

## CHAPTER 3

### CONSTITUTIONAL VALUES, PRINCIPLES, AND POLICY: AGENCY, STRUCTURE, POLITICS AND CULTURE IN KENYA AND AFRICA

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#### 3.1 Values and principles of governance under the Constitution in Kenya and Africa

The Constitution of Kenya is the organizing principle on popular sovereignty, nationhood, and statehood which we have discussed in Chapter 1 and 2 of CODRALKA 1.<sup>1</sup> Constitutional values and principles provide a firm foundation for the governance of economic resources, political powers, and liberty. We adopt an Afro-Kenyanist methodology in integrating ethics, ethos, values, and principles into constitutional democracy to advance individual and group liberties as well as nationhood.<sup>2</sup> These include mutual social responsibility...<sup>3</sup> Some of these are being considered in the debates on the Building Bridges Initiative (BBI).<sup>4</sup>

Constitutional values and structure find expression and are enhanced through agency and structure. And some of the values and principles actually constitute structure to the extent that they have become national or institutional norms or culture.

The Constitution of Kenya 2010 provides for national values and principles of governance under Article 10 (on national values and principles of governance), Art 201 (on values and principles of public finance) Art 232 (on values and principles of public service) and other specific articles.<sup>5</sup> These shall bind all State organs, State officers, public officers and all persons in at least three contexts.

First, whenever any of them applies or interprets the Constitution. Second, whenever the officer or agency enacts, applies or interprets any law. And third, whenever the officer or agency makes or implements public policy decisions. State officers and public officers are the nerve centre of the

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<sup>1</sup> See also Chapters 1 and 2 of *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKA 1) See also CODRALKA 2...

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<sup>4</sup> ...

<sup>5</sup> Article 60 on principles of land; Article 175 on principles of devolution; and article 201 on principles of public finance.

nation and state and carry the highest level of responsibility in the management of state affairs. The values and principles are therefore supposed to guide them as they discharge their mandate.

### **3.2 Typology of Constitutional Values and Principles in Kenya and Africa**

The principles and values can be categorised into four (4) basic groups.<sup>6</sup>

First those that relate to nationhood: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.<sup>7</sup>

Second, those that relate to liberty and related human rights:<sup>8</sup> human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.<sup>9</sup>

Third, those that relate to good governance, integrity, transparency and accountability.<sup>10</sup>

Fourth, sustainable development. These help conceptualize and govern ecological, economic and social sustainability. Sustainable development is a concern for thought and action at local, subnational, and international levels and agencies..Thus sustainable development has been defined by the World Commission on Environment and Development (WCED) (1987), the Rio Declaration and United Nations Commission on Environment and Development (UNCED) process (1992)...as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>11</sup>

Sustainable development has been debated down the ages ranging from the perspectives of the Club of Rome, the Stockholm Declaration (1972), through the report of the World Commission on Environment and Development (WCED), millennium development goals (MDGs) to sustainable development goals (SDGs).<sup>12</sup> They are elaborated in the Bill of Rights in Chapter 4 of the Constitution, and the Environment Management and Coordination Act (EMCA), 1999, as well

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<sup>6</sup> Another typology is that there are generic or systemic values and principles. The 1969 Constitution emphasized rules and the Court's enforcement of the Constitution and constitutionally compliant laws, rules and regulations. This was reinforced by s. 3 of the Judicature Act, 1967, Cap 8 which focused on rule of law with no or little room for values and principles. See also CODRALKA 1, Chapter 1 and CODRALKA 2...

<sup>7</sup> Cf. "Nature of the state"- Ghai" See Ben Sihanya (2013) "Public participation and public interest lawyering under the Kenyan Constitution: Theory, process and reforms," Vol 9 (1) (2013) *Law Society of Kenya Journal* 1-32; Ghai (2005) "A Journey through constitutions: Reflections on Contemporary Constitutions." (On liberal, ethnic, and consociational constitutions....a new typology? Constitutional culture?

<sup>8</sup> "Rights of the people" (Ghai).

<sup>9</sup> Article 10 of the Constitution of Kenya 2010.

<sup>10</sup> "Mode of governance" in Ghai concept paper for constitutional implementation book 2019...

<sup>11</sup> ....

<sup>12</sup> ....

as related natural resource laws on plants (and forests), animals, (wildlife and livestock), microorganisms, land, water, air...<sup>13</sup>

### **3.2.1 Conceptualising some constitutional values and principles of governance in Kenya and Africa<sup>14</sup>**

What are the key constitutional values and principles in Kenya and Africa? What do they mean in context?

#### **3.2.2.1 Human dignity in Kenya and Africa**

The term “human dignity” has been defined to mean the status of human beings entitling them to respect, a status which is first and not to be taken for granted. It refers to their highest value, or to the fact that they are a presupposition for value, as they are those to whom value makes sense.<sup>15</sup>

Kenyan-Africanist perspectives on human dignity include self determination, self autonomy, ....It also includes mutual regard and respect or *kuheshimiana*.....Hence the contented peasant: nobody closes my gate.....I live whether you are there....You will find me at my door.....What constitutional provisions address human dignity directly and indirectly?

One of the first applications of human dignity in international documents is found in the preamble of the Charter of the United Nations (1945), where it is stated that:

“We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>16</sup>

A similar reference is mentioned in the preamble of the Universal Declaration of Human Rights (1948):

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”<sup>17</sup>

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<sup>13</sup> See C.O. Okidi (ed) *Environmental Governance in Kenya: Implementing the Framework Law*,

<sup>14</sup> See also the Bill of Rights, Chapter 15, CODRALKA on Human Rights and the Bill of Rights in Kenya and Africa.

<sup>15</sup> Mette Lebech (2000) “What is human dignity?” Faculty of Philosophy, National University of Ireland, Maynooth....

<sup>16</sup> ....

<sup>17</sup> Thus human dignity is both self- and others-regarding. It is about individual liberty and social justice...

### **3.2.1.2 Social justice in Kenya and Africa**

Social justice is the equal access to wealth, opportunities, and privileges within a society. According to the Business Dictionary, social justice is the fair and proper administration of laws conforming to the natural law that all persons, irrespective of ethnic origin, gender, possessions, race, religion, etc., are to be treated equally and without prejudice.<sup>18</sup>

### **3.2.1.3 Equity in Kenya and Africa**

How does the Constitution conceptualise equity?<sup>19</sup> Equity has an ordinary meaning and a technical meaning. In the ordinary sense, equity means fairness, justice, morality, fair play, equality.<sup>20</sup> Equity also refers to the branch of the law which, before the Judicature Act of 1873 came into force, was applied and administered by the Court of Chancery in England.<sup>21</sup> Focus in this Chapter on values is on the first ordinary meaning.

### **3.2.1.4 Good governance in Kenya and Africa**

The term “governance” has been defined as the process of decision-making and the process by which decisions are implemented (or not implemented).<sup>22</sup> What is the negation or opposite of good governance?

According to the United Nations, Good Governance is measured by the eight factors of Participation, rule of law, transparency, responsiveness, consensus oriented, equity and inclusiveness, effectiveness and efficiency, and accountability.....<sup>23</sup>  
The foregoing are not mutually exclusive. Nor are they exhaustive.....

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<sup>18</sup> Business Dictionary, at <http://www.businessdictionary.com/definition/social-justice.html> (accessed 12/7/2019). Cf. William P. Quigley (2006) “Letter to a law student interested in social justice,” at [https://law.duke.edu/curriculum/pdf/interested\\_social\\_justice.pdf](https://law.duke.edu/curriculum/pdf/interested_social_justice.pdf) (accessed 13/7/2019).

<sup>19</sup> Cf. equity v. equality; equity as fairness or substantive and procedural due process; equity in the context of the 12 doctrines of equity  
....Are there Ken-Africanist “doctrines of equity...”?...equity as part of the received English law under section 3 of the Judicature Act;

<sup>20</sup> See Kenya Legal Sources, at <http://www.kenyalawresourcecenter.org/2011/07/definition-of-equity.html> (accessed 11/3/2019). Cf. WB from .... 1982?

<sup>21</sup> *Ibid.*

<sup>22</sup> See United Nations “What is Good Governance?” at <https://www.unescap.org/sites/default/files/good-governance.pdf> (accessed 13/7/ 2019).

<sup>23</sup> *Ibid.*

### **3.2.2 Constitutional, statutory, and regulatory basis of rules, principles, policies and values<sup>24</sup>**

Articles 10, 201, 232 and Chapter Six of the Constitution lay a firm foundation for values, rules, principles and policies on economic resources, political power and liberty, as well as the related human rights and governance.

### **3.2.3 Statutory values and principles**

Since 2003, the National Assembly, Senate and some of the 47 County Assemblies have enacted numerous statutes and subsidiary legislation on leadership and integrity as well as ethics. Some of these include the Leadership and Integrity Act, Public Officers Ethics Act, Anti-Corruption and Economic Crimes Act, Public Service (Values and Principles) Act, 2014 give effect to the provisions of Article 232 of the Constitution regarding the values and principles of public service.

Section 9 of the Public Service (Values and Principles) Act, 2014 requires public officers to be accountable in their administrative acts.<sup>25</sup> Art 232 of the Constitution and Section 10 of the Act provide for the ethnic balance in public service appointments.

Generally, Chapter 6 of the Constitution (on leadership and integrity) and Chapter 13 of the Constitution (on principles of public service) further ensure that values stated in Article 10 are achieved including good governance.<sup>26</sup>

### **3.2.4 Preamble to the Constitution of Kenya 2010<sup>27</sup> on values, (declaratory) principles**

Constitutional values are the normative standards which seek to secure constitutionalism, the rule of law, democracy and good governance. These values are political, social, cultural, economic and technological.<sup>28</sup>

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<sup>24</sup> BS to analyse the meaning of all these; hierarchy? See Chapter 1 on Conceptualising Sovereignty, Constitution, State and Government in Kenya and Africa [Powers, Authority, Functions; Con and admin law questions are interlinked in text, practice, scholarship] include 4th schedule here; and cross ref in other chapters; cf. Art 1(8) . Cf. religion and traditional beliefs, practices and traditions as a basis of ethical or moral values...Christianity, Hinduism, Islam...as a basis of moral, ethical and legal standard in Kenya, Nigeria..... Cf. Karl Marx; Max Weber on religion...legal sociology.

<sup>25</sup> Cf. IGP Boinett ordered probe into pictures of police brutality in Garissa after photographs were circulated on social media, showing the Independent Police Oversight Authority (IPOA) take against them which has the mandate to investigate any complaints related to disciplinary or criminal offences committed by any member of the National Police Service (NPS) as provided under the Independent Policing Oversight Authority Act, 2011. Or better still, what action will be taken against the police officer involved in the circulation of graphic images of school children caught engaged in immoral acts in school bus? See Lee Mukunga (2015) "Police Officer who took indecent photos of students sent home," *The Standard Newspaper*, Nairobi, 9/8/2015, at <https://www.standardmedia.co.ke/article/2000172141/police-officer-who-took-indecent-photos-of-students-sent-home> (accessed 10/12/2018).

<sup>26</sup> Cite some of the county laws on Leadership and Integrity...

<sup>27</sup> Cf. South Africa, Nigeria, Uganda, Ivory Coast....

<sup>28</sup> Cf. the ambit of Article 10 of the Constitution...

Relatedly, constitutional safeguards are the normative, institutional and structural standards and parameters which help achieve constitutional democracy as well as the foregoing values. Some of the values and safeguards are embodied in the Constitution while others are found outside the constitutional text or framework.<sup>29</sup>

Some of the values are spelt out in fairly general terms in the preamble as well as in other provisions of the Constitution 2010 (such as Article 10 and 232). Cf. s. 70 of the 1969 Constitution which was, strictly speaking, not operative but preambular.<sup>30</sup>

Kenya now joins other countries which have preambular or declaratory clauses in the Constitution. For long, the Indian Constitution was one of the main references points on the significance of fundamental principles of state policy. The argument was and still is that there are fundamental principles of state policy that bind all state agencies and which cannot be changed even by an amendment (review).

The Constitution of Kenya 2010 now has a preamble which is so named. It also contains national values, principles and goals (Chapter 6) and many chapters begin with principles. These spell out the values and principles, then the operative rules e.g. Chapter 5, Chapter 11, Chapter 12, Chapter 13, Chapter 14.

The utility of preambles and such principles or declarations of state policy lie in the fact that they provide guidance in the interpretation and enforcement of the Constitution, particularly when there is ambivalence, ambiguity or equivocation in the *operative* provisions. The preamble may without doubt have the effect of constitutionalizing some rights that are not enumerated therein.

The preamble is a reflection of the purpose (or objectives), the soul and the underlying philosophy of the Constitution. Therefore, as a matter of fact, courts ought to, and frequently do, have regard to preambular provisions of the constitutions in seeking to give effect to the letter and intendment or spirit of the Constitution.

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<sup>29</sup> For a long time, there has been an argument that public life, private law, and sectoral endeavors like education, training and research, among others, be grounded on ethics, morality, or philosophy. The Ominde Education Commission raised the issue in 1964. Subsequently, there have been consensus for a code of ethics in public service, among others. See CODRALKA 1 & 2; BS, Education law and policy in Kenya and Africa (due 2020); Ghai on values... Ghai & McAuslan (1970) *Public Law and Political Change in Kenya, op. cit.*, at Chapter V (“Transition and interlude: from Lancaster to the Republic).

<sup>30</sup> Cf. The situation on the ground in the actual election of leaders and governors. See Ben Sihanya (2013) “Constitutionalism and the rule of law in Kenya’s electoral process,” *Handbook on Elections Disputes in Kenya* under the auspices of the Judiciary Working Committee on Elections Preparation and the Law Society of Kenya. Chapter 21 of Ben Sihanya (forthcoming 2020) *CODRALKA I, SM & IL*, Nairobi & Siaya.

Second, the preamble helps in developing a constituted political community and a political and cultural identity. They act as the common aspirations and the goals that the Kenyan and African society or polity seeks to achieve. These preambular values, principles or clauses can help in nation building and nationalism, essentially in achieving national integration and cohesion, and to reduce forces of disintegration. However, this is only achievable when there is the political will to implement the values and principles by all arms of government and state or public officers.<sup>31</sup>

Constitutionally, the national anthem can be regarded as an instrument seeking not only to present but also to present the traditions, history and beliefs of the Kenyan people. Alongside the loyalty pledge, the national anthem is meant to evoke and promote patriotism of the people to Kenya as well as remind the people of its aspirations, glory and heritage. Remarkably, Art 259 and 260 of the Constitution provides that in an aspiring or practising a constitutional democracy, the Constitution should be interpreted in a manner that implements four objectives.<sup>32</sup>

First, it should be interpreted in a manner that promotes the Constitution's purpose,<sup>33</sup> values and principles. Second, the constitution should be interpreted to advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.<sup>34</sup> Third, the interpretation should permit the development of the law. And fourth, constitutional interpretation should contribute to good governance.

What is the difference between *preambular* and *operative* clauses? (i.e. values v. rules v. principles?)<sup>35</sup> Preambular language is largely aspirational and declaratory.<sup>36</sup> It states general principles. These are to be contrasted with exact, specific operative clauses: indicating the rights, duties or obligations; and the rules of specific officials. The effect is that operative clauses are *justiciable* etc. It is instructive that the values and principles now have a force of law, even if some would require elaboration through legislation and judicial interpretation.

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<sup>31</sup> Justus Wanga (2014) "Too many interests stand in the way of the Constitution," *Saturday Nation*, Nairobi, 23/8/2014, at <http://mobile.nation.co.ke/news/too-many-interests-stand-in-the-way-of-the-Constitution/-/195046/2428978/-/format/xhtml/-/t9kj74/-/index.html> (accessed 03/06/2015).

<sup>32</sup> Article 259(1); 260 of the Constitution of Kenya 2010.

<sup>33</sup> Purposes: objectives, goals, aims, intention, spirit.....Hence purposive interpretation, construction and "translation" under Arts 21, 24, 25,.....259, 260,...of the Constitution....cf. South African Constitution:.....Nigerian Constitution,....., Ugandan Constitution....

<sup>34</sup> Cf. Art 20.....cf. interpretation of the Bill of Rights versus the power clauses or the constitution generally.....versus interpretation of the statute, contract.....*El Mann; Njoya*.....

<sup>35</sup> The old debates: Hart v. Delvin; Hart v, Ronald Dworkin.....One way is to argue that there are only three great schools of law or theoretical schools of legal theory: natural law school; classical and analytical positivism (including Austin, Kelsen, Hart, Dworkism....); and legal sociology, law, politics, economy, or political economy, sociology including Karl Max, Max Weber....Where are the following in this typology: Lawrence Lesig, Kathleen Sullivan, Vicki Jackson; Ben Nwabueze, Yash Ghai, Ben Sihanya? Must all great legal theorists be confined to a (single) law school?

<sup>36</sup> Problematised.... Is?... What is the distinction between Preamble and operative clauses strict under 2010? and under South Africa 1996?

### **3.3 Religion vis-a-vis values and principles<sup>37</sup>**

Kenya is a secular state (Art 8). Remarkably, the preamble to the Kenyan Constitution also incorporates the religious values and principles.<sup>38</sup>

### **3.4 Some social and institutional contexts in Kenya and Africa**

In application of values and principles in Kenya and Africa,<sup>39</sup> The following institutions or structures come into: public service, commercial institutions, educational institutions, religious or faith-based institutions, and civil society organizations (CSOs), among others.

#### **3.4.1 Public service in Kenya and Africa**

Cf. Constitutional systems in East Africa. Vision of Kenya (constitutional basis) engaged; empowered; ethical. That is, character and moral behaviour not just education for self reliance as was in the 8-4-4 system. Cf. 2005: Stabilising the country and ..... as a platform for growth.<sup>40</sup>

#### **3.4.2 Commercial and institutional**

Commercial institutions, both private and public, are expected to apply some values and principles. The OECD and the Central Bank of Kenya have for instance set corporate governance principles which are to be followed by commercial banks in Kenya.<sup>41</sup>

#### **3.4.3 Educational institutions**

Education needs and is grappling with critical questions of values, principles and rules, and the related questions of agency and structures. Education reform needs a rethink of the values and principles underlying the following four phenomena or variables. First, education as reading, writing and arithmetic (3Rs). Second, education as broadly encompassing what I call education, training, research innovation and mentoring (ETRIM).<sup>42</sup>

Third, ETRIM as incorporating skills, knowledge, attitudes, values and innovation (SKAVI), the role and nature of assessment. And fourth, agency and structure of three pathways: either general,

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<sup>37</sup> Details in the Bill of Rights, Chapter 16 CODRALKKA 1, Chapter 7, CODRALKKA 2.

<sup>38</sup> Recall the discussion in class on role of religion in Kenyan statehood. Cf. Chapters 1 & 2. See also the Bill of Rights (*infra* i.e. to follow).....

<sup>39</sup> See BS marginal and textual notes in the books and articles he read recently, on Kenyan politics, economy, political legal sociology, (constitutional) history, culture, traditions, religion, and value systems....

<sup>40</sup> Simeon Hongo Ominde (1964) *Kenya Education Commission* report, Nairobi. Cf. James Mwangi Kamunge, (1988) Report of the presidential working party on education and manpower training for next decade and beyond in Kenya; Ben Sihanya (2013) "Devolution and education law and policy in Kenya," *Law Society of Kenya Journal* Cf. Chapter 7 CODRALKKA 1, originally Ben Sihanya (2013) "Devolution and education law and policy in Kenya," Draft working paper presented at the Kenya Human Rights Commission (KHRC) workshop on Devolution in Kenya, Palacina Hotel, Nairobi on April 18.

<sup>41</sup> See the G20/OECD Principles of Corporate Governance, at <https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> (accessed 11/7/2019). cf. other private sector organisation....

<sup>42</sup> See Ben Sihanya (forthcoming 2020) Education Training Research Innovation and Mentoring Law and Policy in Kenya and Africa.....

professional and talent; or academic, vocational and talent pathways. This includes structure of entry, stay, exit and re-entry, e.g. 1-7-4-2-3, 8-4-4, 2-6-3-3,<sup>43</sup> etc. Values include how to survive (or operation and function), thrive, co-exist, competitiveness, knowledge integration.

### **3.4.4 Religious or faith based institutions and contexts**

Religious institutions have played a role in the development of values and principles especially in religious expression and observance in education, and in governance. This has changed a lot in the following eras: Pre-colonial era; The Kenyatta Kamaliza regime; Moi regime; Kibaki regime; Kenyatta Kamwana regime.

### **3.4.5 Civil society organisations (NGOs, PBOs, CBOs....)**

Civil society organisation led the struggle for values and principles of governance including the incorporation of customary international law and treaties.

## **3.5 A typology of safeguards in Kenya and Africa**

Constitutional safeguards may be divided into three (3) broad categories or typologies, namely: First, the normative safeguards. Second, the institutional safeguards. Third, the structural safeguards

### **3.5.1 Normative Safeguards: Values, norms, rules, principles in Kenya and Africa**

*Normative safeguards* include the rules, values, principles regarding liberties or rights, power, functions and responsibilities; and relationships or structures. Hence norms are about rules.<sup>44</sup> They are also about values. And they are about value judgments of right and wrong.

What are the normative standards under the Bill of Rights, among others?<sup>45</sup>

The Bill of Rights (Arts. 19-59) protects the fundamental freedoms and liberties of the individual.<sup>46</sup> These include the freedom of expression (Art. 33), freedom of the media (Art 34), freedom of access to information (Art 35), right to property (Art. 40), freedom from discrimination (aka the anti-discrimination or equal protection (EP)) clause (Art. 27); the due process clause (as it is called in America) (Art. 47, 50).

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<sup>43</sup> The debate on curriculum content and structure has become intense in 2018/2019, mainly related to implementation of the competency based curriculum (CBC). See Ouma Wanzala (2019) “Knut steps up opposition to new curriculum,” *Daily Nation*, Nairobi, 3/5/2019, at <https://www.nation.co.ke/news/education/Knut-steps-up-opposition-to-new-curriculum/2643604-5098362-tv45gn/index.html> (accessed 17/7/2019). Ben Sihanya (2019) “Interdisciplinarity in legal education, training, innovation and mentoring in Kenya and Africa”....

<sup>44</sup> Cf. the normative system under Hans Kelsen’s pure theory of law, including the system of deriving one norm from another, until one gets to the Grund norm.....cf. Prof Larry Lessig’s for modalities of regulating behavior (power? Liberties?): law, social norms, technology or architecture, market....See Lessig, *Code and other Laws of Cyberspace*....Lessig, *Republic Lost*.....

<sup>45</sup> Cf. Norm as rule; judgement call v. morality; social norms; values.

<sup>46</sup> Under 1969 Constitution, Chapter V (ss. 70-86).

Normative safeguards, including the Bill of Rights, operative rules of law generally, and the rules on executive as well as presidential power have a second purpose of limiting governmental power. E.g. when a freedom has been infringed by the Government or any other person, the claimant may have redress (Art 19-25; Art 47-51).

The normative safeguards also seek to ensure that the Government exercises power responsibly and in a manner that facilitates the enjoyment and protection of freedoms and liberties. This is a major aspect or fragment of American constitutional democracy which emphasises the facilitative role of government in the expansive, promotion and enjoyment of freedoms. In a sense, it qualifies the essentially British or Montesquieuan notion that focuses on limited government.

### **3.5.2 Institutional safeguards: Agencies and organizations in Kenya and Africa**

We pursue a three pronged typology of institutions. First, government of public institutions, including at national, county and intergovernmental levels. These include ministries, departments, and agencies (MDAs)...Second, civil society organisations (CSOs), some of which already exercise some constitutional or public authority (eg representation in commissions and parastatals). These include NGOs, PBOs, CBOs.....<sup>47</sup>

Third, private sector organisations. Some of these also exercise public power especially under public private partnerships (PPP).<sup>48</sup> The institutional safeguards include the separation of powers into three (3) broad categories or arms of Government, namely, executive, legislative and judicial powers (powers of adjudication).

Moreover, these safeguards are secured by ensuring that there are checks and balances or interdependence among the three (3) core organs of government. The 47 county governments is structured with the executive and the county assembly but no judicial branch at county level.

However, what about the Bill set to clothe members of National Assembly with immunity from prosecution from their acts while in office? Such a move flies in the face of equality before the law, which is a pillar of the rule of law.<sup>49</sup> Granted, MPs enjoy parliamentary immunity with regard to claims of defamation for anything they say within the precincts of Parliament. This parliamentary privilege derives from the common law and is usually targeted at ensuring robust and unhindered debate in parliament. Given the numerous cases of corruption,<sup>50</sup> drug trafficking,

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<sup>47</sup> See chapter on Civil Society Organisations in Sihanya (forthcoming 2020) CODRALKA 1 & 2. See cases on PBO Act; deregistration and harassment of CSOs: Africog; Muhuri, Clarion.....

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<sup>49</sup> A.V. Dicey (1885) *An Introduction to the Study of the Law of the Constitution*, Part II Chapter IV.....

<sup>50</sup> ....

child and wife maintenance<sup>51</sup> among MPs, one may easily see the mischief of MPs in seeking to protect themselves from prosecution.<sup>52</sup>

### 3.5.3 Structural safeguards: Organs, institutional hierarchy and relations in Kenya and Africa

Structure in constitutional democracy in Kenya and Africa<sup>53</sup> has at least two meanings. First, the institutions as organ(isation)s that exercise public power constitute the structure. Second, structure and structural safeguards emphasize the relations among the core normative standards, or the core institutions and organs of government<sup>54</sup> or those that exercise public power.<sup>55</sup> Structural safeguards are three pronged. The first category has been discussed above in the relevant Chapters on the legislature, the executive, the judiciary and the commissions and independent offices.<sup>56</sup>

Second, the authoritative or hierarchical character of the constitutional, legislative, regulatory, and administrative institutions of government. Third, the *independence of organ of the Government*:<sup>57</sup> First, competence (or ability),<sup>58</sup> *impartiality*, integrity and *competence* of every arm of government, namely, the legislature, the executive and the judiciary.

Third, the *independence* and *competence* of Parliament. Questions arise in this context. What role if any is there for Parliament to regulate or dismiss an unresponsive executive? Was s. 59 easily available (vote of no confidence)? Is complete independence and separation of powers or possible impeachment desirable? Will Art. 145 be easily available (impeachment)?

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<sup>51</sup> ....

<sup>52</sup> ....

<sup>53</sup> Political science and political sociology compare and contrast structure.....

<sup>54</sup> Structure also relates to the authoritative or hierarchical character of the constitutions, legislative, regulative, and administrative rules and procedures.

<sup>55</sup> The normative system of rules, values, principles and policies are also sometimes regarded structurally for instance under Hans Kelsen's theory of grund norm; and in Karl Marx's formulation of the infrastructure and .... of the political economy: economic relations of production vis-a-vis ideology or consciousness. See Shivji (1995.) "The Rule of Law and Ujamaa in the ideological formation of Tanzania;" Corrigan and Sayer (2018.), "How the law rules: Variations on some themes in Karl Marx..." Ghai (1986) "The rule of law, legitimacy and governance"....; Ghai (1993) "The constitution and governance in Africa: A Prolegomenon;" Ghai (2005) "A journey around constitutions: Reflections on Contemporary Constitutions;" ....Ghai (2002.) "The Constitution and the economy..."

<sup>56</sup> CSOs also exercise public power or authority under the Constitution of Kenya, South Africa and several other African states.....

<sup>57</sup> Cf. Former Chief Justice Willy Mutunga's statement on 20/2/2013; death threat by Mungiki. See Cyprus Ombati (2013) "DPP orders fresh probe on threats to CJ Mutunga," *Standard Newspaper*, Nairobi, 15/12/2013, at [http://www.standardmedia.co.ke/?articleID=2000081627&story\\_title=Kenya:%20DPP%20orders%20fresh%20probe%20on%20threats%20to%20CJ%20Mutunga](http://www.standardmedia.co.ke/?articleID=2000081627&story_title=Kenya:%20DPP%20orders%20fresh%20probe%20on%20threats%20to%20CJ%20Mutunga) (accessed 9/76/2014). He also stated that he had been stopped from travelling to Tanzania by immigration officers? Were these political games by perpetrators and "victims" to secure confidence of the people and lay a basis for the Supreme Court of Kenya decision in *Raila v. IEBC* (2013)?....

<sup>58</sup> In the sense of jurisdiction or mandate...

Constitutional experts led by Yash Pal Ghai and Former Committee of Experts member Ekuru Aukot argue that the supporters of a referendum can draft a petition to impeach President Uhuru Kenyatta for failed leadership in the many issues affecting Kenyans raised by CORD and the Council of Governors. Compare the propaganda and manipulation of “tyranny of numbers” as an obstacle to impeachment in an ethnically divided eleventh and twelfth Parliaments.<sup>59</sup> It is useful to note that Parliamentary supremacy is no less evil than an Executive overlord. Each arm of government can arrest the other and lead to a crisis or breakdown of operations, or impede governance if it has concentration of power.

Was impeachment the way to go in addressing the concerns raised by Okoa Kenya and COG amid the chorus in the National Assembly that ‘we have the numbers?’<sup>60</sup>

The judiciary may declare parliamentary enactments unconstitutional and review laws made by Parliament. Cf. the petition by CORD against the enactment of the Security Laws (Amendment Act), among others.<sup>61</sup> The judiciary may review legislation and executive conduct. The executive plays a lead role in nominating, or dismissal of judges and magistrates.

### **3.6 Leadership and integrity under the Constitution 2010, Statutes and Regulations**

Values and principles have been debated in the context of the appointment, election, service or operation and dismissal of State and public officers.<sup>62</sup> A state officer under article 260 of the constitution is defined as a holder of a state office. It refers to a person who holds an office established by the Constitution or an office which is designated as a state office by national legislation.

#### **3.6.1 Constitutional, statutory and regulatory framework on values, principles on leadership and integrity**

Chapter Six of the Constitution substantively establishes the leadership and integrity standards. Other Articles including Article 10 (discussed earlier), Article 201 and Article 232 also provide for the relevant values and principles.

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<sup>59</sup> Rawlings Otieno (2014) “Experts: Referendum only possible in March 2016,” *Standard Digital News*, Nairobi, 23/9/2014, at [http://www.standardmedia.co.ke/mobile/?articleID=2000135827&story\\_title=experts-vote-only-possible-in-march-2016](http://www.standardmedia.co.ke/mobile/?articleID=2000135827&story_title=experts-vote-only-possible-in-march-2016) (accessed 29/9/14)....

<sup>60</sup> Ben Sihanya (2015) “Continuity of Constitutional Implementation in Kenya After CIC,” Presentation at Conference on Continuity of Constitutional Implementation in Kenya, Strathmore Law School, 27/1/2015.....Would the following sufficiently lead constitutional implementation? A-G’s office, Kenya Law Reform Commission (KLRC).

<sup>61</sup> See *Coalition for Reforms and Democracy & 2 Others v. Republic of Kenya & 10 Others* [2015] eKLR.

<sup>62</sup> Cf. This has been debated in the context of, among others, the then Hague suspects running for Presidency and Deputy Presidency on Jubilee platform; and in the *Matemu* and *Baraza* cases. Is there conflict of authority? See *Trusted Society of Human Rights Alliance v. The Attorney General, Minister for National Cohesion & Constitutional Affairs, Director of Public Prosecutions and Mumo Matemu*, Petition No. 229 of 2012 and *The Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11-373. Chapter 2 on ICC v. Kapenguria 6....

Under Chapter 6 (Articles 73 and 75) of the Constitution, a State Officer is to behave whether in public and official life, in private life or in association with other persons, in a manner that promotes the interests of the people, or the public good or public interest (Arts 73-77) avoids at least three structures or outcomes:

First, any conflict between personal interests and public or official duties.

Second, compromising any public or official interest in favour of a personal interest.

Third, demeaning the office the officer holds.

This has a history from the Public Officer Ethics Act (POEA), 2003 as amended.

Failure to abide by the foregoing and related provisions, regulations, principles and values may render the officer subject to disciplinary procedures which may include removal from office. This also means that State officers are obliged to carry themselves in the most transparent and accountable manner possible and should not attempt to derive any form of personal advantage from their offices.<sup>63</sup>

Section 52 of the Leadership and Integrity Act 2012 provides for the application of Chapter 6 of the Constitution and the Act to public officers as if they were state officers. A public officer is a person who holds an office in the National Government, county government or the public service.<sup>64</sup> A public officer therefore includes a state officer and the provision of the Act applies to both state officers and public officers.

The argument that Chapter 6 of the Constitution only binds appointed officers to the exclusion of elected officials is unconstitutional, textually, fallacious and negates the popular. The Kenyan people decreed that they want integrity in their state and Public Officers under Chapter 6 of the Constitution. The fact that the same people (citizens and electorate) vote or elect some of the officers to public offices does not preclude them from demanding scrutiny and accountability whenever such officers fall short of the irreducible standards.

Such an interpretation is erroneous and mischievous in light of clear Constitutional provisions, national principles and values demanding accountability and transparency under Art. 10, Chapter

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<sup>63</sup> See also Art. 10. Related to other issues and sections? Cf. Deputy Police Commissioners (Kaindi; Muhoro could not be appointed DIG in charge of Kenya Police in spite of having been the best performing candidate due to gender balance). What about Kenyatta II and William Ruto as suspects/indictees? Or 20 or so aspirants who were the subject of a disqualification suit in 2017? What of Mumo Matemu in the High Court and Court of Appeal? Some claimed these issues were not justiciable or that there is a presumption of innocence. That they were a matter of values and rules, not legislation. That Chapter 6 does not deal with the elected officials. Note: it is about State Officers, etc... elected or appointed. See Paul Muite's statist arguments...

<sup>64</sup> Article 260 of the Constitution; *Commission for the Implementation of the Constitution v. National Assembly of Kenya & 2 Others* [2013] eKLR.....

six (6) and Art. 232, etc and the express mention that the Constitution binds all state organs and State officers (Art. 2).

If Kenyan people wanted to exclude their elected leaders from the provisions of chapter 6, nothing would be easier than to state so. Indeed, this is the reasoning behind the inclusion of the recall clause for members of National Assembly in the Constitution. It is a recognition that those who appoint also have the power to dis-appoint. And such power must never be taken from beyond their reach.

Consider the Gilgil weighbridge incident between police officers and Nandi Hills MP Alfred Keter and URP nominated MP Sunjeev Kaur Birdi.<sup>65</sup> In the matter, the DPP recommended the prosecution of the two for alleged breach of Chapter Six of the Constitution.

### **3.6.2 Gifts and donations to state officers in Kenya and Africa**

Article 76 further provides that a gift or donation to a State officer on a public or official *occasion* is a gift or donation to the Republic and shall be delivered to the State unless exempted under an Act of Parliament. Arts. 33, 75, 10, 232... and the intention (or intendment) indicate that the *occasion* does not matter. Avoid conflict of interest at all times. Serve the public interest at all times. Recall the three pronged typology I have developed on leadership and integrity: First, serve the people with integrity because it is an honour. Second, public interest to override personal interest. Third, avoid conflict of interest....

### **3.6.3 Foreign bank accounts by state officers in Kenya and Africa**

In addition to this, a State officer is not to maintain a bank account outside Kenya except in accordance with an Act of Parliament. The issue of foreign bank accounts was crucial especially in the 1970s and 1980s.<sup>66</sup> Restriction on maintaining a foreign bank account is also related to corruption and money laundering when money is obtained through illegal activities then banked or “laundered” proceeds of lawful activities.

An example is Samuel Gichuru<sup>67</sup> and Chris Okemo<sup>68</sup> who have been indicted abroad but the Government has failed or refused to repatriate them to stand trial.<sup>69</sup> What is money laundering? Examples include smuggling ivory or elephant tusks historically; child and women or human

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<sup>65</sup> Angira Zadock (2015) “Alfred Keter claims officers at Gilgil weighbridge were seeking bribes,” *Sunday Nation*, Nairobi, 25/1/2015, at <http://mobile.nation.co.ke/news/DPP-EACC-probe-Alfred-Keter-over-Gilgil-weighbridge-saga/-/1950946/2601724/-/format/xhtml/-/fm500h/-/index.html> (accessed 6/2/15).

<sup>66</sup> Martin Shikuku, the then MP for Butere, the “people’s watchman,” articulated in the issues of corruption and foreign accounts in and outside Parliament. A la and later Minister Charles Njonjo would always be defensive: substantiate or withdraw and apologise....

<sup>67</sup> He is a former MD of KPLC.....

<sup>68</sup> He is a former Finance Minister in the Moi Administration.....

<sup>69</sup> Cf. the legislative proposals on money laundering; the relevant cases....

trafficking for enslavement<sup>70</sup> or prostitution; copyright, trade mark, patent and related intellectual property (IP) infringement and counterfeiting; drugs.<sup>71</sup>

There have been numerous reports on money (illegally) in foreign account, and on money laundering. Examples include the Kroll Report just after Moi left the Presidency. The Panama papers also implicated Kenyan officials... Mr Kenyatta also spoke of billions (illegally) held abroad...

### **3.6.4 Personal loans by state officers in Kenya and Africa**

A State Officer may not seek or accept a personal loan or benefit in circumstances that compromise his integrity. This seeks to secure financial probity of State officers and reduce the chances of acquiring any questionable form of personal financial gain from their office.<sup>72</sup> Consider Moses Wetangula's claim of KES 100m loan to Mr Mungatana....Compare the claim by Secretary General of the Central Organisation of Trade Unions (COTU) Mr Francis Atwoli that he had loaned Mr Cyrus Jirongo KES 100 Million.<sup>73</sup> Were the loanees State Officers? Does the rule, value or principle apply all the same?<sup>74</sup>

### **3.6.5 Gainful employment of state officers**

Furthermore, Article 77 restricts the activities of State officers. It states that a full-time officer shall not participate in any other gainful employment or hold office in a political party. This is to ensure that there is no conflict of interest.<sup>75</sup>

The question as to whether a Member of Parliament is full time state officer still remains unanswered. Compare the decision of Tuiyott, J. in *John Okelo Nagafwa v. Independent Electoral Commission (IEBC) & 2 Others*.<sup>76</sup> In this case, the court considered the appearance of a member of the Senate (Senator Orengo) as a counsel for Senator Moses Wetang'ula before the election court.

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<sup>70</sup> For instance, in the Middle East....

<sup>71</sup> A ship was sunk on the orders of Mr Kenyatta in spite of a court order. Were the drugs also destroyed? Kenya is a consumer's destination, provides transit, and is a source of (some) drugs. Doing trafficking is an offence under the Narcotics Psychotropic Substance Act and an international crime....See the case:....newspaper report....

<sup>72</sup> See *Gichuru, Okemo* cases. See Proceeds of Crime and Anti-Money Laundering Act (POCAMLA).... See also the regulatory and operational framework of the Assets Recovery Agency....Lifestyle Audit Bill 2019.....

<sup>73</sup> Abiud Ochieng' (2017) "Jirongo liable to pay Atwoli Sh100m, court declares," *Daily Nation*, Nairobi, At <https://www.nation.co.ke/news/Jirongo-liable-to-pay-Atwoli-Sh100m--court-declares/1056-4137174-slkeyg/index.html> (accessed 17/7/219)....

<sup>74</sup> *C Onyango Oloo* (on TNA, LBDA).

<sup>75</sup> Cf. Straddling in the context of the Ndegwa report of 1971. D. N. Ndegwa (1971) *Report of Commission of Inquiry: Public Service Structure and Remuneration Commission*, Government Press, Nairobi.... See also Peter Anyang' Nyong'o (1989) "State and society in Kenya: The disintegration of the nationalist coalitions and the rise of presidential authoritarianism 1963-78," *African Affairs*, 229-251; Chapter 1 (on Sessional Paper No 1 of 1965).

<sup>76</sup> *John Okelo Nagafwa v. Independent Electoral Commission (IEBC) & 2 Others*.

After considering Leadership and Integrity Act, 2012 and the Standing Orders of the senate, the judge held that a senator was not on full-time employment, saying:

“It seems that if a member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a member fully from Monday to Friday, 8.00 am to 5:00 pm. In respect to non-Parliamentary business, this court was unable to find any regulation governing the work hours.”<sup>77</sup>

The court concluded:

“The Petitioner has not persuaded this court that Hon. Orengo has used up public time in preparing for and participating in this Election Petition. No evidence has been shown to this court to demonstrate that Counsel’s conduct this far is inherently incompatible or fundamentally in conflict with his role as a member of senate.”<sup>78</sup>

The Court arrived at a constitutionally legitimate and valid finding. But the legal reasoning or *ratio decidendi* was problematic. The primary reason is that there was no (clear) conflict of interest in Senator Orengo’s representation. A Senator is obviously a “full time” officer.<sup>79</sup> Numerous full time officers do not necessarily work from 8 – 5 pm.<sup>80</sup>

Again, the better answer is based on the three pronged typology on leadership and integrity, which were not negated by Senator Orengo in the case: First, does the officer’s work serve the public interest and bring honor to the people (served)? Second, did the officer balance public (as Senator) and private interest (eg representing a client)?

### **3.6.6 DCJ Mwilu v. DPP on leadership and integrity and legal representation by Senators**

In the related case of *Philomena Mbeti Mwilu v. Director of Public Prosecutions & 4 Others*,<sup>81</sup> the Petitioner who was facing five graft-related charges among them acceptance of money in circumstances that undermine public confidence in the office she holds, improperly obtaining the execution of a security belonging to the Imperial Bank, etc sought High Court orders to bar her prosecution.

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<sup>77</sup> *Ibid.*

<sup>78</sup> *John Okelo Nagafwa v. Independent Electoral and Boundaries Commission (IEBC) & 2 Others* Petition No. 3 of 2013.

<sup>79</sup> ....

<sup>80</sup> ....

<sup>81</sup> *Philomena Mbeti Mwilu v. Director of Public Prosecutions and 4 Others*, Petition No 295 of 2018. Counsel for DCJ Mwilu include James Orengo, SC, Okong’o Omogeni, SC, John Khaminwa, Nelson Havi, Jackson Awele, Julie Soweto, Ben Sihanya...

The DPP hired a UK based Queen's Counsel (QC) Khawar Qureshi to represent them in the High Court petition and in the criminal matter before the Chief Magistrate.<sup>82</sup> The Petitioner through her lawyers sought to have Qureshi disqualified from the proceedings on the grounds that his appointment was irregular and unconstitutional. The application was based on two main grounds.

First, that the recruitment process breached principles applicable to public procurement under Article 227 of the Constitution and The Public Procurement and Asset Disposal Act (Act No. 33 of 2015)<sup>83</sup> and regulations made thereunder. Further, that the appointment of Mr Qureshi was procured in violation of Article 10 of the Constitution. Second, that the appointment of Mr Qureshi is not done in conformity with the provisions of the Advocates Act<sup>84</sup> in respect to the admission of a foreign Advocate.

To counter the application to remove Mr Qureshi, the DPP also applied to have SC James Orengo and SC Okong'o Omogeni out because they sit in the Justice and Legal Affairs Committee that grills ODPP's office over accountability. He argued that if they were allowed to represent DCJ Mwilu, there would be a potential conflict of interest because according to him, their positions puts them at cross purposes since they could use their influence in the committee to alter the direction of the case.

The five Judge bench<sup>85</sup> dismissed both applications, effectively allowing Qureshi to represent the DPP and SC Orengo and SC Omogeni to represent the petitioner. On Mr Qureshi's appointment and the alleged violation of the procurement laws, the court ruled that even if the case of the petitioner is that the appointment of Mr Qureshi raised some constitutional questions: "the proper way of raising them would be by way of a substantive constitutional petition in which the issues would be at the centre of the proceedings and not as an interlocutory challenge in proceedings such as this."

The Court also found that Qureshi was properly admitted to practice as a Foreign Advocate, stating that:

"a foreign Advocate need not be a Member of the Law Society of Kenya and the Advocates Benevolent Association as the Advocate does not ordinarily practice in Kenya. Subscription fees in respect thereof is not necessary for such Advocate. In addition, not being a Member of the Law Society, the written approval or a letter of no objection by the President of The Law Society of Kenya would not be required. Simply put, the Law Society of Kenya cannot approve or disapprove a person whom it does not supervise."<sup>86</sup>

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<sup>82</sup> This was done vide Gazette Notice No. 12613 dated December 4, 2018. This notice appointed Mr. Qureshi as a Special Prosecutor in CMC Anticorruption Case No. 38 of 2018-Republic vs. Philomena Mbete Mwilu and Another-

<sup>83</sup> Part XV of the Public Procurement and Asset Disposal Act...

<sup>84</sup> Section 11 of the Advocates Act, 2017, Cap 16....

<sup>85</sup>, Hellen Omondi, Mumbi, Ngugi, Francis Tuiyot, Justices William Musyoka and Chacha Mwita, JJ.

<sup>86</sup> *Philomena Mbete Mwilu v. Director of Public Prosecutions and 4 Others*, *op. cit.*

The Court continued:

“In the exercise of his discretion to admit a person to practice as an Advocate in Kenya, the 4th respondent is under a duty to satisfy himself that the person he admits is a practitioner entitled to appear before Superior Courts of the Commonwealth. A person suspended or expelled from appearing before a Superior Court of a Commonwealth country obviously does not qualify. Once the foreign Advocate satisfies the requirement of the relevant Commonwealth country which entitles him or her to practice before the Superior Courts of that country, then it is needless to ask that advocate to satisfy local requirements for issuance of a Kenyan practicing certificate.”

Thus, in the Court’s view, Mr Qureshi’s appointment satisfied the provisions of section 11 of the Advocates Act, 2017....

The court in dismissing the claims that there was conflict of interest on the part of SC Orengo and SC Omogeni held that a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party.

Was it a “Solomonic” judgment or a diplomatic decision?

These cases should be compared to Majanja, J in *Isaac Aluoch Polo Aluochier v. Attorney General*.<sup>87</sup> IFLAC

### **3.6.7 Retired State Officers in public service: Pension, politics in Kenya**

Article 77 also provides that a retired State officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of a company controlled by the State or a State organ. Other than the pensions provided for above, a retired state officer is prohibited from receiving remuneration from any other public funds.

There has been a long debate on the pension or retired Presidents, Deputy (or Vice) Presidents, Chief Justices, and Deputy Chief Justices.

Does President Kenyatta deserve pension when he retires in terms of the Constitution, the law, and individual performance?<sup>88</sup> Does DP Ruto deserve pension when he retires?<sup>89</sup> Did Moi and Kibaki deserve pension constitutionally? Legally? Or in terms of individual performance?

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<sup>87</sup> *Isaac Aluoch Polo Aluochier v. Attorney General* [2013] eKLR.

<sup>88</sup> See Presidential Retirement Benefits Act 2003 as amended.

<sup>89</sup> Retirement Benefits (Deputy President and Designated State Officers, Act No. 8 of 2015.

Did and do former PM Raila, former VP Kalonzo, former VP Moody Awori deserve pension? Why did most of the Kenyatta (and Ruto) supporters emphasize in 2013-2018 that Raila and Kalonzo had to “retire from politics” before they could enjoy pension:

Did Moi and Kibaki totally keep off politics?<sup>90</sup> What is “politics” for principles of pension? What of constitutional freedoms of political expression (Art 38), freedom of association (36), right to property (40)? Is pension about past service of future ambition to be President or Deputy President? Why did Kenyatta supporters change their views on Raila and Kalonzo after the 9/3/18 “handshake” or rapprochement? NB: Moi’s retirement benefits were reportedly stopped upon death.<sup>91</sup>

Do former Chief Justices Dr Willy Mutunga (2011-2016?) and Evans Johnson Gicheru (2003-2011?) deserve (enhanced) pension constitutionally, legally and in terms of individual performance? Did Dr Willy Mutunga get his pension promptly? What were the issues?<sup>92</sup> Do retired Deputy Chief Justices Kalpana Rawal....deserve (enhanced) pension constitutionally, legally, and in terms of individual performance?

### **3.6.8 Values and principles of public service in Kenya and Africa<sup>93</sup>**

Article 232 of the Constitution provides that the values and principles of public service include: high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable; provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information;

Values and principles also include fair competition and merit as the basis of appointments and promotions; representation of Kenya’s diverse communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women; the members of all ethnic groups; and persons with disabilities.

The said values and principles of public service apply to public service in all State organs in both levels of government; and in all State corporations.

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<sup>90</sup> NB political statements by visits to Moi by President Uhuru Kenyatta, Mama Ngina....Kibaki’s political statements and associations post retirement...

<sup>91</sup> ....

<sup>92</sup> ...(cite)

<sup>93</sup> See also Chapter....CODRALKA 1 on Public Finance Political Economy....in Kenya and Africa

### **3.6.9 Values and Principles of public finance in Kenya and Africa<sup>94</sup>**

Article 201 provides for the values and principles of public finance. It provides that the following principles shall guide all aspects of public finance in the Republic:

First, there shall be openness and accountability, including public participation in financial matters;

Second, the public finance system shall promote an equitable society, and in particular:

(i) the burden of taxation shall be shared fairly;

(ii) revenue raised nationally shall be shared equitably among national and county governments; and

(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;

Third, the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations.

Fourth, public money shall be used in a prudent and responsible way; and

Fifth, financial management shall be responsible, and fiscal reporting shall be clear....<sup>95</sup>

### **3.7 Application of Chapter Six and the implementation challenges in Kenya and Africa**

In order to ensure compliance with the provisions of Chapter 6 concerning leadership and integrity, Article 79 requires Parliament to enact legislation to establish an independent ethics and anti-corruption commission. This is the Ethics and Anti-Corruption Commission (EACC) Act, 2011, which replaced the Kenya Anti-Corruption Commission (KACC)<sup>96</sup> and the Leadership and Integrity Act 2012.

The Ethics and Anti-Corruption Commission (EACC) is mandated to carry out an oversight role to ensure that public institutions uphold the national values, principles of governance and maintain a strict code of integrity. Debate in 2019: DCI should focus on non corruption cases? Or review the overlaps and secure coordination? How should Kenya address independent prosecution under Arts 157, 158, ...in the light of the closeness among ODPP, DCI, EACC?

#### **3.7.1 “War” on corruption in Kenya and Africa<sup>97</sup>**

The war against corruption in Kenya dates back to 1956, when the Prevention of Corruption Act was enacted Kenyatta period with attention to the anti-corruption law and indeed introduced the Ndegwa Straddling policy that allowed public servants to engage in business. This institutionalized

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<sup>94</sup> Cf. Building Bridges Initiative (BBI) discussions

<sup>95</sup> Cf. South Africa, Nigeria, Uganda, Tanzania.....

<sup>96</sup> Cf. Matemu was appointed EACC Chair after Matemu case succeeded on appeal. Cf. High Court’s v. Court of Appeal decisions using IFLAC methodology.

<sup>97</sup> Cf. debate on “weaponizing war on corruption”....

conflict of interest. And there numerous competition matters, including Ken ren (Fertilizer Company) involving Ministry of Finance under Kibuchi.<sup>98</sup>

In 1991, President Moi established the Anti-Corruption Police Squad (Specialized entity within the police department) to prosecute cases of corruption. After 3 years fire consumed then office premises, bringing an end to the work of the unit.

However, the Goldenberg looting scandal emerged in 1994.<sup>99</sup> This resulted to a need for special anticorruption arrangements. The Kenya Anti-Corruption Authority (KACA) thus created in 1997 with Mr John Harun Mwau<sup>100</sup> as its first Director. <sup>101</sup> In July 1998, Mr Mwau obtained warrants of arrests against senior Treasury officials on allegations that they had defrauded the government of more than KES 200 million in tax revenue. Mr Simon Nyachae (as Head of Public Service?) condemned the move, saying the arrests were without basis. The then A-G, Mr Amos Wako entered a *nolle prosequi* (null prosecution...) terminating the charges brought by Mr Mwau against the Treasury officials. <sup>102</sup>

Mr Mwau was later suspended by President Moi and a tribunal was appointed to investigate whether he remained fit to hold office. The tribunal was a political response for the arrest made by Mr Mwau. Mr Mwau had less than a year of being in office and therefore his performance could not have been in issue. Mr Mwau was later removed from office by the tribunal.

Justice Aaron Ringera took over after Mr Harun Mwau. Justice Ringera almost suffered a similar fate as Mr Mwau after he brought corruption charges against Kipng'eno arap Ng'eny in 2000, then a senior minister. A suit was filed in the High Court, in which an order was obtained declaring that KACA powers to prosecute corruption cases were unconstitutional. This led Justice Ringera to resign the following year.<sup>103</sup>

In 2001, Kenya created the Anti-corruption police unit operated by the then Criminal Investigation, now the Directorate of Criminal Investigation (DCI).

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<sup>98</sup> ....

<sup>99</sup> ....

<sup>100</sup> He was the self-proclaimed Boss (of the Party of Independent Candidates of Kenya (PICK)).

<sup>101</sup> President Daniel Moi created Kenya Anti-Corruption Authority after the IMF suspended aid over official corruption in Moi's Administration....

<sup>102</sup> George Kegoro ( 2015) "Why EACC appointments shouldn't be rushed after Matemu, Keino exit," *Saturday Nation, Nairobi*, May 16, 2015, at <http://mobile.nation.co.ke/news/EACC-Appointments-Mumo-Matemu-Resignation/-/1950946/2718960/-/format/xhtml/item/1/-/964dkg/-/index.html> ( accessed 04/06/2015). The DPP's power to enter a *nolle prosequi* is limited under article 157 of the Constitution...See cases under 2010 and 1969 Constitution....

<sup>103</sup> *Ibid.*

Kibaki appointed Mr John Githongo as a special advisor on anti-corruption when Narc took power in 2003.<sup>104</sup> Mr Githongo left office in controversy in 2005, going into exile in the United Kingdom and linked senior officials in Kibaki's administration to the Anglo Leasing scandal.<sup>105</sup>

The Kenya Anti-Corruption Commission (KACC) was then established again in 2003,<sup>106</sup> when Kibaki became the President. Justice Ringera was recruited afresh to head the new KACC. He served until 2009 along with commissioners Fatuma Sichale and Smokin Wanjala when their terms ended and Parliament refused to renew their terms.<sup>107</sup>

PLO Lumumba, was appointed as the new KACC chairman. He had a difficult time during his first year in office. In 2011, KACC changed to the Ethics and Anti Corruption Commission (EACC). All the five KACC commissioners were required to vacate office and, if interested, seek fresh appointments.<sup>108</sup> Prof Jane Onsongo was the only commissioner who made it back.<sup>109</sup>

Mr Matemu was later selected as Chairman of the EACC. Did Matemu have the competence and qualifications, or skills, knowledge, attitude, values and innovation (SKAVI), or interest, or "passion" to fight corruption from his past record?<sup>110</sup> Mr Matemu's appointment was challenged in a Nakuru court by a CSO named Trusted Society of Human Rights Alliance. A bench of three High Court judges nullified his appointment, but their decision was overturned by Court of Appeal and he was sworn in by Chief Justice in 2013.

Uhuru Kenyatta later named a Tribunal led by retired High Court Judge Jonathan Havelock to investigate the conduct of the EACC commissioners including Mumo Matemu. This resulted to the resignation of all the commissioners.<sup>111</sup>

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<sup>104</sup> Mr Githongo had been the head of Transparency International in Kenya.....See.....

<sup>105</sup> *Ibid.*

<sup>106</sup> In 2003, the Anti-Corruption and Economic Crimes Act created the Kenya Anti-Corruption Commission (KACC).

<sup>107</sup> *Ibid.*

<sup>108</sup> Was this privative clause? Ad hominem legislation? What was the political economy of the recomposition of KACC? EACC?

<sup>109</sup> Why?

<sup>110</sup> *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR. (Coram:....) Note the Comparative Methodology in this High Court decision. Drawing from the South African constitutional practice.....

<sup>111</sup> Aggrey Mutambo (2015) "Tribunal in limbo as Matemu quits top anti-graft job," *Daily Nation*, Nairobi, May 12, 2015, at <http://mobile.nation.co.ke/news/Matemu-resigns-as-EACC-boss/-/1950946/2714698/-/format/xhtml/-/7d30pfz/-/index.html> (accessed 04/06/2015).....

### 3.7.2 Addressing Past Integrity problems: analysis of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*<sup>112</sup>

This was an appeal filed at the Court of Appeal at Nairobi challenging the High Court's decision setting aside the appointment of Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission. Upon gazette of Mr. Matemu as the Chairperson of the Ethics and Anti-Corruption Commission, the Trusted Society of Human Rights Alliance, a non-governmental organization based in Nakuru, challenged the appointment in the High Court by way of petition.

The main arguments in the petition before the High Court were that Mr. Matemu did not meet the requirements for appointment to the office of the Chairperson of the Ethics and Anti-Corruption Commission, and that the process of his appointment was unconstitutional. The High Court (Joel Ngugi, Mumbi Ngugi and G. V. Odunga) sustained the petition questioning the constitutionality of the appointment, ruling that the appointment of Mr. Matemu to head the Ethics and Anti-Corruption Commission did not pass the constitutional requirement under the substantive "rationality" test.

The High Court had in its landmark decision held that:

"So it is in this case. We have already established that on available evidence the Interested Party faces unresolved questions about his integrity. The allegations which he is facing are of a nature that, if he is confirmed to this position, he will be expected to investigate the very same issues which form the gist of the allegations against him. It requires no laborious analysis to see that this state of affairs would easily lead many Kenyans to question the impartiality of the Commission or impugn its institutional integrity altogether.

The Court added:

:Were that to happen, it would represent a significant blow to the very institution the Interested Party is being recruited to head and lead in its institutional growth. In our view, this makes the Interested Party unsuitable for the position. As in the *Centre for PIL and Another v. Union of India* [Petition Writ no. 348 of 2010], we find that the appointing authorities did not sufficiently take into consideration the institutional integrity of the Commission or its ability to function effectively with the Interested Party at its helm when they made or approved the appointment."<sup>113</sup>

The High Court also held thus:

"There is no doubt that, if true, these are serious allegations and they would, ineluctably, affect any reasonable person's assessment of the integrity of the Interested Party or his suitability to head the Commission. We are not in a position to make any findings whether these allegations are proved or not. That will have to await appropriate legal proceedings

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<sup>112</sup> *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR Civil Appeal No. 290 of 2012...(Coram:....).....

<sup>113</sup> ....

tailored for that purpose. However, what we are prepared to hold at this point is that the allegations are serious enough and sufficiently plausible to warrant any reasonable person who is charged with the constitutional responsibility of assessing the integrity or suitability of the Interested Party for an appointment to a State or Public Office, especially one which is as sensitive as the Chairperson of the Ethics and Anti-Corruption Commission, to conduct a proper enquiry before such an appointment. We say so on a cursory assessment of the evidence made available to us...’’<sup>114</sup>

The parties in the Appeal case included: the Trusted Society of Human Rights Alliance – an NGO based in Nakuru (1<sup>st</sup> respondent), the Attorney-General (2<sup>nd</sup> respondent), the Minister of Justice and Constitutional Affairs (3<sup>rd</sup> respondent), the Director of Public Prosecutions (4<sup>th</sup> respondent), the Kenyan Section of the International Commission of Jurists (5<sup>th</sup> respondent) and the Kenya Human Rights Commission (6<sup>th</sup> respondent).

The issues for determination as found by the the CoA were:

First, whether the Trusted Society of Human Rights Alliance, an NGO, had the locus standi (capacity) to file the petition at the High Court?

Second, whether the High Court had jurisdiction or power to review and set aside the appointment of Mumo Matemu as Chairperson of the Ethics and Anti-Corruption Commission?

Third, whether the High Court properly applied the principle in the Anarita Karimi Njeru case requiring that constitutional petitions be pleaded with reasonable precision?

Fourth, whether the High Court in its rationality test misapplied the doctrine of Separation of Powers thereby usurping the powers and functions of other arms of government?

Fifth, whether the appointment of Mumo Matemu was undertaken in accordance with the Constitution and the law?

The Court of Appeal ruled in favour of Mumo Matemu and ordered that the whole judgment and orders of the High Court be set aside. It found that the appointment process was a cumulative process, with various stages and appointing organs – the Selection Panel, the National Assembly and the Executive.

According to the CoA, the process of recruitment, selection and appointment of Mumo Matemu alongside the other nominees was duly followed as laid down under section 6 of the Ethics and Anti-Corruption Commission Act. That there was no evidence to show that there was no proper inquiry on the suitability of Mr Matemu in the cumulative process. The Court of Appeal held that

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<sup>114</sup> ....

the High Court's conclusion of procedural impropriety on the part of the appointing organs (Selection Panel, the Executive and the National Assembly) and unsuitability on the part of Mumo Matemu could not be sustained.

### **3.7.3 Corruption and EACC after *Mumo Matemu* 2015 in Kenya and Africa**

Following Mumo Matemu's resignation on May 11, 2015, EACC remained structurally incapacitated for nearly two years. The Commission for Implementation of the Constitution argued that lack of commissioners meant EACC was incapacitated. Indeed, Article 250(1) of the constitution and section 4 of the EACC Act characterizes the EACC (Commission) as consisting of commissioners. Further, section 11(1) d of the EACC Act provides that decisions of the Commission, including making recommendations to the DPP for prosecution can only be legally made by the commissioners. The absence of the commissioners at the EACC thus, worked to disable the commission in a sense, though technical work by the Secretariat would still continue. The making of such recommendations to the DPP in the absence of commissioners would likely attract legal challenges, which deal an even greater blow to the fight against corruption.

What was been done to the "list of shame"? Who did Mr Kenyatta obtain the list from? Was that constitutional, legal or lawful? Does that vitiate any presidential or parliamentary action? Was the naming and sharing in Parliament part of the "political justice" – the politicization of crime and the criminal justice process?

Former Inspector-General of Police David Kimaiyo in a Gazette Notice dated August 15, 2014 designated the Ethics and Anti-Corruption Commission headquarters as a police station. The commission can now detain suspects at the Integrity Centre.<sup>115</sup> How was this move expected to enhance the operations of the anti-graft agency in terms of confidentiality?

Why does non-compliance with rules, principles and values like lack of integrity, corruption, tribalism, stealing or looting of votes, money and land persist in spite of constitutional and regulatory reforms? Is it because there is a Kenyan Constitutions and value system on the one hand and tribal, monarchical or oligarchy or dynastic "value" system like the ultimate Constitution (*mundu witu or mundu wa nyumba*).<sup>116</sup>

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<sup>115</sup> Daily Nation Correspondent (2014) "Anti-graft agency can now lock up suspects," *The Daily Nation*, Nairobi, August 22, 2014, at <http://mobile.nation.co.ke/news/Anti-graft-agency-can-now-lock-up-suspects/-/1950946/2428116/-/format/xhtml/-/rockj/-/index.html> (accessed 29/9/14).

<sup>116</sup> Cf. Constitution; Building Bridges Initiative; Kivutha Kibwana (2018) "We shall only progress if we have shared values," *Daily Nation*, Nairobi, 4/11/2018, at <https://www.nation.co.ke/oped/opinion/We-shall-only-progress-if-we-have-shared-values/440808-4835436-uxqurf/index.html> (accessed 19/12/2018).; John Lonsdale (1992) "The moral economy of Mau Mau: Wealth, poverty and civic virtue in Kikuyu political thought," *Unhappy Valley: Conflict in Kenya and Africa* 2, 315-504....

### **3.8 ICC Cases and how they lowered leadership and integrity standards in Kenya and Africa**

As Kenyans waited the ICC ruling on the “Ocampo Six (6)” in 2011, the question that dominated political, constitutional and juridical discourse was whether Uhuru Kenyatta and William Ruto could contest for presidency if charges against them were confirmed, which were.

#### **3.8.1 Constitutional, statutory, regulatory, administrative and transnational law on integrity and the Kenyan Presidency**

On this question, I opined that there was need to adopt a three-pronged typology regarding the rules of interpretation of constitutions, statutes, and related juridical instruments. I used the British formula as modified by American methodology, for two reasons: First, Kenyan laws and institutions are largely adaptations of British and Commonwealth traditions.<sup>117</sup>

Second, the American interpretation methodology applies because under the new Constitution, Kenya has adapted an American-style presidency and juridical process. The typology entails, first, the plain meaning, literal, textual meaning rule; second the mischief or history rule; and third, the golden, ambiguity, absurdity, or structure rule.

The textual rule requires that the words are to be given the ordinary or lay meaning, unless the text explicitly defines some of its terms otherwise. Using this formula, it is arguable that on the face of it, Article 137 (on qualification for election as President), did not disqualify Uhuru or Ruto from vying for the presidency if charges were confirmed under the Rome Statute.<sup>118</sup> The general rule of interpretation under this formula is that whatever is not specifically barred is permitted (but not necessarily guaranteed) by necessary implication.

However, it is instructive that the Constitution usually does not specify, and is not expected to deal with, all scenarios that may arise, like in presidential nominations or elections. It provides general principles and the statute, rules and regulations, or tradition, may supply details (provided they are not inconsistent with the Constitution).

The rule’s primary aim is to determine the “mischief and defect” that the relevant law has sought to remedy, and what process, decision, ruling or outcome would effectively implement that remedy. This methodology required that the Constitution be read in totality, and not by selectively focusing on Article 137.

Kenyans needed to look at relevant constitutional provisions, including Article 10 on national values and principles of governance; Chapter Six on leadership and integrity of State officers, and

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<sup>117</sup> Ben Sihanya (2012) “Constitution and Rome Statute on qualification for election as president,” *The Standard*, Nairobi, 22/1/2012, at <https://www.standardmedia.co.ke/article/2000050474/constitution-and-rome-statute-on-qualification-for-election-as-president> (accessed 8/8/2019)....

<sup>118</sup> ....

Article 129 on the need for executive authority to meet standards of service orientation, or administrative and economic efficiency<sup>119</sup> and juridical derivation and due process.....

The main mischief that the 2010 Constitution sought to address is the imperial presidency, personification of Executive power, related presidential excesses, and the historically unregulated or underregulated presidential processes such as qualifications for nomination and election, performance and retirement.

These underregulated processes ushered in presidential manipulation, lawlessness, impunity and intrigue (or presidential *fitina* and *nyoko nyoko*), especially with respect to nominations and elections under Jomo Kenyatta, Daniel Arap Moi and Mwai Kibaki administrations.....

The basis of regulation is that the presidency is the most significant office in the State bureaucracy and in Kenya.

Thus persons who supported the withdrawal of Uhuru and Ruto from the presidential elections argued that to allow persons undergoing a criminal process to vie for the top seat, would expose, demean and even criminalise the presidency.<sup>120</sup> They argued that this was against the rules, values and principles of the Constitution. They argued that the charges related to crimes against humanity, including murder, forcible transfer of population, and persecution, which are the most serious under the Constitution and transnational legal process.

Third, the golden rule seeks to avoid absurdity or ambiguity. It allows for interpretation by ignoring ordinary meaning, in order to avoid an absurd, clumsy, anachronistic, ambivalent or counterintuitive outcome. Some observers argued that should the ICC charges be confirmed, and Uhuru and Ruto successfully contest the presidency, then, as State officers, they would be required by the Constitution to step down during the hearing process, or face impeachment.<sup>121</sup>

This is indeed an absurdity that the officers, courts or anyone interpreting, protecting and defending the Constitution would be keen to avoid. The law and legal institutions are required to be purposive and not act in vain.

These rules were developed to focus on statutory interpretation under a constitution found in numerous instruments and common law conventions and parliamentary sovereignty in the UK.<sup>122</sup>

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<sup>119</sup> Arts 47.....

<sup>120</sup> See also Chapter 6....; including the three pronged typology on integrity in public service.....

<sup>121</sup> Art.....

<sup>122</sup> Not “unwritten” Constitution.....See Chapter 1 of CODRALKA 1 on Conceptualising Sovereignty, Constitution, State and Government in Kenya and Africa cf. “informal constitution” in the UK, USA, China, Kenya, Nigeria, South Africa, Uganda.....

But they are applied to constitutional interpretation too, especially in the context of American and Kenyan constitutional supremacy and popular and parliamentary sovereignty in Constitution and law making, respectively.<sup>123</sup>

And constitutions are interpreted to require higher standards of probity and abundance of caution thus acting *ex abundanti cautela*. Indeed, Article 259, in providing guidance to constitutional interpretation, requires that it is interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and human rights and freedoms, permits the development of the law, and contributes to good governance.

Hence constitutional objectives and aspirations are higher than statutory objectives. In this context, statutory and other juridical instruments on qualification are relevant in ascribing particular standards to constitutional objectives. For example, the integrity and anti-corruption legislation and the Public Officer Ethics Act, 2003 require a public officer charged with an offence in a court of law to vacate office until cleared.

During this debate, limited attention was paid to the Political Parties Act, 2011, the Elections Act, 2011 the Independent Electoral and Boundaries Commission (IEBC) Act, 2011, political party constitutions, and nomination, as well as related electoral rules. These laws were important because, first, they gave meaning to the more generic constitutional provisions on qualifications. Second, they shift the decision-making power on this matter to various bureaucrats and courts. For example, under section 24 of the Elections Act, qualification entails satisfying moral and ethical standards prescribed by the Constitution (Chapter Six and articles 10 and 137, etc) and the Act. And disqualification is hinged on factors that "in any way" contravene Chapter Six of the Constitution. IEBC had a role here. But IEBC had indicated that it was upon the courts to determine the eligibility of Uhuru and Ruto to vie.<sup>124</sup>

Despite the fact that the ICC cases were supposed to be treated as personal challenges, the Government of Kenya invested heavily in the matter, in at least three ways. First, the Government of Kenya was reputed as non-compliant with ICC, decisions or requests. Second, the A-G was ordered by Justice Lenaola to act as A-G of Kenya, not a personal advocate of Kenyatta. Third, the Government of Kenya sent a huge delegation to the 14<sup>th</sup> Assembly of State Parties at the Hague in 2015.<sup>125</sup> The 14<sup>th</sup> Assembly of State Parties (ASP) which took place in the Hague, Netherlands further highlighted the challenges that faced the process of securing justice for the direct and indirect victims of the 2007/2008 post-election violence.

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<sup>123</sup> Cf. South Africa, Nigeria, Uganda, Tanzania.....

<sup>124</sup> To cite...

<sup>125</sup> Cite source and authority on transnational legal process (TLP), especially ICC...

### **3.8.2 Kenyatta and Ruto Integrity issues: *International Centre for Policy and Conflict & 5 Others v. Attorney General & 5 Others***

This was a case on leadership and integrity under the Constitution of Kenya 2010. A five judge bench in *International Centre for Policy and Conflict & 5 Others v. Attorney General & 5 Others*<sup>126</sup> was urged to make a determination of the question whether Uhuru Kenyatta and William Ruto were qualified to offer their candidature for the office of President and Deputy President respectively in 2013. The Court held that that was an issue which is within the exclusive jurisdiction of the Supreme Court and that in the premises, it lacked jurisdiction to deal with a question relating to the election of a President or Deputy President.

The Court held that its mandate was limited to interpreting the provisions of the Constitution in respect of the provisions of Chapter Six on leadership and integrity. On the effect of the ICC cases on the integrity of Uhuru Kenyatta and William Ruto, the Court held that:

“We have already placed on record the rights of the citizens of this country to make political choices, and indeed the rights of the 3rd and 4th Respondents to seek public office. Article 1 of the Constitution of Kenya places all sovereign power on the people of Kenya which shall be exercised only in accordance with the Constitution. It shall not be, and can never be the role of this court to exercise that power on behalf of the people of Kenya. That right must remain their best possession in a democratic society and is inalienable.”<sup>127</sup>

The Court also appeared to shift the burden of determining the integrity question to the Independent Electoral and Boundaries Commission (IEBC) and EACC, stating:

“Institutions like the IEBC and the Ethics and Anti Corruption Commission are bestowed with necessary power to conduct, inquire and take disciplinary action. The court should not descend into the arena of inquiry... its proper rule is to ensure the inquiry is undertaken in the standards acceptable in the Constitution”...

Yet IEBC had indicated that it would determine the suitability of the two based on what the High Court would say.<sup>128</sup>

In essence, the Court held that Kenyatta and Ruto’s trials at the ICC, Hague could not be a reason to stop them from vying in elections since no local or international trial had convicted them to imprisonment for more than six months. This judgment is seen to have lowered the integrity

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<sup>126</sup> *International Centre for Policy and Conflict & 5 Others v. Attorney General & 5 Others* [2013] eKLR. The judges were: A. Mbogholi Msagha; Luka Kimaru; Hellen A. Omondi; P. Nyamweya, and George K. Kimondo....

<sup>127</sup> Paragraph 156.....

<sup>128</sup> Pamela Chepkemei (2012) “Court has final say on Uhuru and Ruto, says IEBC boss,” *Daily Nation*, Nairobi, 21/11/2012, available at <https://www.nation.co.ke/news/politics/Court-has-final-say-on-Uhuru-and-Ruto-/1064-1625758-il6t3/index.html> (accessed 14/7/2019).

standards anticipated under the Constitution of Kenya 2010. What were the findings of the ICC on Kenyatta? Ruto?

### **3.9 Integrity and leadership questions in the post 2017 Kenya and Africa**

In 2018, following the handshake, there was a fresh bid by President Uhuru Kenyatta through the office of the Directorate of Criminal Investigations (DCI) to fight corruption. Wachira Maina describes the President's efforts as laudable, although they do not address the roots of corruption in Kenya.<sup>129</sup> First, it started through the appointment of the Director of Public Prosecutions (DPP) Noordin Haji and a new Attorney General Paul Kihara. Second, Uhuru Kenyatta shook hands with his opponent Raila Odinga. Third, a money repatriation effort was initiated through the Ethics and Anti Corruption Commission (EACC), the DCI and the DPP.

The DCI embarked on Friday arrests, rubbing in to senior state and public officials towards the end of 2018. Among those arrested included top officials from National Hospital Insurance Fund (NHIF) and Kenya Pipeline Corporation (KPC). The purge continued in 2019 with former Nairobi Governor Dr Evans Kidero being arrested on a Friday morning in April by detectives from the Ethics and Anti-Corruption Commission (EACC). As at this writing, Kidero faces corruption charges in Court.<sup>130</sup>

Prof Tom Ojienda, a key contestant for the LSK Male Representative to the JSC was also arrested on a Friday evening in December 2018, sparking interest and concerns by lawyers about the manner in which the DCI and the DPP were approaching corruption related allegations.<sup>131</sup>

About 41 KRA employees were also arrested in May 2019 and arraigned in Court for charges of aiding tax evasion.<sup>132</sup>

Significantly, related leadership and integrity issues arose on the appointment of Bernard Chunga to public office as part of a team to lead prosecutorial reforms. It was argued that this contravened Chapters 6 and 13 of the Constitution and section 5(j) of the Truth Justice and Reconciliation Act (TJRC) Act.<sup>133</sup> The TJRC Report had recommended that Chunga should never hold public office.

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<sup>129</sup> Wachira Maina (2018) State Capture: Inside Kenyas inability to fight corruption, Africa Centre for Open Governance.

<sup>130</sup> See *Evans Odhiambo Kidero v. Republic* [2019] Anti-Corruption and Economic Crimes Appeal 11 of 2019 eKLR ; *Evans Odhiambo Kidero v Republic* [2019] eKLR Anti Corruption & Economic Crimes Revision 23 of 2019 eKLR.

<sup>131</sup> *Tom Odhiambo Ojienda v. Director of Public Prosecutions & 4 Others*, Petition No. 2470 of 2018. They largely included SC Orengo, SC Okong'o Omogeni, Nelson Havi, Tom K'opere and Ben Sihanya

<sup>132</sup> Capital News (2019) "DCI arrests 41 KRA employees for aiding tax evasion," at <https://www.capitalfm.co.ke/news/2019/05/dci-arrests-41-kra-employees-for-aiding-tax-evasion/> (accessed 15/7/2019).

<sup>133</sup> .....

Lawyer Nelson Havi asked in a Facebook posting: “Isn’t Noordin Haji guilty of incompetence, gross misconduct and misbehaviour?”<sup>134</sup>

A sample of the numerous historical and continuing cases of corruption, or breach of constitutional, regulatory and administrative standards on leadership and integrity in Kenya and Africa may be summarized in Table or Matrix....below....

### 3.10 Matrix on corruption scandals under Presidential and Premier Administration in Kenya and Africa<sup>135</sup>

Under Uhuru Kenyatta	Under Mwai Kibaki	Under Daniel Moi	Under Jomo Kenyatta
1. The Kenya Pipeline Company: KES 95 billion scandal on suspicious payments to contractors.	Goldenberg Saga (involving KSh18 billion)	Land grabbing by state officers	Land grabbing by state officers
2. National Youth Service: KES 9 billion scandal on suspicious payments to companies	Free learning funds scandal at the Education ministry (involving 4.2 Billion shillings).	Controversial purchase of properties and companies in London, New York and South Africa and even a 10,000 hectare ranch in Australia by state officials.	

<sup>134</sup> A petition was filed by a group of lawyers to stop Chunga's appointment.... See Paul Ogemba (2019) “Chunga’s past records return to haunt him as lawyers seek to block his return to public service,” *The Standard*, 8/7/2019, at <https://www.standardmedia.co.ke/article/2001333128/lawyers-group-moves-to-block-chunga-appointment-over-tainted-past> (accessed 17/7/2019). .... Chunga later reportedly wrote to say “no thank you.” (to quote, cite...).

<sup>135</sup> These are based on court cases and the Auditor General’s reports. They are a moving target and too numerous to list. This reader should list others. ....cf. Uganda, Tanzania, Nigeria, South Africa....under the respective presidents and premiers....

<p>3. Kenya Power &amp; Lighting Company: Multimillion scandal where KPLC employees were accused of registering companies to award themselves contracts and sneaking in unqualified companies into the KPLC database</p>	<p>KSh283 million City Hall cemetery scandal</p>		
<p>4. National Cereals and Produce Board (NCPB): KES 1.9 billion maize scandal. Money paid to (illegal) importers and other dealers while farmers are ignored.</p>	<p>KSh2 billion maize scandal</p>		
<p>5. Chicken gate IEBC scandal (59 Million)</p>	<p>Controversial purchase of land for the Kenyan embassy in Japan (Kshs 1Billion).</p>		
<p>6. Eurobond scandal (2015 Billion)</p>			
<p>7. Karen Land saga, Waitiki Likoni land</p>			
<p>8. Anglo Leasing KES (3 billion) Uhuru Kenyatta payout</p>			
<p>9. Kimwarer &amp; Aror Dam scandals (21Billion? DP Ruto)</p>			

10. Kenya Prison Service scandal (4Billion?)			
11. Ministry of Health (MAfya) scandal) (5 Billion).			
12. JKIA, KQ, KAA saga (President Kenyatta family)			
13. Huduma Number			
14. Standard Guage Railway: Value of SGR land compensation; Pillars...What is the latest?... <sup>136</sup>			
15. Fake gun procurement, KES 40 Billion? DP Ruto's office.... <sup>137</sup>			

### County Governments

County/Governor	Scandal
1. Nairobi County: Evans Kidero & Mike Sonko <sup>138</sup>	Loss of KES 1.7 billion through irregular procurement of health services for staff. loss of KES 1.7 billion through irregular procurement of health services for staff.  Evans Kidero foundation scandal (2.7 Billion)
2. Samburu County Moses Kasaine Lenolkulal	Charged with the offences of conspiracy to commit an offence of corruption, abuse of

<sup>136</sup> See...

<sup>137</sup> See....

<sup>138</sup> Sonko impeachment debate....Sonko signed away transfer of Nairobi city county government powers on February 25, 2020. Article 187 is unjustified nuclear option...better Article 181 impeach Sonko...reorganize power structure politically and constitutionally.

	office contrary, conflict of interest, unlawful acquisition of public property <sup>139</sup>
3. Kiambu County Ferdinand Waititu <sup>140</sup>	Charged with offences related to conflict of interest, dealing with suspected stolen property, abuse of office involving a tender worth Sh588 million and fraudulent acquisition of Sh221 million public property. <sup>141</sup>
4. Migori County Governor Zachariah Obado?	EACC probing 23 firms linked to Obado in Sh2.5B graft scandal <sup>142</sup>
5. Bungoma County Former Governor Kenneth Lusaka <sup>143</sup>	Controversial purchase of “non-carcinogenic” wheelbarrows at KES 110,000 each

### 3.11 Building Bridges Initiative (BBI) Proposals and post report debates

- National ethos are key
- Chapter 6 to be strengthened...consider debate on Conflict of interest Bill 2019<sup>144</sup>
- Elected and appointed officials be bound by ethos, ethics, values, principles
- -Separate ethics from anticorruption and combine it with integrity, integration.<sup>145</sup>
- Establish Ethics and Anticorruption Commission separately and independently in the Constitution, Chapter 6, Chapter 15...

<sup>139</sup> Anti-Corruption and Economic Crimes Revision 7 of 2019, ACC No. 3 of 2019....See case....and debates ....

<sup>140</sup> Impeached by Kiambu County assembly on 19/12/2019 and removed by Senate on 29/1/2020.

<sup>141</sup> Cyrus Ombati (2019) “Waititu, wife, daughter to be charged with graft,” *The Standard Digital*, Nairobi, 17/7/2019, at <https://www.standardmedia.co.ke/article/2001334161/waititu-wife-daughter-to-be-charged-with-graft> (accessed 17/7/2019)....

<sup>142</sup> Brian Wasuna “EACC probes 23 firms linked to Obado in Sh2.5bn graft scandal,” *Daily Nation*, Nairobi, 26/9/2019, at <https://mobile.nation.co.ke/news/EACC-probes-firms-linked-to-Obado/1950946-4777834-1080ap7z/index.html> (accessed 17/7/2019)....

<sup>143</sup> Speaker after 2017 elections.

<sup>144</sup> Cf. Tom Ojienda, “Analysis of Conflict of Interest Bill...”

<sup>145</sup> Of NCIC Act....

- Provide for resignation stepping down, stepping aside, “away,” back....cf US, UK (mere suspicion) on charge; on....clarify that principle. Apply to National Government and County Government (officials) equally with necessary modifications or mutatis mutandis for elected and appointed to consider for P, DP, PM, Governor, Deputy Governor....

### 3.12 Summary of findings, conclusions and recommendations

National values and principles are important in realizing the promise of the rules and policies of the Constitution of Kenya 2010.

Unfortunately, some of the founding values at independence and those in the Constitution of Kenya 2010 have been corrupted and thus compromise constitutional implementation. For instance, instead of tribal inclusion and mutual social responsibility, the Kenyan and African Presidents and Premiers increasingly promote tribal and oligarchic appointments, tendering, accumulation, corruption and exclusion.<sup>146</sup>

Therefore it is critical that the presidency leads in the implementation of the founding and constitutional values and principles. And that legislative and judicial organs as well as the intelligentsia, civil society organizations and people in their masses help in the development of a common law of Kenya and relevant African state.<sup>147</sup>

Consider proposals made in the BBI document, and in the debate on BBI, toward constitutional amendment....

Then leadership, integrity, and constitutional democracy will develop in Kenya and Africa.

© **Prof Ben Sihanya**, JSD (Stanford), Revised 27/2/2013; 26/9/2013; 14/6/2014; 14/10/14; 16/02/15; 16/06/15; 31/08/2015; 10/2/2016; 29/6/2016; 14/4/17; 10/4/2018; 8/2/2019; 4/2/2019; 7/3; 16/7; 17/7; 22/10; 23/10/2019; 15/2/2020; 26/2/2020  
 email: [sihanyamentoring@gmail.com](mailto:sihanyamentoring@gmail.com); [sihanya@innovativelawyering.com](mailto:sihanya@innovativelawyering.com) (use both)  
 url: [www.innovativelawyering.com](http://www.innovativelawyering.com)

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<sup>146</sup> Cf. Lonsdale (...) “The moral economy of Mau Mau: Wealth, Poverty, and civic virtue in Kikuyu political thought,” *op. cit.*

<sup>147</sup> See also Chapter 1 (*supra*).