

**THE LAW AND PRACTICE OF LEADERSHIP AND INTEGRITY IN  
KENYA: A DISQUISITION OF THE POST 2010  
CONSTITUTIONAL DISPENSATION**

**BY**

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## DECLARATION

I, **Silas William Aluku**, (student number **64032582**) hereby declare that '**The Law and Practice of Leadership and Integrity in Kenya: A Disquisition of the Post 2010 Constitutional Dispensation**' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution. I have also obtained Ethical Clearance for this study, the reference number being ST77-2021 on the Ethical Clearance Certificate dated 12 October 2021.

Silas William Aluku

Signature: 

Date: 30 October 2021

Supervisor: Prof Lee Stone

Signature: 

Date: 30 October 2021

## DEDICATION

The Honorable David K. Maraga,  
Chief Justice & President of the Supreme Court of Kenya Emeritus.

The Honorable Justice Isaac Lenaola,  
Lord Justice of the Supreme Court of Kenya.

The Honorable Justice G.V. N. Odunga,  
Lord Justice of the High Court of Kenya.

Your Lordships,

Towards the endeavor of our country's quest to consolidate good governance, the judiciary has played a key and significant role in developing good jurisprudence through landmark decisions that you have played a significant and personal role in. When the history of constitutionalism within the premises of judiciary will be written, your contribution shall undoubtedly occupy a sacrosanct position. Reading through your decisions invites one to a hope for a better prosperous Kenya in the precipitous of the Rule of Law.

To be sure, the motivation to pursue my studies within the premises of ethical governance was partly contributed by the need to embolden your enriching jurisprudence formulated throughout the various judicial pronouncements you have made overtime. Indeed, the said pronouncements only helped to make my studies easier.

Towards this end therefore, kindly accept my approved Master of Laws Dissertation which I have dedicated to you for the aforesaid contribution in good governance in Kenya.

Yours faithfully,



**SILAS WILLIAM ALUKU**

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## **SUMMARY**

Ethical leadership is increasingly becoming a modern aspect of constitutionalism. Whereas entrenchment of ethics has recently gained momentum, ethics has existed in social relations since the advent of civilisation. Ethics, as a transcendent feature of socio-legal relationships, has existed in principles such as democracy, the rule of law, human rights, and republicanism, among others. Kantian ethics are duty-creating obligations that guide social and moral reason for action. Juxtaposed against this philosophical background, Kenya adopted a new constitution after years of prolonged struggle for its second liberation in 2010. The Constitution of Kenya is praised as one of the most transformative constitutions Kenya has ever had. Among its most animating (and admittedly ambitious) transformations is the chapter on leadership and integrity famously entrenched in Chapter Six. Several statutory enactments have been put in place for the implementation of this chapter of the Constitution. Despite the existing elaborate legal and institutional framework in Kenya, ethical leadership and a culture of integrity has remained largely elusive. Accordingly, this study constitutes a critique of the efficacy of the law and practice of leadership and integrity in Kenya.

## **KEY WORDS**

Constitutionalism, Integrity, Ethics, Leadership, Kenya, Morality, Rule of Law, State, Power, Trust

# CHAPTER ONE

## THE INTRODUCTION OF A CITIZEN-LED DEMOCRACY IN KENYA?

### 1. Introduction

The promulgation of the Constitution of Kenya in 2010 (the Constitution) introduced a paradigm shift in the exercise of state power. The adoption of the Constitution was a result of enduring struggle stemming from a legacy of colonisation that pitted individuals in competition against one another, especially in the fight for access to resources. To be sure, post-independence Kenya remained largely unliberated because the leadership that took over from the colonial regime was principally concerned with self-aggrandisement.<sup>1</sup> The spirit of liberation that united indigenous Kenyans against the colonial regime was betrayed by the post-colonial regime. Issues like land ownership, an imperial presidency, police brutality as well as extra-judicial killings haunted Kenya well beyond the colonial era.<sup>2</sup> Arguably, the failure to resolve these historical injustices in combination with perpetual electoral malpractices resulted in deadly post-election violence in 2007 and 2008. As a result of this post-election violence, a government of national unity was formed after the political truce of 28 February 2008. The government embarked on key institutional and legislative reforms with particular emphasis on constitutional reform. The quest for constitutional reform was realized on 27 August 2010.<sup>3</sup> The adoption of the Constitution set in motion heightened expectations for *inter alia* good governance, political prosperity and respect for the rule of law and human rights among the people of Kenya. The Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v Maina Kiai & Others*<sup>4</sup> captured this mood poetically

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<sup>1</sup> See generally, Birmingham D *The Decolonization of Africa* (1995); Fawole WA *The Illusion of the Post-Colonial State: Governance and Security Challenges in Africa* (2018); Acemoglu D & Robinson J *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (2012); van der Veen R *What went wrong with Africa: A contemporary history* (2004). Powerful (and personal) accounts of Kenya's political climate in the time immediately preceding and succeeding independence are provided by Ngũgĩ wa Thiong'o in *Wizard of the Crow* and *Petals of Blood*. There is accordingly no lack of critique of post-colonial Africa and the ongoing struggle for ethical, accountable leadership.

<sup>2</sup> Referring to Kenya specifically, see Musila G 'Governmental Logics of an Assassin State' in Teo T-A & Wynne-Hughes E (eds) *Postcolonial Governmentalities: Rationalities, Violences and Contestations* (2020).

<sup>3</sup> The Constitution of the Republic of Kenya 2010 was promulgated on 27 August 2010 at the historical Uhuru Park Grounds in the capital Nairobi in a largely emotive ceremony.

<sup>4</sup> *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR (Civ. Appeal No. 105 of 2017).

when proclaiming that:

... when the people of Kenya adopted, enacted and gifted themselves and their future generations the 2010 Constitution, it was not an ordinary, common-place act. Nor was it an empty ritual. Rather it was an epochal moment, pregnant with meaning and significance, and speaking to the indomitable will of the people to take charge of their destiny and bend the arc of history to align with their most cherished aspirations and ideals as to how they wish to be governed, and organize their affairs.<sup>5</sup>

The Court was essentially conveying the sovereignty of the people: that the self-determination of the Kenyan people had begun. Consequently, the onus is on the people to hold their leaders accountable to the highest moral and ethical standards as set out in the Constitution. Determined to meet this end, the people willed that leaders must be able to bring dignity, respect and honour to their office, nation and more especially the people. Chapter Six of the Constitution embodies these aspirations and ideals for a leadership purposed on service to the people as opposed to excessive individualistic appropriation of power. Prior to the enactment of the new constitutional dispensation, ethical values in Kenya were found in a somewhat feeble and scattered legislation. Impunity, abuse of due process, violation of human rights, self-aggrandisement and unaccountable, illegitimate governance formed the kernel of governance in Kenya.<sup>6</sup> The promulgation of the Constitution in 2010 introduced the jurisprudence of entrenched ethics. It is therefore expected that ethics shapes the framework of governance and becomes intrinsic in considering the choice of leaders in both elective and appointive public offices as well as institutional integrity and fidelity to due process.<sup>7</sup>

Guided by history, the people of Kenya were compelled to give ethics constitutional impetus for in constitutional democracies the constitution assumes primacy over any law, act or omissions. Ethics, having been given constitutional status, limits individual exercise of state power and anchors the execution of popular political will. Integrity is indeed identified as a principle of good governance under the entrenched clauses of the Constitution. There is therefore genuine determination to make ethics a tool of governance as opposed to a mere directive of state policy. Moreover, Kenya has enacted several

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<sup>5</sup> Id, para 1.

<sup>6</sup> Githiru FM *Transformative Constitutionalism, Legal Culture and the Judiciary under the 2010 Constitution of Kenya* LLD Thesis (University of Pretoria 2015) 55-60.

<sup>7</sup> Presidential Petition No 1 of 2017 [2017] eKLR.

statutes with a view to effective implementation of Chapter Six of the Constitution. The grandparent statute is the Leadership and Integrity Act.<sup>8</sup> The Leadership and Integrity Act establishes general and specific leadership and integrity codes<sup>9</sup> and further sets out elaborate mechanisms for enforcement of these codes. It also sets out offences and attendant penalties.<sup>10</sup> The Ethics and Anti-Corruption Commission Act is enacted to enforce ethics<sup>11</sup> and it establishes a commission for that purpose, although it is questionable whether establishment of the commission to enforce ethics outside of the Leadership and Integrity Act is a weakness in the legal framework. Other pertinent legislation is the Anti-Corruption and Economic Crimes Act enacted to ‘provide for prevention, investigation and punishment of corruption, economic crimes and related offences...’.<sup>12</sup> Completing the list of legislation already mentioned is the Public Officers’ Ethics Act<sup>13</sup> that regulates ethical conduct of public officers; the Companies Act<sup>14</sup> that lays the foundation for corporate governance; the Public Finance Management Act<sup>15</sup> which along with its regulations promulgated in 2015 regulate the management of public resources and the Proceeds of Crime and Anti-Money Laundering Act<sup>16</sup> as well as the Bribery Act<sup>17</sup>

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<sup>8</sup> Act No 19 of 2012 (Rev. 2015). The preamble reads: ‘An Act of Parliament to give effect to, and establish procedures and mechanisms for effective administration of chapter six of the Constitution and for connected purposes’.

<sup>9</sup> Act No 19 of 2012, Part II & III.

<sup>10</sup> The Leadership and Integrity Act requires public officers to sign Leadership and Integrity Codes. It also sets out ways of lodging complaints, referral of complaints for criminal or civil proceedings as well as seeking advisory opinions from the Commission as established under Act No 22 of 2011.

<sup>11</sup> Act No 22 of 2011. The Preamble reads: ‘An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and the powers of the commission, to provide for the qualification for appointment of the chairperson and members of the commission and for connected purposes’.

<sup>12</sup> Act No 3 of 2003 [Rev 2016]. There are also enacted Anti-Corruption and Economic Crimes Regulations, 2003 in furtherance of the objectives of the Act.

<sup>13</sup> Cap 183 Laws of Kenya. Its preamble reads thus: ‘An Act of Parliament to advance ethics of public officers by providing for a code of conduct and ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes’.

<sup>14</sup> Act No 17 of 2015 states: ‘An Act of Parliament to consolidate and reform the law relating to the incorporation, registration, operation, management and regulation of companies; to provide for appointment and functions of auditors; to make provisions relating to companies; and to provide for related matters’.

<sup>15</sup> The Preamble to Act No 18 of 2012 [Rev 2018] provides: ‘An Act of Parliament to provide for effective management of the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies and for connected purposes’.

<sup>16</sup> Cap 59B Laws of Kenya [Rev 2013]. The Act is enacted as follows: ‘An Act of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and for connected purposes’.

enacted to deal with acts of money laundering and bribery, respectively. In terms of article 2(5) and (6) of the Constitution,<sup>18</sup> international instruments, such as the United Nations Convention Against Corruption,<sup>19</sup> and recognised best practices relating to leadership and integrity form part of the Kenyan legal framework for leadership and integrity. In addition, the Leadership and Integrity Act establishes subsidiary legislation enacted to assist in the implementation and enforcement of leadership and integrity.

## 2. Problem Statement

Despite the existence of a very elaborate legal framework crystallising the imperative of just, ethical, transparent and accountable leadership, the search for integrity in leadership in Kenya remains elusive. Stated more directly, there resides a deep underlying abuse of state power and mismanagement of public resources among the trustees of the state. So pronounced is this problem that even the judiciary struggles to locate ethical leadership in Kenya. Without a clear and unambiguous articulation of the essence and characteristics of ethical leadership, the legislative framework will remain toothless and ineffectual.

## 3. Aims and Objectives of the Study

The words of Maraga CJ, in *Raila Amolo Odinga & Anor v IEBC & Others*<sup>20</sup> (*Raila Odinga 2*) forms the kernel of the author's disquisition into ethical leadership in Kenya. The Chief Justice opined that 'the greatness of a nation lies in its fidelity to the

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<sup>17</sup> The preamble to Act No 47 of 2016 reads: 'An Act of Parliament to provide for prevention, investigation and punishment of bribery and for connected purposes'.

<sup>18</sup> Article 2(5) and (6) of the Constitution emphatically provides for the application of international law in Kenya as follows:

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya.

<sup>19</sup> Kenya ratified the Corruption Convention on 9 December 2003. The Convention was adopted pursuant to United Nations General Assembly Resolution 58/4 of 31 October 2003. The Convention opens in a very interesting manner thus: 'Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime terrorism and other threats to human security.' The statement of purpose of the Convention (stipulated in Article 1) succinctly provides that the Convention is designed for the following purposes:

a. To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

b. To promote, facilitate and support international cooperation and technical assistance in prevention of and fight against corruption, including in asset recovery; and

c. To promote integrity, accountability and proper management of public affairs and public property.

<sup>20</sup> [2017] eKLR (Presidential Petition No 1 of 2017) obiter dictum of Maraga CJ.

Constitution and adherence to the rule of law...'. This greatness cannot be achieved in the absence of ethical leadership. As such, ethics creates obligations to persons exercising state power to respect and adhere to promulgated laws and rules. Drawing from the foregoing, the aims and objectives of this research are to:

1. Evaluate the obligations created by entrenched ethics, with particular emphasis on the place of entrenched ethics in the twin terrains of political and public service;
2. Critique the efficacy of the legal and institutional framework on ethics in Kenya;
3. Critically analyse the place of the judiciary in the enforcement of entrenched ethics in Kenya in conjunction with an assessment of challenges, if any, impeding implementation of entrenched ethics.

This research is also inspired by the aim to contribute to the 'measurement' of the various dimensions of ethical democracy in Kenya to establish whether ethical political change is possible and sustainable.<sup>21</sup> Furthermore, the objective is supported by the need to promote peace and justice; something that is only achievable in the context of adherence to a legitimate legal and institutional framework that has ethics as its centre.<sup>22</sup>

#### **4. Literature Review**

Morality encompasses the foundation and ultimate aim of society. Ethics is a practical means of discovering the implementation and preservation of moral standards. The concept of public morality is often used to justify approval or disapproval of certain social conduct such as pornography, prostitution, homosexuality, and manner of dressing. However, this is a narrow application of morality, which leaves out ethical issues of similar import.<sup>23</sup> Whereas law primarily operates to control human behaviour, there are instances where the reverse happens. An appreciation of the law depends in certain instances on societal values.

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<sup>21</sup> Coppedge M, Gerring J, Glynn A, Knutsen CH, Lindberg SI, Pemstein D, Seim B, Skaaning S & Teorell J *Varieties of Democracy: Measuring Two Centuries of Political Change* (2020).

<sup>22</sup> Abdi DI & Mason SJA *Mediation and Governance in Fragile Contexts: Small Steps to Peace* (2019). This book provides a detailed analysis of mediation in response to electoral violence in Kenya and is particularly compelling because of its reference to non-Western approaches to resolving political conflict.

<sup>23</sup> See *Eric Gitare v Non-Governmental Organizations Co-ordination Board & 4 Others* [2015] eKLR, where the Court held:

[T]he Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality. We must emphasise, however, that no matter how

In such a case, law develops from social norms that have been practiced over a long period of time.<sup>24</sup> Morality and ethics operate at both municipal and international level. Law and concomitant instruments are used to implement moral and ethical values in society.

Enforcement of moral and ethical values so as to contribute to predictability and certainty is one of the fundamental roles of law in civilised societies.<sup>25</sup> Understanding the overlap of laws, morals and ethics becomes critical in the study of integrity. This paper proceeds from an incontestable presumption that ethical leadership, or the need thereof, has acquired legal status in Kenya. It is therefore the intention of the author to inquire into the disquisition of the application and practice of entrenched ethics as opposed to its legal status. The author agrees with Kant that an action which conforms to juridical laws is legal whereas morality of an action is determined by its adherence to ethical laws.<sup>26</sup> Morality derives from both individual conscience and social values which, to Kant, is determinable by laws of reason. This might be based on religious conventions or political principles such as democracy, republicanism or socialism. When referred to in this context, moral conduct is defined by conscience and socially shared beliefs. Morality is therefore one of the ways of defining appropriate social activity.<sup>27</sup> A similar approach is adopted by Hart who contends that both moral rules and legal systems have closely related elements that impose certain obligations as well as deny individuals the freedoms to act as they wish.<sup>28</sup>

The framers of the 2010 Constitution of Kenya embraced the Hartian approach, demanding that all sovereign power must be exercised in accordance with the Constitution.<sup>29</sup> Put differently, the authority conferred on state officers must be exercised strictly in

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strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights; they are not laws as contemplated by the Constitution.

<sup>24</sup> Tannsjo T *Understanding Ethics: An Introduction to Moral Theory* (2008) 8. See also, Raz J *The Authority of the Law* 2 ed (2011) 29.

<sup>25</sup> Finnis J *Natural Law and Natural Rights* 2 ed (2011) 303. See also Raz *Authority of Law* 103 on the primacy of the role of society. Specifically, he bases the validity of a legal system on its impact on social behaviour.

<sup>26</sup> Kant I *The Metaphysics of Morals* (translated from original German by Gregor M) (Revised ed) (2018) 16.

<sup>27</sup> Perry S 'Hart's Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) *Fordham Law Review* 1.

<sup>28</sup> Hart HLA *The Concept of Law* 3 ed (2012) 7.

<sup>29</sup> Article 1 of the Constitution of Kenya 2010.

accordance with the Constitution.<sup>30</sup> The Ghanaian Constitution of 1992 also adopts a similar approach in limiting governmental powers. This limitation is expressed dually in the following manner: first, such power can only be exercised to the extent that it benefits the people and secondly, government power can only be exercised within limits sanctioned by the Constitution.<sup>31</sup> Tannsjo adopts the Hartian approach arguing that society has a direct impact on individual conduct. Argued this way, it is contended that predominant social rules have great influence of people's perception of certain conduct such as homosexuality, abortion, marriage etcetera.<sup>32</sup> Critiques of this school of thinking such as Kant argue that social feelings do not offer the best approach to meaningful enforcement of ethics. Kant argues that since social feelings are bereft of practical reason, they cannot form the basis of adherence to duty.<sup>33</sup> Kant's conceives ethics as an unconditional imperative that guides society to live morally. In Kant's theory therefore, both ethics and the law impose duties and defines consequences for deviations from their obligations. Hart's view is very similar to Kant's in that Hart argues that the most prominent feature of law's existence is that it makes some kind of human behaviour obligatory.<sup>34</sup>

Bentham and Kant argue that individual conduct is the bedrock of social morality. Kant's categorical imperatives impose two interrelated obligations to human conduct that is, one's action must not only be supposed to respect humanity in other people, but also equally will that such action works towards ordaining universal law.<sup>35</sup> On the other hand, Bentham posits that morality is the bedrock of social interests. Towards this end the author follows Bentham's argument that being a fictitious body, a community consists of individuals; the interests of the community become the aggregate sum of the interests of individuals.<sup>36</sup> Raz takes a similar approach, advocating that enforceability of norms

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<sup>30</sup> Articles 73 and 75 of the Constitution of Kenya 2010.

<sup>31</sup> Article 1 of the Constitution of the Republic of Ghana 1992 (rev. 1996).

<sup>32</sup> Tannsjo *Understanding Ethics* 8.

<sup>33</sup> Kant *The Metaphysics of Morals* 17, where he states: 'By categorical imperatives certain actions are permitted or forbidden, that is, morally possible or impossible, while some of them are or their opposites are morally necessary, that is obligatory'.

<sup>34</sup> Hart *The Concept of Law* 6.

<sup>35</sup> Kant I *Grounding for the Metaphysics of Morals* (Translated from original German by James W Wellington) 3 ed (1993).

<sup>36</sup> Bentham J *An Introduction to the Principles of Morals and Legislation* (1781) [2000] 15.

depends on their impact on social behaviour; this he calls the primacy of the social.<sup>37</sup> Raz argues that because of the primacy of the social, some norms have society-specific application. In other words, they might be in force in one country and not in force in another. To Raz, social attitudes and responses to legal systems are determined by things such as knowledge, respect and obedience to the system in question.<sup>38</sup>

While the author agrees with Raz on the primacy of the role of society, it seems that Raz holds a contradictory view on the application and enforceability of norms. If the behaviour of people were to form the basis of the existence and application of norms in society, then the whole idea of primacy of the social becomes fallacious. The author aligns himself with Kant's conception of duty as a yardstick of social attitudes and responses to legal systems and/or obligations. If ethics imposes duties and obligations, then the furtherance of such obligations and duties must be the primary motivation for doing and/or refraining from certain actions. The author is thus persuaded by Kant's conception that ordination of a universal law should be the primary motivation for action. The essence of entrenched ethics in a legal system must primarily be to encourage people to adhere to prescribed conduct and refrain from engaging in prohibited activity, whether or not they draw benefit therefrom.

The debate on the horizontality of the constitution most prominently features in the horizontal application of entrenched ethics as shall be seen in subsequent chapters. According to Finnis, the extent of constitutional application is what the judiciary decides it is. The doctrine of third-party effects of constitutional rights which traces its origin in Germany quite clearly elaborates the horizontality of entrenched ethics. According to the doctrine constitutional rights apply to private actors whose legal relations are regulated by private law.<sup>39</sup> A similar position has been embraced by the Kenyan courts as was the holding in the case of *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Scheme & 3 Others*.<sup>40</sup>

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<sup>37</sup> Raz *The Authority of Law* 103.

<sup>38</sup> *Ibid.*

<sup>39</sup> Gardbaum S '[T]he "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 403.

<sup>40</sup> High Court Constitutional Petition No. 65 of 2010 Nairobi. See also Constitutional Petition No 160 of 2013 where the High Court held thus:

It must be obvious, now that not only do we find we have jurisdiction to entertain the dispute before us, but that we consider the fact that the 1<sup>st</sup> Respondent is a private members club to be of limited relevance to the issue at hand. The respondents cannot be allowed to wave a private entity card to this Court, when properly moved, from assuming

The judiciary plays a prominent role in enforcement of ethics through its authoritative common-law making powers. The author agrees with Raz that much as private citizens as possessed of ability to interpret legal situations in their daily undertakings, theirs remains mere opinions not binding on anyone. To Raz, the judiciary's interpretation remains the most authoritative and binding interpretation.<sup>41</sup>

The Ghanaian Constitution of 1992 innovatively creates horizontal obligations through its provisions on duties of the Ghanaian citizens. Some of these duties include to uphold and defend the Constitution; respect for the rights and welfare of other persons; the protection and preservation of public property; and exposing and combatting the misuse and waste of public funds and property; as well as an honest declaration of income and tax obligations.<sup>42</sup> The Constitution of Ghana arguably extends even further than South Africa's progressive Constitution<sup>43</sup> in respect of these obligations placed on government and the people. Nonetheless, this is innovative and remarkable constitutional architecture designed to limit exercise of government power as shall be discussed in subsequent chapters.

Ethical leadership can best be realised through the lens of a strong, independent institutional set up. Reynolds holds the view that effective institutional arrangement is the fundamental safeguard against absolutism. While accepting the role of law as neutral arbiter in society, Reynolds contends that where institutional design permits or rewards abuse of power, there is an inherent tendency towards absolutism. Delimiting rules devoid of strong institutional architecture, to Reynolds, lacks the capacity to contain absolutism.<sup>44</sup> On the other hand, Meirroti & Masterson draw a comparison between states with developed institutions and those with strong or demanding political elites. To them, the former states have better capacity to demand accountability and contain vices such as corruption as

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jurisdiction where there are allegations of breach of fundamental rights and freedoms by its members or other persons.

See also *John Atelu Omilia & Anor v Attorney General & 4 Others* [2017] eKLR, where Mativo J dismissed similar arguments on the non-justiciability of private conduct and opined:

When examined as an individual remedy, it becomes clear that the 'constitutional tort' action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, 'constitutional tort' actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury.

<sup>41</sup> Raz *The Authority of Law* 108.

<sup>42</sup> Article 41(a)-(k) of the Constitution of Ghana 1992 (rev. 1996).

<sup>43</sup> Constitution of the Republic of South Africa, 1996. See in particular, sections 1, 7, 8 and 195.

opposed to the latter.<sup>45</sup> Whereas primarily development of stronger institutions is the yardstick of constitutionalism, the same must not be viewed as an end in itself. Designing of a constitutional document, worth the name, capable of countering absolutism in government should be approached with infinite innovations. Institutions so designed ought to be assigned attendant ethical standards. Madison's "good behaviour" element of republicanism cannot be attained should ethics be delinked from an institution.<sup>46</sup> Indeed, attaching ethics to institutions is one way of designing stronger institutions to achieve constitutionalism. In weak democracies, supposedly independent institutions are deliberately staffed with personnel who are sympathetic to and feel beholden to appointing authorities thus obscuring their ability to be impartial in decision-making. The consequence of this structural composition is ordination of institutions susceptible to manipulation as it was observed by the Independent Review Commission (IREC) of the defunct Electoral Commission of Kenya's conduct of the 2007 general election.<sup>47</sup>

The interplay between ethics and constitutional principles is another aspect that constitutional design must prioritize in order to entrench the culture of constitutionalism. Such constitutional principles as democracy, human rights protection, accountability, separation of powers, and republicanism cannot flourish in a polity where ethics are not infused into the entire system. While writing on separation of powers, Fombad, argues that the basic and fundamental aim of constitutionalism is to safeguard life, individual liberty and protection of property.<sup>48</sup> While Fombad acknowledges the long-held belief that separation of powers is the primary means of countering absolutism, he nonetheless contends that there is lack of consensus as to the ability of the doctrine to check excesses of government in contemporary institutional development. Whereas he admits that separation of powers has been successful in countries like Botswana, Fombad admits there exists challenges of separation of powers especially where there are imperial

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<sup>44</sup> Reynolds BN 'Constitutionalism and the Rule of Law' at <https://scholarshiparchive.byu.edu/facpub/1469> 6.

<sup>45</sup> Meirotti M and Masterson G (eds) 'State Capture in Africa: Old Threats, New Packaging' (Electoral Institute on Sustainable Democracy in Africa, 2018) 6.

<sup>46</sup> Tribunal Referral Net 1 of 2012.

<sup>47</sup> IREC 'Report on the Independent Review Commission on the General Elections held in Kenya on 27 December 2007' (Government Printers 2008).

<sup>48</sup> Fombad CM 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25 *British Columbia Third World Law Journal* 301-302.

presidencies.<sup>49</sup>

Fombad contends that separation of powers remains the valid pillar of constitutionalism and good governance. In contrast, Thomashausen advocates for a move away from emphasis on democratic purity to designing constitutions with the ability to promote social integration.<sup>50</sup> Thomashausen contends that the acceptability and legitimacy of the constitution-making process determines the fate of a constitution. Proper constitutional architecture should therefore be able to blend ethics in the separate arms of government and institutionalize adherence to the rule of law.<sup>51</sup> This then gives rise to Kant's duty situations as he argues that 'duty is the necessity of an action from respect for the law'.<sup>52</sup> Thomashausen agrees with Raz's primacy of the social in constitution-making processes while advocating for a welfarist process. Thomashausen contends that the process that upholds the welfare of a nation, able to fuse competing social interests yields a constitution that has acceptance, support and legitimacy.<sup>53</sup>

Legal rights and duties are grounded on ethical approaches to decision-making and aim at setting normative standards of socially acceptable and desirable behaviour. The system of entrenched ethical values necessitates major paradigm shifts in the governance structure as well as judicial reasoning on various constitutional principles such as democracy. The judiciary in countries with entrenched ethics have been entrusted with interpretation of these norms. Ajibola, J says thus in this regard:

We as African judges must firmly uphold our constitutions and the rights of all our citizens ... If we should fail in our duty, society may not take our judgments seriously and posterity may not forgive us. Confidence in the judiciary could vanish. Respect for law and order may diminish and even break down. If it should, anarchy would take over. People may ... take the law into their own hands and violence would be the order of the day.<sup>54</sup>

In the final analysis, it will not be the imagination and perceptions of civil and political

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<sup>49</sup> Fombad 'The Separation of Powers and Constitutionalism in Africa' 302-303.

<sup>50</sup> Thomashausen A 'Constitutional Power and Legitimacy in the Political Evolution of Southern Africa' *Lusíada. Política Internacional e Segurança*, nº 3 (2010) 46.

<sup>51</sup> See generally, Fombad CM, 'The Constitution as A Source of Accountability: The Role of Constitutionalism' Paper Presented at The International Conference on Sources of Accountability on The African Continent, held at The University of Cape Town, 20-24 July 2009.

<sup>52</sup> Kant *The Metaphysics of Morals* 15.

<sup>53</sup> Thomashausen, 'Constitutional Power and Legitimacy' 46.

<sup>54</sup> Olowu D *An Integrated Rights-Based Approach to Human Development in Africa* (2009) 28-30.

rights, or mere entrenchment of ethical values in legal books alone that will make our national aspirations a real, lasting and animating national heritage. It will also, perhaps more importantly, depend on the political will and proven ability of our judiciary to dedicate itself and its policies to the furtherance of human equality, human dignity, human development and most importantly, ethical consideration and respect for the rule of law. Only then can we be proud of a nation.

## **5. Research Question**

The fundamental question to be addressed in this study is the extent to which entrenched ethics promotes constitutionalism in Kenya and whether ethical leadership can be established (and sustained) in Kenya.

## **6. Approach and Methodology**

### **6.1 Approach**

This research adopts a multi-faceted approach in advancing its theories. First, it is the author's intention to employ both descriptive and analytical approaches. In this regard, a comparative analysis of international best practices will be employed to discuss the application of ethics to realize good governance in Kenya. In this regard, the author will make particular reference to among others South Africa, Ghana and Germany as countries adopting constitutional democracies having a supreme constitution. The English jurisprudence of Parliamentary sovereignty will also be explored to see how courts navigate through common law to enforce and demand ethical leadership. Allan makes the comparison between legal and political constitutionalism in his discussion of the doctrine of "parliamentary sovereignty" and the rule of law.<sup>55</sup> Allan argues that in parliamentary sovereignty the rule of law is often subjected to the legislative majority thus obscuring the idea of it being the cornerstone of liberal democratic constitutionalism. Whereas legal constitutionalism gives primacy to the judiciary to safeguard legal systems, political constitutionalism subjects a legal framework to the whims of (political) representatives as Allan expresses in the following terms:

A legal constitutionalist typically concentrates on the legal framework of law designed to

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<sup>55</sup> Allan TRS *The Sovereignty of Law: Freedom, Constitution and Common Law* (2013) 1.

regulate the exercise of power and protect individual liberty. The political constitutionalist usually treats the legal framework as transient and temporary arrangement of rights, duties, and powers vulnerable to change at the will of a current political majority acting in the name of the people at large.<sup>56</sup>

Central to Allan's disquisition of parliamentary sovereignty is the notion that in such a system public interest is capable of overriding legal principles, thus blurring the idea of the rule of law. In parliamentary sovereignty, the role of the judiciary is reduced to merely applying enacted laws whilst rights and freedoms exist at the mercy and pleasure of the legislature. In constitutional democracies, all the three arms of government are (presumed) to be equal, with each having power to check the excesses of the other. In such jurisdictions, the judiciary possesses sufficient power to give effect to constitutional provisions. Parliamentary sovereignty births the deprivation of the rule of law of its powers to counter absolutism especially where the legislature becomes susceptible to executive manipulation through party dominance. As Allan expresses it:

By confining our concept of law to the regular enforcement of publicly promulgated rules, even when they have very damaging (and perhaps unforeseen) consequences for vulnerable persons or unpopular minorities, we deprive the principle of the rule of law of its power as a shield against oppression.<sup>57</sup>

Entrenched leadership and integrity is a new phenomenon in constitutional making processes geared towards limited governments. However, the basic tenets underlying morality, ethics and law in governance are values that are age-old. As a result, there is a plethora of philosophical literature on morality, ethics and leadership as discussed in the literature review. A desktop study will be utilized to investigate the role of ethics in ensuring limited and accountable government.

## **6.2 Methodology**

'Constitutionalism' is an appropriate methodology to employ in the dissertation because Constitutionalism can be applied to 'reveal new insights into [ethical leadership] as a legal construct'. Particularly compelling is Neil Walker's development of the 'discourse of constitutionalism' that asks: 'what fresh insights and challenges will the "trend towards

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<sup>56</sup> Ibid.

<sup>57</sup> Allan *The Sovereignty of Law* 2.

thinking in a constitutional register bring”?’<sup>58</sup> It is the applied and fundamental aspects of this research design that will facilitate an answer to this question. A component of this applied approach is borrowed from a philosophy on revolution advocated by Martin Luther King who sets out a number of systematic steps, being: ‘1) Collection of the facts to determine whether injustices [or violations of ethical leadership] are alive. 2) Negotiation. 3) Self-purification’ followed by possible nonviolent direct action to restore justice and ethical leadership.<sup>59</sup> This approach will be helpful in the assessment of the polemics of ethics in Kenya as well as the correlations between morality, law and society. The research will take a qualitative approach in which the author will be offering a critique of why society behaves and handles ethics the way it does. In addition, a conceptual approach will be used in discussing the philosophical understanding of morality, law and society. This will help in understanding – and perhaps even measuring – the law and practice of ethics in Kenya.

## **7. Framework of the Dissertation**

Chapter one offers the contextual background of the study and sets the overall tone of the dissertation by introducing chapter six of the Constitution of Kenya that imposes an obligation on political leaders to adhere to the highest standards of ethical conduct as they are servants of the people and the sovereignty of the Kenyan state resides in its people. The philosophical underpinnings of ethical leadership are briefly elucidated, along with a brief comparative study of the imperative of ethical leadership in other jurisdictions. Accordingly, chapter one articulates the methodology of the dissertation, in the form of constitutionalism, alongside a conceptual understanding of law, morality and society.

Chapter two provides a general discourse on ethical leadership with a view to establishing the importance of integrity in leadership. This chapter will also attempt to give a justification of ethics in democratic states. Just like law, the essence of ethics and integrity is to enable consistency and predictability in action. Whereas traditional constitutional architecture has relied on the Montesqueian model to ordain limited government, this has never solely

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<sup>58</sup> Cryer R, Hervey T and Sokhi-Bulley B *Research Methodologies in EU and International Law* (2011) 50-51.

<sup>59</sup> King ML ‘Letter from Birmingham City Jail’ in Kent E (ed) *Revolution and the Rule of Law* (1971) 13.

guaranteed the same. The necessity to hold government to account has led to innovative designs such as democracy in which there arises the need for periodic elections. In modern times, entrenchment of ethics has developed into a constitutional means of limiting excesses of leaders despite the fact that ethics has existed in constitutional principles such as due process, adherence to the rule of law and human rights.

Chapter three discusses the legal framework of leadership and integrity in Kenya. It will also give an overview of statutory framework on ethics in Kenya as well as international laws touching on ethics that are applicable in Kenya. As discussed in the literature review, Kenya has a plethora of legislation dealing with ethical leadership both in the public domain and the private sector. The arrest and intended prosecution of the current Deputy Chief Justice over the transactions leading to the collapse of Imperial Bank shows the stretch of the legal framework over integrity in Kenya.<sup>60</sup> Notwithstanding the existence of a myriad of laws touching on ethics, corruption, abuse of office and disregard for due process have remained the badge with which Kenya is identified. Chapter four then discusses the concept of leadership and integrity in Kenya. It involves a disquisition of chapter six vis-à-vis underlying constitutional principles such as democracy, republicanism, and the presumption of innocence. It will also discuss the horizontality of chapter six. This chapter will also discuss the comparative application of ethics in other jurisdictions. In conclusion, the chapter will discuss the role of the judiciary in enforcing entrenched ethics. In *Shaw v DPP*, Lord Simmonds observed thus:

In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State...<sup>61</sup>

Whereas debate may revolve around the scope of judicial involvement in enforcement of ethics, the question as to whether the courts should enforce ethics must be answered in the affirmative. When questions of ethics are presented before the court, as Finnis observed and so concurred by the dissenting opinion of Lord Reid in *Shaw v DPP*, the court's role is to interpret the enactment. In this regard, it is expected that the judicial authority is

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<sup>60</sup> 'Kenya's Deputy Chief Justice Arrested for Suspected Corruption: Police, Prosecutor', accessible at <https://www.reuters.com/article/us-kenya-corruption/kenyas-deputy-chief-justice-arrested-for-suspected-corruption-police-prosecutor-idUSKCN1LD1FC> Reuters 28 August 2019.

<sup>61</sup> *Shaw v Director of Public Prosecutions* [1961] UKHL 1, [1962] AC 220.

exercised *a priori* independent of any sort of influence. When the judiciary yields to extrinsic influence in decision-making (i.e. becomes partial), the results will be absurd.<sup>62</sup> Chapter five accordingly narrates the socio-legal challenges impeding enforcement and realization of ethical leadership in response to the fundamental research question poses. Finally, chapter six will discuss conclusions and where necessary give recommendations.

Having discussed the foregoing, we now proceed to chapter two which gives a discourse of the theory of ethics and limited government. The author approaches the concept of constitutionalism on an entrenched ethical perspective. It is the author's contention that ethical leadership is a modern design of constitutional practice aimed at limiting governmental powers. In trying to build this argument, the chapter begins with a brief discussion on the need for government and constitution in society. It then proceeds to discuss the theory of ethics vis-à-vis limited government while considering the inter-play between ethics and other elements of constitutionalism such and respect for human rights, separation of powers, independence of the judiciary etc. It is the author's contention that the mere presence of these constitutional elements does not in itself guarantee limited government in the absence of ethics.

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<sup>62</sup> See *Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 Others Ex-parte George Saitoti* [2006] eKLR (Misc. Civ Appeal No 102 of 2006) where the Court was discussing the implications of separation of powers on inquiries of a parliamentary committee vis-à-vis prosecution in a court of law. The court used the 1995 Parliamentary Public Accounts Committee to hold that:

- (1) since Parliament had considered the matter, the courts could not reconsider it without breaching the doctrine of separation of powers.
- (2) to subject Prof Saitoti to another trial, after he had been grilled by Parliament, would amount to double jeopardy.
- (3) since Parliament had sanctioned Prof Saitoti's decision, he now enjoyed immunity under the National Assembly (Powers and Privileges) Act.

## CHAPTER TWO

### THEORY OF ETHICS AND LIMITED GOVERNMENT

#### 1. Introduction

This chapter aims at giving a general discourse on ethics and ethical leadership, establishing the importance of integrity in leadership. The chapter will also delve into the justification for ethics in democratic status, laying the foundation for the discussion in subsequent chapters relating to the need for ethical scrutiny, especially in electoral leadership conflicts with universal suffrage. It is the author's contention that just like law, ethics and integrity aim at establishing consistency and predictability of actions. The premise of this research proceeds from an incontestable fact that ethics and the need for ethical leadership have acquired legal status in Kenya. The architectural design of ethics in the Kenyan legal framework births a conception of ordaining limited exercise of governmental powers. The most irresistible conclusion is therefore that the Kenyan legal framework post 2010 introduces ethics and ethical leadership as a means of embedding a culture of constitutionalism in its dispensation.

The post 2010 constitutional dispensation interrogates the conduct of those exercising governmental powers and calls on them to exercise those powers as trustees.<sup>63</sup> The need to exercise governmental powers as trustees is juxtaposed against the backdrop of the very constitutional recognition that *all sovereign power belongs to The People*.<sup>64</sup> Against this backdrop, it will also be the enterprise of this chapter to give a brief discourse on how the people became a people. This enterprise is plausible because any attempt to inquire on the need for limited government must not presuppose the existence of the institution of the people. This thesis intends therefore to discuss the emergence and the need for such institutions through which the people govern: the state, the government and the law. When properly conceptualised, it will become clearer why constitutionalism is an indispensable aspect of good governance. One cannot be faulted for arguing that entrenched ethics and

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<sup>63</sup> Chapter Six of the Constitution of Kenya, 2010 deals with Leadership and Integrity.

<sup>64</sup> Article 1(1) of the Constitution of Kenya, 2010 which declares: 'All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution'.

associated instruments or mechanisms for checking the use of governmental power are ingredients of constitutionalism; the need for ethical leadership is premised on the need to have exercise of governmental power not for any other motivation but solely, in the words of Kant, as a necessity for action in respect of the law, which he calls duty. Kant writes thus in respect of ethics:

Now an action from duty is supposed to entirely abstract from influence of inclination and with it every object of the will, so nothing is left over for the will that determines it except the law, as what is objective and subjectively pure respect for this practical law, hence the maxim of complying with such a law, even when it infringes all my inclinations.<sup>65</sup>

The argument espoused by this thesis is that of entrenched ethics being an emerging aspect of ordaining limited government as part of the broader spectrum of constitutionalism being the yardstick of good governance. Kant's exposition of the law being founded on limiting, in the first instance, individual motivation to act is the key inquiry of this thesis. The aim here is not to trivialize the traditional means of limiting governmental powers or exercise thereof, but to make executors of such powers the starting point in limiting state powers.

Since the commencement of what is deemed 'civilization',<sup>66</sup> constitutional architecture and design has perpetually aimed at designing limited governments. Traditional constitutional making processes have made these attempts by way of, for instance, following the Montesqueian conception of separation of powers in an attempt to fashion limited governments.<sup>67</sup> This chapter, without undervaluing such traditional attempts to ordain limited government, reflects on the need to devise innovative ways of limiting state exigencies within the established constitutional principles. The underlying tone of this thesis is that since government power is exercised by mankind, it is proper to start the philosophy of limitation of state power from a human perspective. Once the culture of constitutionalism is indoctrinated, then automatically, government will have been arrested from degenerating

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<sup>65</sup> Kant *Groundwork for the Metaphysics of Morals* 15.

<sup>66</sup> Koskenniemi M *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

<sup>67</sup> Sultan T 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' *Journal of European Studies* (2012) 1:

The doctrine of separation of powers or checks and balances between independent and co-equal branches of government, is derived from the work of the French political and social philosopher Baron de Montesquieu. The latter in his *Spirit of Law* (1734) 1 defined the principle of separation of powers, based on a system of checks and balances in government.

to absolutism. The need for ethical leadership in government is more pronounced by Baron de Montesquieu in his *The Spirit of Laws* while writing in this regard that:

There is no greater share of probity to support a monarchical or despotic government. The force of laws in one, and the prince's arm in the other are sufficient to direct and maintain the whole. But in a popular state, one spring more is necessary, namely, virtue.<sup>68</sup>

Whereas there has been limited success in having government powers in separate arms, it cannot be conclusively said that separation of powers is an end in itself in ordaining limited governments. The tendency of governments becoming absolutist due to individualistic tendencies of the rulers to personal-aggrandisement means that the constitution making process must be a series of endless processes with the purpose of ensuring enduring ingenuity. In modern constitutions, entrenchment of ethics and/or ethical leadership has been devised as a further means of calling not only government, but also those wielding state power, to account. Ethical leadership aims at regulating the conduct and manner that leaders exercise government powers and functions. Montesquieu gives a comparative need for virtuous leadership between a monarchical and popular government and contends that whereas in a monarchy the ruler thinks of himself as acting above the law, thus no need for virtue, those executing the laws in a popular government ought to be virtuous for the reason that they are aware that they are as well governed by the same laws they execute.<sup>69</sup> In this regard, therefore, ethics should permeate the terrain of constitutional principles such as adherence to the rule of law, respect for human rights, separation of powers, democracy and republicanism, among other principles. In other words, entrenched ethics aims at embedding a culture of constitutionalism in constitutional governments. As Fombad rightly contends, the presence or institutionalisation of the basic elements of constitutionalism are no guarantee of the existence of constitutionalism but make its prospects better.<sup>70</sup> In the absence of entrenched ethics, ethical leadership will not be compelling to those entrusted with execution of government power. This then leads to the next issue calling for imminent consideration: the theoretical basis and necessity for ethical leadership.

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<sup>68</sup> Baron de Montesquieu *The Spirit of Laws* (1748) (translated by Nugent T, 1752) 37.

<sup>69</sup> Montesquieu *The Spirit of Laws* 38:

For it is clear that in a monarchy, where he who commands the execution of the laws generally thinks himself above them, there is less need of virtue than in a popular government, where the person entrusted with the execution of the laws is sensible of his being subject to their direction.

## 2. The Theory of Ethical Leadership

In order to understand the concept and foundation of ethical leadership, it is important to understand the correlation between ethics and the law. As articulated in the introduction above, Kant discusses the concept of duty as the necessity of an action out of respect for the law. It then becomes further plausible to likewise agree with Kant that the morality of an action lies not in the end intended to be achieved but in the reason for doing it. So, an action done out of respect for law is moral and those actions influenced by external factors are not. This is the fundamental inquiry of this thesis. Kant succinctly writes in this respect:

An action from duty has its moral worth not in the aim that is supposed to be attained by it, but rather in the maxim in accordance with which it is resolved upon; thus that worth depends not on the actuality of the object of the action, but merely on the principle of the volition, in accordance with which the action is done, without regard to any object of the faculty of desire.<sup>71</sup>

To Kant, an action that conforms to juridical laws is legal whereas morality of an action is determined by its adherence to ethical laws.<sup>72</sup> Morality derives from both individual conscience and social values which to Kant, is determinable by laws of reason. This might be based on religious conventions or political principles such as democracy, republicanism or socialism. Referred to in this sense, moral conduct is defined by conscience and socially shared beliefs. Stated differently, morality is one of the ways of defining appropriate social activity.<sup>73</sup> This argument resonates well with Hart who writes:

Moral rules impose obligations and withdraw certain areas of conduct from the free option of the individual to do as he likes. Just as a legal system obviously contains elements closely connected with the simple cases of orders backed by threats, so equally obviously it contains elements closely connected with certain aspects of morality.<sup>74</sup>

It has already been stated that the analysis of ethics in this chapter will be based on the presumption that ethics has been clothed with legal status in Kenya and it shall not therefore, be the enterprise of the chapter to belabour the point. In saying so, it is

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<sup>70</sup> Fombad 'The Constitution as a Source of Accountability' (2009).

<sup>71</sup> Kant *Groundwork for the Metaphysics of Morals* 15.

<sup>72</sup> Kant I *The Metaphysics of Morals* (translated from German by Gregor M) Revised ed (2018) 16.

<sup>73</sup> Perry S 'Hart's Social Rules & the Foundations of Law: Liberating the Internal Point of View' (2006) *Fordham Law Review* 1.

<sup>74</sup> Hart HLA *The Concept of Law* 3 ed (2012) 7.

uncontested that law does not operate in a vacuum. The existence and objects of the law are founded on the idea of the social constitution of mankind. While discussing Diwan's concepts of rights, property, freedoms and liberty, Kangu argued that it is only when mankind is socially constituted that the said concepts arise. Accordingly, therefore, when society had not been invented, the social need of these concepts was not necessary.<sup>75</sup>

Calhoun concurs with this position while writing on the social constitution of mankind thus:

... man is so constituted as to be a social being. His inclinations, and wants, physical and moral, irresistibly impel him to associate with his kind; and he has, accordingly, never been formed found in any age or country, in any state other than the social.<sup>76</sup>

To those who trace the foundation of the institution of governance and government in the social contract, this social constitution of mankind is the starting point of such theory. The author therefore agrees with Calhoun that it is impossible for mankind to exist and realize the development of its faculties without the institution of government. The social contract foundation of government is premised on dual constitution of mankind. Commenting on the social constitution of mankind, Montesquieu argues that immediately when mankind entered into a state of society, certain aspects of human life diminished and in their place arose the state of war. According to Montesquieu's theory, this state of war occurs in duality to wit; one, between nations against nations as each society starts to feel its strength, and two, between individuals against the other. To Montesquieu, it is these dual states of war that give rise to human laws i.e. the law of nations governing relations between nations, and civil laws governing relations between individuals as well as political laws governing relations between the governors and the governed.<sup>77</sup> The reason for these human actions, states Finnis, is the idea of survival and self-preservation, discussing this idea by evaluating the motivations for human action:

All human societies show a concern for the value of human life, in all, self-preservation is generally accepted as a proper motive for human action, and in none is the killing of other human beings permitted without some fairly defined justification.<sup>78</sup>

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<sup>75</sup> Kangu JM 'The Social Contractarian Conceptualisation of the Theory and Institution of Governance' (2007) 2 *Moi University Law Journal* 13.

<sup>76</sup> Calhoun CJ 'A Disquisition on Government and a Discourse on the Constitution and Government of the United States' (2016) accessible at [www.constitution/jcc/disq\\_gov.htm](http://www.constitution/jcc/disq_gov.htm) 1.

<sup>77</sup> Montesquieu *The Spirit of Laws* 21-22.

<sup>78</sup> Finnis J *Natural Laws and Natural Rights* 2 ed (2011) 83.

Kangu adopts a similar philosophy to Finnis: that the purpose of human life is self-preservation. As such, human action is directed to the preservation of one's self and that of other human beings. It follows then that the institution of government is ordained to achieve this objective. The constitution of mankind as to possess dualistic feelings that are in internal antagonism means that without some form of natural umpire, the aspect of survival and self-preservation shall not be achieved, and human life will be lost. Calhoun elucidates the situation thus:

While man is created for the social state and is accordingly so formed as to feel what affects others, as well as what affects himself, he is, at the same time, so constituted as to feel more intensely what affects him directly, than what affects him indirectly through others...he is so constituted, that his direct or individual affections are stronger than his sympathetic or social feelings.<sup>79</sup>

Calhoun's approach coincides with Hobbes's conception of the state of nature. According to Hobbes, nothing mankind does, does not perpetuate the preservation of his life against adversities. The theory of Hobbes is premised on the fact that in the state of nature, mankind was entitled to everything including one another's body. Hobbes approaches the nature of mankind in the optics of science, conceiving the idea of human existence as matter, the perpetuation of which requires deliberate efforts to preserve and conserve it. While discussing Hobbes's works, Kangu recites Vinnicombe's conception of the purpose of human life:

Hobbes was the first not only to enunciate comprehensively a mechanistic understanding of man as matter in motion but also, more importantly, to infer from this the logical conclusion that the only end for human kind is the preservation of matter which the human race comprises.<sup>80</sup>

The dual constitution of mankind, that is, the possession of stronger individual than social feelings, most often gives rise to conflicts and if left unregulated by some higher being, or institution, call it a social umpire, will inevitably lead to the extinction of the human race.<sup>81</sup> This social umpire, in whatever name or form it is constituted, is what we call government. Whereas therefore society is necessary for existence and development of the faculties of mankind, the existence of society is dependent on the existence of government. The dual

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<sup>79</sup> Calhoun 'A Disquisition on Government' 2.

<sup>80</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 5.

and antagonistic constitution of mankind, which makes it mandatory for society to have government, likewise translates to the constitution of government. It is argued that in the quest for survival and self-preservation, mankind tends to be naturally selfish and, states Calhoun, that the individualistic feelings of mankind have postulated enormous challenges to the conception of good governance:

It follows also that government has its origin in this twofold constitution of his nature; the sympathetic or social feelings constituting the remote – and the individual or direct, the proximate cause.<sup>82</sup>

It follows from the foregoing, as a less contestable fact, that since the powers appropriated to government are not self-executory, the very individuals with antagonistic feelings are required to execute them. It then calls for reckoning that because the very dual constitution of mankind impelled the formation of government, the same duality will lead them to appropriate those powers in furtherance not of the object of government, but self-aggrandisement to the detriment of preserving society.<sup>83</sup> There arises the need to devise such other instrument, without which, government will negate from its core object, to check the tendency of government and executors of powers of government from turning tyrannical and absolutist. The instrument, similarly arising from this social constitution of mankind, is what we call the constitution, in its very comprehensive and legal sense. The need for a constitution to check the government from deviating from the object from which it was ordained is human action aimed at responding to the demands of instinct or nature. Vinnicombe discusses these human action as follows:

In addition, by showing sense perception to be a mere mechanical process of motion and counter-motion, Hobbes demonstrated his contention that man is to be understood as matter in motion and, therefore, as responding mechanically to the laws of nature in a manner comparable to any other physical object.<sup>84</sup>

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<sup>81</sup> Vinnicombe T 'Thomas Hobbes and the Displacement of Political Philosophy (2005) Vol 32(8) *International Journal of Social Economics* 667-681.

<sup>82</sup> Calhoun 'A Disquisition on Government' 3

<sup>83</sup> Vinnicombe approaches this concept at pages 670-671 as follows:

The image left from the counter-motion being identified with the power to satisfy a particular desire within the living body, permits all other images similarly derived to be traced to the original motion and desire which is most powerful in all creatures, most of the time; and which originates from matter itself. Motion is common to all matter, but in animate matter is called life; hence the desire for self-preservation, Hobbes postulated, is the axiom from which all human understanding necessarily begins.

<sup>84</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 5.

From the foregoing, it can incontestably be held that whereas government was ordained to preserve society, a constitution is necessary to enable the government to operate in furtherance of the object for which it was ordained. No society, however savage, has ever been heard to have existed without government in some form or another. Commenting on the importance of government for the existence of society, Montesquieu cites Gravina<sup>85</sup> who stated that ‘the united strength of individuals constitutes what we call the body politic’.<sup>86</sup>

Since government is ordained not of human volition, it is thus trite that having a constitution worthy of the name, and capable of serving the purpose for which government was ordained, is the hardest assignment nature has ever assigned to mankind. While writing in defense of private property, Locke argues that whereas nature has endowed mankind with unlimited resources, the same law of nature forbids the appropriation of the said resources beyond their need.<sup>87</sup> This venture, of ordaining a constitution capable of effectively arresting the tendency of governments turning absolute has been left to the wisdom of mankind to perfect that which nature ordained: government. It has been an endless venture that mankind has had to endure, albeit with limited success. Kangu writes in regard to constitution-making processes as follows:

Constitution-making and constitutional review then normally assumes very important status in the quest for good state governance. But many are the times countries have put in place new constitutions without necessarily achieving the goal of good state governance.<sup>88</sup>

It follows then that the greatest challenge to mankind has been to devise means for which those entrusted with exercise of government powers should be prevented from using those powers for self-aggrandisement instead of the furtherance of the object for which government was ordained. Devising the means for which government is put to check cannot be done by introducing a higher government than one in place, as this will be tilting the seat of authority to yet another government whose administrator will be possessed of the same threats as the other government. It cannot also be done by so limiting the powers of government as to render it incapable of performing the object for which it was

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<sup>85</sup> According to Montesquieu (*The Spirit of Laws*), Gravina is an Italian poet and jurist who lived from 1664-1718.

<sup>86</sup> Montesquieu *The Spirit of Laws* 22: ‘Besides the law of nations relating to all societies, there is a polity or civil constitution for each particularly considered. No society can subsist without a form of government’.

<sup>87</sup> Laslett P (ed) *John Locke: Two Treatises of Government* (1960 Student edition 1988) 323-324.

conceived. It will be plausible to agree with Kangu that the elusive search for good state governance is because those concerned with the enterprise do not properly conceptualize the concept of governance and it remains misunderstood by many who are concerned with it.<sup>89</sup>

Traditionally, constitutional architecture has been based on the Montesqueiuan model of power separation to design limited government. In this regard, government powers are vested in three (supposedly)<sup>90</sup> equal arms of government being the executive, the legislature and the judiciary. It was intended that these separate arms of government would help check the excesses of the other hence directing the institution of government to attain the object for which it was created. However, in instances where the executive and legislature are controlled by individuals and/or parties with similar interests, such checks on the other become obsolete. Alternatively, in systems where the judiciary is not properly designed as to be independent, or where its authority is undermined by the other branches, separation of powers has failed to hold the government accountable and directed to its object.<sup>91</sup> As is rightly stated by Fombad, there is a gulfing rift between constitutional text and constitutional practice. According to Fombad, having a constitutional architecture that promotes constitutionalism is entirely different with practicing it.<sup>92</sup> Fombad rightly asserts that to assume that entrenchment of constitutional principles such as periodic elections, respect for the rule of law, separation of powers etcetera sets a solid ground for democratic tranquility and flourishing of the rule law in place of dictatorship and military

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<sup>88</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 2.

<sup>89</sup> Ibid.

<sup>90</sup> Supposed is used as there exists a plethora of literature indicating that in some countries, these arms of government are not equal. The judiciary, for instance, most often plays a feeble role to the political arms where implementation of its orders is always dependent on the political will of the executive.

<sup>91</sup> In developing democracies, the executive and parliament have more often been contemptuous of the judiciary by either disobeying its orders or making extreme budgetary cuts. For instance, on 8 June 2020, the Chief Justice of the Republic of Kenya in a press briefing commented:

It is important to clearly and categorically state that this shortage of judges and the near paralysis of court operations has been caused by the President. The President has persisted in his refusal despite orders in two cases requiring him to swear in those judges within fourteen days.

See also Fombad CM 'Constitutional Reform and Constitutionalism in Africa: Reflections on some current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007.

The imbalance in power among the three branches of government means that the judiciary is not as independent as it should be and therefore cannot freely rule against the government, especially in closely contested election disputes.

<sup>92</sup> Fombad 'Constitutional Reform and Constitutionalism in Africa' 1007.

adventurism, is fallacious.<sup>93</sup> The solution to the tendency of governments turning absolute, Fombad contends, is the imposition of water-tight restrictions. It is against this backdrop that this study advances ethics as a suitable restriction to promote constitutionalism.

The starting point, in view of the foregoing discussion on the discourse of limited government, should be an inquiry, as above made, on the necessity and constitution of government. It has already been established that constitution of government is necessary in order to protect the human race from individuals whose antagonistic feelings could lead to extinction of society. Modern constitution-making processes should therefore endeavour to innovatively design constitutional documents that will not only regulate government, but also clearly regulate the conduct of those entrusted to execute government power. It would be plausible to argue along with Bentham's contention that social interests can only be best understood through the interests of the individual. If Bentham is correct in this regard, then the insertion of ethics into the construct of limited government cannot be faulted if one follows Kant's postulation of human activity having as its aim as *willing* such actions as to form universal law. As Kant contends: 'act only in accordance with the maxim through which you can at the same time will that it becomes a universal law.'<sup>94</sup>

Just as the powers of government cannot execute themselves without the involvement of dually constituted individuals, so does government not degenerate to absolutism without the involvement of those very same individuals. This impels those charged with the execution of state powers to direct their execution of powers and functions of government solely to the obligations and duties arising from the law and not individual presupposition. This way, the purpose for which the constitution was ordained will have been realized. This reasoning resonates well with the works of Kant who writes in his discussion of the concept of good will as follows:

Because the universality of the law in accordance with which effects happen constitutes that which is really called nature in the most general sense (in accordance with its form), i.e. the existence of things insofar as it is determined in accordance with universal laws, thus the universal imperative of duty can also be stated as follows: *So act, as if the maxim of your action were to become through your will a universal law of nature.*<sup>95</sup>

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<sup>93</sup> Ibid.

<sup>94</sup> Kant *Groundwork for the Metaphysics of Morals* 34.

<sup>95</sup> Ibid.

If then we arrive at the conclusion that the constitution is the law birthed from the social contract to regulate the affairs not only of government, but also to prevent the executors of the powers of government from misusing those powers for selfish gains, we will, in a less contestable appreciation, be birthing the concept of the supremacy of the law, which forms the next object calling for imminent consideration.

### **3. Supremacy of Law**

A proper understanding of the concept of supremacy of the law would be resorting to Kant's discussion of the idea of good will. According to Kant, good will is considered good not for any other inclinations, but through its willing. Kant's discourse on the good will, is what this paper considers as the starting point to the theory of supremacy of the law. Viewed in the Kantian spectrum of the good will, ethics can best then be described as "a law within the law", put in other words, just like Kant's "good will" ethics is that law which directs human activity to obey and or respect the law thus ordaining the concept of rule of law and constitutionalism. Kant writes thus about the good will:

Some qualities are even conducive to this good will itself and can make its work much easier, but still have despite this no inner unconditioned worth, yet always presuppose a good will, which limits the esteem which one otherwise rightly has for them, and does not permit them to be held absolutely good. Moderation in affects and passions, self-control and sober reflection are not only good for many aims, but seem even to constitute a part of inner worth of a person; yet they lack much in order to be declared good without limitation (however unconditionally they were praised by the ancients). For without the principles of a good will they can become extremely evil, and the cold-bloodedness of a villain makes him not only far more dangerous but also immediately more abominable in our eyes than he would have been held without it.<sup>96</sup>

From the foregoing, one can rightly argue that Kant's "good will" is what modern constitutional philosophy refers to as constitutionalism. Addressed in that manner, constitutional philosophy regards a constitution of a state as the supreme law that informs all actions of governments and persons in their public and private dealings; and without constitutionalism, the mere having of a constitution, regardless of it willing itself as supreme, will be of no value in limiting governmental action. A proper understanding of the concept of supremacy of the law can best be drawn from Kant's further discourse of the concept of practical laws which he postulates as a categorical imperative that can be

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<sup>96</sup> Id at 10.

envisioned without further reference to exterior explanations from its willing or natural experiences. Kant writes thus:

Thus we will have to investigate the possibility of a categorical imperative entirely a priori, since here we cannot have the advantage that its reality is given in experience, so that its possibility would be necessary not for its establishment but only for its explanation. Meanwhile, we can provisionally have insight into this much: that the categorical imperative alone can be stated as a practical law, while the others collectively are, to be sure, principles of the will, but cannot be called 'laws'.<sup>97</sup>

Law, in its social sense, is the supreme arbiter of social interactions not only between government and the populations, but also within interactions of the individual and their kind as Kangu as follows:

This is because, properly conceptualized and conceived as a country's constitution is partly defined as that law which organizes state governance. It is the law which seeks to define, distribute and constrain the use of state power to ensure that the power is applied to the objectives for which it was invented and in the manner it was intended.<sup>98</sup>

It follows from the foregoing that henceforth, all business, both within the government and among populations, shall be done entirely in accordance with the law. This, in its most philosophical sense, is what is called the rule of law. This adherence to duty and obeying of the law and its attendant obligations is what the object of this paper is, the concept of ethical leadership. It has been stated elsewhere in this paper that in Kenya, ethics enjoys both legal and constitutional status. Taking this approach, one can only approach ethics in light of Hart's description of imperatives of law. Hart writes:

The most prominent general feature of the law at all times and places is that its existence means that certain kind of human conduct is no longer optional but in some sense obligatory.<sup>99</sup>

Given then that a constitution is the instrument ordained to regulate government and executors of its powers, ethics, being entrenched in Kenya, is part of such instruments as is phrased in the Constitution of Kenya 2010, aimed at embedding the culture of limited government, the culture of constitutionalism. Jean-Jacques Rousseau makes reference to laws, morals and virtues while discussing the concept of human compassion. Rousseau argues that mankind is so full of compassion and it is this compassionate aspect of man

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<sup>97</sup> Id at 33

<sup>98</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 1.

<sup>99</sup> Hart *The Concept of Law* 6.

that ignites the remote feelings to override individualistic feelings and none in the state of nature is allowed to disobey this compassion. Rousseau writes in this regard as follows:

It is then certain that compassion is a natural feeling, which by moderating the violence of love of self in each individual, contributes to the preservation of the whole species. It is this compassion that hurries us without reflection to the relief of those who are in distress; it is this which in a state of nature supplies the place of laws, morals and virtues, with the advantage that none are tempted to disobey its gentle voice: it is this which will always prevent a sturdy savage from robbing a weak child or a feeble old man of the sustenance they may have with pain and difficulty acquired, if he sees a possibility of providing for himself by other means; it is this which, instead of inculcating that sublime maxim of rational justice, *Do to others as you would have them do unto you*, inspire all men with that other useful; *Do good to yourself with as little evil as possible to others*.<sup>100</sup>

The idea of the rule of law appears obscure in jurisdictions that adopt the concept of parliamentary sovereignty. In such jurisdictions, Acts of Parliament cannot be judged by courts. Writing on the doctrine of parliamentary sovereignty, Goldsworthy discusses the doctrine in the following terms:

It is said that Parliament is able to enact and repeal any law whatsoever, and that the courts have no authority to judge statutes invalid for violating either moral or constitutional laws of any kind. Consequently, there are no fundamental constitutional laws that Parliament cannot change, other than the doctrine of parliamentary itself.<sup>101</sup>

In the previous discourse, in this chapter, on the institution of government, it was observed that the very danger immediately arising from the consolidation of state power to the government was the risk of that very power becoming absolute. The challenge posed by the doctrine of the parliamentary sovereignty is that by having such unlimited power, parliament may become an instrument of enacting and repealing of laws that may well ordain absolutism in government. Without having of some higher instrument to be used as a means of checking excesses in parliament, courts will be unable to challenge actions of parliament that undermine limitations of government. Immanuel Kant builds this argument in his discussion of the good will as follows:

Even if through the peculiar disfavor of fate, or through the meagre endowment of a stepmotherly nature, this will were entirely lacking in the resources to carry aim, if with its greatest effort nothing were accomplished by it, and only the good will left over (to be sure, not a mere wish, but as the mobilization of all means insofar as they are in our control): then it would shine by itself like a jewel, neither add to or subtract anything from this worth.<sup>102</sup>

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<sup>100</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 14.

<sup>101</sup> Goldsworthy J *The Sovereignty of Parliament History and Philosophy* (1999) 1.

<sup>102</sup> Kant *Groundwork for the Metaphysics of Morals* 10.

It follows from the foregoing that, there arises the danger of absolutism if there will be no instrument to check excesses of parliament. It is for this reason that Goldsworthy appreciates that the doctrine of parliamentary sovereignty has been challenged in modern times. Goldsworthy asserts:

But recently the doctrine has been challenged, by judges and academic lawyers in the United Kingdom, New Zealand and Australia. Sir Robin Cooke, the President of the New Zealand Court of Appeal, was the first eminent judge to do so publicly. ... he came to the view that '[s]ome common law rights presumably lie so deep that even Parliament could not override them'.<sup>103</sup>

Allan, while commenting in support of the doctrine of parliamentary sovereignty contends that the likely abuse of the doctrine would be countered through resistance. Allan argues that if for instance in exercise of its legislative authority parliament enacts laws requiring the killing of all blue-eyed boys, such law, he argues, although legally valid, cannot be obeyed by any sane person.<sup>104</sup> The problem with Allan's contention is the presumption he develops to think that those in power cannot use the institution of law in furthering selfish ends. The mere fact that there is in force a validly enacted law requiring the killing of blue-eyed boys in itself poses a threat to the existence of human species. This negates the very purpose government was ordained; it matters not that the killing is done by a sane or insane person. Constitutionalists will be hesitant to Allan's defense of parliamentary sovereignty using the blue-eyed boys' theory on the basis that government can still use the law to limit individual liberties. In *Sleeklady Cosmetics Limited v County Executive, Transport, Infrastructure and Public Works County Government of Mombasa & Anor*<sup>105</sup> the Respondent had issued an enforcement notice under section 38 of the Physical Planning Act<sup>106</sup> requiring all buildings within the jurisdiction of the County Government of Mombasa to be painted with a white paint and Egyptian blue border on the edges and windows without any writing on the wall or canopy.

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<sup>103</sup> Goldsworthy *The Sovereignty of Parliament History and Philosophy* 2.

<sup>104</sup> Allan *The Sovereignty of Law* 2.

<sup>105</sup> [2020] eKLR.

<sup>106</sup> Cap 286 Laws of Kenya. Section 38(1) reads:

When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

The Petitioners moved to the constitutional court challenging the enforcement notice on grounds inter alia that the impugned notice violated its constitutional rights and in particular the right to own property of any description<sup>107</sup> within the republic of Kenya. The constitutional court issued conservatory orders barring, in the interim, enforcement of the impugned notice. It is important to note that the impugned notice in the *Sleeklady Cosmetics Limited* case was given pursuant to a colonial order under the City By-Laws of 1968 despite the existence of the Constitution of Kenya 2010 which guaranteed a right to ownership of property of any description. This underscores the argument earlier raised above that it matters not that an otherwise bad law is enforced by an insane person as espoused by Allan. Governments are managed by individuals with antagonistic feelings and the being in force of a draconian law will legitimize government exigencies in gross negation of the very purpose for which government was ordained.

Apparent therefore, is that there ought to be in a polity some higher and supreme law, upon which all other laws and institutions of government derive their authority. A keener look at Allan's defense of parliamentary sovereignty contradicts his own analysis of the British Constitutional dispensation. He writes in this regard:

And the principle of legality, that no public official (any more than a private citizen) should be able to exercise coercion without proper constitutional authority, is as much a basic precept of the British Constitution as an expression of the central idea of constitutionalism.<sup>108</sup>

Drawing from Allan's disposition above is the paramountcy of constitutional authority and so being the case, in exercise of its legislative authority, parliament must as well be bound by the ideals of the constitution. Whereas it is not the object of this thesis to discuss the merits or demerits of parliamentary sovereignty, it must be stated that the core hypothesis of this thesis is focused on ways of limiting governmental power as an aspect of constitutionalism. In order to ordain the idea of limited government as an aspect of constitutionalism, emphasis has to be put in exercising government power in accordance

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<sup>107</sup> Article 40(1) of the Constitution of Kenya 2010 regarding the protection of the right to property states: Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property, (a) of any description; and (b) in any part of Kenya.

<sup>108</sup> Allan *The Sovereignty of Law* 1.

with the law and in this respect, the author agrees with Allan while commenting on the functions of the law in this regard:

The law is a shield against arbitrary power, whether wielded by influential private persons or organizations, bent on pursuit of their private interest, or by public officials, committed to conceptions of the public good that may be highly contentious or involve incidental costs that are hard to justify. By confining our conception of law to the regular enforcement of publicly promulgated rules, even when they have very damaging (and perhaps unforeseen) consequences for the vulnerable persons or unpopular minorities, we deprive the principle of the rule of law of much of its power as a shield against oppression.<sup>109</sup>

Allan's discourse raises two pertinent issues to wit; one it reinforces the idea of paramountcy of the law in social ordering and two, by alluding to the fact that law is a shield from oppression – supposed or otherwise – from both private citizens' affairs and public officials', it introduces the concept of horizontality of the law and most particularly, the constitution. The concept of supremacy of the law, and for purposes of this thesis: that the constitution, is the starting point to the discussion of judicial review mechanism. The judicial review powers of the judiciary cannot flourish in jurisdictions without a supreme law that binds all governmental organs and or institutions as well as all persons. It is for this reason that most modern constitutions begin with proclamations of them being the supreme laws of the state at the introductory clauses.<sup>110</sup> It is for this reason that the judiciary, in jurisdictions with absolute parliamentary sovereignty doctrine, are crippled in the sense that such judiciaries are de-whipped of powers to scrutinize parliamentary enactments for want of a superior law to statutes. This precarious position obtains because all Acts of Parliament are said to be *in pari delicto* standing and none is superior to the other unless the subsequent Act expressly repeals the former in cases where they have overlapping provisions. In constitutional democracies, this mischief can easily be cured by resorting to the provisions of the Act which promote the objects and principles

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<sup>109</sup> Id at 2.

<sup>110</sup> Article 2(1) of the Constitution of Kenya, 2010 is unambiguous: This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.

The South African 1996 and Ghanaian 1992 (1996) Constitutions adopt similar phraseology as Kenya's to wit: Article 2 of Republic of South Africa's 196 Constitution reads "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled." The Ghanaian Constitution of 1992 (1996) claims its supremacy in Article 1(2) thus, "This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

embodied in a constitution.<sup>111</sup> In such jurisdictions, courts will often be ready to pronounce the supremacy of the constitution as against parliamentary legislation.<sup>112</sup> It has already been argued that constitutions, of whatever forms, were invented to check on attendant excesses of consolidated powers to the government. Parliament, being part of the very government whose powers were meant to be checked by the constitution, must not be given unchecked powers as there is likely to result in arbitrariness in government through parliamentary absolutism.

#### 4. Horizontality of the Law

Horizontality of entrenched ethics in particular and constitutional law in general has attracted contestation from both academics and legal practitioners. Legal practitioners and scholars have debated overtime whether the constitution applies to the affairs private individuals. Dealing with the issue of horizontality of rights in the United States, Stephen Gardbaum proposes a proper appreciation of four *fundamental threshold questions*. Gardbaum argues that the degree of horizontality is affected by different answers to the fundamental threshold questions. Gardbaum formulates the threshold questions in the following manner:

(1) Do Constitutional rights apply to actions of the courts, or only to the legislature and the executive branches of government? (2) Is private law subject to the Constitution, or only public law? (3) Is common law subject to the Constitution, or only enacted law? (4) Does the constitution apply to litigation between private individuals, or only to litigation between a private individual and the State?<sup>113</sup>

It appears, according to Finnis, that the answer to the foregoing questions lies in the judicial interpretation of the text of an enactment to determine the scope and extent of underlying obligations. In Germany, the Federal Constitutional Court and Federal Administrative Courts have developed the doctrine of “third-party effect of constitutional

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<sup>111</sup> Article 40(2) of the Constitution of Kenya 2010:

Parliament shall not enact a law that permits the State or any person-

- (a) to arbitrarily deprive a person of property of any description or an interest in, or right over, any property of any description; or
- (b) limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated under Article 27(4).

<sup>112</sup> This is the rationale of the petition and the ruling in *Sleeklady Cosmetics Limited v County Executive, Transport, Infrastructure and Public Works County Government of Mombasa & Anor* [2020] eKLR. This is countenanced by the provisions of Article 40 as read with Article 2 of the Constitution of Kenya, 2010.

<sup>113</sup> Gardbaum ‘The “Horizontal Effect” of Constitutional Rights’ 390.

rights”. Under the doctrine, although primarily constitutional rights apply to government action only, they have a direct effect on private law as such indirectly affect private actors whose legal relations are regulated by private law.<sup>114</sup> Kenyan courts seem to have embraced the Irish and German approaches. For instance, in the case of *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Scheme & 3 Others*, Lenaola J (as he then was) observed on the application and binding nature of the Constitution in the following manner:

Looking at the provisions of Articles 2(1), 19(3) & 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. ... The Bill of Rights is therefore not necessarily limited to a State Organ as argued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and in saying so, I am alive to the provisions of Article 2(1) which provides, ‘this constitution is the Supreme Law of the Republic and binds all persons....’<sup>115</sup>

Raz gives a clearer explanation of the importance of resorting to courts to give interpretations of legal enactments. He argues that whereas private individuals are possessed of same capability to interpret legal situations, their views are mere opinion not binding on anyone. Raz states in this respect in the following terms:

The difference between a court and a private individual is not merely that courts are provided with better facilities to determine facts of the case and the law applying to them. Courts have power to make an authoritative determination of people’s legal situations. Private individuals may express their opinion but their views are not binding.<sup>116</sup>

To properly conceptualize horizontality, it is plausible to draw analogy from the right to health under the Kenyan legal framework for instance. The Constitution guarantees every person the right to ‘highest attainable standard of health which includes the right to health care services, including reproductive health.’<sup>117</sup> For a person to properly enjoy the benefit of this guarantee, the Health Act<sup>118</sup> imposes certain obligations on the health care service providers. One, the service providers must give the user sufficient information and two, obtain the user’s informed consent before administering a health care service. These are

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<sup>114</sup> Id at 403.

<sup>115</sup> High Court Constitutional Petition No. 65 of 2010 Nairobi. See n 40 above for the detailed explanation provided by the Court.

<sup>116</sup> Raz J *The Authority of Law* 108.

<sup>117</sup> Article 43(1)(a) of the Constitution.

<sup>118</sup> Act No. 21 of 2017. Section 8 requires health care service providers to inform the user or the guardian of the user, the user’s health status, treatment options available, benefits, risks, and consequences

invariable legal obligations a service provider cannot ignore. However, the following scenario may present itself: an expectant mother visits a health care service provider, she is attended to by unqualified officer or one without requisite experience. No information is passed to her nor does the officer obtain her informed consent as per the law. A medical procedure is administered haphazardly without due regard to legal requirements. In the process, the mother suffers irreparable harm including loss of reproductive ability. The resulting medico-legal issues give rise to underlying debates on horizontality of entrenched ethics. The legal issues revolve around whether a prosecution of the ensuing breaches will be through a constitutional court or ordinary tortious liabilities.<sup>119</sup> In *Gladwell Ikinya & Anor v Aga Khan Hospital*<sup>120</sup> the Constitutional Court observed:

From the contents of this Petition I have no doubt it raises pertinent issues of violation of rights and fundamental freedoms and I find as such this court is the proper forum to adjudicate this matter. I have carefully looked at the prayers and the grounds upon which the petition is premised on and from the same, I find that it will be absurd for this Court to uphold the contention that the Respondent do, that the Petition is inclined more on tortious liability as against violation, infringement, denial and or threat to rights and fundamental freedoms. I find that such theory is gravely stale, and an outright misapprehension of the Petition by the Respondent and that the same cannot be allowed to stand.<sup>121</sup>

Whereas the abstract problem has two enforcement approaches, a prosecution by the Constitutional Court is not too remote. An incorrect application of the doctrine of constitutional avoidance would suggest that the only approach is a tortious claim as against the service providers. This approach is wrong because it presumes the jurisdiction of a constitutional court over constitutional violations by the service providers. One, article 43(1) (a) guarantees highest attainable standard of health. Two, the rights guaranteed under article 43(1)(a) cannot be beneficial to the extent required, if the user is not sufficiently informed. The Constitution guarantees the right to information<sup>122</sup> generally and the right to information for consumers<sup>123</sup> (of goods and services) in particular. A

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associated with each option, user's right to refuse recommended medical options. Section 9 requires health care service provider to obtain user's informed consent unless as exempted under the Act.

<sup>119</sup> Nolan, A. 'The Doctrine of Constitutional Avoidance: A Legal Overview' *Congressional Research Overview* (2 September 2014) 7-5700 [www.crs.gov](http://www.crs.gov) R43706.

<sup>120</sup> Nairobi High Court Petition No. 97 of 2019 [unreported].

<sup>121</sup> Id, paragraph 28.

<sup>122</sup> Article 35(1)(b) of the Constitution.

<sup>123</sup> Article 46(1)(b) of the Constitution. See *Okeyo Omwansa George & Anor v Attorney General & 2 Others* [2012] eKLR, (Pet. No 126 of 2011), where the Court held thus:

denial of these rights cannot be scaled down to a mere tortious liability incapable of enforcement in the purview of constitutional rights. The breaches violate the core of attaining the right to “highest attainable standard of health” by the user of the health care service. The development of the doctrine of “constitutional tort action” or “third-party effect of constitutional rights” means non-state actors are constitutionally liable for violations and or breaches of constitutional provisions. In the *Gladwell Ikinya* case, the Petition arose out of a medical negligence by the Respondents and the Petitioners approached the constitutional court claiming violation of Articles 35, 43 and 46 of the Constitution of Kenya 2010. The Respondents raised a preliminary objection on grounds similar to constitutional avoidance and while dismissing the same, the Constitutional Court pronounced:

The upshot is that the preliminary objection that this court lacks jurisdiction to hear and determine this petition fails. I find and hold that this Honorable Court has jurisdiction to hear and determine this Petition. The Respondent’s preliminary objection on the issue of jurisdiction is dismissed with costs to the Petitioner.<sup>124</sup>

In his discussion of practicable reasonableness, Finnis outlines the obligations created by sections 14(2) and 62(1A) of the English Sale of Goods Act which demand sellers to supply goods of merchantable quality. According to Finnis, where there are permissible variants to these obligations, the same should not obscure the legally prescribed invariants:

But all the potential variations should not be allowed to obscure from our view the invariant elements which the law stipulates... and if they do have this duty, the consequences of failure to conform to it, are well-defined and, legally, inevitable.<sup>125</sup>

The doctrine of judicial avoidance was traditionally developed to check the court’s judicial review powers especially in invalidating statutory enactments. A gulf ought to be created between the court’s powers to protect the integrity of the constitution and the original intent of constitutional avoidance. Secondly, even in judicial review, the application of constitutional avoidance should be done with a lot of skepticism especially in jurisdictions that have entrenched judicial review in their constitutional order. In the United States,

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Consumers require sufficient and accurate information to enable them assess the nature and qualities of services necessary to enable them gain full benefit of legal services. In order to generate efficient market outcomes, consumers must know what is available in order to make informed choices. This is the right guaranteed under Article 43 of the Constitution.

<sup>124</sup> Nairobi Petition No. 97 of 2019 [unreported] paragraph 29.

<sup>125</sup> Finnis *Natural Law and Natural Rights* 310.

where the doctrine developed, judicial review resulted from a constitutional interpretation in *Marbury v Madison*<sup>126</sup> and as such, is not explicit in the United States Constitution. Consequently, the scope of judicial review powers of the United States courts cannot be compared with the Kenyan courts which have their judicial review powers entrenched in the Constitution. To avoid adjudicating constitutional disputes on the basis of constitutional avoidance is therefore defeatist of constitutionalism.

The Ghanaian Constitution of 1992 innovatively creates horizontal obligations through its provisions on duties imposed on the Ghanaian citizens. Some of these duties include to uphold and defend the Constitution, respect for rights and welfare of other persons, protect and preserve public property and expose and combat misuse and waste of public funds and property, and honest declaration of income and tax obligations.<sup>127</sup> To the extent that these duties apply to every citizen and enjoy constitutional impetus, they become an innovative design to hold persons exercising state power individually accountable to uphold rule of law and thereby birth limited government. The framers further gave prominence to the duty to uphold and respect the law<sup>128</sup> before proceeding to enumerate other duties. Once the citizens fulfil this duty, then respect and obedience of the law is given sacrosanct status in organizing social behaviour. The sanctity of the law, where all governmental and human actions are guided by the law, forms the crux of this study. Limitation of governmental powers and its accountability to the people is at the core of constitutionalism and the concept of the rule of law. In the subsequent discussion, this study will build on what Fombad outlines as core elements of constitutionalism to argue for the place of ethics in ordaining limited government.

## **5. Elements of Constitutionalism that enhance Ethical Governance**

In the introductory paragraphs to this chapter, it was observed that in order to limit government from becoming absolutist, and thereby subvert from the objective for which it was ordained, it was necessary to have a constitution. However, the mere having of a constitutional document is not a sufficient guarantee from governing turning absolute. The

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<sup>126</sup> 5 US 137 (1803).

<sup>127</sup> Article 41(a)-(k) of the Constitution of Ghana 1992 (rev. 1996).

<sup>128</sup> Article 41(b) of the Constitution of Ghana.

concept of limited government, or constitutionalism, involves designing constitutional documents with attendant minimum core elements, the absence of which have a greater tendency for creating tyranny and anarchy. It must be stated at the outset that even the existence of these basic elements in a constitutional document does not guarantee limited government but make its realization more obtainable. The question is therefore, what mechanisms must further be put in place to ensure that even with the entrenchment of these core elements, constitutionalism is realized? Fombad identifies key elements of constitutionalism that must be entrenched in a constitutional document that help to advance constitutional practice. This study therefore, uses Fombad's irreducible elements of constitutionalism in discussing how ethics and the need for ethical leadership is a salient aspect of modern day limitation of exercise of governmental powers. The basic elements, although not exhaustive, are discussed in detail below.

### **5.1. Fundamental Rights and Freedoms**

Human rights have become the bromide of constitutional law in almost every civilized nation.<sup>129</sup> The international community of states has belaboured developing human rights instruments used as a yardstick for evaluating a government's commitment to fulfilling the well-being of its citizens. Consequently, a broad-based moral spectrum used to judge the conferment of benefits and treatment of the citizenry by states has since emerged.<sup>130</sup> The question of philosophical consideration for purposes of this study is how adoption of fundamental rights and freedoms helps in fashioning limited governance hence ethical leadership. Wacks's development of human rights has established an ethical relationship within the community of states. According to Wacks:

Moral questions pervade our lives; they are the stuff of political and hence legal, debate. Moreover, since the establishment of the United Nations, the ethical tenor of international relations, especially in the field of human rights, is embodied in an increasing variety of international declarations and conventions, many of which draw on the unspoken assumption of natural law that there is indeed a corpus of moral truths that, if we apply our reasoning minds, we can all discover.<sup>131</sup>

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<sup>129</sup> Fombad 'The Constitution as A Source of Accountability' 7.

<sup>130</sup> Wenar L 'The Nature of Rights' 33(3) (2005) *Philosophy & Public Affairs* 223-252.

<sup>131</sup> Wacks R *The Philosophy of Law: A Very Short Introduction* (2006) 1.

Fundamental rights and freedoms, especially in jurisdictions with entrenched bills of rights, limit governmental actions to protect against arbitrariness. As observed in preceding paragraphs, the biggest fear immediately following the inception of government is the method to hold government to account and ensure it performs the functions for which it was ordained. Recognition of fundamental rights and freedoms in constitutions implies that bills of rights form an integral part of social ordering and government action is limited to the extent allowed by the rights and freedoms so recognized.<sup>132</sup>

In considering the place of fundamental rights and freedoms in entrenching limited government, it is pertinent to consider specific rights recognised in most constitutions. Article 31 of the Constitution of Kenya 2010 guarantees the right to privacy of every person. Prior to the 2010 constitutional dispensation, Kenyans lived in perpetual fear of arbitrary executive action; the executive usurped the people's sovereignty and subjected them to live at its mercy. The entrenchment of the Bill of Rights was intended to cure these historical injustices. In *Robert K Ayisi v Kenya Revenue Authority & Anor* the Court stated as follows:

It may well be that Kenyans wanted to break away from the past in which the executive and its apparatus could arbitrarily break into people's premises at any time of the day or night and cart away people's properties in violation of inalienable human rights and without recourse to due process whatsoever. To therefore deliberately set out to strangle the constitutional right entrenched in the Bill of Rights would be inimical to the spirit of the Constitution.<sup>133</sup>

The Constitution of Kenya is emphatic that the Bill of Rights is an integral part of the country's democratic aspirations and forms the framework of socio-economic and cultural policies.<sup>134</sup> The Court in the *Robert K Ayisi* case above while considering the right to privacy as a recognition of the right to human dignity and freedom of a person restated this constitutional position while citing as supporting authority the case of *Samura Engineering Limited & 10 Others v Kenya Revenue Authority* in which it was held:

The right to privacy enshrined in our constitution includes the right not to have one's person or home searched, one's property searched or possession seized... it has been said that existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state.<sup>135</sup>

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<sup>132</sup> See Article 20(2) of the Constitution of Kenya, 2010.

<sup>133</sup> [2018] eKLR.

<sup>134</sup> Article 19(1) of the Constitution of Kenya, 2010.

<sup>135</sup> [2012] eKLR.

Further constitutional safeguards against governmental exigencies and the use of the Bill of Rights as a safeguard for limited government in the Kenyan Constitution can be found in protection of proprietary rights. Article 40 of the Constitution guarantees both individual and collective ownership of property of 'any description' and 'in any part' of the country and goes further to restraining parliament from enacting laws that purport to arbitrarily deprive people of property rights.<sup>136</sup> The state is further restrained from arbitrarily depriving any person of property rights unless under specified grounds and where such grounds accommodate justifiable deprivation, the affected person shall be compensated.<sup>137</sup> Besides the foregoing, further constitutional guarantees against arbitrary governmental exigencies over individual liberties aimed at promoting the rule of law are to be found in Article 49, subsection 1(f)(i) and (ii) of the Constitution of Kenya, which protects an arrested person from being unreasonably held in custody for a longer period from the time of arrest without being arraigned in court.<sup>138</sup>

The precursory constitutional provisions give examples of how fundamental rights and freedoms contained in a number of bills of rights in modern constitutional architecture are used to limit governmental violation of individual liberties. The recognition, protection and promotion of these rights form an integral part of contemporary adherence to the idea of the rule of law which is an intrinsic part of constitutionalism. Finnis argues that a careful consideration of rights-talk has the consequence of influencing social needs. Finnis writes:

The strength of rights-talk is that, carefully employed, it can express precisely the various aspects of a decision involving more than one person, indicating just what is and is not required of each person concerned, and just when and how one of those persons can affect those requirements.<sup>139</sup>

It is important however, to note that existence and entrenchment of these fundamental rights and freedoms is not an end in itself; the need for ethics and ethical leadership provides a deontological perspective for respect, protection and enforcement of these fundamental guarantees. Finnis argues that the concept of rights is a contemporary

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<sup>136</sup> Article 40(1)(a) and (b) of the Constitution of Kenya, 2010.

<sup>137</sup> Article 40(3)(a) and (b)(i) and (ii) and Article 40(4) of the Constitution of Kenya 2010.

<sup>138</sup> The Constitution provides that an arrested person must be arraigned within 24 hours of being arrested and if the 24 hours lapse outside court hours or ordinary court day, within the next ordinary court day.

<sup>139</sup> Finnis *Natural Law and Natural Rights* 210-211.

instrument for discussion of “what is just” from the view point of those to whom the claims are owed.<sup>140</sup>

## 5.2 Separation of Powers

The necessity of government was primarily founded on the need to protect mankind from extinction. The need for government is essentially founded on the notion of social imbalances in access to resources for survival and self-preservation of mankind.<sup>141</sup> The very social imbalances that existed in pre-civic life that informed the formation of government became mankind’s new challenge since there was a temptation of those charged with executing state power to abuse and misuse those powers. Separation of powers and checks and balances have long been viewed as the constitutional mechanism of ordaining limited government.<sup>142</sup> Separation of powers is founded on the philosophical idea of having distinctive tripartite functions of government with each function performed by distinct and independent arms of government. According to Fombad, this tripartite arrangement of governmental functions includes legislative functions discharged by the legislature, executive acts performed by the executive and magistracy performed by the judiciary.<sup>143</sup>

Like other principles of constitutionalism, the idea of separation of powers, or the designing of constitutions to restrain the exercise of state power by different arms of government, does not in itself guarantee limited government. Most modern constitutional features and designs have inherent ethical considerations that help sustain the ability of the separation of powers to effectively hold government and the exercise of governmental powers to account. One, separation of powers requires that a person can only hold office in one of the arms of government. Two, that neither arm should encroach on the powers of the other arms and three, that no arm of government should exercise the functions of the other. According to Fombad, separation of powers is premised on the need to promote

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<sup>140</sup> Id at 204.

<sup>141</sup> Kangu ‘Social Contractarian Conceptualisation of the Theory and Institution of Governance’ 22.

<sup>142</sup> Fombad CM ‘The Separation of Powers and Constitutionalism in Africa: A Case Study of Botswana’ (2005) 25 *Boston College Third World Law Journal*.

<sup>143</sup> Id, 306.

the rule of law, accountability, subverting conflicts of interest in the execution of state power, promoting efficacy and balancing of interests.<sup>144</sup>

Central to the concept of separation of powers in promoting ethics and ethical leadership is the principle of checks and balances. The proponents of separation of powers as a means of ordaining limited government did not contemplate a rigid exercise of state power by the separate arms of government; rather, one where each arm checks on the potential of excesses and/or arbitrariness of the other. To ensure adherence to the rule of law, each arm of government must be equipped with sufficient power to hold the other arms to account. Madison writes in this regard:

From these facts by which Montesquieu was guided it may clearly be inferred, that in saying “there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates” or “if the power of judging be not separated from the legislative and executive powers,” he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.<sup>145</sup>

The recognition of partial agency among the three arms is premised on the fact that whereas particular functions belong to one arm in the first instance, supervision of judicious exercise of such powers becomes an integral part of other arms, thus promoting restrained exercise of state power and therefore ensuring the idea of limited exercise of governmental power.<sup>146</sup> In the absence of these inbuilt mechanisms, the mere existence of separation of powers will not restrain executors of state power from turning into tyrants and thereby subverting the purpose for which government was ordained. Separation of powers must therefore be qualified by the apportionment of negative powers to each arm so that there is partial interference of the other arms in order to subvert arbitrariness. This possession of negative power is what modern constitutional philosophy refers to as the system of checks and balances.<sup>147</sup>

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<sup>144</sup> Id, 307.

<sup>145</sup> Madison J *The Federalist* 325-326.

<sup>146</sup> Fombad ‘The Separation of Powers and Constitutionalism in Africa’ 313.

<sup>147</sup> Id at 312. See also Wacks, *Philosophy of Law* at 8, where he states:

Locke advocates a limited form of government: the checks and balances among branches of government and the genuine representation in the legislature would, in his view, minimize government and maximize individual liberty.

### 5.3 Judicial Independence

Judicial independence is the hallmark of constitutionalism in constitutional democracies. Protection and safeguarding of the salient elements of constitutionalism such as the rule of law, human rights, and separation of powers cannot be guaranteed in the absence of entrenched judicial independence. In instances where there is defective separation of powers, the judiciary often plays a subservient position to the legislature and the executive. The judicial arm of government is supposed to offer redress to the citizenry in instances of constitutional breaches. In jurisdictions that adopt constitutional supremacy in governance, the existence of an effective judiciary is an effective medium to guarantee good governance. Nolan, while discussing the doctrine of constitutional avoidance, approaches the idea and importance of judicial independence in the following manner:

Because the political branches may not be expected to always adhere to the constitutional limitations placed on each body, as these branches are most directly responsive to the often temporary whims of the people, the federal judiciary established under Article III was deliberately designed by the Framers of the Constitution to be a “countermajoritarian” branch that interpreted the written Constitution and protected its principles. The Constitution did this by “insulating the federal judiciary” from potential pressures, from either the political branches or the public, which could potentially “skew the decision making process or compromise the integrity or legitimacy of federal court decisions.”<sup>148</sup>

The ethical considerations regarding judicial independence include the creation of permanent tenure of office in which judicial personnel stay in office during their “Good Behaviour” and enjoy protection of compensation.<sup>149</sup> Another salient feature of judicial independence is the guarded manner of appointment of judges. Whereas for instance, the executive appoints judges, the same can only be based on recommendations of an independent judicial service commission.<sup>150</sup> Further, the Constitution of Kenya 2010 is emphatic in its recognition that judicial authority can only be exercised in accordance with the Constitution and judicial officers in exercise of judicial authority are not subject to the direction or control of any person or authority.<sup>151</sup> These are the major pillars of judicial

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<sup>148</sup> Nolan ‘The Doctrine of Constitutional Avoidance’ 3.

<sup>149</sup> Hamilton A *The Federalist No. 78* at 437:

[C]ourts were designed to be an intermediate body between the people and the legislature in order ... to keep the latter within the limits assigned to their authority.

<sup>150</sup> See Article 166 of the Constitution of Kenya, 2010. In the case of the Chief Justice and Deputy Chief, such appointment must be approved by the National Assembly. See also Section 174 of the Constitution of South Africa, 1996.

<sup>151</sup> See Article 160 of the Constitution of Kenya, 2010.

independence that serve to ensure that judges work independently without fear of intimidation by the political branches of government.<sup>152</sup> Having considered the philosophy underlying the foundation of government, the existence of an effective, independent judiciary is inevitable in holding the political arms to account. Nolan underscores the importance of judicial independence in the following terms: 'an independent judiciary is needed to ensure that the core norms of our society, as embodied in our Constitution, are enforced against temporary populist interest'.<sup>153</sup>

Central to Nolan's contention above is the idea that the elected arms of the government possess a tendency of acting on expediency and taking shorter means to solve contentious matters. On the other hand, the judicial arm is expected to act on principle. As such, it is expected that it is the judiciary should play a key role in the organisation of government.

#### **5.4 Judicial Review**

The doctrine of separation of powers and the concept of judicial independence are closely intertwined with the doctrine of judicial review. The latter doctrine is the instrument upon which the judiciary relies to guard against the excesses of the political arms of government.<sup>154</sup> Judicial review is a pinnacle of constitutionalism whose existence in a constitutional document or practice ensures effective compliance with the letter and spirit of the constitution.<sup>155</sup> Modern constitutional architecture and design endeavour to entrench this doctrine in the text of the constitution. The Constitution of Kenya, 2010 explicitly confers on the High Court powers to issue an order for judicial review<sup>156</sup> as well as review constitutionality of other laws.<sup>157</sup>

The development of the doctrine occurred without much resistance even in developed democracies like the United States. In *Marbury v Madison*, the Supreme Court held that the very essence of a written constitution and judicial independence epitomises the judiciary's

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<sup>152</sup> Hamilton *The Federalist No. 79* at 440.

<sup>153</sup> Nolan 'The Doctrine of Constitutional Avoidance' 5.

<sup>154</sup> *Id.*, 3.

<sup>155</sup> Fombad 'The Constitution as a Source of Accountability' 10.

<sup>156</sup> See Article 23.3(f) Constitution of Kenya, 2010.

<sup>157</sup> See Article 165.3(d)(i) Constitution of Kenya, 2010.

unique role of invalidating actions of other branches that contravene the constitution.<sup>158</sup>

Discussing the resistance to judicial review in the United States, Nolan states:

Thomas Jefferson, in the wake of his presidency, disavowed the power of judicial review, arguing that “each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question”.<sup>159</sup>

Jefferson’s assertion holds the great temptation of ordaining tyranny and anarchy within government. It is thus understood that the tripartite arrangement of government is premised on the fears of unlimited power in government if consolidated in one hand. The social contractarian philosophical foundation of government recognizes the centrality of the people in governance and in it, it is contended that the people are the only source of legitimate power and from whom constitutions are derived.<sup>160</sup> In order therefore, to stop tendencies of governments becoming absolute, the constitutional architecture designates the people’s power in government into three equal arms and in each, the ability to check on the excesses of the other is assigned. Judicial review, is therefore, the instrument constitutions equip the judiciary with to check on the excesses of the other arms and in doing so, ensure tranquility and flourishing adherence to the rule of law. In a number of instances, the post 2010 Kenyan judiciary has played this watchdog role successfully. For instance, in *Okiya Omtatah Okoit v Communication Authority of Kenya & Others*,<sup>161</sup> the High Court directed the Communication Authority to restore television coverage to the interested parties. The respondents had shut down three media houses for broadcasting the mock-swearing-in of the country’s then opposition leader.<sup>162</sup> Also in *Okiya Omtatah Okoit v Central Bank of Kenya & Others*<sup>163</sup> the High Court nullified the award of currency printing tendered for by the Central Bank of Kenya. The Court held:

Having considered the issues raised in this petition it is my view and I hold that the manner in which the 1<sup>st</sup> Respondent awarded the tender to the 3<sup>rd</sup> Respondent did not meet the constitutional threshold in Article 227 of the Constitution that binds it to contracts for goods

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<sup>158</sup> 5 US (1 Cranch) 137, 177-78 (1803).

<sup>159</sup> Nolan ‘The Doctrine of Constitutional Avoidance’ 4.

<sup>160</sup> Madison *The Federalist No. 49*, 281-82.

<sup>161</sup> HCC Petition no 38 of 2018 (unreported).

<sup>162</sup> Kenya’s opposition leader was sworn-in as “people’s president” after months of protest over the disputed 2017 general election which the country’s Supreme Court nullified and ordered a repeat of the election. The opposition boycotted the repeat election.

<sup>163</sup> HCCC Petition no. 597 of 2017 [2018] Eklr.

or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.<sup>164</sup>

Despite the gulfing rift between judicial pronouncements in Kenya, the executive branch's disregard for court orders has dealt a major blow to advocates of constitutionalism in Kenya. This will form the discussion in chapter four. The important consideration to state at this part is that entrenched judicial review is a step closer to the realisation of constitutional ethics.

### **5.5 Guarded amendment of the Constitution**

The Constitution, it was observed in the discourse on emergence of the institution of governance, is the manifestation of the sovereign will of the people. This sovereign will is often expressed as the supreme law of the land binding on all other laws and organs of government.<sup>165</sup> The uniqueness of a constitution as against ordinary legislation is the fact that a constitution is the primary law regulating not only affairs of the governed and the governors, but also among the governed themselves. It is for this reason that most supreme constitutions start with the phrase "We the People" in their preambles.<sup>166</sup> Being such a unique law, whose primary purpose is to regulate government and hence subvert the likelihood of tyranny and anarchy, the manner in which it can be formulated and reformulated ought to be strictly guarded.<sup>167</sup> Modern constitutional architecture contains entrenched clauses that can only be amended by resort to the people through referendum.<sup>168</sup> The reason for this is to safeguard what constitutional philosophy calls the basic structure of the constitution from careless, malicious and selfish amendments.<sup>169</sup> Despite constitutions having inbuilt mechanisms for their formulations and reformulations,

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<sup>164</sup> [2018] eKLR, 224.

<sup>165</sup> Fombad 'The Constitution as a Source of Accountability' 12.

<sup>166</sup> See the preamble to the Constitution of Kenya, 2010. See also the Constitution of the United States of America. These constitutions begin their respective preambles with the phrase "We the People".

<sup>167</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 19-20.

<sup>168</sup> See Article 255 Constitution of Kenya, 2010, which states: (1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters (a) the supremacy of this Constitution; (b) the territory of Kenya; (c) the sovereignty of the people; (d) the national values and principles of governance referred to in Article 10(2)(a) to (d); (e) the Bill of Rights; (f) the term of office of the President; (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies; (h) the functions of Parliament; (i) the objects, principles and structure of devolved government; or (j) the provisions of this Chapter.

there are instances where they come into force through revolutions. The ethical issues for consideration especially within the judiciary is whether to recognise the legitimacy of the new order. In *Uganda v Commissioner of Prisons Ex parte Matovu*, the High Court pronounced itself in the following [ambiguous] terms:

We hold, that the series of events, which took place in Uganda from February to April, 1966, when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy. But deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed in the 1962 Constitution in particular for the removal of the President and the Vice-President from office. Power was seized by force from both the President and the Vice-President on the grounds mentioned in the early part of this judgment ... our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its *de facto* and *de jure* validity.<sup>170</sup>

The coming into force of a constitutional order by way of revolutions raises pertinent ethical questions of the legitimacy of such constitutional order. This can only be answered by considering the efficacy of the usurpation. The courts, when tasked with such issues, will ask whether the usurper was successful in taking full control of the government. Where the usurper took full control of the government, the courts will accept the new constitutional order and hold themselves as being bound by it. The position will, however, be different where the legitimate government tries to regain control from the usurper. This was the holding of the court in *Madzimbamuto v Lardner-Burker (PC)* where it was held:

The British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed. Both the judges in the General Division and the majority in the Appellate Division rightly still regard the "revolution" as illegal and consider themselves sitting as courts of the lawful Sovereign and not under the revolutionary Constitution of 1965. Their Lordships are therefore of opinion that the usurping Government now in control of Southern Rhodesia cannot be regarded as a lawful government.<sup>171</sup>

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<sup>169</sup> Fombad 'The Constitution as a Source of Accountability' 12.

<sup>170</sup> [1966] EA 514. See also Pakistan decision in *The State v Dosso* [1958] 2 PSCR 180; (1958) PLD 1 SC (PAK) 533:

It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order.

<sup>171</sup> [1969] 1 AC.

In conclusion under this head, two observations can be made. One, a controlled amendment process does not immunize the constitution from being amended. The philosophy of controlled amendment process is aimed at maintaining the integrity of the process. The idea of unamendable clauses is therefore fallacious as no generation of mankind can purport to make constitutional clauses that prevent their posterity from aligning them to their aspirations. Two, the mere fact of having a controlled amendment does not deter whimsical amendment nor does it mean a constitution must always come to force through a legally prescribed manner. The coming into force, or the frequency of reformulation, depends as well on the political and social arrangements that are predominant in the society at any given time.<sup>172</sup> One important thing to note, however, is the existence of a controlled process of amending the constitution gives prominence to the centrality of the people in governance and therefore, enhances the prospects of constitutionalism.

### **5.6 Existence of Democracy Supporting Institutions**

The philosophy informing the foundation of the institution of governance necessitated major paradigmatic shifts in the conduct of human affairs. According to Kangu, these paradigm shifts involved a deviation from unilateralism to a state of 'reason, deliberation, consultation and negotiations in decision-making processes.'<sup>173</sup> Kangu writes in this regard that:

This philosophy dictated a major shift in a number of very important respects; namely, from a life of solitude to that of society; from individualism to solidarity in community and society; from mere passion and negotiation in decision-making and the running of affairs.<sup>174</sup>

The rationale behind these paradigm shifts is based on the foundation of government itself characterised as mankind having surrendered individual powers into a common fund, and where decisions concerning the management of the powers so consolidated ought to be based on plurality and not unilaterally.<sup>175</sup> This is the logical conclusion on the need for entrenching democracy in the constitutional documents governing human relations in a polity. It calls for the reckoning that the mere entrenchment of the basic elements of

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<sup>172</sup> Wheare KC *Modern Constitutions* (1966) 17.

<sup>173</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 20.

<sup>174</sup> Id at 21. See also Sunstein R *Designing Democracy: What Constitutions Do* (2001).

<sup>175</sup> Klug H 'Constitutional Law' *Annual Survey of South African Law* 1 (1995); University of Wisconsin Legal Studies Research Paper No. 1553, accessible at: <https://ssrn.com/abstract=3525049> 2.

constitutionalism does not in itself guarantee constitutional practice.<sup>176</sup> There is eminent need for concerted efforts in constitutional-making processes to innovatively design constitutional principles that not only enhance, but also embed the culture of constitutionalism, especially in African countries where there is no documented evidence of the culture of constitutionalism. Fombad confirms this point:

There is a need to establish a solid basis on which a new constitutional culture would emerge that can transform the constitution into a “living document, building ownership around it, making it available and accessible to all in society and encouraging the people to deploy it in defence of their individual and collective rights”.<sup>177</sup>

The Constitution of South Africa 1996 has catalogued institutions supporting democracy under its chapter nine. These institutions are identified as the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality and the Independent Electoral Commission.<sup>178</sup> The Constitution of Kenya, 2010 adopts a slightly different approach from its South African counterpart in that whereas it recognizes these institutions in various articles, the guiding principles and general provisions relating to these institutions are consolidated under chapter fifteen. These entities are contained in Article 248 of the Constitution of Kenya: the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; the National Police Service Commission; the Auditor-General; and the Controller of Budget. Most important for purposes of this research is the recognition of the objects and authority of these institutions. The Constitution identifies the following objects:

The objects of the commissions and the independent offices are to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles, and promote constitutionalism.<sup>179</sup>

Borrowing from the South African Constitution, the Constitution of Kenya demands that in the execution of their functions, these institutions are subject only to the Constitution and

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<sup>176</sup> Id, 1-5.

<sup>177</sup> Fombad ‘The Constitution as a Source of Accountability’ 11.

<sup>178</sup> See Sections 181-195 of the Constitution of South Africa, 1996.

the law, and are independent and free from the direction or control by any person or authority.<sup>180</sup> To promote the independence of these institutions, the Constitution developed a rigid method of appointment of personnel to execute the functions of these offices and security of tenure is guaranteed, as well as protection of compensation.<sup>181</sup>

## **6. Obligations Brought by Entrenched Ethics**

Having discussed the concept of ethics in the spectrum of the basic elements of constitutionalism above, the next issue calling for the reckoning is the answer to the question what obligations are brought about by entrenched ethics and who is to observe them. This question is pertinent to this discussion in the sense that the mere constitutionalisation of the basic elements of constitutionalism, as earlier observed in this chapter, is not sufficient to inhere the culture of constitutional practice in a country. In the discussion on the theory of ethics, it was revealed that ethics, just like Kant's idea of "good will" calls for the motivation to exercise certain decision-making processes solely out of a sense of duty and obligation. It would therefore be plausible to argue that by recognising that the authority assigned to a state officer is a public trust which should be exercised in a manner *inter alia*, consistent with the purpose and objects of the constitution,<sup>182</sup> one inevitable conclusion is that the execution of governmental functions must solely be motivated by the desire to respect the commands of the law and not for ulterior motives.

The basic elements of constitutionalism discussed above, viewed through the optics of ethics, which has already been identified as a modern aspect of constitutionalism that inheres in the said elements, create certain obligations in relation to the conduct of governmental affairs. The starting point to this debate is having recourse to Kant's discourse on duties arising from relationships. Kant argues that the duty arising out of the concept of friendship is that one ought to love the other they consider as a friend, even if that other does not love back. Kant locates his argument in the context of reason, writing:

But rather reason commands, for itself and independently of all appearances, what ought to happen; hence actions, of which perhaps the world has up to now given no example and

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<sup>179</sup> See Article 249(1) of the Constitution of Kenya, 2010.

<sup>180</sup> See Article 249.2 Constitution of Kenya, 2010.

<sup>181</sup> See Article 250 Constitution of Kenya, 2010.

<sup>182</sup> See Article 73, especially 1((a)(i) of the Constitution of Kenya, 2010.

about which might, grounding in everything on experience, very much doubt even their feasibility, are nevertheless commanded unremittingly by reason; and e.g. pure honesty in friendship can no less be demanded of every human being, even if up to now there may not have been a single honest friend, because this duty, as duty in general, lies prior to all experience in the idea of a reason determining the will through a priori grounds.<sup>183</sup>

From the foregoing and having in mind the discourse on the necessity of government in society in the introduction to this chapter, it can be argued that the major obligation imposed on the executors of governmental power as well as their subjects is to act in such way that their reason for action is exclusively in adherence to the obligations born out of the basic elements of constitutionalism. The biggest problem, Kant concedes, is discerning between acting from a sense of duty and self-satisfaction, using the language of the 'thin veil' that disguises motive. Kant gives an example of a shopkeeper who in ordinary parlance is not supposed to overcharge a juvenile customer nevertheless decides not to disadvantage the inexperienced customer by having standardised prices for everyone. To Kant, this action of the merchant is not sufficient to conclude that it was done from duty or inclination as the same might have been for self-serving ends.<sup>184</sup> Closely following Kantian theory, Fombad confirms that merely having structured constitutions is not sufficient to curb government exigencies. The necessity of having limited governments requires designing of constitutional documents that not only uphold the basic elements of constitutionalism, but also ones that call leaders and the citizens to account. The need for ethics and by extension ethical leadership, it is contended in this study is one such contemporary constitutional feature that advances the cause of constitutional practice.

Ethics and ethical leadership create dual obligations. One, the need for both the governors and the governed to strictly adhere to the rule of law. As was discussed in the preliminary paragraphs of this chapter, the twin institutions of government and the law were introduced to subvert the danger of anarchy in society and therefore save the human species from extinction. Living a constitutional culture is a moral obligation imposed both on executors of state power and the people in honouring the social contract, with Wacks observing that:

The second law of nature is that we mutually divest ourselves of certain rights (such as the right to take another person's life) so as to achieve peace. This mutual transferring of rights

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<sup>183</sup> Kant *The Groundwork for the Metaphysics of Morals* 22.

<sup>184</sup> Id, 13.

is a contract and is the basis of moral duty. [We must be] under no illusion that merely concluding this contract can secure peace. Such agreements need to be honored.<sup>185</sup>

The second obligation created by entrenched ethics is the need for citizens to hold executors of state power to account. Most modern constitutions delegate this obligation to the people by recognizing the centrality of the people in governance through the right of universal suffrage.<sup>186</sup> The ballot process has been recognised as the most formidable way that people participate in holding leaders to account. Indeed, the integrity of the ballot process was the key rationale informing the Court of Appeal's decision in *EIBC v Maina Kiai*.<sup>187</sup> This case makes explicit that the Constitution of Kenya 2010 has charged the people with the indomitable will to determine the manner with which they want to be governed. The preponderance of the ballot as the integral mechanism for the people to peacefully and directly form constitutional government can well be appreciated in Calhoun's articulation of the importance of universal suffrage:

The same constitution of our nature which leads rulers to oppress the ruled, – regardless of the object for which government is ordained, – will, with equal strength, lead the ruled to resist, when possessed of the means of making peaceable and effective resistance. Such an organism, then, as will furnish the means by which resistance may be systematically and peaceably made on the part of the ruled, to oppression and abuse of power on the part of the rulers, is the first and indispensable step towards forming a constitutional government. And as this can only be effected by or through the right of suffrage.<sup>188</sup>

For universal suffrage to enable the people properly to call those exercising state power to account, it must be jealously and zealously insulated from interference. Similarly, the people – the users of the right – must also be properly enlightened to concisely conceptualise their individual and societal interests. So done, universal suffrage, argues Calhoun, suffices in giving electors effective control over the elected. In Calhoun's words:

When this right is properly guarded, and the people sufficiently enlightened to understand their own rights and the interests of the community, and duly to appreciate the motives and conduct of those appointed to make and execute the laws, it is all-sufficient to give to those who elect, effective control over those they have elected.<sup>189</sup>

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<sup>185</sup> Wacks *The Philosophy of Law* 7.

<sup>186</sup> See Constitution of Kenya 2010: Article 1(2) concerns the direct exercise of sovereign power; Article 10(2)(a) regulates national values and principles of governance, including participation of the people; and Article 38(2) as read with Article 81(d) recognises the right and need for universal suffrage.

<sup>187</sup> Civil Appeal 105 of [2017] eKLR.

<sup>188</sup> Calhoun *Disquisition on Government* 7.

<sup>189</sup> *Ibid.*

In this study it is argued that the ballot process is not the primary and the end itself in fashioning limited governments. Instead, there exist inherent and external factors that interfere with the ability of the ballot process to ordain constitutional governments. The ability of the people to utilise the ballot process to hold the elected to account ends at the voting stage. Indeed, where the integrity of the ballot process is compromised, uncertainty ensues as to whether those who come to power having subverted the will of the people will have the moral obligation to respect and adhere to the rule of law and thereby exercise restrained execution of state power. Another limitation of the ballot is where a majority with common interests mobilise to wrestle power from the minority's interests. In these instances, the ballot process is unlikely to achieve its intended objective of clothing the people with sufficient power to check on the excesses of the agents they relinquish their power to.<sup>190</sup>

## **7. Conclusion**

The irresistible conclusion this chapter makes is that there is and shall never be a perfect constitutional document. In Calhoun's words, the constitution-making process 'is one of the most difficult tasks imposed on man' and to form a constitution capable of wholly performing the functions for which it was formed, which is, effectively restraining the government from turning absolute, Calhoun contends, 'has thus far exceeded human wisdom, and possibly ever will.' Constitution-making processes are therefore not aimed at fashioning impulsive instruments; rather they should aim at addressing the perpetually mutating social needs of man. As Calhoun succinctly puts it: 'man is left to perfect what the wisdom of the infinite ordained, as necessary to preserve the race.'<sup>191</sup>

Constitution-making processes must, therefore, develop mechanisms that allow for deliberate and sufficient space to accommodate conspicuous dialogue between the governed and the governors as well as all competing interests in society. The need for constitutionalism in the execution of state power is premised on the quest for good governance. Constitutional ethics requires that governance should be based on a fair and

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<sup>190</sup> Calhoun *Disquisition on Government* 8-9.

<sup>191</sup> *Ibid.*

transparent system anchored on the parameters laid down in the constitution. The prospects of embedding the culture of constitutional practice faces great challenges as leaders who come to power devise strategies and policies that allow them to hold on to power to the detriment of those who elected them. Constitutional ethics, it is suggested, is a step towards entrenching a culture of constitutional practice in solving the enduring quest for good governance. This chapter has considered the place of constitutional ethics in fashioning limited governance. The next chapter proceeds to provide an overview of the legal and institutional framework for ethical leadership in Kenya. Kenya has a plethora of statutes aimed at supporting ethical leadership, yet ethical leadership remains elusive.

## CHAPTER THREE

### LEGAL AND INSTITUTIONAL FRAMEWORK

#### 1. Introduction

The purpose of this chapter is to give an overview of the legislative and institutional framework for ethical leadership in Kenya as opposed to an in-depth analysis of the efficacy or otherwise of the system. A critique of the legal and institutional framework is reserved for chapter four which will also engage comparatively with international best practices. In this regard, the present chapter will highlight the existing constitutional, legislative and customary framework aimed, at least, at arresting government absolutism. It must however, be noted at the onset that the numerous factors comprising the legal and institutional framework discussed here is not exhaustive.

As revealed in chapter one, Kenya has a plethora of enactments aimed at embedding the culture of accountable governance. These enactments are supported by a very progressive and robust constitutional architecture with radical provisions that aim at entrenching the culture of constitutionalism in the country. Theoretically, Kenya has a stoic legal framework capable of solidifying constitutional practice; however, why the quest for good governance has continued to be so elusive remains an unresolved paradox. Juxtaposed against this situation is an elucidation of the legal and institutional framework that applies to Kenya.

A compelling starting point is to locate Kenya's domestic legislative framework within international treaties governing ethical leadership and the prevention of corruption or other illicit activities. The Constitution of Kenya 2010 recognizes international law as forming part of Kenya's legal system.<sup>192</sup> The scope of application of international law has however, not yet received sufficient recognition by the judiciary. This is true of a number of jurisdictions, but there is a growing trend towards international law being invoked in order to deal with issues of the seriousness of fraud and corruption in developing states where international treaties have been adopted to curb same. It is hoped that international law

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<sup>192</sup> Article 2(5) of the Constitution of Kenya 2010 recognizes general rules of international law as forming part of the law of Kenya while article 2(6) recognizes treaties or convention ratified by Kenya as forming part of the law of Kenya.

will obtain constitutional recognition in light of the fact that Kenya has voluntarily undertaken to comply with its international obligations.<sup>193</sup>

## **2. International obligations: United Nations Convention Against Corruption, 2003**

Important for purposes of this study is the United Nations Convention Against Corruption<sup>194</sup> which was adopted and entered into force in 2003 to deal with matters of corruption, money-laundering and economic crimes generally.<sup>195</sup> The preamble to the Convention gives a comprehensive overview of the negative impact of corruption on social stability and security. The Convention gives cognition to the fact that corruption seriously undermines institutions and values of democracy, ethics and justice as well as sustainable development and the rule of law. As articulated in the Convention, corruption has moved from being a local matter to being a transnational phenomenon impacting negatively on all societies and economies. The clarion call is that international cooperation is imperative in its prevention and control. All states bear the onerous responsibility of prevention and eradication of corruption and must act in concert in this regard. The Convention calls on States to have working relations with non-state actors such as civil societies, non-governmental and community-based organizations in combating corruption.<sup>196</sup>

There are three broad purposes of the Convention. The first is to promote and strengthen measures of preventing and combating corruption. The second is to promote, facilitate and support international cooperation and technical assistance in preventing and fighting corruption and asset recovery. The third is to enhance integrity, accountability and proper management of public affairs and property. The broad phraseology adopted by the Convention gives it a wide scope in application. The Convention applies to prevention, investigation, seizure, confiscation and return of proceeds of offences identified in it.<sup>197</sup>

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<sup>193</sup> Sundhya Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011) 188, where she argues that the liberal state form is regarded as 'the only acceptable form of government'. Given Kenya's active participation as an equal member in the international community of states, it is unlikely that the judiciary will be able to ignore international law for much longer.

<sup>194</sup> General Assembly Resolution 58/4 of 31 October 2003.

<sup>195</sup> Ratified by Kenya and gained force of law on 9 December 2003.

<sup>196</sup> Preamble, United Nations Convention Against Corruption.

<sup>197</sup> Articles 1 and 3.

As far as prevention of corruption is concerned, the Convention creates binding obligations on the part of state parties. These obligations must be implemented and enforced so as to combat corruption and ensure accountability. A brief analysis of these measures and obligations reveals ten contextual principles that must be adhered to: firstly, the Convention directs state parties to develop, maintain and implement effective, coordinated anti-corruption policies that promote participation of society and reflect principles of the rule of law, proper management of public property, integrity, transparency and accountability. In addition, state parties are required to ensure that a suitable legal framework is established to create and capacitate anti-corruption institutions that implement anti-corruption policies, as well as increase and disseminate knowledge about prevention of corruption. In order to achieve the objectives of these institutions, state parties are further directed to ensure effective independence of these institutions. Furthermore, the Convention requires state parties to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of their civil servants and other non-elected public officials. Such systems should be anchored in such principles as efficiency, transparency, objective criteria such as merit, equity and aptitude. A fourth principle is that state parties are required to develop codes of conduct for public officials that promote and enhance integrity, honesty and responsibility among public officers. Moreover, state parties are similarly required to establish effective systems of procurement based on transparency, competitive and objective criteria in decision-making that are effective in inter alia the prevention of corruption. The sixth principle is that the Convention directs state parties to develop necessary measures to enhance transparency in its public administration including organization, functioning and decision-making processes. State parties are also required to develop such measures that will strengthen integrity and prevent any chance of judicial officers being compromised, while simultaneously respecting the principle of judicial independence. Similar measures are expected to be developed for prosecutorial officials. As its eighth principle, the Convention obliges state parties to develop appropriate measures so as to enhance accounting and auditing standards within the private sector and where possible, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for non-compliance. The penultimate principle is that state parties are required to promote participation by non-

state actors such as civil society, non-governmental and community-based organizations in the prevention and fight against corruption and to raise awareness regarding the existence, causes and gravity of and threat caused by corruption to the public. Finally, the Convention directs state parties to formulate a comprehensive regulatory and supervisory legal regime for banks and non-banking financial institutions to effectively deal with money-laundering and related crimes. Such regime should enable those institutions to cooperate and exchange information at both the national and international levels.<sup>198</sup>

Chapter Three of the Convention identifies several acts which it directs states to adopt legislation and other measures in pursuit of criminalising specific acts such as bribery of both national public officials and foreign public officials, including officials of international organisations. States are also encouraged to criminalise embezzlement, misappropriation of funds and diversion of property in both the public and private sectors. Trading in influence, abuse of functions, illicit enrichment, concealment, money laundering as well as obstruction of justice are acts which the Convention encourages states to criminalise. The Convention similarly directs state parties to adopt legislation to establish corporate crimes. States are also obligated to establish legislation and other measures that make it possible for the freezing, seizure and confiscation of property or proceeds of crime. Notably, the Convention calls on states to ensure effective protection – by way of adopting legislation and other measures – to witnesses, experts and whistle-blowers who are supposed to give testimony for offences created in pursuance of the objectives of the Convention.<sup>199</sup>

As far as cooperation is concerned, states are directed to establish measures that allow for trans-border cooperation by authorities dealing with corruption, cooperation between offenders and law enforcement authorities as well as cooperation between national authorities and the private sector in combating corruption. Also required of states is establishment of specialised institution to deal with corruption and compensation for damages occasioned by corruption or corrupt activities.<sup>200</sup>

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<sup>198</sup> Articles 5 to 14.

<sup>199</sup> Articles 15 to 32.

<sup>200</sup> Articles 33 to 39.

Chapter Four of the Convention deals explicitly with international cooperation and encourages states to assist each other in investigations and proceedings relating to corruption. The Convention identifies mechanisms to facilitate this cross-border assistance in combating corruption. The mechanisms include extradition, transfer of sentenced persons, offering mutual legal assistance, transfer of criminal proceedings, cooperation in law enforcement, joint investigations as well as offering specialised investigations.<sup>201</sup> Following this, Chapter Five deals with asset recovery and identifies return of property as constituting the Convention's fundamental principle. Consequently, states must accord each other the widest measure of cooperation in asset recovery. The Convention's primary significance is that it directs states to establish effective measures that will enable financial institutions to prevent and detect the transfer of proceeds of crime. To this end, states should require financial institutions to provide (as much as reasonably practical), to the identities of their customers; the beneficial owners of the funds deposited into high value accounts; as well as afford sufficient scrutiny of activities and sources of funds deposited into accounts of persons with high public responsibilities including their proxies and families. States are further required to put in place such measures as would enable another state to institute proceedings for direct recovery by another state. Thus, the Convention directs states to offer each other reasonable cooperation in international confiscation.<sup>202</sup>

Chapter Six deals with technical assistance and information exchange and the Convention identifies three relevant steps it requires states to adopt in combating corruption. These include: (1) States are required to develop training programmes to their personnel dealing with corruption matters; (2) the Convention directs states to share with each other and through international and regional organisations general information concerning corruption in order to formulate uniform information on the prevention and combating of corruption; and (3) states are directed to devise conducive measures for effective implementation of the Convention through international cooperation and consideration of the negative impacts corruption has on society and sustainable development.<sup>203</sup> It is on this important note that the analysis now turns to a consideration of the provisions of the Constitution of

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<sup>201</sup> Articles 43 to 50.

<sup>202</sup> Article 51 to 59.

<sup>203</sup> Articles 60 to 62.

Kenya in order to assess the extent to which Kenya has the legislative and institutional capacity to comply with the obligations imposed by the Convention on Corruption.

### 3. The Constitution

The Constitution of Kenya, 2010 has since its promulgation been hailed as one of the most progressive and transformative charters in modern times.<sup>204</sup> Its expansive and entrenched Bill of Rights, to say the least, is among its notable animating features. The promise of a society anchored on the minimum essential values of social justice, democracy, the rule of law, republicanism and equality cannot be over-emphasized. In its transformative nature, the constitution transforms a hitherto oppressive state marred by perpetual historical injustices such as ethnicity, elitism, nepotism, gender biases, as well as poor governance into a society grounded on equality of all human beings.<sup>205</sup> More significantly is the call for ethical leadership<sup>206</sup> in all spheres of our socio-economic and political transformation.

In order to realize the foregoing, the Constitution has placed an indispensable obligation on the part of those exercising state authority to do so only in their capacities as trustees of such authority.<sup>207</sup> The constitutional architecture and design demanding integrity in exercise of state power is couched in such a manner as to innovatively aim at safeguarding the respect, honour, dignity and integrity of the people, the nation and public office.<sup>208</sup> These principles enable any person or institution faced with a determination of suitability of a person to hold office, to objectively analyse whether the impugned conduct

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<sup>204</sup> Githuri FM 'Transformative Constitution, Legal Culture and the Judiciary Under the 2010 Constitution of Kenya' (LLD Thesis, University of Pretoria, 2015) 3. See also Ojwang J (as he then was) in *Luka Kitumbi & Eight Others v Commissioner of Mines and Geology & Another*, Mombasa HCCC No. 190 of 2010:

I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010.

<sup>205</sup> See articles 10(2)(b); 19(2); 29; 28; and 29 Constitution of Kenya.

<sup>206</sup> See article 10 Constitution of Kenya on national values and principles of good governance. See also Chapter Six (principal chapter of leadership and integrity).

<sup>207</sup> Article 73(1)(a).

<sup>208</sup> Article 73(1)(a)(ii-iv).

of a person, for instance, passes constitutional muster in terms of the identified constitutional principles. In the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others*<sup>209</sup> the High Court rightly determined that when a person's integrity to hold office is being probed, the test is not that required of criminal trial. On the contrary, what is assessed is the existence of serious and plausible allegations. The High Court pronounced itself as follows:

In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behavior, 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. As the Democratic Alliance case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.<sup>210</sup>

The Constitution deliberately dismisses the subjective interrogation of individuals; and instead proceeds to identifying the objective integrity, honour and respect of the people, the nation and the office as practicable means of enforcing ethical leadership.<sup>211</sup> This position was rightly adopted in *Trusted Society of Human Rights Alliance v Attorney General & 2 others* where while discussing the suitability test as contemplated under article 73, the High Court was of the view that the question of suitability can only be approached by having regard to the functions of the particular office. The Court rightly held that the question to be asked would be whether the person has the attributes needed to hold a particular position and execute its functions effectively or whether there are underlying factors that would compromise the ability of the person to discharge those functions effectively.<sup>212</sup> By using the institutions of the people, the nation and the office as a yardstick for evaluating the conduct of trustees exercising state power, it becomes easy to objectively assess whether one's conduct is aimed at promoting social justice or aimed

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<sup>209</sup> [2012] eKLR.

<sup>210</sup> *Id.*, at paragraph 107. It is significant that the Kenyan High Court relied on the jurisprudence of South Africa's Constitutional Court at arriving at this decision.

<sup>211</sup> Report into the Conduct of Hon Lady Justice Nancy Makokha Baraza [2012] eKLR (*Tribunal Referral Net 1*).

<sup>212</sup> *Id.*, at paragraph 109.

In our view, the suitability test asks the question whether the person appointed has the attributes needed to hold that particular position and function effectively in accordance with the demands and expectations of that position or whether there is anything in the person's experience, association, or character that prevents the person from effectively carrying on the duties required by that office. Suitability can only be determined by looking at the functions of the office to which the person is being appointed.

at furthering self-aggrandisement.<sup>213</sup> This is what has been branded protection of institutional integrity.<sup>214</sup> In *Tribunal Referral Net 1 of 2012* it was held:

The actions of the DCJ (Deputy Chief Justice) were not done in connection with her office duties but rather with her private life. Rule 12 of the Judicial Service Code of Conduct and Ethics states as follows: “A judicial officer and any other officer in the Judicial Service shall ensure that his official and private conduct upholds at all times, the dignity and integrity of the Judicial Service by conducting himself, both officially and in private, in a dignified, honest and impeccable manner.” The Tribunal is satisfied that the conduct of the DCJ breached the provisions of Article 168(1)(e) read together with Article 75(1)(c) of the Constitution, 2010 and of the Judicial Code of Conduct, and was of such a serious nature to amount to gross misconduct and misbehavior.

The constitutional architecture and design deployed by the framers of the Constitution to ordain limited government extends beyond Chapter Six of the Constitution. Whereas for instance Article 73 recognizes the exercise of state authority as a form of trust, the foundational basis of this trusteeship derives from Article 1 which is emphatic that “all sovereign power belongs to the people” and proceeds to limit exercise of that power by providing that it can only be exercised “in accordance with this constitution.” In *Trusted Society of Human Rights Alliance v Attorney General & 2 others* the High Court considered the import of article 73 of the Constitution poetically as follows:

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 our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice.<sup>215</sup>

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<sup>213</sup> Githiru ‘Transformative Constitution’ 6.

<sup>214</sup> *Centre for PIL and Another v Union of India and Another*, Petition Writ no. 348 of 2010 cited affirmatively in *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR at paragraph 110: The touchstone for the appointment of the CVC (Central Vigilance Commission) is the institutional integrity as well as the personal integrity of the candidate.... If the selection adversely affects institutional competency and functioning then it shall be the duty of the [appointing authority] not to recommend such a candidate... We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the institution would suffer? If so, would it not be the duty of the HPC not to recommend the person.

<sup>215</sup> [2012] eKLR at paragraph 102.

The Constitution further declares Kenya to be a sovereign republic and a multi-party democratic state founded on national values and principles of good governance referred to in Article 10.<sup>216</sup> The twin concepts of republicanism and democracy are at the heart of every limited government. Madison, for instance, describes republicanism as a form of government in which those who exercise state authority do so at the behest of the great body of the people.<sup>217</sup> Properly conceptualised, Madison's definition of republicanism means that in jurisdictions adopting constitutional supremacy, the idea of the centrality of the people in governance lies at the heart of every republican government. To be sure, like republicanism, democracy recognizes a people-centered form of government premised on deliberation, negotiation and consultation in decision-making processes. Democracy and republicanism reject arbitrary exercise of state power and encourage participation of the people in the affairs affecting their common welfare. Kittrick persuasively opines as follows:

What, however, does democracy consist of? First, democracy embodies the right of people to be directly involved in determining their destinies. It stands for power-sharing and recognition of the right of those affected to participate in decisions pertaining to their common well-being... So perceived, democracy is a symbol of liberty, an expression of people power over government and the ability to dictate governmental objectives and procedures compatible with the people's needs and wishes.<sup>218</sup>

One of the most animating features of the Constitution is the entrenchment of national values and principles of governance. The directives in Article 10, this study argues, embodies every aspect of the Constitution's transformational agenda towards realization of good governance. The national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and the participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development. Most important in the phraseology adopted by the Constitution is that these values and principles are not exhaustive. It is quite conceivable that others may be derived from these directives albeit they are not expressly identified in the Constitution. The only condition is that they must promote the purpose and objective of the Constitution. It is these values and principles

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<sup>216</sup> Article 4 of the Constitution.

<sup>217</sup> Madison *The Federalist* 39.

that arguably locate the entire Constitution within its proper context of furthering transformation and ethics. The judiciary has interpreted these animating principles in an emphatic manner giving them prominence in the quest for good governance. The case of *Association of Gaming Operations Kenya & 41 Others v Attorney General & 4 Others* is apposite, where Majanja J expressed himself as follows:

Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of the sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty.<sup>219</sup>

The directives contained in Article 10 have further been interpreted as laying the groundwork for an ideal people-centered form of governance. Precisely, they offer stronger pillars to a transparent, accountable and just governance system. In *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others* Lenaola J (as he then was) discussed Article 10 in this respect:

Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement.<sup>220</sup>

Having constitutional provisions that embody a desire to entrench good governance is never sufficient to realise constitutional practice in a country. However, their existence provides optimism for a government willing to sustain constitutionalism. Ethical leadership in such jurisdictions, requires a firm commitment from all actors to respect and facilitate the realisation of these constitutional principles such as accountability, transparency and integrity, among other principles which are integral to consolidating good governance. The obligation to ensure sustainable constitutionalism is no longer the preserve of leaders alone, by entrenching, for instance, the principle of public participation, the Constitution requires that even the governed, must participate in governance. It is clear from the foregoing discourse that the Constitution is properly and elaborately framed to realise ethical leadership with a view to promoting constitutionalism. However, a more elaborate

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<sup>218</sup> Kittrie NN 'Democracy: An Institution Whose Time has Come – From Classical Greece to the Modern Pluralistic Society' (1993) 8(2) *American University International Law Review* 527-29.

<sup>219</sup> [2014] eKLR.

<sup>220</sup> [2013] eKLR, see also Odunga J in *Robert N Gakuru & Others v Governor Kiambu County & 3 Others* [2014] eKLR.

discussion on why this quest has remained elusive, and probably better described as a pipe dream, is reserved for chapter four. It cannot be ignored that the laws existing in Kenya prior to the promulgation of the Constitution in 2010 are constitutionally valid insofar as the same are consistent with the Constitution. Against this backdrop, the next issue calling for imminent consideration is the Kenyan statutory framework supporting good governance and ethical leadership.

#### **4. Statutory framework**

It is the purpose of this section to highlight of the existing legislation enacted to promote and enhance good governance in Kenya. Most of this legislation was mentioned in a perfunctory manner in chapter one and will be explored in more depth here. Importantly however, this thesis does not purport to suggest that the statutes discussed here offer an exhaustive list of legislation existing in Kenya aimed at enhancing good governance. Moreover, to avoid any doubt, it is not intended to imply that the chronology of discussion here devises a hierarchy of significance to any statutory enactment or institution established to advance the objectives of any legislation. Further this study will limit the number of statutes and institutions to those considered most relevant to ensuring constitutionalism. These include the Leadership and Integrity Act; the Anti-Corruption and Economic Crimes Act; the Ethics and Anti-Corruption Commission;<sup>221</sup> the Proceeds of Crimes and Money Laundering Act; and the Independent Electoral and Boundaries Commission Act, all discussed against the backdrop of the United Nations Convention Against Corruption as an international instrument which Kenya subscribes to. This does not however, purport to imply that the other statutes are less important as they shall be referred to occasionally in the subsequent chapters.

##### **4.1 Leadership and Integrity Act No. 19 of 2012**

The Leadership and Integrity Act is the primary legislation enacted to implement Chapter Six of the Constitution.<sup>222</sup> The Act is divided into six parts. Section 3 explains the purpose of

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<sup>221</sup> Section 2 of the Leadership and Integrity Act No. 19 of 2012 creates a specialised Commission, being the Ethics and Anti-Corruption Commission.

<sup>222</sup> See the preamble which reads: An Act of Parliament to give effect to and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.

the Act, namely to ensure that state officers respect the values, requirements and principles of the Constitution and proceeds to list them. It appears from this provision that the values, principles and requirements of the Constitution apply only to state office bearers. This is extremely problematic as is revealed in chapter four. It would be fallacious to presume that dangerous aggrandisement may then only be perpetrated by the private sector. Further, modern constitutions apply to and bind all persons. To suggest that accountability should only be required of state or public officers is counter-intuitive and counter-productive to the very reason informing the formation of government. Whereas the Act mandates the Ethics Commission established pursuant to this Act to 'oversee and enforce implementation' of its provisions, it allows for every person to implement it.<sup>223</sup>

The Commission, in terms of section 5 of the Act, can delegate its powers and functions to a public entity or authorised officer. Unfortunately, the Act bluntly allows the Commission to delegate its powers and functions, but never defines under what circumstances. One would be justified in enquiring whether the chances of compromise are moot in instances where the delegation is to an office bearer. Are these officers so well remunerated as to be trusted to singularly investigate, for instance? Would it not serve the purposes of the Act better were the delegation, if inevitable, be to a team of officers with diverse knowledge and experience that would be empowered to collect concrete evidence capable of sustaining a prosecution and eventual conviction of unethical behaviour? These are some of the pertinent issues which this study argues makes the quest for ethical leadership appear diametrically opposed to the intentions of the constitutional framework.

In part two, the Act provides for a general code for leadership and integrity for public officers. This Code includes, inter alia, adoption of Chapter Six of the Constitution as an integral part of the Code; respect for and upholding the rule of law in the execution of duties; assuming personal responsibility in the performance of one's public function; and ensuring professionalism and upholding functional integrity. The Act further requires state officers to observe and maintain moral and ethical requirements such as honesty in conducting public affairs; desist from activities amounting to abuse of office; and ensure that only accurate and honest information is presented to the public, among others. The Act similarly

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<sup>223</sup> See section 4 of the Act.

discourages officials from using their office to illegally appropriate property to themselves in addition to avoiding, as far as possible, situations where their personal interest conflicts with their public engagements. Operating foreign bank accounts as well as acting as agents or furthering the interests of foreign governments are similarly prohibited. Public officers are required to act neutrally and with impartiality in the execution of their state functions.<sup>224</sup> The same question arises: why does this Code not apply to persons in the private sector? Should executives in private organisations, for instance, be allowed to operate bank accounts in foreign countries without any form of accountability over the source of the funds? Should people in the private sector be permitted to illegally acquire property with impunity? Should private organisations enjoying protection of the state be allowed to violate, for instance, human rights, unchecked? This study makes it clear that great atrocities are being perpetrated in the private sector and it is argued that if indeed good governance is to be realised, same must not be allowed to occur unchecked.

Under part three of the Act, each public entity is required to formulate specific codes and where such entity fails to formulate the specific code, the general code shall be the governing code for such entity. The specific codes are supposed to be presented to the Commission for approval and within ninety days of receipt of the codes, the Commission is required to gazette them.<sup>225</sup>

Part four of the Act provides for enforcement mechanisms of the codes. State officers are required to sign specific codes while taking oath of office or within seven days of taking the oath. The requirement to sign is premised on the concept of privity of contract in that signatories commit to be bound by the terms of the codes. Disciplinary proceedings may be preferred against officers who breach the codes unless the more severe consequence of removal from office is provided for by the Constitution or any other law. In this regard, the Act provides the procedure for lodging complaints and conducting investigations and where culpability is established, a recommendation to the relevant institution or office is

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<sup>224</sup> These provisions and others not listed herein are provided for in Part II of the Leadership and Integrity Act (in sections 6 to 36).

<sup>225</sup> See sections 37 to 39.

made for appropriate action attendant to the functions of such institution or office.<sup>226</sup> The Commission can also, upon request, make an advisory opinion and in particular on the application of Chapter Six of the Constitution on an issue. Annual reports of the Commission made in pursuance of the provisions of the Act are presented to the president and parliament and must also be published in the gazette to ensure public access thereto.<sup>227</sup> The publication of the reports correlates well with the concept of public participation discussed previously. A well-informed public will be able to properly keep the government in check. Similarly, the citizenry is only empowered to implement the Act if the information they require is readily available.

Part five of the Act deals with offences and penalties. The Act makes it an offence for a person to obstruct or hinder any person acting in execution of the provisions of the Act. A conviction under the Act for obstruction or hindering attracts a fine of five hundred thousand Kenyan shillings or a maximum of three years' imprisonment or both a fine and imprisonment. However, in a country where tokenism is rampant, five hundred thousand shillings is not a sufficient deterrence to obstruction of investigations. Perpetrators of unethical conduct can easily bribe the investigators with colossal amounts to compromise investigations. In most instances, the persons committing unethical behaviour are wealthy people who can easily afford the fines. Non-compliance with section 20 of the Act<sup>228</sup> attracts on conviction a fine of five million Kenyan shillings or imprisonment for a maximum three years or both imprisonment and a fine. Again, five million shillings cannot be a penalty meted out to persons operating foreign bank accounts, since this amount is a mere drop in the ocean. In a country where embezzlement of funds is a norm, five million shillings can never deter exorbitantly wealthy individuals from operating foreign accounts. The penalties must be sufficiently punitive to have the Act serve its purpose. The very reason for encouraging ethical leadership and hence sustenance of good governance is to safeguard the already scarce resources. As such, there is an urgent call for leaders and

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<sup>226</sup> The Commission or the Attorney-General for civil matters; the Director of Public Prosecutions for criminal matters or any other appropriate authority. See *Tribunal Referral Net 1 of 2012*.

<sup>227</sup> See sections 40 to 45.

<sup>228</sup> A state officer shall not be an agent of, or further the interests of a foreign government, organization or individual in a manner that may be detrimental to the security interests of Kenya, except when acting in the course of official duty.

persons misappropriating public resources to be severely punished.<sup>229</sup> A mere five million shillings is highly ineffective. The only punishment which may have a deterrent effect is contained in sections 46 to 49 of the Act and which stipulate that a state officer who acquires property in contravention of the provisions of the Act may be ordered to forfeit such property and where necessary compensate the state.

It is part six of the Act that provides for general provisions. Public officers acting in good faith in the execution of their duties under the provisions of the Act are protected from prosecution. This provision enables the actors to perform their duties without fear of intimidation from highly placed persons in government. The most salient provisions of the Act are the recommendations for long term investment in education and training on integrity and leadership in the country's workforce, education system and general public.<sup>230</sup> Whereas this is a laudable directive, the same has never been conceived and still remains a pipe dream several years since the enactment of the Act. It ought to be noted that the call for ethical leadership is a shift in focus from containing government absolutism to restraining individualistic absolutism. Incorporating ethical leadership in the education system goes a long way to building a stronger ethical culture among the populations and therefore emboldening the chances of a constitutional culture taking hold in the country.

Disconcertingly, the logical conclusion deduced from the analysis of this Act is that although the Act is well-intentioned, its prospects for catalysing ethical leadership are miserably diluted by the fact that far too much focus has been placed on state or public officers only. Consequently, parliament may have misconstrued the broad idea of ethics as conceived in the Constitution. The need for ethical leadership is aimed at reinforcing the traditional focus on restrained governmental powers by putting additional limitations on those charged with the execution of state power. However, it is argued that horizontality of the law in general and ethics in particular must be adopted as a contemporary and pivotal

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<sup>229</sup> *Moses Kasaine Lenolkulal v Republic* [2019] eKLR, where the court held as follows:

However, and regrettably so, Parliament does not seem to treat corruption offences with the seriousness they deserve – the penal consequences for the offences which the applicant faces are a fine not exceeding Kshs 1,000,000 or a term of imprisonment for ten years or both. The saving grace may be found in section 48(2) which provides for a mandatory fine. Parliament urgently needs to look at the provisions of ACECA if any inroads against corruption are to be made in this country.

<sup>230</sup> Sections 50 to 54.

element of promoting constitutionalism. The framers of laws must therefore place more focus on designing laws that regulate the affairs of all segments of society since the very essence of the law is to insulate society from crumbling under the weight of selfish concerns at the expense of human solidarity for the greater good. Good governance through the embodiment of constitutionalism cannot be realised by putting exclusive focus on the actors within the state alone. Illustrated by recent events in South Africa, state capture also occurs outside of government.<sup>231</sup> Accordingly, private organisations must be compelled to adhere to ethical issues. It is thus submitted that executive leadership of private organisations, including board members, ought to be well regulated.<sup>232</sup>

In the not so distant past Kenya witnessed the collapse of leading corporations such as Nakumatt Supermarket, Tusker Mattresses Limited, Uchumi Supermarkets Limited and others due to unethical conduct and behaviour. The consequence of this was job losses and reduced internal purchasing power in the country. Reduced purchasing power will most obviously lead to further downfall of otherwise well managed corporations and reduced government revenue.<sup>233</sup> Poverty levels automatically invite anarchy through revolutions or *coups d'état* as witnessed in Zimbabwe and the revolutions that spread across African Arab states. If one function of government is to manage, develop and distribute resources,<sup>234</sup> then good governance must not only focus on limiting inherent governmental exigencies but also ensure effective control of all sectors within a state so as to guarantee egalitarian access not only to resources, but also to the means of accessing those resources to ensure social harmony and tranquillity.<sup>235</sup> The attendant collapse of an economy will result in unequal access to resources which will perpetuate the challenges that faced mankind in the state of nature which threatened the existence of society.<sup>236</sup> According to Kangu:

... the diminished resources could no longer be left to their own natural replenishment, but that a way had to be found through which they could be properly managed and developed;

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<sup>231</sup> The Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector, and Organs of State established in South Africa reveals how state capture permeates public institutions often at the behest of private individuals (see <https://www.statecapture.org.za>).

<sup>232</sup> Chimezie CO 'The Role of Good Governance and Development in National Development' (2016) 11 *International Journal of Development and Management Review* 178 and 186.

<sup>233</sup> Id at 177.

<sup>234</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 16.

<sup>235</sup> Preamble and Article 12 of the United Nations Convention Against Corruption, 2003.

<sup>236</sup> Chimezie 'The Role of Good Governance' 177.

to generate more and enough to go round for all individual human beings. Thirdly, because some individuals were weaker, a way had to be found of ensuring the equitable distribution so that even the weaker individuals could be assured of their due share. The strong had to be restrained so that even the weak could have a share of the available resources. As such, the age for solidarity and taking responsibility for the welfare of the other had arrived.<sup>237</sup>

#### **4.2 Anti-Corruption and Economic Crimes Act No. 3 of 2003 (Cap 65)**

The preamble to the Anti-Corruption and Economic Crimes Act (Aceca) provides that Aceca was enacted to deal with corruption and economic crimes in terms of prevention, investigation and punishment. Indeed, since the enactment of Aceca a number of prosecutions related to corruption and economic crimes have been made.<sup>238</sup> Although the success rate of these prosecutions remains wanting,<sup>239</sup> and corruption levels remain rampant, the enactment of Aceca has emboldened the ability of government to promote accountability and transparency. Given that endemic corruption and economic crimes have remained prevalent in the country, this has prompted the judiciary to create a special division of the courts to deal specifically with these crimes.<sup>240</sup>

Aceca allows the Chief Justice to appoint, via gazette notice, special magistrates to try offences of corruption, bribery and economic crimes or related offences and conspiracy to commit or attempt to commit or attempt to abet crimes. The persons appointed as special magistrates must hold the position of chief magistrate or principal magistrate or an advocate of over ten years standing. The special magistrates may try offences under Aceca alongside other offences that the accused may be tried for under any other law. However, as far as it relates to offences under Aceca, the special magistrates are directed to try them on a daily basis.<sup>241</sup> The rationale for the foregoing is to allow for expeditious

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<sup>237</sup> Kangu 'Social Contractarian Conceptualisation of the Theory and Institution of Governance' 16.

<sup>238</sup> Anti-Corruption Case No.3 of 2019, *Republic v Moses Kasaine Lenolkulal and 13 others*; Anti-Corruption Case No. 23 of 2018, *Republic v Sospeter Odeke Ojaamong and 8 Others*; Anti-Corruption Case No. 32 of 2018, *Republic v Evans Odhiambo Kidero & 10 Others* (these cases are dealt with in the lower courts and are therefore unreported but offer a glimpse of government's efforts to enforce accountability laws).

<sup>239</sup> These can largely be attributed to shoddy investigations as opposed to the lack of legal framework. For instance, in the *Ojaamong* case, at the close of the prosecution's case, only two of the 20 prosecution witnesses testified. Even the two who testified were mere investigating officers. This brings into question the integrity of the investigation process in the administration of justice in general and the fight against corruption in particular.

<sup>240</sup> There are created in both the subordinate and superior courts a division named Anti-Corruption & Economic Crimes Division ([www.kenylaw.org](http://www.kenylaw.org)).

<sup>241</sup> Sections 3 and 4.

disposal of cases emanating from Aceca. It can be argued that because the persons charged with offences under Aceca are supposed to be suspended from office for the duration of the trial, the directive to have trials done on a daily basis allows for expeditious determination of their fate in holding office. Also, it is further argued in this study that daily trials reduce the chances of accused persons interfering with witnesses as opposed to prolonged trials. However, the intentions of the Aceca are defeated by lawyers who take up multiple cases hence clogging up their diaries. The outcome of this practice is unwarranted adjournment of cases which end up taking many years to conclude.

An independent Kenya Anti-Corruption Advisory Board (the Board) that is accountable only to parliament is established to advise the Commission in the general exercise of its powers and execution of its functions.<sup>242</sup> Aceca does not provide clarity on the hierarchy of the Commission and the Board. This can lead to operational squabbles as each institution might claim supremacy or autonomy over the other. It is also not clear what happens if the Commission fails to follow the advice of the Board and takes such action that results in losses. Equally, it is not clear whether the advice of the Board is binding on the Commission.

Aceca provides for the process of investigations and gives investigatory powers to the secretary or such person deputised by the secretary.<sup>243</sup> The investigator enjoys such powers, privileges and immunities enjoyed by a police officer under the law.<sup>244</sup> Save for the secretary whose qualifications are defined under the Ethics and Anti-Corruption Commission Act,<sup>245</sup> Aceca goes no further in defining what qualification investigators appointed by the secretary should possess. According to Gottschalk and Gunnesdal '[a] white collar criminal is a person who through the course of his or her occupation utilizes respectability and high social status to perpetrate offences'.<sup>246</sup> Thus, given that economic crimes occur in a complicated syndicate and committed by elites in society, it is proposed in this study that investigations and eventual prosecution of these crimes ought to be done by highly trained and skilled investigators and prosecutors.

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<sup>242</sup> Sections 16 and 22.

<sup>243</sup> Section 23.

<sup>244</sup> See the Criminal Procedure Code (Cap 75), Evidence Act (Cap 80), Police Act (Cap 84).

<sup>245</sup> Chapter 65A (section 16).

To safeguard the integrity of the investigation and easy identification of investigators, the Commission is directed to issue identification documents to investigators. Further, where a complaint has been made and the Commission does not intend to investigate, it must communicate its decision and reasons for not investigating to the complainant in writing. Where a suspect makes full, complete, and reasonably probably true disclosure of facts relating to corruption and economic crimes; or pays the affected persons through the Commission; or makes reparation or pays for all loss of public property, the Commission is allowed to issue an undertaking of cessation of investigation through at least two newspapers of national circulation. The public is allowed to object to the undertaking on specified grounds and the Commission must consider all objections on merit.<sup>247</sup>

The Commission is empowered to request information relating to a person's property and times at which it was acquired. A person who fails or neglects to comply with such request is guilty of an offence for which they are liable to a fine of three hundred thousand shillings, or imprisonment for three years, or both. Arguably, this fine is so inconsequential that it is not likely to compel a person to divulge information. The Commission, vide a court order, can also request an associate of a suspect where there is reasonable cause to believe that the associate was having dealings with the suspect to provide information. Also, vide a court order, the Commission can enter into and search any premises for any record, property or any other thing it reasonably suspects to be in the premises and that had not been produced pursuant to any request made. The secretary or investigator possess powers similar to those of police officers to arrest and charge any person for offences under the Act.<sup>248</sup>

The Commission is mandated to prepare quarterly reports indicating the number of reports made to the director of public prosecutions and whether its recommendation to prosecute was accepted. The attorney-general is required to present the quarterly reports before the national assembly and the commission must gazette the said reports. The publication to the gazette is meant to make the information available to the public. The director of public prosecutions is required to produce annual reports indicating

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<sup>246</sup> Gottschalk P and Gunnesdal L 'White-Collar Crime in the Shadow Economy', [https://doi.org/10.1007/978-3-319-75292-1\\_13](https://doi.org/10.1007/978-3-319-75292-1_13).

<sup>247</sup> Sections 24 to 25A.

<sup>248</sup> Sections 26 to 35.

prosecutions for corruption and economic crimes. The annual reports should indicate whether the commission's recommendations for prosecution were not accepted and provide sufficient reasons for not accepting same. The attorney-general is required to table the annual reports before the national assembly within ten days of the assembly resuming in the next calendar year.<sup>249</sup>

The Aceca identifies and creates ten offences. These offences include secret inducement for advice, deceit, conflict of interest, improper benefit to trustees for appointment, bid rigging, protection of public property and revenue, abuse of office, dealing with suspect property, conspiracy and attempts to perpetrate any of these acts.<sup>250</sup> The framing of charges in prosecuting these offences has come into sharp focus and been heavily scrutinised by the courts. For instance, it has been held that where there exist substantive offences, a charge of conspiracy is unnecessary. In *John Mburu Kinyanjui v Republic*<sup>251</sup> the Court of Appeal pronounced itself in the following manner:

It is not illegal per se to join an alternative count of conspiracy: indeed, it is not necessarily illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences, as Musinga's case above shows and more specifically *Republic v Cooper & Compton* [1974] 2 All E.R 701. The problem is deeper than simply charging substantive counts of conspiracy to alternative counts. Dealing with counts of conspiracy raises problems which require discretion and complete understanding of the case in hand.

In *Director of Public Prosecutions v Thuita Mwangi*<sup>252</sup> the High Court, citing with authority the *Kinyanjui* case set out three key issues to be considered when preferring a charge of conspiracy:

1. Where there is an effective and sufficient charge of substantive offence, the addition of a charge of conspiracy is undesirable as it adds nothing to an effective charge of a substantive offence;
2. Where charges of substantive offence do not adequately represent the overall criminality disclosed by evidence it may be right and proper to include a charge of conspiracy; and
3. A count of conspiracy should not be preferred if the result will be unfair to the defense and this has always to be weighed with other considerations.

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<sup>249</sup> Sections 36 to 37.

<sup>250</sup> Sections 40 to 47.

<sup>251</sup> [1988] eKLR.

<sup>252</sup> [2018] eKLR.

Where alternative and specific offences can be proven by the same evidence as that of conspiracy, it has been established that preferring a charge of conspiracy will be prejudicial to the accused person as it amounts to punishing a person twice on the same facts.

A person convicted of an offence under Part V of Aceca is liable for a fine not exceeding one million shillings or imprisonment for a term not exceeding ten years or both. If as a result of the conduct constituting the offence, a convict received a quantifiable benefit, or any other person suffered a quantifiable loss, the convicted person is liable to an additional mandatory fine. As has been argued before in this chapter and reaffirmed by the decision in *Moses Kasaine Lenolkulal v Republic*, the penalties under Aceca are too weak to deter unethical conduct. There is thus need for parliament to enact tougher penalties that can discourage people from engaging in corruption and economic crimes.<sup>253</sup>

Aceca further provides for the payment of compensation and forfeiture of benefits improperly obtained. A person who engages in any conduct that constitutes corruption or economic crimes must compensate anyone who has suffered such loss as result for an amount equivalent to the loss suffered, irrespective of whether the victim is a public body or private individual. On conviction for corruption or economic crimes, the trial court must order the convict to pay any amount that they are liable for. The court is also obliged to order that the convicted person give over to the rightful owner any property acquired as a result of the conduct constituting corruption or economic crimes. Alternatively, if the property has been alienated, an amount equivalent to the value of the property must be paid. Such order is enforceable as if it were an order made in civil proceedings.<sup>254</sup> Furthermore, the court is directed to consider unexplained assets, whether held by accused person or their proxy, as corroboration that the person accused of corruption or economic crimes received a benefit. The assets of an accused person for purposes of the Act include assets held in trust or otherwise on behalf of the accused person or acquired from an accused person without adequate consideration. Moreover, unless a contrary

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<sup>253</sup> Section 48 of Act No. 3 of 2003.

<sup>254</sup> Sections 51 to 56C.

view is proved, the courts are directed to presume an act as having been done corruptly where an accused person is proven to have done the corrupt act.<sup>255</sup>

A public or state officer charged with corruption and economic crimes shall be suspended at half pay for the duration of the trial provided that the trial is concluded within twenty-four months. Initially, it was argued that this provision did not apply to elected leaders. However, the argument was settled by the High Court in the case of *Kasaine Lenolkulal v Republic* where it affirmed the lower court's decision to suspend the applicant from [elected] office pending determination of the corruption case in the lower court. This has become landmark precedent as subsequent trials saw a number of elected governors suspended from office in addition to being required to post bond and comply with bail terms.<sup>256</sup> Where a conviction has been made, a public officer is suspended without pay until any appeal is concluded. Importantly, a person convicted of corruption and economic crimes is barred from being elected or appointed to a public office for a period of ten years. The Commission is required to annually gazette the names of persons disqualified from holding office.<sup>257</sup>

Despite the foregoing elaborate provisions of law, the quest for good governance remains elusive in Kenya. Corruption and waste of public resources has left the country with huge international debts that the economy is struggling to service. Most parts of the country have remained marginalised in terms of development. One serious concern arising from the laws already discussed, extending also to the wording of some articles of the Constitution, is the over-regulation of the public sector, while turning a blind eye to the private sector. It is submitted that this represents a great threat to good governance; an issue canvassed in further depth later in this study.<sup>258</sup> It is interesting, however, that despite the existence of these provisions and judicial pronouncements, leaders of questionable character are still being cleared to run for office. It remains unclear whether institutions charged with the implementation and enforcement of ethical leadership presuppose application of ethical laws to persons already in leadership position only or apply equally to persons seeking prospective leadership positions. If, indeed, in terms of article 1 'all sovereign power

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<sup>255</sup> Section 57 to 58.

<sup>256</sup> The former governors of Kiambu County and Nairobi City County were impeached by their assemblies.

<sup>257</sup> Sections 62 to 67.

belongs to the people' and it is exercised on their behalf by the persons in leadership positions, the absurd and incongruous conclusion reached is that allowing leaders of questionable character to exercise the sovereign power of the people subverts the very sovereign *will* of the people. It is contended in this study that by virtue of the necessity of having a government to protect society from disintegration, it follows logically that the institution of the people acting in concert in furtherance of their happiness would not will their sovereign authority to be of questionable character. The very reason the character of an individual comes into question is that hitherto they were placed into positions of trust in exercising their authority and they misused it in furtherance not of the common good, but individual aggrandisement. To subsequently allow the very people to run, for instance, for an elective position is a subversion of the will of the people and their collective resolve to surrender their powers to a common fund in a bid to protect their species.<sup>259</sup> Consequently, the concept of ethical interaction is particularly pertinent and is discussed next.

#### **4.3 Ethics and Anti-Corruption Commission Act No. 22 of 2011**

The Ethics and Anti-Corruption Commission Act (EACA) is enacted pursuant to article 79 of the Constitution which provides as follows:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.<sup>260</sup>

EACA establishes the Ethics and Anti-Corruption Commission (EACC)<sup>261</sup> which is the Commission charged with enforcing the various ethical laws in Kenya.<sup>262</sup> EACA provides for the structural composition of the Commission and defines the manner and qualification for appointment of the commissioners and the secretary.<sup>263</sup> Under section 11, the Commission is given additional functions beyond those conferred on it under article 255

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<sup>258</sup> See generally Meiro & Masterson *State Capture in Africa: Old Threats New Packaging* EISA (2018).

<sup>259</sup> Epitomised by the social contract theory as developed and espoused by Locke, Rousseau and Kant.

<sup>260</sup> See the preamble to the Act which provides: 'An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes'.

<sup>261</sup> See section 3.

<sup>262</sup> All laws related to leadership and integrity as well as corruption and economic crimes are enforced by the Commission created under section 3.

and Chapter Six of the Constitution. Key among the additional functions is that the Commission is mandated to develop and promote standards and best practices in integrity and anti-corruption. The problem with EACA, as with other legislation on ethics, is that it is drafted to regulate public and or state officers to the complete exclusion of people in the private sector. There is a systematic mis-conceptualisation of the constitutional theory of ethics in the drafting of key legislation governing ethics in Kenya. It has by now been repeatedly stated in this study that the quest for good governance cannot be realised if a proper conceptualisation of the theory of ethical leadership is not established. Suffice to state at this point that EACA is an institution setting statute and a detailed analysis of same will be conducted when discussing the broad institutional framework within this chapter.

#### **4.4 Independent Electoral and Boundaries Commission Act No. 9 of 2011**

The Independent Electoral and Boundaries Commission Act (IEBC Act) is enacted to make provisions for the appointment and effective operations of the Independent Electoral and Boundaries Commission (IEBC) established under article 88 of the Constitution. Some of the objectives of the Act include providing for the operations, powers, responsibilities and functions of the Commission; to supervise elections and referenda; to provide the legal framework for the constitution of the Commission; and to provide the manner of execution of the functions of the commission pursuant to article 88.<sup>264</sup> The Act confers additional functions on the Commission besides those stated in article 88.<sup>265</sup> The composition, procedure and qualifications for appointment of the commissioners is also set out. The members of the Commission serve for a single six-year term.<sup>266</sup> The Commission is mandated to competitively recruit the secretary whose qualifications are set out in the Act. The secretary is the designated head of the secretariat.<sup>267</sup> This is also an institutional Act and shall be dealt with in detail in part 4 while considering the institutional framework.

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<sup>263</sup> Sections 3 to 6.

<sup>264</sup> Section 3.

<sup>265</sup> Section 4.

<sup>266</sup> Sections 5 to 6.

<sup>267</sup> Section 10.

#### 4.5 Proceeds of Crime and Anti-Money Laundering Act Cap 59B

The Proceeds of Crime and Anti-Money Laundering Act (POCAML) is established to provide for the offence of money laundering and introduce measures to counter this crime, such as identifying; tracing; freezing; seizure; and confiscation of the proceeds of crime.<sup>268</sup> Money laundering and related offences are provided in Part II. POCAML makes it an offence for a person to knowingly enter into an agreement or perform such transaction over any property that is or forms part of a crime.<sup>269</sup> Similarly, the acquisition, use or possession of property forming part of proceeds of a crime is a criminal offence.<sup>270</sup> Where a person knowingly aids another financially with the intention to commit a crime, such conduct is deemed an offence.<sup>271</sup> An interesting addition in this legislation is that the act of tipping off a person intending to commit a crime is also a criminal offence. This applies particularly where a person having knowledge of a report being prepared as contemplated under section 44 of the Act, makes such report available to a person who is likely to prejudice ensuing investigations.<sup>272</sup> It is also an offence to misrepresent or give maliciously false information.<sup>273</sup> In addition, conveyance of monetary instruments into and out of Kenya in excess of such amounts as prescribed under the second schedule and the wilful failure to report a conveyance or material misrepresentation of the amount of the monetary instrument conveyed are made offences.<sup>274</sup> It is also an offence for a person having knowledge of information disclosed under Part II of the Act to alert or bring to the attention of any person who is likely to prejudice any investigations that might ensue as a result of such disclosure.<sup>275</sup> Hindering of lawful execution of functions established under the Act also constitutes an offence.<sup>276</sup>

From the foregoing, what is evident is that the Act contains four categories of offences and their attendant penalties in sections 3, 4 and 7. These sections provide that where the

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<sup>268</sup> See preamble to Cap 59B.

<sup>269</sup> Section 3.

<sup>270</sup> Section 4.

<sup>271</sup> Section 7.

<sup>272</sup> Section 8.

<sup>273</sup> Sections 9 and 10.

<sup>274</sup> Section 12.

<sup>275</sup> Section 13.

<sup>276</sup> Section 15.

offender is a natural person, the penalty prescribed is fourteen years imprisonment or a fine not exceeding five million shillings, or both, or such amount as is equivalent to the value of the subject property; whilst the penalties for body corporates is twenty-five million shillings, or such amount equivalent to the value of the subject property.<sup>277</sup> Given the broad wording of these sections, their constitutionality has been challenged. In *Felix Kiprono Matagei v Attorney-General & 2 Others; Anthony Kihara Gethi (Interested Party)*<sup>278</sup> the Petitioner moved the High Court to declare sections 3, 4 and 7 of POCAMLA as unconstitutional and amounting to a violation of fundamental rights and freedoms for the fact that they do not sufficiently define the crimes created. It was argued that the provision that reads ‘who knows, who ought to reasonably know and engages in any agreement or arrangement’ offends the principle of legality and is accordingly vague. The Petitioner argued that an accused person cannot easily understand the offence they are charged with nor can they comprehend if the activity for which they have been charged covers the activity intended to be addressed by the purpose of the law. The Court, while dismissing the Petition, held that the impugned sections clearly demand that prior to the finding of guilt, the prosecution must prove that the accused person knew, should have known, or ought to have known that they were engaging in acts of money laundering, yet proceeded with the acts and derived proceeds of the crime against the edicts of the law.

For offences under sections 5, 8, 11(1) and 13, POCAMLA provides that where the offences are committed by natural persons, the penalties are imprisonment for a period of seven years, or a fine of two million shillings, or both; while juristic persons shall be fined ten million shillings or such amounts equivalent to the value of the subject property.<sup>279</sup> A conviction under section 12(3) attracts a penalty of ten percent of the value of the subject matter.<sup>280</sup> For offences falling within sections 9, 10 and 14, the penalties for natural persons are two years’ imprisonment or a fine of not more than one million shillings, or both; whilst juristic persons are liable to pay a fine of five million shillings or such amount of the same value to that of the subject property.<sup>281</sup> The salient provision of POCAMLA is

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<sup>277</sup> Section 16(1).

<sup>278</sup> [2019] eKLR.

<sup>279</sup> Section 16(2).

<sup>280</sup> Section 16(3).

<sup>281</sup> Section 16(4).

that it lifts the veil of incorporation where the directors and managers are involved in the commission of offences and imposes personal liability for the crimes committed.<sup>282</sup>

The Act has devised inherent mechanisms to ensure effective discharge of the obligations created. For instance, POCAMLA provides that its provisions override any non-disclosure agreements and proceeds further to exempt from liability any breach of non-disclosure agreements arising from compliance with its obligations.<sup>283</sup> However, POCAMLA still protects the sanctity of the confidentiality of advocate-client relationship.<sup>284</sup> Persons acting in good faith in the execution of their functions and obligations arising from POCAMLA are protected from any civil or criminal prosecution.<sup>285</sup> This protection is pertinent in ensuring that persons discharging the obligations arising from POCAMLA do so to the best of their abilities and without fear of intimidation. The identity of information and informers is expected to be treated with utmost confidentiality except as allowed under subsection 2 of the Act.<sup>286</sup> This provides an incentive for the public to participate in whatever manner in the enforcement of POCAMLA and especially in providing information to the relevant agencies.

POCAMLA establishes a Financial Reporting Centre (FRC) whose main objective is to assist in identification of crime and combating of money laundering.<sup>287</sup> The functions of the FRC include receiving information from reporting institutions under sections 12 and 44; disseminating such information received to appropriate enforcement agencies; carrying out inspection of reporting institutions and disseminating any information obtained in the course of such inspections to appropriate enforcement agencies; designing training requirements and providing training to reporting institutions as a capacity building strategy; periodically publish in the gazette information obtained in the executions of their statutory obligations; and, in consultation with the Board, set up anti-money laundering policies.<sup>288</sup> In the execution of its functions, FRC can issue instructions, directions, guidelines or rules to any reporting institution. Such instructions, directions, guidelines or rules can be general or

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<sup>282</sup> Section 16(6).

<sup>283</sup> Section 17.

<sup>284</sup> Section 18.

<sup>285</sup> Section 19.

<sup>286</sup> Section 20.

<sup>287</sup> Sections 21 and 23.

<sup>288</sup> Section 24.

specific, revoked or varied and directed to such person or in any manner the FRC considers appropriate. The FRC is permitted to delegate any of its functions to a supervisory body.<sup>289</sup>

Where an inspection does take place, the reporting institution being inspected – including any of its officers or employees – are obliged to produce any relevant information that may be requested by the inspector. The salient feature of this provision is its placement of a personal obligation on the officers and/or employees of the reporting institution to produce the information in addition to ensuring that the institution itself complies with the obligation. The crux of this thesis resides on personal responsibility in observance of and obedience to legal obligations and the duty imposed on the officers and/or employees to produce information. The submission is that an unequivocal ethical obligation is created and is binding on the executors of institutional powers to obey the law. POCAMLA makes it an offence for the institution and/or its officers and employees not to produce the requested information or produce the information after the expiry of the prescribed period, which is either seven days or as specified by the notice requesting the information to be availed. In order to safeguard the sanctity and integrity of the inspection, such documents requested ought not to leave the premises of the reporting institution or such other premises where they are produced. It is imperative to emphasise that all the information or documents produced must be handled with utmost confidentiality. On completion of an inspection, the inspector is required to prepare a report to the Director who, after hearing the reporting institution, or giving it reasonable time to be heard, is supposed to issue such directions to the reporting institution to comply with within a reasonable time.<sup>290</sup>

The important safeguard to attainment of the objects of the Act is the provision that even previous employees of the reporting institution are obliged to assist in an inspection. To be sure, an employee of a reporting institution or any person who has previously worked for such institution may be required to give all reasonable assistance in pursuit of an inspection by appearing for examination before an inspector; or producing any documents in relation to an inspection. This can offer the inspector a very important source of information as the existing employees might feel intimidated by the management of the reporting institution

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<sup>289</sup> Section 24A.

<sup>290</sup> Sections 33 and 34.

and thereby fail to give sufficient assistance. Put differently, employees in active service might have a conflict of interest in giving out information especially in situations where such giving of information will result in the likelihood of loss of employment. Notwithstanding this “threat”, a refusal to comply with a requirement of an inspector; the obstruction or hindering of an inspection; furnishing of false or misleading information; or making of a false or misleading statement on examination is an offence. When such offence occurs, the penalties on conviction are imprisonment for three years or a fine of one million shillings, or both such fine and imprisonment for natural persons, whilst juristic persons are liable to pay a fine of five million shillings. Supervisory bodies and their staff are mandated to report any suspicious transactions they encounter in ordinary course of their duty to the FRC. Any deliberate, wilful or intentional failure to report is an offence, whose penalties are similar to those under section 35 discussed immediately above.<sup>291</sup>

The FRC and any such supervisory body are given regulatory and supervisory powers over all reporting institutions regarding the application of POCAMLA. Supervisory bodies are further mandated to enforce compliance with POCAMLA by all reporting institutions within their jurisdiction and that are bound by the provisions of POCAMLA. The obligations of supervisory bodies arising out of POCAMLA form part of the legislative mandate of such institution and constitute the core function of such institution under the empowering statute. A supervisory body is required to periodically submit reports made in pursuance of its obligations under POCAMLA to FRC. The two institutions are required to mutually cooperate in the execution of their powers and the discharge of their functions in order to ensure consistent application of the provisions of POCAMLA. To ensure effective cooperation, POCAMLA allows FRC and a supervisory body to enter into a memorandum of understanding to guide their mutual relations.<sup>292</sup>

POCAMLA has in-built safeguards that enhance the effective execution of the powers and functions of FRC in relation to reporting institutions. These safeguards are obtained through the judiciary. Firstly, FRC can obtain search warrants from the High Court to enter to premises belonging to, or in the possession or control of the reporting institution where

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<sup>291</sup> Sections 35 and 36.

<sup>292</sup> Section 36A.

there is reasonable cause to believe that a reporting institution has failed to keep or produce information on a suspicious transaction. This safeguard extends to an officer, employee or a partner of a reporting institution who is alleged to be committing, have committed or about to commit an offence. Secondly, FRC can apply to the High Court to obtain orders for property tracking and monitoring. Thirdly, where there is wilful failure to comply with the provisions of POCAMLA, FRC can apply to the High Court for orders compelling a reporting institution or any of its officers, employees or partners to enforce compliance.<sup>293</sup>

POCAMLA identifies five key anti-money laundering obligations it imposes on reporting institutions. These include, one, monitoring and reporting suspicious transactions. Under this obligation, reporting institutions are obliged to continuously monitor complex, unusual, suspicious, and large transactions whether or not the same have been completed. Where transactions being monitored raise suspicion of money laundering or proceeds of crime, reporting institutions are supposed to report to the FRC within reasonable time but not more than seven days after such transaction has been done. All suspicious transactions, regardless of whether they are being monitored or not, must be reported to the FRC by a reporting institution. Financial institutions are expected to examine in extensive detail the background and purpose of suspicious transactions and such record being obtained ought to be kept for a period of seven years and the same shall be made available to the FRC, its supervisory bodies or auditors. Reports by a reporting institution to the FRC must be accompanied by all documents appurtenant to the questionable transaction.<sup>294</sup> The second obligation involves verification of customer identification. Reporting institutions are obliged to explore all reasonable means of acquiring proper identification of persons having or intending to have business relations with them. To satisfy themselves as to the identity of such persons, reporting institutions are required to obtain official identification documents from such persons.<sup>295</sup> Where a reporting institution has reasonable cause to believe that

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<sup>293</sup> Sections 37, 38 and 39.

<sup>294</sup> Section 44.

<sup>295</sup> Section 45 provides: (a) in the case of an individual (i) a birth certificate; (ii) a national identity card; (iii) a driver's licence; (iv) a passport; or (v) any other official means of identification as may be prescribed; and (b) in the case of a body corporate (i) evidence of registration or incorporation; (ii) the Act establishing the body corporate; (iii) a corporate resolution authorising a person to act on behalf of the body corporate together with a copy of the latest annual return submitted in respect of the body

the person requesting to enter into business dealings with it is acting on behalf of some other person, that institution must exercise reasonable due diligence to establish the identity of the other person.<sup>296</sup> Thirdly, reporting institutions are obligated to establish and maintain customer records which record should include details of all transactions. The customer accounts are supposed to be kept in the correct name of the holder of that account. The customer records are to be kept in such manner as to be able to sufficiently identify the customer by name, addresses and occupation and the person conducting, or on whose behalf, a transaction is conducted. Also to be kept are records on the nature, time and date of the transaction; the type and amount of currency; the type and identifying number of any account with the reporting institution involved in the transaction; and where the transaction involves negotiable instruments, such details as the drawer, institution drawn from, payee and the amount and date of the instrument. The records must also indicate the name and address of the reporting institution and the officer, employee or agent of the institution who prepared the record. The reporting institution shall keep the record for a minimum of seven years or where applicable for such longer period required by FRC.<sup>297</sup>

The fourth obligation requires reporting institutions to establish and maintain internal control and reporting procedures. The purpose of the said procedures includes identifying a designate person to whom employees of the reporting institution report such information that come to their attention in the course of duty that raise knowledge of suspicion on money laundering. The procedures must as enable such designate person to have reasonable access to information that will help them make an informed determination whether there is a basis to report under section 44, and thirdly, the procedures should require the designated person to directly report the matter where they form an opinion that there is reasonable basis to report.<sup>298</sup> The fifth obligation requires all reporting institution falling within the ambit of POCAMLA to register with the FRC.<sup>299</sup>

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corporate in accordance with the law under which it is established; and (vi) or any other item as may be prescribed; (c) in the case of a government department, a letter from the accounting officer.

<sup>296</sup> Section 45(4).

<sup>297</sup> Section 46 *ibid.*

<sup>298</sup> Section 47 *ibid.*

<sup>299</sup> Section 47A *ibid.*

There is established under POCAMLA an Anti-Money Laundering and Advisory Board (The Board) and the Assets Recovery Agency. The functions of the latter are to implement the provisions of Parts VII to XII whereas the Board performs advisory function to the director in performance of the functions of a director and or exercise of its powers.<sup>300</sup> Further discussion of the Assets Recovery Agency will be done at the institutional framework subsection of this chapter.

This part has considered some pertinent legislation in force in Kenya that is aimed at embedding transparency, accountability and general constitutional practice. Although implementation of the foregoing robust constitutional and legislative framework remains debatable, the existence of the foregoing legislation in the legal system shows the willingness of the country to ordain ethical leadership in the management of public affairs. It will be the argument of this thesis that this legislative framework cannot effectively arrest absolutism in government in the absence of strong institutional arrangement which next forms the issue requiring imminent consideration.

## **5. Institutional Framework**

The essentials of the rule of law and associated arrangement of political institutions are fundamental safeguards that cushion the law from tyrannical rulers.<sup>301</sup> The preceding discourse on the legal framework in place has uncontestedly shown that Kenya has a plethora of legislation dealing with ethical leadership. The efficacy or otherwise of these laws notwithstanding, and against the backdrop of these laws not being self-executing, they require enforcement by appropriately qualified and capacitated enforcement agencies. The need for institutional constraints to restrain executors of state power from utilising the law for selfish gains and obfuscating the rule of law is fundamental to the enterprise of modern constitutional-making process. Ethical laws would be valueless in the absence of institutional checks to arrest the likelihood of executors to corrupt the law through self-centred interpretations and motivations, for instance.<sup>302</sup> This part shall therefore discuss the various institutions created by the existing legislation to promote

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<sup>300</sup> Sections 49 to 54.

<sup>301</sup> Reynolds 'Constitutionalism and the Rule of Law' (<https://scholarsarchive.byu.edu/facpub/1469>) 13.

<sup>302</sup> Id, 15

ethical leadership. It is worth emphasising that just like the discourse on the legal framework, this part does not purport to claim that the institutions herein discussed form an exhaustive list of institutions created to promote ethical leadership.

### **5.1 The Ethics and Anti-Corruption Commission**

The establishing legislation, the Ethics and Anti-Corruption Commission Act (EACC Act) that created the Ethics and Anti-Corruption Commission (the Commission), is enacted pursuant to article 79 of the Constitution to ‘ensure compliance with and enforcement of’ Chapter Six and such legislation as contemplated under article 80 of the Constitution.<sup>303</sup> The preamble to the EACC Act provides that the Act is enacted to establish the Commission; provide for its functions and powers; as well as prescribe qualifications and procedure for appointment of the chairperson and commissioners.<sup>304</sup> The Commission is also empowered to exercise additional powers conferred by article 253 of the Constitution, such as the power to acquire, hold and dispose of property. The Commission is mandated to decentralise its services as much as is practicably possible cognisant of the provisions of article 6(3) of the Constitution.<sup>305</sup> The Commission consists of the chairperson and two commissioners whose tenure of office is a non-renewable six-year term.<sup>306</sup>

The functions of the Commission include those enumerated under article 252 and Chapter Six of the Constitution. The Act gives additional functions which include developing and promoting standards and best practices in integrity and anti-corruption, developing a code of ethics in conjunction with other state actors, and to investigate and recommend for prosecution any acts of corruption or violation of any law enacted in pursuance of Chapter Six. More specifically, the Commission may institute and conduct proceedings in court for purposes of recovery or protection of public property or freeze or confiscate the proceeds

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<sup>303</sup> Article 80 of the Constitution of Kenya 2010 – Legislation on leadership, states:

Parliament shall enact legislation (a) establishing procedures and mechanisms for the effective administration of this Chapter; (b) prescribing the penalties, in addition to the penalties referred to in Article 75, that may be imposed for a contravention of this Chapter; (c) providing for the application of this Chapter, with the necessary modifications, to public officers; and (d) making any other provision necessary for ensuring the promotion of the principles of leadership and integrity referred to in this Chapter, and the enforcement of this Chapter.

<sup>304</sup> See in general the preamble to Act No. 22 of 2011.

<sup>305</sup> A national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

<sup>306</sup> Sections 4 and 7 of Act No. 22 of 2011.

of corruption and may even impose other punitive or disciplinary measures.<sup>307</sup> The Act allows the Commission to collaborate with other state organs and appropriate such powers as shall be necessary to ensure the efficient and effective execution of its lawful functions. The Commission is further allowed to seek professional assistance or advice from persons or organisations it deems appropriate.<sup>308</sup>

The foregoing functions flowing from Part IV of the Aceca have attracted great constitutional scrutiny and the courts have not shied away from interpreting the constitutional scope of these functions. Important to note is that whereas the Commission has constitutional underpinnings, its powers and functions largely flow from statutes. In *Okiya Omtatah & 2 Others v Attorney-General & 4 Others*,<sup>309</sup> the Petitioners invited the High Court to determine the constitutionality of various provisions of Aceca mandating the Commission to investigate acts of corruption and economic crimes. The Petitioners argued that by conferring investigatory powers to the Commission, Parliament had unconstitutionally usurped the functions of the National Police Service by conferring them upon the Commission. In dismissing the Petitioners' contentions, the High Court stated that the additional functions articulated in section 11 of Aceca that confers powers on the Commission flow from article 252(1)(d) of the Constitution which mandates the Commission to '... perform any functions and exercise any powers prescribed by legislation...'. The Court further pronounced itself in the following words:

Even if we find that there is no express power conferred on the EACC to conduct investigations in respect of criminal offences, Article 259 of the Constitution enjoins us to interpret the Constitution in a manner that inter alia promotes its purposes, values and principles and contributes to good governance. On our part we see no inconsistency between the powers donated to EACC under the Aceca or provisions of Article 79 as read with Article 252 of the Constitution. In other words, a holistic interpretation of Articles 79 and 252 aforesaid leads us to the conclusion that the legislature acted within its powers when it enacted Aceca.<sup>310</sup>

The Court's exposition above offers greater insight into the quest for accountable leadership. It proves that the courts are willing to go beyond the positivist, black and white of the law, as long as they are determined to promote the purpose, values and principles

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<sup>307</sup> Section 11(1)(a to j).

<sup>308</sup> Section 11(3) to (5).

<sup>309</sup> [2018] eKLR.

<sup>310</sup> Ibid, paragraph 98.

of the Constitution. Several other judicial pronouncements have affirmed the power of the Commission to investigate acts of corruption and economic crimes as opposed to unnecessarily limiting the Commission's powers of enforcement catered for by Chapter Six. To this end, it is important to note that the principle aim of Chapter Six is to ensure accountable governance and the major indicators of unaccountable governance is the prevalence of corruption and economic crimes. The purposes, values and principles of the Constitution that Chapter Six was ordained to promote will remain a hollow pipe dream if unnecessarily restrictive interpretations will be deployed in the enforcement thereof. In *Boniface Katana Kalareri v Ethics & Anti-Corruption Commission & Another*<sup>311</sup> the High Court held that Commission's mandate goes beyond enforcement of Chapter Six to dealing with matters of ethics and anti-corruption in general. The Court argued further that the enactment of Aceca was to comply with the edicts of article 79 of the Constitution. In *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another*<sup>312</sup> the Court was emphatically categorical that investigations involving corruption and economic crimes are complex and as such, they require specialized skills and knowledge to conduct. Judicial reasoning has further upheld the position that while at the investigatory stage, the Commission is rightly justified to obtain search warrants *ex parte* and without giving prior notice to persons under investigations. This position was well enunciated in *Okiya Omtatah & 2 Others v Attorney-General & 4 Others* as follows:

the order or warrant is never to be granted as a matter of course. To us, to give the notice to the person being investigated can easily jeopardize the incriminating evidence.... Clearly, it is understandable why warrants or seizure orders are obtained *ex-parte* when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24(1) of the Constitution and hence, we find that the allegation for breach of Article 50 fails.<sup>313</sup>

The emerging jurisprudence on warrants and seizure in relation to corruption and economic crimes is that they are necessary elements for the effective combating of crime. Whereas individuals are entitled to the enjoyment of their rights and fundamental freedoms recognized in the Bill of Rights, the courts have been called upon to create a gulf that will help balance the competing social interest, that is, the need for recognition

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<sup>311</sup> [2015] eKLR.

<sup>312</sup> Misc. Civ. App No. 54 of 2006.

<sup>313</sup> [2018] eKLR.

and protection of rights and fundamental freedoms on the one hand and supporting the state in combating crimes on the other hand. From the foregoing, it can be argued, as a virtually incontestable fact, that the Commission is clothed with sufficient instruments buoyed by a judicial system willing to interpret the law with ingenuity to help enhance constitutionalism. It is therefore, paradoxical that lack of transparency and accountability in management, development and distribution of resources has nonetheless flourished in Kenya post the 2010 Constitutional dispensation.

## **5.2 The Independent Electoral and Boundaries Commission**

The Independent Electoral and Boundaries Commission (IEBC) is established under article 88 of the Constitution. The IEBC is the body charged with conducting or supervising elections and referenda for all elective positions established under the Constitution or any other law.<sup>314</sup> Pursuant to the provisions of article 88, Parliament enacted the Independent Electoral and Boundaries Commission Act (IEBC Act) to make provision for the appointment and effective operation of the IEBC.<sup>315</sup> The objects and purposes of the IEBC Act include providing for operations, powers and responsibilities of the IEBC to supervise elections and referenda; provide the legal framework for identification and appointment of the Chairperson, members and secretary; provide for the ways of exercising of powers, responsibilities and functions of IEBC pursuant to article 88(5) of the Constitution; and provide for mechanisms to facilitate consultation with interested parties pursuant to article 89(7) of the Constitution.<sup>316</sup>

The IEBC Act adopts the functions of IEBC as envisaged under article 88(4) of the Constitution. As earlier stated in this Chapter, the IEBC is the constitutional body with the exclusive mandate to oversee elections and conduct referenda. The IEBC is also mandated, in addition to the foregoing functions, to discharge such other functions as may be prescribed by legislation. Both the Constitution and IEBC Act, however, identify common functions alongside those which may be contemplated by such legislation. The functions include registration of voters; the regular revision of the voters' roll; delimitation

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<sup>314</sup> Article 88(4) Constitution of Kenya 2010.

<sup>315</sup> See the preamble to Act No. 9 of 2011.

<sup>316</sup> Section 3.

of constituencies and wards; and the regulation of the process of nomination of candidates by political parties. Even though this is a constitutional mandate of the IEBC, nomination of candidates by parties has never been regulated by the IEBC and even where parties have mockingly invited the IEBC to supervise the nomination process, the results have invariably only remotely reflected the will of the party members. Perhaps this might not be a failure entirely attributable to weaknesses in the IEBC, but to a totally dysfunctional political party structure that has perpetually survived political party reforms. Party patronage has largely remained the determining factor in who gets the nomination certificate to contest an election, despite explicit constitutional provisions on political parties being the fulcrum of the country's representative democracy.<sup>317</sup> Save for election and post-election disputes, the IEBC is mandated to settle electoral disputes including disputes relating to or arising from nominations.<sup>318</sup>

In *Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 Others*<sup>319</sup> the Appellant was aggrieved by the party list forwarded by its party to IEBC for consideration for nomination for special seats. The Appellant therefore lodged a complaint with the Political Parties Dispute Tribunal on allegations inter alia that the 3<sup>rd</sup> Respondent had been unlawfully and unconstitutionally listed under the marginalized or minority group in the party list. The 3<sup>rd</sup> Respondent had been listed as a fourth potential nominee in the party list without specifying the special interest group she represented. The Political Parties Dispute Tribunal annulled the party list and ordered that it be reconstituted to comply with the law. In compliance with the Tribunal's order, the party reconstituted the list by defining the special interest group the 3<sup>rd</sup> Respondent was representing, being mixed heritage Asian-African, and thereafter resubmitted the reconstituted list to IEBC. The Appellant argued that the list had not been reconstituted but rather the same list resubmitted with a mere definition of the category of special interest the 3<sup>rd</sup> Respondent represented and as such, the IEBC violated the Constitution in accepting the resubmitted list. The Electoral Court held that the IEBC acted within the law in receiving the resubmitted

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<sup>317</sup> Article 91 of the Constitution of Kenya, 2010.

<sup>318</sup> Article 88(4)(a) of (e) Constitution.

<sup>319</sup> [2018] eKLR.

list having satisfied itself as to its compliance with the law. This position was affirmed by a unanimous decision of a three-judge bench of the Court of the Appeal.

Other functions of the IEBC flowing from article 88(4) of the Constitution as read together with section 4 of the IEBC Act include registration of candidates for election and voter education. Calhoun gives a clear preponderance of an educated and well-informed voter arguing that a properly informed electorate is capable of making informed choices that will help the ballot process achieve its objective of ordaining governments that work towards attaining its purpose of protecting society from disintegration. In this regard, the IEBC is further mandated to facilitate the observation, monitoring and evaluation of elections and the rationale for this is to ensure the integrity of the ballot process.<sup>320</sup> The IEBC is also mandated to regulate election financing as well as develop a code of conduct for candidates and parties contesting elections and monitoring compliance with the legislation required under article 82(1)(b) relating to the nomination of candidates by parties. The inevitable question, which is the enterprise of this study, is why, despite the existence of the foregoing mandate and most importantly having been given constitutional impetus, the ballot process has remained excessively far from ordaining and/or expressing the sovereign will of the people as envisaged under article 1 of the Constitution? The electoral process and electioneering periods in Kenya have perennially become a threat to peace and stability in the country.<sup>321</sup> In *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others*<sup>322</sup> the Court of Appeal buttressed the importance of Kenya's electoral system as established under the Constitution as being the antidote the people themselves prescribed to fashion the national values and principles of good governance to bring justice and freedom to the country. The Court went on, and this study wholly agrees with same, to pronounce itself in the following manner:

They were also keenly aware that the ties that bind them in united nationhood are periodically stretched and strained at election time and so sought to insulate the electoral process from the deleterious perils and malaise of opacity, corruption, crime and malpractice. The antidote

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<sup>320</sup> See Civil Appeal 105 of 2017; Supreme Court Petition No. 1 of 2017.

<sup>321</sup> The 2007 elections for instance, resulted in a deadly post-election violence that claimed over 1000 lives and massive loss of property. Six prominent persons including the current sitting president and deputy president (Uhuru Muigai Kenyatta and William Samoei Ruto respectively) were indicted at the International Criminal Court (ICC). The 2013 and 2017 elections were marred with violence and interestingly, the Supreme Court annulled the results of the 2017 presidential elections.

<sup>322</sup> Civil Appeal No. 105 of 2017 [2017] eKLR.

they prescribed was an electoral system founded on, and infused with, clearly defined core principles including, in particular, free and fair elections that are conducted by an independent body, are transparent in character and administered in an impartial, neutral, efficient, accurate and accountable manner.<sup>323</sup>

Outside of the IEBC Act and the Constitution, other functions of the IEBC are to be found in the Elections Act,<sup>324</sup> Election Campaign Finances Act,<sup>325</sup> and Election Offences Act.<sup>326</sup> The IEBC has had a vacillating interpretation of some of its functions as ordained by these statutes. For instance, in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* the IEBC argued that announcement of election results as contemplated by article 86(c) of the Elections Act and Election Regulations is different from a declaration of the results. To the IEBC, a declaration meant the finality of an election process, whereas an announcement meant mere publicizing of the results. The context of this flawed interpretation by IEBC was to enable it to tamper with the results declared at the polling station in accordance with article 138(3)(c) of the Constitution.<sup>327</sup> It is not clear why, despite this unambiguous constitutional provision, the IEBC still held the view that results announced under section 39 of the Elections Act, are different from those announced pursuant to article 138 of the Constitution. The position adopted by the IEBC appears to be a misconception of the electoral process envisaged under article 138 of the Constitution since it held the wrong view that since the Elections Act allowed it to appoint returning officers, then the returning officers are appointed for different elective positions and as a consequence, they can only declare results for that specific position and no more. Assuming the position adopted by the Election Regulations enacted by the IEBC were correct, one need not go further than article 138 to know that the results announced at the polling station cannot be altered and where any law or regulation purports to state otherwise, then for reasons of constitutional supremacy, such law or regulations are unconstitutional. It is indisputable that the IEBC's interpretation is fatally flawed because a polling station understood within the context of article 138 of the Constitution shall be such

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<sup>323</sup> [2017] eKLR.

<sup>324</sup> No. 24 of 2011.

<sup>325</sup> No. 42 of 2013.

<sup>326</sup> No 37 of 2016.

<sup>327</sup> After counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

place as prescribed by an Act of Parliament as contemplated by article 138(3)(b)<sup>328</sup> and the Elections Act, which is the legislation contemplated under article 138(3)(b). This specific legislation gives a clearer definition of a polling station: ‘polling station’ means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election.<sup>329</sup>

The Elections Act introduces a further interesting dimension to the understanding of what constitutes a polling station within the meaning of article 138(3)(b) of the Constitution. Section 2 of the Elections Act defines a polling station as a ‘place ... equipped for casting of votes...’. This in itself makes the interpretation of the IEBC discussed above not only unconstitutional but also illegal as all the casting of votes is done at the polling station and none at the national tallying centre to warrant the chairperson of the IEBC to purport to have powers to alter the results declared at the polling station where the casting of votes is done. The IEBC’s position in the case raises a very pertinent issue not only as to its independence, but its political impartiality. This issue, it is contended in this study, would perhaps, at the very least, be the reason why the ballot process has perpetually failed to ordain a limited government, strictly so-called, in Kenya.

### **5.3 Assets Recovery Agency**

The Assets Recovery Agency (Agency) is established under the Proceeds of Crimes and Anti-Money Laundering Act (POCAMLA).<sup>330</sup> The Agency, is mandated to essentially enforce Part VIII of POCAMLA which deals with the procedures for civil forfeiture. In discharging its mandate under sections 81 to 89 of POCAMLA, the Agency can apply for and obtain orders prohibiting any person from dealing with any property that is reasonably believed to be the proceeds of crime. The Agency has powers, where there are prohibition orders, to apply for the forfeiture to the government of any property that is subject to the prohibition orders.<sup>331</sup> Supported by a judiciary determined to entrench constitutional practice, the Agency has been able to apply its powers under Part VIII of POCAMLA with

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<sup>328</sup> The poll shall be taken by secret ballot on the day specified in article 101(1) at the time, in the places and in the manner prescribed under an Act of Parliament.

<sup>329</sup> Section 2 of the Elections Act No. 24 of 2011.

<sup>330</sup> Section 53.

<sup>331</sup> Section 90.

success. For instance, in the case of *Assets Recovery Agency v Rose Monyani Musanda & 2 Others*<sup>332</sup> the High Court considered four issues for determination but of utmost importance for this discourse were (i) whether a criminal conviction was a condition precedent for an order of forfeiture; and (ii) whether the application for forfeiture violates the right to property and fair hearing. It would be important to consider the import of these two issues in brief detail.

On the issue of whether a criminal conviction is a condition precedent to an order of forfeiture, the High Court rightly determined that guided by the existing jurisprudence and legal framework, civil forfeiture proceedings are proceedings in rem, and as such, cannot be pegged on there being a conviction.<sup>333</sup> While citing section 92(4) of POCAMLA, the Court held that a conviction is not required as a condition precedent for an order of forfeiture. It was further argued that proceedings for forfeiture do not aim at punishing an accused person but are intended to ensure the confiscation of proceeds of crime. The Court considered the import of section 92(4) of POCAMLA as follows:

The reasoning for this legislative intent encapsulated in section 92(4) of POCAMLA or the unexplained assets provisions of the Anti-corruption and Economic Crimes Act is, in my view, sound. State agencies dealing with criminal offences are, more often than not, faced with great difficulties in investigation and prosecution of offences, particularly corruption and economic crimes as well as crimes related to drug trafficking and organized crime which have, so to speak, been turned into 'businesses'. The history of criminal convictions in such matters worldwide, but more so in Kenya, demonstrates the difficulty of obtaining convictions. The obstacles placed by the accused in the successful prosecution of such cases are legendary, and the standard of proof in criminal cases often leads to acquittals on technical grounds. This, in my view, is the rationale for provisions such as are found in section 92(4) of POCAMLA. To peg suits for civil forfeiture on criminal convictions would defeat the legislative purpose and intent of POCAMLA.<sup>334</sup>

The existence of such reasoning within the judiciary, this study argues, places the quest for ethical leadership in high echelons in promoting constitutionalism. At the heart of this study is the placement of limitations on individual actions to respect the discipline of the rule of law to ensure constitutionalism. By the courts appreciating the difficulties encountered in prosecuting economic crimes and going further to interpret the law with ingenuity is confirmation of the commitment that the idea of constitutionalism is the bedrock of good

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<sup>332</sup> [2020] eKLR.

<sup>333</sup> See *Asset Recovery Agency v Quorandum Limited & 2 Others* [2018] eKLR.

<sup>334</sup> [2020] eKLR at paragraph 108.

governance. Secondly, the Respondents invited the Court to determine that issuance of forfeiture orders prejudiced their right to own property as well as equal benefit and protection of the law as guaranteed under the Constitution.<sup>335</sup> The Court rightly held that the right to own property, albeit constitutionally protected, does not extend to property that is found to have been acquired illegally.<sup>336</sup> On the issue of equal benefit and protection of the law, the Court rightly determined that the provisions of the law, and more specifically POCAMLA, in respect of which the application was anchored, apply to everyone. There was no basis for the Respondents to assert a violation of article 27 rights when it had been established that the property which was the subject matter of the suit, was acquired illegally and thus constituted proceeds of crime.

#### **5.4 The National Police Service**

The National Police Service is an organ of state established in terms of article 242 of the Constitution and consists of the Kenya Police Service and the Administration Police Service. The Constitution further provides that police functions are national and shall consequently be performed at national level.<sup>337</sup> This constitutional provision is premised on the fact that Kenya has two levels of governance with different functions.<sup>338</sup> The National Police Service Act<sup>339</sup> is enacted to give effect to articles 238, 239, 243, 244 and 347 of the Constitution.<sup>340</sup> The Act provides additional functions of the police services to those provided by the Constitution. Key among these, and relevant to the enterprise of this study, is the investigation of crime; collection of intelligence; prevention and detection of crime; as well as maintaining of law and order.<sup>341</sup>

#### **5.5 The Directorate of Criminal Investigations**

Institutionally, the National Police Service Act establishes the Directorate of Criminal Investigations<sup>342</sup> whose functions include collecting and providing criminal intelligence;

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<sup>335</sup> Articles 40 and 27 of the Constitution of Kenya 2010.

<sup>336</sup> Article 40(6).

<sup>337</sup> Article 243.

<sup>338</sup> Articles 1(4) and 6.

<sup>339</sup> National Police Service Act Cap 84.

<sup>340</sup> Section 3.

<sup>341</sup> Section 24.

<sup>342</sup> Section 28.

undertaking investigations on serious crimes, including homicide, narcotic crimes, human trafficking, money-laundering, terrorism, economic crimes, piracy and organized crimes; maintaining law and order; preventing and detecting crime; apprehending offenders; maintaining criminal records, among other functions.<sup>343</sup> With these broad and clear functions, it is paradoxical that ethical leadership remains a pipe dream in Kenya. It remains to be seen whether the lack of ethical leadership is as a result of institutional failures or whether the institutions are staffed with selfish personnel incapable of properly executing their functions. Poor governance, corruption and diminished hopes for the rule of law have largely remained in Kenya despite the existing legislative and institutional framework to govern the affairs of the country.

### **5.6 Office of the Director of Public Prosecutions**

The Office of the Director of Public Prosecutions (ODPP) is established under article 157 of the Constitution. The ODPP is the head of all criminal prosecutions. The prosecutorial powers of the ODPP empowers the Director of Public Prosecutions (DPP) to institute and undertake, as well as take over and continue, any criminal proceedings. This power extends to discontinuing any criminal proceedings at any stage prior to entry of judgment.<sup>344</sup> The DPP is also empowered to direct the Inspector General of Police to investigate any information or allegation of criminal conduct.<sup>345</sup> The DPP is required to discharge the functions of the ODPP independent of any control by any person or authority and in exercise of such function and powers, the DPP is directed to be guided only by the interests of the public, the interests of the administration of justice and the need to safeguard the integrity of the justice system from being abused.<sup>346</sup>

The Office of the Director of Public Prosecutions Act,<sup>347</sup> enacted to give effect to articles 157 and 158 of the Constitution provides for principles that guide the execution of the functions of the ODPP. These principles, described as fundamental principles, include the rules of natural justice, the promotion of public confidence in the office, the execution of

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<sup>343</sup> Section 35 of Cap 84.

<sup>344</sup> Article 157(6) of the Constitution of Kenya 2010.

<sup>345</sup> Article 157(4).

<sup>346</sup> Article 157(10) and (11).

<sup>347</sup> Act No 2. of 2013.

functions on behalf of the people, serving the cause of justice as opposed to abuse of legal process, protecting the sovereignty of the people, and promoting democratic values and principles, including constitutionalism.<sup>348</sup> In a scathing attack on the ODPP due to its dereliction of its functions to promote constitutionalism and the rule of law, the High Court in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others*, where the DPP had been sued as custodian of information relevant to an inquiry as to suitability of a person to hold office, the Court pronounced itself as follows while addressing the contestation by the DPP that it was improperly joined in the suit:

The Petitioner alleges that the DPP had, in his knowledge, information about the suitability of the Interested Party to hold public office. In the Petitioner's mind, in fact, the information that the DPP had was sufficient to sustain a criminal charge. If true, it would be, to our mind, a dereliction of constitutional duty for the DPP to have failed to present such information during the process of vetting of the Interested Party. The position is that since the DPP bears the responsibility for criminal prosecutions, it is expected that he will be an instrumental office in the vetting of public officials. Hence, while the DPP might not have been directly involved in the process of appointment of the Interested Party, he bore responsibility to properly inform the appointing authorities about the investigations facing the Interested Party. The DPP has, therefore, been properly joined in this petition.<sup>349</sup>

Despite the existence of these well elaborated functions, the quest for constitutional practice remains a mirage in Kenya. The ODPP has not executed its functions to the required standards and in some instances, the independence of the office has been put into sharp focus. The ODPP has not, for instance, been excitingly successful in prosecuting high profile corruption cases and in most of those cases where the ODPP has exercised its discretion to charge, the charge sheets most often contain generic charges that are sometimes often not easy to be proved against the available evidence. In certain instances, these corruption cases are poorly investigated, and arraignments occur only for public relations purposes. Corruption within the office itself has made the attainment of the fundamental principles within the ODPP a hollow dream.

### **5.7 Civil Society Groups**

Civil Society Groups (sometimes termed non-state actors in this study) play a crucial role in promoting constitutionalism, especially through public interest litigation. The Constitution

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<sup>348</sup> Section 4 of Act No 2. of 2013.

<sup>349</sup> [2012] eKLR, paragraph 55.

does not expressly create civil society groups. However, the Constitution protects freedom of association which forms the basis of civil society participation in promoting good governance.<sup>350</sup> The Constitution provides sufficient safeguards to protect freedom of association from unnecessary emasculating by the state. For instance, the Constitution is emphatic that where legislation exists that requires an association to be registered, that registration should not unreasonably be withheld and further, that prior to any cancellation of registration, there must be a fair hearing conducted.<sup>351</sup> These safeguards are important in that they allow for the existence and formation of as many civil societies as possible with expertise to hold as many sectors of government as possible to account. In *Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board*<sup>352</sup> a challenge was lodged in the High Court alleging that the decision by the Respondent to issue notice of deregistration and subsequent freezing of the Petitioner's account was invalid and unlawful. The Petition was premised on a violation of the Petitioner's fundamental rights and freedoms to fair administrative action and a fair hearing as guaranteed by the Constitution.<sup>353</sup> In agreeing with the Petitioner, the Constitutional Court expressed itself thus:

I come to the conclusion that the decision by the Respondent to commence and or effect the process of deregistering the Petitioner as a non-governmental organization under the Non-Governmental Organization Co-Ordination Act, 1990 was riddled with impropriety and procedural deficiencies contrary to Articles 47 and 50(1) of the Constitution. The same position applies to order or direct the freezing of the Petitioner's bank accounts.<sup>354</sup>

The most poignant finding of the Constitutional Court in the above case was that judicial review under the Kenyan jurisprudence has been given constitutional impetus. Consequently, courts tasked with proceedings under article 47 have a duty not only to look at the merits and legality of the decision but also process and procedure. In *EG v Non-Governmental Organizations Co-Ordination Board & 4 Others*<sup>355</sup> the Petitioner had made an application to register a non-governmental organization whose main objective was to champion the rights of gays and lesbians. The Respondent refused to register the

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<sup>350</sup> Article 36(1) Constitution of Kenya 2010 provides: Every person has the right to freedom of association, which includes the right to form, join or participation in activities of association of any kind.

<sup>351</sup> Article 36(3).

<sup>352</sup> [2016] eKLR.

<sup>353</sup> See Articles 47 and 50 of the Constitution of Kenya 2010.

<sup>354</sup> [2016] eKLR at paragraph 70.

<sup>355</sup> [2015] eKLR.

organization because of that objective. The Respondent argued further that there was no infringement of the Petitioner's rights and if any existed, the same is justifiable on the ground inter alia that homosexuality is criminalised in the Penal Code. At the heart of the Petition was whether the decision by the Respondent undermined the Petitioner's right to freedom of association as protected under article 36 of the Constitution. While addressing itself to this question, the Constitutional Court stated: 'Neither Article 36 nor the definition of "person" in Article 260 creates different classes of persons. There is nothing that indicates that the Constitution, when referring to "person", intended to create different classes of persons in terms of Article 36 based on sexual orientation'.<sup>356</sup> With that, the Constitutional Court made a clear statement on the importance of the right to freedom of association being an essential ingredient of democracy which offers invaluable opportunities to the people. These opportunities include collective expression of political opinion, engaging in literary and artistic pursuits, and forming social bonds with others in concert.

Owing to the aforementioned legal backing, civil society groups have achieved tremendous success in keeping the government to check and thereby promoting the culture of constitutionalism. This success has most often been through civil rights advocacy and public interest litigation. Some case law illustrations will better illuminate this position. Article 73 of the Constitution provides inter alia that the guiding principles of leadership and integrity include selection on the basis of personal integrity, competence and suitability, or election in a free and fair election. This provision of the Constitution was put to the test in the case of *Trusted Society Human Rights Alliance v Attorney-General & 2 others*<sup>357</sup> where the Petitioner invited the High Court to determine the suitability of the interested party in the Petition to hold office considering the unresolved issues in his previous employment at the Agricultural Finance Corporation (AFC). The Petitioner contended that the appointment of the interested party as chairperson of the Ethics and Anti-Corruption Commission severely violated the provisions of article 73(2) as the said unresolved issues undermined the integrity of the interested party, rendering him unfit to hold public office.

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<sup>356</sup> [2015] eKLR at paragraph 75.

<sup>357</sup> [2012] eKLR.

The Court agreed with the Petitioner that the appointment of the interested party was unconstitutional as it undermined the integrity test contemplated in article 73 and went further to make several jurisprudential pronouncements that promote constitutionalism and adherence to the rule of law. Key among these include the place of separation of powers in the High Court's interpretative role under article 165 of the Constitution. In this regard the Court rightly held that the doctrine of separation of powers does not prohibit the Court from preventing executive and legislative overreach on their constitutional obligations.<sup>358</sup> Further the Court also made pronouncements on the centrality of the ODPP in promoting good governance, holding that owing to the very nature and purpose for which the ODPP was ordained it is reasonably expected to possess information relating to the suitability of any person to hold such office, especially those persons having criminal investigations against them as was the case with the interested party. The nexus between the presumption of innocence and integrity was also discussed and the Court was of the view that whereas when promulgating the Constitution, Kenyans were aware of the existence and therefore prominence, of the right of presumption of innocence, they were also desirous to demand high standards of personal integrity from persons seeking to govern their collective affairs. Ultimately, the Court invalidated the appointment of the interested party holding that:

We have already established that on available evidence the Interested Party faces unresolved questions about his integrity. The allegations which he is facing are of a nature that, if he is confirmed to this position, he will be expected to investigate the very same issues which form the gist of the allegations against him. It requires no laborious analysis to see that this state of affairs would easily lead many Kenyans to question the impartiality of the Commission or impugn its institutional integrity altogether. Were that to happen, it would represent a significant blow to the very institution the Interested Party is being recruited to head and lead in its institutional growth. In our view, this makes the Interested Party unsuitable for the position. As in the *Centre for PIL and Another v Union of India* (Supra), we find that the appointing authorities did not sufficiently take into consideration the institutional integrity of the Commission or its ability to function effectively with the Interested Party at its helm when they made or approved the appointment.... For all these reasons, therefore, the court finds that the appointment of the Interested Party, Mr. Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission offends the requirements of the Constitution, and in particular Article 73, and holds the same to be unconstitutional. We hereby set the appointment aside.<sup>359</sup>

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<sup>358</sup> [2012] eKLR, at paragraphs 78 and 79.

<sup>359</sup> [2012] eKLR, paragraphs 111 & 112.

However, the foregoing decision was uncharacteristically overturned by the Court of Appeal.<sup>360</sup> The Court of Appeal decision dealt a huge blow to the quest for ethical leadership as an element of constitutionalism. This study behoves a critique of the Court of Appeal decision and an assertion that the theory advanced by this study is consistent with the High Court's decision. The reasons for this approach are the following: the position advanced by the High Court is the correct approach in advancing ethical leadership in Kenya. It is a cardinal rule of constitutional jurisprudence that no constitutional provision is superior to the other. As such, the argument that jurisprudence on integrity is still in its infancy as was held by the Court of Appeal,<sup>361</sup> lacks constitutional backing as the same is akin to stating that article 73 is inferior to other constitutional provision. The quest for ethical leadership did not start in 2010. Instead, it is interwoven with the emergence of governance itself.

Civil society groups have been largely influential in promoting constitutionalism in Kenya. Further judicial decisions provide a spectrum guide of this elucidation. In *Okiya Omtatah Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties)*<sup>362</sup> the Petitioners in the consolidated petitions contested inter alia the creation of the cabinet administrative secretary positions and the appointment of holders thereof by dint of violations of articles 10, 47, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the Constitution, as well as sections 27 and 30 of the Public Service Commission Act.<sup>363</sup> The Court had no reservations in agreeing with the Petitioners and subsequently declared the impugned offices unconstitutional.<sup>364</sup> Similarly, in *Katiba Institute & another v Attorney-General & another*<sup>365</sup> the Petitioners challenged the selection and appointment by the President and members of his cabinet of persons to the positions of chairpersons and members of boards to various state corporations and parastatals. The basis for the challenge was that the mandate to select and appoint persons to those positions should be exercised by the 2<sup>nd</sup> Respondent, and in accordance with the values and principles in

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<sup>360</sup> Civil Appeal No 290 of 2012.

<sup>361</sup> Ibid at paragraph 88.

<sup>362</sup> [2021] eKLR.

<sup>363</sup> Act No 10 of 2017.

<sup>364</sup> [2021] eKLR, at paragraph 310(b).

<sup>365</sup> [2020] eKLR.

articles 10 and 232 of the Constitution. The Court determined that the said selection and appointments were unconstitutional for violating articles 10 and 232 of the Constitution and the Public Service (Values and Principles) Act,<sup>366</sup> and were therefore invalid.

The foregoing discourse offers a synoptic glimpse of the position, legal standing and the success and strategies that non-state actors are employing to embed the culture of ethical leadership as an element of constitutionalism. Whereas there exists documented evidence of enormous success in public interest litigation, the fruits thereof are perpetually denied by the executive branch of government's reluctance to obey court orders.<sup>367</sup>

### **5.8 The Judiciary**

In the struggle to achieve good governance and most importantly, constitutionalism, the judiciary is the institutional fulcrum of an attempt to achieve these aspirations. It is for this reason that the quest for and protection of judicial independence against the exigencies of other branches of government has remained the unending enterprise of constitutional theory and constitution-making processes.<sup>368</sup> Kenya's judiciary, and indeed many other judiciaries in jurisdictions adopting constitutional supremacy, plays a primordial role in safeguarding not only the rule of law but also promoting and embedding the culture of constitutional practice in the country. Judicial autonomy over the other branches of government traces its origin from the philosophical works of Montesquieu who is credited with developing the idea of separation of powers. While commenting on separation of powers Montesquieu famously stated as follows:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.... There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.<sup>369</sup>

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<sup>366</sup> Act No. 1A of 2015.

<sup>367</sup> The Judiciary 'Address by the Honorable Chief Justice David Maraga, during the presentation of the State of the Judiciary and the Administration Justice Report for the Financial Year 2019/2020 at the Supreme Court grounds on 27th November, 2020' Speech by CJ David Maraga at launch of State of the Judiciary accessible at <https://www.judiciary.go.ke>

<sup>368</sup> Ibid.

<sup>369</sup> *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR.

The Constitution of Kenya 2010, and indeed almost all constitutions in adopting the model of governance of constitutional supremacy, do not explicitly provide for separation of powers. However, Montesquieu's model of dispersal of governmental powers inheres in the structure of the Kenyan Constitution. The Constitution of Kenya 2010 is architecturally designed to ensure that the sovereign powers under it are tripartitely delegated to and exercised by the distinct branches of government it has designed.<sup>370</sup>

This constitutional device, upon which the judiciary wields the power to promote the culture of constitutionalism, is the ancient power of judicial review which was initially developed in the United States.<sup>371</sup> Whereas the power and instrument of judicial review remains common law in the United States where it originated, the same in Kenya has been clothed with constitutional impetus at least since the promulgation of the 2010 Constitution.<sup>372</sup> The granting of constitutional impetus to the power of judicial review has emboldened the sovereign judicial powers delegated to the judiciary to promote the growth of the rule of law and constitutionalism in particular. In *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney-General & Another*<sup>373</sup> the Court emphatically pronounced itself in respect to the role of the judiciary as the guardian of the constitution:

In actual fact it is this Court's sole mandate to provide checks and balances for the Executive and the Court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of Constitutional mandates. We find that to do otherwise would be a dereliction of our Constitutional mandate.<sup>374</sup>

## 6. Conclusion

This chapter has elucidated in broad and insightful terms the existing legal and institutional framework on ethical leadership in Kenya. The analysis given herein does not purport to invite the reader to assume that the analysis provides an exhaustive discussion on the legal and institutional framework of leadership and integrity in Kenya. It must however, be appreciated that Kenya has multiple laws and institutions that can help it

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<sup>370</sup> [2012] eKLR, at paragraph 64. See also 'Speech by CJ David Maraga at launch of State of the Judiciary' (<https://www.judiciary.go.ke>).

<sup>371</sup> See *Marbury v Madison* 5 U.S. (1 Cranch) 137, 177 (1803)

<sup>372</sup> Article 23(f) of the Constitution of Kenya 2010.

<sup>373</sup> [2011] eKLR.

<sup>374</sup> [2011] eKLR, cited with affirmation in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2012] eKLR.

realize constitutional practice. In form and content, there exists no ideal legal and institutional framework that is irreproachable and unimpeachable, nor does one exists that solves all problems. Moreover, the legal and institutional framework of a country is not a contract that is struck once and for all. Rather it is part of a deliberate progressive process of social development. A legal and institutional framework that promotes ethical leadership as an element of constitutionalism must inevitably accommodate strategic dialogue between the leaders and the citizens. The greater discourse of this chapter has been that the legal and institutional framework obtaining in Kenya, although significant and far-reaching, is falling short of ordaining irreversible and sustainable ethical leadership.

Kenya's legal and institutional framework hazardously fails to entrench the degree of ethical leadership found in the West where reversal is almost impossible and disastrous. While for instance the kind of ethical leadership obtaining in the West has resulted in a stronger constitutional culture, the one existing in Kenya is not aimed at promoting constitutionalism but rather the replacement of limited government with extreme militarization of civil institutions. Be that as it may, the existing legal and institutional framework offers immense hope for Kenya joining the mainstream of constitutional states and the scattered developments post 2010 provides greater contribution of this framework's attempt to realize and promote ethical leadership. Although not perfect, this framework helps to check the inevitable excesses of government. Having therefore considered the theory of ethical leadership and limited government, and the existing legal and institutional framework, the next chapter will consider the question why, despite existing literature and legislative framework, the quest for ethical leadership remains elusive in Kenya.

## CHAPTER FOUR

### EFFICACY OF THE LAW AND PRACTICE OF ETHICS IN KENYA

#### 1. Introduction

The moral tapestry in terms of adherence to and respect for the rule of law takes some form of a flight across a cosmo-scenic geography in Kenya. Flying through the corridors of justice, the post 2010 judiciary sheds its veil of renaissance through its landmark decisions that reassert its startling glory and eternal place in the quest for good governance; delivering impressive decisions that confirm its position as a co-equal arm of government bequeathed with the powers of being the custodian and guardian of the sovereign judicial will of the people embodied in the supreme law of the republic. This flight portrays a nation precipitated by the rule of law, respect for human rights, social justice and democratic tranquility which form part of the essential features of good governance.

The political plane comes to land on the shores of ethnic divisions, hatred, a people residing beneath escarpments of entrenched impunity; a country whose moral fabric is irredeemably tattered. Navigating into the public service, one lands directly into endemic corruption being the reigning *modus operandi*. Kenya is a country whose public service endures in abuse and misuse of public power. Individualistic aggrandisement has replaced trust in the exercise of public power. If your flight lands in the security sector, extra-judicial killings radiate the struggle for power and disrespect for rules of natural justice; unexplained disappearance of persons and abuse form the badge with which the police force is identified. The private sector welcomes one to the State of Nature; where the majority of people live in degrading and dehumanising circumstances, where survival is only for the fittest. By any standards, the flight through Kenya is a monumental feat of endurance across an imbalanced and fragile society.

Constitutional principles like republicanism, respect for the rule of law, democracy, social justice, natural justice, free and fair elections are principles that have perpetually survived civilization. The imprimatur is to advance the cause of sustainable constitutionalisation in Kenya that has ethics as an inherent feature. Leadership and integrity are not events that

occurred in 2010, but the promulgation of the Constitution does represent a turn in the right direction. The realisation of the fundamental values of constitutionalism underpinned by ethics is achievable if everyone in society contributes by making their voices heard in decision-making processes impacting on governance throughout Kenya. This obligation is imposed by none other than the judiciary of Kenya. Indeed, the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*<sup>375</sup> refers to the entrenchment of social values as ‘the most momentous act of sovereignty and self-determination since independence’ and the High Court’s Constitutional and Human Rights Division narrated the events of 2010 in the case of *Katiba Institute v Attorney-General & 6 others*<sup>376</sup> in the following terms: ‘in 2010, the people of Kenya adopted a Constitution that significantly changed governance structure of the country.’ This judicial recognition of the momentousness of the promulgation of the 2010 Constitution goes to the very heart of post-2010 constitutional jurisprudence as was enunciated by the Supreme Court when it held in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney-General & Another*<sup>377</sup> as follows: ‘Kenya is a Sovereign Republic and a Constitutional democracy founded on national values and principles of governance in Article 10 of her Constitution. All sovereign power in the Republic is reserved to her people...’.

Why then, despite this judicial renaissance, existing constitutional and elaborate legislative and institutional framework cementing the culture of ethical governance as an element of constitutionalism, does constitutionalism and ethical governance remain so elusive in Kenya? Why is it that there remains a gulf between the law and practice of ethical governance in Kenya? This paradox will be explored and analysed in this chapter by way of first providing a brief elucidation of the inter-relationship between the rule of law and ethics in the quest for good governance.

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<sup>375</sup> [2017] eKLR.

<sup>376</sup> [2018] eKLR.

<sup>377</sup> Presidential Petition No. 1 of 2017.

## 2. The Rule of Law and Ethics: Mutually-Reinforcing and Twin Concepts?

Throughout this study ethics, leadership and integrity have been used interchangeably as such reference to ethics (or ethical governance) means reference to leadership with integrity. Having so clarified, the hypothetical questions arising are, what is the correlation between the rule of law and ethics? Are they related concepts insofar as the pursuit of good governance is concerned? The answer to these questions must focus on the roles of the two concepts which is aimed at ensuring that leaders exercise state power and discharge their functions purely based on the law and not any other ulterior influence. According to Golanski:

... the concept of the rule of law has tended to function as a moral operator for evaluating the legal system in progress, at the particular historical moment, and in the context of the conditions of the larger society. As a moral operator, the rule of law is fated to generate robust disagreement. Issues will include which attributes of the legal system in progress are beneficial or detrimental to sustaining governance's moral well-being, and whether the manner in which legal institutional actions are taken at the particular historic moment diminish or bolster the rule of law. The underlying question is whether law's way of proceeding – from the point of view of procedures followed and access for all those affected – weakens or improves the moral situation.<sup>378</sup>

Kant, in his transition from popular moral philosophy to the metaphysics of morals, offers a clearer rendition of the foundation and basis of the rule law in assessing the morality of human action. Kant underscores the invaluable contribution of human experiences in arriving at the incontestable conclusion that there has never been any example of human conduct that has been based solely on the commands of duty. Kant rightly argues that whereas human action may purport to conform to the commands of duty; it is still debatable whether such actions are ever done from duty and therefore clothed with moral worth. In *McDonnell v United States*<sup>379</sup> Robert McDonnell and the wife were indicted on bribery charges arising from their acceptance of loans and gifts from the chief executive officer of a company that sought the Governor's help in getting Virginia's public universities to conduct research on its products. At the time, McDonnell was the Governor of Virginia. The issue for determination was whether there was a trade for an official act in exchange for favours. The Supreme Court held that if there were acts such as setting up a

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<sup>378</sup> Golanski A 'A Structural Concept of the Rule of Law' (2021) 10(1) *British Journal of American Studies* 20-21.

<sup>379</sup> 136 S Ct 2355 (2016).

meeting, calling another public official, or hosting a meeting to qualify as official acts then the statute would be unconstitutionally overreaching. It was contended that only a formal exercise of governmental power would violate the statute. Finnis weighs in on this debate and rightly argues that the rule of law forms the inseparable principle of legal obligations that cannot be traded for one against the other; they form a coherent set, employing themselves in all circumstances and prohibit selective application among its members.<sup>380</sup>

Human nature is naturally fragile and impure hence, human actions are often driven by self-love. Kant argues that such state of affairs has the tendency of purifying otherwise covert ideas and corrupt reason in order to satisfy specific interests or inclinations.<sup>381</sup> It bears repeating that the rule of law instils an obligation on all actors in the legal system to act in accordance with the law. Finnis contends that where one was to retain the quality of a “law-abiding citizen” then they must perform all acts which the law demands of them in good faith since the legal obligations are principles implicit in the legal system.<sup>382</sup> In the *McDonnell* case, it remains unclear whether the Court’s interpretation of the bribery statute favoured the government versus the defendant’s interpretation thereof. It is further argued that the twin and mutually-reinforcing concepts of democracy and the rule of law are often seriously endangered by corruption. The rule of law schema operates to assess the legal system’s structuring of the interactions between the citizens and elected representatives. However, the most confounding task in respect of the rule of law is assessing whether an act is done purely out of the commands of duty or merely driven by covert impulses. Since this is something that remains perpetually troubling, Kant writes eloquently:

In fact, it is absolutely impossible to settle with complete certainty through experience whether there is even a single case where the maxim of an otherwise dutiful action has rested solely on moral grounds and on the representation of one’s duty. For it is sometimes the case that with the most acute self-examination we encounter nothing that could have been powerful enough apart from the moral grounds of duty to move us to this or that good action and to so great sacrifice.<sup>383</sup>

Human action is often disguised as furthering a noble idea. As such, Kant argues that it becomes problematic – even almost impossible – to conclude that human action is driven

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<sup>380</sup> Finnis *Natural Law and Natural Rights* 317.

<sup>381</sup> Kant *Groundwork for the Metaphysics of Morals* 21.

<sup>382</sup> Finnis *Natural Law and Natural Rights* 317.

<sup>383</sup> Kant *Groundwork for the Metaphysics of Morals* 22.

by the covert impulse of self-love. The procurement process leading to the construction of the standard gauge railway offers a perfect understanding of Kant's discourse. In *Okiya Omtatah Okoiti & 2 Others v Attorney-General & 4 Others*<sup>384</sup> the Court of Appeal was confronted with the issue of whether the Kenya Railways Corporation followed due processes in awarding the tender for construction of the standard gauge railway to China Road and Bridge Corporation. Among the issues for determination at the Court of Appeal was whether the award was exempt from procurement procedures as contemplated by section 6(1) of the Public Procurement and Disposal Act (PPDA).<sup>385</sup> It emerged from the evidence that the contracting of China Road and Bridge Corporation was done long before the financing arrangement had been agreed upon. Consequently, the tender did not arise from the 'negotiated loans or grants' as envisaged by section 6 of the PPDA. The Court was left with no choice but to hold that the procuring entity violated both the provisions of article 227(1) of the Constitution of Kenya 2010 and sections 6(1) and 29 of the PPDA. This case offers a clinical example of where actors in the legal system employ the institution of the law in furtherance of individualistic interests as opposed to the common good. This deployment has the tendency of obliterating the rule of law. The social footprints left by the foregoing disposition is an assumption that an idea may have arisen within the realms of a noble objective and in furtherance of the good will, yet the same was motivated by covert incentives. On this argument, Kant writes:

So we gladly flatter ourselves with a false presumption of a nobler motive, while in fact even through the most strenuous testing, we can never fully get behind the covert incentives, because when we are talking about moral worth, it does not depend on the actions, which one sees, but on the inner principles, which one does not see.<sup>386</sup>

Kant offers a more scathing attack on human action as being so self-centered that even where an action purports to conform to the commands of duty, the same are perpetuated by self-interest and not strict adherence to duty. The Constitution of Kenya 2010 imposes important safeguards to protect the independence of the judiciary.<sup>387</sup> Key among those safeguards is the protection of judicial officers from legal action when in faithful

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<sup>384</sup> [2020] eKLR.

<sup>385</sup> Act No. 3 of 2005 provides at section 6(1) as follows: 'Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from any treaty or other agreements to which Kenya is a party, this Act shall prevail except in instances of negotiated grants of loans'.

<sup>386</sup> Kant *Groundwork for the Metaphysics of Morals* 22.

<sup>387</sup> Article 160 of the Constitution of Kenya 2010.

execution of judicial functions. Most importantly too is the stringent process of removal of judges from office.<sup>388</sup> These stringent and protracted processes of removal of judges from office, this study argues, is aimed at inter alia protecting and promoting the confidence of the people in the integrity of the judicial process. It follows therefore that where a judicial officer holding the position of a judge for instance, is suspected of unlawful conduct, then in order to protect the public confidence in the judicial system, such judge must first be removed from office through the constitutionally sanctioned process prior to prosecution over any alleged criminal conduct. It defeats the whole purpose of judicial independence to institute criminal proceedings over a serving judge as the same erodes public confidence over the integrity of the judicial system as a whole.<sup>389</sup>

Strict adherence to the commands of duty imposed by the constitutional safeguards on judicial independence shall not be trammled by actions that put to doubt citizens' confidence in the integrity of the judicial system. Arguing along this line, Kant uses an example of duty within the concept of friendship which he argues demands pure honesty from everybody, however, through human experience, there has never been found a single honest friend. The idea here is that even where one purports to be another's friend, it is not the friendship but self-interests that drive one to purport to be another's friend and therefore defeating the whole purpose of friendship. What Kant projects is that the obligations arising from friendship must not be premised on corresponding honesty from the other person. Kant argues as follows about self-centeredness of human action:

... most of our actions are in conformity with duty; but if one looks closely at "the imaginations of the thoughts of their hearts," then everywhere one runs into the dear self, which is always thrusting itself forward; it is upon this that the aim is based, and not on the strict command of duty, which would often demand self-renunciation.<sup>390</sup>

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<sup>388</sup> Article 168 of the Constitution.

<sup>389</sup> Two Justices of the High Court (JJ Said Chitembwe and Aggrey Muchelule) were arrested by officers from the Director of Criminal Investigations over claims of bribery.

<sup>390</sup> Kant *Groundwork for the Metaphysics of Morals* 22. See also *Okiya Omtatah Okioti & 2 Others v Attorney General & 4 Others* [2020] eKLR where the Court of Appeal held:

Although a substantial segment of the Standard Gauge Railway (SGR) project in Kenya is complete and operational, the manner in which it was procured continues to generate interest, perhaps on account of the magnitude of the investment in it. For instance, in a recent article published in the Daily Nation of 27th May 2020, Robert Shaw, wrote: 'The SGR was a government to government turnkey operation negotiated in the shroud of opaqueness and dumped upon the Kenyan population with the minimum of scrutiny. It's no exaggeration to say it has so far cost twice what it should have and the quotes submitted were around half of what it has cost so far. Why the government went for a more expensive non-tendered option is an open question, which most Kenyans can easily hazard a guess at the answer'.

The “neighbour principle” as articulated by Lord Atkins in *Donoghue v Stevenson*<sup>391</sup> offers a succinct elucidation of the self-renunciation command of duty. The idea of law is to lay foundational obligations of human relations imposing general commands of honesty in human dealings. According to Atkins, human action must be so that it refrains from causing reasonably foreseeable injury to persons who might be affected by such action. Atkins couched the neighbour principle within the precinct of the duty of care in the following words:

The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer’s question, who is my neighbor? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called in question.<sup>392</sup>

Drawing from the foregoing conception of command of duty is the idea of liberty as a modern conception of the rule of law. Contemporary conceptions of the rule of law postulates the idea of the rule of law as being a fundamental ingredient of liberty, demarcating personal spheres of freedom of action from interference by other citizens or public officials. Allan argues that as much as legal duties have limits, such limits must not subject a citizen to the will and whims of another person and on this, Allan concurs with Simmonds who persuasively asserts that:

Law represents the only possible set of conditions within which one can live in community with others while enjoying some domain of entitlement that is secure from the power of others. When a government pursues its objectives through the rule of law, it governs consistently with those conditions.<sup>393</sup>

The rule of law demands two fundamental aspects: that both the people and government must be ruled by the law and obey it; and that the laws should be such that the people are able and willing to be guided by it. Central to the rule of law therefore, is its abhorrence of arbitrary exercise of power. In other words, barring definite civil and criminal law limitations and consonant freedoms of others, one is free to act or refrain from acting as they so wish. Public officials and private persons are subject to judicially enforceable rules that constrain their actions to attainment of authorized public ends through legally sanctioned means.

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<sup>391</sup> [1932] AC 562 HL.

<sup>392</sup> *Id.*, at 580. See also *Journal of the Society of Public Teachers of Law* (1932) 27 at 30

<sup>393</sup> Simmonds N *Law as a Moral Idea* (2007) 143 cited in Allan *The Sovereignty of Law: Freedom Constitution and Common Law* 111.

The constitution is conventionally understood to be the expression of the sovereign will of the people and it therefore assumes supreme status within a particular legal system. Contemporary constitutional architecture and design embodies in their structures certain minimum principles such as equality of all before the law. The rule of law understandably embodies the concept of equality of all before the law in that both public officials and private citizens are prohibited from acting beyond legally sanctioned limits. It is for this reason that most modern constitutions identify the source of state power as emanating from the people and expects the exercise thereof to be in accordance with the constitution. This equality of all before the law therefore imbues the rule of law with a formidable instrument of safeguarding freedom, dignity and liberty – values inherent in all human beings. Discussing the idea of freedom and liberty as the foundational basis of the rule of law, Allan notes:

Freedom or liberty inheres, however, in each individual's status as citizen: the rule of law in a just state secures an equal liberty, consonant with a basic equality of citizenship. Accordingly, the scheme of rights, duties and powers established by legal rules must itself be non-arbitrary, in the sense that it is justified in terms of a public or common good – one that we can fairly suppose favors a similar freedom for all.<sup>394</sup>

The existence of rules demarcating arbitrary distinctions between citizens and/or groups will render the rule of law schema blurred. The rule of law goes beyond the mere existence of and strict adherence to legal rules to equal affirmation of its requirements by all citizens. Arguing from the same perspective, Golanski contends that the rule of law extends beyond the borders of legality into the terrain of capacity to access justice even by ordinary citizens or participants in the legal process. Accordingly, the rule of law connotes the ability of the ordinary citizens to advance their claims without undue regard to their socio-economic status.<sup>395</sup> Where legal rules purport to introduce social distinctions, such distinctions must be capable of being justifiable in an open, transparent and democratic society.<sup>396</sup> The limitations must further be able to respect the equality of all citizens to participate in securing the greatest possible enjoyment of their civil and political rights.<sup>397</sup>

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<sup>394</sup> Allan *The Sovereignty of Law* 93.

<sup>395</sup> Golanski 'A Structural Concept of the Rule of Law' 4.

<sup>396</sup> Article 24 Constitution of Kenya 2010: (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...

<sup>397</sup> Allan *The Sovereignty of Law* 93.

The protection of individual liberty from arbitrary violation by both private citizens and public officials is a fundamental aspect of the operation of the rule of law. A proper conception of the rule of law is underscored by horizontal judicial enforcement of the law. Consequently, the rule of law provides the scheme within which human beings explore the attainment of their potential on the assurance that if they avoid recalcitrance, they will benefit from consonant social cooperation and tolerance towards their individual rights and liberties. Individual liberties derive from the ability of the law to secure and harness peoples' freedom from encroachment. Adherence to the rule of law safeguards individual liberty thereby allowing people to live freely subject only to legally defined constraints and respectful of human dignity. Allan uses the analogy of a slave to buttress the importance of individual liberty:

The value of liberty as independence may be grasped by comparison with the position of a slave, who is wholly subject to the will of his master. Such freedom as a slave is permitted to enjoy is always precarious, subject at any moment to his master's interference. Even if he is allowed an extensive freedom, encompassing a large range of optional conduct, it remains dependent on the master's will and pleasure. Even if, in practice, the slave suffers little interference in the conduct of his affairs, he is nonetheless subject to dominion, or vulnerability to interference.<sup>398</sup>

The rule of law, as attested by the foregoing discussion, presents an instrument of ensuring coherence and predictability in social dealings. The existence of law, this study has argued, does not in itself ensure protection of freedom and liberty of the citizens. It does not offer equal access to the justice system, or to social and economic advancements of actors in society. The existence of the institution of law only provides society with mechanisms to attain equality. There needs to be some mechanisms to facilitate the institution of law to achieve the purpose for which it was ordained. The discussion of the rule of law here concerned itself with the twin and mutually-reinforcing concepts of legality and capacity of all actors within the legal system to equally participate in the realization of their potential in the broader spectrum of social, political and economic tranquility. The ability of the legal system to promote and facilitate equal access by all its participants of its benefits is the central scheme provided by the concept of the rule of law.

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<sup>398</sup> Id, at 97.

Having analysed the concept of the rule of law above, the next discussion will drill down into a critique of the existing patterns of the practical manifestation of the realisation of the rule of law and ethics as a contemporary means of enhancing constitutionalism. The underlying question that builds the theme of this chapter in particular and the enterprise of this study in general is why the quest for good governance in Kenya remains elusive despite the legal and institutional framework demanding ethical governance in the execution of duties and exercise of state power. The next discussion will attempt at giving answers to this question. The issues and practices under consideration do not offer exhaustive circumstances where ethical governance is missing in Kenya. The reader is at liberty to consider other instances that do not embed the culture of ethical governance as a sustained effort in realizing limited governance. The central theme in this chapter is that where the rule of law schema fails, then the entire object of limited government evaporates into the abyss.

The call for ethical governance especially under the constitutional architecture and design of the post 2010 Kenyan jurisprudence is aimed at making the substance of the rule of law workable. The enterprise of ethical governance places the institution of the people at the highest echelons of state power and calls on leaders to exercise such powers as trustees of the great body of the people. In so doing, the trustees must always be guided by the common will of the people expressed through the Constitution. The inherent warning is that where there is a departure from the exercise of state power within the principles implicit in the common will of the people, then the rule of law's function diminishes.

### **3. The Scope of Application of Ethics**

It cannot be gainsaid that there has been a vacuum when it comes to the quest for ethical governance in Kenya because there has been no clear understanding of the scope of its application. This has enervated two schools of thought. On one hand, there is a belief that ethical requirements such as sustained integrity measures should not apply to political leadership. Proponents of this school of thinking argue that constraining people seeking elective leadership from standing for election infringes the right to universal suffrage. So deep rooted is this contentious school of thinking that it has found its way into the judiciary

as well. In *International Center for Policy and Conflict (ICPC) & 5 Others v The Hon AG & 4 Others*<sup>399</sup> the Petitioners had challenged the eligibility of a presidential candidate and his running-mate to vie for the Office of the President of the Republic of Kenya by virtue of their indictments by the International Criminal Court (ICC). The argument put to the High Court was that the said candidates did not meet the Constitutional threshold of integrity to hold public office insofar as their ICC indictments on charges of inter alia crimes against humanity were concerned. The High Court dismissed this petition, claiming:

We have already placed on record the rights of the citizens of this country to make political choices, and indeed the rights of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to seek public office. Article 1 of the Constitution of Kenya places all sovereign power on the people of Kenya which shall be exercised only in accordance with the Constitution. It shall not be, and can never be the role of this court to exercise that power on behalf of the people of Kenya. That right must remain their best possession in a democratic society and is inalienable.<sup>400</sup>

The *ICPC* case is considered a major setback in advancing the enforcement of Chapter Six generally and for ethical governance in particular. The phraseology of Articles 73 and 75 of the Constitution deals with public confidence and integrity of the office, the nation and the people.<sup>401</sup> The Court's interpretation of Article 1 of the Constitution creates an impression that articles 73 and 74 are not part of the Constitution. It seemed to the learned justices that Chapter Six applies only to persons already holding office and universal suffrage trammels the constitutional need for leaders with integrity. The petition before the Court required it to give an interpretation as to whether in view of their indictment, the respondents met the constitutional threshold to hold public office. Further, democracy and the exercise of democratic rights are per se a form of limited government which is the hallmark of republicanism. Democracy and republicanism are intertwined in

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<sup>399</sup> HCCC Pet. No. 552 of 2012 [2013] eKLR.

<sup>400</sup> Ibid.

<sup>401</sup> The relevant articles provide as follows:

Article 73(1) provides: Authority assigned to a State officer-

- (a) is a public trust to be exercised in a manner that -
  - (i) is consistent with the purposes and objects of this Constitution;
  - (ii) demonstrates respect for the people;
  - (iii) brings honor to the nation and dignity to the office; and
  - (iv) promotes confidence in the integrity of the office.

Article 75(1) provides: A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids -

- (a) any conflict between personal interests and official duties; compromises any public or official interest in favour of a personal interest; or
- (c) Demeaning the office the officer holds.

that one of the constituent elements of republicanism, according to Madison, is periodic elections in which the leaders exercise state power at the pleasure of the people and during their good behaviour.<sup>402</sup> The Constitution declares Kenya a sovereign Republic founded on the national values and principles of governance.<sup>403</sup> Integrity is one of the principles identified in the Constitution and which the Court has a constitutional obligation to interpret as against individual conduct.<sup>404</sup> In doing so, the Court was expected to reassert the supremacy of the Constitution.

The *ICPC* case brings to fore the legal and political underpinnings surrounding the scope of application and enforcement of ethics. A truncated enforcement of Chapter Six means that the realisation of ethics will perpetually remain elusive. As observed by the Court in *Maina Kiai* when discussing national values and principles of governance, ‘... the entrenchments are not suggestions or aspirations to be attained at some future date; by generations unborn.’ Instead, they are peremptory obligations and directives binding equally on the present generations as well as future generations. The default argument that has been presented to trounce the judicious assessment of a person’s integrity is the presumption of innocence. This study argues that the obligations arising out of the need for ethical governance should not be viewed within the terrains of criminal culpability of an individual, but rather from the perspective of the best interests of the people, the nation and the office, reinforced by the values of constitutionalism and adherence to the rule of law. The question therefore when a court of law is confronted with the issues as to whether a person’s conduct falls short of the glory of promoting confidence of the people in those who hold office, should be answered not through the person concerned but assessing whether permitting any person whose conduct is impugned to assume office will promote public confidence in the integrity of the office which said person is supposed to hold. Comparatively, the former German President Christian Wulff resigned from his position as president in the wake of investigations into

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<sup>402</sup> Madison *The Federalist Papers: No. 39*.

<sup>403</sup> The concept of republicanism is well captured in Article 4 of the Constitution: (1) Kenya is a sovereign Republic. (2) The Republic of Kenya shall be a multi-party democratic state founded on the national values and principles of governance referred to in Article 10.

<sup>404</sup> The Constitution is emphatic on the jurisdiction of the High Court to interpret the Constitution thus: Article 165(3): Subject to clause (5), the High Court shall have –  
(d) Jurisdiction to hear any question respecting the interpretation of this Constitution ...

acts of seeking political favours and financial impropriety during his tenure as Prime Minister of Lower Saxony. In his televised resignation Wulff addressed the people in unambiguous terms:

Germany needs a president who can devote himself completely to national and international challenges ... and one who commands the trust of a wide majority of citizens. The developments of the past days and weeks have shown that this trust and therefore confidence in my ability to serve have been adversely affected.<sup>405</sup>

In the USA, the 12<sup>th</sup> Amendment to its Constitution requires the President of the Senate to certify the Electoral College votes in the presence of both chambers of Congress. This process is done after the Electoral College has cast its vote and envelopes containing certified votes with instructions that the person having the highest number of votes should be declared winner is presented to Congress. The vice president presides over the joint session of Congress in which the certificates are examined for authenticity. Throughout US history, these processes have confronted the ethical conscience of most vice presidents even where the outcome does not favour their interests. In the aftermath of the 2020 presidential elections, vice president Mike Pence (as he was at the time) was faced with the daunting task of following due process and certifying the votes (despite President Donald Trump's false claim that the vice president had the power to overturn the results), thereby exiting office given that he had been President Donald Trump's running-mate. Similarly, in 1961, vice president Richard N Nixon was presented by the State of Hawaii with two slates of electors. Consequently, the democratic electors' wishes prevailed and his competitor, John F Kennedy, won the election.

The comparative analysis above represents in the clearest terms the staggering difference on the scope and extent of application of ethics between the West and Kenya. Whereas in the West ethics and ethical governance is crystallised, when it comes to political leadership in Kenya, and most of the developing world, the quest for an ethical culture remains unattainable, especially in the political terrains of leadership, chiefly because of the poor conception of constitutional principles such as democracy and universal suffrage. "Bleak" is probably the best way to express the level and prospects for ethical governance in Kenya given that the political class remain in control of the ethics enforcing institutions

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<sup>405</sup> <https://www.cnn.com/2012/02/17/worl/europe/germany-president-scandal/index.html>

such as electoral agencies. The comparative study has shown that ethical governance in the West is buttressed by a strong history, culture and tradition of constitutionalism and the rule of law schema as opposed to Kenya and other African countries which rely purely on the written text to ostensibly achieve good governance.<sup>406</sup> The truncated approach to ethical governance has formed the foundation for the “Big Man” syndrome that pervades the Kenyan and African political landscape, thus reinforcing attempts to shield political leaders from accountability.<sup>407</sup> This has grossly undermined and diminished the prospects of good governance not only in Kenya but throughout the continent. Political accountability is often defeated by an ill-conceived conceptualisation of fundamental constitutional principles such as the presumption of innocence, universal suffrage, and others.

The other school of thinking on the scope and extent of application of ethics holds the view that the need for integrity in leadership should apply equally to both the appointed and elected leadership. In this study it is argued that arising from the discourse on the rule of law, this school of thinking is the best approach to apply if ethical governance is to sustainably achieve the object and purpose of enhancing limited government. Any attempt to exempt ethics, even though it is applied with scepticism and cynicism within the elected leadership, will not only give rise to arbitrary exercise of power, but embed a culture of bad governance. The political class, especially in developing democracies, control almost all sectors of development. It would be catastrophic not to constitutionally demand that the persons in whom the great body of the people bequeath their sovereign powers to, are not equally required to be persons whose ability to serve is not compromised in any respect.

The prevailing position with respect to Kenyan political leadership offers very little hope for the establishment of a culture of good governance. What appears to be the major obstacle to the quest for constitutionalism through ethical governance is the unbridled – and possibly deliberate – misapplication of constitutional principles such as presumption of innocence and universal suffrage. It is inconceivable that individuals whose conduct

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<sup>406</sup> Fombad CM ‘Africa’s Imperial Presidents: Immunity, Impunity and Accountability’ a paper presented at the “African Constitutionalism: Present Challenges and Future Prospects,” conference organized by the Institute for International and Comparative Law in Africa and the African Network of Constitutional Lawyers, held on 1-3 August 2011 at the University of Pretoria.

<sup>407</sup> See generally, Meredith M *The State of Africa: A History of the Continent Since Independence* (2005).

apparently undermines the confidence of the people in the integrity and honour of the office they are vying for are allowed to contest (and subsequently occupy such office) on the premise of the said principles. It is one of the fundamental arguments of this study that the presumption of innocence has absolutely nothing to do with ethical governance, as the criminal culpability of an individual is a purely criminal issue and has no impact on the eligibility of a prospective political leader in the context of universal suffrage. Rather, ethical governance as an instrument of constitutionalism concerns itself with the ability of an office holder to demonstrate respect for the people; honour the nation; and exhibit utmost dignity in the execution of their public powers. Accordingly, ethical governance is a *sine qua non* for the promotion of public confidence in the integrity of the office.<sup>408</sup>

Article 73 of the Constitution of Kenya creates constitutional imperatives capable of objective determination. To argue, therefore, that the scrutiny of individual conduct within the ambit of these constitutional requirement infringes the right to a presumption of innocence and universal suffrages impedes an ethical approach to the development of a culture of constitutionalism. The test that should be applied is not that of criminal culpability but of reasonableness. When confronted with a question whether human action accords respect for the people; honours the nation, respects the dignity of the people and imbues public confidence in the integrity of the office, one need go no further than reasonableness, as was the case with the former German President Wulff's reasons for resignation. To attach criminal culpability or absolute universal suffrage to the notion of ethics in promoting good governance is a flagrant denouement of constitutionalism and the rule of law schema. The High Court in *ICPC* described the political stratum in Kenya as such:

Kenya is at the threshold of holding its first general election since the promulgation of the new Constitution in 2010 ... This momentous event is occurring against the backdrop of a culture of political fragmentation and proliferation of election-related violence in Kenya over the years, which culminated in the post-election violence witnessed in the years 2007-2008. The root causes of the fragmentation and violence were aptly captured in the report of the Commission of Inquiry into the Post-Election Violence (CIPEV), popularly referred to as the Waki Report. They included inter alia, the use of violence by politicians to gain power following the legalization of multi-party democracy in 1991; an entrenched culture of impunity; the concentration of power around the Presidency; the feeling among certain ethnic communities of historical marginalization; poverty and unemployed youth.<sup>409</sup>

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<sup>408</sup> Article 73 of the Constitution of Kenya 2010.

<sup>409</sup> HCCC Pet. No. 552 of 2012.

From the discourse informing the foundation of governance, it is the argument espoused by this study that government was founded in order to protect society from disintegrating. The ICPC's description of Kenya's political structure reaffirms this position. It therefore becomes an incontestable assertion that the political leadership in Kenya and Africa must be held accountable for their actions. When the political class is removed from the ethical obligation to promote the rule of law, the dangers that moved mankind to consolidate power into a common fund will inevitably find their way back to society. Quite clearly, the ICPC identifies these salient dangers in Kenya's political class that necessitate a rethinking and purposive approach to the philosophical understanding of the concepts of the presumption of innocence and universal suffrage. These concepts cannot be applied to trump ethics and the need for ethical governance, as these equally have constitutional status in Kenya's post 2010 jurisprudence. Paradoxically, the ICPC made a serious error in its finding that the power to determine the political leadership vested in Kenyans, without appreciating that the Constitution gave rise to a comprehensive legal and institutional framework to ensure 'responsible leadership, integrity and accountability'.<sup>410</sup> Extending the scope of application of ethics to political leadership is an event towards consolidating a culture of constitutionalism, thus enhancing the prospects of realising good governance. More precisely, implementation of constitutional principles and policies such as ethics must be approached within the transformative nature of the Constitution of Kenya 2010. When confronted with issues such as the need for ethical governance, one must be guided by the spirit and soul of the Constitution (what Kant refers to as 'unseen inner principles') rather than applying a mechanical approach. The Constitution of Kenya 2010 embodies in it values and principles of governance espoused both in its preamble and article 10.

Rather than merely articulating the structure and organisation of government, the Constitution of Kenya focuses on finding a value system that it aims to transform into reality. In *The Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion*<sup>411</sup> it was held that:

A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses

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<sup>410</sup> Ibid at paragraph 6.

<sup>411</sup> No. 2 of 2012.

this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.<sup>412</sup>

Further debate on the scope of application of ethics revolves around its horizontality. The decision of the German Federal Court in *Luth Decision BVerfGE*<sup>413</sup> presents a proper elucidation on this debate. The Federal Court held as follows:

But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human beings to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.<sup>414</sup>

The preceding chapters of this study have extensively discussed the horizontality of ethics. This chapter is intended to find out why, despite the entrenchment of ethics, integrity also remains elusive within non-state actors. Simultaneously, this chapter calls attention to the danger(s) posed when non-state actors are not intrinsically involved in enhancing ethical governance and consequently, constitutionalism. Applying ethics horizontally is part of enhancing the rule of law schema in promoting constitutionalism and good governance. All actors within a legal system must operate under the law and their actions must promote certain essential ethos that help society exist within the parameters of equality.

The role of the private sector in influencing government policy cannot be understated. It is for this reason that the United Nations Convention Against Corruption calls on state parties to enact preventive measures and criminalise prevalent acts of corruption not only in the public sector but also in the private sector.<sup>415</sup> The Convention further encourages state parties to develop such measures as are aimed at preventing corruption within the

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<sup>412</sup> Ibid.

<sup>413</sup> 7, 198 I. Senate (1 BvR 400/51).

<sup>414</sup> Ibid.

<sup>415</sup> Annan AK (then Secretary General of the United Nations) 'The Foreword', United Nations Convention Against Corruption (UNCAC), III.

private sector; and enhancing accounting and auditing standards. Such measures include enhancing cooperation between law enforcement agencies and the actors in the private sector, developing standards and procedures to safeguard the integrity of the private sector, promoting transparency and preventing instances of conflict of interest, among others.<sup>416</sup> It therefore becomes unequivocal that the need for integrity within the private sector is not negotiable. The question must shift from the narrow emphasis on whether horizontality should apply to the private sector, to the broader – and more pertinent – question of the extent to which such horizontality of ethics must be applied.

The fundamental concern rendered throughout this study is that the promulgation of a good constitution does not by itself guarantee the creation of a constitutional culture. The argument advanced in relation hereto is that there is a dire need to employ constitutionally created institutions to avert abuse of power and corruption. Human experience, as espoused by Kant, has taught mankind of the dangers posed by human action in that whereas they promote self-aggrandisement, they often pretend to promote the common good. Guided by these experiences, the Constitution of Kenya 2010 placed an obligation on Kenyans to guard against corruption and other forms of abuse of power.<sup>417</sup> The Constitution deliberately created complementary institutions such as Office of the Director of Public Service, Ant-Corruption Institutions, and an independent judiciary that deploy their functions to protect and strengthen democratic institutions, equality, human rights and the rule of law. Usurpation of state power to advance personal or private interests makes a mockery of the efforts undertaken in the struggle for liberation and self-determination not only in Kenya, but also other African states. The public confidence in the constitutional scheme and integrity of the democratic processes must consequently be zealously guarded from any form of usurpation.<sup>418</sup>

The period towards the end of the twentieth century witnessed concerted efforts towards liberation in most African states. The post-liberation Africa gambled with a number of experimental political and economic system before most settled on multi-partyism and

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<sup>416</sup> Article 12 UNCAC.

<sup>417</sup> This is mostly achieved through the device of public participation guaranteed under article 10 of the Constitution of Kenya 2010.

<sup>418</sup> Meirotti and Masterson *State Capture in Africa* viii.

open market economies in the 1990s. During this transitional period, most African states did not have strong independent institutions founded on effective constitutions to safeguard against the undermining of democratic processes. This exposed African states to the dangers of concentrated powers with the attendant failure to consolidate democracy on the continent. Proof to this effect is adduced by Meirotti and Masterson who argue thus:

The substantial theory developed in Eastern Europe and Latin America, as well as recent revelations and developments in South Africa, show that state capture has profound implications for the consolidation of democracy, systematically eroding democratic processes by undermining the election of public representatives, the institutionalization and normalization of democracy and the socioeconomic transformation processes.<sup>419</sup>

The underlying question from the foregoing discourse is what exactly constitutes state capture and what is its effect on the quest for ethical governance. Meirotti and Masterson define state capture as a contemporary form of 'meta-corruption' intended to influence a state's regulatory framework under which state power is transmitted from the state to non-state actors. To Meirotti and Masterson, state capture erodes substantive democracy and as it gets entrenched, the ballot process and other democracy enhancing institutions become instruments for providing legitimacy to an otherwise illegitimate government. This is what Kant warned of in the context of human action, as is attested to by human experience (history), as furthering not a noble idea but covert impulses as was seen in the discussion on the concept of the rule of law in the preceding parts of this chapter.

Whilst Kenya's post 2010 constitutional jurisprudence was intended to be transformative in nature, the executive overreach subsumed constitutional safeguards within an environment that greatly betrayed the transformative aspirations that the country had when promulgating the Constitution. The events for instance, surrounding the procurement process leading to the construction of the standard gauge railway provides a good example of this situation.<sup>420</sup> Equally, the procurement of the electoral materials required for the 2017 general elections had to be suspended by the courts on several occasions for reason of non-compliance with procurement laws.<sup>421</sup> To this end, Meirotti and Masterson 'explore the interaction between state capture networks and electoral processes to identify

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<sup>419</sup> Ibid 3.

<sup>420</sup> *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others* [2020] eKLR.

how the process of encoding the rules of the electoral game offers an opportunity for state capture' and argue that: '... the electoral process gives state captors a means of exerting their influence because it provides regular access to the organs of state power.'<sup>422</sup> State capture is usually exacerbated by non-state actors and the traditional three branches of government become their key targets. This is because the primary intention of captors is to influence formulation and interpretation of laws and policies of countries they operate in. In highly captured states, the citizens' last resort is independent institutions. However, state capture results in the dilution of this independence and civil space. As such, the citizens begin to detract from participating in democratic processes. In countries with established histories of citizen participation and a strong civil society, democracy is often resilient as Meirotti and Masterson write of South Africa and the US:

... examples from South Africa and the US suggest that in states with a history of an engaged citizenry and an active civil society, 'democracy fights back'. There have been strong reactions by civil society to the perceived capture by interests aligned to the Zuma administration. Stremlau also describes how citizens and civil society in the US continue to practise their right 'to peaceably assemble and to petition the government for a redress of grievances', as was evident in the overwhelming participation in the Women's March on Washington the day after Trump was inaugurated.<sup>423</sup>

The contemporary understanding of state capture posits that the perpetrators thereof are groups that seek to distort the rules that limit their activities. This is often done through control of regulatory frameworks, interaction with state organs especially through influence of procurement processes as well as controlling the business environment through investment codes. The existence of this excessive corruption, according to the United Nations Convention Against Corruption, poses a dangerous and serious threat to the stability and security of society. The same further undermines institutions and values of democracy, ethical values and justice as well as jeopardizes sustainable development and the rule of law. This study has employed state capture to demonstrate how the unregulated private sector operates to interfere with nefarious intent, resulting in bad governance in a country. The existence of a strong independent institutional framework as well a history of citizen participation was identified as the bulwark of consolidating democratic processes in

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<sup>421</sup> *Republic v Independent Electoral & Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR.

<sup>422</sup> Meirotti and Masterson *State Capture in Africa* 6.

<sup>423</sup> *Id.*, 9-10.

a country. In the next discussion, this chapter will interrogate the efficacy or otherwise of the investigatory and prosecutorial processes in upholding ethical governance.

#### **4. Investigation and Prosecution**

Having discussed the concept of the rule of law and its interrelatedness to the need for ethical governance and further the scope of application of ethical governance, it becomes imperative to continue the discussion of this chapter with an analysis of the investigative and prosecutorial powers in creating and maintaining ethical governance in Kenya. Moohr articulates prosecutorial powers in adversarial systems in the following poignant manner:

Justice Robert Jackson famously characterized the federal prosecutor as having 'more control over life, liberty, and reputation than any other person in America.' Sixty years later, Judge Gerard Lynch raised the prosecutor's standing when he remarked that federal prosecutors perform 'the role of god.' Current white collar criminal prosecutions suggest that characterizing federal prosecutors as gods is the better description. Riding a tide of public outrage following discovery of massive fraud at Enron and other firms, prosecutors have attained something akin to heroic status. The failure of the civil regulatory scheme and traditional gatekeepers to prevent or even to report unlawful conduct in corporate offices makes the federal prosecutor the main vindicator of the public interest in lawful business behavior. Prosecutors have successfully prosecuted scores of wrongdoers by completing investigations, obtaining indictments, and frequently securing guilty pleas.<sup>424</sup>

As will be seen shortly in this discussion, an effective prosecutor, especially of white collar and corporate crimes, must have an effectively investigated case in order to be successful. This study proceeds on a hypothetical assumption that the biggest challenge to the development of the rule of law in Kenya is poor investigation of practices that undermine the rule of law. Consequently, investigatory and prosecutorial processes do not help the existing legal and institutional framework to develop a cogent history of constitutional practice. To be sure, the Kenyan experience illustrates a gloomy betrayal of the aspirations of the people to consolidate adherence to the rule of law through ethical governance, as espoused in the Constitution.

Investigative agencies are vulnerable to compromise and are themselves documented as the some of the main perpetrators of high volumes of corruption cases. Furthermore, through this corrupt network evidence presented to court is not sufficient to entertain any

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<sup>424</sup> Moohr GS 'Prosecutorial Powers in Adversarial System: Lessons from Current White Collar Cases' accessible at <https://ssrn.com/abstract=592724> 1.

meaningful prosecution. This is despite the existing jurisprudence from the very same courts that are mandated to weigh the evidence before it against the existing law to ensure a conviction. The investigatory powers under the Kenyan legal framework are primarily exercised by the National Police Service and the Ethics and Anti-Corruption Commission. In exercise of their investigatory powers these institutions are required to act independently and without direction and control of any person, save as to act only within the parameters set by the Constitution and national legislation. The need to act strictly within the ambit of the Constitution and national legislation has afforded courts the jurisdiction to protect the integrity of not only the investigation but also the prosecutorial processes. In *Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties)*,<sup>425</sup> the High Court referred to the case of *Patrick Ngunjiri Muiruri v DPP*, where it was held:

The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.<sup>426</sup>

The Director of Public Prosecutions has a tripartite obligation in the exercise of its powers under article 157. These obligations are to demonstrate that in the exercise of these powers, the Director is acting based entirely on the public interest, the interests of administration of justice, and the need to avert abuse of legal process. These obligations require the prosecution to demonstrate that a prosecution is founded on a firm factual background, otherwise an inference of ulterior motives can easily be made. In *Henry Aming'a Nyabere* the Court further cited with affirmation the case of *R v Inspector General of Police & 3 Others Ex Parte Lillian Wangari & 5 Others*, where it was held that:

It is for this reason that while the DPP has complete discretion and full autonomy to determine whether and against whom to bring criminal charges, the Courts have held that he must at least demonstrate that he has a prosecutable case and that his aim in bringing those charges are in the public interest. Hence, in *R v Attorney General Exp. Kipngeno Arap Ngeny (High Court Civil App. No. 406 of 2001)*, the Court stated thus: A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can

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<sup>425</sup> [2021] eKLR.

<sup>426</sup> [2017] eKLR.

say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.<sup>427</sup>

The foregoing notwithstanding, Kenya's investigative and prosecutorial agencies have failed to build a constitutional culture even post 2010 jurisprudence. With a vibrant judiciary willing to promote the rule of law through its buoyant decisions especially in corruption related matters, the investigative and prosecutorial agencies have often been accused of mishandling evidence at the investigatory stage thus making the prosecution process a façade. Whereas there has been feeble success in prosecuting high profile corruption cases, there has been no documentation of convictions in these matters. Some prosecutorial decisions have been criticized as having been informed by ulterior factors and not based on strong, cogent evidence capable of ensuring a conviction. This is evidenced by the stalling of cases in which accused persons were arrested in highly publicized and dramatic manner. The reason for the foregoing has largely been attributed to corruption, not only within the police force, but also the entire investigatory framework. Hyun makes scathing remarks about the obtaining situation in Kenya:

corruption in Kenya especially in the police service is a particularly large problem that affects social, economic and political interests of the nation. Police corruption is a specific form of police misconduct designed to obtain financial benefits, personal gain, or career advancement for a police officer or officers in exchange for not pursuing, or selectively pursuing, an investigation or arrest. One common form of police corruption is soliciting or accepting bribes in exchange for not reporting organized drug or prostitution or other illegal activities.<sup>428</sup>

Important in this discussion is the understanding that all investigative agencies such as the Ethics and Anti-Corruption Commission are staffed with personnel seconded to it by the National Police Service. Consequently, the very fabric of corrupt police officers permeates these agencies, thereby grossly undermining their efficacy. This study has repeatedly argued that corruption undermines not only democratic aspirations of a nation, but also delegitimizes government and erodes the attempt to build a culture of constitutionalism in a nation's jurisprudential substratum. Besides corruption, Kenya's institutional arrangement equally undermines the ability of the country to effectively fight

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<sup>427</sup> [2017] eKLR.

corruption and other organized crime. The placement of investigatory and prosecutorial powers into separate institutions greatly undermines the war on corruption and organized crime. This will be considered in greater detail when discussing the problems brought about by the existence of too many overlapping laws and institutions.

## 5. The Separation of Powers

The Constitution of Kenya 2010 has a highly structured and multifaceted design of separation of power in its architecture. First, it creates two levels of government being national and county governments.<sup>429</sup> At the national level, state power is further dispersed into the three arms of government as traditionally recognized by French philosopher Montesquieu that is the judiciary, the legislature and the executive.<sup>430</sup> Still at the national level, the Constitution creates a bicameral legislature which takes into account legislative interests of devolved units as well as the popular vote.<sup>431</sup> Calhoun confirms the strength of this structure while discussing the horizontal structure of power dispersal in the Constitution of the United States. Calhoun argues along the line of thought that whereas United States Senators are answerable to the people in their corporate character as States, the Representatives on the other hand are answerable to the people in their individual character as citizens.<sup>432</sup>

At the county level in Kenya, state power is dispersed into two arms of government being county assemblies and county executive.<sup>433</sup> Calhoun offers a more interesting rendition of multifaceted power dispersal. According to Calhoun, in a vertical power dispersal, the two levels of government claim equality, paramountcy and supremacy within their respective jurisdictions. To Calhoun, it is only when the two levels of government unite that one entire government is constituted. In the horizontal power dispersal, Calhoun notes that power is dispersed to three equal departments of government. In this arrangement, none of the

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<sup>428</sup> Hyun HT 'An Investigation of Strategies to Control Corruption in the Police Service: A Comparative Study of Kenya and Korea from 1963 to 2007' (Doctor of Philosophy Thesis, Kenyatta University (2015)).

<sup>429</sup> See articles 1(4) and 6(2) of the Constitution of Kenya 2010.

<sup>430</sup> See articles 93 as read together with 94 (on the legislature); article 129 (executive) and; article 159 (judiciary). The principle of separation of powers is also recognized under article 10 on National Values and Principles of Governance.

<sup>431</sup> See article 93 of the Constitution of Kenya 2010.

<sup>432</sup> Calhoun *A Disquisition on Government* 118.

<sup>433</sup> See article 176.

three departments can claim to be government on its own. Rather, it is upon their coming together that a government is formed. To Calhoun:

As they divide between them the delegated powers appertaining to government, – and as, of course, each is divested of what the other possesses, – it necessarily requires the two united to constitute one entire government. That they are both paramount and supreme within the sphere of their respective powers; – that they stand, within these limits, as equals, – and sustain the relation of co-ordinate governments, has already been fully established. As co-ordinates, they sustain to each other the same relation which subsists between the different departments of the government – the executive, the legislative, and the judicial, – and for the same reason. These are co-ordinates; because each, in the sphere of its powers, is equal to, and independent of the others; and because the three united make the government.<sup>434</sup>

Despite the existing constitutional architecture and design, separation of powers has in most instances failed to sustain limited government leaving the rule of law blurred and distorted in Kenya. The existence of provisions anchoring constitutional principles is not in itself a guarantee of the implementation of these principles.<sup>435</sup> Consequently, separation of powers suffers the same fate as other constitutional safeguards devised to anchor constitutionalism, especially in developing democracies. The failure of separation of powers to promote a history of constitutional practice can partly be attributed to a lack of its philosophical conceptualisation among the actors in the legal system. In effect, separation of powers has more often resulted in governmental absolutism, which is quite the opposite of what was intended by its proponents. Beyond the horizons of animating constitutional provisions designed to enhance the concept of limited government through separation of powers, lies the anthill of abuse and misuse of state power in Kenya. Accordingly, this section has considered how the Constitution of Kenya 2010 has adopted a multifaceted approach to dispersal of state power: first, it disperses power to distinct and interdependent levels of government, and second, within each level, creates separate departments. It is thus relevant to engage in a discussion of how the separation of state power operates vertically, that is, between the two levels of government.

### **5.1 Vertical Power Dispersal**

The history of devolution of power in Kenya dates back to the 1963 independence constitution and subsequent mutilation of the same through parched up amendments that

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<sup>434</sup> Calhoun *A Disquisition on Government* 108.

created a powerful centralized government with an imperial presidency.<sup>436</sup> Key among the amendments was abolition of the *majimbo* system of government that was culminated in 1968.<sup>437</sup> The 1963 Constitution had divided Kenya into eight regional provinces called *jimbos*. The post-independence constitutional amendments were aimed at consolidating state power to an imperial presidency through centralized system of governance. Authors who have written about post-independence Kenya have argued that the constitutional amendments are the main causes of the historical injustices and subsequent post-independence conflicts that failed to consolidate good governance in Kenya. Through these experiences, Kenyans adopted an entrenched system of devolved governance which placed the people at the center of governance through devolution of not only resources, but also state power. Under the 2010 Constitution, forty-seven governments were rightfully and regularly formed. In the course of these establishments, the forty-seven governments carried the aspirations of the people for a perfect republic ordained to address the historic injustices achieved through marginalization, ethnicity, electoral injustices and imperial presidency among others. Devolution offered the people a chance to contest exigencies of an all-powerful centralized system of governance. The High Court in *Institute of Social Accountability & Anor v National Assembly & 4 Others* held as follows:

A declaration is hereby issued that the Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid One of the objectives of devolution is to allow provision of proximate services to the grassroots and allow the people to participate in the governance and decision making. A key underlying principle in this being that of subsidiarity, that recognizes that ideally the local needs and communities are better appreciated, prioritized and localized problems solved at the lowest level capable of dealing. The Constitution requires that the county governments decentralize their functions and services “to the extent that it is efficient and practicable to do so” under Article 176(2). This principle is fortified by Part VI of the County Governments Act, 2012 which sets out the decentralization units in a county. We find that with this cascading mechanism of governance, the Constitution envisaged that although power is shared between the national and county government, the decentralized units within the county would facilitate the achievement of the objects of devolution through to the grassroots. We do not read the Constitution to authorize other competing governance structures outside the national structure, county and sub units of the county government, driving development concerns at the county level.<sup>438</sup>

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<sup>435</sup> Id, 120.

<sup>436</sup> Between 1964 and 1997 there were at least twenty-four constitutional amendments to the constitution.

<sup>437</sup> The Constitution of Kenya (Amendment) Act No. 16 of 1968. This amendment inter alia abolished the Provincial Council, repealed all previous laws passed by the regional assemblies, and deleted from the Constitution all references to provincial and district boundaries.

<sup>438</sup> [2015] eKLR, paragraph 121.

Soon after the promulgation of the 2010 Constitution, experience showed that devolution was not sufficiently equipped to effect the objects for which it was ordained. The failures of devolution were so glaring and revealing to all, which called for human action to intervene in the exigencies of the moment. At one hand was the debate to abolish devolution, whilst others still feared the dangers of centralization and advocated for a three-tier system of vertical power dispersal. The pro-decentralists were guided by the fears of imperial presidency and artefacts of marginalization under centralized governance and encouraged to advocate for decentralization through by the common glory they acquired through decentralization. Besides, the promise of equal distribution of resources and reduced presidential imperialism, depended on preserving devolution.

To the centralists devolution was repugnant to their feelings and aspirations. Their attachment to imperial state powers and institutions, were strong and ranking, since they were identified with the trappings of these powers and institutions and for bigger parts, survived the constitutional scrutiny of the rule of law. They were apprehensive of the dangers to imperialism resulting from the surrender of centralized sovereignty to distinct and interdependent governments and a subsequent consolidation of the same to one whole indivisible sovereign republic. Put differently, the centralists feared the placement of the centralized imperial powers into distinct governments and subsequent interdependence of the two levels of government would compromise their influence of access to resources and state powers.<sup>439</sup> As a result, they abhorred decentralization and regarded it as highly dangerous and vehemently opposed it.

The continued existence of the provincial administration (although in a camouflaged form) and the constituency development fund are testament to this disposition. Whereas the latter fund creates a flow of resources outside the devolved structure of governance, the former consolidates imperial president's grip of power. The national government was mandated to restructure the hitherto provincial administration to accord with and respect the new system of devolved government created under the 2010 Constitution.<sup>440</sup> This

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<sup>439</sup> See article 6(2) Constitution of Kenya 2010. The Constitution first creates 47 distinct county governments and creates one whole national government forming an entire republican government of Kenya.

<sup>440</sup> Section 17 of the Sixth Schedule to the Constitution of Kenya 2010.

imperative was never effected purposively and ultimately, provincial administration has remained in existence making devolution fail to consolidate constitutionalism through the separation of power principle.

In *Institute of Social Accountability & Anor v National Assembly & 4 Others*,<sup>441</sup> the Petitioners challenged the constitutionality of the Constituency Development Fund Act.<sup>442</sup> The Act establishes the Constituency Development Fund that is used to disburse money to the constituency level to finance development projects. The Petitioners confronted the Act on two grounds to wit the process of its enactment and its substance. In particular, the Petitioner contends that the Act contravenes such constitutional principles as the rule of law, good governance, transparency, accountability, separation of powers and division of powers between the national and county governments and public finance management and administrations. The Act was declared unconstitutional and invalid.<sup>443</sup> The High Court described the structure of devolution in the following manner:

Article 1(4) of the Constitution recognizes two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under Article 1 of the Constitution, the county government does not derive its power from the national government but directly from the People of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other. MPs and cabinet secretaries involved in the management or implementation of the CDF constitute the executive and legislative organs of the national government. Their involvement in development activities at the county level not only threatens to undermine the functions of the government at the county level but also blurs the executive and legislative divide that underlies the principle of separation of powers. We therefore find that it is unconstitutional for the national government to extend its mandate in the counties beyond its mandate under the Constitution through the artifice of the CDF.<sup>444</sup>

Devolution has since the promulgation of the 2010 Constitution been faced with tremendous setbacks despite it showing signs of sporadic development in all corners of the republic. From inconsistent distribution of the national resources as envisaged by the constitution and seeming lack of conceptualization of devolution, the national government has continued to muscle down the aspirations of Kenyans in localizing the management of their affairs. The problem is so deep rooted that that county governments through their

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<sup>441</sup> [2015] eKLR.

<sup>442</sup> Act No. 30 of 2013

<sup>443</sup> The High Court held: 'A declaration is hereby issued that the Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid'.

<sup>444</sup> *Institute of Social Accountability & Anor v National Assembly & 4 Others* [2015] eKLR, 122.

council of governors' forum have constantly threatened to shut down government operations at the county levels. The deprivation of resources to the devolved units is so endemic that some of the devolved functions of government such as health services have witnessed perpetual industrial actions by the health services providers in the public sector. All these challenges have made devolution fail to consolidate constitutionalism through vertical separation of powers. However, the challenges and failures notwithstanding, the existence of such framework of power dispersal makes the prospects of limited government achievable. Having dispersed power vertically between the different levels of government, the constitution proceeds at each level to disperse power horizontally among the different co-equal departments. This horizontal power dispersal is the issue calling for the imminent consideration.

## **5.2 Horizontal Power Dispersal**

Having created two levels of government, the 2010 Constitution proceeds to create different departments of governments. At the national level, the Constitution adopts a tripartite power arrangement to which national state power is dispersed to the traditional Montesqueian departments of legislature, executive and judiciary. At the county level the sovereign power is vested at the county executive and county assemblies. Separation of powers is at the heart of the structure of governance under the 2010 Constitutional dispensation. Whereas the constitution creates independent departments at both levels of government it equally equips each with a negative power to check on the exigencies of the other thereby enabling them work in concert in ensuring that the entire governance system works in furtherance of the objects for which it was ordained. In this regard, the High Court in *Institute of Social Accountability [supra]* pronounced itself as follows:

We heard the respondents' claim that the MPs do not get involved in the day to day administration of CDF but instead play an oversight role over the same. Far from the truth, we have reproduced provisions of the CDF Act that reveal more than that. The provisions of section 24 of the Act demonstrate that the Members of the National Assembly are charged with the responsibility of selecting the members to the CDF Committee. They also sit in those committees as ex-officio members. Senators are members of the County Project Committee whose primary role is to, "coordinate the implementation of projects financed through the Fund." We are thus constrained to ask, where the Members of Parliament derive such huge powers from? Certainly it is not from the Constitution. The argument that involvement of MPs reinforces parliament's oversight role is unconvincing. The principle of checks and balances is one that is well embedded in the Constitution.

Kenya adopted a largely parliamentary system at both levels of government. Parliament checks on the executive at the national level while the county assembly is the primary body charged with executive oversight at the county level. Chapter Eight of the Constitution is crystal clear on the role of the Houses of Parliament and the executive function is not one of those roles. The various roles of State organs are implicated in the doctrine of separation of powers.<sup>445</sup>

Despite the existence of quite elaborate constitutional provisions and judicial recognition of separation of powers, horizontal power dispersal, just like vertical, has largely failed to build a history of constitutionalism. Executive emancipation of the other branches, unfortunately at both levels of government, has constantly continued to subvert the aspirations of Kenyans in entrenching the rule of law schema. This disposition can be traced back to what Kant considered the gullible aspects of human action learnt through human experience. Kant argues that human action can easily flatter as furthering some noble objective when in real sense it driven by the pervading self-impulses. Calhoun concurs with Kant arguing that this subrogation of the rule of law stems from the very natural constitution of mankind as to possess stronger proximate feeling as against the social feelings. According to Calhoun, the pervading inclinations of the self leads to a universal state of warfare perpetuated by the passions of suspicion, jealousy, anger and revenge which in turn lead to insolence, fraud and cruelty, the imperils of nature that hazarded mankind to constitute itself into the social.<sup>446</sup> Stephen Holmes joins the debate and presents the twin puzzle in the following manner, “how can we exit from anarchy without falling into tyranny” and “how can we assign the rulers enough powers to control the ruled while also preventing the accumulated power from being abused?”<sup>447</sup> To Fombad the post-independence African regimes failed to cement constitutionalism when the succeeding regimes embarked on institutionalization of oppression in the guise of the quest for elusive policies such as national unity and economic development.<sup>448</sup>

For centuries, constitutional theory and constitutional making processes have grappled with the puzzle of containing government absolutism. One of the traditional means of

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<sup>445</sup> [2015] eKLR, paragraph 125.

<sup>446</sup> Calhoun *A Disquisition on Government* 3

<sup>447</sup> Holmes S *Passions and Constraints: On the Theory of Liberal Democracy* (1995) 270 cited in Fombad CM ‘Constitutional Reform and Constitutionalism in Africa: Reflections from Current Challenges and Future Prospects’ *Buffalo Law Review* Vol 59 (2011) 1012.

<sup>448</sup> Fombad (ibid).

checking government exigencies has been placing of governmental functions into different departments that is horizontal dispersal of government powers. The Kenyan Constitution embodies thus structural arrangement of governmental powers. However, constitutional practice has failed to entrench this device of arresting governmental absolutism in Kenya. Like many African countries, Kenya is still marked by elements of executive imperialism monopolizing power even post 2010 jurisprudence. Questions have since been asked as to whether separation of powers provided under the 2010 jurisprudence is anything beyond executive hegemony over the other departments. Or is separation of powers a mere sham devoid of any relevance to the present realities in the country's constitutional practice? Perhaps the Supreme Court holding in *Raila Odinga & Others v Independent Electoral Commission & Others*<sup>449</sup> offers a better elucidation of how exalted the presidency is even within the other co-equal departments. The Supreme Court stated:

The office of President is the focal point of political leadership, and therefore, a critical constitutional office. This office is one of the main offices, which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office, which, indeed, they themselves renew from time to time, through the popular vote.<sup>450</sup>

This study argues that such pronouncements especially when they emanate from institutions of high authority are a recipe for emboldened executive imperialism. The Supreme Court ideally failed to appreciate the presidency is an institution deriving and exercising its power as an executive agent of the people. It is not a personalized institution. The consequence of this creation of imperial presidency in Kenya can be seen in the attempt by the holders of the office post 2010 constitutional jurisprudence to dilute the principle of separation of powers by making the other departments subordinate to it as shall be discussed below. It shall be of utmost preponderance to state that the executive emasculation of other departments is not unique to Kenya alone; it is a common trend even in mature democracies such as the United States. The difference between the practice in Kenya and other developing democracies and the practice obtaining in mature democracies is that in the latter there has been cemented a strong culture history and

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<sup>449</sup> Supreme Court of Kenya (SCOK) Petition No. 5 of 2013

<sup>450</sup> SCOK at 108.

experiences developed over a long period of time that it is quite impossible to disregard the rule of law over expediency.<sup>451</sup>

The 2010 constitution envisages a strong independent judiciary wielding the sovereign power derived from the people.<sup>452</sup> The judicial independence in the constitution is anchored on a number of safeguards including security of tenure, protected remuneration of judicial officers, independent judicial service commission which is the watchdog of judicial independence, judicial fund which is a charge on the consolidated fund among others.<sup>453</sup> Despite the foregoing constitutional provisions, judicial independence in Kenya and indeed other countries in Africa has remained a pipe dream. The elected departments of governments have often misapplied their constitutional powers to muscle out their influence on the judicial branch. For instance, the legislative branch has always used its powers over the purse to allocate inadequate funding to the judiciary thereby reducing its output.<sup>454</sup> The judiciary is often more endangered where the elective departments are in control of the same party or coalition of parties. In such instances, lack of stronger constitutional safeguards renders the judiciary a puppet of the other two departments. The Constitutional Court in *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex parte George Saitoti*<sup>455</sup> used the report on the Parliamentary public accounts committee of 1995 to find that: 1. Since Parliament had considered this matter, the courts could not reconsider it without breaching the doctrine of separation of powers; 2. To subject Prof Saitoti to another trial, after he had been grilled by Parliament, would amount to double jeopardy; 3. Since Parliament had sanctioned Prof Saitoti's decision, he now enjoyed immunity for his actions under the National Assembly (Powers and Privileges) Act.<sup>456</sup>

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<sup>451</sup> See for instance attempts and schemes by then President of the United States Donald Trump to overturn the results of the 2020 presidential elections through intimidations, violent protests and insurrection of the United States Congress during the certification of the Electoral College votes. President Trump attempted further to blackmail his then Vice President to overturn and or refuse to certify the Electoral College votes in his favor.

<sup>452</sup> Article 159 of the Constitution of Kenya 2010.

<sup>453</sup> Generally, Chapter 11 *ibid*.

<sup>454</sup> Statement by Hon. David K. Maraga, Chief Justice and President of the Supreme Court of Kenya, on the Judiciary Budget Cuts. November 4, 2019.

<sup>455</sup> [2006] eKLR.

<sup>456</sup> Cap 6 repealed by Parliamentary Powers and Privileges Act No. 29 of 2017.

Judicial independence is further subdued through control of appointment of judges. Although in theory this is a constitutionally guarded process, the design of the 2010 constitution gives the executive immense powers on the appointment of judicial officers. The Judicial Service Commission (JSC) is the constitutional body mandated to supervise the appointment of judicial officers.<sup>457</sup> The JSC is composed of chief justice, one judge from each of the superior courts,<sup>458</sup> a magistrate, attorney general, two representatives of the professional body regulating advocates, one person nominated by the public service commission, two persons lacking legal knowledge representing the public and appointed by the president.<sup>459</sup> This makes the JSC composed of eleven commissioners and all are supposed to act only in accordance with the Constitution. The attorney general, public service commission nominee and the two presidential nominees already confer on the executive three direct votes within the JSC. Human experience has shown that the executive often interferes with and influences the persons elected by the advocates to represent them in the JSC. This gives the executive a further two votes making its friendly votes within the JSC six out of eleven and hence having a controlling say in the subsequent decisions taken by the JSC especially in stuffing the judiciary with executive friendly judges. In the ultimate, the judiciary becomes a mere pupate of the executive and the vertical separation of powers is obscured.

Further evidence of executive overreach over other departments in Kenya is to be found in interference by the legislative arm of government. In the wake of the clamour for constitutional reforms through the building bridges initiative<sup>460</sup> the leading populous parties, the ruling Jubilee Party and the Orange Democratic Party staged a series of reorganization of major parliamentary committees that were key to the realization of the Constitution of Kenya (Amendment) Bill<sup>461</sup> which saw leaders of the key committees replaced by those perceived to be friendly to the constitutional amendment process. The executive involvement equally saw members of the county assemblies promised car

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<sup>457</sup> Article 172(1)(a) Constitution of Kenya 2010.

<sup>458</sup> Supreme Court, Court of Appeal and High Court.

<sup>459</sup> Article 171(2) *ibid*.

<sup>460</sup> An initiative fronted by President Uhuru Kenyatta and former Prime Minister Raila Odinga after their “handshake” on 9<sup>th</sup> March 2018 following a highly contested and disputed presidential election.

<sup>461</sup> The Constitution of Kenya (Amendment) Bill 2020.

grants in order to influence their voting patterns towards the adoption of the constitutional amendment bill.<sup>462</sup> Having considered in detail the discourse of separation of powers both vertically, between the different levels of government and, horizontally amongst the coequal departments of government, the next issue calling for imminent deliberation is dispersal of powers within the legislative department created at the national level which is famously referred to as bicameralism.

### 5.3 Bicameralism

The 2010 Constitution, unlike the repealed Constitution, is emphatically unequivocal in its endeavours to expand the avenues for negotiations, deliberations and consultations in decision-making processes which are intrinsic basic components of democracy. One of the ways through which the 2010 Constitution does this is vide the creation of two chambers of Parliament, Bicameral Legislature viz; the Senate and National Assembly.<sup>463</sup> Bicameralism however, is not an entirely alien principle of good governance in Kenya. The Independence Constitution<sup>464</sup> had explicitly stupendous bicameral arrangement of the Legislature.<sup>465</sup> Some commentators have argued that bicameralism in the Independence Constitution was more practical in its functional arrangement than is the 2010 Constitution. Comparatively, whereas the latter constitution provides for specific functions to be exclusively done by one chamber of the legislature, the Independence Constitution demanded complimentary legislative authority between the then Senate and National Assembly.<sup>466</sup> In the ultimate, whereas institutionally the 2010 Constitution conceptualizes the basic tenets of bicameralism, its functional arrangements drifts it back to unicameralism especially in matters not perceived to be touching on devolved units, *counties*;<sup>467</sup> thereby creating impotent bicameralism.

Despite being a robustly transformative charter, the architecture of the 2010 Constitution somewhat fumbled in designing a working bicameral legislature. Instead of being an

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<sup>462</sup> The Constitution under article 257(7) requires a proposed amendment of the Constitution by popular initiative to be supported by a majority of county assemblies.

<sup>463</sup> Constitution of Kenya, 2010, article 93(1).

<sup>464</sup> 1963 Kenya Constitution [repealed] [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>465</sup> Ibid, Chapter IV.

<sup>466</sup> Ibid, Chapter IV Part II.

insurance against majoritarian legislation, the Kenyan bicameral arrangement has resulted in supremacy battles between the Senate and National Assembly. The consequence of which constant loggerheads over functional jurisdictions of either chamber are often witnessed thus derailing vital and important issues of national consideration.<sup>468</sup> These stalemates often practically defeat the spatial model of policymaking which is the benchmark of multi-institutional policy-making models such as bicameralism.

Bicameralism is perhaps becoming the most conspicuous method for variation of modern legislatures. However, designing of perfect, or nearly perfect, institutions that properly espouse basic tenets of constitutionalism is becoming more difficult than ideally assumed, but it offers hope. Consequently, majority of modern constitution-making processes revolve around creation of two separate chambers with distinct personnel. Whereas the Upper House [commonly 'Senate'] is elected and represents regional interest of the country, the Lower House [National Assembly] represents the national populations.<sup>469</sup>

Cutrone and McCarty<sup>470</sup> identify preservation of both mixed governments and federal governments as their justifications of bicameralism. In their analyses of Wood (1969) and Tsebelis and Money (1997), they contend that bicameralism in a mixed government aims at protecting minority interests from manipulation and subsequent suppression by dominant majority interest. This assumption is anchored on the premise that either chamber is represented by divergent interests thereby enabling the exercise of veto power where the relevant interests are being threatened. In this regard, classical bicameralism enhances consensus democracy in the legislative process as it captures different divergent views in society. A well-structured bicameral legislature insures perceived opposition leaning regions against suppression by dominant ruling majority from

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<sup>467</sup> Constitution of Kenya, 2010 Article 109(3).

<sup>468</sup> The apparent lack of consensus and or definition of what *matters relate to county government* to be a subject of complimentary legislation of the two chambers inevitably results to jurisdictional doubts of either chamber. This traction may not bode well with conventional theory and purpose of bicameralism.

<sup>469</sup> Patterson CS and Mughan A 'Senates and the Theory of Bicameralism'.

<sup>470</sup> Cutrone, M and McCarty *Does Bicameralism Matter?* 2-3.

participation in legislative decision-making processes in the nation thus promoting concept of democracy in a state. Lijphart writes:

Lewis states that the primary meaning of democracy is that "all who are affected by a decision should have the chance to participate in making that decision either directly or through chosen representatives... to exclude the losing groups from participation in decision-making clearly violates the primary meaning of democracy."<sup>471</sup>

Similarly, in more heterogeneous societies like Kenya, a properly structured bicameral legislature helps to diffuse partisan legislations by creating institutions that promote equal voting strengths such that small ethnic groups are not legislatively marginalized. To Lijphart:

Especially in *plural societies* – societies that are sharply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate sub-societies with their own political parties, interest groups, and media of communication-the flexibility necessary for majoritarian democracy is likely to be absent. Under these conditions, majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime.<sup>472</sup>

A properly structured bicameral representation therefore provides sufficient mechanisms for an all-inclusive decision-making process encompassing both the majority rulers and minority opposition. There is thus created a fusion of majority and minority views of society. As a result, consensus democracy rather than majoritarian democracy informs the legislative processes. For decentralization works to give autonomy to ethnic minorities in plural states, bicameralism therefore ensures that the interests of these autonomous minorities are fairly represented in the legislative process.<sup>473</sup>

Cutrone and McCarty contend that in 'federal jurisdictions' bicameralism allows for representation of both regional and national population interests in the legislative process. Conventional bicameralism therefore apportions the lower house on the basis of national populations whilst dividing the upper house based on regions.<sup>474</sup> To achieve a balanced regional representation, each region is apportioned equal votes in the Upper Chamber

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<sup>471</sup> Lijphart A *Patterns of Democracy* (1999) 31.

<sup>472</sup> Id 32-33.

<sup>473</sup> Lijphart 33.

<sup>474</sup> Cutrone and McCarty *Does Bicameralism Matter?* See also Doria G 'The Paradox of Federal Bicameralism' 5 *European Diversity and Autonomy Papers – EDAP* (2006) 20 accessible at [www.eurac.edu/edap](http://www.eurac.edu/edap).

while the lower chamber is apportioned proportionately across national populations. This provides for spatial balance of votes across the nation in the broader contours of legislation since the negatives of population representations are countered by unit representation. In the ultimate, whereas the national population interests are represented in the lower house, the upper house represents the interests of regions in the legislative process.<sup>475</sup>

Another salient feature of bicameralism is its role in promoting separation of powers within the legislature. In deed one of the challenges that immediately followed consolidation of power into a common fund, for preservation of the human race, was the consequential concentration of powers.<sup>476</sup> One of the effective mechanisms of containing attendant temptation of abuse and misuse of consolidated state power was found in the province of separation of powers and its concomitant principle of checks and balances. Constitutional theory and Constitutional architecture and design therefore delve with how best to disperse state power so that it is solely utilized to achieve the functions for which government was ordained. In practice, separation of powers and checks and balances are implicit rather than explicit in proper constitutional architecture and design.<sup>477</sup> It can be achieved without express mention thereof.

Conventional separation of powers often revolves around tripartite dispersal of state power with each of the three organs having equivalent ambitions of maximizing their powers. Legislative abdication has, however, become the reigning modus operandi; and conventional separation of power is much becoming bunk. Classical separation of powers must thus be upgraded to contemplate modern intra-branch power dispersal. A critical mechanism to promote internal separation of powers is bicameral bureaucracy. Although not much appreciated in the political cycles, bicameral bureaucracy serves crucial function of creating more textured conceptions of legislature than unicameral activists espouse. Such bureaucracy can be achieved vide the creation of effective bicameral legislature. Bicameral bureaucracy portends a legislature deficient of manipulation by sectarian

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<sup>475</sup> Doria *ibid* 22-23.

<sup>476</sup> Calhoun *Disquisition on Government*.

<sup>477</sup> Madison J *Federalist Paper No.51*. See also, Patterson 'Senates and the Theory of Bicameralism' 13 who quote Lord Bryce 1917-18 'the chief advantage of dividing a legislature into two branches is that the one may check the haste and correct the mistakes of the other'.

interests and builds a cadre of institutionalized decision-making processes. Madison gives a clearer rendition of separation of powers:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.<sup>478</sup>

In the context of separation of powers within the legislature, bicameralism helps to protect any one chamber from furthering sectarian interests of the constituencies they represent.<sup>479</sup> Bicameralism thus connotes Madison's subdivision of power into separate departments of the legislature viz; Senate and National Assembly. In the ultimate, there would be internal power control mechanism within the legislature and legislative process. Entirely consistent with the foregoing principle of bicameral bureaucracy is bicameral democracy which helps expand avenues for consultation, negotiation and deliberation which are benchmarks of democracy. Bicameralism enhances extensive discussion over a proposed legislative enactment and maximizes public participation in the legislative process. Public input as well is extensively conceived in each house espousing ideals of constitutionalism.<sup>480</sup> Bicameralism increases platforms within which both the public and their representatives deliberate on decision making-processes of a state.<sup>481</sup>

### **5.3.1 Bicameralism in Kenya: An Entirely New Concept?**

Bicameralism is not an entirely alien concept in Kenya; it is not an idea that came in 2010. Bicameralism is a constitutional principle that has survived Kenya's long struggle for constitutional reforms and good governance. The kernel of bicameral philosophy in Kenya is the 1963 Constitution (also called the Independence Constitution). The Independence

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<sup>478</sup> Madison, *ibid.*

<sup>479</sup> Murphy W et al *American Constitutional Interpretation* (1986).

<sup>480</sup> Patterson CS and Mughan A "Senates and the Theory of Bicameralism" 15.

<sup>481</sup> Kittrie 'Democracy: An Institution Whose Time has Come' 527-29. See also Lindsay AD *The Essentials of Democracy* (1929): 'That the purpose of democratic machinery is to represent differences; that democracy requires an official and encouraged opposition; that the principle of tolerance is essential to it, and that finally democratic society-and that means a society of democratic non-political association'. See too Venter F *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (2000) 193-4: 'First, he says, democracy signifies tolerance as opposed to fanaticism; secondly, freedom from violence, shown by the fact that democracy enables the citizenry to get rid of its government without spilling blood; thirdly, evolutionary social change, facilitated by free

Constitution had a splendid arrangement of bicameral legislature. The two chambers had overlapping legislative mandates in that either house had an input in a single legislative process. The Independence Constitution had two separate but equal chambers, a latent defect in the 2010 Constitution. The relevant section of the 1963 Constitution provided:

The power of Parliament to make laws shall be exercised by Bills *passed by both Houses of the National Assembly* (or, in the cases mentioned by section 61 of this Constitution, by the House of Representatives) and assented to by Her Majesty or by the Governor-General on behalf of Her Majesty (*Own emphasis*).<sup>482</sup>

The Independence Constitution further provides that the two Houses of the National Assembly (Parliament) must consent to any Bill before it is assented to into law. The Constitution provided as follows:

When a Bill has been passed by that House of the National Assembly in which it originated it shall be sent to other House; and shall be presented to the Governor-General for his assent: (a) when it has been passed by that other House and agreement has been reached between the two Houses on any amendments in it, or (b) when it is required to be so presented under section 61 of this Constitution.<sup>483</sup>

Under the 1963 constitutional dispensation, specific bills could only *originate* from a specific House of the National Assembly and under specified circumstances; the House of Representatives can by-pass the input of Senate. Designating certain bills to only originate from a certain house however, does not waiver the jurisdiction of the other House from considering such bill after the begetting House has passed it. This only serves to distinguish the Constitutional roles of either House. Secondly, the House of Representatives may, under very exceptional circumstances overlook the input of the senate in enacting legislation. This however, only arises where senate is deemed to be delaying such proposed enactment. In all instances, the House of Representatives had to send it's passed bills to the senate. The constitution provided as follows in instances where a bill is sent for assent without the input of the Senate:

When a Bill that is passed by the House of Representatives is certified by the speaker of that House under subsection (2) of this section as a money Bill and having sent to the Senate at least one month before the end of the session, is not passed by the Senate without amendments within one month after it is so sent, the Bill shall, unless the House of

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competition and lifestyles, and fourthly, brotherhood indicated by the acceptance by a society of democracy as a custom founded on the notion that all people are subject to a common lot'.

<sup>482</sup> Section 59(1) of the Constitution of Kenya 1963 (repealed), commonly referred as the Independence Constitution.

<sup>483</sup> Section 59(3) of the Constitution of Kenya 1963 (repealed).

Representatives otherwise resolves and subject to the provisions of subsection (8) and (4) of this section, be presented to the Governor-General for assent.<sup>484</sup>

The underlying bicameral deficiencies in the 1963 Constitutional dispensation occur by default rather than mundane defects of hierarchy discernible in the 2010 Constitutional arrangement. Even where, in the 1963 Constitution, the Lower House bypassed the Upper House there were strict and explicit provisions guiding such derogations.<sup>485</sup>

The bicameral arrangement in the Independence Constitution was abolished following a series of constitutional amendments immediately after independence that were aimed at consolidating power into an imperial presidency.<sup>486</sup> However, the idea of bicameralism found its way into Kenya's jurisprudence following decades of concerted efforts for constitutional change and better governance from the early 1990s. The Draft Constitution (Bomas Draft 2004) was adopted by the Constitution of Kenya Review Commission

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<sup>484</sup> Section 61(1) *ibid.* see the referred subsections hereinbelow:

Subsection (2) when a Bill that in the opinion of the Speaker of the House of Representatives is a money Bill is sent to the Senate from the House of Representatives it shall bear a certificate of the Speaker of the House of Representatives that it is a money Bill.

Subsection (8)(8) states: When:

(a) a Bill that is passed by the House of Representatives is not certified by the speaker of that House under subsection (2) of this section as a money Bill and, having been sent to the Senate at least one month before the end of the session, is not passed by the Senate before the end of the session or is passed by the Senate with amendments to which the House of Representatives does not before the end of the session agree; and (b) in the following session (whether of the same Parliament or not) but not earlier than twelve months after it was first passed by the House of Representatives the same Bill, with no other alterations than those mentioned in subsection (10) of this section, is passed again by the House of Representatives and sent to the Senate at least one month before the end of the session and is not passed by the Senate before the end of the session or is passed by the Senate with amendments to which the House of Representatives does not before the end of the session agree, the Bill shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent with such amendments, if any, as may have been agreed to by both Houses.

Subsection (4) When the question whether or not a Bill is a money Bill has been referred to the Supreme Court under subsection (3) of this section, the Bill shall not be presented to the Governor-General for assent in accordance with the provisions of subsection (1) of this section until the Supreme Court determines that it is a money Bill: Provided that if the Supreme Court has not within one month after the passage of the resolution that the reference should be made, sent to the Speaker of the Senate and the Speaker of the House of Representatives its determination on that reference, it shall not proceed further with its consideration of the reference and the Bill shall, unless the House of Representatives otherwise resolves, be presented to the Governor General for assent.

<sup>485</sup> See Constitution of Kenya 1963 (repealed) [it must be a Money Bill; must be presented to the Senate at least one month before session of Senate ends.]

<sup>486</sup> The Constitution of Kenya (Amendment) (No. 4) Act 1966. There were a series of other Constitutional Amendments between 1964 and 1966 which grossly undermined the existence and relevance of the senate culminating in its abolishment in 1966.

(CKRC). The Bomas Draft 2004 had explicit edicts of bicameralism akin to the wording in the 1963 Constitution.<sup>487</sup> The bicameral architecture in the Bomas Draft was so strong that a Bill is defeated when the referral House rejects it.<sup>488</sup>

Unfortunately, the efforts to get a new constitution and set the country into the era of good governance were crushed and trumped by political avarice. Overtime, the push for a new constitution was resuscitated after the *NARC* administration came to power.<sup>489</sup> The subsequent Draft Constitution (Wako Draft) that was subjected to the Referendum retained the unicameral arrangement of Parliament.<sup>490</sup> The Draft Constitution was defeated in the referendum thereby maintaining the status quo.

The quest for a new blue-print for effective governance of the country continued. The epic of constitutional reform was finally achieved when the new Constitution 2010 was promulgated.<sup>491</sup> The 2010 Constitution set in motion an array of institutional reform to promote good governance. Of greater concern for purposes of this Paper is the re-introduction of bicameralism.<sup>492</sup> A bicameral legislature was seen across the political divide as an effective means to check the excesses of unicameralism that had projected the country into both socio-economic and political oblivion. Even though the 2010 Constitution is anchored on inter alia constitutional principles of separation of powers, public participation, democracy, social justice, equality as the minimum essential values of good governance,<sup>493</sup> the bicameral design thereof failed to properly articulate the architectural methodologies of bicameralism as we next put into consideration.

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<sup>487</sup> Article 134, Draft Constitution of Kenya (Bomas Draft), 2004. [Constitution of Kenya Review Commission. Adopted by the National Constitution Conference on 15 March 2004.

(1) When a Bill has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House for introduction, consideration and passage;

(2) If both Houses pass a Bill in the same form, the Speaker of the House in which the Bill originated shall within seven days refer the Bill to the President for assent.

<sup>488</sup> Article 134(3): If one House passes a Bill and the other House rejects it, the Bill is defeated unless it is a money Bill.

<sup>489</sup> <http://bti2003.bertelsmann-transformation-index.de/73.0.html?&L=1>.

<sup>490</sup> Draft Constitution of Kenya, 2005 (Wako Draft), Article 114: There is established a Parliament of Kenya.

<sup>491</sup> 27 August 2010.

<sup>492</sup> Constitution of Kenya, 2010, article 93.

<sup>493</sup> *Speaker of the Senate & Anor v Hon A-G & Anor & 3 others* [2013] eKLR para 51.

### 5.3.2 Discourse of the New Constitutional Dispensation

*The framers at Philadelphia did not design a government to transform selfish human beings into saints, but to allow people to survive in liberty by putting power against power and ambition against ambition.*<sup>494</sup>

The preface above forms the crux of the discourse on constitutional architecture and design of bicameralism in the 2010 Constitution. We adopt comparative analyses of other jurisdictions that practice bicameralism in their legislative processes. The preliminary test of existence of bicameralism is the desire and will to be bicameral on the part of the polity involved. Adopting and maintaining a bicameral-designed constitution is the first and foremost means of expressing that will. Whereas theoretically the 2010 Constitution adopts a bicameral arrangement, it is the argument espoused by this thesis that the design is fallacious. The framers of the 2010 Constitution not only failed to notice the robust consensus residing beneath the surface of conventional bicameralism, but, much more importantly, failed to critically examine it. The result of which the two chambers are in perpetual squabbles, characterized by suspicions and supremacy battles at the expense of service delivery. The further argument is that framers of the 2010 Constitution, in their design of bicameralism, created latent conflicts of constitutional philosophy. First, the 2010 Constitution establishes a *Parliament of Kenya*, consisting of the *National Assembly* and *the Senate*, and goes further to state: Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.<sup>495</sup>

Despite the foregoing provision, the Constitution erroneously erects a ceiling in Senate's legislative jurisdiction to matters appurtenant to county governments only. All other matters are exclusive functions of the National Assembly.<sup>496</sup> Paradoxically, there is no conventional demarcation of what amounts to *matters related to county governments*. In the ultimate, there lacks a consensus between the two Houses over what matters fall within the terrain of bicameralism and which ones can unilaterally be dealt with by the

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<sup>494</sup> Murphy W et al *American Constitutional Interpretation*.

<sup>495</sup> Constitution of Kenya, 2010, article 33.

<sup>496</sup> Constitution of Kenya, 2010 article 109(3); see *Speaker of the Senate & Anor v Hon AG & Anor & 3 others* [2013] eKLR para 51, at para 55.

National Assembly.<sup>497</sup> For instance, the Constitution requires to be introduced in Parliament a Division of Revenue Bill which shall divide revenue raised by national government among the national and county levels of government.<sup>498</sup> The two chambers could not agree whether such a Bill relates to matters related to county government in their maiden consideration of the said Bill necessitating the intervention of the Supreme Court. In *Speaker of the Senate & Anor v Hon A-G & Anor & 3 others*<sup>499</sup> the facts were:

The Speaker of the National Assembly reversed his action of referring the Division of Revenue Bill, which provided for the sharing of finances between the national and county government, to the Senate. It was argued for the National Assembly that the Bill in question concerned the funding of county governments by the national government and was therefore an exclusive legislative domain of the National Assembly. The Applicants argued that the county governments had profound interests in the monies, the subject matter of the Bill, service whereof, by the constitution, involved the Senate's contribution; and that no law could be enacted without such legislative contribution. The Court held for the Senate that the Speaker of the National Assembly had acted contrary to the Constitution and its fundamental principle regarding the harmonious motion of State institutions.<sup>500</sup>

The functional traction of legislative process is defeatist of the ideals of conventional bicameralism. Any inquiries as to what amounts to *matters related to county governments* create tremendous hurdles that need to be overcome before one can accept their pre-eminent definition. Indeed, the wider argument is that problems encountered in these inquiries demonstrate that *matters related to county governments* are a misnomer and the rhetoric thereof is really a description of social ideals, and a controversial set of ideals at that. Consequently, many people have been unsatisfied with the notion that what amounts to *matters related to county governments* are simply what a particular society or ruling elite perceive so at any given time. Although the Supreme Court has attempted to define the phrase in *matters related to county governments* in *Re the Matter of the Interim Independent Electoral Commission (IIEC)*,<sup>501</sup> there is still lacks consensus across the political cycles as to the precise compass of the phrase. Further, in struggling democracies like Kenya, absence of express Constitutional restraint, respect for judicial

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<sup>497</sup> *Speaker of the Senate & Anor v Hon AG & Anor & 3 others* [2013] eKLR, at para 51. The two chambers could not agree whether the Division of Revenue Bill, 2013 was a matter concerning county government.

<sup>498</sup> Constitution of Kenya, 2010, article 218 (1)(a).

<sup>499</sup> *Speaker of the Senate & Anor v Hon AG & Anor & 3 others* [2013] eKLR.

<sup>500</sup> Id, para 141.

<sup>501</sup> Sup. Ct. Const. Appl. No. 2 of 2013

pronouncements is never consistent. The Court in *IIEC* observed as follows with regards to matters related to county governments:

We consider that the expression 'any matters touching on county governments' should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government.<sup>502</sup>

Notwithstanding the foregoing attempts to define the contours of matters related to county government, traction of legislative roles between the two chambers shall remain murky until by legislative process is fused. The proceeding discourse gives a metaphorical analysis of bicameralism from other jurisdictions.

### **5.3.3 Comparative Analysis**

Comparatively, in South Africa, the 1996 post-apartheid Constitution (1996 Constitution) creates a bicameral legislature viz; the National Assembly (Assembly) and National Council of Provinces (NCOP).<sup>503</sup> The South African Constitution is emphatic in its bicameral arrangement. It structures the Assembly to represent the people and guarantee to them a government by the people. On the other hand, the NCOP is created to represent the interests of the provinces at the national sphere of government mainly through participation in the national legislative process and providing a national forum for public consideration of provincial issues.<sup>504</sup> The 1996 Constitution of South Africa vests legislative authority at the national level of the Republic to Parliament defined to mean the two chambers.<sup>505</sup>

Whereas the 1996 Constitution designates either chamber to be the exclusive begetter of certain Bills, all the two chambers must consider and pass a Bill that originates from either chamber.<sup>506</sup> The complimentary legislative jurisdiction is further nuanced by the provision that even ordinary Bills not affecting provinces must be considered and passed by the NCP before they are referred for presidential assent. The 1996 south African Constitution states: When the National Assembly passes a Bill to which the procedure set out in

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<sup>502</sup> Ibid, paragraph 40.

<sup>503</sup> Section 42 of Constitution of the Republic of South Africa.

<sup>504</sup> Ibid.

<sup>505</sup> The national legislative process is set out in sections 73-78 of the Constitution of the Republic of South Africa.

<sup>506</sup> Section 73(5) of the Constitution of the Republic of South Africa.

section 74 or 76 applies, the Bill must be referred to the National Council of Provinces...<sup>507</sup>

Where the NCOP rejects a Bill referred to it or passes it with amendments which are rejected by the Assembly, the Bill is referred to a Mediation Committee (the committee) comprised of representatives from both chambers. The Committee will either adopt the Bill as passed by the Assembly, or amended version as passed by the NCP, or adopt a different version of its own. However, where the Committee fails to agree within thirty days from the referral date, the Bill fails unless the Assembly re-passes the Bill with at least a supporting vote of two-thirds of its members.<sup>508</sup>

The strength of the South African bicameralism is espoused by the requirement that the decision of the Committee is merely penultimate in the enactment of a contested Bill. The constitution demands that when the Committee agrees on a version of the Bill passed by one chamber, it must be referred to the other chamber. Where the Committee agrees on a different version of the Bill from that of passed by either chamber, that version adopted by the Committee must be referred to and passed by the two chambers. For the Assembly to override the NCOP, a two-third majority vote of its members is mandatory.<sup>509</sup>

The Constitution of the USA, considered as the mother of modern day constitutions, adopts a similar approach to the South African Constitution. The legislative power of the United States is vested in a bicameral Congress consisting of House of Representatives and the Senate.<sup>510</sup> Bicameralism is intended to fashion a “great compromise” between effects of popular majorities with the interests of states. Whereas Representatives are elected biannually vide a popular vote, Senators are elected for a six-year term by the electors in each State [with one-third of Senators coming up for election in every election cycle]. Madison talks of the American bicameral arrangement in the following manner:

The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. So far, the government is national, not federal. The

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<sup>507</sup> Id, section 75(1).

<sup>508</sup> Ibid Section 76(e).

<sup>509</sup> Ibid Section 76 (f)-(j).

<sup>510</sup> Article 1 Constitution of the United States of America <http://constitutionus.com/>.

Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they are now in the existing Congress. So far, the government is federal, not national.<sup>511</sup>

The two chambers have fundamentally equal powers in the legislative process. The House is the exclusive begetter of revenue legislative powers whilst senate has exclusive powers on confirming presidential nominees and approves treaties.<sup>512</sup> Both chambers must however, agree to the same version of a bill before it is presented to the President.<sup>513</sup> Consequent upon their constitutional differences, Senate and the House have developed dissimilar rules of processing legislation. The House rules generally permit numerical majority to fast track legislative process whilst Senate favours a deliberative approach providing significant procedural leverage to individual senators.

The fulcrum of legislative action in either chamber is standing committees. The standing committees comprise of panelists from both parties in either chamber. The committees lead in developing and assessment legislation while panelists often serve for many years allowing them develop expertise in certain policy areas. Committees mainly focus on drafting legislative proposals and take lead roles in providing oversight on policy implementation over enacted legislation.<sup>514</sup>

Once the begetting chamber dispenses off with the bill, it is engrossed and sent to the referral chamber for consideration and vote. The referral chamber more often agrees to the exact text of the originating chamber in which case the bill is sent for presidential assent and Congress becomes functus officio. However, there are instances in which the referral chamber decides to amend or propose an alternative bill to that from the originating chamber.<sup>515</sup>

In extreme cases, the alternative bill may contain an entirely new topic. Once the referral chamber embodies and adopts new changes, the bill is referred further to the begetting chamber for consideration and vote. These amendments exchanges – ping pongs – may

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<sup>511</sup> Doria 'The Paradox of Federal Bicameralism' 13.

<sup>512</sup> <http://beta.congress.gov/legislative-process>.

<sup>513</sup> Ibid, Article 1.7.2.

<sup>514</sup> <http://beta.congress.gov/legislative-process>.

<sup>515</sup> Ibid.

derail legislative enactments. To avert endless trading of legislative proposals by the two chambers, a temporary committee, conference committee, is often created to fashion a compromise bill agreeable to both chambers.<sup>516</sup>

A conference committee consists of select members, conferees, from both chambers. The conferees are drawn from committees from whose terrain the bill resides. Once the conference agrees on a bill, the negotiated proposals are embodied in a conference report which is then considered in similar manner as if it were ordinary Congress business. The two chambers must consider and agree to, separately, the conference report before it is enacted into law.<sup>517</sup>

In Britain, Parliament consists of two chambers viz; the directly elected House of Commons and a non-elected House of Lords. The House of Lords comprises of life peers and hereditary peers. The House of Lords does both legislative and up to 2009, judicial functions through its judicial committee which was the highest appeal court in the English Legal System.<sup>518</sup> The legislative role is exercised vide Bills introduced by government, Public Bills, or by a legislator, Private Members' Bills. The House of Commons is the begetter of all Parliament bills. Bills delved with by the House of Commons to conclusion are referred to the House of Lords which delve with in a similar manner as the House of Commons. The House of Lords may accept, delay the passing rejecting or amend the bills referred to it. Where amendments are preferred to a bill by House of Lords, the amended version is referred to the House of Commons which will either adopt or reject them. Rejection by the House of Lords of a bill merely delays its coming into force.<sup>519</sup>

The British bicameral arrangement is somewhat unique. Whereas in other jurisdictions the disagreements by the two chambers over a proposed legislative enactment are resolved by a special committee, in Britain, the House of Lords cannot defeat the coming into force

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<sup>516</sup> Ibid.

<sup>517</sup> Ibid.

<sup>518</sup> Judicial functions were assumed by the Supreme Court when the Supreme Court was introduced vide the Constitutional Reform Act, 2005.

<sup>519</sup> Patterson and Mughan 'Senates and the Theory of Bicameralism' 12.

of a law. Endless trading of bills between the Chambers is resolved vide the Parliament Acts, 1911 and 1949.<sup>520</sup>

The concept of Parliamentary sovereignty raises the House of Commons above the House of Lords. In this case, an Act of Parliament cannot be defeated on ipso facto basis if it did not go through the House of Lords. In *R (Jackson & others) v Attorney General*<sup>521</sup> the Claimant sought to challenge the validity of the Hunting Act 2004 which had not been consented to by both Houses of Parliament before it got a Royal assent. The government resorted to the Parliament Acts of 1911 and 1949 to force the Bill through Parliament after the House of Lords severally rejected it. The claimants' objection was (1) Acts of Parliament enacted without consideration and consent of both Houses were unconstitutional; (2) the Parliament Act 1949 itself was invalid for lack of House of Lords approval before its enactment into law; and (3) Parliament Act 1949 was itself a result of delegated legislation and could not therefore increase the powers of House of Commons at the expense of the House of Lords. These arguments were dismissed by senior judges in all three courts the case passed. Acts of Parliament could be valid without the consent of the House of Lords. Britain practices the concept of Parliamentary sovereignty meaning Parliament is the primary begetter of all law the consequence of which Acts of Parliament cannot be challenged for validity. In effect, the concept of judicial review is limited in application in Britain.<sup>522</sup>

In Germany, the Basic Law<sup>523</sup> creates a bicameral legislature with substantial law making powers in both chambers. The two chambers are the *Bundesrat* (Senate) and *Bundestag* (lower house).<sup>524</sup> Bundesrat is elected by the Landers while the Bundestag is elected vide popular vote. The Bundesrat is appointed by and to directly represent the Landers (States) upon whose office holding determine the terms of the Bundesrat. The Bundesrat exercises veto power over legislations affecting the Landers and where a bill fails in the

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<sup>520</sup> <http://www.legislation.gov.uk/ukpga/Geo5/1-2/13> 1911 Cap 13 1 and 2 Geo 5;  
<http://www.legislation.gov.uk/ukpga/Geo6/12-13-14/103> 1949 Cap 103 12 13 and 14 Geo 6

<sup>521</sup> [2005] UKHL 56 (13 October 2005) <http://www.bailii.org/uk/cases/UKHL/2005/56.html>.

<sup>522</sup> *Pickin v British Railway Board* [1974].

<sup>523</sup> See Basic Law <http://www.bundesregierung.de/Webs/Breg/DE/Homepage/home.html>.

<sup>524</sup> Articles 38-48 of the Basic law (Bundestag):

Bundesrat, it can only be overridden by an absolute majority vote in the lower house. The Bundesrat determines the position taken by the German ministers in the Council of Ministers of the European Union.<sup>525</sup>

The degree of participation of the Bundesrat in the legislative process depends on whether the bill under consideration is an “objection bill” or “consent bill”. The implicit inference from the phraseology of the Basic law is that objection bill is intended to be the norm i.e. that the Bundesrat has a basic right to object to a bill but after first convening a Mediation Committee. In certain cases, the Basic Law explicitly provides that a bill shall require the consent of the Bundesrat. In such cases, the Bundesrat has an absolute veto and if it refuses consent the bill fails.<sup>526</sup>

From the foregoing discourse, it is evident that different jurisdictions frame their bicameral assemblies differently. Despite such incongruence in the design of the chambers, one thing is trite though; the strength of bicameralism resides in the capacity of the upper chamber, to Mill, to check the passions of the popular lower house. Mill notes that the majority in a single assembly when they ‘assume a permanent character... easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority.’<sup>527</sup>

The history of bicameralism from the comparative analyses will remain highly relevant for developing democracies like Kenya, seeking to wriggle out from the hitherto debilitating, skewed and repressive systems into democratic constitutional systems. By the settled principle of metaphorical study, the study gives bicameral achievements of comparative jurisdictions. The imperative deducible principle is the underlying transformative ideals inherent in the Constitution of 2010, vesting on all actors a responsibility to proliferate the ability of bicameralism to shape the legislative process in the legitimate course intended by the people. It further behoves constitutional law scholars to fuse bicameral rhetoric with

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<http://www.bundesregierung.de/Webs/Breg/DE/Homepage/home.html> and article 20(1) of the Basic law (Bundesrat) <http://www.bundesregierung.de/Webs/Breg/DE/Homepage/home.html>.

<sup>525</sup> Patterson & Mughan ‘Senates and the Theory of Bicameralism’ 11 and 24.

<sup>526</sup> German Basic Law Articles 50 and 83.

<sup>527</sup> Mill JS *Considerations on Representative Government* (1861).

principles, values and prescriptions of the constitution and its ability to promote good governance.

## **6. Conclusion**

This study argues that bicameralism is an integral component and an important benchmark of true democracy especially in mixed and decentralized governments; creating something unity in diversity. It is further argued that bicameralism in Kenya is not a phenomenon that emerged in 2010; it has been in Kenya's legal books and practice and did animate Kenya's national tranquility whenever it has been adopted. Consequently, therefore, the place of bicameralism in Kenya's jurisprudence should be a less contested fact since bicameralism has overtime gained greater prominence globally. Central to the thesis of this paper is the design of bicameralism in the Constitution of Kenya 2010 which is argued was weakly designed. As seen in the metaphorical analysis, bicameralism in other jurisdictions is anchored on coequality of the chambers such that the two chambers thereby created must provide a checking and balancing of one another. Bicameralism therefore increases the scope for consultation, deliberation and negotiation which are benchmarks of democracy. In the ultimate, when a law is enacted, it has received extensive national deliberation; as such, the importance of bicameralism in authoring widely acceptable and easily implementable laws cannot be trivialized.

The architecture and design of bicameralism in the Constitution of Kenya, 2010 broadly betrays the conventional understanding and theory of bicameralism. The constitutional traction of the legislative process of enactment of laws greatly trumps the underlying need for bicameralism, which the People of Kenya, thought they are fashioning for a consensus-based democratic State. The architectural design of the Constitution of Kenya, 2010 is defeatist and calls for immediate rectification to entwine both the Senate and National Assembly in enactment of all legislation. At the back of this argument is the impossibility of demarcating the boundary between what amounts to matters related to county government and what does not, or the demonstrable futility of attempted definition thereof.

Bicameralism promotes bureaucratic legislative processes widening the scope of consensus democracy. By bureaucratic legislative process I mean a long-term project of legislative enactment, interpretation, and enforcement geared towards transforming a country's socio-political institutions and power relationships in a democratic, participatory and egalitarian directions. Bureaucratic bicameralism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. The importance of fusing the legislative process between the two chambers is founded on the novice of constitutional supremacy; which defines the bounds of sovereignty. The constitution thus stands at the higher echelons than any law, state organ, acts or omissions; and is binding on all branches of government and no less on the National Assembly.

Entwining the legislative jurisdictions of the two chambers thus avoids the squabbles that transcend with traction. Humankind is susceptible to erring; so are the institutions ministered by mankind whose passions for self-aggrandizement usurp his duty to society when left unchecked. Designing of balanced and well-equipped mechanisms of power control, though inevitable, will forever remain man's elusive task to insure society from individual usurpations. Obviously therefore, the place of bicameralism in fostering social tranquility is far unambiguous, at least where either chamber is well equipped to act as a coolant of the excesses of the machinations of the other. Barring, other factors, an equally powerful senate imposes greater insurance for a widely deliberated legislative enactment than the presumed unicameral manacles suggest. From the foregoing discussion, it is evident that greater challenges are still facing the institutions charged with promoting good governance through the upholding of the rule of schema. The next issue for consideration is a discourse on facing entrenchment of ethical governance in Kenya.

The promulgation of the Constitution of Kenya 2010 offered glistering hope that the struggle for consolidation of ethical governance has since been realized. However, enforcement of ethical leadership presents a mockery of the aspirations Kenyans had in adopting the new constitutional charter. The enactment of legislations to implement constitutional provisions on ethical governance was the beginning of efforts to undermine those provisions. The dilution of the Leadership and Integrity Bill by cabinet left the

resultant Act without mechanisms of implementing its provisions. The move by cabinet offered the clearest indication of a lack of willingness at the highest echelons of government to consolidate the ethical governance birthed under the new constitutional dispensation.

The enacted legislation to consolidate ethical leadership are a barometer for parliamentary culpability in undermining the quest for ethical governance in Kenya. The same culpability permeates through parliament's lackluster exercise of its oversight role over executive appointments of persons to constitutional offices. The Mumo Matemu case offers a gloomier forecast of the future of ethical governance in Kenya. The events surrounding the appointment of Matemu to chair the Ethics and Anti-Corruption Commission and in particular the casual manner with which parliament vetted Matemu reveals a clouded view of the government's commitment to the fight against corruption and most importantly the quest to consolidate ethical governance.

The hostility to ethical governance from the political departments of government makes the judiciary the last hope for entrenchment of ethical governance. However, the uncertainty provided by judicial reasoning over matters concerning implementation of Chapter Six of the Constitution makes the judiciary no better casualty in presenting a bleaker future to consolidation of ethical leadership in Kenya. Judicial reasoning towards grievances regarding Chapter Six present insurmountable challenges to consolidation of ethical governance. These challenges appeal for urgent need to rethink implementations mechanisms in consolidating ethical governance. Judicial records show that there is little hope in enforcing Chapter Six through appeal to the judicial process. The obtaining position invites an inevitable conclusion that there is judicial cynicism against Chapter Six making the realization of ethical governance a pipe dream.

Contextually, Chapter Six has procured a hitherto evasive standard for judging the quality of ethical governance in Kenya. A lot however, needs to be done in order to fully consolidate ethical governance even though the prevailing political environment makes this a dwindling dream.

# CHAPTER FIVE

## CONFIRMATION OF THE RESEARCH FINDINGS

### 1. Introduction

It will be recalled that the research question that this study sought to answer is the extent to which entrenched ethics promotes constitutionalism in Kenya and whether ethical leadership can be established (and sustained) in Kenya. In pursuit of answering this fundamental question and in an attempt to measure constitutionalism in Kenya, resort is had to the basic steps to confront travesties of justice and ensure compliance with the rule of law. King states that these steps are: '1) Collection of the facts to determine whether injustices [or violations of ethical leadership] are alive. 2) Negotiation. 3) Self-purification' and thereafter, possible nonviolent direct action to restore justice and ethical leadership.<sup>528</sup> This chapter provides an elucidation of the research findings in pursuit of answering this fundamental question.

Consolidation of ethical governance in Kenya has failed to take off because of a number of challenges. These challenges exist despite Kenya having elaborate legal and institutional framework to promote good governance. Paradoxically, this elaborate framework is one of the major challenges to ethical governance. This part will consider in detail how for instance too many overlapping laws and institutions, endemic corruption, politics of ethnicity, judicial restraint are endangering consolidation of the rule of law schema in Kenya. In considering the foregoing, this thesis does not purport to suggest that those are the only challenges ethical governance does face in Kenya. There are far much greater challenges compromising the entrenchment of ethical governance that have not been identified in this thesis but that does not imply they do not provide a hindrance to the entrenchment of the rule of law and constitutionalism in Kenya.

#### 1.1 Too Many Overlapping Laws and Institutions

The discussion on the legal and institutional framework aimed at embedding ethical governance provided an elaborate framework existing in Kenya. One thing that came trite

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<sup>528</sup> King 'Letter from Birmingham City Jail' 13.

was that Kenya has enacted a set of key legislations and installed several institutions in her framework all aimed at promoting ethical governance through enhancement of the rule of law. Important to this discussion at this instant is an enquiry as to whether the existence of multiple laws and institutions is a hindrance to consolidation of ethical governance. In its transformative nature, the Constitution of Kenya 2010 has adopted justiciable national values and principles of good governance. It further has established a groundwork for ethical governance under chapter six that is aimed at consolidating democratic governance. Under the Constitution, there are recognized minimum essential values such as protection of human rights and fundamental freedoms, democracy, social justice, and equality as being the foundation of an open transparent and accountable society. In order to realize the attainment of these broad values and principles, the Constitution requires that parliament establishes an elaborate legal and institutional framework as was discussed under chapter three. These institutions have failed to ensure entrenchment of ethical governance in Kenya. It can probably be argued that the existence of a multiplicity of laws and institutions have contributed to the enduring quest for ethical governance in Kenya.

The independence clauses in the establishing statutes to the institutions created to realize ethical governance have often been employed to promote this institutional incompetence. The independence clauses have often blurred transparency and accountability in execution of duties by these institutions. There is an apparent misapplication of independence clauses which in many instances leads to skewed execution of both constitutional and legislative mandates. The independence clauses are designed to safeguard these institutions against undue interference and not perpetuate a culture of institutional incompetence, impunity and blatant abuse of the rule of law.<sup>529</sup> It calls for no further illustration that the existence of too many laws creates overlapping mandates for these institutions. In countries like Kenya where corruption is highly entrenched, independence clauses do invite misapplication of constitutional and legislative mandates. Fundamentally, the result is dereliction of duty and a failure to consolidate ethical governance.

## 1.2 Endemic Corruption

The UNCAC most arguably offers a more succinct rendition of the existential threats corruption has on ethical governance as an element of good governance. In its preamble, the Convention presents a wide impact of corruption on the security, democratic, ethical stability of society. In this regard, the Convention places rejection of corrupt practices at the kernel of good governance, fairness, responsibility and most importantly securing equality before the law and safeguarding of integrity.<sup>530</sup> It goes without saying the Convention identifies promoting integrity, accountability and proper management of public affairs and resources as some of its purposes.<sup>531</sup> It follows as a less contestable fact that the elusive search for ethical governance in Kenya is primarily contributed by the entrenchment of corruption in ideally all of its sectors; from the private to the public sector, corruption has hugely undermined democracy supporting institutions. Migai Akech offers a gloomy disposition of the foregoing as follows:

... the Kenya Police has consistently obtained the highest aggregate score. The Judiciary, the Ministry of Lands, and Nairobi City Council have also featured several times in the top ten. All these institutions are characterized by wide discretionary powers and citizens interact with them frequently owing to the nature of their services. Although the Ministry of Education has been in the news in the recent past following a major corruption scandal, it has not featured in the top ten of the TI-Kenya rankings. Another significant institution which various commentators and the media allege is a den of corruption is Parliament (the legislature), although it has only featured once in the rankings.<sup>532</sup>

The foregoing mirrors the obtaining position in Kenya despite enormous investments on anti-corruption measures in terms of institutional, financial and legislative investments. It can quite uncontestedly be concluded that the biggest challenge to anticorruption interventions in Kenya is existence of so many institutions and legislation that gives rise to institutional dereliction of duty. The multiple institutions on corruption result in underdevelopment of experienced personnel that can tackle the challenge of mutative nature of corruption and corrupt activities. In consequence, anticorruption strategies

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<sup>529</sup> Sup. Ct. Const. Application No. 2 of 2011 cited in affirmative in *Raila Odinga and others v Independent Electoral and Boundaries Commission and others*. SCOK Petition No. 5 of 2013, 89.

<sup>530</sup> Preamble to the United Nations Convention Against Corruption (UNCAC) General Assembly Resolution 58/4 of 31 October 2003

<sup>531</sup> UNCAC *ibid* Article 1(c)

<sup>532</sup> Akech M *Evaluating the Impact of Corruption (Perception) Indicators on Governance Discourses in Kenya* (2014) 25 *Revista Colombiana de Derecho Internacional* 112.

become poorly developed thus blurring their success. Akech holds a similar view and narrates as follows on failures of anticorruption strategies:

... anticorruption strategies in developing countries fail for two reasons. First, anticorruption strategies do not attack the roots of corruption in such societies, which roots are to be found in the distribution of power. Second, these strategies are 'adopted and implemented in cooperation with the very predators who control the government and, in some cases, the anticorruption instruments themselves'.<sup>533</sup>

Grand corruption has continued to ordain far reaching effects on government's ability to deliver services to Kenyans as shall be demonstrated by a few examples here. First, there was the master Goldenberg scandal. This scandalous scheme was hived between government officials and a businessman in which the businessman was to yearly remit fifty million United States dollars to the government in exchange for exclusive rights to export gold and diamond from Kenya. In addition, the businessman was to get a compensation of 35% of the said exports. However, nothing like export of gold and diamond occurred instead, fictitious supplies to non-existent companies that paid for the "supplies" in fictional foreign currency transpired. It is estimated that the country lost in excess of twenty-seven billion from the Goldenberg scandal.<sup>534</sup>

The maize scandal that occurred or came to the public knowledge in the year 2008 is yet another example of Kenya's inability to consolidate ethical governance. At the time, the country was faced with a severe shortage of maize flowing from the effects of the post-election violation that followed the 2007 general elections. In order to cushion the populations from rising maize flour prices, the government decided to import maize in order to mitigate the skyrocketing effects of the shortage. Although in the maize scandal there was actual supply of the commodity the tendered millers sold the maize at higher prices to genuine millers in the process defeating the government objective to provide citizens with cheap maize flour. According to African Centre for Open Governance:

Under these measures, hundreds of metric tonnes of maize were imported into the country and allocated to millers. Contrary to intended policy expectations, allocations were made to companies and individuals, who in some instances, were not millers and had no milling

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<sup>533</sup> Akech *Evaluating the Impact of Corruption* 103.

<sup>534</sup> The Report of the Judicial Commission of Inquiry into the Goldenberg Affair (October 2005) generally.

premises or capacity. These individuals and companies subsequently sold the maize off to genuine millers and in the process made exorbitant profits.<sup>535</sup>

Another scandal is the Anglo Leasing scandal in which the government entered into contracts with fictitious companies for alleged supply of goods and services to state security agencies. The identity, whereabouts and ownership of these companies remain an unresolved mystery yet the government lost billions of tax-payer's money.<sup>536</sup> There are several other scandals including the Eurobond scandal in which government went for sovereign bonds allegedly to reduce domestic borrowing. The utilization of the proceeds of the international borrowing similarly remain a mystery to date. The circumstances surrounding the procurement and eventual construction of the standard gauge railway equally remain surrounded with obscurity. The other big-money scandals in recent times include the loss of over twenty-one billion shillings to ghost dams in some parts of the country's rift valley. Although high profile government officials have been indicted, conviction and recovery of the lost government money remain a far-fetched dream. In yet another highly promiscuous scandals, the government is said to have awarded tenders to supply medical equipment in the wake of a highly dangerous global pandemic that occurred in 2019 – the novel corona virus pandemic (Covid-19). According to the British Broadcasting Cooperation (BBC),<sup>537</sup> the government had received close to US\$2 billion as aid and grants to fight Covid-19 yet the health workers were complaining lack of public protective equipment. The BBC reported as follows:

The first phase of the investigations has centred around the alleged misuse of \$7.8 million meant to purchase emergency PPE for health workers... preliminary findings have shown that several laws on public procurement were flouted during the award of tenders.<sup>538</sup>

The foregoing discourse leads to a less contestable conclusion that corruption is highly deep routed in all sectors of the economy in Kenya. The inevitable consequence of this is entrenched culture of impunity since the proceeds of these corrupt practices are often used to distort political, judicial and law-making processes in the country. Endemic corruption has highly weakened democracy enhancing institutions in Kenya making

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<sup>535</sup> The Report by African Centre for Open Governance on Maize Scandal (December 2009) [www.africog.org](http://www.africog.org)

<sup>536</sup> Akech *Evaluating the Impact of Corruption* 103.

<sup>537</sup> See *BBC News* for 24 September 2020.

<sup>538</sup> *Ibid.*

consolidation of ethical governance a gulfing rift. And as long as the rift exists the inequalities bedevilling the country will continue posing challenges to the citizens' aspirations realized through the promulgation of the 2010 constitution. Akech contends that the never-ending abuse of power and corruption provide sufficient grounds for political violence through subversion of the ballot processes.<sup>539</sup> This then leads to the next discourse on how politics of ethnicity have helped erode attempts to consolidate ethical governance in Kenya which forms the next issue for consideration.

### **1.3 Politics and Ethnicity**

The canon that politics and corruption are inseparable highly mirrors well in Kenya. These two are further aided by the prevailing balkanized ethnicity making the quest for national ethos a pipe dream. Works of many scholars on ethical governance has proffered the idea that politics, especially during campaigns, and ethnicity have provided avenues in which corruption thrives and a failure to consolidate ethical governance in Kenya. Akech refers to the works of Michela Wrong in concurrence that during political campaigns there is always the narrative that it is the time of certain ethnic group to eat. Akech however, argues further that whereas ethnic balkanization contributes to corruption, institutionalization plays a major role in contributing to the prevalence of the vice. Akech finds the solution to anticorruption mechanisms in having strong institutions that enhance political accountability.<sup>540</sup> Political settings that allow for state capture to occur equally contribute to erosion of ethical governance. Where the political and business elite are in a symbiotic relation, political accountability disappears so does good governance. In Kenya, the business class are often meeting influential politicians especially during electioneering period in order to fund their political campaigns in return for favourable policies and regulations that allow the interests of the business class to thrive. Meirotti and Masterson refer to the situation of state capture in South Africa as follows:

South Africa's new tender-created business elite, which clusters around municipal governments, might be a case in point, supplying the vital finance that local political

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<sup>539</sup> Akech M 'Abuse of Power and the Corruption in Kenya: Will the New Constitution Enhance Government Accountability' *Indiana Journal of Global Studies* (2011) 18(1) at 341.

<sup>540</sup> Id at 343

patrons or 'gatekeepers' require to maintain their electoral predominance in local settings in which the ANC can no longer rely upon a mobilised mass following.<sup>541</sup>

Politics and ethnicity have continued to influence Kenya's quest for good governance since independence. Political party formations have equally taken ethnic dimensions since almost all political parties existing in Kenya are associated with certain ethnic groups where they enjoy occultic support.<sup>542</sup> This happens despite there being constitutional provision requiring parties to have national outlook.<sup>543</sup> Major political parties however, cleverly cloth their organs with personnel from different regions in an attempt to defeat the constitutional imperative of having national character. In truth, they remain properties of regional kingpins who use their clout of regional influence to bargain for power through their ethnic communities as well as their influence within the business elite. The structuring of national policies equally go along these party lines; the huge command a party leader has from their ethnic background the more likely they can be approached by the business elite for financial support and also their political elites for coalition formation purposes.<sup>544</sup> This kind of political formations are not formed on the basis of any ideologies but circumstances and political interests of the ethnic kingpins. For instance, in the run-up to the 2002 general elections, the opposition parties formed the National Rainbow Coalition (NARC) on the premise of among other things end rampant corruption, constitutional change, promote democracy, inclusivity, eradicate poverty, end police brutality and generally bring about good governance. At the end, the only objective that was achieved was to bring to an end the 24 years of Kenya National Union Party and late

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<sup>541</sup> Meirotti and Masterson *State Capture in Africa* 23.

<sup>542</sup> The Independence Party Kenya National African Union is largely viewed as a Kalenjin party especially in the era of late President Daniel Moi, the ruling Jubilee Party, although commanding influence in the Rift Valley and the Mt Kenya regions, two regions are predominantly Kalenjin and Kikuyu ethnic groups and where the current Deputy President and President hail from respectively. Its predominance in the two regions was as a result of their initially forming a joint presidential ticket under their, now merged parties United Republican Party of the Deputy President and The National Alliance Party of the President. The major Opposition Party is largely viewed as a Luo party. Others as Ford Kenya is seen as Luhya party, while Wiper Party is largely viewed as Kamba party. In recent times, there have been agitations by the coastal region to form a coastal party. The coast is mostly inhabited by the Mijikenda.

<sup>543</sup> See article 91 of the Constitution of Kenya 2010

<sup>544</sup> Since 2002, coalition arrangements have become the predominant ways of a person ascending to power (as president) in Kenya. these coalitions equally determined the voting pattern to other elective positions. The more dominant coalition of parties in a region the higher its chances of getting 'victories' for elective positions in that region and consequently influence the political and development patterns in that region.

President Daniel Moi's dictatorial reign.<sup>545</sup> The NARC administration almost immediately disintegrated as a result of mistrust and failure to properly implement its manifesto. In 2005 after the government failed in the referendum that sought to promulgate a constitution that highly maintained imperial presidency, some members of the NARC administration were expelled from government.

The disputed presidential elections of 2007 saw worst effects of ethnic based politics ever witnessed in Kenya. The NARC members who were expelled after the failed referendum of 2005 teamed up in what came to be known as the Pentagon against a group largely perceived to be from the Mt Kenya region.<sup>546</sup> The results of this election were a disputed presidential election which ignited long held ethnic hatred leading to some leaders being tried of crimes against humanity, forceful evictions, and torture among others at the International Criminal Court (ICC) at The Hague, Netherlands.<sup>547</sup> Like the failed referendum of 2005 birthed a coalition, the ICC trials would later see two of the accused persons team up in a joint ticket in the presidential elections of 2013 and 2017.<sup>548</sup> The losing opposition coalition<sup>549</sup> disputed the results of both elections and buoyed by the judicial renaissance brought about by the constitutional reforms of 2010, they petitioned in the Supreme Court losing in the 2013 Petition<sup>550</sup> and successfully overturning the 2017 presidential elections.<sup>551</sup> Even though celebrated globally as having brought national peace and political stability, the immediate union of President Uhuru Kenyatta and Opposition leader Raila Odinga,<sup>552</sup> introduced political hostilities between leaders leaning

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<sup>545</sup> Note here however KANU reigned since independence. Late President Daniel Moi is the one who ruled for the 24 years.

<sup>546</sup> Consisting of regional and ethnic kingpins mainly from the Luo, Luhya, Kalenjin, Kamba, ethnic community and the coastal region.

<sup>547</sup> Famously known locally as Ocampo-Six (after the then ICC Prosecutor Luis-Moreno Ocampo).

<sup>548</sup> In 2013 The National Alliance Party led by Uhuru Kenyatta and United Republican Party led by William Ruto (they went on to become President and Deputy President respectively) who were of the Kikuyu and Kalenjin ethnicity respectively.

<sup>549</sup> Coalition for Reform and Democracy (CORD) led by Raila Odinga in 2013 and the National Super Alliance (NASA) in 2017 which brought together regional/ethnic leaders from Luo, Luhya, Kamba ethnic groups and the coastal regions.

<sup>550</sup> *Raila Odinga & 5 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR.

<sup>551</sup> *Raila Odinga & Anor v Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR.

<sup>552</sup> This was on 9 March 2018 in what is famously referred to as "Handshake".

towards Deputy President William Ruto against the “handshake brothers”.<sup>553</sup> The deputy president’s side viewed the handshake as a political scheme by the president to relent on their coalition deal that the two would support each other for the constitutionally prescribed two term limits for the presidency.

In the aftermath of the handshake and amidst growing political hostilities within the now two factions in the ruling party Jubilee, President Kenyatta and Opposition leader Odinga crafted a number of resolutions some of which included an expanded executive, judiciary ombudsman, increased allocation of funds to the county governments, establishment of national ethos among others. These proposals would later crystalize into a highly divisive proposed constitutional review through what was called the Building Bridges Initiative (BBI). The BBI Advisory Committee was subsequently gazetted<sup>554</sup> to formally start the process of actualizing the constitutional amendment through the popular initiative as envisaged by the 2010 Constitution.<sup>555</sup> The BBI process culminated in the Constitutional (Amendment) Bill<sup>556</sup> that was ruled by both the High Court<sup>557</sup> and the Court of Appeal<sup>558</sup> as having been initiated unconstitutionally as well as being in violation of certain principles of the Constitution such separation powers through intended executive control of the judiciary. The defeat of the BBI process through the judicial process is a peaceful form of resistance to oppression provided for in constitutional governments as opposed to absolute governments which provide no means other than an appeal to force which in the words of Calhoun:

The same constitution of man which leads those who govern to oppress the governed, – if not prevented, – will, with equal force and certainty, lead the latter to resist oppression, when possessed of the means of doing so peaceably and successfully. But absolute governments, of all forms, exclude all other means of resistance to their authority, than that

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<sup>553</sup> The phrase was coined after President Kenyatta and Opposition leader Odinga constantly started referring to each other as “my brother”.

<sup>554</sup> The Advisory Committee vide Gazette Notice Vol CXX-No. 64 of 31<sup>st</sup> May 2018 Notice No. 5154 dated 24 May 2018 was formed to be known as Building Bridges to Unity Advisory Taskforce.

<sup>555</sup> See Articles 255 and 257 Constitution of Kenya 2010

<sup>556</sup> The BBI Constitution of Kenya (Amendment) Bill, 2020

<sup>557</sup> Nairobi High Court Constitutional Petition No E282 of 2020 (Consolidated) *David Ndi & Others v Attorney General & Others*.

<sup>558</sup> Nairobi Civil Appeal No E291 of 2021 *Independent Electoral and Boundaries Commission v David Ndi & Others*.

of force; and, of course, leave no other alternative to the governed, but to acquiesce in oppression, however great it may be, or to resort to force to put down the government.<sup>559</sup>

The political activities in Kenya give a repository of the dangers of governments formed through numerical majorities as against compromises.<sup>560</sup> Whereas the governments of compromise claim close proximity to ordaining perfect constitutional governments, the former governments do no more than using the ballot to shift political power. This movement in power by making the majority party a minority party and vice versa does not prevent government from superseding the objects from which it was ordained. It does merely change the seat of authority from minority to majority without compromising its ability to turning absolute. Calhoun warns that such an arrangement in which the majority and minority parties are in perpetual conflict if left unchecked has the potential of depositing a country to force in resisting oppression. This thesis shall argue that the Kenyans experience in the aftermath of the general election of 2007 vividly captures Calhoun's disposition that unchecked conflicts between the majority and minority parties is a recipe for chaos. To Calhoun, these conflicts arise from the desire to control governmental powers and resources where the competitors do everything within their powers to have such control. The temporal nature of these struggles to control government has a tendency to resort to the intervention of force as Calhoun writes:

But, it is no less true, that this would be a mere change in the relations of the two parties. The minor and subject party would become the major and dominant party, with the same absolute authority and tendency to abuse power; and the major and dominant party would become the minor and subject party, with the same right to resist through the ballot-box; and, if successful, again to change relations, with like effect. But such a state of things must necessarily be temporary. The conflict between the two parties must be transferred, sooner or later, from an appeal to the ballot-box to an appeal to force.<sup>561</sup>

This study argues that Calhoun's *Disquisition on Government* captures its tone on the discourse of politics and ethnicity as a challenge to attempts to consolidate ethical governance in Kenya. The political machinations that have been witnessed in Kenya, the ethnic alliances have resulted in governments that have greatly diluted fundamental constitutional principles such as separation of powers, the rule of law, human rights,

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<sup>559</sup> Calhoun *Disquisition on Government* 21

<sup>560</sup> Cheeseman N 'African Elections as Vehicles for Change' (2010) 21 *Journal of Democracy* 140-141.

<sup>561</sup> Calhoun *Disquisition on Government* 22.

accountability, independence of the magistracy among others in the process making consolidation of ethical governance impossible to achieve. In the aftermath of the invalidation of the 2017 presidential election results, the Jubilee party, having control of Parliament hurriedly enacted election and security laws that favored the ruling administration. To this extent, this study concurs with Akech's disposition that representative democracy is not an end in itself in ensuring government does not supersede the objects for which it was ordained. Akech argues rightly that there is no guarantee that the wielders of state power will always account for their exercise of such power. He therefore suggests that a proper conceptualization of representative democracy must start with an appreciation of inherent limitations within it through the sphere of accountability. According to Akech:

Accountability may be defined as 'a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other.' This definition implies a relationship in which 'some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.' In this relationship the 'accountor' has an obligation to explain and justify his or her conduct to the 'accountee.'<sup>562</sup>

Ethnic politics have greatly contributed to the failures in consolidating ethical governance in Kenya. The inability to curb corruptions in Kenya, despite existing elaborate legislation and institutional network can be attributed to the unwillingness by the political class and the making of appeals to ethnic acclamations whenever agents of the people are called into account. The famous saying when arrests on corruption allegations are made is 'our community is being targeted' and then the political elites from the ethnic background of the perpetrators politicize the matters in an attempt to sway the institutional decision-making processes greatly undermine consolidation of ethical governance.<sup>563</sup> The lack of civic education by the institutions charged with promoting ethics has equally made it difficult for the public to disengage the quest for ethical governance from attempts to ensure leaders are made accountable. Almost all legislations enacted to consolidate ethical governance require attendant institutions to conduct civic education on ethical

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<sup>562</sup> Akech 'Abuse of Power and Corruption in Kenya' 345.

<sup>563</sup> The arrests that occurred pursuant to the investigations over the Kimwarer and Arros Dams scandal and the Kenya Power and Lighting Company Limited were made by the political elites from the Kalenjin

governance.<sup>564</sup> There has never been any attempt to introduce ethical governance courses in the country's educational curriculum. The education system is perhaps one of the best routes through which consolidation of ethical governance can be achieved thus enabling the public to have childhood understanding of the difference between politicization of accountability measures and the need for accountability among all actors within the State. This study equally argues that the need for ethics within the political class is indispensable if ethical governance has to be realized in Kenya. In this regard, institutions charged with safeguarding democracy must be strengthened so as to be as much impartial as possible. The nullification of the constitutional amendment through the Building Bridges Initiative by both the High Court and the Court appeal is a step towards a consolidation of judicial independence. This is because the process was hugely fronted by an executive administration which has gone on record as the most defiant of judicial orders especially post the 2010 constitutional jurisprudence. Safeguarding the integrity of the processes is the strongest indicator of existence of the rule of law within a legal system whilst hiding within the law to promote illegality is a dilution of the rule of law project. This then leads to the next issue calling for imminent consideration, misapplication of constitutional principles to perpetuate self-aggrandizements.

#### **1.4 Misconceptualization of Constitutional Principles**

This study has consistently argued that the existence of a constitution and constitutional practice are two distinct phenomena. The mere adoption of constitutional principles such as separation of powers, independence of the judiciary, human rights, social justice, transparency and accountability among others does not guarantee that the wielders of state power, left unguarded, will promote the actualization of these principles.<sup>565</sup> The gulf between the existence of a constitution and constitutional practice can be compared to the use of traffic lights. A motorist arrives at the traffic lights and finds a clear road with red

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community seem to be an attack on their community and a political scheme by the State against people perceived to be supporters of the Deputy President William Ruto who hails from the community.

<sup>564</sup> Anti-Corruption and Economic Crimes Act; Leadership and Integrity Act, Proceeds of Crime and Anti-Money Laundering Act, United Nations Convention Against Corruption etc. all call for civic education and or inclusion of ethics in the education curriculum. This proactive measure has never been implemented years after the coming into force of the enactments.

<sup>565</sup> Calhoun *Disquisition on Government* 18.

lights on, he has the option of proceeding with his journey or stop and wait for the green light. Here comes into test Immanuel Kant's first formulation of universal law, *act only on that maxim through which you can at the same time will that it should become universal law*. If every motorist who finds a clear path with red lights on decides to proceed disregarding the lights, it would be meaningless to have the traffic lights at the designate place. Just like red traffic lights cannot prevent a recalcitrant motorist from proceeding with his journey, the mere having of constitutional principles in a constitutional document does not guarantee their implementation. This part will consider a few constitutional principles to demonstrate this argument.

#### 1.4.1 Separation of Powers

The constitutional principle of separation of powers has often been misapplied in the Kenyan governance system resulting in sheer lack of accountability among the wielders of State power. Several court decisions, executive manipulation of other departments and legislature rubber stamping executive overreach have often all cited the separation of power principle to justify their decisions to act or not act in some way or the other. As already discussed in previous chapters *ex parte Saitoti*, *Mumo Matemu (appeal)*, and *ICPC* cases, for instance, have invoked the separation of powers as reasons for their decisions when it is clear that a different outcome could have been arrived at had a proper conceptualization of the separation of powers principle been applied. The Mumo Matemu case raises a major jurisprudential paradox over the courts supervisory role over the exercise of constitutional mandates. Whereas both the High Court and the Court of Appeal concur in the courts having jurisdiction to undertake merit review over the exercise of constitutional powers by other co-equal departments of government, it is paradoxical that the Court of Appeal in overturning the High Court decision invoked the discipline of separation of powers. The courts have exclusive mandate to interpret the constitutionality of acts or omissions done or said to have been done under the constitutional powers by a state organ and it is baffling therefore why the Court of Appeal found that the High Court overreached in finding that Mumo Matemu was unfit to hold office as chairperson of the Ethics and Ant-Corruption Commission.

The Constitution mandates the courts to give interpretations that inter alia promote its values and purposes and as well promote the growth of the law.<sup>566</sup> The Court of Appeal in *Mumo Matemu* seemed to have been guided by this imperative when it held that all actors including the Courts have an obligation to facilitate the growth of the jurisprudence on integrity which it termed as being in “its infancy stage.” The ultimate holding by the Court of Appeal is defeatist of the constitutional obligation imposed on the court and it will be the argument espoused by this thesis that such application of separation of powers is counterproductive the purpose and values of the Constitution. The touchstone of ethical governance is institutional integrity and where an act or omission done in exercise of constitutional powers is likely to injure institutional integrity separation of powers should aid in safeguarding and not promote the decomposition of institutional integrity. Constitutional provisions (and principles) are mutually supportive and no one provision is superior than the other.<sup>567</sup> By conferring preference to the principle of separation of powers as against ethical governance, the Court of Appeal was reversing this long held principle. A pure separation of powers as often applied in developing democracies such as Kenya will not yield the object for which the principle was conceived. Separation of powers must be accompanied by its twin concept of checks and balances.<sup>568</sup> For courts to wrongly invoke the concept of separation of powers in dereliction of their constitutionally conferred powers to supervise the exercise of constitutional mandates obviously makes consolidation of ethical governance unachievable milestone. Calhoun rightly talks of the inadequacies of separation of powers in the following manner:

Nor would the division of government into separate, and, as it regards each other, independent departments, prevent this result. Such a division may do much to facilitate its operations, and to secure to its administration greater caution and deliberation; but as each and all the departments, – and, of course, the entire government, – would be under the control of the numerical majority, it is too clear to require explanation, that a mere distribution of its powers among its agents or representatives, could do little or nothing to counteract its tendency to oppression and abuse of power.<sup>569</sup>

The principle of separation of powers, properly conceptualized, must embody in it the concept of checks and balances in order to ordain constitutional governments. In this

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<sup>566</sup> See article 259 of the Constitution of Kenya 2010.

<sup>567</sup> *Tinyefuze v Attorney General of Uganda* Constitutional Petition No. 1 of 1997 [1997] 3 UGCC.

<sup>568</sup> Fombad C M ‘The Separation of Powers and Constitutionalism in Africa’ 305.

<sup>569</sup> Calhoun *A Disquisition on Government* 19.

regard, proper constitutional architecture and design must not only divest in each of the departments of government positive power (to act), but must, of necessity, also vest in each the negative power (to restrain). According to Calhoun, a constitution is as a result of the negative power without which there will be nothing like a constitution. To Calhoun therefore, while the negative power is to the existence of a constitution, the positive is for existence of governments and the combination of the two is what informs constitutional documents. Ethical governance within the parameters of separation of powers requires prudent exercise of the positive powers whilst at the same time providing each department with the capacity to check on the excesses of the other departments.

#### 1.4.2 Universal Suffrage

Contrary to popular view that the ballot process is a manifestation of the people's will in governance, this instrument has in many instances been used to install unpopular governments. The ruling and dominant party, aided by the ballot process, often tends to maximize their constitutional powers while at the same time opposing any restrictions that tend to limit these powers. Concerted efforts will consequently be deployed to dilute the limitations and increase the powers and influence.<sup>570</sup> In almost all developing democracies, universal suffrage has often been associated with governments of numerical majority. Universal suffrage, in the purview of numerical majority, has wrongly been associated with the people's exercise of democratic rights hence the means with which people hold their leaders into account. Human experience throughout Africa however, shows the inherent limitations of the use of numerical majority in clothing the people with sufficient powers to counter-act absolutism in government. This is partly because the people's power ends at the casting of the ballot and they have to wait for another election cycle to exercise it. It is also partly to be attributed to the tendency in developing democracies to manipulate the ballot process in many cases subverting the will of the people.<sup>571</sup> In its report on the general elections in Kenya in December 2007, the Independent Review Commission observed that:

Numerous implausible high turnout figures reported in the strongholds of both main political parties evidence extensive perversion of polling, probably ballot-stuffing, organized impersonation of absent voters, vote buying and/or bribery.... Indeed, vote-buying and

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<sup>570</sup> Ibid 18.

<sup>571</sup> Presidential Petition No. 1 of 2017; see also the Report of the Independent Review Commission (IREC) on the General Elections held in Kenya on 27 December 2007.

ballot-stuffing appear to be such extensive and universally condoned practices in Kenyan elections that the question can rightly be asked whether genuinely free and fair elections are at all possible.<sup>572</sup>

The IREC report and existing literature on the conduct of elections in Africa underscore the problems associated with the reliance on numerical majorities to ordain constitutional governments. In part of its report, IREC observes that much as the overall responsibility on management of elections in Kenya rests with the electoral agency, the Kenyan society is deeply complacent and or actively connived at, the subversion of the electoral process. To IREC, this culture has remained so deep rooted that correcting it will require concerted efforts and a non-partisan commitment from all electoral actors to demand integrity of the electoral process.<sup>573</sup>

In the government of numerical majority, there is a systematic transitions of power struggle away from party to party to a struggle within the party structures. This has the consequence of even substituting the control of government from the whole organ of the party to a simple minority of the party leaders. For the very struggle for control of government between majority and minority parties revolves around control of resources, the same struggle will permeate its way within the party structure and result in formation of different factions within the party system. The conflicts for control of resources transitions from inter-party to intra-party struggles making it impossible for either faction to appropriate government powers beyond certain periods. This arises from the fact that the limited resources within government will not be available for rewarding all interests and those not rewarded will become dissatisfied and seek alternative means of usurping power. Ultimately, Calhoun contends society will become confused, corrupted, disorderly and anarchic and thereby invite an appeal to force in place of policy and principle birthing the end of such numerical governments.<sup>574</sup> Calhoun's disposition is nothing far from the electoral processes in Kenya as primarily Kenya adopts the numerical majority system of ordaining government. As was discussed elsewhere in this chapter, the political party formations in Kenya especially since the adoption of multiparty systems has largely contributed to the failure of universal suffrage to consolidate ethical governance. Political

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<sup>572</sup> IREC, 8-9.

<sup>573</sup> IREC 10.

parties, or the coalition of political parties have often been used as instruments of ascending to power as opposed to vehicles of promoting representative democracies. Such parties, or coalition of parties, quite often die a natural death immediately the leaders ascend and or fail to ascend to power.<sup>575</sup>

The foregoing remains the underlying position as regards the inability of universal suffrage to consolidate ethical governance despite the fact that Kenya has an elaborate legal and institutional framework guarding elections as was observed in chapter three. The question forming the enterprise of this part is whether the existing constitutional, legal and institutional framework is sufficient to guarantee the ability of universal suffrage to ordain ethical governance. Kenya is a State party to various international and regional instruments providing universal principles accepted by the society of nations who believe in democracy as a basis of good governance. Some of the international instruments include the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (UCCPR), International Covenant on Elimination of All Racial Forms of Discrimination (ICERD), Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) as well as Convention on the Rights of Persons with Disabilities (CRPWD). On the other hand, the African Charter on Human and People's Rights (ACHPR), The African Union Declaration on the Principles Governing Democratic Elections in Africa (2002), the African Charter on Democracy, Elections and Governance (2007) form part of the regional instruments to which Kenya is party to that aim at consolidating electoral process in realization of ethical governance.<sup>576</sup>

The principle of universal suffrage, from experience, has aided the entrenchment of absolutism not only in Kenya, but African countries in general. The ballot processes have remained a mockery of the existing electoral laws and structures aimed at expressing the will of the people in governance. The ruling parties have gullibly employed the numerical majority system of ordaining government to extend their grid in power in the guise of the people exercising their sovereignty. Leaders of questionable integrity have been able to

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<sup>574</sup> Calhoun 23.

<sup>575</sup> National Rainbow Coalition (2002); Jubilee Party (2017); Coalition for Reform and Democracy (2013); National Super Alliance (2017); Forum for Restoration of Democracy (1994).

<sup>576</sup> IREC 11-12

employ a corrupted interpretation of electoral and integrity laws and intimidate institutions charged with protecting democratic governance to ascend to power. Most astonishingly is the failure by the judicial system to locate the entwine of ethics and democratic governance, often wrongly, citing the democratic right of the people to choose leaders of their choice. This paper will argue such an application of universal suffrage is defeatist of the quest for consolidation of ethical governance not only in Kenya, but Africa in general.<sup>577</sup> The governments of numerical majority are only suitable to small homogenous societies. As society develops in terms of population and wealth growth, expanded economy in terms of revenue and expenditure, governments of numerical majority become less suitable to society thereby calling for major paradigmatic shift to governments of concurrent major in order to supersede the appeal to resort to force in place of compromise. Much of the foregoing challenges result from a laxity in enforcement of existing laws aimed at entrenching ethical governance in Kenya which then leads to the next issue under consideration which is a lack of proper investigation and prosecutorial strategies.

### **1.5 Improper Coordination of Investigation and Prosecution Strategies**

From what has been discussed throughout this study, the kernel of consolidation of ethical governance lies beneath the escapements of proper investigation and prosecution strategies. Any meaningful and successful prosecution must be anchored on a properly investigated matter. It is for these reasons perhaps that judicial reasoning in Kenya has placed firm obligations on the prosecution to demonstrate prior to institution of charges that there is a prosecutable case. In *Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties)*, the court cited in affirmative *R v Inspector General of Police & 3 Others Ex Parte Lillian Wangari & 5 Others* [2017] eKLR, where it was held:

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor

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<sup>577</sup> HCCC Pet. No. 552 of 2012 [2013] eKLR.

must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.<sup>578</sup>

Investigatory and prosecutorial powers have been placed into various departments in Kenya as was discussed in chapter three. It will be argued that the scattering of these functions proffers a major challenge in the realization of ethical governance. There is no proper coordination of these functions amongst the various institutions mandated to investigate and prosecute offences in Kenya. The case of Mumo Matemu presents the confounding challenges to investigations in Kenya. While clearing Matemu to assume office, the Court of Appeal held that it was parliament's duty to investigate the allegations levelled against Matemu as opposed to the courts. The decision presented an investigatory paradox in the sense that whereas the court held that its proceedings were not a proper forum for conducting an inquiry into the conduct of Matemu's suitability to hold office, the court never specified what the proper forum was. Whereas ultimately Matemu assumed office, the allegations against him remained unresolved.<sup>579</sup> The existence of paralyzed investigatory and prosecutorial mechanisms is a major hindrance to consolidation of ethical governance in Kenya. The existing legal framework makes the office of the director of public prosecutions the only institution with sole prosecutorial powers in Kenya. While the decision to charge or not is a sole discretion of the institution, it does not conduct investigations. It will be argued here that this position provides a challenge to consolidation of ethical governance in Kenya.<sup>580</sup>

Further challenges brought about by existing legal and institutional framework is a lack of cooperation between the institutions mandated to promote ethical governance. Whereas for instance the law mandates these institutions to cooperate in execution of their mandates, conflicts have been witnessed among for instance the ethics and anti-corruption commission, directorate of criminal investigations as well as the office of the director of public prosecutions. There lacks a harmonized and coordinated operation amongst these important institutions. There equally seems to be a lack of coordinated enforcement of ethical requirements between the investigatory agencies and the electoral

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<sup>578</sup> [2021] eKLR.

<sup>579</sup> *Mumo Matemu v Trusted Society of Human Rights & 5 Others* [2013] eKLR.

and other appointing agencies. Whereas the law mandates the ethics and anti-corruption commission to maintain a database of information resulting from its investigatory mandates, there is a continued clearance by the electoral agency of persons with questionable character to vie for elective position. Although these clearances have been occasioned by the judiciary's approach to enforcement of leadership and integrity issues, the fact that the ethics commission never raises issues of integrity with the electoral agency makes the consolidation of ethical governance a gulfing rift. Blasius argues that the existence of multiple constitutional and legislative clauses on independence of these institutions makes cooperation almost unattainable.<sup>581</sup>

Sometimes in 2019, the Judicial Service Commission recommended a list of 41 justices to be appointed by the President to serve in various superior courts of record. These appointments were never made until after two years with the president arguing the national intelligence service had raised integrity issues over some of the judges. It calls for the reckoning that prior to recommending persons to be appointed as judges the Judicial Service Commission, like other Commissions, often does rigorous interviews including public participation. How the intelligence report failed to be presented to the commission prior to the recommendations shows the extent to which the investigatory institutions are detached from embedding ethical governance in Kenya as much as the president's allegations against the judges have been viewed as efforts to undermine judicial independence.

## **2. Conclusion**

The purpose and intention behind this chapter was to clearly elucidate the overwhelming evidence of Kenya's manifest failure to comply with the minimum standards of ethical and accountable political leadership. It is against this backdrop that the following chapter sets out to highlight the primary deficiencies in Kenya's quest for ethical leadership and to suggest implementable recommendations to advance ethical leadership.

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<sup>580</sup> Blasius PO 'Efficacy of the Policy, Legal and Institutional Frameworks for Combating Corruption in Kenya' (LLM dissertation, University of Nairobi (2009) 33.

<sup>581</sup> Id, 34.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 1. Conclusion

The irresistible conclusion this study makes is that there is and shall never be a perfect constitutional document. In Calhoun's words, the constitution making process 'is one of the most difficult tasks imposed on man' and to form a constitution capable of wholly performing the functions for which it was formed, which is, effectively restraining the government from turning absolute, Calhoun contends, 'has thus far exceeded human wisdom, and possibly ever will'. Constitutional making process is therefore, not aimed at fashioning impulsive instruments; rather should aim at addressing the unending and mutating social needs as Calhoun puts it more succinctly, 'man is left to perfect what the wisdom of the Infinite ordained, as necessary to preserve the race'.

Constitution making processes must therefore, develop mechanisms that allow for deliberate space enough to accommodate conspicuous dialogue between the governed and the governors as well as all competing interests in the society. The need for constitutionalism in execution of state power is premised on the quest for good governance. Constitutional ethics requires that governance should be based on a fair and transparent system anchored on the parameters laid down in the constitution. The prospects of embedding the culture of constitutional practice face great challenges as leaders who come to power devise strategies and policies that permit self-interests supersede the object for which government was formed. Constitutional ethics is key in entrenching the culture of constitutional practice in solving the protracted quest for good governance.

Kenya has multiple laws and institutions that can help it realize constitutional practice. In form and content, there exists no ideal legal and institutional framework that is irreproachable and unimpeachable, nor does one exists that solves all problems. Moreover, the legal and institutional framework of a country is not a contract that is struck once and for all, rather a deliberate progressive part of social development. A legal and

institutional framework that promotes ethical leadership as an element of constitutionalism must inevitably accommodate strategic dialogue between the leaders and the citizens.

The legal and institutional framework obtaining in Kenya hazardously fails to entrench the degree of ethical leadership found in the West where reversal is almost impossible and disastrous. While for instance the kind of ethical leadership obtaining in the West has resulted in a stronger constitutional culture, the one existing in Kenya is not aimed at promoting constitutionalism but rather replacement of limited government with extreme militarization of civil institutions. Be that as it may, the existing legal and institutional framework offers immense hope of Kenya joining the mainstream of constitutional states and the scattered developments post 2010 provides greater contribution of this framework's attempt to realize and promote ethical leadership. Although not perfect, this framework helps to check the inevitable excesses of government.

The promulgation of the Constitution of Kenya 2010 offered glistering hope that the struggle for consolidation of ethical governance has since been realized. However, enforcement of ethical leadership presents a mockery of the aspirations Kenyans had in adopting the new constitutional charter. The enactment of legislations to implement constitutional provisions on ethical governance was the beginning of efforts to undermine those provisions. The dilution of the Leadership and Integrity Bill by cabinet left the resultant Act without mechanisms of implementing its provisions. The move by cabinet offered the clearest indication of a lack of willingness at the highest echelons of government to consolidate ethical governance birthed under the new constitutional dispensation.

The enacted legislation to consolidate ethical leadership are a barometer for parliamentary culpability in undermining the quest for ethical governance in Kenya. The same culpability permeates through parliament's lackluster exercise of its oversight role over executive appointments of persons to constitutional offices. The Mumo Matemu case offers a gleaner forecast of the future of ethical governance in Kenya. The events surrounding the appointment of Matemu to chair the Ethics and Anti-Corruption Commission and in particular the casual manner with which parliament vetted Matemu

reveals a clouded view of the government's commitment to the fight against corruption and most importantly the quest to consolidate ethical governance.

The hostility to ethical governance from the political departments of government makes the judiciary the last hope for entrenchment of ethical governance. However, the uncertainty provided by judicial reasoning over matters concerning implementation of Chapter Six of the Constitution makes the judiciary no better casualty in presenting a bleaker future to consolidation of ethical leadership in Kenya. Judicial reasoning towards grievances regarding Chapter Six present insurmountable challenges to consolidation of ethical governance. These challenges appeal for urgent need to rethink implementations mechanisms towards consolidation of ethical governance. Judicial records show that there is little hope in enforcing Chapter Six through appeal to the judicial process. The obtaining position invites an inevitable conclusion that there is judicial cynicism against Chapter Six making the realization of ethical governance a pipe dream.

Contextually, Chapter Six has procured a hitherto evasive standard of judging the quality of ethical governance in Kenya. A lot however, needs to be done in order to fully consolidate ethical governance even though the prevailing political environment makes this dream a gulfing reality. In the final analysis, it will not be the imagination and perceptions of civil and political rights, or mere entrenchment of ethical values in legal books alone that will make our national aspirations a real, lasting and animating national heritage. It will also, perhaps more importantly, depend on the political will and proven ability of our judiciary to dedicate itself and its policies to the furtherance of ethical values. Only then, can one claim there has been attained consolidation of ethical governance.

## **2. Recommendations**

- It has been demonstrated that there is a clear lack of mechanisms to enforce constitutional and statutory provisions on integrity. An appeal is thus made for amendments to be enacted to the Leadership and Integrity Act so as to include mechanisms such as were contained in the initial Leadership and Integrity Bill as prepared by the then Commission for Implementation of the Constitution (CIC) (before being fatally mutilated by both cabinet and parliament). The said amendment must

require public declaration of income, assets and liabilities by persons seeking state office as well as prohibiting state officers from engaging in other gainful employment.

- Procedures for making complaints outside of the court processes should be made clear and dissemination of information to the public must be made proactively. Judicial reasoning on justiciability of integrity issues for persons seeking election to public office should appreciate the ability of such persons to mobilize populations in order to defeat integrity challenges. The ICPC case is a clinical example of the difficulty of extra-judicial enforcement of integrity issues. Courts should not bluntly refuse to entertain integrity suits oblivious of ability of the political class to organize and mobilize populations in order to defeat accountability on integrity issues. The position adopted by Mumbi Ngugi in *Benson Riitho v JM Wakhungu* where it was held that 'there is no statutory procedure or mechanism under which a person who has concerns about the suitability of a person to hold office can be examined' should be developed through litigation as it provides a more responsive approach to enforcement of ethics.
- The approval of Mumo Matemu by the National Assembly to head the Ethics and Anti-Corruption Commission brings to the fore confounding weaknesses in Parliamentary procedures towards entrenchment of ethics. The National Assembly must develop and appreciate the salient role it plays in consolidating ethical governance in Kenya.
- Ethical governance should be incorporated in the education system right from the elementary level.
- It was demonstrated that the existence of a multitude of legislation dealing with ethical governance constitutes a challenge to the consolidation of ethical governance. More research should be conducted on how best these laws and institutions can be harmonized so as to effectively realize the aspirations Kenyans had when promulgating the Constitution in 2010 to establish a people-centred governance system.
- Institutions established to enhance democracy must be strengthened and equipped to withstand political and ethnic based interference. The electoral laws must be fully implemented in order to sanitize the political leadership which is the pinnacle of exercise of state power.

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