyatta's personal, tribal and party interests overrode the public interest.⁵⁸

My argument has been that IEBC Commissioners should come from diverse ethnic and political backgrounds. In the transitional phases the commissioners should be nominated by the leading political formations. The 2017 restructuring presented that opportunity. Mr Tukero ole Kina and Mr Wafula Chebukati were nominated for the position of IEBC Chair. Mr Tukero was the highly ranked candidate, having scored 79 per cent (%), more than 15 points above the next person, Mr Wafula Chebukati, who scored 63 per cent (%) in the interviews.

⁵⁴ Ben Sihanya (2017) "Conduct of IEBC Commissioners key to 2017 General Elections," Vol 1, Issue 8, *Advocate*, Magazine of the *Law Society of Kenya*, at 8.

⁵⁵ *Ibid.*

⁵⁶ A few had argued that religious leaders would bring a conscientious and moral-ethical approach to electoral management. They majorly argued that most religious leaders were already affiliated to the Kenyatta system. This was partly evident by their roles in 2012/2016 when they led prayer meetings to support Kenyatta, and to advance a "peace" crusade: "peaceful" not free, fair, accurate, transparent, verifiable, credible and accountably elections.

⁵⁷ Ben Sihanya (2017) "Conduct of IEBC Commissioners key to 2017 General Elections," *op. cit.*, Under Article 259 (11), "if a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise. See also chapter 4 of this book.

⁵⁸ President Kenyatta instead appointed Mr Wafula Chebukati. For the position of IEBC Commissioners, the following were nominated: Mr Zephania Okeyo Aura (80%), Dr Roselyne Kwamboka Akombe (79%), Prof Abdi Yakub Guliye (75%), Prof Henry Kizito Okola (69%), Mr Samuel Kimeu (68%), Dr Paul Kibiwott Kurgat (66%), Mr Boya Molu (64%), Ms Consolata Nkatha Maina (55%), and Ms Margaret Wanjala Mwachanya (53%). From the above recommended individuals, President Uhuru Kenyatta nominated Consolata Bucha, Boya Molu, Roselyn Akombe, Paul Kurgat, Margaret Mwachanya and Abdi Guliye.... See....

For a long time, Kenya has experienced fundamental challenges and reversals to the consolidation of electoral justice and democracy. The main challenge comes from ethnic colonialism or dictatorship and routine rigging of presidential elections in 1992, 1997, 2007, 2016 and 2017.⁵⁹ This was mainly because the key officials were ethnically or politically affiliated to Moi, Kibaki and Kenyatta.⁶⁰ Many were ethnic clones or cronies even if they were non-Kikuyus.

Complying with the rules and principles and values of the electoral system and voting method under Articles 10, 38, 81, 86, 232, etc. of the Constitution requires demonstrated compliance with and adherence to the rules by officials.⁶¹ The electoral rules and principles include free and fair elections conducted by an independent body and administered in an impartial, non-partisan, neutral, efficient, accurate and accountable manner.⁶² Independent, accurate and accountable are key. And Article 86 stipulates that during every election, the Independent Electoral and Boundaries Commission (IEBC) shall ensure four things.

First, that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. Second, that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station. Third, that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.⁶³ Fourth, that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

With regard to presidential elections, there are four additional requirements.

First, election in every one of the 290 constituencies⁶⁴

⁵⁹ The most free, fair, verifiable and transparent elections so far were those of 1963 and 2002. In both, a Kikuyu candidate was posed to be Prime Minister (Jomo Kenyatta) or President (Mwai Kibaki). See Chapters 3, 11, 12, 13 of this CODRALKA 1.

⁶⁰ In the 1963, 1969 and 1974 elections, the key officials included the Attorney-General (A-G), the Supervisor of Elections (in the A-G's Chambers, the Kenyan African National Union (KANU), and the provincial administration (including the provincial commissioner (PC), the District Commissioner (DC), and the District Officer (DO)). The District Commissioner and the District Officer were returning officers at the district (now county) and constituency (sub-county) levels respectively. Most of these were affiliated to the Kenyatta system.

⁶¹ Article 81 outlines the general principles for the electoral system.

⁶² Articles 81 and 86 have been interpreted in *Maina Kiai, Khelef Khalifa and Tirop Kitur v. IEBC and the Attorney General*, High Court, Petition No. 207 of 2016 eKLR. The lawyers for the petitioners in this case were Mr Willis Otieno, Prof Ben Sihanya and Mr Ochieng' Oginga. On appeal, National Super Alliance (NASA) was joined as a correspondent and represented by SC James Orengo, Mr Paul Mwangi, Mr Otiende Amollo, and Prof Adams Oloo. The *amicus curiae* were Katiba Institute represented by Mr Waigwa Wanyoike and Ms Nkonge.

⁶³ *Ibid.*

⁶⁴ The then Attorney General (A-G) Githu Muigai curiously and unsuccessfully argued that in presidential elections, Kenya is one national constituency and the Independent Electoral and Boundaries Commission (IEBC) Chair is the Returning Officer.

Second, the Constituency Returning Officer has duty to tally, verify, announce and declare results.

Third, presidential election results should be the first to be announced.

Fourth, the presidential election results as announced by the Returning Officer are final with regard to that constituency.

The failures of the disbanded Hassan-led IEBC and the Electoral Commission of Kenya (ECK) were mainly due to lack of independence, especially from Uhuru Kenyatta's Jubilee or Mwai Kibaki's Party of National Unity (PNU) and their tribalised Governments, respectively.

The lawless operatives in the Kenyatta II Government were cited as being keen to compromise or influence elections. As the 2017 General Elections approached, pundits urged Mr Ezra Chiloba and other IEBC officials not to fall victim to Kenyatta's Jubilee. The task ahead called for courage, firmness and absolute commitment to the rule of law and electoral justice by IEBC. It was a case for IEBC to always comply with the constitutional, statutory and regulatory rules, principles and values or norms. Chapter Six of the Constitution, other provisions of the Constitution,⁶⁵ and numerous laws establish the leadership and integrity standards that all IEBC officials must meet.⁶⁶ Kenyans had been demanding that electoral injustices must stop, including corruption, ethnic partisanship, incompetence.⁶⁷ The independence and integrity of IEBC commissioners was expected to be beyond reproach. However, IEBC failed this test.⁶⁸

Prior to the 2017 general elections, it was imperative that the data, links or secretariat and field staff be restructured in good faith. Numerous problems had been already associated with the lack of independence, incompetence and lawlessness of IEBC, National Intelligence Service (NIS), Kenyatta-influenced Interior Ministry⁶⁹ and the provincial administration including chiefs.⁷⁰ These necessitate administrative and human resource vetting and reforms especially in

⁶⁵ These include Articles 2(1), (4), (5), (6); 22; 23; 47; 48; 232 and 258.

⁶⁶ These standards have been elaborated in legislative and emerging case law, including the Leadership and Integrity Act, Public Officer Ethics Act and Public Service (values and principles) Act, among others.

⁶⁷ This includes sharing servers with Kenyatta's Jubilee (like The National Alliance (TNA) in 2016), and procurement scams.

⁶⁸ See, among others, the Supreme Court of Kenya's ICT Report prepared by the office of the Registrar in the context of the presidential petition No. 1 of 2017.

⁶⁹ Joseph Nkaissery, the Cabinet Secretary for the Interior Ministry was quoted warning the opposition NASA against use of the campaign slogan "10 Million Strong." He came under tough criticism for showing bias by ignoring Jubilee's use of "70 plus (+) one" (i.e. the puff that they were targeting 70% +1 votes) slogan and attempting to use his position to interfere with people's political rights guaranteed in Article 38. See also Chapters 1 of CODRALKA 1 and 13 of CODRALKA 2.

⁷⁰ During the voter registration exercise, there were complaints that Jubilee Government was using Chiefs to register voters, and that they were being prepared to facilitate rigging in the August 8, 2017 general elections. See Stephen Astariko (2017) "Jubilee using chiefs to rig polls – Aden," *Star*, Nairobi, January 26, 2017, at http://www.the-star.co.ke/news/2017/01/26/jubilee-using-chiefs-to-rig-polls-aden_c1494153 (accessed 11/6/2017).

the voter registration and results transmission and results management generally. At least three were key. First, double registration and voters sharing ID numbers. Second, confirmed registration of dead, underage, Ethiopian, and Ugandan voters to benefit Kenyatta's Jubilee.⁷¹ Third, issuing more biometric voter registration (BVR) kits than the clerks and not account for their use.⁷²

I argued in the Law Society of Kenya's (LSK's) *Advocate* magazine and elsewhere regarding the 2017 elections that the opposition, civil society organisations (CSOs), academia and the public needed to be eternally vigilant to secure electoral justice, good governance and constitutional democracy in Kenya. Like Mwai Kibaki in 2007, President Uhuru Kenyatta needed to be made accountable through electoral justice. The people, electoral commissions and some of the presidents of Nigeria, Ghana, Cote D'Ivoire, Senegal, Malawi and the Gambia had shown that (presidential) elections can be free, fair, verifiable, transparent, credible and accountable even with an incumbent as a (losing) candidate.⁷³

The Independent Electoral and Boundaries Commission (IEBC) failed to deliver a free, fair, transparent, accountable and verifiable presidential election held on 8/8/2017. Claims of non-compliance with constitutional provisions, illegalities and irregularities including system hacking and manipulation of results were confirmed by the Supreme Court's Report on audit of IEBC servers.⁷⁴

This has intensified the debate on the independence of IEBC, and the constitutional and statutory roles of the Chair of the Independent Electoral and Boundaries Commission (IEBC), IEBC commissioners, the Chief Executive Officer (CEO) of IEBC, and the secretariat as well as temporary staff of IEBC.

20.8 The Parliamentary Service Commission in Kenya as Africa (equivalent in Africa SA, Nigeria, Uganda, Tanzania, Ghana...)

Parliament is key in securing popular sovereignty, liberty and service delivery through legislation, representation and oversight, among others (Arts 93, 94, 95).⁷⁵ Parliament consists of

⁷¹ Nancy Agutu (2017) "Raila links NIS to election fraud, voter listing in Uganda and Ethiopia," *Star*, Nairobi, 24/1/2017, at <http://www.the-star.co.ke/news/2017/01/24/video-raila-links-nis-to-election-fraud-voter-listing-in-uganda-and-c1493442> (accessed 25/4/2017).

⁷² *Ibid.*

⁷³ Cf. the Presidential elections in Ghana (2016) the Gambia (2016), Nigeria (2015), Cote d'Ivoire (2010), Senegal (2012) and Malawi (2014, 2019, 2020) The winners and losers were, respectively: Nana Akufo-Addo (John Mahama), Adama Barrow (Yahya Jammeh), Mohammud Buhari (Goodluck Jonathan); Alassane Ouattara (Laurent Gbagbo); Macky Sall (Abdoulaye Wade); Peter Mutharika (Joyce Banda).

⁷⁴ See Supreme Court of Kenya's ICT Report prepared by the office of the Registrar in the context of the presidential petition No. 1 of 2017.

⁷⁵ Article 93 is on establishment of Parliament. Article 94 is on the role of Parliament. Article 95 is on the role of the National Assembly.

the National Assembly with 349 members (Art 97),⁷⁶ Senate with 68 members (Art 98)⁷⁷ and the 47 county assemblies complete the devolved legislative arm of Government. The PSC is established under Article 127.⁷⁸ It was initially established in 1999 by an amendment to the 1969 through the Constitution of Kenya (Amendment) Act, Act No. 3 of 1999 (the Oloo Aringo Bill).⁷⁹

20.8.1 Powers of the Parliamentary Service Commission⁸⁰ [equivalents in Africa-SA, Nigeria, Uganda, Tanzania, Ghana, Senegal]

The Commission is responsible for:

- (a) providing services and facilities to ensure the efficient and effective functioning of Parliament;
- (b) constituting offices in the parliamentary service, and appointing and supervising office holders;
- (c) preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;
- (d) undertaking, singly or jointly with other relevant organisations, programmes to promote the ideals of parliamentary democracy; and
- (e) performing other functions--

⁷⁶ The detailed composition of the National Assembly is as follows:

- (a) two hundred and ninety members, each elected by the registered voters of single member constituencies;
- (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;
- (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and
- (d) the Speaker, who is an *ex officio* member.

⁷⁷ Senate consists of:

- (a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;
- (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;
- (c) two members, being one man and one woman, representing the youth;
- (d) two members, being one man and one woman, representing persons with disabilities; and
- (e) the Speaker, who is be an *ex officio* member.

⁷⁸ It was previously established through an amendment to the 1969 Constitution in 1999, via the Peter Castro Oloo Aringo Bill (1999). The Speaker of the National Assembly was the first Chair. And Oloo Aringo the Deputy. He was Alego - Usonga Member of Parliament (MP), and later nominated Member of Parliament.

⁷⁹ Samuel Waweru (2005) "The Parliamentary Scene in Kenya," at <http://www.asgp.co/sites/default/files/documents/EPRMKNDGTWFEEUXMPUKNDNVYJNRXGQ.pdf> (accessed 25/4/2017).

⁸⁰ See Chapter 7 on "Legislative Powers, Functions and Structure in Kenya and Africa in CODRALKA 1."

- (i) necessary for the well-being of the members and staff of Parliament; or
- (ii) prescribed by national legislation.

20.8.2 Composition of the Parliamentary Service Commission (PSC) (Equivalent in Africa –SA, Nigeria, Uganda, Tanzania, Ghana...)

The Speaker of the National Assembly (NA) as Chairperson.

The vice-chairperson - elected by the Commission members.

Seven members appointed by Parliament from among its members of whom: Four (of which two are women) are nominated by both Houses by Party or Coalition of parties that form the National Government; Three (at least one woman) are nominated from both Houses by the parties not forming the national government.

One man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.

Secretary to the Commission held by the Clerk of the Senate.

20.8.3 Assessing performance of the Parliamentary Service Commission in Kenya and Africa

The Parliamentary Service Commission (PSC) is expected to provide checks and balances in Parliament. Some of the Parliamentary Service Commission's roles under Article 127(6) of the Constitution include provision of services and facilities to ensure the efficient and effective running of Parliament, the constitution of offices in the parliamentary service, and appointing and supervising office holders. Parliamentary Service Commission (PSC) forms and runs the bureaucratic administration of both Senate and the National Assembly.

The Parliamentary Service Commission (PSC) and the Judicial Service Commission (JSC) are the only two constitutional commissions whose Chairpersons hold office by virtue of holding another office, hence *ex-officio*. The Chair is not appointed through the process that requires the participation of the president either as the initial nominating authority or nominal appointing authority. The Speaker of the National Assembly is the automatic chair of the Parliamentary Service Commission (PSC) (Article 127 of the Constitution).

And the Chief Justice is the automatic Chair of the Judicial Service Commission....⁸¹ Should the Speaker and CJ chair PSC and JSC, respectively? Are they supposed to be oversighted by the commissions they chair? What is the experience with National Police Service Commission (NPSC)? Is it any more effective? Or is there a higher value and principles that the Speaker and CJ should have substantive executive and administrative powers to enable them to effectively

⁸¹ We have discussed the fusion and separation of powers and functions as well as checks and balances in Chapters 9 and 10 above on the Judiciary. See also Chapter 6 on “Fusion and separation of powers, and checks and balances in Kenya and Africa.”

administer the entire legislative arm or judiciary? Just like the President who has powers vis-a-vis the Cabinet (as Chair), the National Security Council (NSC) (as Chair); and vis-a-vis the Kenya Defence Forces (as C-in-C).

20.8.1 The Parliamentary Service Commissions role in Parliamentary Independence on Law making, Administration and Financial Transactions

The Parliamentary Service Commission (PSC) plays at least two (2) major roles. First, is the governance function including providing high level executive oversight regarding the parliamentary administrative bureaucracy? Second, the PSC staff provide key services including drafting or reviewing of bills, rules, regulations, policies and administrative procedures. The staff also engage in the administration and management of human, financial, technical (including various facilities, ICT) and infrastructural resources without which Parliament may not function well or at all.

Before the PSC was established, Parliament (then only the National Assembly (NA) depended on the Executive, through the Attorney-General (AG), for drafting and tabling of bills in Parliament. And the Office of the President and the Ministry of Finance (or Treasury) controlled Parliament's calendar, as well administrative, legislative and formal transactions, including salaries and mileage claims.

20.8.2 Effectiveness of the Parliamentary Service Commission in regulating Parliament's Power in Kenya

The Constitution and Parliamentary Service Commission have helped secure a measure of independence in terms of the calendar of Parliament and its legislative agenda. First, life of Parliament including the date of the General Election is known in advance.⁸² Previously the president determined the date of General Elections which he stated was his "secret weapon" (manipulative strategy or tactic...). Second, the Speaker and the House or Senate Business Community work on Parliamentary sessions.

Yet there are still major challenges in Parliament's role in limiting the powers of the Parliament. Instead, in the 2010-2017 period, it generally protected the interests of the Members of Parliament especially on salary increment and reduced tax burden.⁸³ The Parliamentary Service Commission (PSC) is expected to liaise with other commissions in discharging its functions. PSC has historically used this opportunity to cushion MP's welfare, and undermining the public

⁸² Article 101 of the Constitution stipulates that a general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.

⁸³ Cf. the debate and conflict with the Salaries and Remuneration Commission (SRC) in 2016 where majority of Public Service Commission (PSC) members and other parliamentarians threatened to disband SRC if it would not yield to their demands.

interest. A major challenge is unconstitutional and poor quality law that undermine human rights, electoral equity, the rule of law and constitutional democracy generally.⁸⁴

Moreover, the PSC has appeared to overstep its mandate by interfering with other commissions and purporting to oversee them, for instance, by dramatically summoning the Chief Justice and the Judicial Service Commission (JSC) members for interrogation?⁸⁵ Why was it so political and accusatory in summoning JSC members over the dispute between the JSC and the then Chief Registrar of the Judiciary, Gladys Boss Shollei?⁸⁶ Why was it quiet when the MPs and officers were being intimidated? Ms Shollei was later succeeded by Ms Anne Amadi.

20.9 The Judicial Service Commission in Kenya [Equivalents; Africa: SA, Nigeria, Uganda, Tanzania, Ghana...]

The Judiciary, including courts and tribunals, is the ultimate defender of popular sovereignty, the Constitution, constitutional democracy, the rule of law, liberty and human rights. The Judicial Service Commission is established under Article 171 of the Constitution 2010 and chaired by the Chief Justice (CJ) who is also the President of the Supreme Court.⁸⁷

20.9.1 Powers of the Judicial Service Commission⁸⁸ [Equivalents in Africa: SA, Nigeria, Uganda, Tanzania, Ghana...]

Under Article 172 of the Constitution:

(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall-

- (a) recommend to the President persons for appointment as judges;
- (b) review and make recommendations on the conditions of service of--
 - (i) judges and judicial officers, other than their remuneration; and
 - (ii) the staff of the Judiciary;

⁸⁴ Cf. Wachira Maina (2015) "Why is Parliament making very many bad laws?" *Daily Nation*, Nairobi, 1/5/2015, at <http://www.nation.co.ke/oped/Opinion/Why-is-Parliament-making-very-many-bad-laws/440808-2703674-1203wqyz/index.html> (accessed 7/6/2017).

⁸⁵ Cf. Gladys Boss Shollei dispute and the dispute with Judicial Service Commission (JSC) members.

⁸⁶ In May 2017, there were reports of attempts to disqualify Ms Gladys Shollei from contesting the Uasin Gishu Women Representative seat on a Jubilee Party ticket. This was on grounds of ethical, leadership and integrity rules under Chapter Six of the Constitution on Leadership and Integrity and the relevant electoral laws like the Elections Act, 2011 and the Independent Electoral and Boundaries Commission Act, 2011.

⁸⁷ To discuss composition... Some argue that the number of Judges and Magistrates should be reduced to two: one to represent superior courts, and one the subordinate courts. The chairing of the Judicial Service Commission, like the Parliamentary Service Commission (PSC), is discussed in Chapter 10 above.

⁸⁸ See Chapters 9 and 10 of CODRALKA 1 on Judiciary; Chapters 10 and 11 of CODRALKA 2.

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

(d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and

(e) advise the national government on improving the efficiency of the administration of justice.

20.9.2 Composition of the Judicial Service Commission (JSC) [Equivalents in Africa: SA, Nigerian, Uganda, Tanzania, Ghana]

The Judicial Service Commission consists of:⁸⁹

(a) the Chief Justice (CJ), who shall be the chairperson of the Commission;

(b) one Supreme Court judge elected by the judges of the Supreme Court;

(c) one Court of Appeal judge elected by the judges of the Court of Appeal;

(d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;

(e) the Attorney-General;

(f) two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;

(g) one person nominated by the Public Service Commission; and

(h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.

How has JSC performed?

20.9.3 Performance of the Judicial Service Commission (JSC) in Kenya

The Judicial Service Commission (JSC) is responsible for ensuring that the Judiciary has adequate and motivated staff for efficient service delivery. The Judicial Service Commission is expected to handle all matters relating to human resource management and development.⁹⁰ The Judiciary is guided by at least four sets of instruments. First, the Constitution. Second, numerous statutes, rules and regulations, including the Judicature Act, the High Court (Organization and

⁸⁹ Article 171 of the Constitution of Kenya.

⁹⁰ Article 172 (1) of the Constitution of Kenya, 2010.

Administration) Act, the Magistrate’s Act, the Kadhi’s Court Act, the Court of Appeal (Organisation and Administration) Act, the Supreme Court Act.⁹¹

In the 2010-2012 period, the Judiciary and the IEBC enjoyed very high confidence of the public. This was partly because the checks and balances in the Grand Coalition Government of Kibaki and Raila secured some judicial independence. Moreover, some progressive judges were appointed during this period. The unconstitutional and unjust outcome in the *Raila Odinga* presidential election and other petitions or political cases eroded trust and confidence in the Judiciary and the Judicial Service Commission. There were other problems at the Judicial Service Commission in the 2016-2015 period. Three will suffice.

First, the dispute between the Judicial Service Commission (JSC) and the former (first) Chief Registrar of the Judiciary, Gladys Boss Shollei eroded confidence and trust in the Judiciary in 2016-2015. Relatedly, there were complaints that members of the Judicial Service Commission drew millions of shillings monthly in sitting and travel allowances.⁹² This largely contributes to financial constraints by the judicial arm of Government as money that ought to have been used for development projects ended up in the pockets of a few people.

Second, retirement age. Some judges went to court to oppose the constitutional judicial retirement age of 70 years. These were former deputy Chief Justice Kalpana Rawal and former Justice Philip Tunoi. As I have argued in the *Standard* newspaper and in other platforms, the people of Kenya won a major battle in the Supreme Court’s decision of June 14 and June 16, 2016.⁹³ In this ruling, there were four key outcomes. Among them was that the retirement age for judges is constitutional and remains 70 years as stipulated in the Constitution and not 74 years.⁹⁴ The key interests in this case were the succession to Willy Mutunga’s Chief Justice position as he was retiring. The then Chief Justice, Willy Mutunga handled the case reasonably well in terms of judicial and administrative leadership.⁹⁵ The case ushered in the recomposition of the Supreme Court as two more vacancies emerged.⁹⁶

⁹¹ Others include Employment and Labour Relations Court Act, Environment and Land Court Act and Kadhi’s Court Act.

⁹² Kipchumba Some (2016) “Judicial Service Commission members mint millions every month from sittings,” *Standard Digital News*, at <http://www.standardmedia.co.ke/?articleID=2000094444> (accessed 19/11/2016.)

⁹³ See also the debate in which Prof Ben Sihanya engaged lawyers and the public in the social media, especially Facebook and WhatsApp.

⁹⁴ See Ben Sihanya (2016) “Judges exit age ruling laudable,” *Standard*, Nairobi, 17/6/2016, at <http://www.standardmedia.co.ke/article/2000205523/judges-exit-age-ruling-laudable> (accessed 9/3/2017).

⁹⁵ To quote BS on CJ Mutunga’s role... This article was solicited by the Standard after I had posted a summarised argument and thesis on the judicial retirement.

⁹⁶ This followed the retirement of Kalpana Rawal and Philip Tunoi. The two were replaced by Deputy Chief Justice (DCJ) Philomena Mwilu and Justice Isaac Lenaola.

Third, the process of recruiting and selecting the Chief Justice,⁹⁷ Deputy Chief Justice⁹⁸ and Supreme Court Judge in 2016 was not just. Kenyans expected Judicial Service Commission to apply constitutional and legal criteria that may be summarised in a three pronged typology: First, intellectual and ideological sophistication. Second, professional and ethical standards. Third, capacity to sustain decisional and institutional independent accountability of the judiciary. Judicial Service Commission (JSC) panellists were largely compromised and they had predetermined choices for themselves.⁹⁹ For instance, the interview of Prof Makau Mutua for Chief Justice demonstrated at least two flaws.

First, most JSC questions were simplistic, self-serving, regime-driven¹⁰⁰ or were scenes from cheap Riverwood show biz. They were in a ritual with a predetermined outcome as usual and seemed to have been directed on who to recommend for appointment. Second, the opportunity for professorial constitutional discourse was not utilised to strengthen the judiciary and the quest for justice.¹⁰¹ The opportunity to engage the candidates on the key parameters needed for a Chief Justice or their strengths was lost. For instance, Judicial Service Commission (JSC) did not sufficiently engage Prof Makau Mutua on jurisprudence or a scholarly related topic or human rights.

⁹⁷ The Chief Justice candidates were Justices Alnashir Visram, Smokin Wanjala, David Maraga (who is the current Chief Justice), Roselyn Nambuye, Mbogholi Msagha and lawyer Nzamba Kitonga

⁹⁸ The Deputy Chief Justice candidates were Justices Hannah Okwengu, Abida Ali Aroni, Agnes Murgor, Wanjiru Karanja, Philomena Mwilu, Fatuma Sichale, Lydia Achode, Pauline Nyamweya, Martha Koome, Roselyn Nambuye, Ms Surinder Kapila, Ms Pamela Tutui and Ms Joyce Majiwa.

⁹⁹ The Judicial Service Commission consisted of Prof Margaret Kobia, then Attorney-General (A-G) Githu Muigai, Justice Mohammed Warsame and Justice Aggrey Muchelule, Law Society of Kenya (LSK) representatives Tom Ojienda and Ms Mercy Deche, Chief Magistrate Emily Ominde, Kipng'etich arap Korir Bett and Winifred Guchu.

¹⁰⁰ For instance, the then Acting Chair, Prof Margaret Kobia had regularly asked the question of how the candidates related with top Government officials. Who would they call if they had a challenge? Joseph Kinyua in 2016 had been appointed to a constitutionally dubious office: Chief of Staff at State House; Head of Public Service and Secretary to the Cabinet on the departure of Mr Francis Kimemia (Governor, Nyandarua County, 2017-). These positions are unconstitutional and illegal even though Mr Kinyua occupies them *de facto*. Both had assisted Kenyatta during campaigns. Kobia's persistent question and Maraga's answer underscored the importance of politics and Kikuyu tribal patronage.

¹⁰¹ In related contexts, two flip-flopping and opportunistic intellectuals largely associated with the Kenyatta-Kibaki-Kikuyu power politics or games express strong opinions against alternative ethnic leadership. Dr Peter Kagwanja calls himself "professor," while Mr Mutahi Ngunyi initially called himself "Dr" and later "Professor of Political Economy" (at the dubious "Fort Hall (Murang'a) School of Government." I have argued that Kenya needs such discourses. The 2016 debate on "Prof" Peter Kagwanja and "Dr" Mutahi Ngunyi clarified that in the social sciences and especially among public intellectuals there are Super Professors and Pseudo Professors. That not all who claim to be or *wanajibandika* professor will enter the oracle's shrine of wisdom. Cf. Godwin Murunga (2015) "The place of academic competence in political analysis on local media," *Daily Nation*, Nairobi, 20/2/2015, at <http://www.nation.co.ke/oped/Opinion/The-place-of-academic-competence-in-political-analysis/-/440808/2630602/-/view/printVersion/-/ppjqkcz/-/index.html> (accessed 10/6/2017); Makau Mutua (2016) "Confront the epidemic of fake academic credentials," *Sunday Standard*, Nairobi, 24/4/2016, at <https://www.standardmedia.co.ke/article/2000199384/confront-the-epidemic-of-fake-academic-credentials> (accessed 8/6/2017); Julius Sigei (2016) "Can the real professor please stand up?" *Daily Nation*, Nairobi, 8/5/2016, at <http://www.nation.co.ke/news/Can-the-real-professor-please-stand-up-/1056-3194558-fdlwgr/index.html> (accessed 10/6/2017).

Instead, the more administrative minded Ms Philomena Mwilu (current Deputy Chief Justice) was engaged on jurisprudential issues. Prof Muigai and Prof Ojienda were expected to lead on questions regarding the role and development of jurisprudence ideology and scholarship in the judiciary.¹⁰² In the final analysis, Chief Justice David Maraga was appointed amidst controversy in the Judicial Service Commission and presidency.¹⁰³

Chief Justice Maraga's strengths seem to be his perceived integrity and moral courage His weakness seemed to be that he could not work on Saturday that may suggest dogmatism that could affect judicial and administrative role as a judge.¹⁰⁴ How were these issues addressed during CJ Maraga's tenure?¹⁰⁵

The Judicial Service Commission (JSC) also came under severe criticism when they recommended the appointment of the Deputy Chief Justice, Philomena Mwilu. For instance, Kandara constituency MP Alice Muthoni Wahome criticised DCJ Mwilu's appointment stating that she had not given fair hearing to women during her tenure as a Court of Appeal Judge.¹⁰⁶

The Chief Justice and some judges have joined the (extra) judicial debate on the finality of the decisions of the Court of Appeal regarding election petitions to the offices of Governors, MPs and MCAs under Article 163. The Chief Justice and some other judges proposed a Draft Bill in 2016 that sought to amend the election laws so that the Court of Appeal's decision on election petitions would be final and that the Supreme Court should only handle presidential election disputes under article 140.¹⁰⁷ Some lawyers and JSC members argued that that is not right as it undermines democracy. That in addition, there was no participation from all the relevant stakeholders. According to Prof Tom Ojienda who represented the Law Society of Kenya (LSK) in the Judicial Service Commission (JSC) in the 2014-19 period.

¹⁰² Lawyers have also critiqued the line of questioning adopted by most Judicial Service Commission interviewers in the recruitment of Court of Appeal Judges in 2019. For instance, some argued that Macharia Njeru, the former Law Society of Kenya Male representative to the Judicial Service Commission asked Justice Odunga questions which were more executive minded than the Executive, to paraphrase Lord Atkin in *Liverside v. Anderson*. See also Chapter 8 on judiciary's powers, functions, structure and independent accountability in Kenya and Africa: Interests, process and outcomes... (Discussing the issues and listing the successful candidates)

¹⁰³ Jillo Kadida (2017) "Why JSC settled on Justice David Maraga," *Star*, Nairobi, September 23/9/2017, at www.the-star.co.ke/news/2016/09/23/why-jsc-settled-on-justice-david-maraga_c1425285 (accessed 20/4/2017).

¹⁰⁴ BBC Reporter (2017) "David Maraga: The brave judge who made Kenyan history," *BBC News*, at <https://www.bbc.com/news/world-africa-41123949> (accessed 25/8/2020).

¹⁰⁵See also CODRALKA 3 (forthcoming 2021) chapter on "Assessing the Chief Justice (CJs), and Attorney-Generals (A-Gs) in Kenya and Africa

¹⁰⁶ Brian Okoth (2016) "Why Philomena Mwilu is not fit to be Deputy Chief Justice," *eDaily*, 10/11/2016, at <https://edaily.co.ke/entertainment/why-philomena-mwilu-is-not-fit-to-be-deputy-chief-justice-jubilee-mp-123360/enews/kenyan/> (accessed 18/4/2017).

¹⁰⁷ The issues include the rules on right to sue and the right to appeal; the number of appeals a petitioner is entitled to; questions of appeal on matters of fact and of law; and the Supreme Court's role in electoral matters. These issues have been addressed in Nigeria and Uganda. Regarding the Kenyan debate, the late Justice Otieno Odek....

“limiting the court's jurisdiction and restricting contested elections to only one appeal would undermine the democracy the country has earned.”¹⁰⁸

As at April 2017, the Bill was before the National Assembly which was adjourned *sine die* (indefinitely) on June 15, 2017. Intense debates on judicial independence and accountability continued in the 2018/19 period.¹⁰⁹

Recently, a petition was presented to the High Court with regards to the appointment of Court of Appeal judges. The Judicial Service Commission (JSC) had recommended persons for appointment as judges to the Court of Appeal, Environment and Land Court (ELC), and the Employment and Labour Relations Court (ELRC), and forwarded these names to the President, in accordance with Article 166(1) (b) of the Constitution of Kenya. The President has however, not appointed any of these persons within the prescribed time limit of fourteen (14) days. Such action was later found to be a constitutional violation, and a violation of the Judicial Service Act.¹¹⁰ ...

20.10 The Commission on Revenue Allocation (CRA) in Kenya

Kenya's challenges have been associated with the production, reproduction, distribution, and sharing of political power and resources. Key among these are the division and allocation of financial resources. Chapter twelve of the Constitution of Kenya addresses public finance.¹¹¹

Five key rules, principles and values of public services are: First, openness, accountability and public participation. Second, promotion of equity, meaning that the tax burden is shared fairly at both national and county levels.

Third, public expenditure that promotes equitable development and addresses marginalized areas and groups. Fourth, equitable sharing of the debt benefits and burden between current and future generations. The sharing of the debt benefit and burden among the present generations and between the present and the future needs greater interventions. For instance, the people close ethnically, politically and in terms of business interests have benefited from the KES 250 Billion Eurobond; the Standard Gauge Railway (SGR) and other debt financed projects. Kenyans who

¹⁰⁸ Paul Ogemba (2017) “Lawyers protest new law to lock out governors, senators, MPs from accessing Supreme Court,” *Standard*, Nairobi, 9/42017, at <https://www.standardmedia.co.ke/elections2017/article/2001235001/lawyers-protest-new-law-to-lock-out-governors-senators-mps-from-accessing-supreme-court> (accessed 23/4/2017).

¹⁰⁹ Ben Sihanya (2019) “Securing judicial independence and accountability in Kenya,” Vol 10, Issue No 11, *Nairobi Law Monthly*, 38-43, integrated in chapter 9 and 10 in Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (CODRALKA 1) on “Judicial power, structure, and independent accountability in Kenya and Africa: Interests, process and outcomes,”; and Chapter 14 (CODRALKA 2).....

¹¹⁰ *Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission (JSC) & 2 Others* (interested parties) [2020] eKLR.

¹¹¹ Some of the issues on CRA have been addressed more methodically in Ben Sihanya (2014) “Constitutional and Legislative Policy Framework Guiding the Drafting of County Revenue Laws,” a consultancy done for the Commission for Revenue Allocation (CRA) and Kenya Association of Manufacturers (KAM) 2014-2015.

are not close to Kenyatta bear the greatest burden. Indeed, the Kenyatta family business interests have crowded out public and private investment in the dairy, banking and media industries.¹¹²

Fifth, prudent and responsible use of public resources and responsible financial management with clear fiscal reporting.¹¹³

Some of the main institutions are the Office of the Auditor General (OAG), Controller of Budget (COB), Commission on Revenue Allocation (CRA), National Treasury, National Assembly Budget Committee and Parliamentary Budget Office.

The Commission on Revenue Allocation (CRA) is an independent commission established under Arts 215 and 216 of the Constitution of Kenya.¹¹⁴ Its core mandate is the division of revenue or to recommend the basis for equitable sharing of revenue raised nationally between the National and the County Governments; and sharing of revenue among the County Governments.¹¹⁵ There are three challenges that CRA should address. First, the methodology or formula of securing at least 85% to the National Government and at least 15% of the funding to the 47 counties where most of the implementation belongs under Fourth Schedule.¹¹⁶ Second, the formula or methodology of sharing the resources among the counties. Third, disbursement and efficient financial administration.

¹¹² See Victor Juma (2016) “Kenyatta business empire goes into expansion drive,” *Business Daily*, Nairobi, 11/11/2016, at <http://www.businessdailyafrica.com/corporate/Kenyatta-business-empire-goes-into-expansion-drive/539550-2069704-liwITanzania/index.html> (accessed 10/6/2017). Kenyatta claimed that the Eurobond had been well spent. In reference to a government’s delivery portal which Jubilee launched in 2017, President Kenyatta was quoted as saying “...This portal will help prove how the Sh200 billion Eurobond money was used in projects across the country.” See Star Team (2017) “I’ve delivered on most pledges, says Uhuru, vote for me again,” *Star*, Nairobi, 11/4/2017, at http://www.the-star.co.ke/news/2017/04/11/ive-delivered-on-most-pledges-says-uhuru-vote-for-me-again_c1541597 (accessed 10/6/2017). Finance Cabinet Secretary Henry Rotich said that out of the KES 250 billion Eurobond money, KES196.92 billion was used to finance infrastructure projects in various Government ministries, departments and agencies and that another Sh53.2 billion deposited in an offshore account was used to repay a syndicated loan. He was quoted thus: “In regard to the funding of infrastructure, the total exchequer releases to ministries/departments/agencies was Sh196.2 billion, the available resources from the sovereign bond. Some of the projects are complete while others are ongoing.” See Peter Leftie (2015) “Ministry fails to account for Eurobond cash,” *Daily Nation*, Nairobi, 27/10/2015, at <http://www.nation.co.ke/news/Ministry-fails-to-account-for-Eurobond-cash/1056-2932678-de9mgoz/index.html> (accessed 10/6/2017). On the other hand, the Auditor General Edward Ouko said that KES 215 billion of the Eurobond money could not be accounted for. Ouko cited the Ministry of Water as an example of a ministry which was said to have received Sh11.2 billion yet there was no documentary proof of usage. See Standard Team (2016) “Conflicting reports on Eurobond worrying,” *Standard*, Nairobi, 12/9/2016, at <http://standardgroup.co.ke/mobile/article/2000215587> (accessed 12/6/2017).

¹¹³ Article 201 of the Constitution.

¹¹⁴ The detailed legislative, regulatory and administrative framework for the Commission on Revenue Allocation (CRA) is discussed in the Ben Sihanya (2015) *Constitutional and Legislative Policy Guidebook*, a consultancy for the Commission for Revenue Allocation (CRA) and Kenya Association of Manufacturers (KAM), Nairobi.

¹¹⁵ Article 216 (1) of the Constitution of Kenya.

¹¹⁶ The division of revenue in Nigeria between the federal and 36 state Government. Raila Odinga argued that the Nigerian formula meant that the Draft Okoa (save) Kenya Constitution of Kenya Amendment Bill 2015 was realistic and achievable. See Graham Kajilwa (2015) “Okoa Kenya will fight marginalisation, says CORD leader Raila Odinga,” *Standard*, Nairobi, 11/12/2015, at <https://www.standardmedia.co.ke/mobile/article/2000185059> (accessed 12/5/2017).

How much was allocated this by Commission on Revenue Allocation? First, the law required that at least 15% of the national revenue (not budget) collected by National Government be shared equally among the 47 counties.¹¹⁷ There was debate on the allocation of the funds to the 47 County Governments, with disagreement emerging between the National Assembly and the Senate on what amount needs to be allocated to the devolved units.¹¹⁸

Second, the Commission on Revenue Allocation (CRA) adopted with some indicators that would be used to allocate funds to counties. These indicators are population, poverty levels, county land area, prudential financial management or performance index, and fund equalization index. Infrastructure such as railway, roads, electricity, schools and hospitals which are more expensive are not fully integrated. This formula or methodology and the weighting perpetuate differential developments in favor of Kiambu and other counties that were historically favoured.

According to the Kenya National Bureau of Statistics (KNBS), Nairobi's population stands at 3.1 million, followed by Kakamega at 1.7 million, Bungoma at 1.63 million, Kiambu at 1.62 million while Nakuru has 1.6 million people. The Commission on Revenue Allocation indicated that population is the main factor in the allocation of funds.¹¹⁹ Yet that money should also help develop infrastructure which is the most costly in the development and welfare process. And Kiambu has the best infrastructure after Nairobi in terms of hospitals, water, (national) schools and roads.

Third, there have been delays in disbursement of funds to the counties by the National Treasury and the Commission on Revenue Allocation (CRA) has been instrumental in pushing the National Government. Many counties faced crises in 2015, 2016, 2017, 2019, 2020 and 2021 following the delays by the National Treasury in releasing funds that were to go to the counties.¹²⁰

¹¹⁷ Cf. the ratio in Nigeria between the federal units and the 36 states. See Nwabueze, (2003) *Constitutional Democracy in Africa*, Vol 1, at 63.

¹¹⁸ Article (2) of the Constitution of Kenya 2010. See the following Chapters of CODRALKA 1: Chapter 4 on "Participation and representation in Kenya and Africa: Electoral system, parties, CSOs, business organisations..."; Chapter 6 on "Fusion and Separation of Powers, Checks and Balances, and Devolution in Kenya and Africa,"; Chapter 11 on "Decentralization of Legislative, Executive, Administrative, Judicial and Quasi-Judicial Powers in Kenya and Africa (Constitutional, admin process, admin justice, ADR, Judiciary, general ADR, TDR, debates..., statutory, constitutional v. common law JR ([“prerogative” “writs” “JR orders” in constitutional petitions...]); Chapter 13 on "Planning, Policy and Public Finance under the Constitution in Kenya and Africa"... See "Devolution and Education Law and Policy in Kenya," chapter 16 of CODRALKA 1 and chapter 6 of CODRALKA 2....

¹¹⁹ Daniel Kamande (2012) "Financial aspects of a devolved system," *Star*, Nairobi, 26/6/2017, at <http://kenyanewspaperonline.blogspot.co.ke/2012/06/financial-aspects-of-devolved-system.html> (accessed 10/5/2017).

¹²⁰ The National Treasury delayed in releasing Kshs 66 billion to counties in 2016; Kshs 100 billion in the 2018/2019 financial year; Kshs 78 billion in the 2020/2021 financial year; See Luke Anami (2016) "Counties in crisis as Sh60b allocation delays," *Standard*, Nairobi, 9/8/2017, at <https://www.standardmedia.co.ke/article/2000211620/counties-in-crisis-as-sh60b-allocation-delays> (accessed 27/8/2019); Julius Otieno (2020) "Treasury on the spot over delayed release of Sh78bn to counties," *Star*, Nairobi, November 24, 2020, at <https://www.the-star.co.ke/news/2020-11-24-treasury-on-the-spot-over-delayed-release-of-sh78bn-to-counties/> (accessed January 4, 2021).

20.11 The Public Service Commission [Equivalents in Africa: SA, Nigeria, Uganda, Tanzania, Ghana]

The Public Service Commission (PSC) is the main agency on the appointment, deployment, remuneration, transfer, discipline, retirement, and dismissal of public officers or servants. What is public office? Public service? Civil service?¹²¹ Provincial administration? Article 260 embodies problematic definition of public office: Public officer includes state officer, which is defined thus:

“Public officer means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.”

The role of Public Service Commission of Kenya is to manage human resources in the Kenya “civil service.” Other functions of the Commission include the following five (5): First, establishing and abolishing offices in the “civil service.” Second, appointing persons to hold or act in those offices, and to confirm appointments. Third, exercising disciplinary control over and remove persons holding or acting in those offices. Fourth, promoting the values and principles referred to in Articles 10¹²² and 232¹²³ throughout the public service and investigating, monitoring and evaluating the organization, administration and personnel practices of the public service.¹²⁴ And fifth, ensuring the public service is efficient and effective, and many other functions.

What did the Public Service Commission do about illegal establishment of offices and irregular and tribal appointment by Presidents Kibaki and Kenyatta II (Kenyatta + “Plus”)? First, some of the illegally established offices include office of the County Commissioners, Regional Commissioners, among others. And the illegally abolished offices or those rendered otiose include the Public Service Commission (PSC), the Commission for the Implementation of the Constitution (CIC) and the Ethics and Anti-Corruption Commission (EACC).

Second, the reports of the NCIC show that in the 2010-2017 period, Kibaki’s and Kenyatta’s Kikuyu tribe controlled more than 25% of the public service even though Kikuyu were about 16.48 per cent (%) of the population.¹²⁵ Moreover, the Kikuyu dominated parastatals and other

¹²¹ Civil service is sometimes used interchangeably with public service. Yet public service includes the “civil service proper,” the provincial administration which was supposed to be restructured under sec 17 of the Sixth Schedule to the Constitution; the state apparatus or parastatals bureaucracy, and the Kenya Defence Forces (KDF) or “military service.”....

¹²² On national values and principles of governance....

¹²³ On values and principles of public service.

¹²⁴ Article 234 (2)(d) of the Constitution of Kenya 2010.

¹²⁵ Samuel Maina (2017) “Six tribes take up more than half of all public sector jobs – Report,” *Daily Nation*, Nairobi, 5/9/2017, at <http://www.nation.co.ke/news/Six-tribes-take-up-more-than-half-of-all-public-sector-jobs-/1056-2859898-ch02m0/index.html> (accessed 26/4/2017). There is need to probe the data further because the trend has been that since the Kibaki Presidency (2002) the Kikuyu occupy the positions of CEO, finance officer, procurement officer, etc while the rest alternate in lower positions like messengers, tea girl...cf a 2019 summary that showed that three tribes take up most of the jobs in NSSF and NHIF at 1,007 jobs out of the total 1,927. See Luke

public sector Ministries, Departments and Agencies (MDAs) which are well financed or which are politically and economically strategic. Kikuyus historically dominated the high echelons of the relevant public sector MDAs, for example of the top six positions in the office of the Attorney General's Chambers or the State Law Office (SLO). At various points, the top six (6) officials or heads of departments (HODs) and more than 90% of the heads have been Kikuyus. The top five include Attorney-General, Solicitor General, Deputy Solicitor General, Registrar General, and the Chief Civil Litigation Counsel.¹²⁶ Their influence in the social, and political economy cannot be overemphasised given the role of the Attorney-General (A-G) as the principal legal adviser to the court.¹²⁷ Moreover, the A-G is represented in all the state corporations or parastatals.

Third, in the 2010-2017 period, there were irregular appointments which the Public Service Commission did not manage at all or well. These include Joseph Kinyua as Secretary to the Cabinet and Head of Public Service, yet he had retired twice and has no special skills, and Mr John Mututho who was appointed National Transport and Safety Authority (NTSA) Chairperson, Mr Lee Kinyanjui later replaced him. Ms Nancy Gitau was the Chief Political Advisor before she was formally eased out but informally retained following the tensions before the President Kenyatta II and Deputy President William Ruto's factional interests.¹²⁸

Numerous positions were created in State House even where some of these duplicate constitutional or statutory offices based at the office of the President in Harambee House. The positions were filled with Kikuyus and related cronies, sycophants and clones. These are not advertised, not competitive and are evidence of tribal tyranny. Their remuneration was not aligned under the law and regulations governing the Public Service Commission (PSC) and the Salaries and Remuneration Commission (SRC).

Awich (2019) "Uproar as Big Five tribes dominate civil service," *Star*, Nairobi, 15/8/2019, at <https://www.the-star.co.ke/news/2019-08-15-uproar-as-big-five-tribes-dominate-civil-service/> (accessed 27/8/2019).

¹²⁶ Mr Okiya Okiiti Omtata sued the Attorney-General (A-G) and sought full disclosure. The A-G allegedly demurred and reportedly tried to make some "acting" appointments. The advocates assigned public interest matters have largely been Kikuyu, under the guidance of the A-G Githu Muigai who attends court when the Kenyatta family or regime in Government were at stake. And they mainly argued in the interests of Kibaki or PNU, or Kenyatta or the TNA and Jubilee Party. Githu Muigai was replaced as A-G by Mr Paul Kihara Kariuki, formerly Court of Appeal President. Mr Kihara Kariuki has an even stronger record as a Kikuyu chauvinist and Kenyatta soothsayer. Three will suffice for now. First, he constituted a three judge bench on a public holiday prior to the repeat elections in 2017 (Kenyatta birthday) to reverse without hearing the decision of Justice Odunga on constitutionality of returning officers. Second, as a Court of Appeal President, he went to the Kenyatta State House where Kenyatta ridiculed state officers on corruption wars and generally compromised the independence and accountability of the judiciary. Third, Mr Kariuki as Court of Appeal President and A-G stifled constitutional (Article 156) public interest role which would question the Kenyatta administrator's policies, practice, contempt of court and general lawlessness and impunity.

¹²⁷ See Chapter 4 CODRALKKA 1 on "Participation and Representation in Kenya and Africa: Electoral system, Parties, CSOs, Business Organizations," Article 157. See also the Office of the Attorney General Act, No. 49 of 2012.

¹²⁸ It was reported that Deputy President William Ruto's factions had decried that Ms Gitau and Mr Francis Kimemia and other Kenyatta confidants had given evidence or assistance to the ICC prosecutor.

20.12 The Salaries and Remuneration Commission (SRC) in Kenya and Africa

The Salaries and Remuneration Commission (SRC) is key to governance, administration and financial equity and efficiency of the public service. The terms and conditions of service in the public service has needed attention in terms of equity, harmony and rationalisation of remuneration, and related terms and conditions of service. As indicated, article 260 of the Constitution problematically defines the public service thus:

“...the collectively of all individuals, other than State officers, performing a function within a State organ.”

Article 260 also defines public office thus:

“...an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.”

A better definition must capture three key issues. First, that the office is established by or under the Constitution or that the officer is appointed under constitutional rules and norms. Second, that the office and officer operates under constitutional or statutory rules and norms. Third, that the office may be abolished or the officer disappointed only in accordance with rules and norms established by or under the Constitution.¹²⁹

The Salaries and Remuneration Commission (SRC) is operationalized under the Salaries and Remuneration Commission Act, 2011. Some of the functions of SRC are to inquire into and determine the salaries and remuneration to be paid out of public funds to State officers and other public officers, and to keep under review all matters relating to the salaries and remuneration of public officers.

Since 2016, the Salaries and Remuneration Commission (SRC) has sometimes sought to assert itself in regulating salaries of state and public officers in Kenya. For instance, in 2016, SRC declared illegal the hefty exit package that MPs had awarded themselves in the 10th Parliament (2008-16).¹³⁰

However, SRC has largely failed to rationalize public service pay that mainly goes to the presidency, commissions and national as well as county politicians.

¹²⁹ See Chapters 14 CODRALKA 3 on Administrative Bureaucracy and Regulatory Process and Justice in Kenya and Africa: Cabinet, Cabinet Secretary, Secretary to the Cabinet, Chief Administrative Secretary, Principal Secretary, HOPS (HOCS), and County Administration (CPSB, County Secretary) in Kenya and Africa. See also this Chapter 20 on the discussions on the Public Service Commission and on the Commission on Revenue Allocation (chapter 8-12) and on the Commission on Administrative Justice (CAJ)...

¹³⁰ See Chapter 4 CODRALKA 1 on Participation and Representation in Kenya and Africa: Electoral System, Parties, CSOs, Business Organisations; Chapter 18 CODRALKA 2 on “Public Participation and Public Interest Lawyering Under the Kenyan Constitution: Theory, Process and Reforms.” revised from Ben Sihanya (2016) “Public participation and public interest lawyering under the Kenyan Constitution: theory, process and reforms,” Vol 9 (1), *Law Society of Kenya Journal*, 1-32.

Issues regarding equal pay for work of equal value as well as related benefits for employees in the public service in Kenya are yet to be addressed. In fact, the inequity, discrepancies and (structural) distortions have been enhanced under the administrations of Kibaki and Kenyatta II. Yet the Constitution and the law is clear on how the equity and harmony are to be achieved.

Primary and post-primary teachers, lecturers, and health workers¹³¹ have repeatedly gone on strike or go-slow since 2010. This is mainly because SRC has not come out strongly to offer concrete solutions. The Kenyatta II Government and the Salaries and Remuneration Commission (SRC) adopted a three-pronged strategy. First, arguing that SRC must decide the remuneration. Second, arguing that the Salaries and Remuneration Commission was yet to make the decision. Third, that the public sector wage bill is or was unsustainable.¹³²

In 2017, the SRC released a report that evaluated more than 600,000 public servants' jobs in Kenya. The report allegedly sought to, *inter alia*, bridge the gap between the highest- and lowest-paid workers.¹³³ The report was rejected by doctors (who had demanded a 300 per cent pay increase) as well as other professionals. SRC argued it had completed setting the scheme and remuneration for state officers: from the President to MCA, and that it adopted the ratio of 1:28 within the state officer category so that the difference between the highest (President) did not exceed the lowest (MCA). This was an excuse to explain away the fact that SRC had not taken into account non-state officers.

A sample of the pay structure in the public service explains the inequitable distribution in the 2010-17 period. The tribal or regional dimension is key. Three (3) core issues: First, most of the offices with the highest remuneration or budgets (hence allowances) have been led by the Kikuyu or cronies.¹³⁴ Second, where the head (e.g. the Cabinet Secretary is a Kikuyu, the second in command, for instance the Principal Secretary may be a Kikuyu or a crony or vice versa.

¹³¹ These include doctors, nurses, and clinical officers. In fact in 2017, the clamour was so strong that the Kenya Union of Clinical Officers was registered.

¹³² Cf. debate(s) on wage bill in 2017, 2018, 2019, 2020...over the past 5 years, the public wage bill has increased rapidly. *East African* newspaper in 2017 reported that without the SRC, the wage bill situation would have been worse. See Anne Gitau (2017) "No matter what the IMF says, Kenya's wage bill is not out of control," *East African*, Nairobi, 21/2/2017, at <https://www.theeastafrican.co.ke/oped/comment/Kenya-wage-bill-not-out-of-control-/434750-3821902-14kme/index.html> (accessed April 25, 2020); And the dubious Punguza Mzigo constitutional amendment proposal by Dr Ekuru Aukot of the Third Way Alliance Party. Constitutional reform is about accountability, not just accounting. Are resources shared and utilized equitably and effectively? Were Kenya to have 100 MPs *a la* Punguza Mzigo, they would justifiably argue to be paid more based on qualifications, responsibility and performance, under the Kenya Qualification Framework (KQF Act). And a small number of MPs would not necessarily end wastage. The main issue is rationalizing and controlling salaries, allowances, wastage, and looting by sharing power at the top of the executive especially the Presidency where Kenyans are under-represented. See also Sihanya (2021) "Amending the Constitution of Kenya 2010 Post 2017: Interests, Process and Outcomes Chapter 31 of CODRALKA 1.

¹³³ Patrick Lang'at (2017) "Civil servants reject Serem's pay scheme," *Daily Nation*, Nairobi, 14/11/ 2016, at <http://www.nation.co.ke/news/Civil-servants-reject-Serem-s-pay-scheme/1056-3451230-12lcc61/> (accessed 8/3/2017).

¹³⁴ The following list and message was debated in social media and Facebook in the 2016-17 period: "*Hatuko pamoja...*"

Third, the non-Kikuyus in the top echelons were affiliated to Kenyatta or related Kikuyu by marriage or business interests.

Executive¹³⁵ [To adapt the Gazette Notice on salaries and remuneration...]

Office	Remuneration since 2016 (KES)
President	650,000 ¹³⁶
Deputy President (DP)	1,487,500
Cabinet Secretary (CS)	1,056,000
Chief of Defence Forces	1, 120, 000
County Governor	1,111,673
Attorney-General (A-G)	1,095,019
Auditor-General	1,082,528
Director of Public Prosecution (DPP)	902,432
Controller of Budget (CoB)	895,270
National Intelligence Services (NIS) Director General	916,757
Central Bank of Kenya (CBK) Governor	3, 000, 000

¹³⁵ Under the Kenya Qualification Framework (Act), what are the relevant academic qualifications, levels of personal responsibility, and performance?

¹³⁶ Laban Wanambisi (2016) “New salary structure for Kenya public servants,” *Capital News*, Nairobi, 5/2/ 2016, at <http://www.capitalfm.co.ke/news/2016/02/new-salary-structure-for-kenya-public-servants/> (accessed 20/4/2017). See also the exponential increase in the budget for the office of President, and the related waste and plunder.....David Ndi (2019) “We are not overrepresented, it’s the imperial presidency killing us,” August 21, 2019, at <https://www.theelephant.info/op-eds/2019/08/21/we-are-not-overrepresented-its-the-imperial-presidency-thats-killing-us/> (accessed January 4, 2021).

Legislature¹³⁷

Speaker of the National Assembly	1,375,439
Speaker of the Senate	1,375,439
Member of National Assembly (MP) -	740,927 ¹³⁸
Member of the Senate (Senator)	740,927
Member of County Assembly (MCA)	157,574
Speaker County Assembly	283,500

Judiciary¹³⁹

Chief Justice	1,380,351
Judge of the Supreme Court	1,082,528

Commissions¹⁴⁰

Chairman, Independent Electoral and Boundaries Commission (IEBC)	1,082,528
Chairman, Commission on Implementation of the Constitution (CIC) -	1,082,528 ¹⁴¹

¹³⁷ What are the academic qualifications? Level of responsibility? Performance?

¹³⁸ While these are elective, Uhuru Kenyatta's TNA party and Jubilee coalition secured all the Central Kenya Member of Parliament (MP) seats. Some in the Kikuyu diaspora like Nakuru and Laikipia as well as 7 for Kikuyus in Nairobi.

¹³⁹ Analyse, job description (JD), terms of reference (ToR), qualifications and key performance indicators (KPI)....

¹⁴⁰ Analyse qualifications and key performance indicators (KPI)....

¹⁴¹ Commission on Implementation of the Commission's (CIC) term ended on December 2015. It was renewable and should have been renewed under the Constitution, and on the basis of pending work, even by replacing the commissioners.

Academia¹⁴²

University Professor ¹⁴³	- 144,672
University lecturer	

20.13 The Teachers Service Commission [Equivalentents in Africa: Nigeria, Uganda, Tanzania, Ghana...is TSC the largest simple employer in Kenya?... Africa?]

What is the constitutional mandate of the Teachers Service Commission (TSC)?¹⁴⁴ How has it governed, administered or managed teachers? The education sector and especially teachers, tutors and lecturers are key in developing Kenyan nationhood and promoting popular sovereignty, liberty and public service delivery. Teachers are essential in the development of skills, knowledge, attitude, values and innovation (SKAVI) for the foregoing. The Teachers Service Commission (TSC) has the role of managing human resources within the education sector.¹⁴⁵

One major setback that Teachers Service Commission (TSC) has experienced is the frequent strikes by the teachers. In early 2016 teachers went on a strike demanding pay that had been pending for 15 years.¹⁴⁶ They relied on an agreement that was reached between the Kibaki

¹⁴² Note the decline in the human resource (through retrenchment), funding, equipment and infrastructure that used to support and subsidize academic research, teaching and publishing...More funding is directed to administrative salaries and allowances; spurious infrastructure, and beautification, including cabro works, manicuring and pedicuring lawns and hedges....See Sihanya (forthcoming 2020) *Education, Training, Research, Innovation, and Mentoring Law and Policy in Kenya and Africa*, *op. cit*; Ben Sihanya (2016) *Intellectual Property and Innovation Law and Policy in Kenya and Africa: Transferring Technology for Sustainable Development*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya; Ben Sihanya (forthcoming 2021) *Copyright Law and Policy in Kenya and Africa*, SM & Prof Ben Sihanya Advocates, Nairobi and Siaya.....Ben Sihanya (forthcoming 2021) *IP Innovation and Technology Law in Kenya and Africa: Cases and Materials*, SM & Prof Ben Sihanya Advocates, Nairobi & Siaya; Ben Sihanya (forthcoming 2021) "Transferring Technology, IP and Innovation from the Oracle's Shrine in Kenya and Africa: Afro Kenyanism and Interdisciplinarity in Knowledge Production and Dissemination," forthcoming professorial inaugural; Ben Sihanya (forthcoming 2021) "Becoming a full law professor in Kenya and Africa: Exploring legal sociology, Afro-Kenyanist theorizing and the Oracle's Shrine,".....; Ben Sihanya (forthcoming 2021) "Researching and Writing an Afro-Kenyanist LLB, LLM and LLD Thesis: Lessons from the oracle's shrine," Keynote presentation at the second Legal Research Fair, University of Nairobi Law School, 20/8/2019.

¹⁴³ One of the reasons for low pay has been limited Kenyatta or Kikuyu interest and participants in these categories, and the fear that a sufficiently resourced academia would be more independent, more critical, and even outcompete the politicians in the government for political office.

¹⁴⁴ There was clamour by health workers at the Bomas Constitution Review Process that a health service commission be established in the Constitution. See Section 269 of the Bomas Draft Constitution of Kenya dated 15/3/2004, published by Katiba Institute, at https://katibaculturalrights.files.wordpress.com/2016/04/kenya_4_draft_constitution_bomas_draft_2004.pdf (accessed 10/5/2017). The doctors referred the clamour in 2017. See....

¹⁴⁵ Article 237 of the Constitution.. Most of the provisions on the TSC were drawn from the then TSC Act, 1968, cap 212.

¹⁴⁶ President Moi Government had agreed to pay teachers as the 1997 General Elections approached. He later told them *hakuna pesa, hakuna pesa, hakuna pesa* (There is no money...) The teachers supported NARC against Daniel arap Moi or KANU's Uhuru Kenyatta in 2002.

Government and teachers five years earlier in which teachers were promised higher salaries and allowances over a 10-year period.¹⁴⁷

The Teachers Service Commission (TSC), Salaries Remuneration Commission, and President Kenyatta II intimidated the Kenya National Union of Teachers (KNUT) and the Kenya Union of Post Primary Education Teachers (KUPPET), including through the Employment and Labour Relations Court (ELRC) (formerly Industrial Court.) KNUT leaders were arrested, fined and President Kenyatta ordered them to implement controversial laptops policy for toddlers.¹⁴⁸

In 2019, the Education Ministry introduced critical components of the Competency Based Curriculum (CBC) which was actually a new system (not just non university curriculum) of education, training, research, innovation and mentoring (ETRIM). The Ministry under Cabinet Secretary (CS) Amina Mohammed and later Cabinet Secretary Prof George Magoha argued that CBC had enjoyed public participation under the Taskforce to Align Education and Training to the Constitution chaired by Prof Douglas Odhiambo in 2011/12.¹⁴⁹ KNUT under its Secretary General, Mr Wilson Sossion, MP argued that there had been no public participation and that the content, structure and delivery would adversely affect poor, illiterate and rural children, pupils, students and families.

The Ministry and Teachers Service Commission (TSC) battled KNUT in court, administratively and politically, including withholding benefits from KNUT members,¹⁵⁰ and deregistering Mr William Sossion as a teacher.¹⁵¹

20.14 The National Police Service Commission in Kenya and Africa

Security is a human right under Article 29 of the Constitution of Kenya 2010). Moreover, to guarantee security, three constitutional security agencies have been established, namely the

¹⁴⁷ Ben Sihanya (2016) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," Vol 9 (1), *Law Society of Kenya Journal*, 1–32, *op. cit.*

"Cotu backs teachers' bid to hold strike," at <http://www.knut.or.ke/index.php/news-events/37-cotu-backs-teachers-bid-to-hold-strike> (accessed 19/11/2016).

¹⁴⁸ Cf See Simon Ndonga (2016) "KNUT officials due in court for defying strike order," Capital News, Nairobi, 9/7/2016, at <http://www.capitalfm.co.ke/news/2016/07/knut-officials-due-in-court-for-defying-strike-order/> (accessed 10/6/2017); Isaac Ongiri (2016) "Knut defies Uhuru plea to end strike," *Daily Nation*, Nairobi, 5/7/2016, at <http://www.nation.co.ke/news/Knut-defies-Uhuru-plea-to-end-strike/-/1056/1906330/-/cryk9z/-/index.html> (accessed 10/5/2017).

¹⁴⁹ Abiud Ochieng' (2019) "Court allows TSC to deregister Knut boss Wilson Sossion," *Daily Nation*, Nairobi, 26/7/2019, at <https://www.nation.co.ke/news/education/Court-allows-TSC-to-deregister-Wilson-Sossion/2643604-5211558-svuqo1z/index.html> (accessed 27/8/2019)

¹⁵⁰ Benjamin Muriuki (2019) "KNUT threatens strike after TSC demotes teachers, cuts salaries," *Citizen Digital*, Nairobi, 5/8/2019, at <https://citizentv.co.ke/news/knut-threatens-strike-after-tsc-demotes-teachers-cuts-salaries-267792/> (accessed 27/8/2019).

¹⁵¹ Abiud Ochieng' (2019) "Court allows TSC to deregister Knut boss Wilson Sossion," *Daily Nation*, Nairobi, 26/7/2019, at <https://www.nation.co.ke/news/education/Court-allows-TSC-to-deregister-Wilson-Sossion/2643604-5211558-svuqo1z/index.html> (accessed 27/8/2019); Ben Sihanya (2019) Education, Training, Research and Mentoring Law and Policy in Kenya and Africa, SM & Prof Ben Sihanya Advocates,.....Cf. Kenya Women Teachers Association (KEWOTA); Kenya Union of Post-Primary Education Teachers (KUPPET); Kenya Secondary Schools Heads Association (KESSHA), Kenya Primary Schools Heads Association (KEPSHA); Mr William Sossion: Prefer Ministry to Teachers Service Commission (TSC)? What of teachers (to be) under counties....?

National Police Service (NPS),¹⁵² the National Intelligence Service (NIS),¹⁵³ and the Kenya Defence Forces (KDF).¹⁵⁴ These are to be supported by the Commander-in-Chief of the Defence Forces, (chair of the) National Security Council (NSC) and the National Security Advisory Council (NSAC).

The National Police Service Commission (NPSC) was established under Article 239 of the Constitution of Kenya 2010 to ensure smooth functioning of the Kenya Police Service. Previously, under the 1969 Constitution, there was a Kenya Police Force under the Commission of Police. The new name National Police Service was introduced under the 2010 Constitution to reflect its new servant (as opposed to lord or master) role.¹⁵⁵ This followed the protracted issues concerning security organs in Kenya where Kenyans had suffered extra-judicial killings, brutality, harassment, intimidation and lawlessness in the arms of officers who were supposed to protect them.¹⁵⁶

The commission's roles include recruitment and appointment of persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service.¹⁵⁷

Conflicts or turf wars between the National Police Service (and especially the Inspector General) and the National Police Service Commission (NPSC) as well as leadership wrangles within the NPSC nearly paralyzed the operations of the Commission in March 2016 and after.¹⁵⁸ The then National Police Service Commission (NPSC) Chairman, Mr Johnstone Kavuludi¹⁵⁹ and some NPSC commissioners seemed to have been intimidated. And President Kenyatta II was keen on amendments to the law to undermine the National Police Service Commission (NPSC). One of the effects of the amendments to the National Police Service Act in 2017 was to reduce NPSC's power or authority especially on promotions and discipline in the service.¹⁶⁰

¹⁵² Article 243 on the establishment of the National Police Service. Cf the Security Laws (Amendment) Act, 2014.

¹⁵³ Article 242 on the establishment of the National Intelligence Service.

¹⁵⁴ Article 241 on the establishment of the Defence Forces and Defence Council.

¹⁵⁵ Steve Nguru (2012) "National Police Service under the New Constitution," at <http://www.ustawi.info.ke/index.php/government/government-under-the-new-constitution/national-police-service> accessed 7/3/2017). The idea was that the police should cease being a brutal force and should rather deliver or secure *utumishi kwa wote* (service to all).

¹⁵⁶ Cf. Report of the Truth, Justice and Reconciliation Commission, 2008 (TJRC).

¹⁵⁷ Article 246 Of the Constitution of Kenya 2010.

¹⁵⁸ Cf. dispute between the Inspector General Kimaiyo and the Commission's Chair Kavuludi on the appointment of police officers to head core dockets.

¹⁵⁹ He was succeeded by Mr Eliud Kinuthia in 2019.

¹⁶⁰ Inspector General Joseph Boinnet's office issued a list of promoted individuals that contradicted that on the National Police Service Commission. The Inspector General's list omitted seven names out of the 53 that had been issues by NPSC. See Cyrus Ombati (2016) "NPSC to review case of officers left in promotion," *Standard*, Nairobi, 9/8/2016, at <https://www.standardmedia.co.ke/article/2000211439/npsc-to-review-case-of-officers-left-in-promotions> (accessed 28/5/2017). Mr Kimaiyo was forced to resign and he later contested the Elgeyo Marakwet Senatorial race on a Kenya African National Union (KANU) ticket, not of Jubilee that he had seemed support while in office.

There are also genuine claims that the National Police Service Commission (NPSC) and other related security organs including the Kenya Defence Force (KDF), the National Intelligence Service (NIS) as well as the National Youth Service (NYS) were involved in manipulating the voter registration exercise in 2016 and 2017.¹⁶¹ The keenness of the Jubilee administration under President Kenyatta to retain power through electoral malpractices and manipulation of key security agencies was a major concern from 2016-2017. Thus the reversals on constitutional implementation by the Jubilee Government. These were significant concerns that had to be confronted and addressed in the context of the August 2017 General Elections.

Reforming security requires reviewing the lessons of the pre-2010 history and the post 2010 experience. This includes three key issues: First, how has security been conceptualised historically and in the context of the 2010 Constitution? Second, what are the key legal, social, economic and political issues regarding security in Kenya? Third, what are the key normative, institutional and structural reforms to security in Kenya?

Under “discretion as a basis of power” Prof Okoth Ogendo advances an argument that we cite *in extension*: [Most to be integrated into the discussion on security Chapter 15: Administering and Regulating Security and Criminal Justice System in Kenya and Africa.....]

“The first point to make is that the operative concept itself: ‘national (or public) security’ was kept deliberately fuzzy and at times, illusive. Although this cannot be said to be a peculiar African problem, what is, is the over-breadth of that concept in African security laws.” As Okoth Ogendo stated a typical definition is to be found in Kenya’s preservation of public Securities Act Cap. 57 which reads as follows:

“The preservation of public security includes (a) the defence of the territory and people of Kenya; (b) the securing of fundamental rights and freedoms of the individual; (c) the securing of the safety of persons and property; (d) the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the government or the constitution; (e) the maintenance of the administration of justice; (f) the provision of a sufficiency of the supplies and services essential to the life and well-being of the community their equitable distribution, and availability at fair prices; and (g) the provision of administrative and preventive measures during periods of actual or apprehensible national danger or calamity or in consequence of any disaster or destruction arising from natural sources. (Emphasis original)”¹⁶²

Okoth Ogendo adds that:

¹⁶¹ Justus Ochieng (2017) “Probe Nkaissey, Mucheru over rigging claim, Mudavadi party demands,” *Daily Nation*, Nairobi, 25/1/2017, at <http://www.nation.co.ke/news/politics/election-rigging-voting/1064-3786658-q7snogz/> (accessed 8/3/2017).

¹⁶² H.W.O. Okoth Ogendo (1991) “Constitutions without constitutionalism: Reflections on an African Political Paradox,” in Issa G. Shivji (eds) (1991) *State and Constitutionalism: African Debate on Democracy*, South African Political Economy Series (SAPES) Trust, Harare, Zimbabwe, 17-18. The Personal Property Security Act (PPSA) was amended in 1997 under the Inter Parties Parliamentary Group (IPPG). See Chapters...CODRALKA 1; Chapters.....of CODRALKA 2....

“On one interpretation that definition says no more than that ‘the preservation of public security: means whatever the authority competent to invoke security powers says it is.’ Indeed, courts in some African countries have so decided.¹⁶³

He explains:

“That over-breadth is perhaps to be expected given the nature of the state in Africa. For as Boli-Bennett points out, since it is the state which enacts law and determines whether that law confers sufficient powers for its purposes, one must expect it to frame the law in a manner that is most favourable to its proclivities. In respect of public security law, therefore, the more centralised and coercive the state is, the more loosely defined will be the operative concept itself.”¹⁶⁴

Okoth Ogendo concludes:

“That observation leads to the second and more important point: namely that in an ever-increasing number of countries, security powers can and often is exercised without recourse to a declaration of emergency. All that is required in Kenya and Malawi, for example, is for the relevant authority to indicate by gazette notice that in his own subjective judgement, sufficient grounds exist for the exercise of those powers.¹⁶⁵ And as long as such a notice is in effect, a whole range of measures which range all the way from indefinite detention without trial, restriction of movement including the imposition of curfews, and press censorship, to suspension of any legislation (other than the Constitution and the enabling Act itself), may be taken. In practice, however, gazette notices once issued, are never withdrawn.¹⁶⁶ As a result, security powers are permanently available and exercisable. An important consequence of this is that the boundaries between security powers, *stricto sensu*, and ordinary criminal law are often blurred.”¹⁶⁷

Remarkably, the constitutional text and intendment or spirit seems to redefine security as a human right and to reverse coercion, brutality and corruption previously associated with security and administrative powers.¹⁶⁸

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ This was in the pre-1997 Inter Parties Parliamentary Group (IPPG) and the 2010 dispensation, even though some practices persist, including attempts to reverse constitutional gains through legislation amendments or appointment of county commissioners.

¹⁶⁶ For instance, the North Eastern Province (NEP) was governed through emergency laws and the repeal of section 127 in 1992 (by Act No. 6 of 1992, s. 12).

¹⁶⁷ H.W.O Okoth Ogendo (1991) “Constitutions without constitutionalism: Reflections on an African Political Paradox,” *op. cit.*

¹⁶⁸ Ben Sihanya (forthcoming 2021) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (CODRALKA)* Vol. 1: *Presidency, Bureaucracy and Administrative Justice in Kenya* (Revised Teaching Notes on Constitutional Law and Comparative Constitutional Law by Ben Sihanya 2004-2021, Sihanya Mentoring & Prof Ben Sihanya Advocates.

20.15 Ethics and Anti-Corruption Commission [Equivalent in Africa: SA, Nigeria, Uganda, Tanzania, Ghana....BBI debates: EACC or ACECA and EICor integration ? Asset recovery....of wealth.....]

The Ethics and Anti-Corruption Commission (EACC) is one of the three (3) constitutional Commissions that is not specifically mentioned in Chapter fifteen (15) of the Constitution (Art 248).¹⁶⁹ Where its mandate is constitutional and statutory, its composition and operations are largely based on statute. The key objective and mandate of EACC is to secure ethics, and leadership and integrity, combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption.¹⁷⁰

The Ethics and Anti-Corruption Commission (EACC) was established by Article 79 of the Constitution and operationalised under the Ethics and Anti-Corruption Commission Act 2011. It replaced the Kenya Anti-Corruption Commission (KACC).¹⁷¹ Under section 16 of the Ethics and Anti-Corruption Commission (EACC) Act, the Commission has the powers to conduct investigations on its own initiative or on a complaint made by any person. The Kenya Anti-Corruption Commission (KACC) itself succeeded the Kenya Anti Corruption Authority (KACA).

20.15.1 Effectiveness and Service Delivery by the Ethics and Anti-Corruption Commission

More than half a decade after its establishment, the EACC remains conflicted, controversial and inconsequential in handling serious corruption cases.¹⁷² There are three (3) major reasons. First, a legislative framework that is weak by design. This includes too many laws. For example, the Leadership and Integrity Act 2012 was enacted to dilute Chapter Six of the Constitution (on leadership and integrity). The Act allows those with integrity problems, and even pending court cases to contest in elective seats. Hence the following, among others, were cleared by the Independent Electoral and Boundaries Commission (IEBC) to contest the relevant offices in the 2017 General Elections.

Yet Article 10, Chapter Six and Article 260 of the Constitution, as well as the High Court in *Kenyatta*¹⁷³ and *Matemu*¹⁷⁴ cases are clear that State officers include elected officials and they cannot hold office if they have pending integrity matters. This development was mainly related

¹⁶⁹ The others are the Commission for the Implementation of the Constitution (CIC), the National Gender and Equality Commission (NGEC), the Commission for Administrative Justice (CAJ).

¹⁷⁰ Ethics and Anti-Corruption Commission (2015) EACC Mission Statement, at <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf> (accessed 24/4/2017).

¹⁷¹ Parliament disbanded the then Kenya Anti-Corruption Commission (KACC) on August 4, 2011 in line with the requirements for change under the Constitution 2010. See <http://www.eacc.go.ke/default.asp?pageid=2> (accessed 20/11/2016).

¹⁷² EACC was established on September 5, 2011.

¹⁷³ *International Centre for Policy and Conflict & 5 others v. Attorney General & 5 Others* [2016] eKLR....

¹⁷⁴ *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012.

to Uhuru Kenyatta and William Ruto bulldozing the IEBC, Courts, and the African Union to enable them to capture the Presidency and Deputy Presidency while they faced charges against humanity, among others, at the International Criminal Court (ICC) at the Hague in the Netherlands.

In January 2021, the EACC released a letter allegedly barring impeached Governors including former Kiambu County Governor, Ferdinand Waititu (alias Babayao) from vying for the Nairobi County gubernatorial by-elections scheduled on February 18, 2021.¹⁷⁵ The vacancy was as a result of the impeachment, conviction and removal of Governor Mike Mbuvi Sonko by the Nairobi County Assembly, and confirmed by Senate on December 17, 2020.¹⁷⁶

The Commission on Implementation of the Constitution (CIC) sued to oppose the watering down of the Act by Parliament. CIC presented two key arguments: First, they argued that the Ethics and Anti-Corruption Commission (EACC's) powers had been clipped.¹⁷⁷ Second, they argued that the Act paved way for those with pending court cases to vie for elective positions.¹⁷⁸ The Act also undermined the mandate of the Ethics and Anti-Corruption Commission by not providing procedures for the implementation and enforcement of the Act. However, the High Court found that the Act was constitutional and effective.

The Ethics and Anti-Corruption Commission also remains ineffective partly because of the politicisation of whether the corruption cases touch on public officers or state officers. The Anti-Corruption and Economic Crimes Act (ACECA) captures the conduct of public officials but fails to cover those of state officers under the Constitution of Kenya 2010.¹⁷⁹

To some, without prosecutorial powers, EACC cannot fully implement its roles.¹⁸⁰ They have argued that some agencies like the Independent Electoral and Boundaries Commission (IEBC),

¹⁷⁵ Stephen Rutto (2021) "Only court can bar ex-governors from city poll, says Havi," *Standard*, Nairobi, January 1, 2021, at <https://www.standardmedia.co.ke/politics/article/2001398840/only-court-can-bar-ex-governors-from-city-poll-says-havi> (accessed January 5, 2021);

¹⁷⁶ Japheth Ogila (2020) "Nairobi Governor Mike Sonko sent home after Senate upholds his impeachment by Nairobi County Assembly," *Standard*, Nairobi, December 18, 2020, at <https://www.standardmedia.co.ke/politics/article/2001397657/its-over-for-sonko> (accessed January 5, 2021).

¹⁷⁷ *The Commission for the Implementation of the Constitution v. Parliament of Kenya & Another* [2016] Eklr. Petition 454 of 2012, eKLR.

¹⁷⁸ It is noteworthy that despite presenting this petition, CIC did not advance the argument for disqualification of current President, Uhuru Kenyatta and Deputy President William Ruto, as candidates in 2016 on the basis of Chapter Six violations (on leadership and integrity)...See Chapters 3 on (Constitutional Values, Principles and Policies: Agency and Structure in Kenya and Africa); Chapter 11 and 12 (The President and Deputy President in Kenya and Africa); and Chapter 13 on (Prime Minister and Deputy Prime Minister, Vice President, Deputy Prime Minister (DPM) and other Cabinet Offices in Kenya).

¹⁷⁹ "State Officer" is defined in Article 260 as a person who holds a state office. There are several state offices e.g. the president, deputy president, cabinet secretary, member of parliament, judges and magistrates, members of commission under Chapter fifteen, member of county assembly, governor or deputy governor or any other member of the executive committee of the county government, Attorney-General, Director of Public Prosecution, Secretary to the Cabinet, Principal Secretary, Chief of the Kenya Defence Forces (KDF). The list is not exhaustive, and may include "an office established and designated as a State Office by rational legislation." Cf Art 260 on "state officer).

¹⁸⁰ Such views have been expressed by some EACC officials, including Bishop (Rtd) Eliud Wabukala, the EACC Chair since 2017. See Ben Sihanya (2016) "The United Nations Convention Against Corruption: Implementation

the Anti-Counterfeit Agency (ACA) and the National Environment Management Authority (NEMA) have prosecutorial powers. Some leaders of Civil Society Organizations (CSOs) have argued that IEBC did not seek these powers nor have they utilized them.¹⁸¹

Yet it is clear that the Ethics and Anti-Corruption Commission and the IEBC should not exercise prosecutorial powers. This is mainly because of the need to maintain separation of powers and checks and balances, as well as the fact that most of these institutions have not delivered on their core mandate. It is necessary for EACC to be strengthened. Corruption cannot be fought by grand gestures. Policy; political and administrative strategies and tactics must be reviewed and implemented. And most of all the President must lead from the front.¹⁸²

To discuss EACC's performance and its predecessors; the chairs and Chief Executive Officers (CEOs), questions of powers, functions, coordination among Ethics and Anti-Corruption Commission (EACC), Director of Criminal Investigations (DCI), Director of Public Prosecutions (DPP)... Some of the cases involve(d) the DCJ, Governors and Advocates.....

Philomena Mbeti Mwilu (DCJ) v. Director of Public Prosecutions (DPP) & 3 Others; Stanley Muluvi Kiima (Interested party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR; Republic v. Philomena Mwilu (DCJ) & Another, ACC No. 38 of 2018; the Ojienda cases: Ethics And Anti-Corruption Commission v. Tom Ojienda, SC, T/a Prof Tom Ojienda & Associates & 2 Others; Law Society of Kenya (Amicus Curiae);

Waititu: Ferdinand Ndung'u Waititu Babayao v. Republic [2019] eKLR; Ferdinand Ndung'u Waititu v. Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR; Ferdinand Ndung'u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 Others [2018] eKLR; Ferdinand Ndung'u Waititu Babayao & 12 others v. Republic [2019] eKLR ...;

Migori Governor Zachariah Okoth Obado: Republic v. Zacharia Okoth Obado & 2 others [2018] eKLR; Republic v. Zacharia Okoth Obado & 2 others [2019] eKLR...

Ojaamong': Peter Odima Khasamule v. Independent Electoral and Boundaries Commission (I.E.B.C.) & 2 others [2018] eKLR; Sospeter Ojaamong v. Linet Amondi Otieno Nairobi HCC No. 31 of [2004] eKLR; Civil Appeal No. 175 of 2006;...

Samburu Governor, Moses Lenolkulal cases: ACC No. 3 of 2019, R v. Moses Lenolkulal and 13 others; Moses Kasaine Lenolkulal v. Director of Public Prosecutions [2019] eKLR; Lesrima Simeon Saimanga v. Independent and Electoral Boundaries Commission & 2 others [2017] eKLR; Moses Lenolkulal v. DPP, Criminal Revision No. 25 of 2019....

Review on Kenya 2016 Omnibus Assessment Checklist," Presentation at Brackenhurst Conference Hotel, Limuru on November 7 & 8, 2016....

¹⁸¹ The Independent Electoral and Boundaries Commission (IEBC) no longer has prosecutorial powers.

¹⁸² In 2017 as the public demanded (greater) accountability on corruption, looting and impunity, President, Uhuru Kenyatta was quoted saying "mnataka nifanye nini?" ("what do you want me to do?") See *The Star* Reporter "State House scolds media for shoddy reporting after Uhuru attacks Raila," http://www.the-star.co.ke/news/2016/11/06/state-house-scolds-media-for-shoddy-reporting-after-uhuru-attacks_c1450857 (accessed 20/3/2017).

20.16 Commission for the Implementation of the Constitution in Kenya and Africa

The Commission for the Implementation of the Constitution (CIC) is established under section 5(6) of the Sixth Schedule of the Constitution. The mandate of CIC was stipulated in section 5 (of the same Schedule) and section 4 of the Commission for the Implementation of the Constitution Act, 2010. The Commission for the Implementation of the Constitution (CIC) had a renewable five (5) year mandate renewal to facilitate transition and implementation.

20.16.1 Establishment and terms of Commission for the Implementation of the Constitution

Article 249 of the Constitution amplifies roles of the constitutional commissions including the CIC. Three generic objects of the commissions and the independent offices are listed and they are: First, to protect the sovereignty of the people. Second, to secure the observance by all State organs of democratic values and principles. Third, to promote constitutionalism.

The five (5) key functions of the Commission for the Implementation of the Constitution were specific and generic. The specific functions were two:¹⁸³

- (a) monitor, facilitate, and oversee the development of legislation and administrative procedures required to implement the Constitution;
- (b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission (KLRC)¹⁸⁴ in preparing for tabling in Parliament, the legislation required to implement the Constitution.

The three generic functions, which also apply to other commissions or independent offices were:

- (c) work with each constitutional Commission to ensure that the letter and the spirit of the Constitution is respected;
- (d) report at least once every three months to the Parliamentary Select Committee on¹⁸⁵—
 - (i) the progress in the implementation of the Constitution; and
 - (ii) any impediments to the implementation of the constitution;
- (e) exercise such other functions as are provided for by the constitution or any other written law.

20.16.2 Monitoring and checking Government organs

The Commission on Implementation of the Constitution's (CIC) key role was to monitor the implementation of the system of devolved government. It played a role in guiding the implementation process as Kenya transitioned from the 1969 Constitution to the Constitution

¹⁸³ Section 4 of the Commission for the Implementation of the Constitution Act (CIC), 2010.

¹⁸⁴ KLRC is a statutory commission established under the Kenya Law Reform Commission Act. KLRC was initially established in 1982 under the Law Reform Commission Act, 1982. The immediate chair for the Commission for the Implementation of the Constitution (CIC) before its term ended was Mr Charles Nyachae; while the current chair for the Kenya Law Reform Commission (KLRC) is Mr Mbage Ng'ang'a.

¹⁸⁵ The functions under paragraph (d) were both specific and generic.

2010. The nine (9) member commission sometimes intervened in matters touching devolution and constitutional implementation. But it later acquiesced in crucial matters like electoral fraud of March 2016, and numerous unconstitutional laws and conduct prompted by President Kenyatta.

Moreover, the Commission acquiesced in Kenyatta's insistence that the Commission on Implementation of the Constitution's term not be extended and that its mandate be handled by the then A-G Githu Muigai's office.¹⁸⁶ Lastly, from 2016, the Commission for the Implementation of the Constitution (CIC) Chairman Charles Nyachae became a partisan player and a cheer leader of Kenyatta and Deputy President William Ruto including accompanying them to political rallies as Nyachae sought to vie for senate in Kisii County in 2017 on a Jubilee Party ticket.¹⁸⁷

20.17 National Cohesion and Integration Commission in Kenya and Africa

The National Cohesion and Integration Commission (NCIC) is established under section 15 of the National Cohesion and Integration Act, 2008. One of its key objects is to unify and integrate Kenyans into a cohesive society guided by national values and the principles of governance contained in Article 10 of the Constitution.

The National Cohesion and Integration Commission (NCIC) consists of twelve (12) commissioners¹⁸⁸ including its Chairperson and the Chairperson of the Kenya National Commission on Human Rights;¹⁸⁹ the Chairperson of the National Commission on Gender and Development, and the Chairperson of the Public Complaints Standing Committee (Ombudsman) or better, Ombudsperson.¹⁹⁰

There is a general perception that the National Cohesion and Integration Commission (NCIC) has largely failed to achieve ethnic and national inclusion, integration and equity or to tame hate speech among politicians who fuel tribal animosity in political forums. The commission remained clueless or toothless and largely pro-Kenyatta administration as Kenya heads to the 2017 General Elections. The failures by the commission to fight negative ethnicity and unite Kenyans are largely attributable to the influence by Kenyatta's Jubilee Government's top

¹⁸⁶ Many had argued that even if the commissioners did not want their term extended (which was a case of good riddance), the CIC term should be extended and new commissioners appointed to secure constitutional implementation especially due to the Kenyatta reversals.

¹⁸⁷ See Aggrey Omboki (2017) "Forget about Nasa, Jubilee is the real deal, Uhuru tells Kisii residents," *Daily Nation*, Nairobi, 21/3/2017, at <http://www.nation.co.ke/news/politics/Shun-Nasa-Uhuru-tells-Kisii-residents/1064-3859192-jeke32/> (accessed 25/4/2017).

¹⁸⁸ Section 17 of the National Cohesion and Integration Commission (NCIC) Act.

¹⁸⁹ The first Chair was Ms Kagwiria Mbogori, a former Director and CEO of the Kenyan Section of the International Commission of Jurists (ICJ).

¹⁹⁰ The first Chair was Mr Otiende Amollo. He had served in the Committee of Experts on Constitutional Review, and is currently the National Assembly Member of Parliament (MP) for Rarieda Constituency on a NASA/ODM ticket following the 8/8/17 General Elections. He was succeeded by Dr Regina Mwatha, who is the acting Chairperson and Vice Chair of the Commission.

officials and the fact that the Presidency has itself promoted discrimination and tribalism in Kenya through skewed appointments and venomous utterances that promote Kikuyuism and undermine Kenyan diversity on nationhood.

20.18 Independent Offices in Kenya and Africa [Equivalent in SA, Nigeria, Uganda, Tanzania, Ghana...]

The two independent offices created under Article 228 and 229 of the Constitution of Kenya 2010 are the offices of the Auditor-General and the Controller of Budget (CoB). The two officers used to be under one office in the public service (Controller and Auditor General) under the 1969 Constitution.¹⁹¹

20.18.1 Auditor General in Kenya and Africa

Article 229 of the Constitution of Kenya 2010 establishes the Office of the Auditor General. Articles 248 and 249 provide for the independence of the Office of the Auditor General. It is also established and operationalized under section 4 of the Public Audit Act.¹⁹²

The Auditor-General is mandated to, among others, audit and report on the accounts of the following six agencies.¹⁹³ First, the national and county governments. Second, accounts of all funds and authorities of the national and county governments. Third, accounts of all courts.¹⁹⁴ Fourth, the accounts of every commission and independent office established by the Constitution. Fifth, accounts of the National Assembly, the Senate and the county assemblies. And sixth, accounts of political parties funded from public funds and public debt.

President Uhuru Kenyatta's reversals and his political power playing in 2016-2017 adversely affected the Auditor-General's independence. The Kenyatta II administration was keen on discriminating against individuals in his Government who appeared to be exposing the rot in the system, especially those who were not Kikuyu. For instance, during an anti-corruption conference in State House in 2016, President Uhuru Kenyatta cautioned the Auditor-General regarding the Auditor-General's going to America to probe the lost Eurobond funds.

Later in 2017, Jubilee MPs in Parliament moved a motion to eject former Auditor-General, Edward Ouko on baseless allegations that his office had wasted public funds.¹⁹⁵ This was after the then Director of Public Prosecutions (DPP), Mr Keriako Tobiko had cleared the Auditor General of charges of abuse of office by the Ethics and Anti-Corruption Commission (EACC). The Director of Public Prosecution (DPP) clarified that there was no evidence that the latter had

¹⁹¹ Section 105 of the 1969 Constitution.

¹⁹² Public Audit Act, No. 34 of 2015.

¹⁹³ Article 229 of the Constitution.

¹⁹⁴ Article 159 states that the Judiciary includes courts and tribunals. Would the Auditor General's mandate extend to judicial, quasi-judicial and even administrative tribunals?

¹⁹⁵ See Moses Njagi (2017) Stop this witch-hunt, Auditor General Edward Ouko tells MPs in protest letter," *Standard*, Nairobi, 19/2/2017, at <https://www.standardmedia.co.ke/article/2001229893/stop-this-witch-hunt-auditor-general-edward-ouko-tells-mps-in-protest-letter> (accessed 30/8/2019).

abused office and in fact recommended prosecution of Deputy Auditor General, Mr Stephen Kinuthia over fraud and corruption.¹⁹⁶

And of course the Ethics and Anti-Corruption Commission (EACC) Deputy CEO, Mr Kamau Mubea continued to agitate for Mr Edward Ouko to be held liable arguing that the Auditor-General's Office was culpable. The debate was that even if the Office was culpable, the Auditor General could only be held accountable communally or through loss of office if he was liable for commission or omission. It was clear that the Kikuyu Deputy from the Office of the Auditor-General was liable but was being shielded.

Mr Ouko left office in August 2019 after securing his non-renewable term of eight years.¹⁹⁷ He made some important proposals regarding the structure of the executive especially the presidency vis-à-vis the office of the Auditor General:

“Auditor General Edward Ouko wants amendments to the Constitution to create a Head of State separate from the head of government, who will work independent of each other to help protect his office from the wrath of an imperial presidency. Mr Ouko says a Head of State will shield his office from being taken down by a powerful President since auditing the executive is equal to auditing the President as they are his appointees.”¹⁹⁸

What about the Controller of Budget's office?

20.18.2 Controller of Budget in Kenya as Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

The office of the Controller of Budget (CoB) is established under Article 228 of the Constitution of Kenya. Constitutionally, this is also an independent office whose core mandate is to oversee implementation of the budgets of the National and County Governments by authorizing withdrawal from public funds. Its roles are categorised into seven: oversight role, controlling role, advisory role, investigation role, arbitration or mediation role, and public sensitization role.¹⁹⁹ The first holder was Mrs Agnes Odhiambo.²⁰⁰ She was intimidated by Kenyatta and

¹⁹⁶ Joseph Muraya (2019) “Auditor General in the clear but officers found liable for irregular procurement of software,” *Capital News*, Nairobi, at <https://www.capitalfm.co.ke/news/2017/02/auditor-general-in-the-clear-but-officers-found-liable-for-irregular-procurement-of-software/> (accessed 23/8/19). Some argued he had performed well and that he should enjoy an extension (of five years), and that in any event, some had enjoyed term extension (KRA....). Mr Kenyatta II promptly declared the office vacant. See....

¹⁹⁷ See Kennedy Kimanathi (2019) “Hunt on for a new auditor as Ouko's term in office ends,” *Daily Nation*, Nairobi, 27/5/2019, at <https://www.nation.co.ke/news/Hunt-on-for-a-new-auditor-as-Ouko-s-term-in-office-ends/1056-5162744-72wkJz/index.html> (accessed 27/8/2019).

¹⁹⁸ Vincent Achuka and Paul Wafula (2019) “Why Ouko wants the Constitution changed to clip president's powers,” *Daily Nation*, Nairobi, 28/8/2019, at 9. See also the editorial in the Standard: Standard (2019) “Heed Ouko advice and give Auditor General's office teeth,” *Standard*, Nairobi, 29/8/2019, at 14; cf. Dr David Ndi (2019) “We are not overrepresented, it's the imperial presidency that is killing us,” *EastAfrican Review*, Nairobi, 21/8/2019, at <https://www.theeastafricanreview.info/op-eds/2019/08/21/we-are-not-overrepresented-its-the-imperial-presidency-thats-killing-us/> (accessed 30/8/2019).

¹⁹⁹ Article 252, Constitution of Kenya, 2010.

Attorney-General (A-G) Muigai and other officials to accede to payment of KES 4 billion for the illegal Anglo-leasing contracts.²⁰¹

Mrs Agnes Odhiambo served her full non renewable term of eight years that ended in August 2019. Mr Kenyatta promptly declared the office vacant. Mr Paul Wafula commented thus:

“In fulfilling the applicable legal procedures, the President has ... caused the declaration of a vacancy in the office of the Auditor-General designated Mr Stephen Masha as the Acting Controller of Budget for...90 days commencing August 27, 2019,’ the statement from State House added. ‘The declaration of the vacancy in the office of Controller of Budget is the mandate of the Public Service Commission, and the same was communicated by that commission separately.’”²⁰²

Are there other offices which the people and the constitution intend to be independent and accountable?

20.18.3 Office of the Director of Public Prosecutions in Kenya and Africa

The office of the Director of Public Prosecutions (DPP) is established under Article 157 of the Constitution. The DPP’s key mandate is to institute and to undertake prosecution of criminal matters and all other related incidents. It is supposed to be an independent or autonomous office. The term of office is eight (8) years, non-renewable.²⁰³ The first Director of Public Prosecution was Mr Keriako Tobiko (2011-2019).

Prior to the adoption or promulgation of the Constitution 2010, all prosecutorial functions and all those related to the conduct of a request for extradition were carried out by the office of the Attorney-General. There is therefore a distinction between the office of the DPP and that of the Attorney-General (A-G).²⁰⁴

The office of the Director of Public Prosecutions (DPP) has not been independent on critical matters. There are challenges of interference by the presidency and the executive in general.²⁰⁵ In addition, the office still faces challenges of overlapping duties with the Office of the Attorney-General. For instance, in Kenya, whenever an extradition request is received the DPP is the one supposed to commence proceedings for extradition orders. In commencing the extradition

²⁰⁰ She was replaced as Chairperson by Ms Margaret Nyakang’o, from December 4, 2019. See *Citizen Reporter* (2020) “New Controller of Budget Margaret Nyakang’o sworn in,” *Citizen Digital*, Nairobi, December 5, 2019, at <https://citizentv.co.ke/news/new-controller-of-budget-margaret-nyakango-sworn-in-306517/> (accessed January 7, 2021).

²⁰¹ See Julius Otieno (2019) “Controller of Budget exits, says KRA should collect county revenue,” *The Star*, Nairobi, 20/8/2019, at <https://www.the-star.co.ke/news/2019-08-20-controller-of-budget-exits-says-kra-should-collect-county-revenue/> (accessed 27/8/2019).

²⁰² Paul Wafula (2019) “Uhuru names Masha acting Budget chief,” *Daily Nation*, Nairobi, 28/8/2019, at 11.

²⁰³ Article 157(5) states, “the Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.”

²⁰⁴ See the discussion on the office of the Attorney-General (A-G) below.

²⁰⁵ This is the criminalization of politics and the politicization of crime.

proceedings, the Director of Public Prosecutions (DPP) exercises his constitutional powers under Article 157.

However, the Extradition (Contiguous and Foreign Countries) Act, Cap 76 and the Extradition (Commonwealth Countries) Act, Cap 77 still gives the Attorney General a central role in the proceedings. Legal analysts have argued that Kenya must quickly review all the extradition statutes to align them with the new constitutional dispensation.

In the High Court case of *Samuel Kimuchu Gichuru & Another v. Attorney-General & 3 Others* (2015) eKLR touching on the powers of the Director of Public Prosecutions and the Attorney General on extradition matters, Isaac Lenaola, J. observed:

“While the Act provides that the Attorney General is the one to issue the authority to proceed, the onus now falls on Parliament and the Kenya Law Reform Commission to amend the Act and bring it into conformity with the Constitution.”²⁰⁶

The court in this case affirmed the position that the Director of Public Prosecutions (DPP) is fully in charge of extradition.

The historical development of the Office of the DPP and the performance of its occupants shows that the Director of Public Prosecutions (DPP) has been too closely entangled in the presidential power play. Three key phases: First, DPP meant Deputy Public Prosecutor working under the direction of the A-G.²⁰⁷ Second, DPP became Director of Public Prosecution following a constitutional amendment, but still under the Attorney-General. Third, the Director of Public Prosecutions (DPP’s) office under Article 157 is supposed to be independent of the Attorney-General’s and President’s office.

Mr Keriako Tobiko resigned and was appointed Cabinet Secretary (CS) for Environment. He was replaced by Mr Noordin Haji who had previously worked at the National Intelligence Service (NIS).²⁰⁸ Many lawyers argued that there was hardly any clear distinction among the offices of the Director of Public Prosecution (DPP), Director of Criminal Investigations (DCI) and even the Ethics and Anti-Corruption Commission (EACC). Some of the cases that support this argument include the conduct of *R v. Mwilu* (attempted prosecution) and *Mwilu v. DPP*²⁰⁹ (Petition); and a long list of cases involving Prof Tom Ojienda, the then Law Society of Kenya (LSK) male representative to the Judicial; Service Commission (JSC).²¹⁰

²⁰⁶ Justice Isaac Lenaola was appointed to the Supreme Court of Kenya (SCOK) on October 26, 2016.

²⁰⁷ Some of the Directors of Public Prosecutions (DPPs) under these terms include Bernard Chunga, cf. Mr Phillip Murgor.

²⁰⁸ Cyrus Ombati (2018) “Haji joins ODPP from NIS, promises fairness to all,” *Standard*, Nairobi, 4/4/2018, at <https://www.standardmedia.co.ke/article/2001275540/haji-joins-odpp-from-nis-promises-fairness-to-all> (accessed 27/8/2019).

²⁰⁹ The Deputy Chief Justice (DCJ) was successfully represented by SC James Orengo, SC Okong’o Omogeni, Mr Nelson Havi, Mr John Khaminwa, Ms Julie Soweto, Mr Jackson Awele, and (Prof) Ben Sihanya.

²¹⁰ See *Ojienda v. DPP*; *Ojienda v. EACC*; *Ojienda v. KRA*; *R v. Ojienda*....

The BBI 2019 and 2020 Reports and the Constitution of Kenya (Amendment) Bill 2020 propose the strengthening of the office of the ODPP. Some of the recommendations include including the ODPP as an independent office under Chapter 15 (both functionally and financially independent) (Clause 36 of the Bill).²¹¹

20.18.4 Office of the Attorney-General in Kenya and Africa [Equivalent in Africa: SA, Nigeria, Uganda, Tanzania, Ghana, Senegal...]

The Office of the Attorney-General draws its mandate from Article 156 of the Constitution of Kenya (2010), which vests on the Attorney-General at least three sets of powers and functions. First, the responsibility of being the Principal Legal Adviser to the Government. Second to ensure that the rule of law is promoted, protected and upheld. Third, to defend the public interest. Further, the Office of the Attorney-General Act No. 49 of 2012 elaborates the functions of the office using a three pronged typology.

First, advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters.

Second, negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies; and

Third, performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General. A-G's who have served since independence in 1963 are Charles Mugane Njonjo (1963 – 1979); James B. Karugu (1980-1981); Joseph Kamere (1981-1983); Matthew Guy Muli (1983-1991); Amos Wako (1991 - 2011); Githu Muigai (2011–2018), and currently Paul Kihara Kariuki (2018-...).

20.19 Semi-Autonomous Government Agencies) or Semi-Independent Offices in Kenya and Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

The semi-autonomous government agencies (SAGAs) or semi-independent offices include (heads of) governmental departments, state corporations, parastatals and organisations under the various ministries, departments and agencies (MDAs). These are semi-independent partly because of three reasons. First, their salaries are drawn from a charge on Consolidated Fund. Second, because their daily activities and functions are not controlled by the three arms of government (executive, legislature and judiciary). Third, the process of appointing or disappointing the governors or managers is governed by the Constitution and legislation and must follow due process.

²¹¹ Cyrus Ombati (2020) “DPP's office to be made independent in changes,” *Standard*, Nairobi, October 22, 2020, at <https://www.standardmedia.co.ke/nairobi/article/2001390994/dpps-independence-enhanced-in-proposals-in-the-draft> (accessed January 5, 2021).

20.19.1 Commission for University Education in Kenya and Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

Basic and higher education are now constitutional rights under articles 43 and 53. While the governance of basic education is provided through the Teachers Service Commission (TSC) under article 248, the governance of university education is largely a statutory matter.

The Commission for University Education (CUE) was established under the Universities Act, No. 42 of 2012, as the successor to the Commission for Higher Education (CHE). CUE's objects include: to promote the objectives of university education, namely the development, processing, storage and dissemination of knowledge for the benefit of humanity; to advise the Cabinet Secretary on the establishment of public universities; to accredit universities; to co-ordinate the long-term planning, staff development, scholarship and physical development of university education; to promote national unity and identity in universities.

Many challenges associated with this Commission relate to irregular accreditation of many universities in Kenya by the Commission for Higher Education which were followed by irregular closures by the Commission for University Education (CUE).

In Kenya, basic and higher education was expected to enhance intake of Skills, Knowledge, Attitudes, Values and Innovation (SKAVI). Briefly, skills focus on know how (how to) and knowledge (know why). Attitudes and values relate to ethical and professional standards, some of which are now constituted under Article 10, Chapter Six, and other provisions of the Constitution.²¹² The Commission for University Education (CUE) is expected to provide life skills and a livelihood. The Commission for University Education (CUE) needs to liaise with relevant Government commissions, independent offices and generally. Remarkably, opportunities in various institutions of higher learning are more easily available in Central Region and Nairobi.

And where fees are paid the classes have more than 50% from Kikuyu and the leadership and managers of the institutions are generally appointed or elected from among the Kikuyu.

20.19.2 Communication Authority of Kenya²¹³ in Kenya and Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

This is the body that deals with and regulates broadcasting, telecommunication, information security, frequency spectrum, postal and courier, among others. Formerly, was called the Communication Commission of Kenya (CCK).²¹⁴

²¹² See also Articles 162 and 232. Also relevant is the Public Service (values and principles) Act.

²¹³ There is also the Competition Authority of Kenya (CAK), under the Competition Act, 2012.

²¹⁴ See also BS paper on IP and Innovation during COVID-19 "Ben Sihanya (forthcoming 2021) "Intellectual Property, Innovation, and Technology Transfer in Health in Kenya and Africa: Case of COVID-19 and Malaria," in Ben Sihanya (forthcoming 2021) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials* (IPILKA 2); BS on Cybersecurity and communication law and policy....

Section 5A(1) of the Kenya Information and Communication Amendment Act 2016 states that the Authority shall be independent and free of control by Government, political or commercial interests in the exercise of its powers and in the performance of its function.

It is legally independent but factually dependent because it is still subject to some level of control by the executive, through the relevant Cabinet Secretary. In section 5C, it is provided that the Cabinet Secretary may issue to the Authority policy guidelines of a general nature relating to the provisions of the Act. While such a clause doesn't undermine independence per se, the Kenyatta Government generally controlled specific policy and operational matters including digital migration, and the management of competition in key markets like voice technology, data communication and MPesa services (or mobile money).

20.19.3 [Kenya] Copyright Tribunal in Kenya and Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

The [Kenya] Copyright Tribunal (formerly Competent Authority) is established under section 48 (1) of Kenya's Copyright Act, 2001. Since 2001, the Authority has only existed on paper. It has not been formally established. In 2012, Githu Muigai, the then Attorney General appointed the following to lead the Competent Authority:²¹⁵ Ben Sihanya (Chairman), and the following members, Prof Paul Musili Wambua, Mr Leonard Obura Aloo, Mr John Syekei and Ms Michi Kirimi. The authority was supposed to hear and determine disputes arising from decisions of the Kenya Copyright Board (KECOBO) and the Collecting Society.²¹⁶

There is need to operationalize the Authority in the context of reforming administrative, quasi-judicial and judicial, tribunals under Art 159 of the Constitution and relevant laws. For instance, the Authority should be restructured and renamed the Kenya Copyright Tribunal (KCT). The United Kingdom and Ghana among others, have made a list of statutes reforming copyright tribunal.

20.19.4 Kenya Revenue Authority in Kenya and Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

The Kenya Revenue Authority is established under section 3 of the Kenya Revenue Authority Act, Cap. 469.²¹⁷ Its main function is to act as an agency of the Government for the collection and

²¹⁵ Through Gazette notice no. 4339 dated 2nd April 2012....

²¹⁶ Under section 48 (4) of the Copyright Act, a "collecting society" means an organisation which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licences in respect of copyright works or performer's rights. Subsequently, the following were appointed to the Kenya Copyright Tribunal (the name the present author had suggested to reflect the organisation's powers and mandate: Prof Ben Sihanya; Prof Paul Musili Wambua; Mr Leonard Obura Aloo; Mr John Syekei; Ms Michi Kirimi.

²¹⁷ Cf. Tax Procedures Act, 2015

receipt of all revenue. KRA performs its duties under some degree the supervision of the Cabinet Secretary who in the time is in charge of finance and national treasury.

KRA's particular roles are: First, to assess, collect and account for all revenues in accordance with the written laws and the specified provisions of the written laws. Second, to advise on matters relating to the administration of, and collection of revenue under the written laws or the specified provisions of the written laws. Third, to perform such other functions in relation to revenue as the Minister may direct.

20.19.5 Office of the Inspector General of Police in Kenya and Africa [Equivalents in SA, Nigeria, US, Tanzania, Ghana....]

The Office of the Inspector General of Police is established under Article 245 of the Constitution. The IG is responsible for matters relating to command and discipline of the National Police Service (NPS).²¹⁸

Under section 8A (5) of the National Police Service Act, the Cabinet Secretary may lawfully give direction in writing to the Inspector- General with respect to any matter of policy for the National Police Service. Thus, the office of the IG enjoys little independence especially from the executive arm of government. Kenya has had two inspector generals: David Kimaiyo and Joseph Boinett.

20.20 Summary of Findings, Conclusions and Recommendations on Constitutional Commissions and Independent Offices in Kenya and Africa [To apply Sihanya Mentoring guidelines and methodology]

In this Chapter, I have discussed the theoretical, textual, historical and practical questions regarding the (Constitutional) Commissions and independent offices in Kenya. The discussion includes their establishment and appointments; operation; and abolition or disappointment of the commissions or offices, and the challenges and opportunities. We have discussed the typology of commissions and independent offices under the Constitution of Kenya 2010.

The debate on the theory on commissions, independent offices, and the fourth arm is an ambivalent ongoing academic debate that shall soon or later be acknowledged in practice, as especially as Kenyans demand greater presidential, governmental and specific institutional accountability in the context and aftermath of the 2017 general elections.

One cross-cutting theme and finding in this study is that most of the Commissions have not delivered on their generic or specific mandates: promising popular sovereignty, liberty, and public service delivery. This is mainly because the National Government has not provided the

²¹⁸ Section 8A of the National Police Service Act, but this duty is subject to disciplinary control of the National Police Service Commission (NPSC).

necessary resources or has not expressed political good will to have the commissions deliver fully on their mandates.

At least three issues have been debated regarding constitutional commissions and independent offices in the context of the rapprochement or handshake between the People's President²¹⁹ and former Prime Minister Raila Odinga, and President Uhuru Kenyatta on 9/3/2019. These issues arise in the context of the work of the Building Bridges Initiative (BBI (to unity)) and proposed constitutional amendments through a parliamentary or referendum process. The Building Bridges Initiative (BBI) 2020 report in this case, recommended the strengthening of the Director of Criminal Investigations and generally the criminal justice system; an increase of resources to the Office of Director of Public Prosecutions (ODPP) to facilitate more effective prosecutions; establish and/or strengthen internal accountability systems for every independent commission; among other recommendations.

First, rationalizing the work of some of the commissions to enhance popular sovereignty through coordination and even merger. This relates to the powers, mandates, competencies and functions of the Public Service Commission (PSC), the Salaries and Remuneration (SRC), and Commission on Revenue Allocation (CRA). The commissioners should be held personally responsible where there is lack of or they fail the test of independence or accountability, because they have the constitutional mandate, protection and resources.

Second, enhancing independence, accountability, especially of the Independent Electoral and Boundaries Commission (IEBC), Judicial Service Commission (JSC), and the National Land Commission (NLC)... This requires better criteria on appointment and oversight.

Third, rationalizing the salaries and allowances. Most of the commissions and offices are overpaid. Pay must be commensurate with qualifications, responsibilities and performance under the Kenya Qualification Framework (KQF).

Constitutional commissions and independent offices in Kenya need to be left or given room to exercise their mandates fully and independently as envisaged by the Constitution. The President and the executive arm should also facilitate the functioning of the Commissions through at least three measures.

First, providing adequate and prompt funding where needed. Second, providing a conducive political environment for the Commissions to discharge their mandate. Third, leading from the front through role modelling by promoting popular sovereignty, liberty or human rights and service delivery, as well as in the fight against corruption and impunity on governance.

.... the discourse continues and let wisdom flow from and back to the Oracle's Shrine, and back in class and through books, articles, online, in the Oracle's Shrine and in appropriate fora....

²¹⁹ This title is still used, especially to emphasize that the leaders of the handshake reforms are those (two) who took the presidential oath of office at Uhuru Park and at Kasarani....

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