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CHAPTER 1

UNCLOGGING THE WHEELS OF JUSTICE: A REVIEW OF JUDICIAL TRANSFORMATION IN THE POST-2007 PERIOD

Morris Kiwinda Mbondenyi

Introduction

In Kenya, the judiciary is the main institution empowered to provide remedies and sanctions for a breach of the Constitution or ordinary law. The 2010 Constitution is categorical that 'judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals' established under the Constitution.[1] It is needless to emphasise that a firmly rooted democracy requires a vibrant judiciary that is fully committed to due process and the enhancement of liberal principles and thinking. It is rather unfortunate, however, that successive political regimes in Kenya generally neglected the important role of the judiciary. At best, the judiciary was interfered with. Thus, the country almost succumbed to the 2007 post-elections anarchy because its judiciary could not be relied on to mediate on the political crisis that culminated from the botched elections.

Prior to the enactment of the new Constitution in 2010, the judiciary was faced with the difficult task of maintaining the intricate balance between socio-political transformation and interpretation of law. When called upon to determine matters of a political nature, the judiciary was on most occasions seen to favour the reigning political class to the detriment of other litigants. Undoubtedly, therefore, the judiciary was one of the government's handmaidens for undemocratic and mundane practices such as ethnic polarisation, electoral malpractices and uneven access to public resources.[2] Judicial independence was largely a byword because the legal system was plagued with a number of handicaps, which shall be discussed

1 Constitution of Kenya 2010, art 159.

2 See in this regard M Mbondenyi 'The right to participate in the government of one's country: An analysis of Article 13(1) of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 elections crisis' (2009) 9 *African Human Rights Law Journal* 199.

in detail in part of this chapter.[3] This partly explains why, when Kenya was engulfed in post-elections anarchy in 2007, the international community, rather than the country's judiciary, was found to be a more suitable mediator in the conflict. Primarily, the country's judiciary had recurrently been criticised for continuing to identify with questionable judicial pronouncements that bordered on partisanship. Thus, the endemic failures in governance, coupled with executive interference with the judiciary, undermined the role the judiciary would potentially have played in redressing the 2007 electoral dispute.[4] This scenario made it imperative for necessary legislative and institutional reforms to be undertaken to guarantee a transformed judiciary that, in the very least, would be the bridge to the country's socio-political and economic transformation.

The promulgation of a new Constitution in 2010 therefore signalled the dawn of a new beginning in so far as judicial transformation in Kenya is concerned. The Constitution contains provisions that are indicative of the fact that judicial transformation in Kenya is in the offing. The realisation of such transformation, however, will be tenable only if these provisions are fully implemented. It is important to point out that the mere promulgation of a robust Constitution does not necessarily guarantee judicial transformation. What really matters is how seriously the Constitution is implemented to ensure such transformation. This chapter therefore critiques the process of judicial transformation in the country in the post-2007 period.

The state of Kenya's judiciary in the pre-2007 period

The emergence and evolution of Kenya's judiciary can be traced to the East African Order in Council of 1897.[5] Under this regime, the judiciary was not only based on a tripartite division of subordinate courts into Native courts, Muslim courts and those staffed by administrative officers and magistrates, but also established a dual system of superior courts – one for Europeans and the other for Africans.[6] Notwithstanding this formal structure, it is believed that the need to have a network of dispute resolution mechanisms throughout the country prompted the colonial administration to empower village elders, headmen and chiefs to settle disputes within their vicinity. These traditional dispute resolution mechanisms gradually evolved into tribunals and were therefore accorded

3 See 'Rehabilitating Kenya's Judicial System' http://www.idrc.ca/en/ev-104828-201-1-DO_TOPIC.html (accessed 21 July 2013).
4 Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of governance' (2008) 20/1 (A) 3.
5 See the Judiciary of Kenya website http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=261&Itemid=295 (accessed 21 July 2013).
6 As above.

official recognition in 1907, upon the promulgation of the Native Courts Ordinance.[7]

It is noteworthy that prior to Kenya being declared Britain's protectorate, during the reign of the Imperial British East African Company (IBEAC), administration of justice was haphazard.[8] This indeed impaired the development of the country's judicial system.[9] During this period, administration of justice was neither consistent nor continuous, as the IBEAC handled different regions of the country differently. For example, coastal Kenya had Islamic courts administering justice, while a totally different system was applied in other parts of the country.[10]

The 1907 Native Courts Ordinance therefore sought to reorganise the country's justice system by authorising the Chief Native Commissioner to set up, control and administer the existing tribunals.[11] Consequently, tribunals were established at the divisional level of each district and a *Liwali* was appointed at the Coast to adjudicate disputes arising in the Muslim community. This essentially meant that one could appeal against the decisions of these tribunals to the District Officer (DO), District Commissioner (DC) and finally to the Provincial Commissioner (PC). The Supreme Court was the highest court of appeal in the land.[12]

In 1930, the Native Appeals Tribunal's Ordinance[13] was promulgated. This legislation, amongst other things, limited the number of elders sitting on a tribunal. It also made it a prerequisite for the person recording the tribunal's proceedings to be literate.[14] The progress registered by these tribunals was very significant, leading to their replacement with courts similar to those that served non-Africans. In 1950, the colonial administration therefore enacted the African Courts Ordinance, which abolished the tribunals.[15] This period also marked the beginning of restructuring of the country's court system. The Chief Justice headed the new system, while the Registrar of the Supreme Court carried out the administrative duties.[16] Experienced judges and magistrates were also appointed to administer justice in these courts. On the other hand, Muslim courts, which were classified as subordinate courts, were headed by a Chief Kadhi. In spite of this restructuring, however, the African courts remained

7 As above.
8 J Gitau 'Kenya's constitutional reform: The Kadhi's court debate' (2010) *Judiciary Watch Report* 180.
9 YP Ghai & JP McAuslan *Public Law and political change in Kenya: A study of the legal framework of government from colonial times to present* (2001) 125.
10 Gitau (n 8 above).
11 See the Judiciary of Kenya website (n 5 above).
12 As above.
13 As above.
14 As above.
15 As above.
16 As above.

part of the Provincial Administration and not the judiciary.[17] This was perhaps motivated by ethnic and racial considerations perpetuated by the colonial policies of segregation. It was not until 1962 when these courts were eventually transferred to the judiciary.[18]

When Kenya attained her independence in 1963, the judiciary was further reoriented to accommodate the socio-political changes the country was experiencing. In the main, there was the pressing need to balance the racial composition in key governmental institutions. In the case of the judiciary, this necessitated the establishment of the Judicial Service Commission (JSC) that would ensure unbiased appointments of judicial officers. These developments also saw the establishment of the Court of Appeal, and in 1964, the renaming of the Supreme Court as the High Court.[19] To aid the process of reorientation and restructuring of the judiciary, several legislations were enacted in the early years of the country's independence. For instance, in 1967, the Judicature Act,[20] Magistrates' Courts Act[21] and the Kadhis Courts Act[22] were enacted.

As pointed out elsewhere above, the country's judiciary has encountered numerous handicaps over the period of its subsistence. Such handicaps include inadequate legislative and institutional frameworks for appointment of competent judicial officers; the apparent appointment of judicial officers on the basis of tribalism, cronyism and personal loyalties; allegations of corruption and related malpractices; and political interference.

Grand corruption was the hallmark of the country's justice system in the period prior to the 2007 elections.[23] Amongst the host of corrupt activities reported include judges ruling in favour of litigants without regard to merit, misinformed litigants missing their court appearances, and lack of court reporting leading to decisions that ignored precedents.[24] This state of affairs would have gone unattended had it not been for the intervention of government in 2003, which set up a committee to review the integrity of the judiciary. In a report presented to then Chief Justice, Evans Gicheru, the committee alleged that a total of 105 judicial officers, including 87 magistrates and 23 judges, acted corruptly.[25] Judges implicated in the report were given the option to either resign or be investigated by independent tribunals.[26] The refusal of five judges to resign

17 As above.
18 As above.
19 As above.
20 Chap 8, Laws of Kenya.
21 Chap 10, Laws of Kenya.
22 Chap 11, Laws of Kenya.
23 See 'Rehabilitating Kenya's Judicial System' http://www.idrc.ca/en/ev-104828-201-1-DO_TOPIC.html (accessed 21 July 2014). See also 'Report of the Task Force on Judicial Reforms in Kenya' Government Printer, Nairobi, August 2009.
24 As above.

prompted the President to set up two tribunals to investigate the corruption allegations.[27]

At another level, the inadequacies of the then subsisting legal and institutional frameworks were a clog to judicial transformation in the country. For slightly more than four decades, Kenya prided itself in a Constitution and a legal system aped from its former British coloniser.[28] The now repealed Constitution granted judges untrammeled security of tenure, meaning they could only be removed from office upon proof of inability to dispense their functions, or for misbehaviour, or upon attaining the age of 74 years.[29] Where there was need to remove a judge from office, the President could appoint a tribunal to investigate the judge's conduct and suspend the judge from exercising the functions of his/her office pending the decision of the tribunal.[30] Although security of tenure is ideally meant to strengthen the independence of judicial officers, using it as a shield, judicial officers successfully evaded accountability measures, leading to corruption, incompetence and indolence.

Again, the repealed Constitution did not adequately guarantee judicial independence in so far as it vested upon the President enormous powers and overwhelming influence over the executive, judicial and legislative functions of government. For instance, it mandated the President to appoint the Attorney-General,[31] Chief Justice and other judges.[32] As already mentioned above, the question of determining the removal of these judicial officers was also vested in the President who by law was required to appoint a tribunal in this regard. Democracy, strictly so-called, was therefore not tenable in Kenya, mostly due to an 'authoritarian Constitution' that vested enormous powers in the presidency. Disquiet with the overly amended Constitution, coupled with detest for the abuse of executive powers by incumbents, led to the agitation for constitutional reforms. It was strongly believed that only comprehensive constitutional reforms could guarantee a positive transformation of the judiciary by,

25 In September 2003, the Hon Justice Aaron Ringera and his committee prepared and presented a report on corruption and integrity in the judiciary to the Chief Justice Evans Gicheru. See 'ICJ Kenya's judicial reform newsletter' Issue 1, December 2003 http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.icj-kenya.org%2Findex.php%2Fresources%2Fnewsletters-bulletins%3Fdownload%3D65%3Aicj-kenyas-judicial-reform-newsletter-issue-1-dec-2003&ei=OAv-UsCBGbDe7AbI9oDIAg&usg=AFQjCNHJ4tMA-VNkc9l2EWfaEVyaoH612w&bvm=bv.61190604,d.bGQ (accessed 21 July 2014).
26 As above.
27 As above.
28 See the Constitution of the Republic of Kenya, adopted in 1963. This Constitution was subsequently repealed on 27 August 2010 following a successful referendum that led to the Promulgation of a new Constitution.
29 Sec 62(1) & (2).
30 Sec 62(4).
31 Sec 109.
32 Sec 61.

amongst other things, ensuring separation of powers and bringing to an end the abuse of executive powers.

Although the agitation for constitutional reforms begun in the early 1990s, initial attempts at comprehensive reforms were given legal effect in 1998, when the Constitution of Kenya Review Act was enacted.[33] These attempts, however, were not immediately fruitful because the then Kenya African National Union (KANU) government was not comfortable with the scope of the potential reforms. Most contentious were proposals on the devolution of powers through a federal system of government and the limiting of the powers of the President through the creation of the office of a Prime Minister with 'executive powers'.[34]

The wrangles between the government and opposition parties saw the country go into the 2002 elections without effecting substantial legislative reforms. Principally, the constitutional review process was hampered by divisive politics, animated by high levels of political posturing and discord. More often than not, national interests were traded off against the sectarian interests of politicians and other decision-makers. Without constitutional reforms, there were no judicial reforms.

Consequently, when the country was engulfed in post-elections anarchy in 2007, the international community, rather than the country's judiciary, was found to be a more suitable mediator.[35] This was somewhat a 'wake up call' to the country as a whole. A lasting solution needed to be found very urgently to restore peoples' confidence in the country's key institutions – the legislature, judiciary and executive. In a way, the anarchy witnessed in the aftermath of the 2007 elections became the country's turning point in so far as legislative and institutional reforms in the country were concerned. Judicial transformation was identified as one of the key institutional reforms the country desperately needed.

An overview of the approaches to judicial transformation in Kenya

After the 2007 post-elections violence, it was obvious that the country was in desperate need of a 'watertight' judicial system that would ensure greater citizens' participation and promote accountability and

33 See the Constitution of Kenya Review Act 13 of 1997. According to sec 2A(c) of the Act, the purpose the Constitution review process was to secure provisions in the Constitution 'recognising and demarcating divisions of responsibility among the state organs of the executive, the legislature, and the judiciary so as to create checks and balances between them and ensure accountability of the government and its officers to the people of Kenya'.

34 See Kituo Cha Katiba 'Key historical and constitutional developments' http://www.kituochakatiba.co.ug/constkenya.htm (accessed 1 September 2012).

35 Human Rights Watch (n 4 above).

transparency in the conduct of public affairs. Characteristically, such a judicial system should be able to provide equal opportunities to all litigants without regard to status, age, gender, ethnicity, race or political affiliation. Secondly, it should be an empowered judiciary that would determine, without undue interference, the question of transfer of political power and periodic renewal of political leadership. Thirdly, without compromising its deserved independence, the judiciary should have a good working relationship with other state organs, such as the legislature, the executive, National Human Rights Institutions, as well as Non-Governmental entities. Lastly, it should uphold the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.

With these characteristics in mind, the search for a transformed judiciary in Kenya begun in earnest after the Grand Coalition government was sworn in on 28 February 2008. In 2009, a taskforce was set up by the government to propose ways in which the judiciary could be reformed.[36] Amongst other things, the Task Force identified several challenges that impaired the judiciary from performing its functions effectively. These challenges included:[37]

(i) Complex rules of procedure that undermine[d] access to justice and expeditious disposal of cases;

(ii) Backlog and delays in the disposal of cases thereby eroding public confidence in the Judiciary;

(iii) Manual and mechanical systems of operations that affect[ed] efficiency in service delivery;

(iv) Inadequate financial and human resources that contribute[d] to case backlog;

(v) Inability to absorb donor funds due to complex procurement and other financial procedures;

(vi) Unethical conduct on the part of some judicial officers and staff that impede[d] the fair and impartial dispensation of justice;

(vii) Weak administrative structures that undermine[d] the effective administration of courts;

(viii) Lack of operational autonomy and independence;

(ix) Poor terms and conditions of service that [made] it difficult for the Judiciary to attract and retain highly qualified professionals amongst its ranks;

(x) Less than transparent procedures for the appointment and promotion of judicial officers particularly Judges; and

36 See 'Report of the Task Force on Judicial Reforms in Kenya' Government Printer, Nairobi, August 2009.

37 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 1 - 2.

(xi) Lack of effective complaints and disciplinary mechanisms to deal with misbehaviour by Judges.

The Task Force made numerous recommendations for judicial reforms as well as the implementation strategies for those recommendations.[38] However, it was not until a new Constitution was promulgated on 27 August 2010, when the dawn of true judicial transformation became apparent. The Constitution of 2010 envisages characteristics of a progressive judiciary and provides a framework through which the country's judiciary could be transformed. What follows is an analysis of the approaches undertaken to realise judicial transformation in Kenya following the promulgation of the Constitution of 2010.

Constitutionalisation of the doctrine of judicial independence

Judicial independence is an important concept that has classically been taken to mean that judges should be free from Executive interference. However, in modern times, the doctrine has correctly been understood to require judges to be free from both outside and inside pressure, notwithstanding its source. This essentially means the definition of judicial independence can no longer be restricted to the prohibition of state interference with the judiciary. This is because non-state actors, such as the media and multinational corporations could also pose a threat to judicial independence. Internal pressure could also compromise on judicial independence.

An independent judiciary is unquestionably crucial to the thriving of democracy and to the successful negotiation of political transitions. This independence may be secured by, for example, the charging of judges' salaries on the Consolidated Fund, separation of the judiciary from parliament, security of tenure of office and judicial immunity. It should be noted, however, that complete independence would be extremely difficult because the operation of the judiciary is a government responsibility, hence the reason it is considered to be one of its three arms. This fact notwithstanding, there are certain elements in the 2010 Constitution that guarantee the judiciary a greater degree of independence than was ever experienced before. Three of these elements are discussed below.

Mode of appointment of judges

In the previous constitutional dispensation, judicial independence was compromised at the point judges were appointed. Frequently, the process was politicised or dominated by the executive. Qualifications for

38 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) chap 12.

appointment of judges were also skewed to favour a small fraction of legal professionals. As was correctly pointed out by the Task Force on Judicial Reforms:

> [O]ne of the causes of loss of public confidence in the Judiciary has been the use of non-transparent procedures in the appointment of Judges … The process through which candidates for appointment are currently identified and vetted by the JSC is neither transparent, nor based on any publicly known or measurable criteria.[39]

On the qualifications for appointment of judges, sections 61(3) of the repealed Constitution only regarded a restricted category of persons to have been duly qualified. Accordingly:

> A person shall not be qualified to be appointed a Judge of the Court of Appeal and the High Court unless:
>
> (a) he is, or has been, a Judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court; or
>
> (b) he is an advocate of the High Court of Kenya of not less than seven years standing; or
>
> (c) he holds, and has held for a period of, or for periods amounting in the aggregate to, not less than seven years, one or other of the qualifications specified in paragraphs (a), (b), (c) and (d) of section 12(1) of the Advocates Act as in force on 12th December, 1963.[40]

These qualifications were clearly not sufficient to ensure the appointment of appropriately qualified and experienced persons. As a result of the insufficiency of the qualifications, many 'would be qualified' persons could not be appointed as judges. Apart from that, the President was mandated to unilaterally appoint judges. Judges, apart from the Chief Justice, were appointed by the President on the advice of the Judicial Service Commission (JSC) which by no means could be said to be independent.[41] In the case of the Chief Justice, the advice of the JSC was not necessary as the Constitution mandated the President to appoint the office bearer unilaterally.[42]

It is equally important to point out that the process of appointment of judges, in sharp contrast with that of appointment of magistrates, was not transparent and competitive in the sense that it was not preceded by advertisement, vetting and interview of suitably qualified candidates.[43]

39 See Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 23 - 24.
40 See sec 61(3) of the Constitution of Kenya 2008 Revised Edition.
41 As above, sec 61(2).
42 As above, sec 61(1).
43 See Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 26.

The approach therefore denied many interested and qualified Kenyans the opportunity to serve as judges.[44]

Under the 2010 Constitution, however, the mode of appointment of judges has been couched in such a way as to ensure greater independence of the judiciary. Firstly, the President can no longer unilaterally appoint judges. The Constitution is categorical that the Chief Justice and the Deputy Chief Justice can only be appointed by the President in accordance with the recommendation of the JSC and subject to the approval of the National Assembly.[45] A similar process applies with respect to other judges except that in their case, the approval of the National Assembly is not necessary.[46] As will be shown elsewhere below, the process of appointment of judges is now more transparent since the current JSC is more independent than its predecessor.

Secondly, to ensure the appointment of appropriately qualified and experienced persons, the Constitution has expanded the scope of qualifications for appointment of judges. Thus, the Chief Justice, the Deputy Chief Justice and other judges of the Supreme Court are appointed from amongst persons who have at least fifteen years of experience, either as judges of superior courts, or as distinguished academics, judicial officers, legal practitioners or have such experience in other relevant legal fields.[47] The same qualifications apply to judges of the Court of Appeal, the High Court and judges of the Industrial Court and the Land and Environment Courts except that these courts require persons with lesser experience of at least ten years.[48] Judges of the Industrial Court are expected to be more specialised in the law and practice of employment and labour relations[49] just as the Environment and Land Court calls for expertise in the law of real property and environment.[50] In addition, a person qualifies for appointment as judge if s/he holds a recognised degree in law[51] and has a high moral character, integrity and impartiality.[52]

Thirdly, the new constitutional dispensation has necessitated the formulation of a new process of appointment of judges. For transparency, the Judicial Service Commission Act requires the JSC to constitute a selection panel to consider applications for recommendation for appointment to judgeship.[53] Procedurally, where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within 14 days

44 As above.
45 Constitution of Kenya 2010, art 166(1)(a).
46 Art 166(1)(b).
47 Art 166(3).
48 Art 166.
49 The Industrial Court Act 20 of 2011, sec 6(b).
50 The Environmental and Land Court Act 19 of 2011, sec 7(1)(b).
51 Constitution of Kenya 2010, art 166(2)(a).
52 Art 166(2)(c). Section 7(1)(d) of the Environment and Land Court Act specifically provides that judges must meet the requirements of chapter six of the Constitution.
53 See Judicial Service Commission Act 11 of 2011, sec 30(1) & (2).

advertise such a vacancy.[54] In response to such an advertisement, persons interested in seeking consideration for nomination and recommendation for appointment will thereafter complete and file a prescribed application form and comply with all requirements described therein.[55] The applications shall thereafter be reviewed by the JSC and background investigations conducted on the suitability of the applicants.[56] At the close of the application period, the JSC is by law required to publish the names of all the applicants.[57] Once all this is done, interviews shall be conducted and the names of successful applicants forwarded to the President for appointment.[58]

The above stipulated procedure clearly provides equal employment opportunities in the judiciary to all qualified persons without regard to one's status, age, sex, ethnicity, race or political affiliation. It can therefore be argued that the mode of appointing judicial officers, more particularly judges, is more objective and transparent in the current constitutional dispensation, as opposed to that of the former.

Security of tenure

Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause. Such removal would demand formal proceedings with clearly stipulated procedural protections afforded to the affected judicial officer. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in consideration of cases.[59] Security of tenure therefore means that, only in exceptional circumstances that are prescribed by the law, may a judge be removed from office.

It is rather unfortunate that although it provided for security of tenure, the repealed Constitution had glaring gaps in matters concerning the removal of judges from office. Such gaps made it exceptionally difficult for the judiciary to operate as an independent entity. The first gap related to the procedure for removal of judges. The Constitution provided for only one method of initiating such removal, that is: 'If the Chief Justice represents to the President that the question of removing a puisne judge … ought to be investigated.'[60] This simply meant that no one but the CJ had the power to initiate the process of removal of judges from office. This

54 See First Schedule to the Judicial Service Commission Act, sec 3(1).
55 As above, sec 4(2)
56 As above, sec 6.
57 As above, sec 9(1)(a).
58 As above, sec 10.
59 US Agency for International Development *Guidance for promoting judicial independence and impartiality* (2002) 39.
60 Sec 62(5) of the Repealed Constitution.

partly explains why the JSC lacked any institutionalised mechanism to receive and process complaints that could initiate the removal process.[61]

Another glaring gap related to the grounds for removal of a judge. The Constitution provided for only two grounds, namely, 'inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour …'[62] A judge's incompetence therefore did not form the basis of his or her removal from office. This explains why gross incompetence was countenanced, entertained and largely went unpunished.

In order to safeguard the independence of the judiciary, the Constitution of 2010 has attempted, in numerous ways, to secure the tenure of judges. In the main, the Constitution expressly states that a judge may vacate office by reason of retirement, death, resignation or removal.[63] Unlike its predecessor that gave Parliament the responsibility to determine judges' retirement age,[64] the Constitution of 2010 expressly provides for the retirement age of judges.[65] In the case of the office of Chief Justice, it gives one the choice either to hold office for a maximum period of ten years or until attaining the retirement age of seventy, whichever is earlier.[66] Thus, one can only be the Chief Justice for a maximum period of ten years, a marked departure from what obtained in the previous constitutional dispensation.

The 2010 Constitution also expands the grounds for removal of a judge from office beyond what obtained in the repealed Constitution. Accordingly, a judge may be removed from office on grounds of inability to perform their functions due to mental or physical incapacity; breach of a code of conduct prescribed for judges by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour.[67]

The procedure for removal of a judge has also been firmed up to prevent any possible abuse by an individual. Thus, the removal of a judge may be initiated only by the JSC acting on its own motion, or on the petition of any person.[68] The CJ can no longer unilaterally initiate the process of removal of a judge.

61 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 28.
62 Sec 62(3) of the repealed Constitution.
63 Constitution of Kenya 2010, art 167.
64 See sec 62(1) of the repealed Constitution.
65 Constitution of Kenya 2010, art 167(1).
66 Art 167(2).
67 Art 168(1)(a) - (e).
68 Art 168(2).

Financial security and independence

Another important element of judicial independence is financial security and independence. Like fear of dismissal, financial fear is a great threat to judicial independence. First, a judge may compromise justice for fear of reduction of his or her salary. Secondly, the judiciary may not be able to pursue justice effectively if its finances are controlled by another entity. The fact that another arm of government is controlling the funds needed by the judiciary in its operations may be sufficient incentive to make the judiciary bow to its whims or directions.

The 2010 Constitution secures financial independence of the judiciary in two main ways. First, it guarantees that

> the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.[69]

Secondly, it provides for the establishment of a Judiciary Fund to be used for administrative expenses of the judiciary and 'such other purposes as may be necessary for the discharge of the functions of the Judiciary'.[70] Upon approval of judicial financial estimates by the National Assembly, the expenditure of the judiciary becomes a charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund.[71] This way, the judiciary cannot be arm-twisted by the other arms of government when requesting for funds to execute its mandate.

Constitutional entrenchment of ethics and integrity in the judiciary

As correctly pointed out by the Task Force on Judicial Reforms in Kenya:

> Ethics and integrity are fundamental pillars of an independent, efficient, and accountable judicial system. Judicial officers and staff are expected to conform to high moral and ethical standards of behaviour befitting persons mandated to safeguard the law and administer justice. They are also expected to be above reproach, scrupulously impartial and fair in their judicial functions as well as in their public and private lives.[72]

Notwithstanding this assertion, corruption remained one of the greatest challenges to the judiciary in the period prior to the enactment of the 2010 Constitution. In fact the Task Force conceded that, whereas there were

69 Art 160(4).
70 Art 173(2).
71 Art 173(4).
72 Report of the Task Force on Judicial Reforms in Kenya (n 36 above) 73.

measures to address corruption within the judiciary, the vice was still rampant, leading to low public confidence in the judicial process.[73]

With the inception of the 2010 Constitution, however, there is a glimmer of hope that corruption in the judiciary will soon be a thing of the past. Pursuant to schedule six of the Constitution, mechanisms and procedures for vetting the suitability of all judges and magistrates who were in office under the old dispensation was established.[74] Parliament passed the Vetting of Judges and Magistrates Act, 2011.[75] By virtue of this Act, the Vetting of Judges and Magistrates Board was constituted to determine the suitability of all the then serving judges.[76] The Board delivered its initial decision that saw four Court of Appeal judges relieved from office. These judges included Riaga Omollo, Samuel Bosire, Emmanuel Okubasu and Joseph Nyamu.[77] Thereafter, more judges were declared unsuitable to hold office due to their past corruption records.[78] Generally, the vetting process is intended to ensure that all judicial officers measure up to the functions they have been employed to perform by conforming to the ethics and integrity of the offices they hold.

In addition to requiring the vetting of judicial officers, the Constitution also has numerous provisions on ethics and leadership integrity. Chapter of the Constitution, for example, deals with leadership and integrity. Article 73(2) lists the guiding principles of leadership and integrity to include:

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by –

(i) honesty in the execution of public duties;

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

73 As above.
74 Constitution of Kenya 2010, schedule six, art 23(1). See also art 24(1) of the Constitution which required the then Chief Justice to vacate office within sixth months from the effective date of the Constitution to pave way for the appointment of a new Chief Justice.
75 The Vetting of Judges and Magistrates Act 2 of 2011.
76 Sec 23(2).
77 See T Maliti 'Four Kenyan Appeal Court Judges declared unfit for office' http://www.icckenya.org/2012/04/four-kenyan-appeals-court-judges-declared-unfit-for-office/ (accessed 15 May 2012).
78 For more information on the current status on the vetting of Magistrates and Judges visit the Vetting of Judges and Magistrates Board website http://www.jmvb.or.ke/ (accessed 14 May 2014).

(e) discipline and commitment in service to the people.

These principles bind all public and state officers, including judicial officers. If strictly enforced, these principles have the potential to enhance standards of integrity and eliminate potential conflicts of interest in the judiciary.

A restructured court system

In his maiden progress report on the Transformation of the judiciary, Chief Justice Willy Mutunga described the state of the judiciary as he found it when he took office as follows:

> We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic … The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralised. Accountability mechanisms were weak and reporting requirements absent … That is the old order.[79]

As a way of facilitating the emergence of a new, transformed judicial order, the 2010 Constitution lays the foundation that permits the judiciary to effectively address its internal matters of governance, administrative systems and processes. In the main, the Constitution provides that the 'judiciary shall not be subject to the control or direction of any person or authority' when performing its functions.[80] On this basis, the judiciary can come up with administrative systems and processes that will guarantee its smooth operation.

For ease of management, the 2010 Constitution expressly acknowledges two tiers of courts: superior and subordinate courts. Superior courts comprise the Supreme Court, Court of Appeal, High Court and other courts with the status of the High Court with competence to hear and determine disputes relating to employment and labour relations and the environment and land.[81] Subordinate courts include the Magistrates courts, Kadhis courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament.[82] Each of the superior courts has a designated head who is elected by other judges to serve as the 'overseer'. Accordingly, the Supreme Court is headed by a president, who

79 See the 'Judiciary transformation framework 2012-2016' 8 http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary%27s%20Tranformation%20Framework-fv.pdf (accessed 14 May 2014).
80 See Constitution of Kenya 2010, art 160(1).
81 Art 162(1) & (2).
82 Art 162(4).

is the Chief Justice;[83] the Court of Appeal by the President of the Court of Appeal;[84] and the High Court by the Principal Judge.[85]

The Constitution also establishes two new offices in the judiciary: the office of the Chief Registrar of the judiciary,[86] to be the chief administrator and accounting officer of the judiciary; and the office of the Deputy Chief Justice to act as the deputy head of the judiciary.[87] This arrangement is plausible as it enhances clarity in organisational and reporting lines amongst senior judicial officials. The judiciary can use this arrangement to build up operational structures that will eventually facilitate effective steering, designing and implementation of its programmes.

A more empowered Judicial Service Commission

The Judicial Service Commission (JSC) is the body bestowed with the responsibility of promoting and facilitating 'the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice'.[88] Amongst its many tasks the JSC is expected to:[89]

- Recommend to the President persons for appointment as judges;
- Review and make recommendations on the conditions of service of – (i) judges and judicial officers, other than their remuneration; and (ii) the staff of the Judiciary;
- Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
- Prepare and implement programmes for the continuing education and training of judges and judicial officers; and
- Advise the national government on improving the efficiency of the administration of justice.

Arguably, the establishment of the JSC was intended to be the optimum solution in ensuring a fair and transparent process of appointing judicial officials, whilst safeguarding against excessive 'tribalisation' and politicisation of the judiciary. Under the repealed Constitution, the JSC was not an independent body. Rather, it was composed of five members who were considered 'insiders' for they all owed their positions directly to the President. These included the Chief Justice (chairperson), the Attorney-General, a judge of the Court of Appeal, a judge of the High

83 Art 163(1)(a).
84 Art 164(2).
85 Art 165(2).
86 Art 161(2)(c).
87 Art 161(2)(b).
88 Art 172(1).
89 Art 172(1)(a) - (e).

Court, and chairperson of the Public Service Commission (PSC).[90] Because of the skewed composition, judicial appointments were widely criticised as a form of patronage and a source of influence that was used to serve short-term political interests.

Under the new constitutional dispensation, however, the JSC is more representative in composition and less susceptible to executive and political interference. Each cadre of the courts is entitled to elect one representative to the JSC. This translates into a Supreme Court judge elected by the judges of the Supreme Court, a Court of Appeal judge elected by appellate judges, a High Court judge elected by judges of the High Court and a magistrate elected by magistrates.[91] The Law Society of Kenya, being the statutory organisation representing the legal profession is, for the first time, entitled to elect two representatives, a man and a woman,[92] while one person nominated to represents the Public Service Commission (PSC).[93] The general public has also not been left out as it has two representatives in the Commission, appointed by the President.[94] The Attorney-General, as the chief legal advisor of the state, is also a member of the Commission.[95] The Chief Justice chairs the JSC while the Chief Registrar of the judiciary serves as its Secretary.[96]

The current set-up of the JSC is expected to enhance the position of the judiciary as an independent arm of government and at the same time create a stronger guarantee of scrutiny of possible candidates for judicial office. It also guarantees greater public protection against political or capricious appointments. Above all, it is consistent with international best practices and standards.

Conclusion

The 2010 Constitution has made notable inclusions which can be the basis of judicial transformation in Kenya. These include, amongst others, the constitutionalisation of the doctrine of judicial independence, entrenchment of ethics and integrity in the judiciary, restructuring of the court system and the establishment of a more empowered JSC. These constitutional developments are indicative of the fact that judicial transformation in Kenya is in the offing. Hopefully, Kenya will soon have a vibrant judiciary that will ably determine the socio-political transformation of the nation in unprecedented ways. This, however, will be possible only if the judiciary is bold enough to sever its traditional and

90 See sec 68(1) of the repealed Constitution.
91 Constitution of Kenya 2010, art 1721(2)(b) - (d).
92 Constitution of Kenya 2010, art 171(2)(f)
93 Constitution of Kenya 2010, art 171(2)(g).
94 Constitution of Kenya 2010, art 171(2)(h).
95 Constitution of Kenya 2010, art 171(2)(e).
96 Constitution of Kenya 2010, art 171(3).

unhealthy bond with the executive. As stated above, the mere promulgation of a robust Constitution does not in itself guarantee judicial transformation. What really matters is the holistic transformation of individuals, systems and structures, including personal attitudes, value systems, and the nature and the composition of the bench and administrators in the judiciary.

The experiences and approaches of the judiciary in Kenya can provide many useful lessons to other African countries, including, principally, that a transformative judiciary in any country should have, as its ultimate purpose, the desire to foster strong, accountable and efficient institutions. In this regard, the judiciary should take the necessary initiatives to ensure that it operates independently, asserts its impartiality and commits itself to a raft of reforms aimed at influencing the political transformation of the nation. Indeed, the 2010 Constitution provides the platform for the realisation of all these values because it envisages the establishment of inclusive, accountable, participatory, decentralised and transparent institutions of governance. The Constitution also espouses multiculturalism, diversity and the promotion of gender equity as well as the rights for vulnerable and victimised groups. All these are necessary ingredients of a transformed, efficient judiciary.

CHAPTER 2

THE LEADERSHIP AND INTEGRITY CHAPTER OF THE 2010 CONSTITUTION OF KENYA: THE ELUSIVE THRESHOLD

Juliet Okoth

Introduction

The promulgation of the 2010 Constitution marked a new beginning in governance of the people of Kenya.[1] Amongst its revolutionary chapters is the one on leadership and integrity.[2] The chapter is predicated upon the assumption that state officers are the nerve centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. A state officer is required to exercise authority in a manner that is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office.[3] The inclusion of this chapter was informed by Kenya's history where state officers have mainly abused their offices to enrich themselves, their friends and family. The chapter on leadership and integrity would ensure that state officers are people of integrity, hence uproot the culture of impunity and bad governance that has been the burden of Kenya.[4]

The question that then comes to mind is what exactly are the integrity standards set by the Constitution? This question has informed the many cases that have been filed before the Kenyan courts challenging the suitability of certain individuals to hold state office. The High Court in *Trusted Society of Human Rights Alliance v The Attorney General and Others,*[5]

1 The new Constitution was promulgated on 27 August 2010. For further details on its provisions, see: Constitution of Kenya (promulgated 27 August 2010) http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (accessed 3 May 2014).
2 Chap Six.
3 Art 73(1)(a).
4 *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others* Petition No 552 of 2012 para 4.
5 *Trusted Society of Human Rights Alliance v The Attorney General and Others* Petition No 229 of 2012.

while disqualifying Mr Mumo Matemu from heading the Ethics and Anti-Corruption Commission, established that the constitutional standards of integrity did not need to rise to the level of criminality, and unresolved questions of a candidate's character would suffice to make them fail the integrity test.

The judge's verdict that the principles of leadership and integrity – espoused in article 73 of the Constitution – override the 'presumption of innocence until proven guilty' principle, relied more on the spirit of chapter by stating in the ruling that Kenyans were very clear in their intentions when they entrenched chapter in the Constitution. They were singularly aware the Constitution has other values such as the presumption of innocence until proven guilty.

The High Court asserted that there is no requirement that an officer's behaviour, attribute or conduct in question has to rise to the threshold of criminality. That is, the test of integrity is more than having or not having a criminal case pending in court. The court operationalised integrity thus,

> to my mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to national values enumerated in the Constitution.[6]

The High court further asserted that vetting and appointing authorities have a duty to exercise judicious rigour and thoroughness in vetting of public officers. That is, upholding the principles enshrined in chapter is an obligation for those appointing or vetting them.

Matemu's case raised important rules of the thumb on interpreting or applying Chapter of the Constitution.

(1) First, *do not appoint if* the person is facing allegations that are 'serious enough to prejudice any reasonable person's thinking regarding his integrity and suitability' to be in that office.

(2) Second, before one can be *cleared* for a public office there should be evidence that adequate investigations had been done on the person's integrity allegations and that a candidate's qualifications and attributes 'must be weighed against the constitutional test as contained in Chapter'.

(3) Vetting institutions and agencies have a duty to discharge their constitutional obligations of ensuring that public officers meet the criteria set.

(4) Where/when allegations are made to the effect that vetting organs did not do their work, courts are obligated to investigate whether the process of recruitment met the constitutional requirement.

6 *Trusted Society of Human Rights Alliance* (n 5 above) para 107.

The Court of Appeal overturned this decision and Mr Mumo Matemu's appointment was confirmed.[7] Perhaps the most intriguing of the integrity threshold cases was the one that challenged the eligibility of the current President and his Deputy to run for the 2013 presidential elections, the *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others* case.[8] The Court was faced with the difficulty of interpreting whether the constitutional criteria for integrity allowed individuals charged in the International Criminal Court (ICC) to run for the highest office in the land. The petition was eventually dismissed, raising the question of what standards have been established by the courts when interpreting the constitutional threshold of integrity.

The court in dismissing the petition, ruled it has no jurisdiction to hear matters on qualification or disqualification of presidential candidates.[9] It stated that any matter relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court including the determination of the question whether such a person meets the test of integrity under chapter of the Constitution in relation to presidential elections.

The court further ruled that the Independent Electoral and Boundaries Commission (IEBC) and the Ethics and Anti-Corruption Commission (EACC) have the necessary powers to inquire into the integrity of persons seeking elective office. Like the previous court decision the court was of the opinion that even if it was found that the third, fourth and fifth respondents did not meet the integrity and leadership test, the institution with the constitutional and statutory mandate to consider this would be the IEBC.

In the *Benson Riitho Mureithi vs JW Wakhungu and 2 Others*,[10] the petitioner filed a petition challenging the constitutionality of the appointment of Ferdinand Waititu, the interested party as the chairman of the Athi Water Services Board by the first respondent, a Cabinet Secretary. He argued that the respondent failed to take into consideration the provisions of article 73 in chapter of the Constitution of Kenya, 2010 when making said appointment. The petitioner enumerated incidents in which the interested party was involved and which questioned his integrity.

It was the respondent's case that matters of integrity fall for determination under the provisions of the Leadership and Integrity Act and The Ethics and the Anti-Corruption Commission Act. The court in

7 *Mumo Matemu v Trusted Society of Human Rights Alliance and Others* Court of Appeal at Nairobi, No 290 of 2012.
8 *International Centre for Policy and Conflict* (n 4 above).
9 *International Centre for Policy and Conflict* (n 4 above) 89.
10 Petition No 19 of 2014.

relying on the aforesaid Acts quoted by the respondents vindicated its jurisdiction by explaining that what was provided in the Leadership and Integrity Act and The Ethics and the Anti-Corruption Commission Act is a system for ensuring observance of the Code of Ethics for public and state officers who are in office and that there were no mechanisms to examine the suitability of a person proposed for appointment to public office.[11] For the elective posts where we have the IEBC with a very clear constitutional and legislative mandate with regard to determining the eligibility of a person intending to vie for elective office, the court stated that there were no such mechanisms for those seeking appointive positions.[12] In this regard the court was persuaded to conduct an inquiry into the issue regarding the propriety of the appointment of Ferdinand Waititu as the Chairman of the Athi Water Services Board.

Having established its jurisdiction, the next question which the court was called to answer was whether a Cabinet Secretary in considering a person for an appointive public office should consider the provisions of chapter of the Constitution. The court bore into its mind that the petitioner's case in the matter was not that the Court should find the interested party unsuitable to serve as the Chairman of the Athi Water Services Board. Rather, the petitioner's claim was directed at the Cabinet Secretary that in exercise of her powers she failed to consider the provisions of the Constitution and therefore appointed a person who fell short of the constitutional criteria. In this regard the Court pointed out that it was not making any decision on the character, integrity or suitability of the interested party but was concerned with whether the Cabinet Secretary, in appointing him Chairman, took into consideration the provisions of the Constitution. The Court went on to find that the Cabinet Secretary failed to act in accordance with the Constitution, and her appointment of the interested party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution. The court in quashing the appointment stated that the Cabinet Secretary failed to conduct an inquiry with regard to the suitability of the interested party under the Constitution, a responsibility that fell on her.[13] That there were serious unresolved questions with regard to the integrity of the interested party which she failed to consider. It was hence her duty to make a determination of the suitability of the interested party in light of chapter of the Constitution.

The Judiciary has the final authority on the interpretation of the Constitution. This makes it key to the effective implementation of the integrity provisions in the Constitution. This chapter is, therefore, confined to a critical analysis of the courts' interpretation of the integrity threshold in the Constitution, including other key issues that arise in the integrity cases, such as *locus standi* and jurisdiction.

11 *Benson Riitho Mureithi* (n 10 above)para 54.
12 *Benson Riitho Mureithi* (n 10 above) para 55.
13 *Benson Riitho* (n 10 above) para 92.

Locus standi

The question of who has the right to bring a claim before the courts was a great hurdle for public interest litigation for a long time. One had to have suffered some personal or direct injury to warrant a standing to institute a claim.[14] This issue has also greatly featured in the integrity cases before the courts. In *Mumo Matemu v Trusted Society of Human Rights Alliance and Others*[15] the appellant questioned the first respondent's standing to bring a petition challenging his suitability for appointment to the Office of the Chairperson of the Ethics and Anti-Corruption Commission. The first respondent had petitioned the High Court and asserted that the appellant had engaged in issues of impropriety while he was a senior officer in a Government institution (Agricultural Finance Corporation). Amongst the allegations of the appellant's misconduct were that he approved loans without security, that he fraudulently paid loans to unknown bank accounts and that the appellant swore an affidavit with false information. The petition in the High Court was allowed leading to the appeal. At the appeal, the appellant submitted that the first respondent, a non-governmental organisation (NGO), had no *locus standi* to lodge the petition at the High Court as the allegations complained were in bad faith and had emanated from a private dispute between directors of a private company. This argument failed.

The Court of Appeal stated that the issue of leadership and institutional integrity of the Ethics and Anti-Corruption Commission was an important one and of public interest. The Court found that in the absence of bad faith, the first respondent, an NGO whose mandate included pursuit of constitutionalism, had the locus to file the petition. The Court of Appeal agreed with the High Court that the standard guide for locus must remain article 258 of the Constitution. The article gives every person a right to institute court proceedings where the Constitution has been contravened or is threatened to be contravened.[16] Apart from acting in one's own interest, court proceedings in such circumstances may also be instituted by a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.[17]

The standard adopted by the Court of Appeal on *locus standi* is one that has been applied by other courts when petitions raising integrity questions

14 *Wangari Maathai v Kenya Times Media* HCCC No 72 of 1994; *Paul Nderitu v Pashito* Holdings HCCC No 3063 of 1997.
15 *Mumo Matemu* (n 7 above).
16 Art 258(1).
17 Art 258(2).

are challenged on account of the right of standing.[18] The courts generally have a tendency to decline to any objection on the right of standing unless it can be shown that the petition is an abuse of judicial process. The following statement by the Court of Appeal clearly illustrates the point when it asserted that:

> … the person who moves the Court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.[19]

The new Constitution of Kenya, enacted in 2010, fundamentally changed the law on *locus standi*. An assertion that a private citizen seeking to enforce a public right would have to demonstrate some special interest can no longer be sustained under the new Constitution. The Constitution, by virtue of articles 3, 22 and 258, gives everyone the right to defend it.[20] The Constitution has broadened the application of *locus standi* to facilitate access to justice by the people. By liberalising the rule on the right of standing, the Constitution has made it possible to effectively question the constitutionality of actions of those who hold public office and prevent violations of the law. Matters of the integrity of individuals seeking to hold public or state offices are by their very nature of public interest. The standard thus adopted by the courts on *locus standi* in the integrity cases is the correct position and conforms to the letter and spirit of the Constitution.

Jurisdiction

The issue of jurisdiction is one of the most fundamental questions that a court needs to establish before proceeding to adjudicate on a matter.[21] This issue has been raised in all cases on the constitutional integrity threshold. A review of the cases shows that the objection often raised is that the High Court cannot exercise jurisdiction on integrity questions when the Constitution and other laws give such authority to other organs. The contention is that the High Court's intervention violates the doctrine of separation of powers.

18 See *Luka Lubwayo and Another v Gerald Otieno Kajwang and Another* Petition 120 of 2013, High Court of Kenya (HCK) Nairobi, para 28; *Benson Riitho Mureithi v JW Wakhungu*, *Cabinet Secretary Ministry of Environment, Water and Natural Resources and the Attorney General* Petition 19 of 2014, HCK Nairobi, paras 59, 60.

19 *Mumo Matemu* (n 7 above) para 31.

20 Art 3(1) states that '[e]very person has an obligation to respect, uphold and defend' the Constitution.

21 *Mumo Matemu* (n 7 above) para 33; see also *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1.

In *International Centre for Policy and Conflict,*[22] the issue of jurisdiction proved to be the most crucial question that eventually determined the outcome of the case. The respondents and interested parties in the case argued that under article 165 of the Constitution, the High Court did not have jurisdiction to deal with a question that essentially challenges the qualification of a candidate seeking to be elected as President of Kenya. They submitted that the court with jurisdiction to hear matters relating to the election of the President was the Supreme Court. The High Court agreed with the respondents. It held that a holistic reading of the Constitution leads to the conclusion that the Supreme Court has the exclusive jurisdiction to deal with any question relating to the election of the President, including whether one is qualified or disqualified to contest the position of President.[23]

The High Court in *Luka Lubwayo*[24] was also faced with the question of jurisdiction. The petitioners in the suit were contesting the integrity or suitability of the first respondent to run for and hold office of Senator. The basis of this petition was that the first respondent, while practicing as an advocate, had misappropriated client funds, and upon due process before the Advocates Disciplinary Committee, was found liable and struck off the Roll of Advocates between 1999 and 2006. In July 2012, upon the respondent's application, he was reinstated into the Roll of Advocates with certain conditions. The petitioners contested that this reinstatement did not overrule the previous findings on the respondent's misconduct.

The petitioners further claimed that the second respondent, the IEBC, had failed to give consideration to the question of the first respondent's integrity or suitability as mandated by article 88(5) of the Constitution, which obligates the second respondent to exercise its powers and perform its functions in accordance with the Constitution and national legislation. Indeed the second respondent's Dispute Resolution Committee had an opportunity to determine the issues raised on the first respondent's integrity or suitability, but it failed to, citing that it did not have jurisdiction and that only the High Court was competent to decide the matter. The petitioners thus asserted that under such circumstances, the High Court had an obligation to step in and investigate whether the first respondent met the constitutional and other legislative requirements to run for Senate.

The respondents, when opposing the petition, argued that the only institution with the mandate to decide on issues relating to integrity and leadership in this circumstance was the IEBC, as provided for under article 88(4)(e) of the Constitution and section 74(1) of the Elections Act. They submitted that the High Court then only had the power for judicial review. The High Court observed that it could not indeed invoke its unlimited

22 *International Centre for Policy and Conflict* (n 4 above).
23 *International Centre for Policy and Conflict* (n 4 above) paras 85 - 89.
24 *Luka Lubwayo* (n 18 above).

jurisdiction as provided in article 165 of the Constitution, 'where Parliament has specifically and expressly prescribed procedures for handling grievances raised by a petitioner'.[25] The Court found that while the IEBC was the organ constitutionally mandated to deal with the question of the first respondent's integrity, it failed and or refused to do so, instead referring the matter to the courts. The Court held that in circumstances such as the one in the case at hand, where the IEBC failed to carry out its constitutional mandate, the High Court then had the mandate to determine the questions on the first respondent's integrity.[26]

In *Mumo Matemu v Trusted Society of Human Rights Alliance and Others,*[27] the appellant challenged the High Court's decision to exercise its jurisdiction to adjudicate the petition that challenged his suitability for appointment to the office of the Chairperson of the Ethics and Anti-Corruption Commission. The main contention by the appellant was that since his appointment had already been gazetted, the High Court could no longer exercise jurisdiction, and the only manner in which he could be removed from office would be through the procedures set out in article 251 of the Constitution and section 42 of the Leadership and Integrity Act. The appellant asserted that the High Court had misapprehended the doctrine of separation of powers which divests the court of jurisdiction to review some decisions and actions of the other branches of Government.

The Court of Appeal, when looking into the issue of jurisdiction, disagreed with the appellant. It found that the petition before the High Court had challenged the constitutionality of the manner and process of the appellant's appointment and was not a removal procedure or a complaint against the appellant in his capacity as a state officer. The Court of Appeal stated that the nature of litigation is not determined by its outcome, but by 'its substance at the time of seizure and proceedings'.[28] In the circumstances, the Court found that an order setting aside the appellant's appointment would flow from a judicial finding that the process and manner of his appointment was unconstitutional and as such, the High Court had rightly exercised jurisdiction.

It is evident from the above cases that the question of jurisdiction is a key issue in cases relating to leadership and integrity. The courts acknowledge that generally, under article 165 of the Constitution, the High Court's jurisdiction is broad enough to review the constitutionality or

25 *Luka Lubwayo* (n 18 above) para 23. See also *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425.
26 This position was also recognised in *International Centre for Policy and Conflict* (n 4 above) para 107.
27 *Mumo Matemu* (n 7 above).
28 *Mumo Matemu* (n 7 above) para 38.

legality of any act carried out by other organs of Government.[29] Nonetheless, the High Court is required to exercise caution before exercising this jurisdiction. The High Court thus has jurisdiction to inquire into matters of integrity relating to elective and appointive public office, but it must first give an opportunity to the relevant constitutional bodies or state organs to deal with any dispute on the same. This formula lends credence to the doctrine of separation of powers in the Constitution, allowing the courts to only intervene when the constitutionally designated organ fails to carry out its constitutional mandate, or carries out the mandate in a manner that contravenes the Constitution.

The constitutional standards of integrity

The decisions

The question that this section seeks to answer is whether the courts have established the standards of the integrity requirement under chapter of the Constitution. In other words, what is the constitutional threshold of integrity?

This question was put to test in *International Centre for Policy and Conflict,*[30] where the petitioners contended that the trial process of the third and fourth respondents before the ICC, up to confirmation of charges, met the necessary legal threshold required by law in Kenya to bar a person from being nominated to contest or assume state office. The third and fourth respondents, the current President of Kenya and his Deputy, are facing

29 Art 165 of the Constitution partly provides:
(1) There is established the High Court, which?
(3) Subject to clause (5), the High Court shall have?
(a) unlimited original jurisdiction in criminal and civil matters;
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of?
(i) the question whether any law is inconsistent with or in contravention of this Constitution;
(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
(iv) a question relating to conflict of laws under Article191**;** and
(e) any other jurisdiction, original or appellate, conferred on it by legislation.

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

charges of crimes against humanity before the ICC.[31] Although the High Court had declared that it had no jurisdiction to decide on the third and fourth respondents' qualification to participate in the presidential elections, it still established its jurisdiction to interpret the constitutional threshold of integrity in light of the dispute before it. One wonders why the High Court decided to proceed to look into the merits of the substantive issues when it had found that in light of the dispute, the Supreme Court was the right forum. By carrying on with the analysis of the substantive issues, the High Court did usurp the power of the Supreme Court, which in this circumstance also has the power to interpret the Constitution.

The High Court observed that to interpret chapter of the Constitution, it would adopt a holistic and purposive interpretation that enhanced good governance, observance of the rule of law and human rights.[32] The Court acknowledged that the purpose of chapter is to set higher standards of integrity for persons seeking to serve as state officers. It defined integrity as the firm adherence to moral and ethical values in one's behaviour. It further stated that:

> Integrity is therefore not only about an individual's own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar's wife: they must be beyond reproach.[33]

To buttress its position, the court agreed with the integrity standard that was set out in *Trusted Society of Human Rights Alliance v The Attorney General and Others,*[34] where the High Court observed that:

> … a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not ... it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.[35]

31 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11; *Prosecutor v Uhuru Muigai Kenyatta,* ICC-01/09-02/11. The case against the President has since been withdrawn, see *Prosecutor v Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015.
32 *International Centre for Policy and Conflict* (n 4 above) para 130.
33 *International Centre for Policy and Conflict* (n 4 above) para 131.
34 *Trusted Society of Human Rights Alliance* (n 5 above).
35 *Trusted Society of Human Rights Alliance* (n 5 above) para 107.

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

Having adopted this standard of integrity, the Court further observed that the standard established by chapter must be weighed against the Bill of Rights in the Constitution. In this aspect, the Court was of the view that the Bill of Rights is a cornerstone of the Constitution and as a result, the rights that it protects 'in particular articles 38 and 50 in the unique circumstances of this case' must prevail over the demands of chapter six. The Court asserted that although the charges that the third and fourth respondents were facing before the ICC were serious, they had not yet been convicted, and until then, they had a right to be presumed innocent until proven otherwise. Recognising that the presumption of innocence ensures a fair trial for anyone before court, the Court reiterated that the right to fair trial could not be limited by virtue of article 25 of the Constitution. In limiting the application of the integrity chapter, the High Court also took into account the political rights of the interested party, The National Alliance Party (TNA), which had nominated the third respondent (Uhuru Kenyatta) as a presidential candidate. The Court held that if the third and fourth respondents were disqualified, the right of TNA to field its candidate for the presidential elections would be prejudiced and by extension, the Court considered that this would also violate the right of the citizens to exercise their democratic right to elect representatives in a free and fair election. The Court found that limiting the interested party's political rights would be inimical to the exercise of democratic rights and freedoms of its members and would disenfranchise the electorate.[36]

Interestingly, the Court, when looking into the effect of the ICC cases on the integrity of third and fourth respondents, came to the conclusion that by virtue of the principle of complementarity under the ICC Statute (also Rome Statute), the ICC and Kenyan courts cannot simultaneously adjudicate over the same matter. As a consequence, the High Court reasoned that only the ICC could bar the third and fourth respondents from participating in the presidential elections, and since there was no such provision in the ICC Statute, the respective respondents could not be barred.[37] The High Court, to rebut its position, stated that there was no evidence that the third and fourth respondents had been subjected to any trial by the local courts or the ICC that resulted in imprisonment for more than six months, and thus, the respective respondents could not be barred from participating in the elections.

36 *International Centre for Policy and Conflict* (n 4 above) paras 139 - 147.
37 *International Centre for Policy and Conflict* (n 4 above) para 152.

The court in *International Centre for Policy and Conflict* also looked into the question of the integrity of the fifth respondent, James Gesami, who was seeking to be Member of Parliament of West Mugirango Constituency. The contention of the fourth petitioner, a civic leader in West Mugirango Constituency, was that the fifth respondent, while serving as the Member of Parliament of West Mugirango Constituency, had engaged in corrupt activities and misuse of public office where he transferred Kshs 1 050 000 to his personal account from the Constituency Development Fund (CDF). The fifth respondent was compelled, by an order of the High Court through the writ of mandamus, to refund the monies. The fourth petitioner asserted that the conduct of the fifth respondent constituted a breach of trust and was contrary to the national values and principles of governance and integrity as stipulated in the Constitution, making the fifth respondent ineligible for elective or being appointed to state office. It is also important to note that the fifth respondent was arrested and faced criminal charges in regards to the same conduct of which he was acquitted after full trial. Consequently, the fifth respondent filed a suit to recover the monies he was compelled to pay to the CDF. Upon reviewing the matter, the High Court found that it would be unreasonable to limit the political rights of the fifth respondent to contest any public office since he had been acquitted of criminal charges.[38]

The threshold applied by the Court in *International Centre for Policy* in respect to the fifth respondent was also applied in *Luka Lubwayo and Another v Gerald Otieno Kajwang and Another.*[39] The High Court in this case also adopted the 'unresolved issues of character' as the threshold on integrity. The High Court made a finding that the first respondent, who was seeking an elective post as the Senator of the county of Homabay, had indeed been struck off the Roll of Advocates for misuse of clients' funds while practicing as an advocate. At the time of the petition, the first respondent had already been reinstated to the Roll of Advocates and given some conditions to fulfill. The Court held that discipline by the Disciplinary Committee *per se* was not a ground for disqualification, once the disciplinary measures have been discharged and the first respondent reinstated to the Roll of Advocates.[40] The Court, to support its finding, relied on the logic that flows from a reading of article 99(2) of the Constitution, which provides that only a person subject to a sentence of at least six months does not qualify to run for a state or public office, which therefore implies that conviction as such is not a basis for disqualifying anyone from running for office.[41]

In addition, the High Court made a distinction between appointive and elective positions. It noted that the only criteria set out for elective

38 *International Centre for Policy and Conflict* (n 4 above) paras 157 - 167.
39 *Luka Lubwayo* (n 18 above).
40 *Luka Lubwayo* (n 18 above) para 38.
41 *Luka Lubwayo* (n 12 above) paras 35 - 38.

positions under article 73(2)(a)(ii) of the Constitution was that the elections should be fair. The Court observed that, 'in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness'.[42]

Analysis

The delicate balance

Establishing the constitutional threshold of integrity has been a difficult task for the courts. At face value, it would seem that the constitutional standard of integrity that our courts recognise was set out in *Trusted Society of Human Rights Alliance v The Attorney General and Others*, where the High Court declared that where there are too many unresolved questions about one's honesty, financial probity, reputation, scrupulousness or commitment to the national values enshrined in the Constitution, amongst others, the person will be said to lack integrity. The High Court in this case was of the view that the standard of integrity in the Constitution did not require that the conduct in question rise to the level of criminality, observing that 'it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity'.[43] This is clearly a high threshold for the integrity test.

Article 10 of the Constitution sets out the national values and principles that bind all state organs, state and public officers and amongst these values is that of 'good governance, integrity, transparency and accountability'.[44] Under article 73 of the Constitution, a state officer is required to exercise authority in a manner that is consistent with the purposes and objects of the Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. Such state officer should also conduct himself in a manner that avoids, 'any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds'.[45] This indicates that the question of integrity must always inform all decisions relating to the governance of the people of Kenya, and is one of the key ideals that we as a nation aspire for. In fact, it has been argued that since the main problem with Kenya's public affairs is poor leadership and corruption, which led to the adoption of a new Constitution to remedy this situation, chapter six on leadership and integrity can be

42 *Luka Lubwayo* (n 12 above) para 40.
43 *Trusted Society of Human Rights Alliance* (n 5 above) para 107.
44 Art 10(2)(c).
45 Art 75.

considered as the soul of the Constitution.[46] An ideal is the conception of perfection and would require the adoption of a high standard of integrity that ensures that only the best persons are entrusted with management of public affairs. In the circumstances, the integrity standard that was adopted by the court in *Trusted Society of Human Rights Alliance v The Attorney General and Others*[47]on unresolved issues of integrity, is the more persuasive and best possible standard that can describe the constitutional integrity threshold. This standard was indeed approved in other High Court decisions, with the court in *International Centre for Policy and Conflict*[48] further observing that a person of integrity must be beyond reproach.

Despite the high integrity threshold that the High Court set out, there has been a great dilemma in its application, in particular, where the integrity standards in the Constitution seem to be in conflict with individual rights guaranteed under the same Constitution. The presumption of innocence has especially been the main counter argument against the question of integrity. In *International Centre for Policy and Conflict,*[49] the court held that political rights under article 38 of the Constitution and the right to a fair hearing, under article 50, which includes the right to be presumed innocent, must prevail over the integrity standards in chapter six. It is curious that the Court came to this conclusion because in effect, it made the integrity standards set out in chapter six of the Constitution redundant.[50] Under the rule of harmony which the Court purportedly used to interpret the Constitution, '[t]he entire Constitution has [to] be read as an integrated whole with no one particular provision destroying the other but each sustaining the other'.[51] The Court, in its decision, destroyed the effect of chapter six, and went against the principle of harmony that it set out to follow.

Whereas the Bill of Rights forms an integral part of the Constitution, it must be read within the context of the constitutional requirements for integrity, and its application should also adhere to the national values and principles in the Constitution. The high standards of integrity in chapter six could not have been included in the Constitution in vain. Their inclusion was informed by the desire to clean up the politics and institutions of governance, thus the need that the provisions in chapter six should have substantive power.[52] An interpretation which in effect makes the chapter

46 S Kimeu *Integrity: The ultimate standard for leadership* (2012) 1.
47 *Trusted Society of Human Rights Alliance* (n 5 above).
48 *International Centre for Policy and Conflict* (n 4 above).
49 As above.
50 Also see L Musumba 'The case for comprehensive scenario building as a means for pre-testing the articles of a proposed constitution to ensure its viability post promulgation: A case study of Kenya' A paper presented at the Constitution-Making in Africa Conference, University of the Western Cape, 13 September 2013, arguing that this decision effectively negated the very essence of chapter six.
51 *International Centre for Policy and Conflict* (n 4 above) para 79.
52 *Trusted Society of Human Rights Alliance* (n 5 above) para 102.

on integrity redundant is repugnant to the letter and spirit of the Constitution.

Although the presumption of innocence is a fundamental right within the right to a fair trial, its overriding value should specifically apply in the particular case where there is the probability of the individual being declared guilty and punished. A distinction needs to be drawn between the process that determines the guilt or innocence of a person for purposes of punishment, and the process where the individual is being vetted for purposes of being rewarded a leadership position.[53] In the latter process, where the person is being vetted for purposes of entrusting him with the management of public affairs, the more persuasive interpretation would be that national values should override individual rights, as observed by the Court in *Trusted Society of Human Rights Alliance v The Attorney General and Others*:

> Kenyans were very clear in their intentions when they entrenched Chapter six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up the State's politics and governance structures by insisting on high standards of personal integrity among those seeking to govern or hold public office.[54]

Furthermore, a declaration that one does not meet the constitutional standards of integrity does not equate one to being guilty. It only requires that an individual's desire to hold public office is put on hold until all outstanding questions on his probity are settled.

The High Court in *International Centre for Policy and Conflict,*[55] when looking into the effect of ICC case on the integrity of the third and fourth respondent, concluded that under the principle of complementarity, it was the ICC that should have determined the respective respondents' suitability to contest. This reasoning is incomprehensible and misguided. The principle of complementarity under the ICC Statute only arises where courts within a national jurisdiction are looking into the same issues in respect of the cases before the ICC.[56] A case looking into the question of integrity of an individual is not similar to a case looking into the same individual's criminal responsibility for international crimes. The cases of the third and fourth respondents before the ICC should have been considered to fall within the category of the unresolved questions on their character. Such a consideration would not make them guilty of the crimes

53 S Kimeu *Integrity: The ultimate standard for leadership* Adili Transparency International 2012, 2.
54 *Trusted Society of Human Rights Alliance* (n 5 above) para 102.
55 *International Centre for Policy and Conflict* (n 4 above).
56 See para 10 of the preamble, and arts 17, 18, 19, 20 and 53 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 90.

they are accused of before the ICC, but would only require that they put aside their ambitions until their names are cleared. Several reasons lend credence to such a conclusion. First, the Constitution itself contemplates the impeachment of a President suspected of having committed a crime under national or international law.[57] By analogy, this provision would also demand that a person seeking to hold the office of the President should not be facing charges of a serious nature like international crimes. Second, the question of integrity also looks into the integrity of the institution in question, and where the working of the institution is likely to suffer because of the personal integrity of the individual seeking to head it, such an individual should not hold such an office.[58] Where a president and his deputy are both required to attend trials before the ICC, discharging their constitutional duties becomes a challenge.[59] There is also the risk of a country suffering in its diplomatic and trade relations with other countries who, as a matter of policy, refrain to deal with suspects of international crimes.

The unresolved question of character standard implies that once all the issues on a person's integrity are cleared, the individual may pursue their desire to hold public office. Thus, in *Luka Lubwayo,*[60] the Court found that although the first respondent, who was seeking to be Senator of Homabay County, had been found guilty for misappropriating client funds and thus struck off the roll, the first respondent had no outstanding issues on his integrity because he had since been reinstated onto the Roll of Advocates. The Court in this respect observed that

> the mere fact that the 1st respondent was *"convicted"* by the Disciplinary Committee of the Law Society of Kenya is *per se* not a ground for disqualification once the *"conviction"* was *"served"* and the 1st Respondent reinstated to the Roll of Advocates.[61]

The same standard was also used by the Court in *International Centre for Policy and Conflict* when it cleared the first respondent to run for Member of Parliament for South Mugirango constituency, upon finding that he had been acquitted of criminal charges in relation to the alleged misappropriated funds of the Constituency Development Fund. An objective evaluation of the two cases shows that the courts came to the right conclusion, as the two respective respondents had no cases pending

57 Art 145(1)(b) of the Constitution.
58 *Centre for PIL and Another v Union of India and Another* Writ Petition No 348 of 2010, cited in *International Centre for Policy and Conflict and 5 Others v The Hon Attorney General and 4 Others* Petition No 552 of 2012, para 134.
59 The difficulty of the President and his Deputy attending trial and carrying out their constitutional duties greatly informed Kenya's failed attempt to defer the cases before the ICC. See African Union Assembly 'Decision on Africa's relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec. 1 October 2013; United Nations Security Council 'Peace and security in Africa' 7060th Meeting, S/PV.7060 (15 November 2013).
60 *Luka Lubwayo* (n 18 above).
61 *Luka Lubwayo* (n 18 above) para 38.

against them and as such, no longer had any outstanding questions on their probity.

The unresolved probity questions declared by the High Court in *Trusted Society of Human Rights Alliance* set out a high integrity threshold, perhaps in keeping with the desires of Kenyans as reflected in the Constitution. This standard has, however, been watered down by giving other rights guaranteed in the Constitution priority over the integrity standards. It seems that a pending criminal case would not disqualify one under the integrity test until a conviction is established, and even in the case of a conviction, it would have to result into a sentence of more than six months to fail the integrity threshold. The later interpretations have made the integrity chapter redundant. This could not have been the intention of the drafters and the people of Kenya. A more progressive interpretation would be one that gives meaning and purpose to the integrity provisions in the Constitution. Thus, in the instance where one still has pending criminal cases or civil cases that touch on issues of their integrity, it would be more prudent to declare that they do not satisfy the integrity standards in the Constitution until those cases are cleared. The question of integrity is a matter of public interest, and in such instances, it is more persuasive to adopt a decision that upholds national values and principles over individual rights. Integrity does not only focus on the individual but also the institution. Subsequently, the courts, when looking into the integrity question, should also satisfy themselves that the institution in question will not suffer should the proposed individual take over its management.

Elective versus appointive positions

The decisions of the courts have approved the argument that different standards apply in elective offices as opposed to appointive offices. The High Court in *Luka Lubwayo*,[62] while approving this division, observed that article 73(2)(a) of the Constitution establishes this distinction where it demands personal integrity only for appointive positions. The Court noted that the only criterion thearticle sets for elective positions was that the individuals be elected in a free and fair election. The High Court observed that the distinction was important because 'in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness'.[63]

The above distinction was also adopted by the Court in *International Centre for Policy and Conflict*[64] when it held that political rights must prevail

62 *Luka Lubwayo* (n 18 above).
63 *Luka Lubwayo* (n 18 above) para 40.
64 *International Centre for Policy and Conflict* (n 4 above).

over the chapter on integrity. Although the Court had agreed with the petitioners that an inquiry into the integrity of a candidate for state office, whether appointed or elected, is an essential requirement for the enforcement of chapter six of the Constitution, its eventual decision came to a different conclusion. The Court observed that not allowing the third and fourth respondent to run for the presidential elections would violate the citizens' right to exercise their democratic right to elect representatives in a free and fair election by universal suffrage.

The effect of these decisions is that politicians have been insulated from the integrity provisions in the Constitution. The question that follows is whether this distinction does not then make a mockery of the integrity chapter. If politicians are excluded from the demands in the integrity chapter, and the same Constitution requires their participation in the selection and vetting of individuals appointed to state offices, how can they uphold integrity standards that they are themselves not subject to? Would the same politicians have the moral authority to question the integrity standards of proposed state officers? The exclusion of politicians from the requirements in the leadership and integrity chapter of the Constitution defeats not only the purpose of the chapter, but also its implementation. The need for good governance is a theme that runs throughout the Constitution, and integrity is one of the principles that underpin it. This dictates that the integrity requirements in chapter six of the Constitution should apply to all institutions established in the Constitution and to all individuals seeking to hold public office whether elective or appointive.

A step back?

Although the integrity standard recognised by the High Court in *Trusted Society of Human Rights Alliance* was heralded as a step in the right direction, the appellate court decision on the same matter in *Mumo Matemu* seems to have set this standard aside.[65] The High Court had set aside the appellant's appointment as the Chairman of the Ethics and Anti-Corruption Commission upon a finding that on available evidence, the appellant had too many unresolved questions about his integrity. The Court of Appeal, although acknowledging the High Court's powers to conduct review of appointments to public offices on procedural soundness as well as on the legality of the appointment to determine if it satisfies the constitutional threshold, held that in the instance where the appointing authority had applied its mind to constitutional requirements and arrived at a rational conclusion, the courts should not interfere.[66] The Court of Appeal stated that in such cases, the High Court's role is not to sit on appeal over the opinion of the appointing authority, but to check if the appointing

65 *Mumo Matemu* (n 7 above).
66 *Mumo Matemu* (n 7 above) para 52.

authority took into account material and vital aspects that had a bearing to the constitutional and legislative purpose of integrity.[67]

The Court of Appeal observed that in light of the doctrine of separation of powers, the High Court should have used the rationality test, which in the Court's opinion would have led to a different conclusion. The Court articulated that in light of the principles in article 73 of the Constitution, a fact-dependent objective test was the best standard of review of constitutionality of appointments on grounds of integrity. It found that there was no evidence to show that there was no proper inquiry on the suitability of the appellant in the cumulative process of his appointment. On the unsuitability of the appellant, the Court of Appeal, relying on the 'intensely fact based inquiry test', found that there was no conclusive proof on evidence of the allegations against the appellant's integrity.

Of particular interest is the Court of Appeal's view of the constitutional integrity standard. It observed that:

> We wish to reiterate, having disposed of the issue of separation of powers, that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them.[68]

It further added that:

> … although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.[69]

In other words, the Court of Appeal dismissed the unresolved issues of integrity standard set out by the High Court, and declared that the constitutional integrity threshold can only be dictated by the daily experiences and practices of the people of Kenya and is not a standard that the courts can set. The Court of Appeal also seems to declare that all other institutions with the mandate to implement chapter six could implement it according to their own interpretation without looking to the courts for guidelines. The impact of the Court of Appeal's decision is that there is now no clear standard on the constitutional threshold of integrity.

67 *Mumo Matemu* (n 7 above) para 54.
68 *Mumo Matemu* (n 7 above) para 59.
69 *Mumo Matemu* (n 7 above) para 60.

By stating that the courts do not have the power to set out clear and predictable guidelines on the constitutional standard of integrity, the decision by the Court of Appeal has reduced courts to mere bystanders in the integrity debate. While acknowledging the centrality of the doctrine of the separation of powers in the Constitution, the Court of Appeal, in a bid to give deference to other constitutional organs with power to implement the leadership and integrity chapter, fettered the courts mandate as the final authority in the interpretation of the Constitution. Although other arms of Government, such as Parliament and the Executive, and other public authorities, also have the mandate to interpret the Constitution, where a problem of interpretation arises they still need to seek the courts intervention for guidance.[70] Perhaps recognising the Judiciary's central role in interpreting the Constitution, it emerged in *Luka Lubwayo*[71] that the IEBC was hesitant to decide whether the first respondent met the constitutional integrity threshold and instead holding that only the High Court could decide on this issue. The Judiciary's significant role in implementing the Constitution is entrenched in the Constitution and an interpretation that declares otherwise goes against the letter and spirit of the Constitution.[72]

An outstanding aspect of the Court of Appeal's decision was its holding that the 'fact-dependent objective test' was the best standard of review of constitutionality of appointments on grounds of integrity.[73] The Court observed that since a determination of unsuitability to hold office is a drastic form of judicial review, the Court's finding must be based on cogent and conclusive evidence. It reiterated that any such conclusion by the Court must be based on findings premised on applicable evidentiary standards, which in cases involving 'intensely fact-based inquiry', the Court established that the evidentiary standard was higher than the standard of balance of probability required in other constitutional based cases.[74] The approach by the Court of Appeal ensures that an individual's integrity cannot be challenged based on mere frivolous allegations, but must be supported by satisfactory evidence.

The decision by the Court of Appeal in *Mumo Matemu* case set aside the only constitutional threshold of integrity that had so far been identified by the High Court, albeit with some variations, and failed to establish an alternative threshold. The effect of this is that there is now no proper guideline upon which the chapter on leadership and integrity may be implemented, at least in our courts.

70 B Sihanya 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' (2011) *FES Kenya Occasional Paper No 5*, 23.
71 *Mumo Matemu* (n 7 above).
72 Chapter ten.
73 *Mumo Matemu* (n 7 above) para 60.
74 *Mumo Matemu* (n 7 above) paras 62 - 66.

Other setbacks experienced in implementing sound leadership and integrity standards

Slow pace of institutional reforms

Apart from judicial reforms, other governmental institutions are lagging behind in the reforms mandated by the 2010 Constitution. The public service ought to carry out restructuring in light of the Constitution of Kenya, 2010. The restructuring of the public service ought to be done to secure at least three objectives: First, ensure that the power of the Public Service Commission (PSC) is enhanced and rationalised and that PSC is secured from inefficient and inequitable control by the higher executive bureaucracy. Second, establish standards, criteria and rules on appointment, promotion, transfer, demotion and related discipline etc, of public servants. This is important in ensuring transparency, fairness and due process. Third, ensure that the public service upholds the text or letter and intendment or spirit of the 2010 Constitution especially as regards competence and integrity of persons before being appointed to the public service.[75]

Low level of awareness

A major obstacle to implementation of chapter six of the Constitution is a lack of awareness on the implications of the Constitution. In order for the Constitution to function properly and deliver visible results, the citizens must have a full understanding of the Constitution. The most effective way to ensure that citizens understand the Constitution is through civic education. Citizen participation in governance is another feature that runs through the whole Constitution. All of these mechanisms are useful in ensuring the provisions of the Constitution in relation to leadership and integrity are adhered to.

Passive citizenry

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

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

The lacuna of the law

The legal framework on leadership and integrity as presently constituted is very weak and cannot sustain the quest for a leadership that eschews the provisions of the Constitution.

The Leadership and Integrity Act and other statutes do not have sufficient enforcement mechanisms to make sure that the provisions of the Constitution on leadership and integrity are enforced. The agency tasked with the enforcement of chapter six is not vested with sufficient powers to enforce the laws on leadership and integrity. The laws are more observed in breach than compliance as a consequence of this weak enforcement structure.

Recommendations

Performance Contracting

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

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

Empowering the legislature

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

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

The judiciary's role in implementing leadership and integrity provisions

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

Independent constitutional commissions in constitutional implementation

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

Civil Society Organisations

Article 1 of the Constitution, vests all sovereign power in the people of Kenya, and in articles 10, 129 and 232, which provide for the participation of the people in all facets of law execution, including in policy making. 'The people' in the 2010 Constitution is largely embodied in civil society. Civil Society Organisations should take the front line in making the voice of the people heard in matters of leadership and integrity. This is because the citizens by themselves may not have the necessary financial muscle to make the Government account when it violates salient provisions with regards to leadership and integrity of state and public officers. This will go a long way in ensuring a system of checks and balances with regards to public appointments is observed.

Media

The media plays a crucial role in shaping a healthy democracy. A vibrant media is the backbone of a democracy. The media makes the public aware of various social, political and economic activities happening within the state and also outside. Many consider the media as a mirror, which shows the public or strives to show the state the bare truth and harsh realities of life. The media has undoubtedly evolved and become more active over the years. With regard to elections, the media assists the public, especially the illiterate, in making choices, for example, in the elections. The media have made a significant achievement in improving the awareness of people on all socio-political and economic issues. Coverage of exploitative malpractices of leaders has helped in providing bases for prosecuting or taking stringent actions against them through public censorship or through other means. The media also exposes loopholes in the democratic system, which ultimately helps government in filling the gaps identified and making the system of governance more accountable, responsive and citizen-friendly. Information technology has enhanced information flow to people in all walks and spheres. The perfect blend of technology and media has opened the state to public scrutiny especially on issues of corruption in politics and society.[76]

The Constitution of Kenya 2010 has provided for a comprehensive Bill of Rights that anchors freedom of expression and freedom of the media.[77] Every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. Thus the media should take an active role in ensuring the leadership and integrity standards are upheld.

Conclusion

It was hoped that under the new Constitution, a new set of standards would be entrenched for people seeking to hold leadership positions. Chapter six of the Constitution, on leadership and integrity, was to ensure that state officers are people of high integrity, therefore ending the culture of impunity and bad governance. Attempts to implement chapter six have proved to be futile, with the courts failing to set out clear standards on the constitutional integrity threshold. The courts approach has ensured that the lowest possible standard has been maintained for the integrity

76 'Kenya, Democracy and Political Participation' A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi, Karuti Kanyinga March 2014 http://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf (accessed 28 May 2015).

77 Art 34, 2010 Constitution.

threshold. While the leadership and integrity chapter was intended to entrench a complete metamorphosis in our leadership, its interpretation and application has instead resulted into business as usual. This in effect has made chapter six redundant, rolling back the gains made in an attempt to establish good governance. The results of the last election and decisions by the courts show that perhaps the people of Kenya were not ready to embrace the principles enunciated under the leadership and integrity chapter in the Constitution.

CHAPTER 3

KENYA'S FISCAL ACCOUNTABILITY REVISITED: A REVIEW OF THE HISTORICAL EROSION OF THE COUNTRY'S FISCAL CONSTITUTION FROM 1962 TO 2010

Attiya Waris

Introduction

Through history it is the frequency of wars in Europe that resulted in the recognition of the value of taxation as states looked for ways to finance both the threats to their security as well as their attacks of other neighbouring states.[1] Between the 13 and 14 centuries, there was the complete transformation of finance in the English state.[2] Direct taxation was maintained for emergencies but the sheer scale of the wars led to the acceptance by parliament of the distinction between ordinary and extraordinary revenue and the possibility of a move towards a tax state. However, the end of the Hundred Years' War in 1453 showed the constitutional restrictions on the right to tax by the crown and the state went back to the domain based system with a feudal type system and little or no tax.[3] This movement back and forth of the decision to tax or not to tax is a constitutional issue and the ability to build it or erase it was as a result of interactions between the state or crown and the society.

Schumpeter, a fiscal sociologist and economist, argued that modern taxation (or taxation as we know it today) was first developed in the 15th century, in the Italian city republics. In the ensuing tug of war, as he terms it, in relation to the decision making process of the state on what to tax and what not to, the issue of the right to tax and justice in taxation, including its constitutionality, arose.[4] This part of the development of taxation is key. He also saw the link between the prince or ruler at city-state level and the services that should be accorded to the populace in return. He was of the view that the link between the revenue to the state from the people, and the use of the revenue, was linked through justice, and that the power or right

1 WM Ormrod, M Bonney et al *Crises, revolutions and self-sustained growth: Essays in European fiscal history, 1130 - 1830* (1999) chap 1.
2 JA Schumpeter *History of economic analysis* (1954) 32 - 33.
3 As above.
4 As above.

to tax was subject to the control of the population.[5] This development further strengthened the linkages between taxation the people and the purposes of taxation by requiring that the constitution protect the right and the exercise of its right.[6]

In the developing world, most states were former colonies of European states. At independence, the ex-colonised states fell immediately into the category of developing countries. Economically, the post-colonial states responded with an initial boom. The government no longer limited the newly discovered economic power racially as it had been during the colonial period. This boom economy was, however, led politically by leaders most of whom were freedom fighters, and who were making a transition into peacetime politics. This combination of a euphoric citizenry with new access to economic power, and a government unprepared to create and deal with economic policy, did not initially impact the economy. The infrastructure remained capable of meeting the needs of the developing economy. In addition, most states, in order to smoothly transit from colonialism to independence, agreed with the imperial states to adopt a constitution and almost all the legislation that had been put in place during colonisation without major amendment. For British colonies, the decolonisation process involved the adoption, upon independence, of a Westminster Model of a Constitution, all legislation passed during the period of colonisation by the British, and the honouring of all international agreements undertaken on behalf of the colony by the imperial government.[7] Tax treaties were all also adopted without question by African states except for Kenya who 're-negotiated' all the tax treaties however there are no recorded changes in the text of these treaties.

The inherited fiscal state was thus based on the general principles of the constitution and the legislation on taxation. However, the result of this wholesale adoption of legislation without referencing it back to the people, and at times taken under the pressure of independence, led to compromised legislation that failed to make reference to certain principles and fundamental issues that had developed naturally through the evolution of the fiscal state in Europe. These concepts and issues were implemented without the people ever having a say and may be one of the factors that has led to the current crisis of the fiscal state in the developing world. These include the transfer of the power to tax to the ruler in constitutional law; the application of taxation principles and fairness and finally the application of the social welfare state. Over the years, constitutions would inevitably last for decades. However, it is becoming increasingly common especially in developing countries for constitutions to be extensively amended or overhauled over time. As a result, there is a

5 As above.
6 A Waris 'Tax and development: Solving Kenya's fiscal crisis using human rights' (2013) chap 2.
7 As above.

lack of clarity as to what constitutional options a state has in the provisions that will be placed in its constitution with regard to the fiscal social contract. Consequently, there is need to examine the constitutional changes that Kenya has gone through with respect to the fiscal social contract in order to determine the appropriateness of the current structure and to help inform future amendments.[8]

The key terms found in this include the fiscal contract, fiscal constitution, taxation and fiscal policy and these concepts need to be clearly understood before one can delve into the issues. The fiscal contract is the bargained exchange between government and taxpayers as argued by Moore, a political scientist, and that it includes representation, goods and services as well as societal-state pressure.[9] The fiscal constitution by extension includes not just the fiscal provisions found in a constitution as some would assume but also the overall set of rules by which the nation's commitments to taxing and spending are to be arranged,[10] and has also been defined by a political scientist.

Taxation has many diverse definitions, however, for the purposes of this paper will refer to the process whereby charges are imposed on individual's institutions or property by the legislative branch of the federal government and by many state governments to raise funds for public purposes, while tax and fiscal policy is the tax to collect, amounts to pay and by whom coupled with the use of the government budget to affect an economy.[11]

As a result this chapter will in part utilise a historical approach on the theoretical analysis of constitutions and the power or right of a state to levy taxes. In part it will analyse and chart out the fiscal provisions in the development of Kenya's constitutional history from independence to date. This section will analyse the 1964 independence Constitution and the amendments that were made as well as the discussions in the draft constitutions that were debated at the Kenyan constitutional conferences and finally the provisions that came into force with the 2010 Constitution of the Republic of Kenya. It will also discuss where the difficulties lie in the clarification of the constitutional provisions. Part will thus make recommendations, while part will be the conclusion.

8 Waris, Delineating a Rights-based Constitutional Fiscal Social Contract through African Fiscal Constitutions EALJ (forthcoming 2015).

9 M Moore 'Between coercion and contract: competing narratives on taxation and governance' in Deborah Brautigam et al (eds) *Taxation and state-building in developing countries: Capacity and consent* (2008).

10 Brennan, G. and J. M. Buchanan (1980). The power to tax : analytical foundations of a fiscal constitution. Cambridge, Cambridge University Press.

11 DN Weil 'Fiscal policy' *The Concise Encyclopaedia of Economics* http://www.econlib.org/library/Enc1/FiscalPolicy.html (accessed 29 May 2015).

The theories of constitutional law in the context of taxation

On-going scholarship on taxation and democracy,[12] taxation and constitutionalism,[13] and taxpayers' rights, acknowledge that economic considerations that have hitherto informed tax policy and the design of frameworks for taxation do not address the governance context of taxation adequately, although there is growing literature on diverse aspects of this issue.[14] In consideration of the constitutional law, there are different motivations that influence the passing of tax regulations through legislation. The literature on the determinants of tax policy and tax structure does not offer one unified model but many competing approaches. The ability to collect revenue affects the capacity of the state. The success in securing revenue depends on the relationship between states and their subjects. However, these constitutional texts only make passing reference to the 'right to tax' of government, which is not further elaborated upon or defined and is seemingly assumed. There is, however, sometimes reference to the need for consent, trust and legitimacy between the state and its subjects as well as the assumption of the willingness of citizens to pay tax for public purposes rather than retain it.

The political space that citizens and societies have to play in taxation brings with it the constitution or the fiscal social contract. This paper limits itself to the constitutional provisions and the role of society within it. Participation of society in other facets of tax legislation and policy are outside the scope of this paper. Although some argue that tax is the area of the expert there is a growing movement that the problems facing taxation have been created by the so-called experts and there is a need to remind the experts of the reality of taxation which is money taken from members of society be they individual or institutional in order to finance government activity. Corruption in developing countries has become a challenge and will continue to be an obstacle to development if the expertise argument is allowed to hold sway. This sub-section will now analyse the debates on the tax provisions found in a constitution and will discuss the debates in order

12 See generally S Steinmo *Taxation and democracy: Swedish, British and American approaches to financing the modern state* (1993) and W Hettich & S Winer *Democratic choice and taxation: A theoretical and empirical analysis* (2005).

13 G Brennan & JM Buchanan *The power to tax: Analytical foundations of a fiscal constitution* (1980). JG Head *Public goods and public welfare* (1975); J Prebble 'Should tax legislation be written from a "principles and purpose" point of view or a "precise and detailed" point of view?' (1998) *British Tax Review* 112.

14 O Therkildsen 'Public sector reform in a poor, aid-dependent country, Tanzania' (2000) 20 *Public Administration and Development* 61; OH Fjeldstad 'Local Government tax enforcement in Tanzania' (2001) 39 *Journal of Modern African Studies* 289; F Luoga 'The viability of developing democratic legal frameworks for taxation in developing countries: Some lessons from Tanzanian tax reform experiences' (2003) 2 *Law, Social Justice and Global Development Journal*.

to provide a framework within which to understand the constitution of Kenya.

Constitutional law and the power to tax

A tax system is based on the constitution of a country. Principles of constitutional law like equality, the protection of marriage and family, and the guarantee of welfare, are particularly important features of tax systems. These principles are human rights principles in addition to being constitutional and are enshrined in article 19(1) of the current Kenyan Constitution.[15] In addition, a constitution builds the framework of all governmental activities, including the tax policy; for example, the German Constitutional Court has developed jurisprudence remarkable for its judicial activism in the tax area.[16]

Oliver Wendell Holmes (1927) stated that 'taxation is the price we pay for civilization'.[17] A surface reading of the statement might suggest that we should acquiesce to whatever taxes are imposed on us, because the alternative would be even more painful than the taxes we pay. A deeper reflection on Holmes' statement, however, reveals the ambiguity about taxation. That some taxation may strengthen society does not mean that any and all taxation will do so. It presumes infallibility in a created tax system that can only ever be a sub-optimal compromise. If the alternative to taxation is the absence of government and civil order, some taxation is necessary to provide a basic framework for it and therefore maintain security. In this respect taxation is truly a price we pay for civilisation. That some taxation works to our common benefit does not, however, mean that any and all taxation does so. Thus, taxation is seen by Holmes to be a way of stimulating political participation as a result of people questioning the manner in which their money is spent. Besides, it is most likely that 'rates of government spending will always be higher than the revenue from the taxes legislatures are willing to impose on their constituents'.[18]

Detailed discussion on the constitutionality of the power to tax in recent debates centres on the issue of unitary and federal power sharing.[19]

15 It is now a central feature of our Constitution, is an integral part of Kenya's democratic state and the framework for all governmental policies – economic, social and cultural.
16 V Thuronyi *Comparative tax law* (2003) 83.
17 *Compania General De Tabacos De Filipinas v Collector of Internal Revenue* 275 US 87, 100, dissenting opinion (21 November 1927).
18 JM Buchanan 'Restoring the spirit of classical liberalism' Notes from Foundation of Economic Education (FEE), 2 July 2005 www.fee.org (accessed 2 May 2014).
19 GVL Forest 'The allocation of taxing power under the Canadian Constitution' *Toronto, Canadian Tax Foundation* (1981); O Akanle 'The power to tax and federalism in Nigeria Lagos' *Centre for Business and Investment Studies* (1988). State action can be rested upon the three legs of the power to police (maintain law and order).

In the United States,[20] scholars like Beale, an economist, never made any reference to whether the founding fathers of the United States (US) Constitution inferred into the provisions the right of government to levy tax.[21] Dividing tax power between different levels of government in a federation is shown to arguably lead not only to over-taxation, but also distorts the composition of state and federal public spending.[22] In federal states however, constitutional law discussions are on the division of tax power in between the constituent states within the federal state. This includes countries such as Canada, US and Nigeria. They are concerned with the share of taxation that is remitted back to the federal authority *vis-à-vis* the amount retained by the state and the issue of maintaining the balance on the basis of population and productivity.[23]

Brennan and Buchanan, political scientists, argue that the power to tax does not carry with it the obligation to use tax revenue in a particular way. It is simply a power to take. As a result, all constitutional rules may be seen as possibly limiting the power to tax.[24] They thus state, that there is no commensurate right of the citizenry for the money they remit to government. It could as a result, be argued that no one may be deprived of property arbitrarily and thus there is an entitlement for that deprivation. However, the power to tax debate does not make room for this argument. This chapter recognises and takes into account the debate on the power versus the right to tax, and then proceeds to examine the constitutionality of the taxation and finance provisions found in the various Kenyan constitutions, past and present. It takes the argument of the right to tax one step forward to include in it a reflection of the human rights approach in order to better centre it as a holistic part not only of the constitution but also human rights and their financing or realisation

The major motives of government taxation policy can be derived from the classical economist views of Musgrave on the functions of public finance,[25] which are essentially financing and steering. If we take the financing requirements as articulated, then the public deficit can be seen as an indicator for the demand of tax policy and tax reforms or just as evidence of overspending.[26] Imposing taxes can thus also be a key factor in determining the amount of savings and investment in an economy, as

20 WS Moore 'The constitution and the budget: Are constitutional limits on tax, spending, and budget powers desirable at the federal level' in WS Moore & RG Penner (eds) *Procedural and quantitative constitutional constraints on fiscal authority* (1980).
21 JH Beale 'Jurisdiction to tax' (1919) 32 *Harvard Law Review* 587; AA Reed 'Our forgotten Constitution – A bicentennial comment' (1987) 97 *Yale Law Journal* 281.
22 BU Wigger & U Wartha 'Vertical tax externalities and the composition of public spending in a federation' (2004) 84 *Economics Letters* 357.
23 RM Bird 'Institutions and economic development: Growth and governance in less-developed and post-socialist countries' *Tax policy and economic development* (1992).
24 G Brennan & JM Buchanan *The power to tax: Analytical foundations of a fiscal constitution* (1980) 8 - 9.
25 RA Musgrave & PB Musgrave *Public finance in theory and practice* (1980).
26 GB Koester 'The political economy of tax reforms – Evidence from the German case 1964 - 2004' Humbolt University, Berlin (2005) 6.

well as how much people work, when and on what they spend their income, and on the structure of business. A higher tax rate translates directly into a lower amount of disposable income, which means less money available for saving and investment. It also results in people working to obtain a certain disposable income and nothing more (thus not working harder for more money but to maintain a standard of living) and finally businesses are structured in order to avoid as much tax as possible. As a result, theoretically, the distribution of the tax burden might stimulate taxpayers' behaviour by encouraging remission of taxes if they are geared towards a common welfare goal.[27]

Constitutional theorists of taxation, as a result are predominantly economists or political scientists, however jurists or legal scholars are conspicuously missing. Thus, there seems to be an approach to the economics of the issue from a distance and the legislative issues reflect the perspective of other fields. These scholars argue that since government has the power to tax, the only limitations that can be placed on it must be constitutionally and legislatively imposed and hence that state-society relations are moot (debatable but not of any actual relevance). This translates into limited interaction by society in constitution making as well as in upholding fiscally inclined provisions.

Enshrining into the Constitution taxation principles and policies

While most constitutions tend to have very basic tax and finance provisions, the Kenyan 2010 Constitution is a departure from this as it sets out principles that should guide not only all its articles but some are specifically targeting fiscal provisions. The result of this is a need to not only discuss the constitution and legislation but also principles and policies that normally form part of government policy and discretion but have been shifted and constitutionally enshrined. As a result it is of importance to understand the principles and policies that generally guide taxation before one can see its application and elaboration in the development of Kenya's fiscal constitution.

Beginning with Adam Smith, writers have been attempting to establish criteria by which revenue and expenditure policies should be evaluated. The principles laid down by Adam Smith in the *Wealth of Nations* are still followed today in taxation policy. Smith argued that people pay according to their abilities, and in accordance with the proportion of revenue they enjoy under the protection of the state.[28] He thus covers both the ability to pay and the benefit theories of taxation. Musgrave then goes a step forward

27 DP Racheter & RE Wagner (eds) *Politics, taxation, and the rule of law: The power to tax in constitutional perspective* (2002).
28 A Smith *The wealth of nations* (1977) book v, chap ii.

and states that no one questions the fact that the budget should be designed to maximise welfare but that the fundamental question that remains unanswered is how benefit is valued and how the valuation then depends on the manner in which the tax bill is distributed. [29]

There has always been a debate on taxation and fairness. Rousseau argues on the basis of the impulse to help that seems to be one of the more pleasant sides of human nature. Rousseau[30] classed it amongst the 'natural' feelings and Adam Smith thought it was inherent to human nature. In addition, Henry George argued for the idea that the strong and the rich have a moral obligation to assist the weak and those in need and that it is normative in all major world religions.[31] Assistance could also take the form of charity and voluntary activities. Keynes stated that in framing tax principles and state finance, political and social aims must be considered together with the equitable and economic aims.[32] However within today's context of the difficulty in maintaining the welfare state in a fiscal crisis the use of fairness in the collection and distribution of taxation may be a better policy approach.

Arguments that dispose of the fairness concept usually argue for security and defence. Defence is seen as being more important than opulence[33] and many allow the imposition of tariffs to prevent dependence on imports.[34] Malthus also supported the concept of high tariffs based on the argument of future wars agreeing with Adam Smith.[35] Ricardo, however, disagreed with this analysis and felt that no matter what sanctions were imposed food would always be allowed through.[36]

That these principles may be found in a constitution would be a big step forward in moving policy to law and may have both negative and positive repercussions as will be discussed in the Kenyan context. These theories of Smith and Rousseau will be used in addressing the question as to whether the pathway of constitutional amendments to the fiscal provisions that have been taken since independence have actually improved in them or whether these provisions have been undermined resulting in a weakened fiscal system.

29 RA Musgrave & AT Peacock *Classics in the theory of public finance* (1962) xi.
30 JJ Rousseau *Discourse on the origin and the foundations of inequality among men* (1754).
31 M Friedman *Capitalism and freedom* (1962).
32 JN Keynes *The scope and method of political economy* (1917) 81.
33 A Smith *The wealth of nations* (1977) 429.
34 M Olson *The economics of the wartime shortage: A history of British food supplies in the Napoleonic War and in World Wars I and II* (1963) 3 - 4
35 TR Malthus 'Observations on the effects of the corn laws, and of a rise or fall in the price of corn on the agriculture and general wealth of the country' (1814) http://socserv.mcmaster.ca/econ/ugcm/3ll3/malthus/cornlaws (accessed 1 May 2007).
36 D Ricardo & P Sraffa *The works and correspondence* (1962) 176 - 178.

The Kenyan fiscal contract

Kenya's fiscal provisions have gone through several stages of change and amendment. This section will analyse the provisions before independence, the independence Constitution, the Amendments phase just post independence, the draft constitutions that went to referendum and finally the current 2010 Constitution. All constitutions have standard fiscal provisions: firstly, those allowing for the collection of money from state residents. Secondly, the mechanisms and budget processes. Thirdly, the oversight and audit functions. Finally, the distribution functions and share of expenditure usually within a division of responsibilities. However these are not always clearly separated and thus the picture is a mesh of who, what, when, where, why and how the financing of the state and its peoples takes place.

The creation of the fiscal contract

British colonial tax policy developed before its rule in East Africa on several grounds. Firstly, it was to prop up the economy of Britain by creating foreign markets and sources of raw materials for its industries. Secondly, it was to locate and secure the source of the Nile. Thirdly, it was to conquer Africa from the Cape to Cairo as a jewel in the crown of the British to show the world their might. Fourthly, it was motivated by the desire of securing the spices route to Asia and to maintain the link with the Indian colony in the wake of the Suez Canal crisis. Fifthly, it was a deliberate policy to slowly colonise African states by moving gradually from co-existence to control. Finally, Britain intended to spearhead the abolition of slavery and this was undertaken in the background of the need to evangelise the world.[37] None of these were a fiscal policy nor was there an intention to create an independent fiscal state.

In 1962, before independence in Kenya, a constitutional conference, which was participatory, was held in the UK and included members of the colonial office as well as the leaders who had been fighting for independence and the conclusions were set out in a report.[38] In the section on public service it stated that the Constitution would ensure the independence of the public service from political control at both central government and at regional level. While the section on finance stated that the federal regions should have adequate sources of revenue that were constitutionally secured. An expert commission was also to be appointed to study the powers required to implement this principle and the basis of

37 A Waris 'Taxation without principles: A historical analysis of the Kenyan taxation system' (2007) 1 *Kenya Law Review* 272 273.

38 Report of the Kenya Constitutional Conference, 1962 presented to Parliament by the Secretary of State for the Colonies by command of Her Majesty, April 1962 (Ref 31 Coe and Ref 30 Coe).

financial assistance to the regions in addition to central government. These provisions showed clearly that there needed to be unbroken financing of regional as well as central government staffing with the central government's finances being used to support this. As a result, at independence Kenya adopted a federal state, as reflected in these provisions practising fiscal federalism. This was without doubt a step forward towards a more democratic fiscal process.

The independence Constitution, which had been drafted in a conference, was amended almost immediately after the country was declared a republic in 1964. After independence, the provisions of the 1963 independence Constitution went through 24 constitutional amendments,[39] with the effect of completely changed fiscal provisions within the constitution. Although these were done using the mechanisms in place in the independence Constitution, changes such as moving the state into a one party state resulted in almost no opposition to the amendment in a period of oppression and extra-judicial killings and increased centralised controls.

In 2000 after huge pressure from both within and outside Kenya, the state began to engage in a process of participatory constitutional reform. The decision was to pass a new constitution through a national referendum. There have been several draft constitutions as well as two referendums leading up to the adoption of the current Kenyan Constitution. These are commonly referred to as the Constitution of Kenya Review Commission (CKRC) Draft,[40] the Bomas Draft[41] and the Wako Draft.[42] The Bomas Draft, which was the result of a constitutional conference on the CKRC draft, is the most critical as it was the text that was intended to be presented to the nation in a referendum. However, this did not take place and instead the Attorney-General presented an

39 The Constitution of Kenya (Amendment) Act 28 of 1964; The Constitution of Kenya (Amendment) (No 2) Act 38 of 1964; The Constitution of Kenya (Amendment) Act 14 of 1965; The Constitution of Kenya (Amendment) Act 16 of 1966; The Constitution of Kenya (Amendment) (No 2) Act 17 of 1966/Turn Coat Rule; The Constitution of Kenya (Amendment) (No 3) Act 18 of 1966; The Constitution of Kenya (Amendment) (No 4) Act 19 of 1966; The Constitution of Kenya (Amendment) Act 4 of 1967; The Constitution of Kenya (Amendment) Act 16 of 1968; The Constitution of Kenya (Amendment) (No 2) Act 16 of 1968; The Constitution of Kenya (Amendment) Act 5 of 1969; The Constitution of Kenya (Amendment) Act 10 of 1974; The Constitution of Kenya (Amendment) Act 5 of 1974; The Constitution of Kenya (Amendment) Act 1 of 1975; The Constitution of Kenya (Amendment) Act 13 of 1977; The Constitution of Kenya (Amendment) Act 1 of 1979; The Constitution of Kenya (Amendment) Act 5 of 1979; The Constitution of Kenya (Amendment) Act 7 of 1982; The Constitution of Kenya (Amendment) Act 6 of 1986; The Constitution of Kenya (Amendment) Act 14 of 1986; The Constitution of Kenya (Amendment) Act 20 of 1987; The Constitution of Kenya (Amendment) Act 8 of 1988; The Constitution of Kenya (Amendment) Act 1990, The Constitution of Kenya (Amendment) Act 12 of 1991.

40 The First Draft was prepared by the Constitutional Review Commission. It was then presented to the national conference for discussion and amendment.

41 The Draft that emerged after the Constitutional Conference.

42 The Draft prepared by the then Attorney-General of Kenya that was rejected by the nation in a national referendum as it seemed to be an attempt to overturn the mandate of the National Constitutional Conference.

alternative draft that is referred to as the Wako Draft that was subjected to a referendum in 2005 and rejected. Following the contested presidential elections in 2007 - 2008 and the accompanying post election violence, the antagonistic parties agreed to restart and complete the constitutional review process.[43] The process culminated in the adoption of the Constitution of Kenya, 2010. The Committee of Experts, the body appointed to lead the process had prepared a Harmonised Draft Constitution, building on two earlier drafts (Bomas Draft and Wako Draft). On public finance, the provisions in the Constitution of Kenya 2010 are substantially the same as those in the Bomas Draft, which were adopted without any changes by the Committee of Experts.

The Central Government's power to tax

To date the United Kingdom (UK) does not have a written constitution,[44] thus the fiscal contract before independence was based on article 4 of the Bill of Rights Act of 1689, which vested the sole authority to tax in the UK Parliament but uses language that reflects a right and responsibility based collection system.[45] This is the fiscal contract that the peoples of the East African protectorate and later colony were guided by legislatively and constitutionally, however since the responsibility in the UK law was to its citizens in the UK and not to the colonised peoples this became one of the reasons for independence.[46]

The independence Kenyan Constitution was no exception to the norm.[47]Firstly, all revenues were to be paid into a Consolidated Fund from which withdrawal could only be done through provision within the Constitution itself or by an Act of Parliament or by a vote on account passed by the National Assembly under section 101.[48] Money could then be withdrawn from the consolidated fund for state and constitutionally sanctioned expenditure. Other permitted withdrawals were in accordance with the Appropriation Act, expenses approved by the House of Representatives and those approved by the Controller and Auditor-General.[49]

Despite the criticisms raised regarding the Wako Draft, it reproduced verbatim the provisions on finance in the Bomas Draft were maintained in

43 K Kindiki 'The Emerging Jurisprudence on Kenya's Constitutional Review Law' (2007) *Kenya Law Review* 153 - 187.
44 P Baker 'The equality principle in united kingdom taxation law' http://www.taxbar.com/documents/Equality_Principle_Philip_Baker_000.pdf (accessed 6 April 2013).
45 M Daunton 'Equality and incentive: Fiscal politics from Gladstone to Brown by 2002' http://www.historyandpolicy.org/papers/policy-paper-06.html (accessed 6 April 2013).
46 Waris *Tax and development* (2013) chap 7.
47 See chap 8, Constitution of the Republic of Kenya (1963).
48 Sec 99(1) and 121.
49 Sec 122.

verbatim. As a result, it was made very clear that tax in Kenya was a power of the state and not a right with responsibilities. According to article 24(1)(g) of both drafts, one of the responsibilities of a good citizen is payment of all due taxes.

The Regional Governments' power to tax

Each Regional Assembly was empowered to make laws in respect of taxes. The 1963 Constitution considered making provisions for local government. The regional assemblies then had fairly powerful provisions including: regulating the scale, determining the principles of assessment and prescribing the manner of collection of tax, rate, contribution, rates or royalty was levied by any council.

However the amendments that came about almost within a year of independence completely undermined the fiscal federation in place. The fiscal provisions were amended through increasing centralisation. First, in the Constitution of Kenya (Amendment) Act 28 of 1964, the executive authority of the majimbos (federal regions) was highly watered down and provisions for citizenship and local authorities were modified. Secondly, the Constitution of Kenya (Amendment) (No 2) Act 38 of 1964 transferred to Parliament powers to alter regional boundaries. Originally, the power of the regions and independent sources of revenue to regions rendered them not entirely dependent on Central Government. Thirdly, in the Constitution of Kenya (Amendment) Act 14 of 1965, the Constitution amendment reduced the voting threshold from 90 per cent to 65 per cent in senate and from 75 per cent to 65 per cent in the lower house, while the executive power of regions disappeared completely.

Fourthly, in the Constitution of Kenya (Amendment) Act 16 of 1966, executive powers were increased to rule by decree. The Constitution of Kenya (Amendment) Act 16 of 1968 abolished provincial councils and deleted from the constitution any references to the provincial and district boundaries and alterations thereof. In the Constitution of Kenya (Amendment) Act 5 of 1969, all previous amendments as at February 1969 were consolidated, thereby resulting in a revised Constitution for Kenya in one document which was declared to be the authentic document.

The federal state provisions that were in the 1963 Constitution before amendment were partially re-introduced during the constitutional conference and expressed in both the Bomas and Wako drafts. However the extent of the delineation was not set out in these two drafts that are a reflection of the 2010 Constitution. Today these provisions have been relegated to the provisions in the County Government Act.

Article 239 of both the Boma and Wako draft Constitutions was also maintained verbatim on devolved governments' shares of national funds.

It stated that the government shall promote financial equalisation amongst all levels of government. Each devolved government was entitled to an equitable share of revenue raised nationally.[50]

The principles of taxation

The idea of having fiscal principles in a constitution is fairly novel. The norm has always been that this remains the ambit of government power and discretion and part of its policy. As a result there were no provisions on fiscal principles inserted in past constitutions in Kenya. However section 218 of the Bomas Draft[51] set out the primary object of the public finance management system of the Republic as being to ensure:

(a) efficient and effective generation of revenue;

(b) adherence to the principles of transparency and accountability and observance of law, including appropriate controls and oversight over borrowing and expenditure;

(c) equitable raising of revenue, and the sharing of national and local resources and revenue throughout the Republic, taking into account the special needs of marginalized communities;[52]

(d) the application of the principles of universality, of equality of tax treatment and of taxation according to economic capacity;

(e) that imposition of tax shall take into account the burden of direct taxes on the devolved governments and the people;

(f) that the benefits and burdens of public borrowing and spending are shared equitably between present and future generations;

(g) that the budgets and budgetary processes promote transparency, accountability and the effective financial management of the economy, debt and public sector; and

(h) that public accounts are audited and reported on regularly.

This novel and very interesting approach coupled with the additional principles added in by the Wako Draft of the Constitution which includes

50 A provision similar to this was contemplated by the 1963 Constitution in sec 137(2)(b).

51 This was sec 236 in the CKRC Draft and was maintained verbatim in the Wako Draft. The CKRC Draft part II was titled taxation powers and revenue sharing. Its sub-title was 'Imposition of Power' and it stated as follows:

'237(1) No person or authority may –
(a) impose a tax, fee or charge on behalf of either the Government or a devolved level of government, except under the authority of legislation; or
(b) waive or vary any tax, fee or charge imposed by law except as expressly provided by legislation.
(2) Legislation that provides for any waiver of any tax, charge or fee shall provide that a record of such waivers and the reason for them is kept and reported to the Auditor-General.'

In the Wako Draft, article 30 stated that it 'provides that the legislative *power* of the Republic shall vest in the Parliament.' (emphasis added)

52 This provision was also the aim set out in the 1962 Report of the Kenya Constitutional Conference.

a section on *National Values, Principles and Goals* to ensure open and transparent government and accountability of state officers, public officers, state organs and public authorities; eradication of corruption as well as affirmative action principles squarely shifts policy guidance away from the states power to guidance by the society and its principles in theory.

The fund and collection structure

The 1963 Constitution provided only for a consolidated fund as well as a regional fund. Under section 99 of the post-independence Constitution, amendments led to sub-section (2), which provided that a public fund could also be established for a specific purpose.

The independent Constitution set out regional assemblies with a fund for each region which was to retain all revenues collected as long as they were not listed in section 181.[53] Money was also deposited into a regional contingency fund from which withdrawals could be made in cases of urgent and unforeseen needs for expenditure.[54] No money could be removed from either fund unless authorised by the regional assembly or authorised by the Auditor and Controller General or his representative.[55] A Finance and Establishments Committee was created to ensure the preparation and tabling before the Regional Assembly the estimates of the revenues and expenditures of the Region.[56]

The Constitution of Kenya, 2010 creates a consolidated fund[57] and mandates Parliament to establish the Contingencies Fund[58] and the Equalisation Fund.[59] The 2010 Constitution also mandates the establishment of a Revenue Fund for each County Government.[60] These additional funds are not necessarily a reflection of a better set of fiscal provisions but a reflection of the lack of trust the society has developed with the state where specific funds are required to be set up in order to ensure that past errors are resolved. It instead adds to the complication and expense of a developing country's fiscal system.

53 Sec 129.
54 Sec 134.
55 Sec 130.
56 Sec 132.
57 Art 206.
58 Art 208.
59 Art 204. The Equalisation Fund is a time-bound Affirmative Action measure constitutionally sanctioned mechanism that seeks to address the legacy of marginalisation to benefit of marginalised counties (as identified by the Commission on Revenue Allocation) by providing support in the provision of basic services such a s water, roads, health facilities and electricity.
60 Art 207.

The budget process

At independence, the Minister of Finance was responsible for the preparation and presentation of the draft budget for the following year before the National Assembly,[61] through an appropriation bill,[62] with a statement of excess or a supplementary estimate showing the sums required or spent if necessary. A Contingencies Fund was required from which the Minister of Finance, where he was satisfied that there was an urgent or an unforeseen need for expenditure, made advances from.[63] Section 126 provided for the payment of salaries and allowances to the holder of the office to which the section applied. Section 127 charged all debts to the consolidated fund.

Under the amended 1964 Constitution, article 100 provided that the Minister of Finance had to prepare annual estimates of revenue and expenditure and lay them before Parliament. Expenditures had to be placed in separate votes but the source of revenue need not be specified. However article 100 authorised the minister to make alterations after Parliamentary approval. This article was used together with section 5(2) of the Exchequer and Audit Act, which made parliamentary authority on resource allocation almost superfluous. The Finance Minister could actually suspend the government budget under this provision without reference to anyone. Thus under this provision government could spend more money than allocated, introduce budget items, and spend money before informing Parliament provided it subsequently submits supplementary estimates. This offended the principle of predictability at the most basic level. Article 102 set out the role of the Civil Contingencies Fund (CCF) and its purpose was to finance unexpected and unforeseen emergencies. However, this was not respected. Ministerial allowances that were not catered for were very often used to withdraw from the fund.

Today, one can argue that the budgetary process has been 'democratised' and perhaps rendered more transparent and the executive required to be more accountable for example to the Senate as set out in article 218 in division of revenue. The executive is also required to introduce proposals (on division of revenue between national and county governments and on sharing among counties) in parliament TWO months before the end of the financial year. This allows for meaningful debate and exchanges that allow the legislature to make its input and influence the process. In addition the Commission on Revenue Allocation, which is a creature of the new Constitution at article 215 also further democratises, professionalises and renders the process more transparent and accountable. This two months' time requirement also applies to the tabling

61 Sec 100(1) and (2).
62 Sec 123.
63 Sec 125.

of budget estimates in the National Assembly as set out in article 221. The constitution mandates scrutiny of the estimates by a Parliamentary Committee, which is obliged to facilitate public participation, which then approves the estimates before preparing an Appropriation Bill. In terms of capacity, the role of the Parliamentary Budgetary Office has been enhanced.

The audit and oversight function

At independence, section 128 defined the Office of the Controller and Auditor-General (A&CG) and outlined his duties and functions. The Harmonised Draft Constitution that was eventually adopted in 2010 introduced a new provision: the controller of budget had to approve any withdrawal from the fund. This would then justify the splitting of the roles of the Controller and Auditor-General into the Controller of Budget and the Auditor-General.[64]

In the past administrative functions have resulted in tax and debt management issues being conducted by the executive, with the role of parliament being relegated to post action audit reports that are traditionally subjected to long administrative delays.[65] This is further blamed on the lack of technical capacity to quickly scrutinise financial data, conduct analysis and make pertinent conclusions. Hence upon passing of a tax law, the only check or balance on its effectiveness, efficiency or pertinence in the country is assessed, on average, three years later when an audit report is filed. However, in light of the fact that the offices of the Controller and the Auditor-General have been split, the work should now be done in a timely manner. However the qualifications of these two positions and the manner in which they will be held responsible for failure to comply with their constitutionally mandated offices remains unclear.

In light of the current world fiscal crisis, debts may also lead to further problems, as there is also no limit on how much the cabinet secretary can borrow locally. The relevant Cabinet Secretary has *carte blanche* on how much to borrow, at what terms and for what purpose. On external borrowing, there are two soft conditions. First, there is a ceiling on borrowing which is a flat amount. Second, external funds can only be used for approved expenditures. However, there is no provision to ensure that these are productive investments or cost effective activities. In fact, a minister can borrow and spend as he pleases before seeking parliamentary approval as long as he submits supplementary estimates later. As a result with borrowing uncapped the ability to put the people into unlimited debt

64 For the withdrawal of money from the Consolidated Fund, the approval of the Controller of Budget is required. This had not been provided for in either the 1963 however it is set out in 204(9) of the 2010 Constitution.

65 Kenya currently has published audited reports up to the 2000 - 2001 fiscal years only.

and the only inevitable end is the need to increase tax collection to pay off the debt in the future.

Customs duties exemptions had previously been delegated, but the exemption from customs has moved to the East Africa Community (EAC) thus there is a clash between state powers and those of the Community and this needs to be addressed. Exemptions were for the purposes of public interest. However, how can exemption of a luxury car be for public interest? In addition, the state may vary value added tax, for example, to up to 30 per cent, without going back to parliament or consulting the people in a participatory system. These powers undermine the stability of the Kenyan tax system and need to be controlled carefully. Such a variation rule also makes Kenyan taxes fundamentally unpredictable and discouraged private investments particularly if done quietly outside the public view.

The supervisory role of the finances of the state are conducted through the offices of the Controller and Auditor-General and the Auditor-General of State Corporations. Deliberations of the Parliamentary Audit Committee and the Parliamentary Investigations Committee (PAC and PIC) this is limited to linking parliamentary approval to the release of funds. It does not refer to the quality of expenditure or the realisation of results. Audits thus simply answer the question whether the money was actually spent or not as approved. Spending more than the economic value of an item should not be scrutinised. Commissions of this nature were noted as far back as 1997 when the Public Expenditure Review Report noted that 'Government investments may not generate a commensurate level of GDP growth because the cost of acquiring capital is far greater than the value of the capital created'.[66]

Unfortunately, there are also no on-going audits on the basis of value for money. Normally these audits would be conducted at implementation, monitoring or post execution stage in the procurement process.

The Bill of Rights in both the drafts as well as the 2010 Constitution also recognised the right of every person to administrative action that is expeditious, lawful, reasonable and fair (article 70(1)).

The sharing of revenue

Part of the independence Constitution dealt with financial relations between the Centre and Regions. Tax on the importation into Kenya of motor spirit or diesel oil was to be re-distributed by the Government of

66 Njeru Kirira, 'Function of legislature – public finance/financial mechanisms' Submission to the Constitution of Kenya Review Commission, 22 - 23 March 2002 http://www.commonlii.org/ke/other/KECKRC/2001/34.html (accessed 2 May 2014).

Kenya to the Regions as: (20 per cent) one-fifth to the Eastern Region; (40 per cent) two-fifths to the Centra1 Region; (10 per cent) one-tenth to the Rift Valley Region; and of the remaining (30 per cent) three-tenths, (29,4 per cent) 98 per cent to the Coast Region and the rest (0,6 per cent) to the North-Eastern Region.[67]

For all other taxes collected, apart from tax on motor spirit or diesel fuel[68] or agricultural produce, the Regions in respect of each financial year should receive a sum equal to 32 per cent of the proceeds of that duty for that financial year and the sum was to be divided amongst the Regions in shares proportionate to the respective numbers of the inhabitants of each Region.[69] The proceeds of any tax, duty or fee relating to a regionally issued licence fall under regional revenue.[70]

Royalties for minerals up to 100 000 Kenya shillings as well as one-third (33,3 per cent) of any excess would be retained by central government. For royalties over 100 000 Kenya Shillings two-thirds (66,6 per cent) of the amount over this amount (the excess) would be divided regionally as follows: one-sixth (11,1 per cent) to the region where the mineral was found; and remaining half between all other five regions equally (approximately 11,1 per cent each). However any royalty collected from Lake Magadi soda ash mining was to be given to the Rift Valley region and royalty from forest produce after expenses was regarded as revenue fully belonging to the region from where the produce originates.

In addition, the regional Assembly was authorised to make laws with respect to: firstly, taxes on the incomes of resident Region; secondly, rates on land or buildings within the Region; thirdly, poll taxes in the Region; fourthly, taxes in respect of regional entertainment to which persons are admitted for payment; and finally royalties in respect of common minerals extracted in the Region.

However the Regional Assemblies were not allowed to tax bodies corporate, partnerships or persons under the age of eighteen years. It also limited the total amount of tax to a maximum level of 600 Kenya Shillings. Poll tax was limited to 100 Kenya Shillings. In addition, taxation of the residents of Nairobi fell under central government as set out in section 144(1).

67 Sec 137.
68 Sec 152 states that 'motor spirit' includes gasoline and other light oils suitable for use as fuel in internal-combustion engines and other products suitable for such use but does not include aviation spirit or other fuels suitable for use in aircraft engines; and 'diesel oil' means light amber mineral oil suitable for use as fuel in high-speed internal-combustion engines.
69 Sec 138.
70 Sec 139.

Both the Wako and Bomas drafts in the fourth schedule stated that the Government may raise revenue by way of taxes, levies, fees and charges including income tax; value added tax; corporation tax; customs duties and other duties on import and export of goods; excise tax; general sales tax; national stamp duties; taxes from the national lottery and schemes of a similar nature; taxes on transport by road, air, rail and water; rents from houses and other property owned by the Government; fees for licences issued by the Government; court fees, fines and forfeitures; exchange receipts; motor vehicle registration fees and driving licence fees; natural resource royalties tax; fees for Government goods and services; and any other taxes authorised by national legislation. This is similarly found in schedule five of the 2010 Constitution.

The re-distribution of revenue

Articles 100 to 104 of the Constitution allowed Parliament to authorise public spending to meet public purposes. Upon independence, half of the Regional Contingent of the Police Force for the Region was paid by the central government.[71] Today redistribution has been relegated to a legislative function and the battle continues between regional and central government constantly on the share of re-distribution while a revenue allocation commission makes decision on allocation, however the shares of resource allocation are no longer demarcated within the constitution.

Recommendations

There were many issues that were extensively discussed during the constitutional conferences and in diverse debates before and even after the 2005 and 2010 referendums on the Kenyan Constitution. However tax was not one of these issues.[72]

As a result, there are several issues that remain unclear, and it is crucial that the state moves forward in enacting some constitutional amendments

71 Sec 141.

72 Adapted from the contested issues as identified by the Law Society of Kenya's (LSK) Standing Committee's Final Report to the LSK Council, dated August 2006, and was commissioned by the UNDP Kenya. See LSK (2006) 'Standing Committee's Final Report to the LSK Council' http://www.ke.undp.org/constitutionalreview.pdf (accessed 2 May 2015). They included the Kadhis' court/Christian courts, presidential powers, executive authority, powers of prime minister, presidential/parliamentary system of government, external ministers – non-elected, women representation in parliament, presidential impeachment threshold, threshold for amending the new Constitution, place of culture in the Constitution, bill of rights (including issues relating to Muslims, land tenure and land commission, gay and lesbian marriages, citizenship, child rights and death sentence), administrative justice, Teachers Service Commission, provincial administration, post Constitution legislative enactments, devolution, presidential elections, entrenchment of the Kenya Anti-Corruption Commission in the Constitution, the place of the East African Community and its organs in the Constitution and Treaty Making Procedures.

or at minimum, legislative changes, as we settle into the implementation of the new Constitution. Firstly, article 210 of the Constitution which deals with the imposition of tax should be elaborated on to ensure that: one, that the Finance Bill is submitted to Parliament on the basis of agreed fiscal strategy, with resources allocated based on a minimum of five of the principles of taxation consistently throughout the Bill, in addition to using national objectives and needs to guide it. Two, there is a need for the use of economic stability and equity as the measure for the disbursement of resources. Three, expenditure should be sustainable especially in regard to preventing the accumulation of excessive debt. Finally, intergenerational equity should be maintained in the case of public debt and investment. Ideally parliament should be the custodian of public interest with the authority to protect and preserve public property. All other institutions and individuals authorised to collect or spend should do so under specifically delegated authority. In addition, parliament should reserve the right to take corrective action, especially on collection and mobilisation of resources, to ensure that fiscal assets are not used indiscriminately and ensure their efficient utilisation.

Secondly, there is a lack of specificity in the Constitution on the interaction within parliament as well as between parliament and government on the way forward for the government in fiscal decision-making. This includes but is not limited to: an absence of specific and written down institutional arrangements between the three branches of government in the context of taxation and fiscal policy; no clear demarcation of responsibilities and functions between the three arms of government; there is an absence of clarity on the capacity of each of the institutions to act as checks and balances on each other; and no clearly delineated provisions within the constitution as concerns parliament to enforce accountability and responsibility and demand transparency.

Thirdly, exemptions, variations and abandonment of taxes have been placed in the hands of the Cabinet Secretaries concerned. When parliament delegates any duty, it must retain the capacity to follow up on implementation, and demand accountability and transparency together with value for money. In addition, it must retain the power to demand reports on the delegated functions.

Fourthly, there needs to be a budget law. There is the option of placing many of these provisions in a piece of legislation but with the background of the reluctance to apply budgetary controls in the Kenyan context, the Constitution may be the only option. This includes provisions setting out that: annual budget estimates be accompanied by a budget policy indicating immediate, short-term, medium-term and long-term Government objectives; a budget detailing proposal of departments, comments and recommendations of the Cabinet Secretary of Finance and their submission of these to Parliament two months before presentation of budget; parliamentary scrutiny of departmental proposals before the

debates commences on the consolidated estimates; annual estimated be submitted with economic data to justify them; departmental budgets should indicate clear objectives and targets. The two month timeline provided for, is not enough; and changes to the budget, without parliamentary approval, should be limited if they are over 3 per cent of the budget.

Fifthly, the President currently appoints both the Controller of Budgets and the Auditor-General. This requires to be addressed as follows: There is a need for the basic minimum qualifications for the appointees to be revised. The appointment should be ratified by a majority of legislators in Parliament and any queries must be brought forward in parliament. Matters of finance should not be delegated to a committee but must be dealt with by the full parliament and even if the committee remains necessary the sessions must be open and regional representation must be ensured for both members of the legislature as well as public participants.

Sixthly, article 228 of the Constitution should be clarified to enhance accountability of the Controller of Budgets and government to provide that: one, any withdrawals must be presented to parliament within 21 days for approval. Two, details of the emergency must be provided including its nature, the responsible department, the extent and duration of the emergency. Finally, misuse will be termed a crime and the minister will be required to reimburse the amount personally.

Seventhly, in article 214, debts must be pegged to either GDP or revenue performance. Total debts and the economic capacity to service them must be pegged to each other. Public officers who commit funds are to be held personally responsible. Officers are requested to make good any loss from unauthorised expenditures. There must be disciplinary action or criminal charges for misuse of funds. All public debts and contingent liabilities must be reported at least twice a year. A Budget outcome/ performance report must be released within four months of the end of the fiscal year, include achievements and must be gazetted for public scrutiny.

Eighthly, there is no obvious list in order of priorities and thus commensurate spending and sourcing to address particular policies. Policies could address particular ethnic groups or marginalised groups like the disabled, or the girl child, thus justifying increased expenditure for schools for girls. It is for these reasons that the canon of efficiency, equity, stability, neutrality and predictability seem tantamount to the success of developing states taxation and public expenditure. This includes compliance with international treaties and standards such as the Millennium Development Goals as well as treaties that Kenya is party to.

Ninthly, there is a need to limit taxation. The more taxes the government takes, the less money individuals have to spend. The less they have to spend, the lower the standard of living. The higher the tax, the less

people save and invest. This limit to tax would include ensuring that there is always a balanced budget, that line item vetoes are allowed, that there be a super majority requirement as well as a referendum before large scale spending or constitutional amendments. Other potential recommendations to consider include the use of sunset provisions to put time limits on certain types of fiscal provisions so that they do not go on unchecked.

Conclusion

Emerging democracies have a unique opportunity. Unlike western democracies, which have long established and entrenched systems, there is currently the freedom in Kenya to construct the fiscal contract practically from scratch. Emerging democracies can adopt a system that meets the goal of raising revenue without the burden of excessive complexity and administrative costs, not to mention coercion and inequity. Constitutional provisions should reflect re-distribution. Taxes must be kept as low as possible, with low administrative costs. Taxes must be simple, visible and partially earmarked for specific purposes. This tax collection and re-distribution must be clear and easily understood. Although they should not be changed frequently, they should have a definite life span in order to allow for development indicators as well as inflation and economic changes to be re-assessed in order to also reassess the law in place.

Kenya's fiscal constitution has gone through numerous changes, most of which were a result of the change from a decentralised federal to a centralised unitary government with the amendment of the Westminster style independence Constitution. It subsequently was further centralised as was the case of all other laws in the country over the years, especially due to changes in the political and administration structures. However, these changes were not motivated by, or did not reflect any fiscal ideal. The current Kenyan Constitution can be placed in between the 1969 Constitution and the 1963 one, as it reflects some aspects of a federal system. However, the independence Constitution is more preferable as it established a more progressive fiscal contract since it had less uncertainty and was more delineated in terms of the sharing of revenue and resources.

These successive amendments not only eroded the fiscal contract but also completely replaced it with a power-centric and controlling government with no reference to responsibilities of the state. The Constitution also institutionalised an unchecked power to collect taxes whenever and wherever the state required finances. The result was a very centralised and controlling state. It may have been one of the many reasons that resulted in the overwhelming demand by the people to have a new constitution. The perception that many hold is that the fiscal laws were not a direct reason but the need to devolve finances stemmed from the fiscal provisions and the weakening of the system as a result. The fact that 40 years later we are back to a Constitution that has similar devolved

government principles is a reflection of the importance of finance and a recognition that perhaps the independence Constitution before it was amended was a better document than we gave it credit. As a result, the sharing provisions that were set out in the independence Constitution were completely removed through successive constitutional amendments that de-constructed not only the federal system but also the fiscal contract that had been agreed upon through the constitutional conference. These changes were not rationalised in terms of reducing tax burdens, or creating a more efficient taxation framework: they constituted victory for centralising forces and the effect was that taxes that were devolved and collected regionally such as those on soda ash in Magadi were as a result shifted to central government.

If the history of fiscal amendments is to be reflected upon, it is apparent that making any amendment, however small, to a constitution, can de-construct the fabric of a state and completely change its character. Despite such important lessons on the likelihood of negative implications, especially in speedy and rushed amendments to the Constitution, there have already been calls for amendments to diverse provisions of the new Constitution since 2012. Although this chapter adds its voice in calling for a reconsideration of the Kenyan fiscal structures, it also recognises that some issues may be addressed through mere legislation and policy rather than actual amendments to the current Constitution.

From the discussion in this chapter, despite the novel elements in the 2010 Constitution: including national values and principles with are overarching (art 10); detailed principles of public finance (art 201); revamped institutional framework that enhances accountability, transparency; a more democratic public finance system with an enhanced role for the legislature; and mandatory public participation it is apparent that the 1963 independence Constitution established a much better and clearer fiscal contract than the current 2010 Constitution. Although, the current 2010 fiscal Constitution is still much better than that which was in place just before the country began debating the social and fiscal contract that citizens hold with the state. The progress achieved in the 2010 Constitution requires to be adequately safeguarded from any regression, while at the same time, effort is made to improve the fiscal contract to a level that equals or is better than the progressive contract established under the 1963 Constitution. It is this failure to debate and discuss the fiscal provisions in the new constitution, in order to address their appropriateness, which has resulted in the creation of a very fiscally heavy and idealistic Constitution.

CHAPTER 4

JUDICIAL RESPONSES TO WOMEN'S RIGHTS VIOLATIONS IN KENYA IN THE POST-2007 CONTEXT

Ruth Aura-Odhiambo

Introduction

Throughout Kenyan history, defective and subjective cultural beliefs allowed women only limited roles in society as a result of their subordination.[1] Many people, in preservation of patriarchy,[2] believed that women's natural roles were being mothers and wives. Women were considered to be better suited for childbearing and household work than for involvement in the public life. The women's movement in Kenya has faced many challenges to gain equality in political, social and economic aspects of society due to the patriarchal nature of the Kenyan society. Until 2010, the Kenyan society formally denied women some significant rights and freedoms accorded to men.[3]

Since the promulgation of a new constitutional dispensation in 2010, women's efforts to fight against violation of their rights have been an important part of the women's rights movement. Notable are the express provisions of the Constitution which seek to improve the legal, socio-economic and political status of women in the country. Article 10(2)(b) for instance integrates issues of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised as part of national values and principles of governance which were conspicuously absent in the repealed Constitution. Broadly interpreted, this article outlaws all forms of discrimination against women and sets the tone for the protection of women's rights as embodied

1 T Kanogo *African womanhood in colonial Kenya 1900-50* (2005) 3-5.

2 Patriarchy is a social and ideological construct, which considers men (who are the patriarchs) as superior to women. S Ray 'Understanding patriarchy' (undated) *Human Rights, Gender and Environment* 1.

3 See, for instance, sec 82(4)(b) and (c) of the repealed 1964 Kenyan Constitution, which allowed for discrimination with respect to 'marriage, divorce, burial, devolution of property on death or other matters of personal law' and customary law, respectively. These are areas where women face serious subjugation, subordination and threat to their fundamental rights and freedoms.

in the constitutional framework. This is an indication that culture cannot be invoked by anyone to derogate from these constitutionally-guaranteed rights.

Another milestone for Kenyan women is the equality clause encapsulated under article 27 which guarantees equality, equal protection, and equal benefits before the law. The clause is categorical that both men and women have the right to equal treatment and opportunities in all spheres of life.[4] The Constitution further guarantees, through the enactment of legislation and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination, the realisation of the rights under the equality clause.[5] Through affirmative action, the Constitution mandates the state to implement a two-thirds gender principle where no more than two-thirds of members of either in elective or appointive bodies are of the same gender.[6] This will be revisited later in depth in the chapter.

At the international level, Kenya has ratified, in addition to other important human rights instruments, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[7] in 1984 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2010.[8] These instruments have further vitalised the human rights issues. Despite the ratifications and subsequent integration of these instruments into the constitution and legal framework, the same has not been fully translated into legal niceties for the benefit of Kenyan women as shall be illustrated in later analysis.

Despite the fact that women form a majority of the population in Kenya[9] and play an active role in the development of the society, the government relatively remains a very patriarchal society, and the status of women remains relatively low with inequalities and inequities prevailing in many aspects of life. Women continue to be marginalised and discriminated against in almost all aspects of their lives, a situation which

4 Art 27(3) of the Constitution.
5 Art 27(6) of the Constitution.
6 Art 27(8) of the Constitution.
7 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13.
8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11 July 2003, entry into force 25 November 2005) (2003/2005).
9 The 2009 Kenya Population and Housing Census places the number of females at 19 192 498 as opposed to the males which are placed at 19 192 458 representing 50,3% and 49,7% respectively. Kenya National Bureau of Statistics 'The 2009 Kenya Population and Housing Census' August 2010 Vol 1C. See also FIDA-K 'At risk: Rights violations of HIV-positive women in Kenyan health facilities' (2008) http://reproductiverights.org/sites/default/files/documents/At%20Risk.pdf (accessed 19 December 2014).

is reinforced by the existing laws and policies, as well as the socio-cultural factors. Defined in its literal sense, patriarchy means the rule of the father in a male-dominated family.[10] Walby calls it 'a system of social structures and practices in which men dominate, oppress and exploit women'.[11]

During the colonisation period in Kenya, the British maintained this form of structure, life patterns as well as the culture of the community as it existed at the time.[12] This reinforced the system which was based on patriarchy in the colonial and post-colonial social, political, and economic structures.[13] These practices have continued to influence the day-to-day activities of the Government in all its institutions and agencies, including the judiciary.

Women representation in the judiciary has been skewed for a long time, with the majority occupying the bottom tiers of the institution.[14] As a result, the judiciary has, in most instances, been inconsistent in protecting women from the claws of patriarchy. This can be attributed to a male-dominated judiciary which has over the years reflected patriarchal tendencies in its decisions and therefore denied women equal access to justice.[15] The securing of equal and effective access to justice entails gender-sensitive engineering of the entire chain of justice in a way that guarantees not only formal but also substantive equality.[16] The limited appreciation of women's rights and an inadequate appreciation of gender roles by a patriarchal male-dominated judiciary negatively affect women's equal access to justice.

10 S Walby *Theorising patriarchy* (1990).
11 As above.
12 M Mathangani 'Thetriple battle: Gender, class, and democracy in Kenya' (1995) 39 *Howard Law Journal* 287.
13 Mathangani further argues that the situation did not change when the country became a republic in post-independent Kenya. Rather, the patriarchal system was absorbed into governmental structures and institutions, and was further reinforced by law and social practices that conditioned women to be inferiors, promoted gender stereotypes, and labeled female politicians as 'abnormal women'. As above.
14 It is notable that after the judicial purge in 2003, there was no woman as a Court of Appeal Judge, which previously had only one woman out of ten men. In spite of a credible report indicating that women formed about 35% of the total number of lawyers in the country and that 36% of the magistrates were women, the female gender still made up only 22% of High Court judges. 'The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of All Forms of Discrimination against Women' February 2006 to April 2009. Since the promulgation of the 2010 Constitution of Kenya and subsequent reforms, there have been modest changes in the Kenyan judiciary. For instance, there are currently eight female Court of Appeal judges as opposed to 16 male judges, which is progressive compared to the pre-2010 constitutional framework. See, Republic of Kenya, the Judiciary 'List of judges' http://www.judiciary.go.ke/portal/judges-of-the-judiciary.html (accessed 6 May 2014).
15 It should be noted however that there have been instances, though few, when female judges have played into the hands of patriarchy and ignored the promotion of women's rights. See for instance the case of *Rono vs Rono* Eldoret High Court Probate and Administration Cause No 40 of 1988, discussed below.
16 F Raday 'Access to justice' (undated) http://www.ohchr.org/documents/issues/women/wg/presentationwomenacessjustice.doc (accessed 18 December 2014).

Under international law, it is recognised that access to justice is paramount in the realisation and enforcement of human rights. Kenya has signed and ratified various international legal instruments. Therefore, access to courts is necessary in order to enforce rights enshrined in the Constitution, in legislation and/or in the case law. CEDAW mandates states 'to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'.[17] Similarly, the equality of all persons before courts and tribunals is stipulated in article 14 of the International Covenant on Civil and Political Rights (ICCPR).[18] The right to a legal remedy for human rights violations is also protected by article 14 of the ICCPR[19] and article 7 of the African Charter on Human Peoples' Rights.[20] These provisions have been replicated in the 2010 Constitution of Kenya under article 48 on access to justice, article 22(1) on enforcement of rights, and article 23(1) on the authority of courts to uphold and enforce the Bill of Rights. In essence, these provisions, guarantee persons whose rights have been violated access to courts for redress.[21]

However, access to courts for women, especially those in rural areas, is still severely limited.[22] Women's access to courts may be hindered by discriminatory family law norms, social barriers, institutional and procedural obstacles, practical and economic challenges.[23] There is however a general trend to repeal these norms, barriers and challenges especially in the post-2010 period.The premise of this chapter is that at the national level, the judicial branch of government is the first line of defense for protecting women's individual rights and freedoms, which is why its effectiveness in responding to human rights violations is so vital. An adequate judicial response is essential if women victims of violence are to have a remedy against human rights violations and if those violations are not to go without redress.

17 Art 2 of CEDAW.
18 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.
19 As above.
20 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3/Rev.5.
21 The issue will be discussed in greater detail later in this chapter.
22 Food and Agriculture Organization (FAO) 'Rural women and access to justice' (2013) FAO's contribution to a Committee on the Elimination of Discrimination against Women (CEDAW) half-day general discussion on access to justice.
23 'Access to justice – Concept notefor half day general discussion' Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/ConceptNoteAccessToJustice.pdf (accessed 19 December 2014).

Pre-2010 judiciary in Kenya and its response to women human rights violations

The repealed Constitution provided for only the first generation rights, which are civil and political rights.[24] These rights were general in nature and did not specifically include women's cluster of rights. They included the right to life and personal liberty, freedom from slavery and forced labour, inhuman treatment, deprivation of property, arbitrary search or entry, and freedom of conscience, expression, assembly, association, and movement.[25] The repealed Constitution was extremely limited in scope in terms of protection of women's rights. In that regard, the courts could offer little or no protection to women.

During the pre-2010 judicial epoch, the attitude of the courts towards women and violation of women's rights was at its lowest. The High Court in the case of *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge*[26] best illustrates this position. In this case Kuloba, J reprimanded women for travelling to Beijing to 'look for ideology'. The Court consequently declined to award the respondent her share of matrimonial property by considering extraneous matters that were purely based on sexism. The Court in exhibiting a biased attitude against women observed that:

> Many a married woman goes out to work. She has a profession. She has a high career. She is in big business. She travels to Beijing in search of ideologies and a basis for rebellion against her own culture. Like anyone else, she owns her own property separately, jointly or in common with anyone. Her business interest, her property and whatever is hers is everywhere in Kenya and abroad, in the rural, urban and outlying districts. In Nairobi alone her property and businesses, swell through Lavington, Muthaiga, Kileleshwa, Kenyatta Avenue, swirls in Eastlands, with confluents from everywhere. Perhaps apart from procreation and occasional cooking, a number of important wifely duties obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for all these and more …

Even in criminal matters the courts have shown bias in the administration of justice which has subsequently impeded women's access to justice. The Court of Appeal in the case of *Dzitu v Republic*[27] best illustrates this position. The appellant had been charged with, amongst other things, rape, with the alternative charge of indecent assault on a female. The second count related to attempted rape. At the court of first instance, the appellant was convicted and sentenced to serve four years in prison in addition to

24 See chap V (from secs 70 to 86) of the Repealed Constitution.
25 These rights were, however, undermined, for example, through the 6th Constitutional Amendment Act 18 of 1966, which was published on 7 June 1966.
26 HCCC No 1610 of 1999.
27 *Dzitu v Republic* Malindi HCCA No 73 of 2002.

being condemned to three strokes of the cane with hard labour, but he appealed. The appeal was allowed and the accused person acquitted on the ground that a prosecutor below the rank of acting inspector had prosecuted the case. This was a case where an accused is acquitted on the basis of a technicality instead of considering the substance of the law. This was a miscarriage of justice for the woman who was raped and the court did not consider the pain and trauma suffered by the woman to allow the case to proceed on merit.

In other cases, judicial officers were reluctant to mete out the desired punishment. This was demonstrated in the case *Matheka v Republic*[28] in which the appellant had been convicted of defilement of a girl under the age of 14 years in contravention of section 145(1) of the Penal Code by the court of first instance. He was consequently sentenced to 14 years' imprisonment in addition to eight strokes of the cane. On appeal, the Court, although appreciating the gravity of the nature of the offence, allowed the appeal against the lower court's sentence. The Court of Appeal observed that:

> The evidence against the appellant was overwhelming … The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. In this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed.

The repealed constitution imported culture and patriarchy in most of its provisions. Sections 90 and 91, on citizenship for instance, only allowed men to confer citizenship to children born outside Kenya and non-Kenyan spouses respectively while Kenyan women were denied this privilege.[29] The courts also perpetuated the culture of patriarchy and subjugation of women. In the case of *Shaka Zulu Assegai v The Attorney General of Kenya*[30] in dismissing the suit argued that conferment of citizenship by Kenyan women on non-Kenyan citizens, even after marriage, went against the grain and spirit of constitution observing that Kenya was a patrilineal

28 *Matheka v Republic* High Court at Mombasa, Case No 126/00.

29 Section 90 of the repealed Constitution provided that 'a person born outside Kenya after 11 December 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya' while sec 91 provided that 'a woman who has been married to a citizen of Kenya shall be entitled upon making an application in such a manner as may be prescribed by and/or any Act prescribed by parliament to be registered as a citizen of Kenya'. See also RA Odhiambo 'The perception and application of international law within the domestic arena – The paradigm shift in the Kenyan scenario' (2005) Masters Programme in Women's Law, SEARCWL, 2005/2006 5.

30 *Shaka Zulu Assegai vs The Attorney General of Kenya* (1990) Unreported. In this case, the petitioner was a black American who married a Kenyan. He filed a constitutional reference against the Attorney-General seeking Kenyan citizenship by virtue of the fact that he was married to a Kenyan woman.

society and as such children and wives would naturally take up the nationality of their fathers.[31]

The famous case of *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga*[32] commonly referred to as the *SM Otieno* case further illustrates the bias of pre-2010 judiciary against women in interpreting the repealed constitution. The case involved a prominent Nairobi lawyer named SM Otieno who passed away without leaving a will. Immediately upon his death, his widow Wambui Otieno embarked on making burial arrangements to inter her husband in Ngong near Nairobi and far away from Otieno's rural home. However, the husband's clan, *Umira Kager* wanted to bury his body in Nyalgunga Nyanza, which was his ancestral home, in accordance with the Luo community customs. In court, the widow prayed for a declaration that she was entitled to claim her husband's body and bury it on their farm near Nairobi. Justice Frank Shields issued an injunction restraining the brother of the deceased and the *Umira Kager* clan elders from burying the deceased at the ancestral lands of the clan. The clan immediately appealed against the ruling and the Court of Appeal set aside the ruling and orders of the lower court. The case was then taken for a full trial at the High Court where a three-judge all-male bench decided that the deceased was to be buried in Nyanza. The widow unsuccessfully appealed against this decision.

The Court in this case upheld the Luo customs and traditions, stating that the wife had no duty to bury the deceased, and that in the absence of customary law, the duty could only lie with the personal representative of his estate. The Court stated that:

> [T]here is no way an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr Otieno having been born and bred a Luo remained a member of the Luo tribe and subject to the customary law of the Luo people.

With respect to division of matrimonial property, women suffered a backlash in 2007 when the Court of Appeal altered the norm of the 50/50 share of matrimonial property upon divorce in the case of *Echaria v Echaria*.[33] In this case, the court stated that the wife must show financial contribution in a case of division of matrimonial property and

31 It should be noted that at the time the decision was made, the Constitution was silent on the issue of discrimination on the basis of sex. Such decision was against the principle of equality and contravened art 9 of CEDAW which Kenya had ratified without reservation. The said art provided that: 'That state parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband …'

32 *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* (1982 - 88) 1 KAR.

33 [2007] eKLR. See also *Kamore v Kamore* [2000] 1 EA 80 and *Kimani v Kimani* HCCC No 1610 of 1999, which espoused a similar principle.

subsequently awarded the wife only 30 per cent of the matrimonial property. This decision ignored the non-financial contributions a woman brings to a family and went against the equality principle as espoused under article 16 of CEDAW. This provision provides for equality between men and women in a marriage at the time of its dissolution or separation or upon the death of a spouse. Prior to this decision, a woman only needed to show that she was a wife and that the matrimonial property for division was acquired during coverture.[34]

These cases demonstrate the incessant fight for women's rights to be liberated, which efforts in the above cases have been thwarted on grounds that indicated gaps in the law as well as a laxity by the judicial officers in implementing the law. These kinds of situations have brought about instances where, in Kenya, women confront manifold violations of their human rights that attack their progress in the public life and those that hamper their private lives as well.

The Constitution of Kenya 2010 as the launch pad for a paradigm shift in the protection of women's rights

Kenya has a very ambitious and progressive Constitution, which seeks to restore public faith and confidence in the country's institutions. The aim of the Constitution is that the legislative arm of Government will truly act as the representatives of the people and the supervisors of the executive; that the executive will put the interests of the nation first, above ethnic, individual and class interests; and that the curse of impunity will be ended when the rule of law prevails. The role of the judiciary in the realisation of this vision is critical.

The 2010 Constitution of Kenya aims at creating a human rights state, having set out an elaborate Bill of Rights with 33 articles, and declaring these to be an integral part of the democratic state and framework for social, economic and cultural policies.[35] Courts are expressly mandated to protect, uphold and enforce these rights. Having allocated these responsibilities to the courts, the Constitution then proclaims that judicial authority comes from the people of Kenya and is exercised by courts and tribunals on their behalf. Although judicial authority is vested in the judiciary, it is derived from the people of Kenya and should be exercised for their benefit.[36]

34 See for instance *Kivuitu v Kivuitu* [1991] 2 KAR 241.
35 See chap 4 of the 2010 Constitution of Kenya generally.
36 Art 159 of the 2010 Constitution of Kenya.

The 2010 Constitution establishes a framework through which non-discrimination and gender parity is advanced. It asserts rights of women and men to equal treatment and equal opportunities in political, economic, cultural and social spheres and requires state organs and public offices to take measures, including affirmative action to address past systemic discrimination suffered by vulnerable groups including women.[37] Equal citizenship rights are guaranteed and women can now transfer citizenship to their children whether born in foreign countries or born to foreign fathers.[38]

In composition of the National Assembly, 47 seats are reserved for women. A further 16 seats are reserved for nomination of women by political parties to the Senate. Women are also given opportunity to participate in leadership through county elections. The Constitution further limits membership of any gender in elective and appointive public bodies by capping membership at two thirds.[39] It further guarantees representation of women in public bodies by ensuring equal access by women and men to opportunities of appointment, training and advancement at all levels of public service.[40] These provisions are meant to ensure women also occupy positions of leadership in public offices which give them an opportunity to bring their perspectives and influence decision-making processes. It is important to note that Kenyan political environment has been a hostile environment for women to wade through. The reserved seats and the two-thirds gender rule have given women a lease of life in politics by increasing and ensuring their participation in decision-making processes in politics through these formulae.

Since the adoption of the 2010 Constitution, various legislation to compliment support for the rights of women has been adopted as law. This includes the Prohibition of Female Genital Mutilation Act,[41] which prohibits the practice of female genital mutilation, in order to safeguard against the violation of a women's mental or physical integrity through such practice. The Matrimonial Property Act,[42] which provides for the rights and responsibilities of spouses in relation to matrimonial property, has also effectively been passed into law. This is in addition to the Land Act[43] and the Land Registration Act,[44] which require that spousal consent

37 Art 27 of the 2010 Constitution of Kenya.
38 Art 14(1) of the 2010 Constitution of Kenya.
39 Art 81(b) of the 2010 Constitution of Kenya.
40 Art 232 of the 2010 Constitution of Kenya.
41 32 of 2011.
42 49 of 2013.
43 6 of 2012.
44 3 of 2012.

must be obtained before dealing in any way with matrimonial property.[45] There is also the Political Parties' Act,[46] which requires that for any political party to be registered it has to provide proof of equitable gender representation.[47] In addition, there is the Protection against Domestic Violence Bill of 2013, which, however, is yet to be passed into law.

General constitutional provisions relating to women's rights

Women's rights are an integral part of Kenya's democratic state, and their constitutionally entrenched rights are a framework for social, economic and cultural policies. Generally, as previously mentioned, article 10 provides for national values and guiding principles and imports issues of human dignity, non-discrimination, equality, among other rights. Read together with article 2(4), the Constitution outlaws use of biased customs and cultural norms as grounds for discrimination against women. Article 14(1) of the 2010 Constitution ensures that women are able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. This was a right which was only guaranteed to men.[48] The wording of the clause in this particular article has imported the meaning of citizenship as enunciated in article 9 of CEDAW and article 6 of the Maputo Protocol on issues of nationality.

Article 26 of Constitution generally outlaws abortion. However, a woman is allowed to abort under certain circumstances including where in the opinion of a trained health professional there is need for emergency treatment, or the life of or the health of the mother is in danger, or where there is a written law permitting it.[49] Liberal interpretation of article 26(4) on 'permitted by any other written law' indicates that abortion is permitted in Kenya on demand for reasons other than those specified in the provision. Provisions of international law such as article 12 of CEDAW allowing abortion can be invoked as being 'any other written law'.

Article 27 can be considered as the 'equality clause' when the main principle of equality is discussed. The provision in addition to outlawing discrimination in whichever form, guarantees equal rights between men

45 Previously, Land Control Boards were required to first approve transactions affecting agricultural land, on the basis of sec 6 of Land Control Act, Chap 302 of the Laws of Kenya. However, spousal consent was not required for such transactions. Thus, one spouse could sell the matrimonial home without the other's knowledge, much less consent. See, for instance, the case of *Kamau v Kamau* (2006) 59 KLR 9, where the Court of Appeal upheld a husband's sale of matrimonial land without his wife's consent.

46 11 of 2012.

47 Sec 7(2)(b) of the Political Parties' Act.

48 See secs 90 and 91 of the Repealed Constitution and the interpretation of the court in *Shaka Zulu's* case.

49 Art 26(4) of the Constitution.

and women in all spheres. To operationalise this clause, article 27(6) and (8) mandates the government to undertake certain measures which include enactment of legislation and flagging affirmative action programmes and policies to redress the injustices caused by past discrimination. There is a specific requirement that mandates the government to ensure that not more than two-thirds of members of elective or appointive bodies are of the same gender. This principle has been partially employed by government in the appointment of public and judicial officers. While the article has not been fully implemented, there is an effort at compliance which has helped increase the number of women in decision-making processes.

Under article 45(3), the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the period of its subsistence and at its dissolution. The protection of women has been bolstered by this provision as it cushions women, in particular those in customary marriages, from being evicted from their matrimonial homes empty handed as was the case under the old constitutional order. Article 53(1)(e) further assures that parental responsibility shall be shared between parents regardless of marital status. In the past, children born out of wedlock were the primary responsibility of the mothers. This consequently overburdened women in providing for such children. This provision has thus made it possible for both parents to cater for the child equally and therefore sanitising the situation.

Article 60(1)(f) eliminates gender discrimination in relation to land and property, and gives everyone, including women, the right to inheritance and unbiased access to land. This provision is also bolstered in the National Land Policy.[50] These provisions are aimed at safeguarding women's land and property rights which hitherto had been ignored by statute. Additionally, article 68(c)(iii) provides that Parliament shall enact legislation for the protection of matrimonial property, with special interest on the matrimonial home during, and upon the termination of the marriage. Since independence, matrimonial property in Kenya has not had a specific legislation addressing the issue. Instead the Married Women Matrimonial Property Act of 1882 has been in use by virtue of the Reception Clause of 1897.[51] To operationalise article 68(c)(iii), Parliament has enacted the Matrimonial Property Act to specifically address these issues in the Kenyan context. On the general principles of the electoral system and process, article 81(b) of the Constitution provides for a one-third requirement for either gender in elective bodies. This provides the women of Kenya with the opportunity to constitute at least one-third of persons elected to public bodies. This has the same principle on the two-thirds rule which has already been discussed previously in this chapter

50 See para 220 - 225 of the Policy.
51 This means the provision by which English Law became part of Kenyan Law.

under article 27. The Supreme Court of Kenya has held that this particular right for women is progressive in nature.[52]

Article 91(f) of the Constitution requires gender equality to be maintained in political parties. It provides a basic requirement for political parties to respect and promote gender equality. Under article 27(3), the Constitution ensures that women and men will have the right to equal treatment and opportunities in political, economic, cultural and social spheres without discrimination. The Constitution further accords the right to health, including reproductive health to all.[53]

Specific responses by courts to women's rights violations

Political representation and engagement in decision-making processes

Whereas women continue to play an important role in party politics, women's participation in the often alpha-male led political parties, with strong ethno-regional appeals, has been confined to 'entertaining' power and voting, not representation. Indeed, it is this dilemma on women's representation that made the women's caucus, arguably the most organised and representative of the caucuses in Kenya's protracted constitutional making process, to advocate for several provisions that would remedy the historical legacies of women's exclusion and marginalisation in decision making processes.[54] The history of the struggle for affirmative action[55] bore fruit after the promulgation of the 2010 Constitution of Kenya. It provides a legal framework for gender equality and women's empowerment.

The Constitution of Kenya recognises women and ethnic minorities as special groups deserving of constitutional protection. The principles of devolution under the Constitution also seek to foster and promote affirmative action. Two approaches have been provided for under the Constitution. First, affirmative action is made a key principle of

52 See, *Supreme Court Advisory Opinion on the Applicability of Two-Third Gender Rule*, Reference No 2 of 2012.The case will be discussed in more detail later in the chapter.

53 Art 43(a) of the Constitution.

54 A Aketch 'Gender equity Kenya crossroads' (undated) http://www.awid.org/News-Analysis/Women-s-Rights-in-the-News2/Gender-Equity-Kenya-Crossroads (accessed on 5 February 2014).

55 According to the Stanford Encyclopaedia of Philosophy, 'affirmative action' means positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture, from which they have been historically excluded. When those steps involve preferential selection ? selection on the basis of race, gender, or ethnicity ? affirmative action generates intense controversy. Stanford Encyclopaedia of Philosophy http://plato.stanford.edu/entries/affirmative-action/ (accessed 5 February 2014).

governance.[56] Secondly, there are specific constitutional provisions on affirmative action.[57] The provisions on affirmative action require the Government to take positive steps to ensure historical injustices are redressed and minorities empowered. Affirmative action by and large can be termed as a normative type of restraint.

As noted earlier, the Supreme Court of Kenya, by a vote of four to one, held that gender equity as an affirmative action right for women in political participation regarding the two-thirds rule is progressive in nature and not for immediate realisation. The Chief Justice, however dissenting from the majority decision,[58] stated that the two-thirds gender principle should be implemented during the General Elections held on 4 March 2013.[59] The majority decision of court made provisions for legislative framework to be in place by August 2015to help in the implementation of the two-thirds principle. Politically and socially, this decision will continue to have negative effects on women's participation in public service, and their shaping of public policies and legislation, considering that there are few women who take part in active politics and activism as long as a framework is not devised to implement this principle. Male-dominated institutions often view issues through a patriarchal lens and therefore lack the proper and necessary insight to appreciate issues affecting women and this impedes women's socio-economic and political progress. Affirmative action is bound to bring equality and freedom from discrimination for both men and women, as they have the constitutional right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[60]

Post-2010 courts have effectively made an attempt at redressing the situation as pre-existed before the ratification of a novel constitutional dispensation. The case of *Centre for Rights Education and Awareness (CREAW) and 8 Others v Attorney General and Another* for instance is a prime example where Court positively made a decision on the issue of women representation.[61] The case involved a petition and a judicial review application on the question of the constitutionality of the appointment or deployment by the President of 47 County Commissioners with only ten out of the 47 persons 'appointed' or 'assigned' as County Commissioners being women. The petitioners impugned the acts of the President in making the 'appointment' or 'deployment' as being unconstitutional and in violation of articles 10, 27, and 132 of the Constitution. The petitioners

56 Art 174 on electoral system, and art 81(b)(c) and 100 of the Constitution on representation.
57 See arts 10(2)(b), 53, 54, 55, 56, 57, 59, 91(e), 97(b), 98(c) - (e), 127(c) & (d), 171(1)(d) & (f), 174, 175 and 232 of the Constitution.
58 *Dissenting Advisory Opinion* http://www.judiciary.go.ke/portal/assets/files/one-third-rule/Dissenting%20Opinion-One%20Third%20Rule.pdf (accessed 14 February 2014).
59 *Dissenting Advisory Opinion* (n 58 above) para 11.12.
60 Art 27(1) and (3) of the Constitution.
61 *Centre for Rights Education and Awareness (CREAW) and 8 Others v Attorney General and Another* [2012] eKLR.

submitted that under articles 27(6) and (7), the Constitution had made a salient promise to the different genders in Kenya.

The petitioners consequently prayed that the Court considers the provisions of article 27(6) of the Constitution, which requires that the Court, in the context of gender, to always ask itself which gender has been disadvantaged in the past so that where an opportunity arises to give a gender more than the mere average, that gender is given priority in order to bridge the gap created by historical disadvantage. The Court made a finding that the president was indeed in violation of articles 10 and 27 of the Constitution since the issue of gender balance was never considered in the appointments. The duty, the Court stated, was on the state to show that it could not get the one-third of County Commissioners out of the women population, which comprises of a majority of the total population.

Similarly, the High Court in *Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General and Another*[62] where the Petitioners went to court to challenge the presidential nomination of the Chief Justice, Attorney-General, Director of Public Prosecutions and the Controller of Budget as being unconstitutional. In upholding the Petitioner's assertions, the Court held that the nominations were unconstitutional for violating article 27 of the Constitution for discriminating against women, amongst other grounds. Those who were appointed then were all men as opposed to the requirement for the two-thirds principle stipulated under article 27(8).

This case followed the decision of the High Court rendered in *Milka Adhiambo Otieno and Another v The Attorney General and Another*[63] where the court observed that public bodies should apply the principle contained in article 27(8) of the Constitution. The Court of Appeal buttressed this position when it held in *Commission for the Implementation of the Constitution v The Attorney General and Others* that:

> Article 90 of the Constitution decrees that the party lists must comply with ... the requirement for gender equity in that the qualified candidates must be listed in order of priority but that order must alternate between men and women.[64]

Another symbolic ruling was delivered in the case of *FIDA-Kenya and 5 Others v The Attorney General and the Judicial Service Commission.*[65] This petition challenged the constitutionality of the nominations of applicants

62 [2011] eKLR.
63 Kisumu HC Petition No 33 of 2011.
64 Civil Appeal No 351 of 2012. See also the decision of the Court in *National Gender and Equality Commission (NGEC) v Independent Electoral and Boundaries Commission and 5 Others* Petition No 147 of 2013.
65 Petition No 102 of 2011. The Court recognised that persons to be appointed to any judicial office have to be learned persons who have gone through vigorous learning and experience. The criteria for appointment of the judicial officers were clearly

to the positions of Judges of the Supreme Court. The applicants were of the view that the nominations list was in contravention of the rule requiring that not more than a third of persons appointed to any public office be from the same gender. The Court eventually dismissed the petition but not without first emphasising that judicial appointment should be based on the concept of equal opportunity and non-discrimination. The Court held that:

> We do not hold you in contempt. In fact and indeed we do not regard the women who were not considered for the Supreme Court as less deserving than those who were recommended and appointed. It is not their failure but because [the Judicial Service Commission] JSC exercised a legitimate discretion within the parameters of the law in favour of those who performed better than them. We realize from your submissions and conduct that you will find this decision disappointing but your disappointment should not be exaggerated by the thought that this rejection reflects in any way on your legal and human worth. You have our sympathy in the sense that it is too bad that you did not succeed.

The Court concluded that to grant the orders sought would undoubtedly be encroaching upon policy and legislation undertakings, which were not reserved for the judiciary. According to the bench, the charge of constitutional impropriety levelled against the Judicial Service Commission (JSC) was without any evidential basis and, therefore, misconceived and unfounded. The Court pronounced that it was unable to uphold such allegations and assertions because it was not the Court's role to pronounce policy or to legislate. The Court, however, commended the petitioners for their great passion and fervour with which they pursued the petition before the Court. Due to the public interest and furore created by the petition, they were urged to remain vigilant and to keep the state and the legislature on their toes until all women of Kenya are accorded full recognition and their capabilities appreciated.

The position adopted by the courts in these cases underscores the importance of the two-thirds gender rule. The Constitution promotes the participation of women and men at all levels of governance and makes provisions for proportional representation. It provides for women occupying at least one-third of the seats in County Assemblies as well at least one-third of the seats in the Senate. However, these analyses indicate total disharmony and confusion in the way to implement the two-thirds gender rule. It really puts a halt towards the high-end achievement of affirmative action now advocated for in all countries of the world. It has surely slowed down the efforts to bring the issue on affirmative action to

spelled out in the Constitution and the provisions of the Judicial Service Act. The Court took the view that art 27 of the Constitution as a whole or in part did not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions. It opined that art 27 can only be sustained against the government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms by the state.

play in all sectors of government, a situation that will derail the representation of women in key dockets to have their issues dealt with succinctly.

The rights of women in labour relations

Gender equality is a fundamental right and is essential to development. Lack of gender equality results in a large unutilised economic potential, which means that both women and men should be given the same opportunities to deploy their resources. It is, therefore, critical that women and men have the same chances of access to political, economic, healthcare, education, and employment opportunities. Such should be the fundamentals upon which the courts arrive at their decisions to ensure that no woman is discriminated against on the basis of gender in relation to employment. In this regard, the 2010 Constitution of Kenya provides that *every* worker has the right to fair labour practices. The 'every' in this provision connotes both men and women and does not discriminate against any particular sex.

International human rights standards governing the rights of women have also established the consideration of sexual harassment against women as amounting to discrimination against women, which is proscribed at international law.[66] CEDAW prohibits all forms of discrimination against women and calls upon state parties to take relevant measures to prevent such actions.[67] Discrimination against women is also addressed in other international treaties, to varying degrees, including the Universal Declaration on Human Rights (UDHR),[68] the International Covenant on Civil and Political Rights,[69] and the International Covenant on Economic, Social and Cultural Rights (CESCR).[70] Under article 2 of the ICCPR, each state party undertakes to respect and ensure the enjoyment, by all individuals within its territory and subject to its jurisdiction, the rights recognised in the Covenant, without distinction of any kind such as race, sex, language, religion, political opinion and national or social origin.[71]

The Courts ought to uphold the rights of women, in cases of their violation by employers, on the basis of the treaty obligations of the state to

66 Art 1 of the Convention on the Elimination of All Forms of Discrimination against Women (n 7 above).
67 As above.
68 Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948).
69 International Covenant on Civil and Political Rights (n 18 above).
70 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.
71 W Maina 'Using international human rights to confront discrimination: The case of Nigeria, Tanzania, Kenya and South Africa' in International Commission of Jurists (ed) *Human rights litigation and the domestication of international human rights standards in Sub Saharan Africa* (2007) 1 39, 43.

uphold the standards set out in the international instruments, which have also been codified into Kenyan law through the 2010 Constitution of Kenya. More importantly, employment discrimination on the basis of gender, in the form of sexual harassment, is an affront on the dignity of the person and is inconsistent with human rights norms as enshrined in international instruments such as the Universal Declaration of Human Rights.

With regard to recent jurisprudence from the courts on employment issues, the case of *VMK v CUEA,*[72] which involved a young female adult who suffered blatant discrimination at the work place for a period of seven years for reasons of sex, pregnancy and HIV/AIDS status, is instructive. The Court, in acknowledging the existence of discriminatory practises against the woman, held that:

> [T]he conduct of the Respondent grossly violated Article 27 of the Constitution and in particular her right to equal benefit of the law and equal enjoyment of all rights was grossly violated by the discriminative conduct of the respondent in spite of specific provisions of the labour laws that guaranteed the claimant specific rights and equality at the workplace.

The Principal Judge, Mathews Nduma, in awarding her damages amounting to Kenya Shillings 6 971 346 stated that the blatant confrontation by the Human Resource Office who told her that people with HIV status could not be employed permanently, the testing of HIV status without her consent, and the disclosure of her status to third parties without her authority, demonstrated the seriousness of the violations and the need to compensate the claimant for the hurt feelings and eventual loss of employment due to her HIV status.

In the case of *Jane Wairimu Macharia v Mugo Waweru and Associates* the court addressed the question of the right to maternity leave for female employees.[73] The claimant's allegations were based on unfair termination of her employment and failure to be paid terminal benefits. According to the claimant, she served the respondent with diligence and loyalty but the respondent terminated her services when she applied for maternity leave. In her evidence in chief, the claimant stated that when she pursued the issue of her maternity leave, he ejected her out of his office. Subsequently, she was admitted to the Nairobi Women's Hospital on 18 July 2011 and delivered her baby on 19 July 2011. She also stated that at no time was a review of her performance ever undertaken nor did she agree to extension of her probation.

72 *VMK v CUEA* [2013] eKLR.
73 *Jane Wairimu Macharia v Mugo Waweru and Associates* Industrial Court Cause No 621 of 2012.

The Court found that the employer's conduct was discriminatory under section 46 of the Employment Act.[74] In addition, the Court affirmed that every female employee has a right to a three-month maternity leave, besides the annual leave enjoyed by all other employees. Failure of an employer to comply with this statutory period amounts to a direct discrimination against female employees.[75] The Court further held that:[76]

> A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. Even where there may be disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.

These cases indicate the devotion of the courts in the enforcement of the rules against discrimination on the grounds of sex or health status that is biased against women. They affirm the commitment by the judiciary to stamp its authority in order to institutionalise gender values in the employment sector through progressive jurisprudence that protects women.

Property ownership

The government has demonstrated its laudable commitment to gender equality by ratifying international human rights conventions, such as CEDAW and Maputo Protocol, and in adopting a National Gender and Development Policy. However, women in Kenya still suffer the degrading and even life-threatening consequences of their lack of property rights and the resulting absence of economic security. This denial of equal property rights places most women in Kenya at greater risk of poverty, disease, violence, and homelessness.[77]

This situation is a direct consequence of discriminatory laws and practices concerning women's access to and control of land and matrimonial property. Being a patriarchal society, Kenya has laws such as the Succession Act[78] that discriminate against women when, for instance, it comes to inheritance of property. The Act provides that when someone dies intestate, the property shall devolve on the surviving child or equally

74 Employment Act 11 of 2007.
75 Sec 29 of the Employment Act 2007 provides that a female employee is entitled to maternity leave on full pay provided she gives her employer at least seven-day notice. Sec 5(3) of the Act similarly provides that no employer may discriminate either directly or indirectly against an employee or prospective employee on the grounds of pregnancy.
76 n 73 above.
77 Government of Kenya 'The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)'.
78 Chap 160 of the Laws of Kenya.

be divided amongst the surviving children without making any distinction as regards to the sex of the children.[79] There has however been inconsistent and skewed interpretation of the legislation by the courts as to whether daughters can inherit from their deceased parents' estate. In practice the courts have in many instances ruled that married or unmarried daughters have no right to inherit and they are customarily excluded or given less share of the net estate than sons.[80] For instance, in *Rono*[81] where the court acknowledged that the deceased treated his children equally, but refused to take cognisance of the equal rights of women to own property when it held that:

> The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute law recognizes both sexes to be legible for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all daughters will get equal shares and all the sons will get equal shares. However due to the fact that daughters have an option to marry, the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged, as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than the daughters of the second house.

Fortunately, on appeal,[82] the Court of Appeal addressed itself to the international legal framework, particularly CEDAW, the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights and the African Charter, which Kenya had at the time ratified to resolve the dispute. The court observed that ratification of an international instrument is a clear indication that Kenya had the intention of being bound by those provisions within the global context even if it has not domesticated them. In that regard, the court stated that:[83]

> Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international treaties and covenants … In 1984 it also ratified, without reservation, the Convention on the Elimination of all forms of Discrimination Against Women and also the Banjul Charter (1992) without reservations … It is in the context of these international laws that the 1997 amendment to section 82 of the constitution to outlaw discrimination on the basis of sex becomes understandable. The country was moving in tandem with the emerging global culture, particularly on gender issues I have referred at some length to international law provisions to underscore the view I take in this matter that the central issue relating to the discrimination which this appeal raises cannot be fully addressed by reference to domestic legislation

79 Sec 35(5) of the Succession Act.
80 Odhiambo (n 29 above) 4.
81 Eldoret High Court Probate and Administration Cause No 40 of 1988.
82 Civil Appeal No 66 of 2002 (Eldoret).
83 As above.

> alone. The relevant international laws, which Kenya has ratified, will also inform my decision.

The Court of Appeal decision was a step in the right direction for most women in terms of protection of women's rights to property since many women are left destitute following the death of their husbands and fathers or after a divorce. Many of them succumb to threats and hostility from their in-laws, and move away from their homes to live in abject poverty. Kenya's land laws were developed against a customary law system in which women had no rights to own land and only limited rights to access or use land.[84] Then, the process of land adjudication, consolidation, and registration crystallised men's absolute ownership and control of land. As a result, women in modern day Kenya rarely own land titles either individually or jointly with their husbands.

However, the recent passing of the Matrimonial Property Act 2013 offers reprieve to women.[85] Section 8 of the Act makes clear provision on how matrimonial property is divided in polygamous marriages. For instance, property acquired by a man and his wife is owned exclusively by them if that property was acquired before the man married another wife. Any subsequent property bought after the man has married another wife the property is considered as that of the man and his wives. This section is important as it brings the principle of equity in distribution of matrimonial property. It also prevents issues of unfair advantage taken by women who come late in marriage when resources have been accumulated through the hard work of the man and the first wife and want to claim a share without material contribution.

While the women in Kenya face numerous obstacles during marriage, the burden becomes insurmountable in the case of divorce or dissolution of the marriage. At separation or divorce, women are often unable to take away an adequate share of their matrimonial property, and are usually forced to leave the matrimonial home with little more than personal effects. The lack of equal property rights upon divorce and the fact that many women become the sole caretakers of their children often drives them into poverty. The precarious economic position of women renders

84 This position has significantly changed as was illustrated by the court in *Re Estate of Mburugu Nkaabu (Deceased)* , where the surrounding issues involved inheritance the distribution of property, the court held that the Constitution, through art 27 and 60(f), gave a woman the right to inherit property. The court intervened to protect the rights of a daughter who was disinherited by her brothers for being a woman.

85 Until the passage of this Act in December 2013, women in Kenya were at the mercy of a legal system that did not provide clear and equal access to the use, management, and control of matrimonial property. The Married Women's Property Act of 1882, an antiquated British law, contained the sole technical clause available for courts to regulate property distribution between spouses, often depriving wives of any share, much less equal share to matrimonial property. For instance, polygamy forced women to share hard-earned matrimonial property with multiple co-wives and children all bound to receive an ever smaller share of resources. Some husbands use property earned by the first wife to acquire additional wives.

them more vulnerable to, for instance, domestic violence, and undermines their ability to leave abusive relationships or to negotiate safe sex. As a result, women and their children face serious physical and psychological health harms, including increased risk of contracting HIV/AIDS.

Women are unable to effectively assert their rights to property because of gender bias in customary law and the lack of procedural safeguards for land disputes. They are excluded from the decision-making process as men hold the vast majority of seats in institutions that adjudicate land rights.[86] The decisions emanating from those bodies are often based on discriminatory and degrading notions about women's inability to manage or own land, some of which are enshrined in customary law. As a result, women are subjugated to the status of second-class citizens who must rely on men as the sources of their rights.

As has already been discussed, there exist gaps in the Kenyan legislative framework with respect to matrimonial property which has consequently resulted in skewed and dressed in patriarchal undertones that belittle and dismiss the vast contribution of women in the society.[87] The fact that a marriage is formalised under statute or custom makes no difference in determining women's rights and such rights, if at all they exist, do so at the will of the husband. Married women therefore rarely enjoy equal rights to control, alienate, or transfer matrimonial property.[88]

The Constitution has effectively changed the landscape on division of matrimonial property, while paving way for progressive legislation such as the Matrimonial Property Act, the Land Act and the Land Registration Act. The new constitutional dispensation requires matrimonial property to be divided equally after divorce. In that regard, article 45(3) of the Constitution provides that '[p]arties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage'. Further, by virtue of article 2(5) and (6) of the 2010 Constitution, general rules of international law and treaties ratified by Kenya become part of Kenyan law. To this end, international conventions such as CEDAW, Beijing Platform for Action (BPFA),[89] African Charter on Human and Peoples' Rights,[90] and the Maputo Protocol (the Charter's

86 The bodies that govern land lack adequate procedural safeguards to protect the rights of women because, first, women are nearly absent from land adjudication bodies; second, the land disputes procedures are biased against women, and third, husbands may sell matrimonial land without their wives' consent. Ministry of Gender, Sports, Culture and Social Services 'National gender and development policy' (2000) 20 http://www.culture.go.ke/images/stories/pdf/genderpolicy (accessed 14 February 2014).

87 See for instance the cases already discussed, including *Kimani vs Kimani*, where Kuloba, J sarcastically dismissed efforts by women to address inequality.

88 See generally, Kenya Land Alliance 'The national land policy in Kenya: Critical gender issues and policy statements' (2004) *KLA Issues Paper* 1.

89 Beijing Declaration and Platform for Action, UN Doc A/Conf. 177/20(17 October 1995).

90 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.

Protocol on rights of women) amongst others, which point to equality of both men and women, can be directly applied in the national jurisdiction by Kenyan courts.

The courts have now moved and sidestepped the unfortunate bad law made in the then male-dominated Court of Appeal in *Echaria's* case and *Muthembwa*,[91] which engendered oppression of women on the basis of the requirement of proof of contribution with regard to matrimonial property. The attitude of the Court in *Echaria's case* was, however, positive only in lamenting that the law was rigid and could only be applied as it was. The Court stated as follows:[92]

> We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision of Pettit Vs Pettit and Gissing Vs Gissing to give proprietary rights to spouses as distinct from registered title rights Section 17 of the Act must be given the same interpretation as the law Lords did in the said two cases. Such law should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act 1970. The Matrimonial Causes Act of 1973 also made a difference

The period after 2010 has been characterised by a series of court decisions that have upheld the concept of equality of parties in marriage. One of the most recent decisions was delivered in *CMN v AWM*[93] where the husband had singularly financed the matrimonial house but upon divorce, the Court decreed that the house had to be divided equally between the parties. In rendering a deadly blow to past inequality, the learned judge had this to say:

> The legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the property which matters … the legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property [matrimonial house] equally between the Plaintiff [husband] and the Defendant [wife].

91 *Muthembwa v Muthembwa* Civil Appeal No 74 of 2001. In this case, it was held that a spouse who has contributed to the increase in value to property that is inherited by or gifted to the other spouse before the marriage will be entitled to a share of the increased value under sec 17 of the Married Women Property Act of 1889. The wife claimed that one of the properties she was claiming was a property that the man had inherited from the father before they got married. The wife claimed she had increased the value of that land by improving it and it was held that she was entitled to 50% of the value of the improvement of that property.

92 See *Echaria* (n 33 above).

93 *CMN v AWM* [2013] eKLR.

Similarly, in the case *ZWN v PNN*[94] the Court was pro-active in making a finding that property distribution between the spouses was to be pegged on a 50-50 basis. The Court opined as follows:

> [T]he principle of equality currently enshrined in Article 45(3) of the current Kenyan constitution and as derived from the afore assessed human rights instruments that Kenya was party to as a member of the international community and which principle this court is enjoined to apply enjoins this court to rule and order that the plaintiff is entitled to a half share of all matrimonial properties adjudged to be matrimonial properties herein.

The same rationale was applied in the case of *JAO v NA*[95] where the court had the following to say:

> There is no doubt that the way to go is towards the principle that matrimonial property should be shared on 50:50 basis. This will be in furtherance of the principles of the Kenyan Constitution and the International treaties and conventions which have been ratified in Kenya. We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The constitution, international conventions and treaties which have been ratified by Kenya have shown the way.

Violence against women

Domestic violence has international recognition as a violation of women's rights. The modern criminal justice system has failed to respond adequately to crime generally, and to domestic violence in particular.[96] Muli argues that current trends in the battle against domestic violence weigh heavily in favour of greater criminalisation of domestic violence through aggressive prosecution and legislation of punitive laws against barterers.[97] However, the dominance of patriarchy in the society has also led to acceptance of gender based and sexual violence as normal behaviour. Traditionally, women in some communities even expect to be beaten by their husbands as a sign of love.[98]

The Sexual Offences Act of 2006 introduced stiffer penalties for sexual offenders in Kenya, but implementation and enforcement of the Act are still not mainstreamed despite the rise in gender-based violence and sexual violence. Marital rape, which is also rampant has however, not yet been

94 [2012] eKLR.
95 [2013] eKLR.
96 M Elizabeth 'Rethinking access to justice: Enforcing women's rights in cases of domestic violence in Kenya' (2004) 2 *East African Journal of Human Rights and Democracy* 222.
97 As above.
98 RA Odhiambo 'Intimate terror: A case study of the laws versus lived realities of battered wives among the Luo Community living in Nakuru, Kenya' PGD Thesis, University of Zimbabwe, 2000 16.

criminalised as an offence punishable by law.[99] For victims of violence, where the state fails to act to protect them from perpetrators, it causes them and their families to live in fear of a repeat occurrence of the violence, especially where the victims and their families know the perpetrators. The idea that justice should not only be done but 'should be seen to be done' has the objective of according victims a sense of closure, peace of mind and a sense of dignity.

In the case of *CK and 11 Others v The Commissioner of Police/Inspector General of the National Police Service and 2 Others*[100] the Court cited with approval the famous decision of the South African Constitutional Court in *Carmichele v Minister Safety and Security and Another*[101] where the Court stated that 'the courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community'. The Court subsequently made a finding that there was both a statutory and a constitutional duty of the respondents to positively act in protecting the petitioners, the breach of which infringed the petitioners' right to equal protection and benefit of the law, contrary to article 27 of the Constitution. As a result, the failure to enforce the existing defilement laws had contributed to the development of a culture of tolerance for pervasive sexual violence against children and impunity. Sexual violence had caused some of the victims to flee their homes in fear bereft of support of their friends and family. The Court further noted that it was the role of judicial officers, therefore, to protect the victims and their families and ensure that perpetrators are held accountable to reduce the cases of gender-based violence. The Court stated thus:

> Whereas the perpetrators are directly responsible for the harms to the petitioners, the respondents herein cannot escape blame and responsibility. The respondents' ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a 'climate of impunity' for commission of sexual offences and in particular defilement … this to me makes the respondents responsible for physical and psychological harms inflicted by perpetrators … the State's duty to protect is heightened in the case of vulnerable groups such as girl-children and the State's failure to protect need not be intentional for it to constitute a breach of its obligations.

The due diligence principle goes hand in hand with the principle of non-discrimination. What this means is that states are under an obligation to act on cases of violence against women in the same manner as other forms of violence. It requires states to use the same level of commitment in

99 In Kenya marital rape is not recognised as a crime in the Sexual Offences Act, which addresses offences of a sexual nature. Women have to put up with the vice within their marital homes. CW Kung'u 'Criminalization of marital rape in Kenya' PGD Thesis, University of Toronto, 2011.

100 *CK and 11 Others vs The Commissioner of Police/Inspector General of the National Police Service and 2 Others* High Court Petition No 10 of 2012.

101 *Carmichele vs Minister Safety and Security and Another* 2001 (4) SA 938 (CC).

relation to preventing, investigating, punishing and providing remedies for gender-based violence against women as they do with other forms of violence.[102]

Reproductive health rights

Socio-economic rights embodied within the Constitution of Kenya of 2010 include rights to labour relations, education, health care, food, water, social security and housing.[103] These rights are guaranteed to all Kenyans irrespective of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth of an individual. Women in Kenya are not an exception and are, therefore, also entitled to these rights. In this regard, article 11(1) of the CESCR mandates state parties to 'recognize the right of everyone to an adequate standard of living....'[104] The deprivation of women's equal enjoyment of economic, social and cultural rights because of biased laws and custom divest them of economic resources, subjecting women to greater risk of domestic violence and HIV/AIDS. Kenyan women, who are at greater risk of HIV infection or who are already living with the virus are denied the highest attainable standard of health guaranteed under article 12 of the CESCR.[105]

The right to health care services is explicitly guaranteed, providing content to the right to health and placing clear obligations upon the Government to provide health care services.[106] Reproductive health care is included in the definition of the right to health and health care services, affirming that reproductive health care is essential to the right to health and forms part of the health care services to which people are entitled. Although reproductive health is not defined in the Constitution, Kenya however is in the process of enacting the Reproductive Health Care Bill, 2014[107] which defines reproductive health as

> a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.

102 Special Rapporteur on Violence against Women 'The due diligence standard as a tool for the elimination of violence against women' UN Doc E/CN.4/2006/61 (2006) 35.
103 Arts 41, 44 and 45 of the Constitution of Kenya.
104 International Covenant on Economic, Social and Cultural Rights (n 70 above).
105 As above.
106 Art 43(1)(a) of the Constitution.
107 The first reading of the Bill took place on 12 June 2014 and is currently pending before Senate http://kenyalaw.org/kl/index.php?id=4248 (accessed 20 December 2014).

This definition borrows from the definition adopted at the 1994 International Conference on Population and Development which provides that:[108]

> Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy ...

For decades, women seeking reproductive health services in Kenya have been suffering serious human rights violations, including physical and verbal abuse and detention in health facilities for inability to pay hospital fees. Shortage of funds, medical staff and equipment plague the health care system, particularly the public health institutions, dramatically interfering with the ability of health care staff to provide adequate and quality care efficiently. These systemic problems have persisted, in part, because of a dismal lack of accountability within the health care system, which in turn stems from a lack of basic awareness about patients' rights and the absence of transparent and effective oversight mechanisms.

Under the 2010 Constitution, women have the right to access safe and legal abortion where the pregnancy presents a danger to their mental or physical health.[109] Access to safe abortion in cases of pregnancy resulting from sexual violence should also be – and, in Kenya, has been – understood as central to preserving a woman's life and health.[110]

In the case of *PAO and 2 Others v Attorney General*, the Court acknowledged that the case raised critical issues pertaining to the constitutional right of citizens to the highest attainable standard of

108 Programme of Action of the International Conference on Population and Development, Cairo, 5 - 13 September 1994, UN Doc A/CONF.171/13/Rev.1 (1995) 7.2.

109 Art 26(4) of the Constitution.

110 See the English decisions of *R v Bourne* [1939] 1 KB 687, [1938] 3 All ER 615; *Mehar Singh Bansel v R,* 1959 E Afr L Rep 813 (Kenya) (affirming *R v Bourne* in the East African Court of Appeal); and the National Guidelines on Management of Sexual Violence in Kenya, which states that: 'If they [survivors of sexual violence] present with a pregnancy, which they feel is as a consequence of the rape, they should be informed that in Kenya, termination of pregnancy may be allowed after rape (Sexual Offences Act, 2006). If the woman decides to opt for termination, she should be treated with compassion, and referred appropriately.' Ministry of Public Health and Sanitation, and Ministry of Medical Services 'National guidelines on management of sexual violence in Kenya' 2nd edition 2009 13 http://www.svri.org/national guidelines.pdf (accessed 10 May 2014).

health.[111] In a move to fight counterfeit drugs, Kenya enacted the Anti-Counterfeit Act to prohibit trade in counterfeit goods, including drugs.[112] The High Court in this matter declared the Anti-Counterfeit Act a violation of the right to the highest attainable standard of health in as far as it limited access to generic medicines and drugs. This was highly progressive considering that there exists a high HIV/AIDS prevalence rate among women than in men in Kenya.[113]

Harmful cultural practices

Harmful cultural norms include female circumcision and genital mutilation, facial scarring, early or forced marriage, cultural practices associated with childbirth, dowry-related crimes, honour crimes, and the consequences of son preference.[114] These practices adversely affect the health of women and children. Through controlling women's bodies for men's benefit and through ensuring the political and economic subordination of women, harmful cultural practices perpetuate the inferior status of women. Despite their harmful nature and their violation of international human rights laws, such practices persisted because they were never questioned.

These practices are harmful to women and children as they inflict both immediate and long-term mental and physical pain on their victims. They more so violate a number of rights protected in international and regional instruments. These rights include the right to life, right to health, right to non-discrimination on the basis of sex and the right to liberty. They also include the right to the security of the person, which incorporates the right not to be subjected to violence and recognises the need for children to receive special protection. Further, international and regional instruments safeguard the right not to be subjected to inhuman or degrading treatment.

111 *PAO and 2 Others v Attorney General* [2012] eKLR.

112 Anti-Counterfeit Act No 13 of 2008. The three petitioners in the *PAO* case were adults living with HIV/AIDS, and had been taking medication since generic antiretroviral (ARV) drugs became widely available. The petitioners averred that section 2 of the Act did not differentiate between counterfeits and generic drugs, and thus, were afraid that in its enforcement, the very drugs on which their lives depended would be criminalised and thus liable to seizure. Further, they were concerned that the cost of their treatment was likely to increase considerably as they would have to rely on branded drugs that are more expensive. The Court asked the state to reconsider the provisions of sec 2 of the Act alongside its constitutional obligation to ensure that citizens have the highest attainable standards of health and make the appropriate amendments to the Act.

113 In Kenya, the HIV prevalence rate for adult women is almost double that for men. This represents a female-to-male ratio of 1.9 to 1.0, the highest in Africa. Kenya National Bureau of Statistics et al 'Kenya demographic and health survey 2008-2009' (June 2010).

114 Paras 39, 93, 107(a) and 114(a) of BPFA (n 89 above); See also HE Warzazi 'Third report of the Special Rapporteur on Traditional Practices affecting the Health of Women and the Girl Child' Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 9 July 1999, E/CN.4/Sub.2/1999/14, para 20.

Some of the relevant clauses of international instruments that are relevant in the protection of the stated rights include article 5 of CEDAW, which provides that state parties must undertake:

> [A]ll appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Similarly, articles 2(2) and 5(d) of the Maputo Protocol and articles 2, 6, 12, 19, 24, 27 and 28 of the Convention on the Rights of the Child (CRC)[115] as well as article 7 of the ICCPR echo the same principle stipulated in article 5 of CEDAW. In Kenya, the case of *MNN v Attorney General of Kenya*, brought on behalf of a woman who was mistreated, abused, and whose genitals were mutilated without her knowledge or consent in a private Kenyan hospital,[116] brings to light the continuing severity of the harm suffered by women in Kenyan health facilities. The *MNN* case also reveals the weaknesses of the accountability mechanisms that are meant to protect women from such abuse as well as provide remedies when rights violations occur.

The *MNN* case is one of the first reproductive rights cases to be brought before the Kenyan High Court that highlights the state's failure to live up to its legal obligations under both domestic law and international human rights standards. With this case, the High Court has an opportunity to demand stronger legal standards on female genital mutilation, to address the systemic accountability issues that permit rights violations in healthcare facilities, and to affirm Kenya's obligation to implement international human rights law.

Conclusion

In exercising judicial functions, judicial officers take an oath to, at all times, protect, administer and defend the Constitution with a view to upholding the dignity and the respect of the judiciary and the judicial system of Kenya while promoting, amongst other constitutional values, fairness. Article 10 of the Constitution of Kenya, mandates the judiciary to enforce and implement rights in accordance with the set out national values and guiding principles. This means that the judiciary must consider such principles as equality, equity, human rights, non-discrimination and social justice in carrying out its functions. In light of the fact that women are still considered second-class citizens in the country, which is still a

115 Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3.
116 Undecided and unreported.

largely patriarchal society, the courts must safeguard against the derailment of women's rights.

The 2010 Constitution, unlike the repealed Constitution, is progressive and more explicit in its protection of women's rights. The Constitution entrenches an equality clause under article 27 which states, unequivocally, that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Additionally, the Constitution, through a substantive approach, ensures women are adequately represented in the legal, socio-economic and political spheres through the requirement of implementation of the two-thirds principle. This is a major step forward, and women for women, as the provision departs from the non-gender specific provisions of the repealed Constitution which went as far as limiting women's rights with respect to inheritance, burial and personal law.

The Constitution recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people, and also affirms the right of the people to practise their culture. However, retrogressive cultural practices and patriarchy still greatly influence judicial decisions in the country. As a way of safeguarding Kenyan women from retrogressive cultural practices, the 2010 Constitution in article 2(4) also stipulates that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency. This means that courts have an obligation to proscribe and penalise cultural practices that are biased against women, and those that violate their rights, in addition to ensuring that women are not treated subjectively using such practices. The role of the court is to ensure that human rights violations do not go unpunished. This is because public confidence in the judiciary is restored where perpetrators are brought to book. Conversely, where perpetrators are not held to account, citizens lose their confidence in the ability of the state to protect their rights and this may result in anarchy.

Parliament has since enacted several laws granting the courts greater mandate in the interpretation and application of the laws in the advancement of women's rights. Since the advent of the new constitutional dispensation, the judiciary has issued decisions that have appeared to support the advancement and protection of women's rights. Through formulation of a legal framework that is responsive, the government has attempted to comply with international obligations to respect, protect and fulfil fundamental rights and freedoms of individuals, women included. The judiciary is now able to invoke and interpret this novel legal framework to confer rights to women whenever there is a violation.

This chapter sought to interrogate whether the judiciary has made positive or negative progress towards enforcing women's rights since the promulgation of the 2010 Constitution. Available case law which has been analysed in the chapter indicates that although much still needs to be done

before women fully realise their fundamentally guaranteed rights as espoused in both the Constitution and international legal instruments applicable in the country, the courts have attempted to reduce the gap between men and women in terms of equality.

CHAPTER 5

PROSECUTING THE 2007 POST ELECTION VIOLENCE-RELATED INTERNATIONAL CRIMES IN KENYAN COURTS: EXPOSING THE REAL CHALLENGES

Evelyne Owiye Asaala

Introduction and background

On 27 December 2007 Kenya held its ninth general election since independence.[1] The outcome of the presidential elections was however contested on several fronts. Rigging allegations marred by scores of violence lead to the commission of international and other serious crimes in several parts of the country.[2] These events prompted the need to establish mechanisms to help Kenya address its past and forge a way forward on a path of peace, justice and prosperity. The Kenya National Dialogue and Reconciliation Committee (KNDRC) was established to spearhead the process.[3] It is this committee that laid a foundation for the subsequent transitional justice mechanisms. The committee agreed on several initiatives, including: the establishment of a truth justice and reconciliation commission;[4] the adoption of a comprehensive constitutional, legal and institutional reform processes;[5] and the establishment of a commission of inquiry to investigate the violence and

1 A general election combines the presidential election, parliamentary and civic elections.

2 European Union Election Observation Mission *Final report on Kenya: General elections 27 December 2007* (3 April 2008) 36; Internal Displacement Monitoring Centre (IDMC) 'Speedy reforms needed to deal with past injustices and prevent future displacement' (10 June 2010) http://www.internal- displacement.org/countries/Kenya (accessed 26 October 2011); Commission of Inquiry into the Post Election Violence (CIPEV) *Final report* (15 October 2008) 472 - 475 http://www.dialoguekenya.org/index.php/reports/commission-reports.html (accessed 1 May 2012).

3 This was an *ad hoc* committee established during the Post Election Violence (PEV). It comprised of members drawn from the then ruling Party of National Unity, the then opposition party Orange Democratic Party and a panel of eminent African personalities: Benjamin Mkapa, Graca Machel and Jakaya Kikwete. The former United Nations Secretary Genera, Kofi Anan, chaired the committee.

4 KNDRC *Agreement on agenda item three: How to resolve the political crisis* (14 February 2008) 3 http://www.dialoguekenya.org/index.php/agreements.html (accessed 1 May 2012).

5 As above.

make recommendations on any probable legal redress.[6] This agreement was deemed to be the most comprehensive way of addressing the salient objectives of the transitional justice process.[7] While some of these initiatives are still ongoing, others have completed their work with varying degrees of success.[8] Yet, others have come to a pre-mature end having hardly achieved their objectives.[9]

Kenya is therefore grappling with questions regarding its social, legal, economic and political transition. The theme on prosecuting alleged perpetrators of past crimes has taken centre stage. The understanding that prosecution is critical to the success of any transition resonates with various legal-philosophical thinking that underlies a transitional justice process.[10] Although this contribution acknowledges that some scholars emphasise the prioritisation of alternative accountability mechanisms like truth-telling, healing and peace building during transition,[11] it adopts a holistic approach that underscores the importance of accountability through prosecution for transitional societies.[12] The study also takes note of an international duty to prosecute for countries like Kenya who are

6 KNDRC *Agreement: Commission of Inquiry into Post-Election Violence* (2008).

7 TO Hansen 'Kenya's power-sharing arrangement and its implications for transitional justice' (2013) 17 *The International Journal of Human Rights* 307.

8 CIPEV concluded its mandate in 2008. Its investigations and findings have been hailed to be most comprehensive. In fact, the ICC prosecution has often times relied on these findings in the ongoing trials. The TJRC equally concluded its mandate in 2013 and its final report handed over to the President on 23 May 2013 for implementation. The report was subsequently tabled before Parliament on 24 July 2013 exceeding the deadline stipulated under section 48(4) of the TJR Act which requires that the final report be tabled in Parliament within 21 days after its publication. Since then, nothing has been done towards implementation the TJRC's report. On the other hand local prosecution of international crimes seems to have become submerged under the ongoing ICC trials. There is hardly any reporting of these cases if not public knowledge at least as a form of justice to the victims. On constitutional reforms, a commendable job was done leading to the promulgation of a new constitution on 27 August 2010. This Constitution embodies principles on numerous institutional reforms. Related institutional reforms include reforms of the electoral body, police reforms, judicial reforms which called upon the legislators to enact legislation providing for vetting of judicial officers. This process is still ongoing. Even then, a general lax amongst the implementers on living the new Constitution is notable.

9 As above. With a specific focus on local prosecution of international crimes.

10 R Teitel *Transitional justice* (2000). Teitel acknowledges that trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule. See also D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 25. See also M Osiel *Mass Atrocity, collective memory and the law* 15 - 22 as cited by J Rowen 'Social realities and philosophical ideals in transitional justice' (2008) 7 *Cardozo Public Law Policy & Ethics Journal* 98. L Huyse 'Justice after transition: On the choices successor elites make in dealing with the past' (1995) 20 *Law and Social Inquiry* 55. Huyse points out the importance of prosecutions for a young democracy in transition to be not only a tool that legitimises the new government, but also fosters respect for new democratic institutions.

11 L Keller 'Achieving peace without justice: The International Criminal Court and Ugandan alternative justice mechanisms' (2008) 23 *Connecticut Journal of International Law* 261.

12 Teitel (n 10 above); Orentlicher (n 10 above); Osiel (n 10 above).

party to the Rome Statute.[13] It is argued that for states like Kenya, any transitional justice measures must therefore address the issue of impunity for past atrocities through prosecution. Indeed, there exists both local and international consensus on the importance of prosecuting international and other serious crimes in Kenya following their commission in the Post Election Violence (PEV) of 2007. Furthermore, the Commission of Inquiry into the PEV[14] (CIPEV) underscored the need for a prosecution mechanism to eradicate impunity.[15]

While the ICC is only exercising jurisdiction over those who bear the highest responsibility for PEV,[16] municipal courts are expected to hold to account the actual perpetrators or those who bear less responsibility. This is because the ICC only acts in complimentarity to local courts.[17] In fact some scholars have argued that the ICC only exists as a reinforcement of the efforts of national systems in combating the culture of impunity and bringing defaulters to justice; it therefore relies principally on states to investigate and prosecute persons accused of ICC crimes under its domestic criminal justice system.[18] Thus, the ICC and state parties to the Statute have a mutual responsibility to bring to justice perpetrators of the worst crimes, neither party having exclusive jurisdiction.

This study critically analyses the challenges facing effective prosecutions of international crimes in Kenyan courts. In light of the numerous countries undertaking transitional justice processes – both in Africa and throughout the world – a study of this nature becomes a fundamental contribution in guiding municipal adjudication of these offences. How should local courts effectively prosecute the actual perpetrators of international crimes who may not necessarily bear the

13 Para 5, preamble to the Rome Statute of the international criminal court, underscores that the philosophy underlying the Rome Statute is to put an end to impunity for the perpetrators of crimes of concern to the international community thus contributing to their prevention; Art 5, of the Rome Statute further enlists these crimes to include genocide, war crimes and crimes against humanity; K Obura 'Duty to prosecute international crimes under international law' in C Murugu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 11.

14 The Kenya National Dialogue and Reconciliation Committee Agreement: Commission of Inquiry of Post-Election Violence (2008) 1.

15 CIPEV Report (n 2 above) 472.

16 Initially, ICC investigations were launched against six individuals: William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Husein Ali. After confirmation hearings, proceedings were confirmed against three: William Samoei Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta. While Ruto and Sang continue to face trial before the ICC today, the case against Uhuru Kenyatta was withdrawn due to insufficient evidence. ICC-01/09-02/11, Trial Chamber V(B), Situation in the Republic of Kenya in the case of *The Prosecutor v Uhuru Muigai Kenyatta,* Decision on withdrawal of charges against Kenyatta, 13 March 2015.

17 Art 17(1)(a), Rome Statute.

18 H Steiner & P Alston *International human rights in context: Law, politics, morals* (2007) 1299; EO Asaala 'The International Criminal Court factor on transitional justice in Kenya' in K Ambos & O Maunganidze (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (2012)124.

greatest responsibility? In other words, how should local criminal law systems and legislations effectively respond to international crimes? To this end, this chapter seeks to inform better criminal law processes that set out to achieve their objectives effectively over international crimes in national courts.

This chapter is divided into three main parts. After a brief introduction, the part examines the key challenges towards effective local prosecutions as well as the impact of these local prosecutions on transitional justice in Kenya. The essence of this section is to discuss Kenya's experience in prosecuting international crimes. In its analysis, this part considers the jurisprudence put forth by the Kenyan courts regarding prosecution of PEV-related crimes. However, because of the limited scope of this contribution only a selected number of the PEV-related cases are reviewed. The Kenyan cases that were confirmed by the ICC and the geographical coverage of their charges are the criterion that this chapter has used in selecting the cases under discussion. A discussion on the challenges also adopts a thematic approach, which highlights the following aspects: jurisdiction, dubious investigations, local ownership and legitimacy and lack of political will. Finally, the study draws various conclusions and suggests the way forward.

Challenges to effective prosecution of international crimes in local courts

Local prosecutions of crimes against humanity in Kenya have faced a vast range of challenges. Key amongst them includes the jurisdictional question, inadequate investigations by police (inadequate competencies and human and technical resources), lack of legitimacy and local ownership, lack of political will and the influence of international politics informed by the ICC-related cases. This has deeply compromised the significance expected of these local prosecutions.

The jurisdiction question

Kenya is not only a member state to the Rome Statute;[19] the International Crimes Act (ICA) further domesticates the Rome Statute while adopting its definition of crimes against humanity.[20] This law however came into force long after the alleged PEV crimes were committed. Similarly, although the Kenyan Constitution makes a mandatory requirement of general rules of international law and any treaties ratified by Kenya to form part of the laws of Kenya,[21] it was promulgated way after PEV. Until the

19 Kenya ratified the Rome Statute on 15 March 2005.
20 Art 6(4), ICA.
21 Art 2(5) & (6), 2010 Constitution of Kenya.

promulgation of the 2010 Constitution, Kenya traditionally ascribed to the dualist philosophy of applying international law in domestic courts.[22] Prosecuting PEV related international crimes under Kenyan laws was therefore not possible, as it would have amounted to an infringement of the established international law principle of *nullum crimen sine lege.*[23] This deficiency in the legal framework then explains why local mechanisms chose to prosecute ordinary municipal crimes instead of international crimes such as crimes against humanity for those not singled out by the ICC. Local prosecution of PEV related crimes therefore involved crimes ranging from petty crimes to capital offences: murder,[24] handling stolen goods,[25] burglary,[26] rape and defilement,[27] which offences essentially comprise the ingredients of crimes against humanity.[28]

Given this scenario, there has been no instance when local courts have bothered to conceptualise the notion of crimes against humanity. This option of prosecuting alleged perpetrators under ordinary crimes in domestic courts has meant that it is only those prosecuted at the ICC that face the charges of international crimes. Interestingly, while Kenyan courts did not prosecute alleged perpetrators with crimes against humanity, the punishment for capital conduct attracts a death sentence unlike for crimes against humanity whose maximum punishment is life sentence.[29] This is despite the fact that the ICC requires a much more higher and stringent threshold in proving crimes against humanity. The end results is that those with highest responsibility are treated more leniently by international law as opposed to those who did not bear the highest responsibility and facing prosecution before municipal courts. Nevertheless, there has been no

22 JO Ambani 'Navigating past the "Dualist Doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 25 30. The doctrine of dualism implies that upon ratifying an international treaty, the principles of this treaty do not apply in the domestic legal set up of a country until such a time that this country transforms these principles into its own domestic law.

23 Art 22, Rome Statute; this implies that no person can be held criminally responsible unless such conduct constitutes a crime under the law.

24 *R v Stephen Kiprotich Leting & Others* Nakuru High Court Criminal Case No 34 of 2008. This was one of the stunning cases where the acussed persons, jointly with others not before the court were charged of murder of about 35 people who were all burnt in a church at Kiambaa, Uasin Gishu District, Rift valley Province; see also *R v John Kimita Mwaniki* Nakuru High Court Criminal Case No 116 of 2007; see also *R v Eric Akeyo Otieno* Criminal Appeal No 10 of 2008. See also *R v Peter Kipkemboi Rutto alias Saitoti* Nakuru High Court Criminal Case No 118 of 2008.

25 *R v James Wafula Khamala,* Bungoma High Court Criminal Appeal No 9 of 2010.

26 *R v Paul Khamala*, Kakamega High Court criminal Appeal No 115 of 2008.

27 R v *Philemon Kipsang Kirui*, Kericho High Court Criminal Appeal No 59 of 2009.

28 Art 7(1), The Rome Statute of the ICC, document A/CONF.183/9 of 17 July 1998 as amended up to 16 January 2002. Crimes against humanity has been defined as acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, enforced disappearance of persons, apartheid and other inhuman acts committed as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack.

29 Art 77, Rome Statute; secs 204 & 296(2), Penal Code of Kenya (Cap 63 Laws of Kenya) the punishments for murder and robbery with violence respectively attract death sentence.

discomfort or complaints as to why PEV crimes were not prosecuted as international crimes but ordinary crime in Kenyan courts.

The ICC Pre-Trial Chamber's authorisation of the Prosecutor to launch investigations of the Kenyan cases[30] triggered a local case challenging the ICC's involvement in Kenyan PEV–related cases. In the case of *Joseph Kimani Gathungu v The Attorney General & Others*,[31] the applicant sought *inter alia* court oders declaring ICC's involvement in Kenyan PEV cases unconstitutional and therefore a nullity. It was the applicant's further submission that the ICC was not provided for under the constitution as an organ capable of investigating crimes committed in Kenya. The respondents, however, lodged a preliminary objection questioning, *inter alia,* whether the High Court of Kenya had jurisdiction in respect of the jurisdiction of the ICC and whether the ICC was amenable to judicial proceedings before the High Court of Kenya.

This application paved the way for Kenyan courts to canvass the salient issues on the role played by international criminal justice systems *viz-a-viz* municipal systems in the prosecution of international crimes. The fact that Kenya had not domesticated the ICC Statute as a dualist state then posed a real challenge necessitating the courts intervention. In this case, the court observed that:

> … international tribunal such as the ICC is well recognized to have *compétence de la compétence* – an initial capacity to determine whether or not it has the jurisdiction to hear and determine a case coming up before it … the ICC, acting within the terms of the Rome Statute, has already determined that it indeed has jurisdiction. The ICC has gone further to determine the second jurisdictional question: whether the special facts of post-election violence in Kenya (2007 - 2008) render the matter justiciable before that Court. The ICC has determined that, on the facts, it has jurisdiction to investigate, hear and determine the cases arising from the post-election violence.[32]

According to the court, the ICC has inherent capacity emanating from the Rome Statute to determine whether or not it has got jurisdiction to hear and determine a matter. It is through the exercise of this power that the court determined its jurisdiction over the Kenyan cases. More so, 'Kenya was a member of the community of nations and subject to the governing law bearing upon states as members of that community'.[33] Obligations arising from this governing law are embodied in treaties and conventions to which states were parties and the Rome Statute was one such

30 ICC-01/09, Pre-Trial Chamber II, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the Situation in the Republic of Kenya (31 March 2010).
31 Constitutional Reference Number 12 of 2010, High Court of Kenya at Mombasa, 23rd November 2010; (2010) eKLR http://kenyalaw.org/caselaw/cases/view/72570/ (accessed 15 May 2014).
32 Constitutional Reference Number 12 of 2010, para h.
33 As above.

convention. The act of ratifying international treaties by a state therefore allows limitations on its sovereignty regarding the stipulated legal obligations. It cannot therefore be argued that the ICC in any way infringes on Kenya's constitutional sovereignty when Kenya voluntarily ratified the Rome Statute binding itself to its provisions. The applicant's reliance on Kenya's new constitution as excluding the ICC's operations in Kenya was therefore not convincing since:

> … the Constitution of 2010 is not to be regarded as rejecting the role of international institutions such as the ICC. Indeed, from the express provisions of the Constitution, 'the general rules of international law shall form part of the law of Kenya'; and Kenya remains party to a large number of multilateral international legal instruments: and so, by law, Kenya has obligations to give effect to these. One of such Conventions is the Rome Statute which establishes the International Criminal Court.[34]

To this end, the court dismissed the application on grounds that it neither had such jurisdiction nor were the orders being sought justiciable.

Dubious investigations and laxity by police officers

The quality of local investigation conducted in PEV-related cases has also raised concern. Poor investigations have allowed many perpetrators of serious crimes to evade accountability,[35] resulting in very few prosecutions, and even fewer convictions.[36] According to a report from the Office of the Director of Public Prosecutions (ODPP), a total of 6081 PEV-related cases were reported to the local authorities for investigations.[37] Out of all these cases, only 366 had been taken to Court by the year 2012. Of these, 23 cases were still pending in court, 78 cases had resulted to acquittals, 77 cases had been withdrawn and only 138 convictions achieved.[38] A study by Human Rights Watch however confirms that only a paltry number of these convictions were for serious crimes directly related to the post election violence.[39] These included two murder cases, three cases of robberies with violence, one for assault and another for assault causing grievous harm.[40] In fact, the ODPPs report has been criticised for lacking precision. For example, four of the alleged 49 convictions in Sexual and Gender Based Violence (SGBV) were actually acquittals and two of these cases had nothing to do with PEV as they involved men having carnal knowledge with sheep.[41] Only one of all these

34 As above.
35 Human Rights Watch *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011) 4.
36 Human Rights Watch (n 35 above) 3.
37 The Multi-Agency Task Force on the 2007/2008 PEV 'Report on the 2007/2008 PEV Related cases' (2012) 1.
38 The Multi-Agency Task Force on the 2007/2008 PEV (n 37 above) 2.
39 Human Rights Watch (n 35 above).
40 Human Rights Watch (n 35 above) 4.
41 Human Rights Watch (n 35 above) 25

cases was a clear SGBV case related to PEV and the same had resulted to an acquittal on the charges of sexual offences, but a conviction on robbery with violence.[42]

It is also alarming that some of the 'hot spot' areas with high casualties for PEV victims recorded no subsequent convictions. In Uasin Gishu for example, there was no single conviction despite the killing of 230 people. Similarly, no single police officer was convicted despite an estimated 962 cases of police shootings, which resulted in 405 deaths.[43] The laxity displayed by police officers in the investigations of sexual offences related to post election violence is equally appalling.[44] Despite recommending a list of 66 complaints to the DPP for prosecution, the police subsequently endorsed a closure of almost all these cases due to lack of evidence.[45] According to the DPP, the majority of these files contained nothing more than complainants' statements.[46] Although the DPP sent the files back for further investigations, they were never returned.[47] The dismal performance in prosecution can therefore be closely associated to poor investigations by the police officers.

Having ascribed to the adversarial system of dispute resolution, it has become increasingly difficult, and almost impossible for Kenyan courts to make any meaningful engagement with PEV cases where investigations are conducted dismally. For example, most of the occurrences upon which those facing trial before the ICC were charged for crimes against humanity attracted a charge of murder for the alleged actual perpetrators in the municipal courts.[48] Yet, the outcome of local prosecutions remains questionable over allegations of poor investigations. A critical review of some of these cases is worth considering.

42 As above.
43 CIPEV report (n 2 above); Human Rights Watch (n 35 above).
44 CIPEV report (n 2 above) 399 - 404; Human Rights Watch (n 35 above) 20. This report condemns the failure of police to investigate sexual offences committed during the post-election violence. Following these criticism, the police established a Police Task Force to investigate rape cases during the post-election violence. This Task Force was however criticised by FIDA, one of the major stakeholders who later withdrew its membership citing lack of credibility on the part of the Task Force.
45 Human Rights Watch (n 35 above) 21.
46 As above.
47 As above.
48 Situation in the Republic of Kenya, in the case of *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11, Pre-Trial Chamber II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute 10 - 11 http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf (accessed 13 May 2014); Situation in the Republic of Kenya, in the case of *Prosecutor v Francis Karimi Muthaura, Uhuru Muigai and Mohammed Hussein Ali,* ICC-01/09-02/11, Pre-Trial Chamber II, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute 11 - 13 http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf (accessed 13 May 2014).

Firstly, was the case of *R v Stephen Kiprotich Leting and 3 Others.*[49] The facts of this case were as follows: On 30 December 2008, following eruption of PEV, some Kikuyu families in Uasin Ngishu District within Rift Valley Province were apprehended with fear and sought refuge at Kenya Assemblies of God Church Kiambaa. The number of those seeking refuge at the church increased the following day with an additional 160 people whose houses had been torched joining those already at the church. On the night of 1 January 2008, a gang of about 4000 people armed with bows and arrows attacked the church. While those seeking refuge scattered, some locked themselves inside the church. The gang then surrounded the church and set it ablaze killing about 35 people.

Whereas the High Court in this case condemned the crimes committed, it underlined the importance of the state proving PEV cases 'beyond reasonable doubt' in order to secure convictions. According to the court, the state failed to prove three cardinal components essential to proving the crime of murder: '(a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.' It was the courts observation that the prosecution failed to call some crucial witnesses and as a result failed to establish that some of the deceased persons were actually dead or that it was the accused persons who actually murdered them. The first, second and fourth accused persons in this case raised the defence of *alibi*. In so far as the third accused person admitted being at the scene of crime, it was his submission that he had only rushed there to rescue the victims. The police were unable to produce evidence to dismiss these claims beyond reasonable doubt.

The court further observed that the prosecutor ought to have called into action the doctrine of 'common intention'[50] in order to secure the conviction of the accused persons. In the court's wisdom, the doctrine of common intention was very essential given the manner in which the attack was orchestrated. For instance, all the attackers had painted their faces, were chanting war dirges, were armed with crude weapons including machetes, pangas, spears, clubs, arrows and bows, were systematic in the manner in which they launched their attacks against Kimuli, Rehema and Kiambaa farms, were systematic in the manner they followed their victims slashing and hacking them to death then finally setting the church ablaze. These factors were adequate proof for common intention. According to the

49 High Court Criminal case no 34 of 2008 at Nakuru http://kenyalaw.org/caselaw/cases/view/55195 (accesed 30 January 2015)

50 This simply means a premeditated plan to act in concert. In order to secure a conviction under common intention, the prosecution must prove that the accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.

Court, all this evidence narrows down to proof of a preconceived plan to commit these atrocities. The court however decried the level of evidence produced by the police:

> One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act … I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered. In this case there is absolutely no evidence of the raiders and/or any of the accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents… In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be … I have to point out the shoddy police investigations in this case so that blame is placed where it belongs … The judiciary is being accused of acquitting criminals and unleashing them to society ... I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them. In our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person.[51]

Having expressed his frustration over the quality of investigations and prosecutions in this case, the court proceeded to acquit all the accused persons on the basis that the prosecution had failed to prove their case.

Secondly, is the case of *Republic v Edward Kirui*[52] which portrays the direct role of the then Kenyan government in PEV. Aggrieved by the declaration of Mwai Kibaki as the elected president of the 2007 general elections, the Orange Democratic Party (ODM) party, the then official opposition, contested the elections and gave notice of their intention to hold peaceful demonstrations to express their displeasure. The police responded to this notice by ODM by declaring the planned demonstrations illegal. Consequently, the government intensified police presence all over the country especially in ODM's strongholds. Despite declaring the meetings illegal, ODM supporters however went on as planned. It was at Kondele, in Nyanza where displeased crowds continued with the demonstrations despite warnings to disperse. It was in this context that the

51 n 49 above.
52 Nairobi High Court Criminal Case No 9 of 2008; (2010) eKLR http://kenyalaw.org/caselaw/cases/view/68555/ (accessed 15 May 2014).

two persons in this case were shot dead by the accused police officer. These events were captured on a video camera and displayed during trial.

While the court found that the offence of murder had been committed, the major issue for determination remained the question whether it was the accused person who shot the deceased. One of the issues central to this case was identification of the accused person. This was shrouded in uncertainty as a result of contradicting evidence from some of the witnesses. The court did not however fault the police for failing to hold an identification parade since the identifying witnesses were well known to the accused person even before the incident. The other key issue that arose was whether the accused fired the shot that killed the deceased persons. The sergeant in charge of armoury testified that on that material day he issued the accused with an AK47 serial number 23008378. The Firearms Examiner and the then Acting Senior Superintendent however testified that the firearm he examined and established was the rifle whose shot killed the accused was one which bore the serial number 3008378. Casting doubt on whether it was the accused's rifle that actually killed the deceased. According to the court, the prosecution had not only failed to produce before the court rifle serial number 3008378 but also failed to make any attempts to link the firearm to the accused. As a result the accused was acquitted. The Civil Society of Kenya has however argued that the police tampered with this evidence.[53] That local prosecution totally failed to prove their cases to required standards leading to mass acquittals is a notable trend in most of these cases. Thus, corruption within the police investigating agencies, incompetence and the unwillingness of police officers to hold their colleagues accountable are some of the factors that largely contributed to massive premature dismissal of these cases.

Relatedly, some of the cases reviewed by a Task Force[54] revealed that some victims hardly knew their perpetrators and only identified them as 'neighbours' or 'members of a particular ethnic group'.[55] This contributed to several acquittals especially in sexual and gender-based crimes.[56] Interestingly, despite numerous efforts by victims of SGB crimes identifying the police as their perpetrators no single police officer was charged with sexual offences.[57]

53 Human Rights Watch (n 35 above) 33.
54 In 2012, through Gazette Notice No 5417 of 20 April 2012, the Director of Public Prosecutions established a Multi-Agency Task Force to undertake a national review, re-evaluation, and re-examination of all cases arising out to the 2007 - 2008 PEV.
55 The Multi-Agency Task Force on the 2007/2008 PEV (n 37 above) 3. CIPEV report (n 2 above) 400.
56 *Republic v Julius Cheruiyot Kogo*; *Republic v Erick Kibet Towett and Simion Kipyegon Chepkwony.* In both these cases, although the victims could identify the perpetrators, they failed to identify their names. This made the court to declare unclear the identification process leading to acquittals.
57 Human Rights Watch (n 35 above) 38.

Lack of legitimacy and local ownership

Like any other transitional justice mechanism, local prosecution must be relevant to the local communities. As such, they must take into account the priorities of the local communities in the identification and prosecution of alleged perpetrators. Thus, not only should the elites declare such a process legitimate, but also the local population.[58]

Local prosecution of PEV cases has suffered lack of legitimacy and local ownership at two levels. Firstly, the distrust between investigating police officers and the general public. Secondly, the distrust between the judicial arm of government and the general public.

One major reason contributing to poor investigations by the police officers is their perceived lack of legitimacy by the locals who are a crucial component of the process. The Kenyan public lacks trust of police officers.[59] During and after the PEV period, this was exacerbated by the tribal tension then reigning in the country. For example, the public wanted nothing to do with the police in areas where they were perceived to be the government.[60] A police officer has previously observed that '… in Western [province] and Nyanza [province], people don't give information about crime. People are used to being in the opposition, and they receive government officials negatively'.[61] In some exceptional cases, the police have been accused of being partial in their investigations especially where they had ethnic solidarity with accused persons.[62] This was particularly the challenge in the PEV investigations in Rift Valley where police officers have confessed that some of their colleagues were in synch with some suspected local perpetrators.[63] With this state of affairs it becomes a challenge for the police to carry out effective investigations given that those who possess such knowledge may not be willing to freely pass it to the authorities.

Public perception of Kenya's judiciary further distances the local population from local prosecution of PEV related cases. Historically, the Kenyan judiciary has had a reputation of lacking independence,[64]

58 This is the position favoured by both scholars and human rights organisations. See for instance, Human Rights Watch (n 35 above) 4; E Lutz 'Transitional justice: Lessons learned and the road ahead' in N Roht-Arriaza & J Mariezcurrena (eds) *Transitional justice in the twenty-first century: Beyond truth versus justice* (2006) 325 - 342.
59 Human Rights Watch (n 35 above) 47.
60 As above.
61 As above.
62 As above.
63 As above.
64 CIPEV report (n 2 above) 460.

untrusted to dispense any form of justice[65] and extremely corrupt.[66] It is this mistrust of the local judicial system that informed the excitement amongst Kenyans upon learning the possibility of alleged perpetrators being prosecuted at the ICC.[67] Notably however, the judiciary has undergone some fundamental reform processes. This was significantly achieved through the adoption of stringent measures of appointing judicial officers and the vetting of current judges and magistrates.[68] Unfortunately, despite all these reforms, a similar attitude is slowly and steadily pervading the public regarding prosecution of the actual perpetrators of PEV. This attitude has been informed by what some commentators perceive to be erroneous jurisprudence on key judicial decisions revolving around the 'real power wielders'.[69] As a result, there has not been much focus on the few cases that have been successfully prosecuted locally.

Lack of political will

Government's commitment to the entire process of transitional justice, including prosecution, is fundamental to the success of any transitional justice process. To the contrary, a lack of political will has largely characterised domestic efforts towards holding alleged perpetrators of international crimes accountable for past atrocities. A report by Human Rights Watch, for instance, labels domestic prosecution efforts as a 'half-hearted' effort at accountability – as such, 'hundreds of ... perpetrators of serious crimes continue to evade accountability'.[70] This deficiency, according to Asaala and Dicker, can be attributed to a host of challenges including a distinct lack of political will at two levels.[71] Firstly at the local

65 Africa Policy Institute 'Breaking Kenya's impasse: Chaos or courts?' Africa policy brief 3 as cited in B Ongaro & O Ambani 'Constitutionalism as a panacea to ethnic divisions in Kenya: A post 2007 election crisis perspective' in JM Wachira (ed) *Ethnicity, human rights and constitutionalism in Africa* (2008) 29. This prompted the then ODM presidential candidate, Raila Odinga, to publicly decline having the disputed elections of 2007 resolved by local courts.

66 Report of the Task Force on Judicial Reforms (2009) 74 - 77.

67 'It's the Hague, Kenyans tell violence suspects' *Daily Nation* 19 July 2009 8 and 9. See also 'Hopes for justice high among Kenyans as Ocampo arrives' *Daily Nation* 6 November 2009 4. Pursuant to 'MPs vow to defy Kibaki and Raila' *The Standard* 7 July 2009 http://www.standardmedia.co.ke/?incl=comments&id=1144018708&cid=&articleID=1144018708 (accessed 3 July 2012), the Members of Parliament vowed to block the Bill seeking to try post-poll offenders locally for fear of manipulation from the executive.

68 Vetting of Judges and Magistrates Act of 2011.

69 See generally, E Asaala & N Dicker 'Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?' (2013) 13 *Africa Human Rights Law Journal* 351. See also *International Centre for Policy and Conflict & 5 Others v the AG & 4 Others* Constitutional and Human Rights Division Petition 552 of 2012 (2013) eKLR http://kenyalaw.org/CaseSearch/view_preview1.php?link=119030658917561929345 59 (accessed 4 April 2014). See, generally, Supreme Court of Kenya Petitions 3, 4 & 5 of 2013; Reports on re-tally of 22 polling stations in Petition 5 of 2013 and Report of the scrutiny of 33 400 polling stations. These reports are as a result of the Supreme Court's own *suo moto* motion.

70 Human Rights Watch (n 35 above) 4.

71 Asaala & Dicker (n 69 above).

level, a study has confirmed that the police, the Attorney-General and all state prosecutors succumbed to negative local political pressure against prosecution.[72] In several instances, local politicians as well as the then police commissioner, Mohammed Ali, telephoned his officers instructing them to release suspected perpetrators of PEV.[73] Consequently, despite overwhelming evidence that the police may have gathered against suspected perpetrators, they had no option but to discard it and release the suspect without further prosecution. Besides, despite several claims made by the CIPEV report implicating several local leaders for having funded and facilitated the violence, the police never bothered to follow-up and investigate such claims.[74] It is therefore not surprising that the government has displayed a lot of laxity towards effective local prosecution of some of the crucial cases it dubbed 'priority cases'.[75] In most of these cases, the authorities closed their investigations without any arrest claiming that there were no identifiable suspects.[76] As a result, in the majority of the cases that were prosecuted, none involved suspected local politicians despite allegations of their involvement in organising, financing and directing the local violence.[77] Although this contribution is aware of the fact that prosecuting PEV under national laws would not cover all the elements of crimes against humanity like deportation, acts like organising and financing would sufficiently be covered under the notion of 'accessories before the fact'[78] that essentially apportions criminal liability.

72 Human Rights Watch (n 35 above) 53.
73 Human Rights Watch (n 35 above) 54.
74 CIPEV (n 2 above) 225. For example the report implicates a member of Parliament from the Coast province in funding the youth to burn all businesses belonging to ODM supporters.
75 These included the burning of a house in Naivasha that killed 9 people.
76 *Republic v Jackson Kibor*, Nakuru Magistrate's Court CR 96/08. Mr Kibor, an ODM politician was arrested and charged with inciting violence. According to an interview with BBC on 31 January 2007, Kibor had declared war against Kikuyus and advocated for their eviction from the Rift Valley as follows: 'People had to fight Kikuyus because Kibaki is a Kikuyu ... We will not sit down and say one tribe lead Kenya. We will fight. This is a war. We will start the war. One tribe cannot lead the other 41 tribes. This is a war. Now we're fighting for power ... We will not let [Kikuyus] come back again, because they are thieves. We will never let them come back ... We will divide Kenya.' A Kalenjin youth interviewed in the same broadcast, who confessed to have participated in the Kiambaa church burning, told the journalist that perpetrators of violence were taking cues from the elders: 'We as young men, our culture, we don't go over what somebody ... an elder tells us. If the elder say no, we step down, but if our elders say yes, we will proceed ... I do it because it is something that has been permitted from our elders.' Human Rights Watch (n 35 above) 29, citing Pascale Harter, 'Assignment' BBC World Service, 31 January 2008. This prosecution never proceeded to the end as the then Attorney-General withdrew the charges by entering a *nolle prosequi*.
77 Human Rights Watch (n 35 above) 29.
78 Under Kenyan practice, an accessory before the fact has been used interchangeably with aiders, abettors and procurers. This is covered under section 20 of the Penal Code and it includes aiders, abettors and those who counselled or procured (assisted or encouraged) the principle offender into this category. In terms of responsibility and punishment, aiders, abettors, counsellors or procurers are all held responsible in the same manner as though they were the actual perpetrators.

Secondly, at the international level, the Kenyan government has displayed general reluctance to effectively cooperate with the ICC regarding the Kenyan cases.[79] For example, despite the government's reluctance to establish a tribunal to prosecute those who bare the highest responsibility for international crimes,[80] on several occasions, the Kenyan Parliament unanimously resolved to have Kenya withdraw from the Rome Statute.[81] Subsequently, in January 2011 the government announced its intention to establish a special division within the High Court to deal with all PEV cases.[82] This was a laudable step, since such local initiatives are likely to assuage related fears in future.[83] In fact, while recommending for the establishment of an International Crimes Division (ICD) modelled against the ICC within the Kenyan High Court, a Task Force has highlighted that ICD should be conferred jurisdiction over PEV cases in order to try international crimes under ICA.[84]

The timing of this announcement by the Kenyan government however raised questions about its real motive. This is especially so given that on 26 November 2009, the ICC had authorised the prosecutor of the court to investigate the Kenyan situation. The intention of establishing a special division within the High Court was therefore largely confused by government officials who suggested it as a way of reverting the ICC cases back to the local mechanisms and not as complimenting the ICC processes.[85] It is thus feared that the ultimate objective of these effort maybe to undermine the ICC process.[86] Immediately after the said announcement, the Kenyan government made an application on 31 March 2011 to the Pre-Trial Chamber of the ICC challenging the admissibility of the cases against the six claiming that there were ongoing local investigations, which failed. While confirming the admissibility of the Kenyan cases, the ICC dismissed claims by the Kenyan government that there were ongoing investigations as being hypothetical promises and not

79 Asaala & Dicker (n 69 above) 346.
80 CIPEV called upon government to establish a Special Tribunal comprising both national and international judges and prosecutors to prosecute international crimes committed during PEV.
81 Motion 144 in Kenya National Assembly, Motions 2010 (22 December 2010).
82 See generally, ICTJ 'Prosecuting international and other serious crimes in Kenya' (2013) 2 https://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 6 March 2013).
83 Judicial Service Commission 'Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in the High Court of Kenya' (2012).
84 The Multi-Agency Task Force on the 2007/2008 PEV (n 37 above) 4 - 5.
85 KPTJ & KHRC 'Securing justice: Establishing a domestic mechanism for the 2007/08 post-election violence in Kenya' (2013).
86 KPTJ & KHRC (n 85 above) 14.

investigations within the context of article 17(1)(a).[87] According to the Court,

> the failure to specifically mention the suspects before the ICC as some of the people under the government's investigation, rendered the information given by the Kenyan government inadequate to sustain the application.[88]

The Court was emphatic that an investigation within the meaning of section 17(1) *must* encompass the same *conduct* in respect of the same *persons* as at the time of the proceedings concerning the admissibility challenge.[89] It is indeed very doubtful as to whether any local prosecutions would seek to prosecute the same individuals before the ICC.

The Kenyan government fight against admissibility of its cases before the ICC happened after several failed attempts to have a special tribunal, coupled with absurd requests by the East African Court and the African Court on Human and Peoples' Rights to undertake the prosecutions.[90] The declaration by the Kenyan government that no further prosecutions of PEV-related cases was tenable due to lack of sufficient evidence[91] came as an icing to the numerous failed attempts to get rid of the ICC process. While this statement may be true in principle, it depicts the discomfort of the Kenyan government regarding the ongoing ICC cases. It is submitted that the essence of this statement was to convey a message to the international community that there were no crimes against humanity committed in Kenya's PEV after all. This is informed by firstly, the persistence by the Kenyan government in collaboration with regional and sub-regional institutions that the ICC cases against the Kenyan president

87 ICC-01/09-02/11-96, ICC Pre-Trial Chamber, *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to article (19)(2)(b) of the Statute (30 May 2011) 6. See also ICC-01/09-01/11-101, ICC Pre-Trial Chamber II, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to article 19(2)(b) of the Statute (30 May 2011) 19.

88 ICC Pre-Trial Chamber II, *Muthaura, Kenyatta, Ali* (n 87 above) 25. See also ICC Pre-Trial Chamber II, *Ruto, Kosgey, Sang* (n 87 above). See a detailed discussion of this decision in EO Asaala 'The International Criminal Court factor on transitional justice in Kenya' in O Maunganidze & K Ambos (eds) *Power and prosecutions: Challenges and opportunities for international criminal justice in Sub-Saharan Africa* (2012) 133 - 134.

89 ICC Pre-Trial Chamber II *Muthaura, Kenyatta, Hussein Ali* (n 87 above) 21 & 26.

90 On 12 February 2009, a 'Constitution of Kenya (Amendment Bill) 2009' allowing the creation of a local tribunal was shot down by the Kenyan Parliament. See also ICTJ 'Prosecuting international and other serious crimes in Kenya' (2013) 2 https://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 6 March 2013).

91 'CID report says no charge can hold for PEV perpetrators' *The Standard* 15 February 2014 http://www.standardmedia.co.ke/mobile/?articleID=2000104723&story_title=cid-report-says-no-charge-can-hold-for-pev-perpetrators (accessed 7 April 2014).

and his deputy must be withdrawn.[92] Again, in a bid to undermine the ICC, the Kenyan government refused to arrest Omar Al-Bashir when he visited the country on 27 August 2010 despite a Kenyan High Court decision calling upon it to do so.[93] Secondly, is the reluctance by the ODPP's office to initiate investigations and or prosecute a total of 255 alleged perpetrators of PEV as recommended by the Truth Justice and Reconciliation Commission (TJRC) of Kenya.[94] Instead, Parliament has enacted legislation to allow its members to make amendments (which would effectively translate to re-writing) to the TJRC report.[95]

The tension between the government's relationship and the ICC can thus be cited as a central factor informing the political unwillingness at ensuring effective local prosecution of those who do not bear the highest responsibility for PEV crimes. These, coupled with the general elections of 2013, shifted much focus from local accountability measures through prosecution.

Conclusions and recommendations

This chapter set out to discuss the real challenges that compromised effective prosecution of international crime in Kenya's PEV-related cases and how these influenced the entire transitional justice process in Kenya. It has established that a majority of the cases reported to the authority during the PEV period were hardly investigated and/or prosecuted. For example out of the 6081 cases that were reported, the police prosecuted only 366 cases. For the few cases the police prosecuted, a majority of them ended up in acquittals with only six successful convictions. Although the police blame this on a lack of resources, lack of forensic laboratory with trained personnel and adequate equipment, this study has established the following as the main contributing factors: poor investigations, corruption and incompetence within the police officers, lack of legitimacy and local ownership and lack of political will.

92 Ext/Assembly/AU/Dec 1, Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia (12 October 2013) 2 - 3, Decision on Africa's relationship with the International Criminal Court http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 4 April 2014).

93 *The Kenya Section of the International Commission of Jurists v the Attorney General, The Minister of State for Provincial Administration and Internal Security* Final Judgment, eKLR; 28 November 2011.

94 See generally chap IV of Vol 4 of the TJRC Kenya Report.

95 Sec 49 of the Truth Justice and Reconciliation Act provided that upon the publication of the TJRC's report, the Minister of Justice and Constitutional Affairs was required to 'operationalise' the implementation mechanism as would have been proposed by the TJRC within six months. The Truth Justice and Reconciliation (Amendment) Act 44 of 2013, Kenya Gazette Supplement No 178, however introduces an interesting twist. It provides that 'The Minister shall, *upon consideration of the report of the Commission by the National Assembly,* set in motion a mechanism to monitor the implementation of the report in accordance with the recommendations of the National Assembly'.

As such, subsequent prosecution of PEV cases can seldom be said to have any positive impact on Kenya's general objectives on transitional justice. In fact, it cannot be said that local prosecution of PEV cases guarantee any non-reoccurrence of similar crimes in the future. Related senseless tribal clashes continue to silently ravage the country without any respect for human life.[96] Yet, the perpetrators are hardly held to account. This continued impunity is evidence that the rule of law remains elusive in Kenya. The general lack of political will coupled with the lack of local ownership and inept investigations have denied local prosecution of international crimes in Kenya's PEV the much required local legitimacy thus compromising its ability to positively influence Kenya's transitional justice process. Consequently, the most important positive contributions of effective prosecutions in the ongoing transitional process in Kenya remain a mirage. Regardless of the initial misunderstandings, this chapter calls upon the judiciary to re-visit the discourse on establishing the International Crimes Division within the High Court as a specialised prosecutorial unit to deal with this kind of crimes. This will not only enhance Kenya's complimentarity to the ICC in future but will also guarantee special attention to international crimes. The central government should facilitate this initiative by providing the necessary financial resources, the training of all personnel and relevant stakeholders including the police, as well as the establishment of a forensic laboratory with trained personnel and adequate equipment.

Notably also, are the inequalities depicted by the penal sanctions between municipal courts and the ICC. How can it be justified that those who do not bear the highest responsibility are sentenced to death when convicted, while those who bear the highest responsibility can only be punished to a maximum life sentence? This study calls upon the Kenyan lawmakers to amend this law accordingly in order to reflect the set international standards.

96 D Miriri & H Malalo 'Second Kenyan minister charged with inciting violence' *Reuters* (online) 27 September 2012. See also J Gondi 'Bridging the impunity gap in Kenya requires a holistic approach to transitional justice' International Centre for Transitional Justice 19 July 2012 http://www.ictj.org/news/bridging-impunity-gap-kenya-requires-holistic-approach-transitional-justice#.UAgiyuOS0HM. (accessed 20 October 2013).

CHAPTER 6

TOWARDS A CORRUPTION FREE KENYA: DEMYSTIFYING THE CONCEPT OF CORRUPTION FOR THE POST-2010 ANTI-CORRUPTION AGENDA

Ken Obura

'When the state is in healthy condition, all things prosper; when it is corrupt, all things go to ruin.' Democritus

Introduction

The 2010 Constitution represents an invigorated desire by Kenyans to rid themselves of the vice of corruption. This desire permeates the entire framework of the Constitution and is evidenced in the express inclusion of provisions against corruption including: the values of good governance, integrity, transparency and accountability as national values and principles of governance;[1] a chapter on leadership and integrity;[2] an anti-corruption institution as a constitutional commission having the status and powers of chapter fifteen commissions of the Constitution;[3] and the recognition of corruption as a ground for limiting the enjoyment of human rights.[4] This need to entrench the fight against corruption in the Constitution was informed by the chequered history of the fight in Kenya, which had seen anti-corruption institutions being created and disbanded as soon as they

1 Art 10(2)(c) of the Constitution of Kenya (promulgated 27 August 2010) http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (accessed 3 May 2014).

2 Chap 6.

3 Art 79. According to the Constitution, chapter fifteen Commissions are independent institutions subject only to the Constitution and the rule of law. Art 249(2). This entrenchment was informed by the chequered history of anti-corruption agencies in Kenya whereby institutions were being created and disbanded at the whims of corrupt brokers.

4 See, for example, the right to property clause, which while guaranteeing the right to acquire, hold and dispose of property and the right against arbitrary deprivation and uncompensated compulsory acquisition, also makes it clear that: 'The rights under this Article do not extend to any property that has been found to have been *unlawfully acquired*'. Art 40(6) (emphasis added).

started having some meaningful impact.[5] It was also an expression of Kenyans frustration with corruption, which had stalked them since independence and consistently denied them the enjoyment of the fruits of their collective and individual labour.[6]

Yet, despite the entrenchment of the fight against corruption in the Constitution and the express desire to eradicate corruption, disagreement abounds on the meaning of corruption amongst Kenyans. The Kenya Anti-Corruption Commission (now Ethics and Anti-Corruption Commission) has, for example, found that Kenyans disagree not only on the criteria to be used in determining corrupt conduct but also on the actual meaning of corruption. The criteria debate has pitted those who see law as the best criteria for determining standards of behaviour against those who view morality as the better criteria. On the other hand, the debate on the meaning of corruption has seen a division emerging not only on whether the definition should cover both the public and private related corruption but also on whether the list of corrupt acts should be closed to specific acts or should be left open ended.[7] This confusion is not helped by the fact that both the Constitution and the prime anti-corruption law in Kenya, the Anti-Corruption and Economic Crimes Act (ACECA), have not come up with a unifying definition, with the latter instead merely outlawing corruption's various manifestations.[8]

This disagreement on the criteria and definition of corruption is, however, not unique to Kenya and can be attributed to the complex and multifaceted nature of corruption which makes it take on various forms and functions in different contexts.[9] As Marquette pointedly laments, 'no matter how many times it is prodded, poked at or pulled apart, more questions than answers seem to arise from the literature'.[10] Because of this difficulty in identifying the true nature of corruption some commentators, like Ulrich Von Alemann, have advised against a search for a universally true and correct definition arguing that such a definition is unattainable

5 See JT Gathii 'Kenya's long anti-corruption agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission under the 2010 Constitution' http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1401&context=facpubs (accessed 10 December 2014).

6 For further reading on the history of corruption in Kenya, see generally K Kibwana et al *The anatomy of corruption in Kenya: Legal, political and socio-economic perspectives* (1996); Parliamentary Anti-Corruption Select Committee *Report of the Parliamentary Anti-Corruption Select Committee* (2000); JP Mutonyi 'Fighting corruption: Is Kenya on the right track?' (2002) 3 *Police Practice and Research: An International Journal* 21.

7 See, for example, Kenya Anti-Corruption Commission 'National perception survey' 2006 eacc.go.ke (accessed 28 March 2014).

8 See Anti-Corruption and Economic Crimes Act 2 of 2003 (ACECA) secs 2 & 39 - 47.

9 On the complexity of corruption, see generally MK Khan 'A typology of corrupt transactions in developing countries' (1996) 27 *Institute of Development Studies Bulletin* 12; J Gardiner 'Defining corruption, coping with corruption in a borderless world' in M Punch et al (eds) *Proceedings of the Fifth International Anti-Corruption Conference* (1993) 26.

10 H Marquette 'Corruption eruption: Development and the international community' (1999) 20 *Third World Quarterly* 1215 1215.

and can only act as a guiding star.[11] Others, like Oskar Kurer, have contended that this disagreement on the definition of corruption is healthy as 'far from hampering the research effort, the lack of a unified definition has positively stimulated it'.[12]

It is this chapter's argument, however, that the disagreement on the concept of corruption if unresolved would result in a confusing state of affairs where varied definitions of corruption exist side by side in uneasy competition. Such a confusing state of affairs if allowed to persist could discourage or slow down the effort to eradicate corruption as there would be no agreement on which to fight corruption. To avoid such a result, it is imperative, therefore, that the different perspectives on corruption are examined and their commonalities exposed with a view to reconciling their differences. This chapter specifically seeks to do that. It discusses the various theoretical and practical perspectives on and dimensions of corruption with a view to unravelling the idea behind corruption and the element(s) that makes an act condemnable as corruption. The aim is to resolve the disagreement on the criteria and meaning of corruption and provide a clear understanding of the concept of corruption for purposes of post-2010 Constitution analysis of corruption problem in Kenya.

To facilitate the discussion, the chapter is divided into sections. After this introductory section, the section will delve into discussing the moral and legal criteria of standards of human behaviour and their implication to the understanding of corruption. The aim is to propose a well thought out criterion to be utilised in the post-2010 anti-corruption analysis. The section will compare the conception of corruption in the international, regional and Kenya's anti-corruption instruments. The aim is to extract the essential elements of corruption that should guide the post-2010 determination of whether a behaviour is corrupt or not. The section will conclude.

The illegality/immorality of corruption

In their effort to eradicate corruption, the anti-corruption agencies in Kenya have often sought partnership with a number of organisations. This effort has been supported by successive anti-corruption laws, which have consistently called upon the anti-corruption agencies to collaborate with public, private and civil society organisations in the fight against corruption.[13] One category of the organisations that the agencies have placed disproportionate reliance on has been the faith based organisations.

11 See U von Alemann 'The unknown depths of political theory: The case for a multidimensional concept of corruption' (2004) 42 *Crime, Law & Social Change* 25 26 ('Maybe such a definition is like the Holy Grail, i.e. something unattainable that can only be a kind of guiding star').

12 O Kurer 'Corruption: An alternative approach to its definition and measurement' (2005) 53 *Political Studies* 222 227.

As noted by the former director of the Kenya Anti-Corruption Commission, Justice Aaron Ringera:

> We continue to partner with many law enforcement agencies, other government departments, schools, private sector actors and civil society. However, we believe that this fight will benefit from a *much greater impetus if we use places of worship as the vanguard platform of advocacy* against corruption in Kenya.[14]

This emphasis on partnership with faith based organisations is informed by the understanding that 'Law of God provides the most enduring influence on our conduct as human beings' and that corruption is an act against the Law of God, which can only be successfully eradicated if Kenyans are guided to 'discover God's position on corruption and His direction on living a corrupt free life'.[15] These views compounded by the acknowledgement of the 'supremacy of the Almighty God of all creation' by the Constitution,[16] raises the question as to whether the criteria for corrupt conduct in Kenya should be morality or the hard law passed by the legislature. This question is not moot because despite the clear edict by the courts that the anti-corruption agencies' mandate is circumscribed by the law,[17] it is not uncommon to find Kenyans and anti-corruption officials judging the corruptness of conducts based on moral criterion. It is imperative, therefore, to analyse the meaning and implication of the two criteria to the understanding of corruption and propose a well thought out criterion for use in post-2010 anti-corruption analysis.

This section is aimed towards achieving these ends. In this regard, it is noteworthy that the debate on the place of law and morality in the regulation of human conduct is not new. It forms a central part of legal philosophy and has for a long time pitted the 'positivists' against the 'naturalists' with the 'historicists' coming late in the day to join in the fray.[18] The positivists, on the one hand, view law as being independent from morality and insist on law as the criteria for the standard of behaviour. The naturalists, on the other hand, view law and morality as being intertwined and insist on a universal morality as the criteria for the

13 See, for example, s 7 of ACECA and s 11(3) of the Ethics and Anti-Corruption Act 2012.

14 A Ringera 'Forward' in Kenya Anti-Corruption et al (eds) *A bible study guide for groups and individuals* (2008) vii (emphasis added).

15 n 14 above.

16 Constitution of Kenya 2010, preamble.

17 As noted by the Court of Appeal in *Kenya Anti-Corruption Commission v First Mercantile Securities Corporation* [2010] eKLR 21, 'The Appellant (KACC – the precursor to EACC) is a statutory body under Kenyan Law and it can only do that which its creating statute empowers it to do'. See also *Nicholas Muriuki Kangangi v Attorney General* [2011] eKLR para 13 ('As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void').

18 The positivists are the proponents of the positive law school of thought. The naturalists support the natural law school of thought. The historicists espouse the historical law theory.

standard of behaviour. The historicists, on their part, while agreeing with the naturalists on the connection between law and morality, insists that morality as a criteria must take into account the historical and cultural specificity of each society. But what do these criteria mean in practice and which criterion should one adopt when defining corruption?

The legal criterion

The legal criterion of standard of behaviour is usually attributed to the positive law school of thought. The positivists contend that the ultimate source of law is the will of the lawmaker as expressed in operational law and not some abstract morality as espoused by the naturalists. They argue that one must first establish what law is before it can legitimately be asked what the law ought to be or how it came to be what it is.[19] In other words, to the positivists the problem of norm setting is determined with reference to the legal rules provided by statutes and court decisions. Thus, to positivists, the standard of behaviour is what is formally enunciated as such by the lawmakers.[20]

To a legal positivist, therefore, corruption would be connected to any behaviour that violates some formal standard or rule of behaviour set down by a political system for its officials and citizens. This positivist perspective to corruption can be equated to what some commentators have called the legal approach to corruption.[21] This definition says if an act is prohibited by formal laws, it is corrupt; if it is not prohibited, it is not corrupt even if it is injurious or unethical. For example, behaviour was judged by James Bryce to be either permissible or corrupt depending on the criteria established by legislators and judges:

> Corruption may be taken to include those modes of employing money to attain private ends by political means which are *criminal* or at least *illegal*,

19 See J Austin *The province of jurisprudence determined* (1995) 157, explaining legal positivism thus:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation.

20 Some positivists have adopted an extreme conceptualism whereby a legal norm is only considered legal if a sovereign lawmaker is identified. For analysis of this school, of which Kelsen's theory is an example (H Kelsen *General theory of law and state* (1945)), see E Bodenheimer *Jurisprudence: The philosophy and method of law* (1974) 91 - 109. At the other extreme end of the positive theory are the adherents of the Critical Legal Studies movement who view legal rules as rationalisations of officials' behaviour, the source of which is found in economic, political, and other non-legal factors. For an exposition of this school, see JA Standen 'Note: Critical Legal Studies as an anti-positivist phenomenon' (1986) 72 *Virginia Law Review* 983.

21 Scott calls this approach, the legal approach. See JC Scott *Comparative political corruption* (1972) 3 - 5. See also AJ Heidenheimer *Political corruption: Readings in comparative analysis* (1970) 3 - 5 (calling this definition 'public office centred').

> because they induce persons charged with a public duty to transgress that duty and misuse the functions assigned to them.[22]

One advantage of using law as the criterion for corruption is that the resultant definition of corruption is clear and can easily be operationalised as government officials and ordinary citizens can be expected to access and understand the requirements and prohibitions spelled out in statutes.[23] A second advantage is that even if the legal definition is not perfect or if new corrupt issues arise in the future, the lawmaker can easily amend the laws to deal with these problems.

The legal criterion, however, suffers from a number of shortcomings. One flaw is that it assumes that all that is legal is not corrupt and that all that is illegal is corrupt. However, this is not necessarily true. As Jackson et al aptly point out:

> Worse still, using law as the standard of corruption supports the assertion that everything that is not legal is permitted. The legal foundation of political corruption is simultaneously too narrow and too broad, excluding too much (the unethical but legal) and including too much (the illegal but not unethical).[24]

The second defect is that the definition depends on the idea that legal frameworks are somewhat neutral, objective and non-political and that, therefore, what the lawmaker wills in the law should be taken as the true representation of the good of society. Research, however, shows that laws regulating political and bureaucratic conduct are not neutral and often depend on the prevailing assumptions and beliefs about the nature of politics and the character of public office.[25] In some cases these laws are actually a product of a trade-off amongst the politically powerful who can determine and declare a conduct to be improper or proper for reasons not necessarily in tandem with the interest of the general public.[26] James Scott captures this concern thus:

> Our conception of corruption does not cover political systems that are, in Aristotelian terms, 'corrupt' in that they systematically serve the interests of special groups or sectors. A given regime may be biased or repressive; it may

22 J Bryce *Modern democracies* (1921) 477 - 478 (emphasis added).

23 This is not always the case though as statutory drafting often lends itself to varied interpretations. Still the fact that it is written in statutory books makes it accessible for verification.

24 M Jackson et al 'Sovereign eyes: Legislators' perception of corruption' (1994) 32 *Journal of Commonwealth and Comparative Politics* 54 55 - 56.

25 See, for example, L Beck 'Senegal's enlarged presidential majority: Deepening democracy or detour?' in R Joseph (ed) *State, conflict, and democracy in Africa* (1999) 197. It discusses the public perception in the case of the LONASE scandal involving the skimming off of large sums of money from the Senegalese lottery and how the perceptions are influenced by the nature of politics at play.

26 For an exposition on the politics of law making, see, for example, D Kairys (ed) *The politics of law: A progressive critique* (1998).

> consistently favour the interests, say, of the aristocracy, big business, a single ethnic group, or a single region while it represses other demands ...[27]

Kenya's anti-corruption history is illustrative of this second shortcoming. For example, a cursory glance into the history shows that since the first anti-corruption legislation (the Prevention of Corruption Act) was enacted in 1956 there have been no less than five anti-corruption agencies established to spearhead the fight against corruption in Kenya.[28] The disbandment of successive anti-corruption agencies has mainly been occasioned by political machination, especially in instances where the holders of political power have felt threatened by the independence and effectiveness of the particular agency.[29]

A further shortcoming of the legal approach is that when the impugned conduct allegedly transgresses a legal norm or standard, such as customary law, which is not tied to a specific statute or court ruling, this definition of corruption becomes less useful in differentiating acceptable and unacceptable behaviour in society.[30]

The objective moral criterion

To overcome some of the shortcomings of the positivist approach, a second way of identifying the required standard of behaviour may be to resort to natural law. Natural law theory holds the view that man-made law, as well as individual choices, can and should be determined using objective moral standards.[31] As HLA Hart explains, the classical theory of natural law is the view 'that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid'.[32] In other words, to the naturalist, in order to determine what the standard of behaviour is, the inquiry must not stop at examining what the rules that have been accepted says but must go further

27 Scott (n 21 above) 5. See also Kurer (n 12 above) 222, pointing out that the definition 'fails to cover cases where legislation itself is corrupt (for example, 'legislative corruption' such as the indiscriminate enrichment of legislators), and it is inapplicable in pre-modern settings'.

28 The anti-corruption agencies in their order are: Anti-Corruption Police Squad, Kenya Anti-Corruption Authority (I) (KACA I), KACA II, Anti-Corruption Police Unit (ACPU), Kenya Anti-Corruption Commission (KACC), Ethics and Anti-Corruption Commission (EACC).

29 For further reading on the history of the Anti-corruption agencies in Kenya, see generally K Kibwana et al *The anatomy of corruption in Kenya: Legal, political and socio-economic perspectives* (1996); Parliamentary Anti-Corruption Select Committee *Report of the Parliamentary Anti-Corruption Select Committee* (2000); JP Mutonyi 'Fighting corruption: Is Kenya on the right track?' (2002) 3 *Police Practice and Research: An International Journal* 21.

30 See J Gardiner 'Defining corruption' in AJ Heidenheimer & M Johnston (eds) *Political corruption: Concepts and contexts* (2002) 25.

31 For a discussion on natural law theory, see, for example, R Dworkin 'The model of rules' (1967) 35 *University of Chicago Law Review* 14.

32 HLA Hart *The concept of law* (2012) 182.

and refer to the objective standards of morality.[33] It is only the rules that conform to this objective standard of morality that deserve to be accepted as law (standard of behaviour).

To a naturalist, therefore, corruption is viewed as an act that goes against human nature, and against human morality. This definition says: if an act is harmful to the general human good (morality), it is corrupt even if it is legal; if it is beneficial to the public good, it is not corrupt even if it violates the law. For example, Thomas Aquinas, one of the proponents of natural-law theory, argued that 'law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good'.[34] In his view, while actions 'are certainly individual … those individual actions have a relationship to the general good ...'[35] Thus, individual actions that go against this general good should be condemned and punished.[36] As Larry A Dimatteo concludes in his review of the history of natural law theory:

> As a member of such a community, one's actions, contractual or otherwise, must never be detrimental to that community. Taking advantage of another community member would be considered such a detriment. On strict theological grounds, this detriment would be considered a sin against God. Therefore, Aristotelian and Thomistic virtue held that the obtainment of wealth was not a good in itself. It was a means to self- sufficiency which was a precursor of happiness. However, one could only obtain happiness through wealth if it was obtained honourably.[37]

Proponents of this school emphasise the classical view of public good in which officials are unselfish and treat everyone equally and with fairness.[38] Thus, an act that is selfish, unequal in treatment and is unfair in process and result can be said to be corrupt.[39] These principles of natural law are usually fronted as universal, neutral and unbounded by time.[40]

However, to be sure, the naturalists are not unanimously agreed on how morality or public good is to be determined. To those of the Judeo-

33 See P Soper 'Some natural confusions about natural law' (1992) 90 *Michigan Law Review* 2393 2398, noting that a natural law theory is 'a theory of law that insists that one determine what law is, not just by a factual inquiry into the conventions that have been accepted, but also by reference to minimum standards of morality'.

34 See T Aquinas *Selected philosophical writings* (1993) 413, arguing that '[a]ctions are certainly individual, but those individual actions have a relationship to the general good'.

35 Aquinas (n 30 above) 413.

36 This position is supported by Lon Fuller. See, L Fuller *The morality of law* (1969) 5 - 6.

37 LA Dimatteo 'The history of natural law theory: Transforming embedded influences into a Fuller understanding of modern contract law' (1999) 60 *University of Pittsburgh Law Review* 839 848.

38 For a discussion, see J Rawls *A theory of justice* (1971) 11 - 18, 114 - 117.

39 See R Dworkin *Taking rights seriously* (1977), giving examples to illustrate how natural law principles aim at the fairness of the outcome.

40 See, for example, LL Wenreb *Natural law and justice* (1987) 1 - 2, discussing the connections between nature, law, and morality in classical natural law theory.

Christian legal tradition, such as St Augustine and St Aquinas, the arbiter of this moral law was to be the ecclesiastical authority.[41] To some, like Fuller and Finnis, the decision is to be made by skilful practitioners, basing their analysis on the facts of each instance of law-making.[42] To others, like John Locke, natural law is the 'decree of the divine will' rather than a mere 'dictate of reason' and can, therefore, only be revealed to a select few by God.[43] However, the dominant position within the natural law tradition appears to be that moral truths are to be derived from truths about human nature as viewed by the whole society (failing which, by the majority in the society).[44] The basis of this position is that since natural law is discoverable from the universe through human reason, and since all human beings are endowed with reason, it should only follow that these laws of nature are universal and discoverable to all human beings in whatever station of life they may be.[45] Thus, according to the dominant view, what is moral, or what is good, is what the people say it is, and since it is based on human nature, what is moral in New York, should be moral in Paris, Beijing, Sydney or Lagos.[46] Jean-Jacques Rousseau pointed out this universality of morality when he said:

> Thus there is, at the bottom of *all souls*, an innate principle of justice and of moral *truth* (which is) *prior* to *all national prejudices*, to *all maxims of education*. This principle is the involuntary rule by which, despite *our own maxims*, we judge our actions, and those of others, as good or bad; and it is to this principle that I give the name conscience.[47]

This natural-law school view of corruption as a breach of the general human good (as determined by public opinion) can be equated to what some authors have called 'public interest' or 'public opinion' criteria for

41 See JH Berman 'The religious foundations of western law' (1975) 24 *Catholic University Law Review* 490 498, pointing out that '[t]here was also a claim of moral superiority by the ecclesiastical authority, coupled with demands for changes in the secular law to conform to moral standards set by the clergy'. See also WW Bassett 'Canon law and the common law' (1978) 29 *Hastings Law Journal* 1383 1407, pointing out that '[b]y the middle of the fourteenth century the principles and the theories of the canonists virtually permeated society'.

42 See, for example, J Finnis *Natural law and natural rights* (1980) 33 - 36, responding to the 'is/ought' challenge.

43 See J Locke *Essays on the law of nature* (1958) 474 - 475, defining divine law as law that 'which God has set to the actions of men, and whether promulgated to them by the light of nature, or the voice of revelation'.

44 See RP George *In defence of natural law* (1999), summarising the dispute. See also J Locke *Two treatise of government* (1967) second treatise, sec 98, arguing, though in a political context, that unanimous consent is 'next impossible ever to be had' and that the only alternative is majoritarianism.

45 See, for example, YR Simon *The tradition of natural law: A philosopher's reflection* (1965) 41 - 66; Wenreb (n 40 above) 1 - 2, discussing the connections between nature, law and morality in classical natural law theory.

46 But see OW Holmes 'Natural law' (1919) 32 *Harvard Law Review* 40, arguing that one's reason is often tampered by one's earlier environment and experience, which is not uniform.

47 JJ Rousseau 'Lettres morales' in *JJ Rousseau Ouvres completes de Jean-Jacques Rousseau* vol 4 (1969) 1111 (emphasis added).

corrupt conduct.[48] The 'public interest' school views corruption as a violation of public interest.[49] The 'public opinion' school, on the other hand, tries to define corruption according to how people in a nation view it. According to this school, an act is said to be corrupt when the weight of public opinion perceives it so.[50] Thus, a natural-law theory perspective, in a way, combines these two perspectives in its approach to the conception of corruption.

One advantage of the natural-law perspective is that, because it is based on universal moral principles, it can be used as an acceptable framework for a cross-cultural study or analysis of corruption.[51] The second advantage is that since it represents the general understanding of corruption by the citizens in a country, it can provide a basis for effective anti-corruption strategy. This is because it is easier to enlist and foster public support in the fight against corruption when citizen values correspond to the statutory definition of corruption. Citizens are also more likely to police themselves when faced with compromising situations since the conception of corruption would be in line with their own internal beliefs. At the global level, such a universalistic approach to corruption provides a standardised and acceptable frame for engendering a global action against corruption.

Still, the natural-law theory approach is not without limitations. One major limitation is that a concept as broad as 'morality' or 'public good' upon which behaviour is to be based, while it might be innate in human nature, is not an easy concept to identify.[52] It is inevitably broad and ambiguous, and will rarely give one answer that everyone accepts.[53] A second challenge is that it is usually difficult to demarcate the boundary

48 Scott (n 21 above) 3.

49 A classic example of a public interest definition available in literature is that of Carl Friedrich, quoted in AJ Heidenheimer et al (eds) *Political corruption: A handbook* (1989) 10; and in M Philip 'Defining political corruption' (1997) XLV *Political Studies* 436 440, where he observes that:

> 'The pattern of corruption can be said to exist whenever a power holder who is charged with doing certain things i.e., who is a responsible functionary or officeholder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby *does damage to the public and its interest*' (emphasis added).

50 For a discussion, see Jackson (n 24 above) 54 - 67.

51 But see ML Liiv *The causes of administrative corruption: Hypothesis for Central and Eastern Europe* (2004) 9, arguing that '[t]he weakness of the moralistic approach derives from negative connotations – wrong judgments and cultural relativism that may accompany international comparisons'.

52 See, for example, S Anderson 'Corruption in Sweden: Exploring danger zones and change' (2004) 28 http://www.diva-portal.org/smash/get/diva2:142008/FULLTEXT01.pdf (accessed 20 October 2012), who claims that according to the public interest-centred definitions, illegal actions can be justified if they promote the common interest.

53 See, for example, R Williams *Political corruption in Africa* (1987) 11, pointing out the difficulty and arguing that corruption, like 'obscenity is more readily condemned than defined or explained'.

between the opinion of public and that of the political elite.[54] What is taken to be public opinion in many societies is oftentimes the opinion of the elites.[55] It is also not guaranteed that all citizens in a country have the capacity to reason and identify governing ethical norms.[56] And even if they all do, one's reason, as noted by Oliver W Holmes, is often tampered by one's earlier environment and experience, which is often not uniform.[57] Furthermore, research carried out on public opinions shows that attitudes and beliefs are not static and can and do change with time.[58] This possibility of fluctuation in opinion with time and environment raises doubt about the immutability and universality of morality as espoused by the naturalists.

The subjective moral criterion

To overcome the challenge occasioned by the possibility of fluctuation in opinion about the required standard of behaviour, one way would be to view corrupt conduct from a relativist perspective. The relative moral criterion is usually attributed to the historical law school of thought. The historical law theory sprung up as a response to the inability of the natural law theory to accept the relativity of morals and as an attempt to recognise customary law that had been left out by the positivists.[59] The theory advocates for a relativist approach to the conception of law, arguing that the ultimate source of law is the character, the culture, and the historical traditions of a society.[60] It holds that law is determined by the 'custom' and 'popular belief' of a specific people and not by 'the arbitrary will of the

54 See Heidenheimer (n 49 above). In his view the corruptness of political acts is determined by the interaction between the judgment of a particular act by the public and by political elites or public officials. He points to the existence of a scale or dimension of corruption that can be used to classify political behaviours according to their degree of corruptness from 'black' to 'gray' to 'white.'

55 See, for example, M Johnston *Political corruption and public policy in America* (1982) 7, pointing out that there are, after all, many publics and they rarely agree on anything of importance.

56 See, for example, J Locke 'The reasonableness of Christianity' in J Locke *The works of John Locke* vol 7 (1824) 140 142, arguing that 'human reason unassisted' can 'fail men in its great and proper business of morality'.

57 See Holmes (n 46 above) 41. He concludes that the 'jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere'.

58 See H Erskine 'Polls: corruption in government' (1973) 37 *Public Opinion Quarterly* 1.

59 The historical school of thought, just like its characteristic, was founded in response to a historical event – the 1814 drafting of a code of laws for the states that made up the German confederation (before Germany was established as a unified state). It is usually traced back to the writings of the German jurist, Friedrich Karl von Savigny who opposed the idea of such a cross-cutting code of laws, which did not take into account the historical peculiarities of the individual states making up the German confederation. See FV Savigny *Of the vocation of our age for legislation and jurisprudence* (1831). See also A Bickel *The morality of consent* (1975).

60 For an exposition and critique of the historical school of jurisprudence, see J Stone *The province and function of law: Law as logic, justice, and social control: A study in jurisprudence* (1950) 419 - 448.

legislature'.[61] Unlike the positive school, the historical law school concentrates more on the rules of customary law than the rules of statutory law. In addition, unlike the natural school, it is more concerned with those specific moral principles that correspond to the social life, the beliefs and the values of a given people or a given community rather than with universal moral principles. Thus to the historicists, the criteria for determining the standard of behaviour is the popular belief and custom of the society in which the law is to apply.[62]

Understood in this sense, therefore, from the historical law perspective, corruption may be viewed as a concept in comparative, historical research. This definition says: if an act is harmful to the good of a specific society, it is corrupt even if it is legal in the eye of another group of people; if it is beneficial to a people of a particular society, it is not corrupt even if it violates the good of another society or another generation within the same society.[63] In other words, from a historicist's perspective, corruption should be viewed as a relative concept and not as a universal one. In this regard, Michael Johnston has aptly pointed out that:

> We never will devise a definition of corruption as a category of behaviour that will travel well to all such places or times – or even, realistically, to most of them. Moreover, such approaches will often tell us little about the development or significance of corruption in real societies. I propose that in such instances we study, not a category of behaviour, but rather the issue or idea of corruption, and the social and political processes through which it acquires its meaning and significance. I regard corruption as a 'politically contested concept', and suggest that comparative analysis can fruitfully focus upon what I call role-defining conflicts.[64]

The need for a relativist approach to conceptualisation of corruption springs from a number of considerations. First, it is the recognition that the social, political and economic structures of countries differ. For example, some of the tasks that are performed by government officials in countries with socialist systems are performed by private individuals in the private sector of the capitalist societies, and in these two situations different

61 Law, wrote Savigny, 'is developed first by custom and by popular belief, then by juristic activity ?everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a legislator'. Savigny (n 59 above) 30.

62 HJ Bermant 'Toward an integrative jurisprudence: Politics, morality, history' (1998) 76 *California Law Review* 779 788 - 794. See also OW Holmes *The common law* (1963) 1, pointing out that 'the life of the law has not been logic: it has been experience'.

63 An example of definition that fits this bill is that proposed by A Sajo 'From corruption to extortion: Conceptualization of post-communist corruption' (2003) 40 *Crime, law and social change* 171 176, noting that '[w]hile a concept of corruption may serve goals of intellectual clarity and categorisation, 'real corruption' is a *social construct* that results from official definitions … and anti-corruption practices'.

64 M Johnston 'Comparing corruption: Conflicts, standards and development' Paper presented at the XVI World Congress of the International Political Science Association, Berlin, 1994 http://www.nobribes.org/Documents/ipsaconf.doc (accessed 20 December 2012).

standards apply.[65] Second, it is the understanding that the attitude of a people to corruption is often influenced by their historical experience.[66] For instance, in former colonies where the European legal system was superimposed on the traditional system, the prevalent attitude is that practices that were customary in the traditional set up only became corrupt when colonial values were introduced.[67] Third, there is difference in opinion about what the scope of corruption should be. There are countries that believe that corruption should be limited to bribery, while others believe that the concept should be broadened to cover other acts such as embezzlement, fraud, favouritism, election dishonesty and bid rigging.[68] And even amongst those who accept that corruption should cover bribery, there are some who believe that customarily recognised acts such as 'gift giving' or 'grease payments' should be left out of the definition.[69]

Yet, despite its apparent usefulness in identifying the type of activities understood as immoral in a particular polity, the use of local norms and judgments as a basis for discussing moral concepts such as corruption poses a number of related problems. First, by endorsing conceptual relativism, the theory creates an obstacle to any attempt at cross-cultural analysis of moral concepts. Second, by limiting the discussion of moral concepts to time-bound sensitivities of individual polities, it impinges upon a search for a universal and immutable sense of morality and by extension corruption. Third, the idea of relative national ideals and community values, if unchecked, can be hijacked by crafty individuals to justify political arbitrariness or moral depravity. For example, in the context of Africa, it is sometimes said that the use of public position to assist members of one's family or next of kin is a valid expression of the extended family system that has existed in many African communities. Or that bribery is a harmless way of showing gratitude for deeds done, a practice that had

65 James Scott, for example, notes that a nation where almost everyone is a government employee can't easily be compared with one where most people work for private corporations. Scott (n 21 above) 5.

66 Ronald Wraith and Edgar Simpkins, for instance, point out that 'an act is presumably only corrupt if society condemns it as such, and if the doer is afflicted with a sense of guilt when he does it: *neither of these apply to a great deal of African nepotism*' (emphasis added). R Wraith & E Simpkins *Corruption in developing countries* (1963) 35.

67 As a senior official of a Pacific nation said at the Third International Anti-Corruption Conference in Hong Kong, 'we did not have corruption in my nation until the British legal system was brought in: The British introduced us to the concept of corruption!' See Independent Commission against Corruption 'Third International Anti-Corruption Conference' Hong Kong, 1987.

68 Compare the definition of corruption in South Africa's Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) and Kenya's Anti-Corruption and Economic Crimes Act of 2003.

69 See, for example, the US Foreign Corrupt Practices Act of 1977, secs 78dd-1(b), 78dd-2(b) (exempting the payment of grease money from the ambit of foreign bribery).

existed in many African societies since time immemorial.[70] However, as the Economic Commission for Africa rightly points out, these explanations are but mere justifications of what are evidently corrupt conducts.[71]

Why legal criterion should be preferred

The three criteria discussed leave us with a set of contradictory descriptions of standard of behaviour and by extension the phenomenon of corruption, all of which, as highlighted, have major disadvantages. The option that remains is either to accept a state of affairs with multiple definitions or to try to pick up the strengths of each approach and cobble up a hybrid definition. The first option will leave us with different approaches in uneasy competition. For instance, historical law approaches, which rely on ascertaining locally what is perceived to be good or moral, will have the disadvantage of being relativistic, different in time and from society to society. Natural-law approaches that define concepts according to universal moral principles will meet the criticism of being culturally insensitive and of imposing a particular moral understanding of behaviour on the world.[72] On the other hand, in an increasingly globalising world, it is only a well-defined objective criterion of behaviour that can permit international comparisons and engender globalised action against harmful behaviour such as corruption.

Given these irreconcilable differences, the alternative approach would be to integrate the three classical schools of thought into a common functional focus.[73] This approach is not new and has been advocated by the integrative law theorists. The integrative law theory, which is usually traced to Jerome Hall,[74] is based on the understanding that each of the competing schools of law has identified some useful dimension of law, which would be lost if only one of the schools is used as a source of

70 For a discussion of the African perspective, see, for example, JPO de Sardan 'A moral economy of corruption in Africa?' (1999) 37 *Journal of Modern African Studies* 25; C Akani (ed) *Corruption in Nigeria: The Niger Delta experience* (2002); A Nwankwo 'Political economy of corruption in Nigeria' in C Akani (ed) *Corruption in Nigeria: The Niger Delta experience* (2002) 9; E Ekekwe *Class and state in Nigeria* (1986); T Falola & J Ihonvbere (eds) *Nigeria and the international capitalist system* (1988).

71 Economic Commission for Africa 'Assessing the efficiency and impact of national anti-corruption institutions in Africa' (2010), where it points out that a 'problem with cultural explanations for corruption is that they easily become justifications'.

72 For example, when examining why, according to British standards, colonial Burma was so 'corrupt' JS Furnivall concluded that in many cases the Burmese were simply following their customary norms of correct conduct. JS Furnivall *Colonial policy and practice: A comparative study of Burma and Netherlands India* (1948).

73 But see Kurer (n 12 above) 227, pointing out that 'far from hampering the research effort, the lack of a unified definition has positively stimulated it'.

74 The theory was first espoused by Hall in his 1947 article. See, J Hall 'Integrative jurisprudence' in P Sayre (ed) *Interpretations of modern legal philosophies: Essays in honour of Roscoe Pound* (1947) 313. He called this legal philosophy that combines the three classical schools (legal positivism, natural-law theory, and the historical school) integrative jurisprudence.

reference.[75] It thus advocates for the mutual reinforcement of the three schools of jurisprudence while recognising their separate individual importance.[76] It provides that for this mutual reinforcement to be made possible, a broader definition in law than that which is usually adopted by each of the schools and which captures the particular virtues of each school must be given.[77] A definition of corruption based on this approach would thus have to embrace the virtues of all the three legal schools of thought for it to meet the criteria of the integrationists. Such a definition would most probably capture the aspect of formal duties and norms from the positivist perspective and the violation of public good as viewed by both the naturalists and historicists.[78]

The chapter agrees with the integrationists that each of the three substantive legal schools of thoughts has isolated some important perspective of law that would be lost if one aligns itself exclusively with any one of the schools. It, however, contends that if lawmakers are truly representative of the people, then their conception of corruption as enacted in statutes would most probably also be in tandem with the predominant opinion of members of the society which they spring from.[79] As jurist Dicey correctly pointed out, a representative legislature, to ensure its own political survival, would not ordinarily legislate against the wishes of the people or against 'the sentiment prevailing among the distinct majority of the citizens of a given country'.[80] In other words, one can safely argue that a positivist approach to corruption does not really contradict a historicist or a naturalist understanding of corruption. Indeed, legal definitions in most, if not all countries, also usually contribute to the public good and breaking them is condemned by the public.[81] Thus, an act declared illegal by the formal laws would most probably also be immoral in the sense of

75 J Hall *Foundations of jurisprudence* (1973) chap 6; J Hall *Studies in jurisprudence and criminal theory* (1958) 37 - 47; J Hall 'From legal theory to integrative jurisprudence' (1964) 33 *University of Cincinnati Law Review* 153. See also E Bodenheimer 'Seventy-five years of evolution in legal philosophy' (1978) 23 *American Journal of Jurisprudence* 181 204 - 205 (writing of 'The Need for an Integrative Jurisprudence' and citing Jerome Hall).

76 See Bermant (n 62 above) 80.

77 See Hall *Foundation of jurisprudence* (n 75 above) 313, combining positivism and natural-law theory with sociological jurisprudence and defining law as a type of social action, a process in which rules and values and facts coalesce and are actualised.

78 See Bermant (n 62 above) 787.

79 See K Adrian 'Democracy and despotism: Bipolarism renewed? (the comparative survey of freedom: 1996)' (1996) 1 *Freedom Review* 27, noting that growing democratisation has meant the emergence of vibrant civil society and free press with the power to hold leaders accountable.

80 AV Dicey *Lecture on the relation between law and public opinion in England during the nineteenth century* (1905) 55 quoted in PP Craig 'Dicey: Unitary, self-correcting democracy and public law' (1990) 106 *Law Quarterly Review* 105 111.

81 See, for example, M Jackson 'The political consequences of corruption: a reassessment' (1986) 18 *Comparative Politics* 459 460, arguing that:

> 'A more stable and precise standard is the law or formal regulations. Laws change, but, unless we seek a single ultimate standard, this is an advantage, not a problem: contrasts or changes in laws allow us to compare the political processes and value conflicts involved in setting rules of behaviour'.

being injurious to public good/morality as understood by both the naturalists and historicists.

On the other hand, not all immoral acts usually find themselves into formal laws. There are many conducts, which, though considered immoral by popular belief or opinion, fail to meet the threshold of illegality and are, therefore, excluded from the province of law.[82] This could be because they are private and harmless to the common good or because their potential harm to the common good is considered to be at a tolerable level not warranting intervention of the law.[83] The latter acts of immorality that do not meet the threshold of illegality, it is contended, should not be included in the definition of corruption. The reason for this limitation as aptly explained by Thomas Hobbes is that:

> The desires and other passions of men are in themselves no sin. No more are the actions that proceed from those passions, *till they know a law that forbids them; which till laws be made they cannot know; nor can any law be made, till they (society) have agreed upon the person (sovereign) that shall make it*.[84]

Thus, to the extent that an immoral act is made corrupt by formal law, it should be recognised in a corruption definition. But to the extent that an immoral act does not meet the threshold of illegality, it should be excluded from the ambit of a corruption definition. It is in this light that the argument for the limitation of the concept of corruption to illegal and not merely immoral act is to be understood.

82 This point was ably demonstrated by Lord Devlin and Jurist Hart in their debate on the Wolfenden Committee's Report on homosexuality and prostitution (JPK Lovibond 'The report of the Departmental Committee on Homosexual Offences and Prostitution' (1957) 2 *British Medical Journal* 639). See generally P Devlin *The enforcement of morals* (1959), providing the guideline for the relationship of law and morality as: first, privacy should be respected; second, law should only intervene when society won't tolerate certain behaviour; third, law should be a minimum standard not a maximum standard; HLA Hart *Law, liberty and morality* (1963), while disagreeing with Devlin on the standard for determining morality, he argues that the standard should be 'best' not 'popular' opinion, however, similarly holds that law should not apply in all aspects of social life. See also G Dworkin 'Lord Devlin and the enforcement of morals' (1966) 75 *Yale Law Journal* 986, introducing the concept of liberty into the debate and arguing that if a behaviour is a basic liberty (such as sex) this should not be illegalised unless they cause harm to the public.

83 See the guidelines provided by Devlin in Devlin (n 82 above). See also T Aquinas *Summa Theologica* (Fathers of the English Dominican Province translation 1947) Q 96 Art 2 Obj 3 holding that:

> 'human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.'

84 W Molesworth (ed) *The English works of Thomas Hobbes of Malmesbury* (1839 - 1845) 114 (emphasis added).

The illegal corruption

Having identified illegality as the standard for identifying corrupt conduct, the second question that arises is: which illegal acts are corrupt or put another way, which corrupt acts ought to be illegal. To answer the first form of the question would require one to take a positivist's review of the law to find out what the legal definition of corruption actually is. On the other hand, to answer the second form of the question would require one to engage in a naturalist's (universalist) or a historicist's (relativist) inquiry into the popular moral opinion or belief of what a legal definition of corruption ought to be. However, if one is to take the position, as this chapter does, that the lawmaker's will, as expressed in the formal laws, is usually not in conflict with the prevailing moral position in the society, then an inquiry into the legal definition provided in the formal laws would in most cases be enough to answer both the 'is' and the 'ought' in the two forms of the question. Indeed as the Kenyan Constitutional Court aptly noted in the case of *Republic v The Kenya National Commission on Human Rights Ex-parte William Ruto,*[85] legislatures and courts 'do not operate in a (social) vacuum' nor do they 'close their eyes and ears to what is happening in the society'; instead they 'always try to give life to the aspirations of the societies in which they live in'.[86]

Thus one can safely argue that definitional provisions in national formal laws are also representative of the prevailing moral position of the time. However, this assumption must also take into account the fact that there are political systems which are corrupt in that they serve the interests of special groups or sectors and not that of the public.[87] As a caution, therefore, in addition to reviewing national formal laws it is also important to review the prevailing popular opinion as expressed in research findings and in regional and international instruments to confirm whether the definition as 'is' complies with the definition as 'ought' to be.

An examination of the anti-corruption law in Kenya (The Anti-Corruption and Economic Crimes Act of 2003 of Kenya (ACECA)) reveals that there is no one-line definition of corruption. Instead the Act identifies the various manifestations of corruption and attempts to delineate their elements that make them offensive. The identified forms of corruption include bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust, and an offence involving dishonesty in connection with any tax, rate or impost levied under any Act

85 *Republic v The Kenya National Commission on Human Rights Ex-parte William Ruto* [2012] eKLR.
86 *William Ruto* (n 85 above) 10.
87 See I Currie & J de Waal *The Bill of Rights handbook* (5 ed, 2005) 3, giving the example of the racial South African Parliament, which under the 1909 Union Constitution 'could write and rewrite the law, alter the basic structure of the state and invade human rights without constraints'.

or even electoral offences.[88] The emerging thread from the definitions of these forms of corruption, however, is that they involve some form of misuse of authority or resources entrusted by the public for private gain. For example, section 39 describes bribery as occurring when one party gives to or receives from another party anything of value with the purpose of influencing them to abuse their power.[89] Similarly section 40 to 47 define the other offences of corruption as including the fraudulent/ unlawful acquisition, mortgage, charge or disposal of public property; failure to pay taxes, fees, levies and charges; fraudulent payments out of public revenue; breach of financial or procurement procedures and engaging in unplanned public projects.[90]

Indeed, while there is a difference in emphasis on the forms of corruption under ACECA, the common thread is that these forms involve the abuse of authority, office or resources entrusted by the public for private benefit. This understanding of the illegal corruption as abuse of public entrusted authority or resources for private benefit in ACECA mirrors its conception in other national anti-corruption laws and international and regional conventions. For example, the South African Prevention and Combating of Corrupt Activities Act of 2004, while singling out the bribery form of corruption, nevertheless defines it as occurring when one party gives to or receives from another party anything of value with the purpose of influencing them to abuse their power.[91] Similarly, the United States (US) Foreign Corrupt Practices Act of 1977 (FCPA), which is touted as the progenitor of the international legal understanding of corruption,[92] though focusing on the corrupt practice of foreign bribery, defines it as the 'paying, offering to pay, or promising to pay foreign government officials to influence any official act, induce officials to act or fail to act in violation of their lawful duty, or induce officials to use their influence with government to obtain business'.[93]

The United Nations Convention against Corruption (UNCAC), which is the global instrument against corruption, also conceptualises corruption broadly as including bribery, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, concealment of illicit wealth and

88 ACECA, s 2.
89 ACECA, s 39
90 ACECA, s 39 - 47.
91 Prevention and Combating of Corrupt Activities Act 2004 (PCCAA), s 3.
92 Professor Peter Schroth, for example, notes that 'any discussion of international measures against corruption and bribery must begin with the United States.' PW Schroth 'National and international constitutional law aspects of African treaties and laws against corruption' (2003) 13 *Transnational Law & Contemporary Problems* 83 87.
93 FCPA, 78dd-l(a), 78dd-2(a) & 78dd-3(a). See also PA Glenn & JP Sanford 'The Foreign Corrupt Practices Act revisited: Attempting to regulate ethical bribes in global business' (1994) 30(2) *International Journal of Purchasing and Materials Management* 15, 15 - 20

obstruction of justice.[94] The definition holds to account both public and private sector actors and applies in both domestic and foreign context.[95] In this regard, it criminalises the bribery of not just foreign public officials, but also of national public officials and officials of public international organisations.[96]

Similarly, the African Union Convention on Preventing and Combating Corruption, which is the regional anti-corruption instrument for the African continent, conceptualises corruption broadly to cover active and passive bribery; influence peddling; illicit enrichment; diversion of public property for private use; concealment of proceeds derived from corrupt acts; and conspiracy to commit corruption.[97] Likewise, the Inter-American Convention against Corruption requires states parties to criminalise: solicitation, acceptance, offer, or delivery of improper payments; the illicit use of a position of public entrusted authority for the official's own benefit; the fraudulent use or concealment of property derived from that position of authority; and participation in any of these acts as accomplice, collaborator or conspirator.[98] The same conception of corruption as abuse of public entrusted authority is also evident in both the Criminal and Civil Conventions on Corruption of the Council of Europe[99] and the European Union's Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States.[100]

This illegal thread of corruption as abuse of public entrusted authority for private benefit is also evident in the writing of many scholars and in the opinion of practitioners in the field of corruption. For example, in his research amongst elites in emerging economies, Daniel Kaufman found empirical support for relying on this definition as a workable definition for corruption.[101] Similarly, in her literature review for the Asian Foundation, Amanda Morgan found many recent academic studies and international organisations opting for this definition in their analysis of corruption.[102]

94 UNCAC chap III.
95 UNCAC, arts 21 & 22.
96 UNCAC, arts 15 & 16.
97 AU Convention, art 4.
98 OAS Convention, art VI & VII.
99 See COE Criminal Convention arts 5, 6, 9, 11, 12 & 13, criminalising a list of specific forms of corruption, the majority of which are limited to active and passive bribery. Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, insider trading and nepotism are not. Apart from domestic corruption, the Convention also deals with a range of transnational cases such as bribery of foreign public officials and members of foreign public assemblies. See also COE Civil Convention, art 2 (defining corruption as 'requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof').
100 EU Corruption Convention, art 2.
101 D Kaufmann *Perceptions about corruption among elites in emerging economies* (1997).
102 See AL Morgan *Corruption: Causes, consequences, and policy implications: A literature review* (1998) 9 - 10.

The World Bank too has carried a review of anti-corruption literature and found a preponderant conception of corruption as abuse of public entrusted authority for private gain.[103]

It is contended that this understanding of corruption as the abuse of authority, office or resources entrusted by the public for private benefit is broad and open ended enough to cover the limitless manifestations of corruption such as bribery, embezzlement, favouritism, bid rigging and fraud. The definition is also tenably integrative of the legal and moral criterion of behaviour as it embraces the aspect of formal duties and norms from the positivist perspective through the concept of public trust. In addition, it incorporates the aspect of violation of the public good as viewed by both the naturalists and historicists through the concept of abuse of public entrusted authority. Further, the definition embraces the essential conflict between public good and private interest in corruption as viewed by both the naturalists and historicists through the economic concept of private gain.[104] In this way, corruption becomes a multidimensional concept that has legal, social, political, economic and ethical connotations.[105] The definition can, thus, be said to capture the multifaceted nature of corruption and is advocated for corruption analysis purposes.[106]

Meaning of public entrusted authority

Conception of corruption as abuse of public entrusted authority for private benefit, though predominant, is, however, not universally supported. A major criticism that is usually levelled against a conception of corruption as abuse of public authority, office or resources for private gain is that it

103 World Bank *Helping countries combat corruption: The role of the World Bank* (1997). The World Bank, for example, defines corruption as 'the abuse of public office for private gain'. The African Development Bank, on the other hand, sees corruption as encompassing not only abuse of public office but also of private office and defines it as 'the abuse of public or private office for personal gain'. See African Development Bank 'Anticorruption policy: Harmonized definition of corrupt and fraudulent practices' http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf (accessed 4 February 2010). Transparency International eschews this public-private dichotomy and simply defines it as 'the abuse of entrusted power for personal gain'. Transparency International *Global corruption report* (2003). See also S Rose-Ackerman 'The political economy of corruption' in KA Elliot (ed) *Corruption and the global economy* (1997) 31 31, pointing out that corruption also occurs where public officials have a direct responsibility for the provision of a public service or application of specific regulations to the private sector.

104 Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

105 Brinkerhoff, for example, sees corruption as 'subsuming a wide variety of illegal, illicit, irregular, and/or unprincipled activities and behaviours'. DW Brinkerhoff 'Assessing political will for anti-corruption efforts: An analytic framework' (2000) 20 *Public Administration and Development* 239 241.

106 On the complexity of corruption, see generally MK Khan 'A typology of corrupt transactions in developing countries' (1996) 27 *Institute of Development Studies Bulletin* 12.

leaves out private corruption, particularly corruption in the private sector. The argument goes that by restricting corruption to abuse of 'public office' or 'public authority' or 'public resources,' the definition ignores corruption that takes place in the private sector.[107]

Such criticism can, however, only be valid if by 'public' is meant 'government' so that the definition turns into abuse of 'government office' or 'government authority' or 'government resources'. Otherwise, if by 'public office', 'public authority' or 'public resources' is meant an office, authority or resources entrusted by the public then the criticism loses its sting. This is because most, if not all, of the offices, authority or resources in the private sector are also entrusted by the public or a section of the public and, therefore, their abuse falls within this broad definition of corruption.[108]

What the definition does not cover, and rightly so, is the abuse of private authority, which private individuals entrust to themselves, such as the case where a sole proprietor misuses the funds of his business for personal benefit. In this case, while there is abuse leading to loss of fund, there would be no wrongdoing warranting legal sanction because the capital was the sole proprietor's to begin with. The case would be different if the person, for private benefit, abuses the authority or resources formally entrusted to him or her by another person, a group of people, family members, customers, creditors, a partnership, a company or an association. In all these latter cases the public, or more accurately, a section of the public, is involved and going by the functional definition of corruption the person, even though a sole proprietor, would have abused authority or resources entrusted by the public for private benefit. The public here must, therefore, be construed broadly to include the whole public or a section of it.

This broad understanding of the 'public office/authority/resources' is necessary for three related reasons. Firstly, in many countries the private sector is increasingly overgrowing the government sector in size.[109] Secondly, the line between the government and private sectors is being

107 S Rose-Ackerman *Corruption and government: Causes, consequences, and reform* (1999) 187 - 188.

108 The private sector is made up of sole proprietorships, partnerships, companies, or associations whose shareholders are members of the public. Therefore people working in these private institutions are acting under entrusted authority by a section of the public. Any abuse of such authority would, tenably, fall within the definition of corruption.

109 See, for example, D MacGregor 'Jobs in the public and private sectors: Presenting data (updated to June 2000) on jobs in the public and private sectors' (2001) *Economic Trends, Working Paper No 571* http://www.statistics.gov.uk/cci/article.asp?id=88 (accessed 1 November 2011), pointing out that in the UK, 82 per cent of all workforce jobs were in the private sector in 2000; Y Yao 'The size of China's private sector' (1999) *China Update* 1 2, pointing out to an increasing influence of the private sector in China – for example the private sector accounted for 34,3 per cent of national industrial output by 1997, compared to 2 per cent in 1985.

blurred by privatisation of government functions, outsourcing, and public listing of private companies in the share market.[110] Third, the huge economic muscle of multinational corporations and the consequent impact they are having on the lives of members of the public means that they cannot be excluded from an international anticorruption strategy.[111] Another unrelated but equally important reason is that with the increasing devolution of government functions to local levels, government offices are increasingly affecting only a section of the public. This latter reality further justifies the need to broaden the definition of public office so as to capture offices formed by or affecting only a section of the public. Thus, viewed from this broad perspective, an office or authority that has been created by the public or a section of it, be it in the public or private sector, would fall within the definition of public office/authority and if a person entrusted with that office/authority abuses its functions for private benefit such abuse would amount to corruption.

The nature of abuse

The kinds of abuse that would amount to corruption, as seen from the discussed legal instruments, are varied and, therefore, difficult to circumscribe, and it is argued that they should not be. One common denominator of these forms of abuse, however, is that they involve the use of public entrusted authority for the purpose for which it was not intended. This common denominator derives from the ordinary dictionary meaning of abuse, which is, misuse or use for an unintended purpose.[112] Thus, abuse of public entrusted authority would entail the use of authority for the purpose for which it was not intended. This abuse can take many forms, including demanding bribes before offering an otherwise free public service, embezzlement, diverting public resources for personal use, nepotism or cronyism in recruitment to public offices, acting for one's own benefit in carrying out official functions, fraudulent dealings, or taking advantage of information that one only has access to as a public official. The World Bank, for example, has taken 'abuse of public office for private

110 Privatisation, apart from transferring public-oriented services to the private sector, also creates opportunities for corruption during the process of transfer and after. See P Heywood 'Political corruption: Problems and perspectives' (1997) 45 *Political Studies* 417 429, arguing that due to economic liberalisation and new political management reforms, the borderline between private and public spheres have blurred. See also Transparency International Press Release 'TI calls for the UN Anti-Corruption Convention to deter bribery of corporate officials and criminalize private sector corruption' 11 March 2003 http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html (accessed 1 January 2012).

111 On the economic muscle of multinational corporations, see United Nations Conference on Trade and Development *World investment report 2002* (2002) 90 http://r0.unctad.org/wir/pdfs/fullWIR02/pp85-114.pdf (accessed 30 October 2011).

112 See Oxford dictionaries http://oxforddictionaries.com/definition/english/abuse (accessed 3 September 2011) defining abuse as 'use (something) to bad effect or for a bad purpose; misuse'.

gain' as its minimal working definition and dissected it by identifying specific abuses:

> Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues.[113]

The abuse is, however, not limited to those initiated by the holder of public office/authority but also include those initiated by private individuals. So that it also amounts to corruption if private individuals offer bribes to influence decisions of officials entrusted with public authority/office in their favour so as to, for example, pay lower taxes, win a contract, get employed or promoted, get something done quickly, or avoid a fine or penalty. As the World Bank rightly notes, public office 'is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit'.[114]

The intention of abuse is to benefit private not public interest

It is usually not easy to identify the reasons that motivate people to act in a certain way especially given the conflation and complexity of individual dispositions. Indeed countering corruption would be very easy if the motivations were easily identifiable and uncontroversial. As Espejo et al observe, it then 'would be enough to carry out structural diagnosis, detect inadequate relations and banish corruption'.[115] But such a task is not easy as one has to take into account a great diversity in human motivation and modes of action and move beyond approaches that embrace a 'single behavioural logic'.[116] Furthermore, one has to contend with the 'situational imperatives' and the 'social processes' that shape a person's inclination.[117] Still, despite this seemingly insurmountable challenge, the search for behavioural motivations has remained a perennial endeavour preoccupying the thoughts of scholars for many years.[118]

113 World Bank *Helping countries combat corruption: The role of the World Bank* (1997) 8 - 9.
114 World Bank (n 113 above) 8.
115 R Espejo et al 'Auditing as the dissolution of corruption' (2001) 14 *Systemic Practice and Action Research* 139 144.
116 JP Olsen 'Citizens, public administration and the search for theoretical foundations' (2004) 37 *Political Science & Politics* 69 75.
117 JQ Wilson *Bureaucracy: What government agencies do and why they do it* (1989) 34.
118 See for example, PE Crewson 'Public service motivation: Building empirical evidence of incidence and effect' (1997) 7 *Journal of Public Administration Research and Theory* 499; DD Wittmer 'Serving the people or serving for pay: Reward preferences among government, hybrid sector, and business managers' (1991) 14 *Public Productivity and Management Review* 369.

Within the context of corruption, it is generally recognised that corruption is not a crime of passion, or an accidental happenstance, but a crime of calculated gain.[119] This calculation involves a conscious or sub-conscious weighing of the expected benefits of engaging in corruption and the expected costs in the form of the consequences of being detected.[120] Corruption is predicted to occur if the gain from corruption outweighs the cost of being caught. As Van Klaveren aptly noted:

> A corrupt civil servant regards his public office as a business, the income of which he will seek to maximise. The office then becomes a 'maximising unit'. The size of his income depends upon the market situation and his talents for funding the point of maximal gain on the public's demand curve.[121]

A person, thus, engages in the abuse of public entrusted authority because of the personal gain that he calculates to reap from it.[122] Because of this reason, private gain is generally considered an integral part in the conception of corruption. But should all abuses of public entrusted authority for private gain be regarded as corruption? The answer to this question requires one to appreciate the factors that motivate individuals to resort to corruption as a means of achieving private gain.

Studies reveal that, while the motivational factors for human behaviour are many,[123] those that drive the calculation in corruption can, however, be distilled into two: the internal factor of greed and the external

119 See R Klitgaard et al *Corrupt cities: A practical guide to cure and prevention* (2000) 28, noting that 'Corruption is a crime of calculation, not passion'.

120 R Klitgaard *Tropical gangsters* (1990) 90, where he observes that 'it is reasonable to posit that an official undertakes a corrupt action when in his judgments, its likely benefits outweigh its likely costs'. Compare with the tax evasion model where the same calculations take place. See M Allingham & A Sandmo 'Income tax evasion: A theoretical analysis' (1972) 1 *Journal of Public Economics* 323.

121 See J Van Klaveren 'The concept of corruption' in AJ Heidenheimer (ed) *Political corruption: Readings in comparative analysis* (1978) 26 38 - 40. See also M Qizilbash 'Corruption and human development: A conceptual discussion' (2001) 29 *Oxford Development Studies* 265 267 - 268, noting that the civil servant is 'an income-maximizing monopolist, who uses his monopoly position to exploit the public'. Viewed from a principal-agent perspective, the agent or civil servant is said to be corrupt when he sacrifices the interest of the principal or public to his or her own pecuniary advantage. According to Klitgaard '[t]his approach defines corruption in terms of the divergence between the principal's or public's interests and those of the agent or civil servant: corruption occurs when an agent betrays the principal's interest in pursuit of her (sic) own'. R Klitgaard *Controlling corruption* (1988) 24.

122 See further GS Becker 'Crime and punishment: An economic approach' (1968) 76 *Journal of Political Economy* 169.

123 For example, when asked to rank what is most important to them, 60% of public employees surveyed by Houston chose 'meaningful work,' 18% chose 'chances for promotion,' 12% chose 'job security,' and 11% put 'high income' at the top of their list. DJ Houston 'Public service motivation: A multi-variate test (2000) 10 *Journal of Public Administration Research and Theory* 713.

factor of need.[124] Legal philosophers have similarly identified these two as the main drivers of corrupt conduct. On his account of human psychology, Thomas Hobbes, for example, points out that man's action is motivated by self-preservation. In chapter of *The Citizen,* he urges that the whole breach of the laws of nature 'consists in the false reasoning or rather folly of those who see not those duties they are necessarily to perform towards others in order to *their own conservation*'.[125] John Locke, on his part, is more nuanced, arguing that man has the capacity for reason and good judgement and that he is always motivated to do what is right.[126] At the same time, he acknowledges man's perennial temptations to take advantage of others and to develop 'disproportionate desires' for worldly goods and power, to the neglect of virtue.[127] Jean-Jacques Rousseau's own view is that humans are motivated by both self-preservation and by natural concern for others, dispositions that can manifest themselves in a variety of ways.[128]

124 For the causes of corruption in Africa, see Economic Commission for Africa (n 71 above) 30 - 32, concluding that '[i]n the end, the most sensible explanations are selfish and without redemption, the desire of the individual to better himself financially or politically at the expense of the commonwealth'. See also V Tanzi *Corruption around the world ? Causes, consequences, scope, and cures* (1998), concluding that '[o]ne can speculate that there may be corruption due to greed and corruption due to need'. Holmes also cites human weakness as another human motivation for corruption. He gives the example of those who, because of human weakness, find it difficult to reject offers from a person of a 'generous' nature or those who accepts gifts because they know they have been particularly helpful to someone (that is, they feel that a reward is not inappropriate), or those who genuinely do not want to offend or embarrass a grateful supplicant. Fear is also mentioned as a motivation for corruption. It is argued that in a hierarchical situation, for example, a subordinate may fear the consequences of not acting in a similar way to his corrupt superior. See L Holmes *The end of communist power: Anti-corruption campaign and legitimation crisis* (1993) 170. However, all these examples given by Holmes point to human weakness and fear as more of a justification for engaging in corruption than a motivation for the same. In any case, these external factors that 'force' people to be weak can safely fall under the need factor.

125 T Hobbes *De Cive (The Citizen)* (1949) 32n (emphasis added). See also L Stephen *Hobbes* (1904) 208 - 209, concluding that Hobbes' real theory is that '[m]en act for their own preservation as stones fall by gravitation'; JW Gough *The social contract: A critical study of its development* (1957) 111, pointing out that the reasons why men obey the sovereign is for self-preservation. He observes that '[T]heir ruling motive is desire for protection – for the preservation of their lives'. But see M Oakeshott *Leviathan* (1957) Lviii–Lxi, pointing out that while selfishness is common in Hobbes, Hobbes is making a more fundamental point not exclusively related to self-preservation.

126 J Locke *Second treatise of government* (1980) 9.

127 Locke (n 126 above) chap 4.

128 For Rousseau, 'the human race would have perished long ago if its preservation had depended only on the reasoning of its members'. In his view, our disposition to do what is good for oneself without harming others is a 'natural sentiment,' and 'it is in this natural sentiment, rather than in subtle arguments, that we must seek the cause of the repugnance every man would feel in doing evil, even independently of the maxims of education'. JJ Rousseau *The social contract* (1786) 108.

Indeed greed, which John Locke calls 'disproportionate desires', has been recognised as a predominant factor in the motivation for corruption.[129] This is because it makes people selfish and insatiably hungry for status and comfort which their lawful income cannot match.[130] Because of greed, people become blind to the misery their corruption causes others and justifies it simply because they gain from it.[131] It makes people trade their personal integrity and virtues in exchange for the trappings of wealth. In the case of public officials, greed comes in to motivate them to abuse their authority, embezzle or misappropriate entrusted public funds, or demand bribes from members of the public so as to finance their 'disproportionate desires' for lavish lifestyles and worldly power.[132] For the private citizens, greed leads them to offer bribes so as to avoid or jump to the front of a bureaucratic queue, or avoid lawful obligation or penalty, or get a benefit that they are otherwise not entitled to.[133] And since greed feeds on itself, the more benefit these people gain, the greedier they become for more. As Hobbes aptly noted:

> So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; *but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.*[134]

While greed 'pushes' an individual to selfishly seek beyond their basic requirement, the need-factor, what Hobbes and Rousseau calls self-preservation, forces an individual to satisfy basic requirements for survival.

129 See, for example, R Wraith & E Simpkins *Corruption in developing countries* (1963) 40, pointing out that love for ostentation is a major contributor of corruption in African societies; J Thornton 'Confiscating criminal assets: The new deterrent' (1990) 2 *Current Issues Criminal Justice* 72, concluding that 'the motivation for such crime is greed and the aim is profit'; TM Ocran *Law in aid of development: Issues in legal theory, institution building, and economic development in Africa* (1978) 119, fn 10 (listing greed as a cause of corruption in West Africa); D Treisman 'The causes of corruption: a cross-national study' (2000) 76 *Journal of Public Economics* 399 399–457; E Colombatto 'Why is corruption tolerated?' (2003) 16 *Review of Austrian Economics* 363 363 - 79.

130 See JS Nye 'Corruption and political development: A cost-benefit analysis' (1967) *American Political Science Review* 61 416, identifying corruption as behaviour that 'deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains'.

131 See SH Alatas *The sociology of corruption: The nature, function, causes, and prevention of corruption* (1980) 77, quoting the 14th century writing of Abdul Rahman Ibn Khaldun that 'the root cause of corruption' was 'the passion for luxurious living with the ruling group. It was to meet the expenditure on luxury that the ruling group resorted to corrupt dealing'.

132 See RC Tilman 'Emergence of black-market bureaucracy: Administration, development, and corruption in the new states' in MU Ekpo (ed) *Bureaucratic corruption in Sub-Saharan Africa: Toward a search for causes and consequences* (1979) 352, quoting Brahman Prime Minister of Chandragupta list of 'at least forty ways' of embezzling money from government.

133 See, for example, Alatas (n 131 above) 9, giving examples of bribery in ancient China.

134 Molesworth (n 84 above) 85 (emphasis added). See also Plato *Republic* (2000) VI, 1, where he observes that 'our lusts are set over our thoughts like cruel mistresses, ordering and compelling us to do outlandish things'.

It is caused mainly by the systemic deficiencies in a society's institutions, laws, economics, culture and politics.[135] For example, where institutions have ceased, or take long to function, citizens may be 'forced' to resort to bribes because it is the fastest way, or actually the only way by which they can access the service that they are otherwise freely entitled to.[136] Similarly, where a country's politics is unregulated or is unstable, politicians may find that they have to resort to bribery and cheating to get elected or to maintain their political positions.[137] The same logic applies where the economy cannot afford workers' basic needs, or where poverty is pervasive to the point that people cannot make ends meet. In these instances, individuals may be tempted to resort to corrupt ways of earning money or accessing resources in order to cushion themselves or their families from the debilitating effects of a non-functioning economy.[138] Likewise, where one's culture requires, for example, dependence and loyalty to one's group, individuals may be 'forced' to misuse their position in favour of the group so as to secure their sense of belonging.[139]

Some might argue that because need based corruption is externally driven, it should be considered a lesser corruption than greed based corruption. However, this argument should not be allowed to hold sway. This is because there is enough evidence showing that there are many people who would be in similar dire situations caused by external need but still remain honest, hardworking, impartial and trustworthy.[140] Indeed,

135 For a discussion see C Van Rijckeghem & B Weder 'Corruption and the rate of temptation: Do low wages in the civil service cause corruption?' (1997) *International Monetary Fund Working Paper No 97/73* papers.ssrn.com/sol3/papers.cfm?abstract_id=882353 (accessed 20 November 2011).

136 See MU Ekpo 'Gift-giving and bureaucratic corruption in Nigeria' in Ekpo (n 132 above).

137 The concept of 'status strain' introduced by Lipset and Raab can explain how people behave when they fear losing their status. This fear of status decline is caused when those who are socially well-established feel threatened. In politically unstable countries, the anxiety and fear from the 'status strain' will put pressure on the people to do anything possible in order to protect their social status and property, including engaging in corrupt conduct. SM Lipset & E Raab *The politics of unreason: The right-wing extremism in America* (1970).

138 See Rijckeghem & Weder (n 135 above).

139 As Carvajal aptly notes, close relationships have corruption-engendering effects as 'networks need friends in influential positions in order to manoeuvre payoffs, to attain suitable regulations in accordance with one's interests, and to buy protection'. R Carvajal 'Large scale corruption: Definition, causes, and cures' (1999) 12 *Systemic Practice and Action Research* 335 343. According to Holmes (n 124 above) 165: 'The power of both peer pressure and peer-comparison can be great, for instance in the words of one artist "when the best of people take bribes, isn't it the fool who doesn't?" In other words if individuals see others around them benefiting from corruption, they may well choose to indulge too'.

140 See, for example, Rijckeghem & Weder (n 135 above). According to their empirical study based on public sector wage data of 31 developing countries, the raising of the level of salary would not lead to lower corruption in the short run, though an active wage policy is still necessary in the fight against corruption. See also K Abbink 'Fair salaries and moral cost of corruption' (2000) *University of Bonn Economic Discussion Papers No 1*, concluding that high relative salaries do not lead to less corruption; Compare with RK Goel & MA Nelson 'Corruption and government size: A disaggregated analysis (1998) 97 *Public Choice* 107.

these deficiencies in societal structures that force people to resort to underhand tactics are not aimed at specific individuals but affect the public in common. Those who react to them by taking unlawful advantage of the opportunities granted by their public positions for private benefit should not, therefore, escape culpability on the basis of need.[141] When the social conditions are dire men must learn to live honestly within those conditions as they seek ways to improve or rectify the situation for all. Otherwise, necessity can become a pretence under which 'every enormity is attempted to be justified'.[142] As Rousseau correctly pointed out in *Emile,*

> it is the fewness of his needs, the narrow limits within which he can compare himself with others that makes a man really good; *what makes him really bad is a multiplicity of needs and dependence on the opinions of others.*[143]

Thus, both greed and need based corruption are equally culpable. They both elevate private interest over public good. This elevation of private interest over public interest is what makes corruption condemnable in many societies, and accounts for why private gain is considered an essential element in the definition of corruption.[144] It must, therefore, be shown to exist for an abuse of public entrusted authority to amount to corruption. Mere abuse of public entrusted authority would not suffice. This is because there are circumstances where an abuse of public entrusted authority would be justified for serving the common good and not private interest. For example, in cases of an emergency, a public official may be forced to divert funds or public property from its intended purpose in order to save public lives. In these kinds of cases, the element of private gain would be lacking to make the act corrupt.

This requirement for proof of private benefit in a corruption offence has received support from the Courts in Kenya. For example, in the case of *Republic v Director of Public Prosecutions & Another Ex-parte Henry Kiprono Kosgey & Another,*[145] the Court in dismissing a charge of abuse of office against the accused, noted, inter alia, that no single prosecution witness had testified that the accused used his office to confer a benefit to himself or to various beneficiaries.[146]

Still, one has to be careful before setting a fast and rigid rule that all acts that seem not to serve private benefit or that serve public good are non-

141 See JJ Rousseau 'Lettres morales' in H Gouhier *Ouvres completes de Jean Jacques Rousseau* vol 4 (1969) 1106, noting that 'the whole morality of human life is the intention of man'.
142 See W Paley *The principles of moral and political philosophy* (1786) 121, where he observes that 'necessity is pretended; the name under which every enormity is attempted to be justified'.
143 Rousseau *Emile: Or, on education* (1762) 209 (emphasis added).
144 See Tanzi (n 124 above).
145 *Republic v Director of Public Prosecutions & Another Ex-parte Henry Kiprono Kosgey & Another* [2012] eKLR.
146 As above.

corrupt. This is because private interest comes in various shades and shapes and is not limited to monetary gain, or to the individual interest of the public official, but extends to other non-monetary benefits and to benefits accruing to the family, friends and close associates of the suspected official.[147] Indeed, the benefit to the public could well be incidental to the main objective of benefitting private interests. For example, a holder of public office may opt for single sourcing in procuring public goods and services instead of the more rigorous process of open tendering, ostensibly to save the public money and time while the real reason is to rig the process in favour of a specific supplier who is his close associate or friend. Each case should, therefore, be determined on its own facts. The point that needs to be stressed, though, is that the intention to benefit private interest is an essential element in the conception of corruption.

Why private benefit at the expense of public good is at the core of corruption definition: A social contract theory explanation

As understood in the above description, corruption, in a sense, is the elevation of self-interest over public good. It is rooted in the selfish idea that the goal of holding public entrusted office or authority is to channel as much of the public cake as possible to one's self, family, tribe or friends, with little regard to the need of the trustees (the public). This essence of corruption goes to the very root of why corruption is condemned in many societies.[148] It breaches the very premise of the social contract, which requires persons entrusted with public authority, resources, or office to utilise the authority, resources, or office for the benefit of the public and not to convert public goods, services, benefits and advantages to private hands, without lawful or moral justification.[149] As one commentator aptly observed:

> Under any theory of government, the wealth of a nation is traditionally placed under the guardianship of its elected and appointed officials. Implicit in the acceptance of a public appointment is a commitment by the political leadership to hold and manage the nation's wealth and resources in trust for the people. In their role as a trustee, the public servant is subject to the constraints imposed by the fiduciary relationship he enjoys with the public he serves. A fiduciary is under a duty to refrain from administering the trust in a

147 Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

148 See Tanzi (n 124 above).

149 See, for example, E Burke 'Reflections on the revolution in France' in E Burke *The work of the right honorable Edmund Burke* (1871) 359, pointing out that 'society is, indeed, a contract'. But see JS Mill *On liberty* (1975) 70, stating that '[s]ociety is not founded on a contract, and … no good purpose is answered by inventing a contract in order to deduce social obligations from it'.

> manner that advances his personal interests at the expense of the beneficiaries and to use reasonable care and skill to preserve the trust property. Officials who engage in illicit enrichment (a form of corruption) violate this public trust.[150]

The idea of the social contract has been used since the 17th century to explain the legitimacy of human authorities and still remains a popular doctrine today.[151] It is usually traced back to the classical writings of Thomas Hobbes,[152] John Locke[153] and Jean-Jacques Rousseau,[154] though Sophists[155] and earlier philosophers like Plato[156] and Aristotle[157] had also touched on it.[158] The theory views human authorities as established by convention with their subjects for specific tasks and that their legitimacy depends upon fulfilment of these tasks.[159] The theory begins by unravelling the condition of man in the hypothetical 'state of nature', that is, the natural state of man before creation of civil society. In this state, life is described as 'solitary, poor, nasty, short and brutish'[160] as men are forced to compete for limited resources in an environment full of

150 N Kofele-Kale 'Presumed guilty: Balancing competing rights and interests in combating economic crimes' (2006) 40 *International Lawyer* 909 942.

151 See, for example, P Riley *Will and political legitimacy: A critical exposition of social contract theory in Hobbes, Locke, Rousseau, Kant and Hegel* (1982) 1, pointing out that 'political legitimacy, political authority and political obligations are derived from the consent of those who create a government and who operate it'.

152 T Hobbes *Leviathan* (1994).

153 Locke (n 126 above).

154 JJ Rousseau *The social contract and the first and second discourses* (2002).

155 Sophists were travelling teachers in ancient Greece who specialised in the use of philosophy to teach virtues and excellence to their students, who were mainly made up of the nobility. On details of Sophist thoughts, see J de Romilly *The great sophists in periclean Athens* (1992), pointing out that sophists in fifth-century (BC) Athens had inferred from the difference in lifestyle and custom amongst the communities living in the Mediterranean world that social arrangements were not products of nature, but of convention or contract.

156 For example, in earlier Platonic dialogue, Crito, Socrates adopts a social contract argument to tell Crito why he must remain in prison and accept the death penalty. He argues that because the laws of Athens have served him during his life out of prison, he is consequently obligated to obey the laws. See Plato *Five dialogues* (1981).

157 See Aristotle *On generation and corruption* (2004).

158 For a historical account of social contract theory see DG Ritchie 'Contribution to the history of the social contract theory' in DG Ritchie (ed) *Darwin and Hegel: And other philosophical essays* (1893) 196.

159 While there is controversy on how voluntarism and contract theory arose, what is certain is that ideas of the 'good' state espoused by the early Christian leaning theorists eventually gave way to ideas of the 'legitimate' state, which was taken to rest on will of the people. Today, social contract theory is understood to hold that social arrangements are products of agreements not of nature. For a discussion of the origin of legitimate state and social contract theory, see, for example, A Black 'The juristic origins of social contract theory' (1993) 14 *History of Political Thought* 57.

160 Hobbes (n 152 above) 100.

distrust and lacking in an externally enforceable rule of competition.[161] Life is uncertain and insecure in this environment because survival is dependent on the strength and fitness of each individual and the goodwill of the adversary.[162] Yet this individual strength is not a guarantee for survival as even the strongest man can be killed 'in their sleep' or by a combined force of the weaker members.[163] Nor can the goodwill of the adversary be relied on as it is always subject to the self-interest of its holder.[164]

It is this unpredictability of life in the state of nature that motivates natural men to make deals with one another and create a sovereign with powers to oversee the peaceful enjoyment of their individual rights.[165] To ensure their escape from the unpredictable state of nature, social contract theories hold that rational individuals will agree to let go of their unregulated freedom in the state of nature in exchange for the predictability and security of a civil society governed by enforceable common law.[166] As Michael Keeley aptly notes,

> [b]ut, since some persons may not always act with good will, and since even those who do may be biased toward their own cause in judging violations of the moral law, people may derive additional benefit by agreeing to positive laws and responsible judges to enforce them.[167]

The social contract is made up of two parts: first, natural men 'collectively and reciprocally' agree to waive the rights they had against one another in the state of nature;[168] and second, they agree to endow some one person

161 Even though, as John Locke points out, nature has provided enough for everybody and despite the fact that natural man is controlled in his actions by natural morality discoverable to human reason, given that this morality is not externally enforced, the self-interest of man can and often does take over thereby creating a state of anxiety in the state of nature. For a fuller reading of Locke's argument, see T Pogge *World poverty and human rights* (2008) chap 4. See also Hobbes (n 146 above), characterising the natural condition of humankind as a mutually unprofitable state of war of every person against every other person.

162 Locke (n 126 above) para 5.

163 C Friend 'Social contract theory' *Internet Encyclopaedia of Philosophy* http://www.iep.utm.edu/soc-cont/ (accessed 12 January 2012).

164 Locke (n 126 above) chaps II and III.

165 But see generally Riley (n 151 above), arguing that the bedrock of social contract is voluntary consent and not on any other basis such as necessity, custom, convenience, theocracy, divine right, the natural superiority of one's betters, or psychological compulsion.

166 Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. See Hobbes (n 152 above) 158 - 159; see also Burke (n 149 above) 309, observing that a fundamental rule of civilised society is 'that no man should be judge in his own cause'. But see Montesquieu's story of the Troglodytes to the import that savage men make no compacts or agreements and do not attach importance to promises. CLB de Montesquieu 'The parable of the Troglodytes' in CLB de Montesquieu *Persian letters* (1721).

167 M Keeley 'Continuing the social contract tradition' (1995) 5 *Business Ethics Quarterly* 241 243.

168 Hobbes defines contract as '[t]he mutual transferring of Right'. Hobbes (n 152 above) 68.

or assembly of persons with the authority and power to ensure that the waiver in the first contract is not breached (is enforced).[169] In other words, the social contract requires that natural men must not only agree to live in community with each other under shared laws, but also to create an authority (sovereign) to enforce the social contract and the laws that constitute it.[170] In this way society becomes possible because, whereas in the state of nature there was no authority to control the actions of individuals, now there is a conventionally created civil sovereign that can overawe men to cooperate.[171]

To ensure that the sovereign is able to function, the individuals voluntarily surrender to the sovereign person or assembly of persons the authority necessary to enforce the first contract.[172] These include the power to make laws, judge and mete out punishment for breaches of the contract.[173] The individuals also agree to give the sovereign control over communal resources to protect and use in the execution of its functions.[174] In addition, the individuals agree to abide by the decisions of the sovereign and where necessary to assist in effecting the same.[175] On its part, the sovereign must ensure that it protects and secures the individual members of the society and their common interest in an impartial and just manner and that the resources entrusted in its care are used for the common good.[176]

169 See Hobbes (n 152 above) 89. He states that '[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants'. For criticism of Hobbes, see C Pateman *The problem of political obligation: A critical analysis of liberal theory* (1979) 53, arguing that for Hobbes the 'bonds of civil life rest on the sword, not on the individual's social capacities'.

170 For Locke, there must be no question about asserting the 'right to punish' those who violate moral standards of conduct ? principally property rights ? but this right is given to a 'commonwealth' rather than to a 'Leviathan.' Locke (n 126 above) 65 - 66.

171 See Hobbes (n 152 above) 82, noting that the motive for a contract, a mutual transference of rights to a sovereign, is 'the security of man's person, in his life and in the means of so preserving his life as not to be weary of it'.

172 Hobbes formulates the covenant by which the sovereign is instituted in these words: 'I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.' Hobbes (n 152 above) 87.

173 According to Locke, men gain three things in the civil society which they lacked in the state of nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. Locke (n 126 above) para 97.

174 For Locke, protection of property, including their property in their own bodies, is the primary motivation of the social contract. Locke (n 126 above) para 124.

175 Although Hobbes insists that 'all men equally, are by Nature Free', yet he treats authorisation as limiting that freedom. Hobbes (n 152 above) 111. He distinguishes two ways in which such a limitation might arise, either 'from the expresse words, I Authorise all his Actions' by which the subject places himself under the sovereign, or 'from the Intention of him [the subject] that submitteth himself to his [the sovereign's] Power, (which Intention is to be understood by the End for which he so submitteth ...)'. And this end, Hobbes goes on to say, is 'the Peace of the Subjects within themselves, and their Defence against a common Enemy.'.

176 As Rousseau urges, it is only on the 'basis of this common interest that society must be governed'. JJ Rousseau *The social contract and the first and second discourses* (2002) 25. According to Hobbes, the motive for a contract is 'the security of man's person, in his life and in the means of so preserving his life as not to be weary of it'. Hobbes (n 152 above) chap 14, 82. See also Locke (n 126 above) para 97.

The social contract does not, however, divest the individuals of all their rights nor does it give the sovereign power to control all aspects of the individual life. There remains with the individuals a residual right that allows them to pursue their natural self-interests – interests that do not breach the common interest – without the interference of the sovereign.[177] For example, with regard to property, Locke argued that the system of natural liberty leaves the fruits of nature to man in common, but the fruits of labour to the individual worker:

> [T]hough the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself … Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.[178]

In this way, Man comes 'to have a property in several parts of which God gave to Mankind in common, and that without any express Compact of all the Commoners'.[179] Thus, under the social contract, only those private acts that affect other individuals' or the communal well-being are to be subjected to common law and to the sovereign's supervision.[180] Otherwise, the individual retains the freedom to pursue his individual interests unfettered by the sovereign will. As Rousseau aptly pointed out:

> It is apparent from this that the sovereign power, albeit entirely sacred, and entirely inviolable, does not and cannot exceed the limits of the general conventions, *and that every man can fully dispose of the part of his goods and freedom that has been left to him by these conventions.*[181]

This traditional notion of social contract was meant to explain the creation of civil societies and the legitimacy of government authority.[182] However, since Immanuel Kant used the term as an idea for social formation,[183] the theory has also been used to explain the formation of social entities at both

177 For a discussion of the place of individual right in civil society, see, for example, AS Brett *Liberty, right and nature: Individual rights in later scholastic thought* (2003).
178 Locke (n 126 above) 328.
179 Locke (n 126 above) 327 - 328.
180 But see J Tully *A discourse on property: John Locke and his adversaries* (1980). He attributes to Locke the remarkable conclusion that property in political society is a creation of that society and that when man enters into the political society, '[a]ll the possessions a man has in the state of nature … become the possessions of the community' so that 'the distribution of property is now conventional'. Thus according to Tully's interpretation of Locke, a man in civil society has no other property entitlements than those which are given to him by the communal laws. Trully (this note) 98, 164 and 165.
181 Rousseau (n 176 above) 63 (emphasis added).
182 See generally Riley (n 151 above).
183 For a full translation of Kant's entire work, see I Kant *The conflict of the faculties* (1979). Kant talks of the idea of the social contract, that 'the act through which a people constitutes itself a state, or to speak more properly the *Idea of such an act,* in terms of which alone its legitimacy can be conceived, is the original contract by which all the people surrender their outward freedom in order to resume it at once as *members of a common entity* …' (emphasis added). Kant (this note) 186.

macro and micro state levels.[184] Understood in this sense, therefore, whenever two or more people or groups of people come together and voluntarily agree amongst themselves to share the burdens of life and the side-benefit that emerges from the collective synergy, the basis of a social contract is formed.[185] When this grouping anoints, appoints or elects a representative person or an assembly of persons to look after their collective interest, such a person or persons is or are expected to act impartially and in the common interest of the group.

However, when the representative(s) breaches this public trust for their own private benefit or when individual members of the society bribe the representative(s) in order to get preferential treatment then the social system becomes corrupted.[186] As Rousseau aptly noted 'if you would have the general will (common interest) accomplished, bring all particular wills (private interests) into conformity with it'; in other words, 'as virtue is nothing more than the conformity of the particular wills with the general will, establish the reign of virtue'.[187] The corollary is that where the pursuit of common interest is replaced by the glory of selfish interest, the reign of virtue loses to that of corruption.[188] Indeed, the orthodox understanding of corruption since Aristotle's writing in *On generation and corruption*,[189] the one put forth in particular by Machiavelli in his *Il Principe*,[190] is that of corruption as a decline or decay of the capacity of the citizens and officials of a state (and it may now be added, of any other social formation) to subordinate the pursuit of private interests to the demands of the common good.[191] It is in this sense that the explanation of corruption as an abuse of public entrusted authority for private benefit is (or ought to be) understood.

184 For this approach, see, for example, T Donaldson & TW Dunfee, 'Integrative social contracts theory: A communitarian conception of economic ethics' (1995) 11 *Economics and Philosophy* 85. See also M Rosenfeld 'Contract and justice: The relation between classical contract law and social contract theory' (1985) 70 *Iowa Law Review* 769 863, pointing to 'the *twofold nature of the Social Contract as Contract of Association and Contract of Government*' (emphasis added).

185 See generally IR MacNeil *The new social contract: An inquiry into modern contractual relations* (1980).

186 R Braibanti 'Reflection on bureaucratic corruption' (1962) 40 *Public Administration* 357 365, pointing out that bureaucratic norms are meant to ensure, after all, precisely this – that 'decisions be made without regard to personal interest and group pressure'.

187 JJ Rousseau 'Economie politique' in JJ Rousseau *The social contract and discourses* (1950) 302 - 310.

188 See, for example, DH Lowenstein 'Political bribery and the intermediate theory of politics' (1985) 32 *UCLA Law Review* 784 786 and 833, pointing out that a related conception of corruption arises from political philosophy and trusteeship theory: the idea that public officials must privilege the public interest rather than either political considerations or private gain.

189 Aristotle (n 157 above).

190 N Machiavelli *The prince (Italian: Il Principe)* (1532).

191 For a discussion on Aristotle's views, see J Barnes *The complete works of Aristotle: Volume one* (1984). In a passage in Politics, Aristotle, for example, says:

> 'There are three kinds of constitution, or an equal number of deviations, or, as it were, corruptions of these three kinds ... The deviation or corruption of kingship is tyranny. Both kingship and tyranny are forms of government by a single person, but the tyrant studies his own advantage … the king looks to that of his subjects.' Quoted in Heidenheimer (n 49 above) 3.

Conclusion

This chapter has demarcated the contours of corruption. It concludes that while the legal criteria for determining standard of behaviour has certain limitations, it is a better criteria than both the universal and relative moral criteria for determining acts that amount to corruption. The reason for this is three-fold. First, moral criteria are usually too wide and ambiguous on concepts as they depend on public opinions which are never uniform or static. Second, popular opinions on concepts are usually just that: opinions and would not ordinary have any force on the behaviour of people until they are backed by the law. Third, legal standards of behaviour are often also a reflection of the prevailing morals in the society as the lawmakers who enact them do spring from the same society. Thus, while the moral debate on the standard of behaviour is important in determining the kind of standards that should guide the behaviour in any society, only those morals or conducts that have been distilled into law, it is contended, should determine the standard of corruption.

The chapter also concludes that the standard of corrupt behaviour should not be overly circumscribed given the multifaceted nature of corruption. Indeed, there are many identified acts of corruption, which if a rigid definition of corruption is adopted would most probably be left out. In this connection, it is concluded that the best definition that captures the various manifestations of corruption is that of abuse of public entrusted authority for private gain. This definition is not novel and seems to be the popular standard accepted in the various laws and scholarly writings. The public nature of the definition derives from the fact that the purpose of law as evincible from the contractual basis of society is not to restrict the freedoms of individual members of the society, but to create an atmosphere where everybody can realise their full potential, by regulating only conduct that affects the common good of society. Those individual acts that have no bearing on this common good are accordingly excluded from the ambit of the law. Thus, the public related definition of corruption is more in tandem with the social contract regime than one that tries to also capture private corruption, which does not affect the common good.

The chapter further concludes that an essential component of corruption is its elevation of private interest over public good. This elevation of private interest over public good is what makes corruption condemnable in many societies. Mere abuse of public entrusted authority without private gain or intention to benefit private interest would, therefore, not suffice to make an act corrupt. This might sound like a contradiction since an abuse by its very nature is a bad thing. However, there are instances when a trustee of public authority might be forced, by unforeseen circumstance to, for example, relocate resources from their intended purpose or use less competitive procurement procedures so as to serve an emergent public need. While these acts might amount to an

'abuse' (in the sense of going against the intended purpose or laid down procedure respectively), they would not amount to corruption as the element of private gain would be missing. Private gain should, therefore, be shown to exist for an abuse of public entrusted authority to amount to corruption. Indeed most anti-corruption legal instruments, including Kenya's ACECA, do capture this essential thread in their conception of corruption.