

CHAPTER 9¹

JUDICIAL POWER, STRUCTURE, AND INDEPENDENT ACCOUNTABILITY IN KENYA AND AFRICA: INTERESTS, FUNCTIONS, PROCESS AND OUTCOMES²

This Chapter may be cited as Ben Sihanya (forthcoming 2021) “Judicial Power, Structure, and Independent Accountability in Kenya and Africa: Interests, Process and Outcomes,” Part 1, Chapter 9, in Ben Sihanya (2021) *Constitutional Democracy, Regulatory and Administrative in Kenya and Africa Vol. 1: Presidency, Premier, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

9.1 Conceptualizing the Judiciary or Judicature in Kenya and Africa: Courts, Judicial Tribunals and Quasi-judicial Tribunals³

My overarching argument in this Chapter on the Judiciary in Kenya and Africa is three-pronged. First, the Judiciary is one of the three co-equal arms of Government. It is not “the third arm;” nor the “shortest” arm; nor “the unelected branch”...It is simply the Judiciary ... It includes the courts, tribunals, and “bodies” and indeed judges, magistrates, judicial officers and staff.

Second, the judicial power, functions and structure have been adversely affected by at least three (3) challenges. First, politicization of the judiciary.⁴ Second, judicialization of politics.⁵ Third, juridification of society, politics and political economy in Kenya and Africa.⁶

Third, judicial reform, including debates in the context of the Building Bridges Initiative (BBI) addressed the question of separating the Judiciary and the Judicial Service Commission (JSC).⁷ These reforms proposed to address at least four (4) questions. First, to of harmonize the tenure of the Deputy Chief Justice (DCJ) with that of the Chief Justice (CJ) under (Art. 167).⁸ Second, to

¹ This chapter on Judiciary power, structure and independent account in Kenya and Africa is divided into two Chapters 9 and 10.

² See generally Ben Sihanya (2019) “Securing judicial independence and accountability in Kenya,” Vol. 10 (11) *Nairobi Law Monthly* 38-43.

³ To compare executive and administrative tribunals....

⁴To elaborate these with cases, situations and anecdotes.... See Chapters 4, 29 and 30 of CODRALKA 1 on Presidential Elections 2017 and beyond, CODRALKA 1 & 2; Wachira Maina (2015) “How drafters of 2010 Constitution ensured MPs won’t abuse it for political expediency,” *Daily Nation*, Nairobi, March 27, 2015, at <https://www.nation.co.ke/oped/opinion/How-drafters-of-2010-Constitution-ensured-MPs/440808-2668160-me7wg1z/index.html> (accessed 20/4/2020).

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⁷ The JSC proposed that the Chief Registrar of the Judiciary (CRJ) should remain in the Judiciary while a Secretary be appointed to be the CEO of the Judicial Service Commission (JSC)....

⁸ See ... Clause 40 of the Constitution of Kenya (Amendment) Bill, 2020.

limit the scope of the Supreme Court’s jurisdiction with regards to election petitions that should be limited to presidential election disputes.⁹ Third, empowering the the Judicial Service Commission (JSC) to discipline Judges....¹⁰ Fourth, the establishment of the Judiciary Ombudsman as a check on maladministration in the Judiciary under proposed (Art. 172A).¹¹

How can Afro-Kenyan constitutional sociology and constitutional democracy help analyze, appreciate and reform the judicial power, structure, and independent accountability in Kenya and Africa?

The judicial power and function may be conceptualized under a three-pronged typology. First, the judicial power vests in, belongs to, and is derived from the people who are sovereign as stipulated under Article 1 and Article 159 of the Constitution. This is similar to the legislative and executive powers and functions, as discussed in Chapter 7 and 8 respectively.

Second, the judicial power and function are exercised, executed or administered by the Judiciary which consists of courts and (quasi-judicial) tribunals. Third, the judicial power and function is the power and function to interpret, administer (?), (and enforce?) the Constitution and the law. It is the arbiter in disputes, or cases and controversies.¹²

The Kenyan constitutional and legal system is largely adversarial,¹³ with limited elements or an inquisitorial systems.¹⁴ Thus, questions arise on justiciability, the political question doctrine, and related issues on the scope and limits of judicial power or jurisdiction and function.

⁹ See submissions by the Judicial Service Commission (JSC) (not Judiciary?) to the Building Bridges Initiative (BBI). One of the key proposals was that the Chief Registrar of the Judiciary (CRJ) remains the accounting officer of the Judiciary while a separate officer be appointed the Secretary for the JSC. What of the Chief Justice Chairing? What would be the best compromise? To separate the two and to secure parity with the Executive on the basis of the argument that the President does not chair the Public Service Commission (PSC)? See also, Moses Odhiambo (2020) “BBI proposal: Judiciary Ombudsman created as JSC allowed to discipline judges,” *Star*, October 22, 2020, at <https://www.the-star.co.ke/news/2020-10-21-bbi-proposal-judiciary-ombudsman-created-as-jsc-allowed-to-discipline-judges/> (accessed December 4, 2020).

¹⁰ See the BBI 2020 Report proposals and debate on the proposed amendment to Article 172 (functions of the Judicial Service Commission) to introduce the Office of the Judiciary Ombudsman.

¹¹ See Chapter 10 of CODRALKA 1 below; See Ben Sihanya (forthcoming 2021) “Restructuring the Legislative, Executive and Judicial Structure under Building Bridges Initiative (BBI) Amendment in Kenya....”

¹² See Article III of the US Constitution....

¹³ Nikhil Desai, Elizabeth Muthoka and Arooj Sheikh (2020) “Litigation and enforcement in Kenya: overview,” *Thompson Reuters*, February 1, 2020, at [https://content.next.westlaw.com/Document/16da5f045db8e11e8a5b3e3d9e23d7429/View/FullText.html?originatio nContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/Document/16da5f045db8e11e8a5b3e3d9e23d7429/View/FullText.html?originatio nContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true) (accessed March 26, 2021).

¹⁴ Cf. Inquest proceedings, under Section 385 of the Criminal Procedure Code (CPC). Cf. the National Coroners Service Act, No. 18 of 2017; Chapter 10... below.

There are three (3) main jurisdiction questions. First, what is the objective and source of jurisdiction of courts in Afro-Kenyan constitutional democracy? People? Constitution? Statute? Inherent?¹⁵ Second, what are the limits of the jurisdiction of courts and judicial officers? Third, is the Supreme Court's jurisdiction on advisory opinions consistent with the constitutional text, constitutional democracy and rule of law?¹⁶

9.2 Structure and Legal Method of the Judiciary in Kenya and Africa

What is the constitutional and legal framework on the structure and method of the Judiciary in Kenya? What is the administrative and institutional framework of judiciary structure and legal method in Afro-Kenyan constitutional democracy? The Judiciary comprises the courts established under Art. 162 (system of courts), categories of judges, magistrates, Kadhi's,¹⁷ judicial officers and judicial staff.¹⁸

The courts include superior courts like the Supreme Court, Court of Appeal, and High Court.¹⁹ The "courts equivalent to the High Court" are Employment and Labour Relations Court (ELRC), and the Environment and Land Court (ELC).²⁰ The courts include superior courts like the Supreme Court, Court of Appeal, and High Court. The subordinate courts are the Magistrates Court, and Kadhi's Court.

The foregoing and following are classified as superior courts, subordinate or inferior courts, tribunals and bodies.... What tribunals fall under the Judiciary?²¹

And which (quasi) judicial, executive and administrative tribunals fall under the other arms of Government and especially executive? There are more than sixty (60) tribunals in Kenya.²²

¹⁵ In England, the courts were initially called the King's or Queen's courts. The monarch was then regarded as the fountain of justice. See....

¹⁶ Cf. the US constitutional text and case law affirming that courts deal with "cases and controversies," (Art III of the US Constitution). See also Noah R. Feldman & Kathleen M. Sullivan (2019) *Constitutional Law*, Foundation Press, New York, 20th ed....

¹⁷ Cf. the Weberian double error: "Khadi justice"in Max Weber (1954) *Max Weber on Law in Economy and Society* (edited and annotated by Max Rheinstein and translated by Edward Shils and Max Rheinstein), Harvard University Law Press, Cambridge, Massachusetts. "Khadi justice" is unproblematized in the otherwise excellent article, David M. Trubek (1972) "Max Weber on law and the rise of capitalism," *Wisconsin Law Review*, 720-153, *op. cit.*, at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4993&context=fss_papers (accessed December 4, 2020). See also Chapters 5 on Theory and Methodology of Comparative Constitutional and Administrative Law: Law in Sustainable Development; 6 on Fusion and Separation of powers, Checks and Balances in Kenya and Africa; 8 on Executive Power, Function, and Structure in Kenya and Africa, 11 and 12 on President and Deputy President in Kenya and Africa...

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²⁰ Most scholars, lawyers, court users, and the Judicial Service Commission (JSC) agree that Employment and Labour Relations Court (ELRC) and Environment and Land Court (ELC) should be divisions within the High Court.... See Chapter 10 below...

²¹ See Chapter 10 of CODRALKA 1.... See also Judiciary (2021) "Know your tribunals," at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/RevisedKnowYourTribunalsAdvert.pdf> (accessed March 28, 2021).

These are established based on a statute by statute basis. They are established and constituted differently.²³

Some by are constituted by the Chief Justice while others, by the Cabinet Secretary. For instance, the Teachers Service Appeal Tribunal (TSAT) is set up by the Cabinet Secretary of Education to hear and determine appeals raised from the administrative decisions of the Teachers Service Commission (TSC).²⁴ The terms of office of the members of this tribunal is determined by the Cabinet Secretary, but should not exceed three (3) years.²⁵ Further, the CS also has the mandate of establishing the substantive and procedural rules of this tribunal, hence raising questions as to whether it is independent?

There has been debate on whether the tribunals are part of the Judiciary and or the Executive, and the implications for their establishment and appointments.²⁶

In *Okiya Omtatah v. JSC and Attorney-General* (2021) the main issue was the need for unanimity in the structure and composition of “local” tribunals. The Petitioner argued that despite tribunals falling under Art. 169(1)(d) (subordinate courts), the Executive still maintained a significant control over these tribunals. Justice AC Mrima held that the appointment and dis-appointment of members of tribunals by the Executive is a violation of the doctrine of separation of powers and judicial independence.²⁷

Further, the court held that the Judicial Service Commission (JSC) has the mandate to constitute and restructure the local tribunals established under Art. 169(1)(d) of the Constitution. The courts issued a structural interdict requiring the Attorney-General Paul Kihara Kariuki and Parliament to file a report on regularization within six (6) months...²⁸

What are the “bodies” anticipated under “judiciary, tribunals or bodies” in (Art. 159)?

The Judiciary is headed by the Chief Justice and assisted by the Deputy Chief Justice (DCJ). The Chief Justice and the Deputy Chief Justice double up as the President and Vice President of the Supreme Court, respectively. The Administrative head of the Judiciary is the Chief Registrar of the Judiciary (CRJ). The Judicial Service Commission (JSC) handles human resource issues in the Judiciary.²⁹

Some of the debates after 2010 and especially in the context of the BBI Report 2019 and 2020 reforms included the administrative powers *vis-à-vis* judicial powers of the Chief Justice, Deputy

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²⁶ Cf. Draft Tribunals Bill, 2015, Report of the Taskforce on Tribunals....

²⁷ *Okiya Omtatah Okiiti v. Judicial Service Commission & 2 Others; Katiba Institute* (Interested Party) [2021] eKLR.

²⁸ *Ibid*.....

²⁹ Arts. 171 (establishment of the Judicial Service Commission), Art. 172 (functions of the Judicial Service Commission) Constitution of Kenya.

Chief Justice (DCJ), President³⁰ of the Court of Appeal, Principal Judge of the High Court, Presiding Judges of the High Court Divisions and Stations, Judges, magistrates, Kadhis, Chairs and Members of Tribunals, the Chief Registrar of the Judiciary, and Registrars.³¹

At least three (3) examples illustrate the issues. First, the Chief Justice has at least six (6) roles. First, as the Head of the Judiciary (an arm, organ or branch of Government). Second, as President of the Supreme Court of Kenya. Third, as the Chairperson of the Judicial Service Commission (JSC). Fourth, as a Supreme Court Judge. Fifth, as Chairperson of the National Council for Law Reporting (Kenya Law).³² Sixth, the Chief Justice is the Chairperson of the National Council on Administration of Justice (NCAJ).³³

While some of these roles help consolidate and strengthen the judicial function and judicial independence, some may compromise separation of powers, check and balances as well as the accountability of the Judiciary. An example is being Head of the Judiciary,³⁴ and being a judge, while serving as the Chairperson to the Judicial Service Commission (JSC).³⁵

The Building Bridges Initiative (BBI) 2020 Report, the Draft Bill, and the Constitution of Kenya (Amendment) Bill 2020 proposed the introduction of the Office of the Judiciary Ombudsman, appointed by the President subject to approval by Parliament under proposed Art. 172A (office of the Judiciary Ombudsman) which elicited lot of debate.³⁶

In November 2020, it was reported that former CJ David Maraga insinuated that the creation of the Office of Judiciary Ombudsman (BBI proposed Article 172A), appointed by the President, could be a threat towards the independence of the Judiciary.³⁷

³⁰ My emphasis....

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³³ S. 34, Judicial Service Act, No. 1 of 2011. Judicial Service Commission proposed to the BBI taskforce that the three arms of Government may be represented in National Council on Administration of Justice. Discuss in the context of coordination “one Government,” separation of powers, checks and balances in Chapter 4, 6 of CODRLKA 1,....

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³⁵ What is the optional compromise?....

³⁶ Julius Otieno (2021) “Judiciary wants President barred from appointing Ombudsman,” *Star*, Nairobi, March 19, 2021, at <https://www.the-star.co.ke/news/2021-03-19-judiciary-wants-president-barred-from-appointing-ombudsman/> (accessed March 26, 2021); Justus Ochieng & Patrick Lang’at (2020) “BBI debate: Ruto camp demands multiple referendum questions,” *Daily Nation*, Nairobi, December 1, 2020, at <https://nation.africa/kenya/news/politics/bbi-debate-ruto-camp-demands-multiple-referendum-questions-3214794?view=htmlamp> (accessed December 4, 2020). Problematize this: Conceptually; contextually... where has it been done in constitutional amendments? Cf. Kenya 2005, 2010.... Njoya Were these part of the delaying tactics by the opponents of the constitutional reform process?

³⁷ Tonny Ndung’u (2020) “Maraga to Kenyans: Reject any proposals in the BBI that threaten independence of the Judiciary,” *Citizen Digital*, November 27, 2020, at <https://citizentv.co.ke/news/maraga-to-kenyans-reject-any-proposals-in-the-bbi-that-threaten-independence-of-the-judiciary-1211920/> (accessed December 4, 2020).

Remarkably, there has been a Judiciary Ombudsman (the Deputy Chief Justice (DCJ)....). The office of the Judiciary Ombudsman also exists in the UK. The main idea is to hold Judges, magistrates and other judicial officers, and judicial staff accountable for maladministration. The Chief Justice is also to be held accountable, and the appointment of such an office by the Chief Justice or the JSC was regarded as problematic, and a direct conflict of interest.

Regarding presidential nomination, it is arguable that a selection panel should shortlist three (3) candidates and forward the names to the President as Hon Raila Odinga explained at the launch of the BBI Signatures drive...³⁸ It is also arguable that presidential appointment is nominal, notional, administrative or “peripheral”³⁹ given the role of Senate in vetting nominees.⁴⁰ The appointment is similar to presidential appointment of the Chief Justice, Deputy Chief Justice and other judges under Art. 166 (appointment of Chief Justice, Deputy Chief Justice and other judges)

Significantly, the Judiciary Ombudsman clearly operates and even reports to Parliament under proposed Article 172A(4) hence reasonable independence of that officer. Article 172A(4) states:

“The Judiciary Ombudsman shall prepare regular reports to the Judicial Service Commission and an annual report to Parliament on any complaint under clause (3), which shall state— (a) the findings of the Judiciary Ombudsman; and (b) recommendations on the action to be taken by the Judicial Service Commission”

Second, the 2010 Constitution did not clarify the oath and term of office for the Deputy Chief Justice⁴¹ nor how the Deputy Chief Justice or the Senior most Justice of the Supreme Court could act as Chief Justice pending the filling of the vacancy in the office of the Chief Justice.⁴² Third, there were questions regarding the role of the Chief Justice, including Deputy Chief Justice (?) as the first among equals in the Supreme Court. Hence the litigation and debate on Chief Justice

³⁸ Moses Odhiambo (2020) “All systems go as Uhuru, Raila launch BBI signature collection,” *Star*, November 25, 2020, at <https://www.the-star.co.ke/news/2020-11-25-all-systems-go-as-uhuru-raila-launch-bbi-signature-collection/> (accessed December 8, 2020).

³⁹ See Justice Chacha Mwita on presidential appointment of Justice Warsame as the Court of Appeal Representative to the Judicial Service Commission (JSC).

⁴⁰ Roselyne Obala (2020) “Uhuru and Raila drastic changes in new Referendum Bill,” *Standard*, Nairobi, November 26, 2020, at <https://www.standardmedia.co.ke/adblock?u=https://www.standardmedia.co.ke/politics/article/2001395235/uhuru-and-raila-dramatic-changes-in-new-referendum-bill> (accessed December 8, 2020).

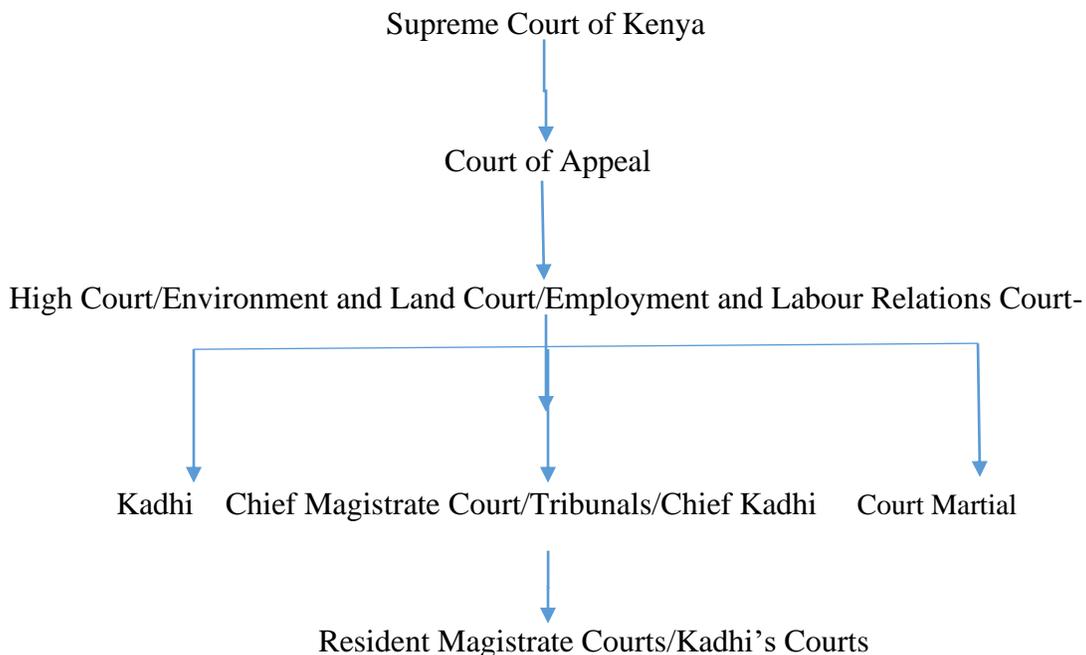
⁴¹ The BBI 2020 Report proposed the harmonization of the tenure of office of the DCJ to that of the Chief Justice through a proposed amendment to Article 167, Constitution of Kenya 2010 under Clause 40 of the Bill.

⁴²See Clause 40 of the Constitution of Kenya (Amendment) Bill, 2020; Jillo Kadida (2021) “Maraga to hand over instruments of power to Mwilu in special Supreme Court session,” *Star*, Nairobi, January 11, 2021, at <https://www.the-star.co.ke/news/2021-01-11-watch-maraga-to-hand-over-instruments-of-power-to-mwilu-in-special-supreme-court-session/> (accessed March 26, 2021).

Mutunga’s orders rescinding Supreme Court Justice Njoki Ndung’u orders on the case on retirement of Justice Kalpana Rawal and Philip Tunoi in 2016.⁴³

The Supreme Court lacks quorum even as Kenya approached the 2022 General Elections. Given the critical and constitutional role of the Supreme Court in the 2013 and 2017 presidential election disputes, was it tactical to have an improperly constituted Supreme Court in the preparatory and critical phases of 2022 General Elections and Kenyatta II succession?⁵⁴ And or was it constitutional to position certain candidates for the office of the Chief Justice given the likely and actual ethnic imbalance or Kikuyu and or GEMA domination of the major offices in Government?⁵⁵

Figure 9.1: Structure of Courts in Kenya



Source: Judiciary Website (Redrawn by IL & SM and Sihanya Advocates)

⁴³ Kamau Muthoni (2016) “Rawal seeks to reverse CJ Willy Mutunga’s directive on her retirement case,” *Standard Digital*, Nairobi, May 31, 2016, at <https://www.standardmedia.co.ke/article/2000203537> (accessed 25/3/2020); Walter Menya (2017) “Mutunga affidavit reveals intrigues dogging Supreme Court,” *Daily Nation*, Nairobi, September 17, 2017, at https://www.nation.co.ke/news/Mutunga-affidavit-lays-bare-intrigue_cbcvfvvjvjjjfg_vvv:~:s-dogging-top-court-/1056-4099264-4gpk12/index.html (accessed 25/3/2020). See Chapter 10 below.

⁵⁴ The Supreme Court of Kenya had composition challenges from 2017: DCJ Philomena Mwilu was being constantly intimidated through agents of the Executive and would not sit on occasions; Justice JB Ojwang’s was retired in January 2020 after undergoing a special purpose vehicle (SPV) tribunal that predictably cleared him; and Justice Mohammed Ibrahim was unwell- most of the time.... See The Conversation (2019) “Kenya’s Supreme Court: Old wine in new bottles?,” *The Conversation*, May 16, 2019, at <https://www.theelephant.info/features/2019/05/16/kenyas-supreme-court-old-wine-in-new-bottles/> (accessed April 14, 2021).

⁵⁵ Cite offices like President, National Assembly, Speaker, Attorney-General, Supreme Court Justice at least 5 out of 11 JSC members; Central Bank of Kenya (CBK), Kenya Revenue Authority (KRA).....cite sources.....

9.3 Conceptualizing Judicial Power, Jurisdiction and Functions in Kenya and Africa

Judicial power, jurisdiction and functions in Kenya and Africa fall under at least six (6) categories.

First, whatever jurisdiction is civil,⁵⁶ criminal,⁵⁷ admiralty⁵⁸ or (martial?).⁵⁹

Second, financial jurisdiction....

Third, original, review, “reference,”⁶⁰ revision....⁶¹

Fourth, appellate jurisdiction.

9.3.1 Subject Matter Jurisdiction: Civil, Criminal, Admiralty, Martial

Section 11(1) of the Court (Organization and Administration) Act, No. 27 of 2015 provides that the Chief Justice may establish various divisions of the courts including;

- “(a) the Family and Children Division;
- (b) the Commercial Division;
- (c) the Admiralty Division;
- (d) the Civil Division;

⁵⁶ Civil Procedure Act, 2010; Civil Procedure Rules, 2010;....

⁵⁷ The Penal Code and numerous criminal laws; substantive criminal (justice) law is the Constitution (Arts. 2, 3, 22, 23, 47, 48, 49, 50....) on procedure; Criminal Procedure Code, Cap 75, (CPC); Anti-Corruption and Economic Crimes Act., 2003 (ACECA)....; Evidence Act....

⁵⁸ E.g...

⁵⁹ Cf. “administrative” courts in France; “small claims courts;” Tax courts; intellectual property courts in Thailand....

⁶⁰ Cf. “reference” cases under the 2010 Constitution, under s. 67 of the 1969 Constitution of Kenya. Whenever a question of constitutional interpretation arose in subordinate courts, proceedings would be stayed as the matter was referred to the High Court. An example was *Republic v. Margaret Magiri Ngui* (1985), Criminal Application No. 59 of 1985.... In the *Magiri Ngui* case, the High Court ruled that the Criminal Procedure Code (CPC) was unconstitutional as it contravened section 72 of the 1969 Constitution which had listed only four (4) non bailable offences: murder, treason, robbery with violence. Later, Parliament amended the Constitution to conform with the Criminal Procedure Code (CPC)...., instead of the reverse....

⁶¹ Cf. the numerous criminal revision cases arising from Supreme Court decision in *Francis Kioko Muruatetu & Another v. Republic* (2017) eKLR, Petition No. 15 & 16 (Consolidated) of 2015. The Supreme Court declared death sentence unconstitutional... that judges and magistrates have discretion.... Some of the criminal revision cases include.... *Joseph Nduvi Mbuvi v. Republic* [2019] eKLR Criminal Revision No. 4 of 2019 (Odunga J., Machakos); *Republic v. John Wambua Munyao & 3 Others* [2018] eKLR, CR. Revision No. 25 of 2018 (Odunga J., Machakos); *Republic v. Mohamed Githiye* [2013] eKLR, Cr. Revision No. 430 of 2001 (Lessit J., Meru).... Report of the Task Force on the Review of the Mandatory Death Sentence, at <http://congres.ecpm.org/wp-content/uploads/2019/04/Maryann-Njau-Kimani-PRESENTATION-DEATH-PENALTY-BRUSSELS.pdf> (accessed December 8, 2020) There is a difference between the constitutionality of the “death sentence” and of the “mandatory death sentence” Cross ref and discuss under security and criminal justice... Chapter 15.... Cf. South Africa, *S v. Makwanyane and Another* (CCT 3/94) ...; Nigeria, Uganda, Tanzania, USA, UK.; cf. right to life of the accused and rights of victims; balancing act....

- (e) the Criminal Division;
- (f) the Constitutional and Human Rights Division;
- (g) the Judicial Review Division; and
- (h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.”

These court divisions may be created for at least three (3) reasons. First, to ensure effectiveness in judicial service delivery. Second, to enhance efficiency in court processes and dispute resolution. Third, to promote coordination and cooperation among judicial organs to promote the administration of justice.

To discuss the meaning and significance of every component, the constitutional and statutory provisions, as well as case law on the foregoing and the following....

9.3.2 Financial Jurisdiction of Courts in Kenya

Table on Financial Jurisdiction of Courts in Kenya

Court	Matter	Pecuniary Jurisdiction	Comments
Chief Magistrate	Civil claim	KES 20,000,000	ss. 6, 7, 8 and 9 of Magistrate Courts Act No. 26 of 2015
Senior Principal Magistrate	Civil claim	KES 15,000,000	ss. 6, 7, 8 and 9 of Magistrate Courts Act No. 26 of 2015
Principal Magistrate	Civil claim	KES 10,000,000	ss. 6, 7, 8 and 9 of Magistrate Courts Act No. 26 of 2015
Senior Resident Magistrate	Civil Claim	KES 7,000,000	ss. 6, 7, 8 and 9 of Magistrate Courts Act No. 26 of 2015
Resident Magistrate	Civil claim	KES 5,000,000	ss. 6, 7, 8 and 9 of Magistrate Courts Act No. 26 of 2015

Source: Magistrate Courts Act, No. 26 of 2015 (Table drawn by IL & SM and Sihanya Advocates).

9.3.3 Original, Review, Reference, and Revision Jurisdiction of courts in Kenya and Africa

...The Judiciary in Kenya and Africa has at least five (5) types of jurisdiction. First, original jurisdiction. Second, review. Third, reference jurisdiction. Fourth, revision jurisdiction, Fifth, appellate jurisdiction.

9.3.3.1 Original Jurisdiction of Courts⁶² in Kenya and Africa

What is original jurisdiction? What are the sources of original jurisdiction of courts.... Courts also often exercise jurisdiction only after parties have exhausted Internal Dispute Resolution Mechanisms (IDRMs)... These may include various alternative dispute resolution (ADR) mechanisms including Traditional Dispute Resolution (Cross Reference Arts. 67(2)(f),⁶³ 159(2)(c)⁶⁴)....

9.3.3.2 Review jurisdiction of courts in Kenya and Africa

What is to judicial review or review in the judicial process? What is administrative review?....

The High Court has inherent jurisdiction on review. Was this limited by Employment and Labour Relations Court (ELRC) and the Environment and Land Court? (ELC) Relatedly, the High Court jurisdiction was limited when it was excluded from entertaining cases on constitutional review.

Section 60 was amended⁶⁵ to establish the Interim Independent Constitutional Review Dispute Resolution Court (IICRDRC) which then adjudicated and facilitated the transition to the 2010 Constitution?⁶⁶

9.3.4 Review Jurisdiction of Courts in Kenya and AfricaWhat? Why? Example...

What is review jurisdiction? What are the constitutional and legal sources of power and review jurisdiction in Kenya and Africa? What are the key institutional and administrative frameworks

⁶² Cf. guidelines for active case management in magistrate courts....

⁶³ Article 67(2)(f) provides that one of the functions of the National Land Commission (NLC) is to “to encourage the application of traditional dispute resolution mechanisms in land conflicts.”

⁶⁴ Article 159(2)(c) provides that one of the principles that courts are guided by while dispensing justice is “alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”

⁶⁵ Section 60A (Establishment of Interim Independent Constitution Dispute Resolution Court) was amended to read “(1) Notwithstanding Section 60 there shall be an Interim Independent Constitutional Dispute Resolution Court (IICDRC) which have exclusive original jurisdiction to hear and determine all and only matters arising from the Constitutional review process. (2) The judges of the Court shall be nine judges of whom: (a) there shall be non-citizens who are qualified to be appointed judges or have served as judges of the highest court in any jurisdiction within the Commonwealth nominated by the Parliamentary Select Committee, and (b) Six shall be recruited through a competitive process by the Parliamentary Select Committee and upon approval by the National Assembly be appointed by the President in consultation with the Prime Minister. (3) For the avoidance of doubt, the court is not a division of the High Court.” The author represented LSK in the registration...the office of then Prime Minister Raila Odinga, the AG and the Constitutional Affairs Minister....

⁶⁶ Ben Sihanya.... represented the Law Society of Kenya (LSK) in agreeing with the Ministry of Justice, Attorney General’s Office, Prime Minister’s Office and Office of the President. Who were the Judges? What cases did they hear and determine? There had been fear that a case like *Njoya v. A-G* (2005) ...could be brought in the High Court to scuttle the constitutional review process

on review jurisdiction and what is their impact on administrative processes, administration of justice, good governance and sustainable development? What are the recent and necessary reforms on the exercise of review jurisdiction by court in Kenya and Africa?

9.3.5 Appellate jurisdiction of courts in Kenya and Africa

What is an appeal? What is an appeal in judicial process? This involves a person or party asking a higher court to reverse the decision of a trial court after final judgment or other legal ruling.⁶⁷ An appeal is not automatic in most cases. The right of appeal as granted by the Constitution of Kenya 2010 (Art 163(3) (Supreme Court...); statute; and the relevant rule and regulation. The law stipulates the grounds and timelines of approval, and or the relevant principle...⁶⁸

There is also “appeal” in administrative and political processes. Here, the appeals are structured or sequenced. They also take the form of utilizing “good offices.” Some of them, are more strictly alternative dispute resolution (ADR) processes.⁶⁹

On the appellate matters, tribunals are treated as subordinate courts...⁷⁰ Appeals lie in the High Court. Only High Court has inherent jurisdiction under Article 165(3)(c) Constitution of Kenya 2010 to determine appeals on matters arising from tribunals. But even this is limited to review of inferior tribunals including all subordinate courts, tribunals, bodies and even all the arms of Government....

At least three (3) attempts to limit the High Court’s inherent jurisdiction were not fully successful conceptually, contextually and practically. First, the establishment of courts of equivalent jurisdiction under Art 165 of the Constitution. Second, the establishment of Judges and Magistrates Vetting Board (JMVB) under section 23 of the Sixth Schedule of the Constitution.⁷¹ And third, some judicial decisions including those claiming that the Supreme Court of Kenya has inherent jurisdiction.⁷²

9.4 Unlimited and inherent jurisdiction of courts⁷³ in Kenya and Africa

What is inherent jurisdiction? What are the sources of power and inherent jurisdiction in Kenya and Africa?⁷⁴

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⁶⁹ Examples include complaints management and dispute settlement in public universities, political parties...

⁷⁰ *Okiya Omtatah v. Judicial Service Commission (JSC) & A-G* (2021)....

⁷¹ See Chapters 9, and 10 of CODRALKA 1....below.

⁷² *Republic v. Ahmad Abolfathi Mohammed & Another* [2018] eKLR, Criminal Application No. 2 of 2018; *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, Application No. 5 of 2014.

⁷³ Art 165(3).

9.5 Contextualizing Powers and Functions of Courts in Kenya and Africa

How does the constitutional and legal frameworks contextualize judicial powers and functions in Kenya and Africa? What are the key institutional and administrative frameworks on judicial powers and functions and what is their impact on administrative processes, administration of justice, good governance and sustainable development? What are the recent and necessary reforms on the exercise of judicial power and functions?

Article 159 of the Constitution of Kenya 2010 states:

“(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

Then the Constitution states the principles:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.”

How has the judicial power and functions been stipulated and exercised with reference to and in the context of the Fourth and Sixth Schedule to the Constitution, and the Bomas Draft, and the debates on the Building Bridges Initiative (BBI) . The High Court has since about 2004 (?) played a major role in the constitutional reform process and debate in Kenya.⁷⁵

In March 2021, the High Court suspended the implementation of the Constitution of Kenya (Amendment) Bill, 2020, whereupon Parliament exercised its legislative role of approving or rejecting the Bill popular initiative Bill under Art. 257 (amendment by popular initiative).⁷⁶ With the promulgation of the Constitution of Kenya, 2010, Kenyans popularly approved the introduction of an apex court (Supreme Court) under Art. 163 of the Constitution. This was

⁷⁴ ..cf. debate on the theory, source, and nature or character of public, governmental, Executive and Legislative power....(create a section in Chapter 7 on sources of legislative power.... Chapter..... and in Chapters 8 on Executive Power, Function, and Structure in Kenya and Africa... executive v. administrative powers and functions; sources of administrative powers....

⁷⁵ Cf. Yellow Movement case;.... Shikuku.....; *Njoya*.....; Oki Ooko Ombaka (20..) “Challenges facing constitutional reform in Kenya,”...

⁷⁶ See *David Ndi & Others v. Attorney General & Others* [2021] eKLR (consolidated petitions E282, 397, E400, E401, E402, E416 and E426 of 2020 ... (Justices Joel Ngugi, George Odunga, JJ, J Nakaru)....; Dzuya Walter (2021) “High Court suspends implementation of BBI Bill if passed by Parliament,” *Citizen Digital*, Nairobi, March 26, 2021, at <https://citizentv.co.ke/news/high-court-suspends-implementation-of-bbi-bill-if-passed-by-parliament-8899127/> (accessed March 28, 2021). See also Chapter 7 on Legislative Power, Structure, and Process in Kenya and Africa...; Ben Sihanya (forthcoming 2021) “The Building Bridges Initiative (BBI) Report 2020, and the Constitution of Kenya (Amendment) Bill, 2020 vis-à-vis Devolution in Kenya.”....

partly due to public mistrust of the then judicial system and especially the Court of Appeal (COA), and the need to restructure Kenya's court system.

We conceptualize, problematize and contextualize the structure, power and functions of the Supreme Court of Kenya (SCORK) under the Constitution of Kenya, 2010, and with regard to the apex court in South Africa, Uganda, Tanzania, Uganda, Nigeria....

9.5.1 Supreme Court of Kenya and Africa

The Supreme Court of Kenya is established under Article 163 of the Constitution of Kenya 2010.⁷⁷ It consists of seven (7) Judges: the Chief Justice (CJ), who is the president of the Court, the Deputy Chief Justice (DCJ), who is the deputy to the Chief Justice and the vice-president of the court and five (5) other judges.

The Supreme Court is properly constituted for purposes of its proceedings when it has a composition of five (5) judges.⁷⁸ The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140 and subject to clause (4) and (5) of Article 163 of the Constitution.⁷⁹ It also has jurisdiction to hear and determine a case involving interpretation or application of the Constitution or a matter certified by the Supreme Court or the Court of Appeal as one that involves a matter of general public importance.

What is the test of "general importance" regarding the Supreme Court's appellate jurisdiction under Article 163(4)(b) of the Constitution? This was addressed in the following four (4) cases, among others: First, Justices Mohammed Ibrahim and J.B. Ojwang' (Rtd 2020) allowed an appeal to the Supreme Court in *Harmanus Phillipus Steyn v. Giovanni Gneecchi-Ruscone* (2013);⁸⁰ where they held that matters including deciding on categories of commercial players like brokers and commission agents in an emerging economy raise substantive public interest matters which could be appealed at the Supreme Court.

⁷⁷ Supreme Court Act, 2011; Judicial Service Commission Act;....

⁷⁸ Judicial Service Commission sought expansion to 11... what of 9? Or reduce full bench to 3? Some argue(d) that the US has only 9 justices with a GDP of USD 20.5 trillion, a population of 382.2 million (in 2018), and a territory of 9.16 Km² See.... (on and GDP....). The number of justices of the Supreme Court is more directly related to the complexity of a political economy and legal sociology than just GDP.... Remarkably, the US has robust social and legal norms as well as institutions which have been developed, partly by the Supreme Court. Since 1776, 1787, 1791.... Kenya's quest for nationhood has been frustrated by internal and external forces of retrogression.... A sufficiently populated, qualified, competent, and committed Supreme Court is crucial. It is better to increase from 7 to 9: at least 2 (1?) justice will always be or is likely to sit in the JSC. Moreover, there can be sickness, or other cause of unavailability or commitments in Kenya or abroad....

⁷⁹ Presidential Election Petition No 1, 2017, *Raila v. IEBC and Others; John Harun Mwau & 2 Others v. Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR, Presidential Election Petition 2 & 4 of 2017 (Consolidated); *Institute for Democratic Governance v. Raila Amolo Odinga & 6 Others* [2017] eKLR; *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 others*[2013] eKLR, Petition 5, 3 & 4 of 2013.

⁸⁰ *Harmanus Phillipus Steyn v. Giovanni Gneecchi-Ruscone* (2013), Application No. 4 of 2012, (2013) eKLR.

Second, in *Sum Model Industries Ltd v. Industrial and Commercial Development Corporation*, (2011) the Applicant applied for leave of appeal at the Supreme Court on a decision of the Court of Appeal. Justices P.K. Tunoi and Smokin Wanjala denied the application. They held that such appeals can only be heard where they raise matters of general public importance under section 14 of the Supreme Court Act, 2011, which was not satisfied in this case.⁸¹ Sec. 14 states:

“(1) To ensure that the ends of justice are met, the Supreme Court shall, within twelve months of the commencement of this Act, either on its own motion or on the application of any person, review the judgments and decisions of any judge— (a) removed from office on account of a recommendation by a tribunal appointed by the President, whether before or after the commencement of this Act; or (b) removed from office pursuant to the Vetting of Judges and Magistrates Act, 2011 (Act No. 2 of 2011); or (c) who resigns or opts to retire, whether before or after the commencement of this Act, in consequence of a complaint of misconduct or misbehaviour. (2) To qualify for review under subsection (1), the judgment or decision shall have been the basis of the removal, resignation or retirement of, or complaint against, the judge.⁸²

Further, it states:

(3) The Court shall, in exercise of its powers under this section (a) conduct a preliminary enquiry to determine the admissibility of the matter; and (b) have all the necessary powers to determine the review under this section, including calling for evidence. (4) An application for review in respect of a judgment or decision made before the commencement of this Act shall not be entertained two years after the commencement of this Act. (5) Nothing in this section shall be construed as limiting or otherwise affecting the inherent power⁸³ of the Court, either on its own motion or on the application of a party, to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the due process of the Court.”⁸⁴

Third, the Supreme Court also declined to grant leave of appeal on matters arising from a Court of Appeal decision in *Koinange Investment & Development Ltd v. Robert Nelson Ngethe* (2012). Justices Jamila Mohammed, William Ouko and Rose Nambuye opined that the subject matter (a sale contract) did not raise the question of general public importance, and it did not transcend the particulars of the petition.⁸⁵

⁸¹ *Sum Model Industries Limited v. Industrial and Commercial Development Corporation*, Nairobi Supreme Court Civil Application No.1 of 2011.

⁸² Cf. BBI post-Kisii and post Bomas debates on powers and grounds....

⁸³ Inherent power? What is the acceptable, limited meaning of SCORK’s “inherent power” e.g. every court or tribunal, 9.8.1 (below on section 3A Civil Procedure Act) having some powers in its procedures?...cf. Chapters 5, 6, 7, 8

⁸⁴ Cf. BBI post-Kisii and post Bomas debates on process, implications, on bringing an end to litigation...and the politics of amending or editing BBI post Bomas....

⁸⁵ *Koinange Investment & Development Ltd v. Robert Nelson Ngethe*, Civil Appl. No. 15 of 2012.

Fourth, Justices Smokin Wanjala and P.K. Tunoi held in *Lawrence Nduu and 6000 Others v. Kenya Breweries Ltd & Another*(2012) that appellants must clearly define the nature of interlocutory orders sought from the Supreme Court, when they invoke Article 163(4). Further, that appeals to the Supreme Court can only be entertained in at least two (2) instances. First, that where the appeal involves a matter of constitutional interpretation. Second, where the appellant proves that the subject matter is a matter of general public importance.⁸⁶....

Why has the Supreme Court been insisting in numerous cases that it has inherent jurisdiction?⁸⁷ The post 2013 and the BBI 2019 and 2020 debates included whether the Supreme Court of Kenya should only have jurisdiction on presidential elections and should not entertain any appeals on any of the other five (5) elections. These elections are the gubernatorial, ward, constituency, women representative, and senatorial elections.⁸⁸ The BBI 2020 Report proposed that the Court of Appeal should be the final adjudicating institution for election disputes except presidential election disputes which is the inherent jurisdiction of the SCORK.⁸⁹

Some argue(d) that the Nigerian and Ugandan experiences in this regard is crucial even if the general jurisprudence and legal sociology in these States on elections and constitutional democracy are largely retrogressive....⁹⁰

Remarkably, there were proposals by various stakeholders in and after the 2016 “supremacy battles” among the judges of the Supreme Court that the Constitution be amended to alter the quorum? and even composition (?) of the Supreme Court...⁹¹

⁸⁶ *Lawrence Nduu and 6000 Others v. Kenya Breweries Limited & Another*, Petition No 3 of 2012.

⁸⁷ In at least five (5) cases, even in the otherwise well decided *Maina Kiai* case, on the finality of polling station results, the Supreme Court of Kenya (SCORK) sneaked in its claim to inherent jurisdiction. How has SCORK interpreted Art 163(8)? That it can determine its jurisdiction, including to admit fresh evidence in the discredited Wajir Governor Election Petition? See.... limited meaning of “inherent” above....What is SCORK’s jurisdiction on criminal, civil, election petition, arbitral, admiralty matters....toSee... Hon. Justice (Prof.) James Otieno-Odek (2014) “Transmutation of Kenya Superior Court Jurisdiction: From pyramidal to hour-glass jurisdictional system,” Paper presented at the Annual LSK Conference Leisure Lodge, Mombasa, on August, 15, 2014, available at <https://innovativelawyering.com/attachments/article/19/Hon%20Justice%20Prof%20Odek%20-%20Transmutation%20of%20Kenya%20Superior%20Court%20Jurisdiction.pdf> (accessed April 14, 2021)...; Justice Warsame ... during the April 12 and 13, 2021 interviews for Chief Justice.

⁸⁸ See Chapter 4 on Participation and Representation in Afro-Kenyan Constitutional Democracy....; also Chapter 22 on Electoral Justice in Kenya and Africa under the 2010 Constitution: Implementation, Enforcement, Reversals and Reforms....;

⁸⁹ See proposed amendment to Art. 140 ((Questions as to validity of presidential election)) in Clause 27 of the Constitution of Kenya (Amendment) Bill, 2020. It states “Article 140 (2) of the Constitution is amended by deleting the word “fourteen” and substituting therefor the word “thirty”....

⁹⁰ Bobi Wine (Robert Kyagulanyi) the frontrunner in 2021 Ugandan presidential election withdrew the election petition citing the lack of independence in the Supreme Court bench. See *Al Jazeera* (2021) “Ugandan opposition leader Bobi Wine withdraws poll result challenge,” Uganda, February 22, 2021, at <https://www.aljazeera.com/news/2021/2/22/ugandan-opposition-leader-wine-withdraws-poll-result-challenge> (accessed March 26, 2021); See also *Amama Mbabazi v. Museveni & Others* (Presidential Election Petition-2016/1) [2016] UGSC 3....

The general rule in Kenya is that the Supreme Court is properly constituted where the bench consists, comprise or constitutes of at least five (5) judges. Thus, Justice Mohammed Ibrahim in *Justice Kalpana H. Rawal v. Judicial Service Commission & 5 Others* (2016) held that the question of quorum must be treated as a jurisdictional question that must first be settled before any other matter.⁹²

Relatedly, the question as to whether a court has quorum to listen to any matter was also decided by the Constitutional Court in South Africa. The court held that this matter is so critical to the extent that a matter may be dismissed without the parties being heard where the court has no quorum.⁹³

What are the powers, functions and structure of the Supreme and constitutional courts in South Africa,⁹⁴ Nigeria, Uganda, Tanzania, United Kingdom and USA?⁹⁵

The apex courts in various common law states have made significant contributions to the development of jurisprudence, constitutional democracy, upholding the rule of law, separation of powers, safeguarding human rights, ensuring electoral democracy and sustainable development.⁹⁶ Relatively, the extent and impact of these contributions has largely been debated with regard to who the head of the apex court is in comparison to the predecessor, and successors.⁹⁷

The Chief Justices and Deputy Chief Justices under the 2010 Constitution have made some progressive and retrogressive contributions... The Chief Justices were (Dr) Willy Mutunga and Justice David Maraga.⁹⁸ Former Chief Justice David Maraga retired on January 12, 2021 after attaining the retirement age of seventy (70) years under Art. 167(1) and 167(2) of the Constitution.⁹⁹ This is similar to the retirement age in Australia.¹⁰⁰ The Maraga succession

⁹¹cf. President Biden's 36-member Presidential Commission on the Supreme Court of the United States on structure, composition of the Supreme Court of the United States 2021....See Kimberly Strawbridge Robinson (2021) "Biden's Supreme Court Commission: Who's on it and why explained," *Bloomberg Law*, April 10, 2021, at <https://news.bloomberglaw.com/us-law-week/bidens-supreme-court-commission-whos-on-it-and-why-explained> (accessed April 13, 2021).

⁹² *Justice Kalpana H. Rawal v. Judicial Service Commission & 5 Others* [2016] Civil Application No. 11 of 2016.

⁹³ *In the matter between Baaitse Elizabeth Nkabinde & Another and Judicial Service Commission & 3 Others* CCT 122/2016.

⁹⁴ Cf. s. 168 of the South African Constitution (Supreme Court of Appeal)....

⁹⁵ Cf. Article III, section 2, of the US Constitution....

⁹⁶ ...Debates development of jurisprudence by the Supreme Court of Kenya (SCORK); role of law academy....Justices Mohamed Warsame, David Majanja, Juma Chitembew.....2021 CJ interviews

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⁹⁸ See also Chapters 9 of CODRALKA 1....

⁹⁹ Judah Ben Hur (2021) "Chief Justice David Maraga's retirement ceremony in pictures," *Standard*, Nairobi, January 11, 2021, at <https://www.standardmedia.co.ke/nairobi/article/2001399754/chief-justice-david-maragas-retirement-ceremony-in-pictures> (accessed March 28, 2021).

¹⁰⁰ See section 72 of the Australian Constitution. It states that "The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age"....

debate became politically intense in March and April 2021. Part of the debate has always been the Chief Justice (CJ) and DCJ being labelled either an “insider”¹⁰¹ or “outsider.”¹⁰²

The Deputy Chief Justices (DCJs) after 2010 are former Justice (Rtd) Ms (later Dr) Nancy Baraza,¹⁰³ Justice (Rtd) Kaplana Rawal,¹⁰⁴ and Justice Philomena Mwilu¹⁰⁵

9.5.2 Court of Appeal in Kenya and Africa

The Court of Appeal is established under Article 164 of the Constitution. It consists of a number of judges, being not fewer than twelve (12), as may be prescribed by an Act of Parliament.¹⁰⁶ The Court is headed by a President of the Court of Appeal who is elected by the judges of the Court of Appeal from among themselves.¹⁰⁷

Some of the proposals in the BBI debates and the Constitution of Kenya (Amendment) Bill 2020 included repealing and replacing election with appointment of Court of Appeal and High Court Principal Judges to depoliticize the offices....¹⁰⁸

The Court of Appeal has limited appellate jurisdiction.¹⁰⁹ It hears appeals from “the High Court and any other court as prescribed by an Act of Parliament...”¹¹⁰ How has the Court of Appeal performed since 2010? What are the powers, functions and structure of the Court of Appeal in South Africa,¹¹¹ Nigeria,¹¹² Uganda,¹¹³ Tanzania,¹¹⁴ UK and USA?¹¹⁵

¹⁰¹

¹⁰² Nyambega Gisesa (2021) “Intrigues in picking of Kenya's next CJ,” *Daily Nation*, Nairobi, March 28, 2021, at <https://nation.africa/kenya/news/intrigues-in-picking-of-kenya-s-next-cj-3338996> (accessed March 28, 2021); Some of the candidates included the then President of the Court of Appeal Justice William Ouko. See Chapter 9 on Judicial Power, Structure, and Independent Accountability in Kenya and Africa.... *op. cit.* See also section 9.2 of Chapter 9 where we discussed the suitability questions regarding applicants for the Chief Justice and Supreme Court positions in 2021....

¹⁰³ Later Dr Nancy Baraza....

¹⁰⁴

¹⁰⁵ DCJ Philomena Mwilu stepped in as acting Chief Justice on January 12, 2021 when retired Chief Justice David Maraga proceeded on terminal leave.... See.....

¹⁰⁶ Court of Appeal (Organization and Administration) Act, 2015.

¹⁰⁷ Court of Appeal (Organization and Administration) Act, 2015, sec. 4(a); Presidents of the Court of Appeal since 2010 are Justice Erastus Githinji, Justice Paul Kihara Kariuki (the A-G from 2018), and Justice William Ouko.

¹⁰⁸

¹⁰⁹ Cf. Art 164(3).....; Appellate Jurisdiction Act....; Court of Appeal (Organization and Administration) Act...; Judicature Act....; *Rafiki Enterprises Ltd v. Kingsway Tyres & Automart Ltd* [1996]eKLR; *Kenya Hotel Properties Limited v. Attorney General & 5 Others* [2018] eKLR; *Kenya Ports Authority v. Modern Holdings [E.A] Ltd* [2017] eKLR....

¹¹⁰ Article 164(3) of the Constitution; Section 5 of the Court of Appeal (Organization and Administration) Act, 2015; *Judicial Service Commission & Secretary, Judicial Service Commission v. Kalpana H. Rawal* [2015] eKLR; *Tomito Alex Tampushi v. Patrick Sosio Lekakeny & 3 Others* [2018] eKLR....

¹¹¹Section 168 of the Constitution of South Africa (Supreme Court of Appeal). Its powers include deciding on appeals, and any matters connected with appeals, or referred to it by an Act of Parliament.

¹¹²See section 240 of Nigeria, 1999 (Appellate jurisdiction) Constitution. Section 123 of the Constitution of Nigeria constitutionalizes the exclusive jurisdiction of the Supreme Court on presidential election petitions to the

The BBI 2020 Report proposed that the Court of Appeal be the final determinant institution for all election disputes other than presidential election disputes which is the inherent jurisdiction of the SCORK. This is covered under a proposed amendment to Art. 164 (Court of Appeal).

9.5.3 High Court in Kenya and Africa¹¹⁶

The High Court is established under Article 165 and consists of a number of judges to be prescribed by an Act of Parliament.¹¹⁷ The Court is organized and administered in the manner prescribed by the Court (Organization and Administration) Act, No. 27 of 2015.¹¹⁸ The Court has a Principal Judge, who is elected by the judges of the High Court from among themselves.¹¹⁹

There are Presiding Judges for every Court Station or Division. The Divisions are eight (8). First, the Criminal Division. Second, the Civil Division. Third, the Constitutional and Human Rights Division. Fourth, the Judicial Review Division. Fifth, the Commercial and Tax Division. Sixth, Anti-corruption and Economics Crimes Division. Seventh, the Family Division. Eight, the Admiralty Division.¹²⁰

A court station means a judicial station with a resident magistrate undertaking judicial proceedings on a daily basis.¹²¹

There are also Presiding Judges for Courts Equivalent to the High Court; The Employment and Labour Relations Court¹²² and the Environment and Land Court.¹²³

office of the President, Vice President, and in determining questions as to whether their term has ended.... Draft Constitution of Tanzania?Uganda?South Africa?

¹¹³

¹¹⁴See section 108 (Court of Appeal) Constitution of Tanzania. It is the final appellate court, and determines appeals lying from the High Courts from Zanzibar and mainland Tanzania.

¹¹⁵

¹¹⁶ The three Principal Judges in the critical BBI and related reform debates of 2018/2020 period were Justice Lydia Achode, High Court; Justice Samson O. Okong'o, Environment and Land Court; Justice Maureen Onyango, Employment and Labour Relations Court.... In 2021, the eight cases against the BBI constitutional reform process were heard by a five judge bench including Justices Joel Ngugi, George V. Odunga, E.C. Mwita, J. Ngaah, and J. Mulwa. See *David Ndi & Others v. Attorney General & Others* [2021] eKLR (consolidated petitions E282, 397, E400, E401, E402, E416 and E426 of 2020 ... *op. cit.*....

¹¹⁷ High Court (Organization and Administration) Act, No. 27 of 2015.

¹¹⁸ Cf. Judicature Act, Cap 8. Cf. Bomas Draft, 2004....

¹¹⁹ The Principal Judges since 2010 are Justice Richard Mwongo, Justice Lydia Achode....

¹²⁰ See... www.judiciary.go.ke (accessed 5/5/20)....

¹²¹ In 2020, there were 116 Court stations led by magistrates and 20 High Court stations in Kenya. See <https://www.judiciary.go.ke/courts/> (accessed 20/4/2020).

¹²² The Presiding Judges of ELRC who served from 2011 are Justice Nduma Nderi, Justice Maureen Onyango, respectively. Cf. Judiciary (2018) "Employment and Labour Relations Court," at <https://www.judiciary.go.ke/courts/employment-and-labour-relations-court/> (accessed 5/5/20); Justice James Rika (2012) "The reconstituted Industrial Court of Kenya and the role of the social partners," at <http://kenyalaw.org/kenyalawblog/the-re-constituted-industrial-court-of-kenya-and-the-role-of-the-social-partners/>

The High Court is duly constituted by one Judge sitting alone. However, there are instances where two (2) or more High Court Judges may be required to determine certain kinds of cases.¹²⁴

The High Court has unlimited original jurisdiction in civil, criminal and admiralty matters.¹²⁵ It has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

The High Court also has jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution or national legislation to consider the removal of a person from office, other than a tribunal appointed under Article 144 (removal of President on grounds of incapacity).

Under Art 165, the High Court has jurisdiction on at least six (6) matters. First, to hear any question respecting the interpretation of the Constitution including the determination of: the question whether any law is inconsistent with or in contravention of the Constitution. Second, the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. Third, any matter relating to constitutional powers of State organs in respect of county governments.

Fourth, any matter relating to the constitutional relationship between the levels of government. Fifth, a question relating to conflict of laws under Article 191 on conflict of laws. And sixth, any other jurisdiction, original or appellate, conferred on it by legislation.¹²⁶

Under Art 165(4) whenever a case in the High Court involves a substantial question of law, a party may apply or a judge may order *suo moto* that the matter be referred to the Chief Justice to appoint a bench consisting of uneven number of judges (not fewer than 3) to hear a matter. Examples include *Maina Kiai v. Independent Electoral and Boundaries Commission*.¹²⁷

9.5.4 Courts of Equivalent Jurisdiction to the High Court in Kenya and Africa

The jurisdiction of the High Court (Judges) has arguably been limited and debated in the context of Environment and Land Court (ELC) Judge, Employment and Labour Relations Court (ELRC) Judge. But has the High Court's original jurisdiction been limited? Has it been constitutionally

(accessed 5/5/20); Emily Odhong (2016) *Rethinking Industrial Relations for Enhanced Organizational Performance in Kenya*, Grin Publishers.

¹²³ The Presiding Judges of ELC from 2011 were Justice Anne Abongo and Justice Samson Odhiambo Okong'o,.... respectively. Cf. Norah A. Atieno (2014) *Appraising Specialized Courts in the Attainment of Environmental Justice: The Kenyan Experience*, unpublished LLM Thesis, University of Nairobi Law School....

¹²⁴

¹²⁵ Section 35; limited under s. 3.4 ? Cf. s.60 of the 1969 Constitution on the Interim Independent Constitution Dispute Resolution Court (IICDRC). See s.3A Civil Procedure Act, 2010, (CPA).... See also Chapter 9 and 10 on Judicial Power, Structure, and Independent Accountability in Kenya and Africa....

¹²⁶

¹²⁷ *Maina Kiai v. Independent Electoral and Boundaries Commission*, Petition No. 207 of 2016; *Republic v. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR, Judicial Review No. 378 of 2017 (on procurement of election materials)....

and effectively ousted in matters regarding ELC, ELRC, and presidential election petitions (but not presidential elections *as such*)?

The Supreme Court held in *Republic v. Karisa Chengo & 2 Others* (2017) that judges of the ELC and ELRC lack jurisdiction to hear and determine matters reserved for the High Court.¹²⁸ This also applies vice versa to the High Court.

In *Law Society of Kenya Nairobi Branch v. Malindi Law Society & 6 Others* (2017),¹²⁹ the issue was whether it is within the power of Parliament to confer, by legislation, jurisdiction on magistrates? Could magistrates courts hear and determine disputes relating to employment and labour relations? Could magistrates courts hear and determine cases on environment and the use and occupation of, and title to land? or was jurisdiction to determine such disputes the preserve of the courts of equal status (specialized courts) established under Article 162(2) of the Constitution?¹³⁰

What are the powers, functions and structure of Specialized Courts in South Africa, Nigeria, Uganda, UK and USA?

9.5.5 Subordinate Courts in Kenya and Africa

What is the constitutional basis of subordinate courts in Kenya? What are these courts? What are the powers and functions of subordinate courts in Kenya? What are the debates on their jurisdiction on land and environment? And on employment and labour relations?

What are the debates regarding Kadhi's courts? At independence in 1963? At Bomas? In the Bomas Draft Constitution? In the 2005 referendum? Why did the Kibaki administration introduce "Christian courts" into the referendum draft in 2005? What were the debates and litigation on Kadhi's Courts in the context of the proposed Draft Constitution 2009?¹³¹

Dr Muhamad Maraja argues that Kadhi's courts have been in existence in Kenya's constitutional and legal sources of law pre and post-independence. Therefore, they are an integral part of

¹²⁸ *Republic v. Karisa Chengo & 2 Others* [2017] eKLR, Petition No. 5 of 2015. Cf. James Rika (2013) "The proper role and jurisdiction of the Industrial Courts," Discussion Paper, mid year review and training Workshop for Judges of the Industrial Courts of Kenya, Judicial Training Institute, April 16-20, 2013, at <http://kenyalaw.org/kenyalawblog/the-proper-role-and-jurisdiction-of-the-industrial-court/> (accessed 12/5/2020).

¹²⁹ *Law Society of Kenya Nairobi Branch v. Malindi Law Society & 6 Others* [2017] eKLR, Civil Appeal No. 287 of 2016.

¹³⁰ Pheroze E. Nowrojee (1973) "Can the District Magistrates administer the whole of the customary law?" 9 *East Africa Law Journal* 59.....

¹³¹ Cf. Samuel Mbithi Kimeu (2006) "Historical and legal foundations of the Kadhis courts in Kenya," at https://www.academia.edu/2170737/Kadhis_courts_in_Kenya_current_debates_on_the_harmonized_draft_constituti_on_of_Kenya (accessed 5/5/20); Abdulkadir Tayob (2011) "Muslim responses to Kadhis courts as part of Kenya's constitutional review," at https://www.academia.edu/2170737/Kadhis_courts_in_Kenya_current_debates_on_the_harmonized_draft_constituti_on_of_Kenya (accessed 5/5/20)....

Kenya's judicial system. He also argued that if the main contentious issue against the then Proposed Constitution of Kenya, 2010 had been the entrenchment of Kadhis' courts (or "Muslim's court") then Kenya was likely to have a scenario whereby individuals would demand for the establishment of courts of law specific to their different beliefs. That this proposal would only have been discriminatory only where Christians made such a claim which was subsequently opposed.¹³²....

What are the Kadhi's courts debates post 2010?¹³³

9.5.6 Tribunals in Kenya and Africa

What are tribunals and bodies? These are judicial bodies established by Acts of Parliament, to exercise quasi-judicial functions. Article 1(3)(c) of the Constitution recognizes independent tribunals and the Judiciary among state organs that exercise delegated sovereign power in Kenya.

What is their constitutional and legal basis? The Constitution recognizes tribunals in at least four (4) other provisions. First, Article 20(4) (on application of the Bill of Rights) stipulates that in interpreting the Bill of Rights, courts and tribunals must be guided by constitutional values and principles including equity, equality, human dignity, and in a manner that promotes the spirit and objects of the Bill of Rights in a constitutional democracy.

Second, Art. 159(1) stipulates that judicial authority shall be vested in and exercised by courts and independent tribunals.¹³⁴ Third, independent tribunals also have a role to play in judicial review of administrative action and efficient administration. This must be clearly stipulated in the enabling legislation. Fourth, Art. 169(1) defines subordinate courts to include any local tribunals¹³⁵ established by an Act of Parliament. This includes the Rent Restrictions Tribunal established under the Rent Restriction Act.¹³⁶

¹³² See Muhamad Mraja (2010) "Kadhis courts in Kenya: Current debates on the Harmonized Draft Constitution of Kenya," at https://www.academia.edu/2170737/Kadhis_courts_in_Kenya_current_debates_on_the_harmonized_draft_constituti_on_of_Kenya (accessed 5/5/20);... The clamour for "christian courts" in the Kibaki-DP ("Wako" Draft Constitution 2005 was a Kibaki red having to muddle debate on progressive constitutional review....PNU and related interests in the Kibaki succession sponsored a case in the Interim Independent Constitutional Dispute Resolution Court (IICDRC) on Kadhi's courts...See Ben Sihanya (2010) "The Historical Context of the Interim Independent Constitutional Dispute Resolution Court (IICDRC) in Kenya," talking points for a presentation to a judicial retreat organized by the Ministry of Justice and Constitutional Affairs in collaboration with the United Nations Development Programme (UNDP) at the Naivasha Simba Lodge on February 15, 2010.....to quote from it...and publish it in BS selected works....

¹³³ ...

¹³⁴ Article 159(1) Constitution of Kenya, 2010 states "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

¹³⁵ What are "local" (domestic?) tribunals?

¹³⁶ Section 4 of the Rent Restriction Act, Cap 296.

What are their powers and functions? The powers and functions of tribunals vary depending on the subject matter and purpose of their established as provided under the relevant Act. For instance, the Legal Education Appeals Tribunal is established under section 29(1) Legal Education Act, 2012, to hear and determine appeals on matters decided by the Council for Legal Education (CLE).¹³⁷

How do tribunals relate to courts?¹³⁸ The court system in Kenya is structured, regulated and spelt out in the Constitution, relevant Acts, rules, regulations, and case law.... However, the operations of tribunals are largely ambiguous, and widely perceived as not free, fair and just. Hence, the need to rationalize, restructure and harmonize their powers and functions under a common legal, institutional and administrative framework....¹³⁹

Some of the tribunals identified by the court in *Omtatah Okoiti v. Judicial Service Commission & 2 Others; Katiba Institute (Interested Party)* (2021)¹⁴⁰ are listed in the table below:

Table 9.5.6. 1 on Tribunals under Kenyan Law¹⁴¹

	Tribunals	Legislation
1.	Board of Review	Prisons Act
2.	Business Premises Tribunal	the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act
3.	Provincial Land Control Appeals Board	Land Control Act
4.	Central Land Control Appeals Board	Land Control Act
5.	Gold Mines Development Loans Board	Gold Mines Development Loans Act
6.	Seed and Plants Tribunal	Seeds and Plant Varieties Act
7.	Sugar Arbitration Tribunal	Sugar Act
8.	Water Resources Management Authority	Water Act
9.	Water Appeal Board	Water Act.

¹³⁷ See also Chapter 9 of CODRALKA 1 on Judicial Power, Structure, and Independent Accountability in Kenya and Africa: Interests, Process and Outcomes, on Education Appeals Tribunal....

¹³⁸ See Chapters 9... and 10 of CODRALKA 1 on Judicial Power, Structure, and Independent Accountability in Kenya and Africa: Interests, Process and Outcomes....

¹³⁹ cf. the Draft Tribunals Bill, 2015....South Africa? Nigeria? Uganda? Tanzania? United Kingdom (UK)?

¹⁴⁰ *Omtatah Okoiti v. Judicial Service Commission & 2 Others; Katiba Institute (Interested Party)* [2021] eKLR...*op. cit.*...

¹⁴¹ What of Copyright Tribunal...? Cf. Tribunals in South Africa, Nigeria, Uganda, Tanzania, USA, UK....

10.	Water Service Board	Water Act
11.	Wildlife Conservation and Management Services Appeals Tribunal	Wildlife Conservation and Management Act.
12.	Tourist Appeal Board	Tourist Industry Licensing Act
13.	Transport Licensing Appeal Tribunal	Transport Licensing Act
14.	State Corporations Appeals Tribunal	the State Corporations Act
15.	Value Added Tax Appeals Tribunal	Value Added Tax Act
16.	Capital Markets Tribunal	Capital Markets Authority Act
17.	Insurance Appeals Tribunal	Insurance Act
18.	Co-operative Tribunal	Co-operatives Act
19.	Hotels and Restaurants Appeals Tribunal	Hotels and Restaurants Act
20.	Kenya Bureau of Standards	Standards Act
21.	Restrictive Trade Practices Tribunal	Restrictive Trade Practices, Monopolies and Price Controls Act
22.	Land Disputes Tribunals	Land Disputes Tribunal
23.	Land Disputes Appeal Committee	Land Disputes Tribunals Act
24.	Non-Government Organizations Co-ordination Board	the Non-Governmental Originations Coordination Act

Source: Drafted from Research at Sihanya Advocates and Sihanya Mentoring 2021.

Relatedly, the BBI Constitution of Kenya (Amendment) Bill 2020 proposed to amend Art. 88 (on Independent Electoral and Boundaries Commission) to vest the Political Parties' Disputes Tribunal (PPDT) with the constitutional mandate of handling all matters related to nomination of candidates by political parties.¹⁴² This is to achieve a speedy adjudication of such disputes.

¹⁴² See the Elections Act, No. 24 of 2011.

9.6 Conceptualizing Judicial Independence in Kenya and Africa

First, in the exercise of judicial authority, the Judiciary, as constituted by Article 161 (judicial offices and officers), shall be subject only to the Constitution and the law, and shall not be subject to the control or direction of any person or authority.¹⁴³

Second, “the office of a judge of a superior court shall not be abolished while there is a substantive holder of the office.” Once a judge has been appointed, or a judge’s position filled, it can’t be declared redundant, vacant or abolished when the judge is still serving.¹⁴⁴

Why don’t magistrates get similar, equivalent, concomitant, or proportionate protection, privileges or immunity given that the principle of independence and accountability also apply to magistrates? Given that in some cases magistrates have similar qualifications?¹⁴⁵ And face similar risks?

Third, the remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund. The Consolidated Fund is established under Art 206.¹⁴⁶ The idea is that judges’ remuneration and benefits should not be subject to a Fund and approval process that would be controlled by any other arm of Government or that is uncertain or arbitrary. Controlled by line ministries or the National Treasury would prejudice judicial independence in decisional and institutional terms.

Fourth, the remuneration and benefits¹⁴⁷ payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge. Judges reportedly raised this to argue that their income should not be taxed.¹⁴⁸

There were similar arguments regarding the Salaries and Remuneration Commission’s (SRC’s) proposal to review the salaries and remuneration of State Officers. The question has always been, is the Salaries and Remunerations Commission (SRC) to exercise power arbitrarily? SRC recklessly addressed at least four matters.

¹⁴³ These seven points are discussed in detail in CODRALKA 1 Chapter 10 on Judicial Power, Process and Independent Accountability in Kenya and Africa.....

¹⁴⁴ Meaning? Implication?

¹⁴⁵ For instance, in terms of academic qualifications, all judges and magistrates must have an LLB degree or equivalent. Any higher academic qualification like LLM and PhD (JSD) are merely an “added advantage” and have at times been a disadvantage....

¹⁴⁶

¹⁴⁷ Discuss below: Justice Odunga’s decision on remuneration of Judges appointed for the magistracy *vis-à-vis* appointed for the Bar, academy, etc JSC implementation?

¹⁴⁸ Under the 1969 Constitution, the remuneration of constitutional office holders was not subject to taxation. That changed under the 2010 Constitution. But some judges still sought to secure exemption.... What the people and the Constitution deemed to have been changed....Cf. Jillo Kadida (2008) “Judges protest as new tax rule enforced,” *Daily Nation*, Nairobi, 9/6/2014, at <http://www.nation.co.ke/news/-/1056/476746/-/5g8sg1z/-/index.html> (accessed 9/6/2014).

First, in the context leading and related to the teachers strike of 2013.¹⁴⁹ Second, the remuneration of MPs.¹⁵⁰

Third, Members of County Assemblies (MCAs). Fourth, job evaluation and salaries and remuneration of professors, lecturers, technical administrators, secretarial, clerical and other staff of public universities in the context of the following collective bargaining agreements (CBAs): 2012-2017; 2017-2021, 2021-2025....¹⁵¹

Who is to vet the SRC?

BBI debates addressed the Salaries and Remunerations Commission (SRC) in the Constitution of Kenya (Amendment) Bill 2020, and in submissions by Constitutional Implementation Oversight Committee (CIOC)....¹⁵²

Clause 61 of the Constitution of Kenya (Amendment) Bill 2020 at least proposed four (4) amendments to Article 230 on the Salaries and Remunerations Commission (SRC). First, on its mandate to “nationalize and review salaries and remuneration to all State officers and public officers.” Second, proposal to provide that the SRC comprises of a Chairperson and six (6) members, nominated by the President and approved by the National Assembly.

Third, to provide that the mandate of the SRC includes determining and harmonizing the rates paid by the National and County Governments for consultancy services offered to them. Fourth, proposal to delete Article 230(3) which restricted voting rights by the members nominated by the Cabinet Secretary for Finance, the Attorney-General, and one (1) person with relevant experience in human resource management on the public service, nominated by the Cabinet Secretary for Public Service.¹⁵³

Fifth, a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. Some of the

¹⁴⁹ Benjamin Muindi (2013) “Union offered new deal under SRC rules,” *Daily Nation*, Nairobi, July 7, 2013, at <https://www.nation.co.ke/news/SRC-offers-teachers-fresh-terms/1056-1908134-hbq08u/index.html> (accessed 25/3/2010).

¹⁵⁰ Walter Ameyia (2019) “Blow to MPs as SRC gets order halting sh. 250,000 allowance,” *Daily Nation*, Nairobi, June 1, 2020, at <https://www.nation.co.ke/news/SRC-bars-MPs-house-allowance/1056-5140244-14ynhfrz/index.html> (accessed 25/3/2020).

¹⁵¹ Augustine Oduor (2019) “SRC, varsities split over sh 14b employees pay,” *Standard Digital*, Nairobi, December 23, 2019, at <https://www.standardmedia.co.ke/article/2001354171/christmas-shock-for-30-000-varsity-workers> (accessed 25/3/2020). In the context of the BBI debates, one of the main arguments of the Central Organization of Trade Unions (COTU) and trade union(ist)s is that the Salaries and Remuneration Commission (SRC) interfered with collective bargaining agreements (CBAs) freely entered into between (federations) of employers and trade unions. See.... COTU Secretary General, Francis Atwoli, reiterated these views on Labour Day, May 1, 2020.... See also Chapter 20 on Constitutional Commissions and Independent offices (CCIOs) in Kenya and Africa....

¹⁵² This is a Committee of the National Assembly established under the National Assembly Standing Orders.... Kenya needs a joint National Assembly and Senate CIOC....

¹⁵³ See also Chapter 20 on Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities Financing based [categorization of CCIOs...]...

rationales include the fact that they may have made honest mistakes; there is room for appeal, among others.¹⁵⁴ Article 160(5) states:

“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

Sixth, budget of the Judiciary and JSC be guaranteed through participation; It should be sufficient; be protected through the Judiciary Fund (Art. 173) and not arbitrarily reviewed through supplementary budget e.g. in 2019 and 2020. There were also been proposals made to the BBI 2 that Judiciary budget be capped and ring fenced within the Constitution at 3.5%.¹⁵⁵

The retirement age of judges may only be changed in a manner consistent with the Constitution and statute.¹⁵⁶

The Constitution of Kenya also gives the Chief Justice the mandate to make rules providing for the court proceedings to facilitate access to justice for all persons.¹⁵⁷ Some of these are published in the Kenya Gazette Supplement No. 95.¹⁵⁸ This is a limited delegated legislative power; the rules must be consistent with the constitution and the relevant statutes.¹⁵⁹

9.7 Composition of Courts in Kenya and Africa

Generally, Courts are composed of first, the Chief Justice, Deputy Chief Justice, five (5) Supreme Court Justices (total of 7).¹⁶⁰ Second, the President of the Court of Appeal, Court of Appeal Judges (at least 12) (Art. 164(1)(a)).¹⁶¹ Third, Principal Judge of the High Court,

¹⁵⁴ Cite on limited judicial or official immunity, Constitution (Article 160(5)), Evidence Act, ss. 132, 133. Cf. s. 134 on advocates, interpreters, clerks... is the main protection accorded to the subject of the information?. E.g. client? It also protects the professional....

¹⁵⁵ The argument is three-pronged. First, the National Assembly and Executive, especially President and National Treasury have grossly and unconstitutionally underfunded the Judiciary as part of the weaponization of the budget.... And even the little allocation has been arbitrarily reduced.... Second, should the minimum be 3.5% or? Third, is a principle on the minimum without figures sufficient? With a principle on development *vis-à-vis* recurrent expenditure? One argument has been that initially the Judiciary may spend a lot on institutional development in constructing courts in the counties.... and that later as the economy grows, such a fixed percentage may lead to too much (development) financing in the Judiciary and (proportionately) less in the Executive, Legislature, etc....

¹⁵⁶ See Chapter 9 and 10. ...

¹⁵⁷ This power is conferred by Article 22(3) as read with Article 23 and Article 165(3) (b) of the Constitution of Kenya.

¹⁵⁸ Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules). The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

¹⁵⁹ See Chapter 6 on Legislative Power, Structure and Process in Kenya and Africa.

¹⁶⁰ Supreme Court judges may be a maximum of 8 or more(?). In case the Chief Justice ten (10) year term expires before the retirement age of the Chief Justice and the Chief Justice chooses to sit as an associate judge, under Art. 167(4) 16....

¹⁶¹ The exact number is to be fixed by a statute. See s. 4 of the Court of Appeal (Organization and Administration) Act, 2015 which, like the Constitution, prescribes “not less than 12” judges....

Presiding Judges of High Court Stations and Divisions, (puisne) judges.¹⁶² Fourth, Chief Magistrates, Senior Principal Magistrates, Principal Magistrates, Senior Resident Magistrates, and Resident Magistrates.

Fifth, Chief, Principal, Senior Resident and Resident Kadhi.¹⁶³ Sixth, Judicial officers with quasi-judicial roles. Seventh, the Chief Registrar of the Judiciary, Deputy Chief Registrar of Judiciary; Registrar of the Supreme Court, Court of Appeal, High Court, Deputy Registrars. Eighth, Executive officers; Judicial staff; paralegals, among others.¹⁶⁴

In *Law Society of Kenya v. Attorney General & Another*,¹⁶⁵ where the Statute Law (Miscellaneous Amendment) Bill, 2015 sought to make minor amendments to various statutory enactments. The contentious issue was the proposal to amend section 30(3) of the Judicial Service Commission Act, 2011 to provide that the JSC was to provide three (3) names to the President for consideration for appointment as Chief Justice (CJ). This contradicted Art. 166 which stipulates that the JSC submits only one (1) name to the President. The petitioner argued that if this was allowed, it would negate judicial independence.

Justices R. Mwangi, Weldon Korir, Mumbi Ngugi, George V. Odunga and the late J. Louis Onguto held that amendment to section 30(3) of the JSC Act, 2011 by the Statute Law (Miscellaneous) Amendment Act, 2015 was unconstitutional, null and void.

With respect to the Judicial Service Act, 2011 (No. 1 of 2011) . The Amendment Act had the effect of inter alia amending section 30(3) of the Act by deleting the previous subsection (3) of section 30 and substitution therewith a new section 30(3). The new section 30(3) of the Act contradicts the provisions of Article 166(1)(a) of the Constitution in that while Article 166 empowers the Commission to forward one name for each position, the new law takes away this constitutionally guaranteed power by requiring the Commission to forward three names.

In *Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission & 2 Others (Interested Parties)*,¹⁶⁶ the issue was on the President's refusal to appoint judges within fourteen (14) days as nominated by the JSC in the exercise of the President's constitutional power and mandate under Art. 166(1)(b) (Appointment of Chief Justice, Deputy Chief Justice and other judges). The President had raised integrity questions with regards to some of the nominees.

¹⁶² The number of High Court judges is to be prescribed by a statute. See s. 4 of the High Court (Organization and Administration) Act, 2015, which prescribes "not more than 200" judges.

¹⁶³ The appeals lie in the High Court from.... There were submissions to the BBI Task Force that appeals on Islamic law should lie in....

¹⁶⁴ See Supreme Court Act, 2011, and Regulations, ...; Court of Appeal (Organisation and Administration Act, and Regulations); High Court (Organisation and Administration Act and Regulations)...

¹⁶⁵ *Law Society of Kenya v. Attorney General & Another* [2016] eKLR, Constitutional Petition No. 3 of 2016.

¹⁶⁶ *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR, Petition No. 369 of 2019.

Justices Lydia Achode, James Makau and EC. Mwita held that the President is bound by the recommendations of the JSC in exercise of his mandate under Art. 166(1)(b) as read with Art. 172(1)(a) (functions of the Judicial Service Commission).¹⁶⁷

This decision was fundamental in emphasizing the independence of constitutional commissions and independent offices under Chapter 15 of the Constitution. It laid a basis for respect for separation of powers by the Executive through a clear demarcation of the limits of Executive powers vis-à-vis the role of the Judicial Service Commission in the appointment and dis-appointment of judges and judicial officers in Kenya.¹⁶⁸ It is a contribution to the law, practice and jurisprudence on administrative vis-à-vis administrative, alternative dispute resolution (ADR) and judicial processes in Kenya and Africa.

9.8 Appointment of the Chief Justice and Supreme Court Justice in Kenya 2021: A Case Study

In March and April 2021, there was also intense debate regarding the succession of retired Chief Justice David Maraga and Supreme Court Justice JB Ojwang. The debate was majorly on the qualifications, and suitability of three (3) applicants for the Chief Justice (10 out of 13 applicants) and Supreme Court Justice (all 9 applicants), respectively.¹⁶⁹

On March 29, 2021, the Law Society of Kenya (LSK) through its President Nelson Andayi Havi sent to the Judicial Service Commission (JSC) and published a 501 page memorandum on complaints and concerns on the following three (3) applicants for the positions named: Justice Martha Koome Karambu, Philip Murgor Kipchirchir SC (for Supreme Court Justice), and Prof Kameri Mbote Annie Patricia Gathiru SC (for Chief Justice).

The complaints focused on integrity, competence, nepotism, plagiarism, abuse of office and suitability standards established in the Report of the Tribunal to Investigate the Conduct of the Deputy Chief Justice of the Republic of Kenya.¹⁷⁰ The issues were part of the subject matter of the interview of Professor Kameri Mbote Annie Patricia Gathiru SC for Chief Justice on April 13, 2021 and Justice Martha Koome on April 14, 2021.

¹⁶⁷ Article 172 (on the functions of the Judicial Service Commission) of the Constitution.

¹⁶⁸ See also Chapter 8, 11 and 12 on the Executive, President and Deputy President in Kenya and Africa...

¹⁶⁹ Cf. Anne Amadi (2021) "All set for selection of Chief Justice and one judge of the Supreme Court," *Daily Nation*, Nairobi, April 4, 2021, at <https://nation.africa/kenya/blogs-opinion/blogs/all-set-for-selection-of-chief-justice-and-one-judge-of-the-supreme-court-3348188> (accessed April 7, 2021). ... Richard Posner (2016) *Divergent Paths: The Academy and the Judiciary*, Harvard UP,....op. cit... Bork.. Anita Hill and aftermath....Positive engagements in Kenya and Africa.. Academy, Bar training, KSL, pupillage, reseach assistance, Bar, LSK, ICJ(K), Judiciary, JTI, CLE...

¹⁷⁰ Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR... Report of the Tribunal to Investigate the Conduct of the Deputy Chief Justice of the Republic of Kenya, 2012, at <http://kenyalaw.org/CaseSearch/generate.php?link=89938> (accessed April 12, 2021).

The Law Society of Kenya (LSK) 501 page memorandum stated in part:

“The offices of the Chief Justice and Judge of the Supreme Court are State officers. They should be occupied by individuals who not only meet professional qualifications but who are of unquestionable personal integrity, competence and suitability. The need for an independent but accountable Judiciary militates against the appointment of individuals with proven track records of making decisions or taking actions influenced by nepotism, favouritism and other improper motives or corrupt practises to the two offices.”¹⁷¹

It further stated:

“There is considerable doubt as to whether Hon Lady Justice Martha Koome Karambu, Philip Murgor Kipchirchir SC and Prof Kameri Mbote Annie Patricia Gathiru SC can serve as Chief Justice of the Supreme Court as the case may be given the information relating to them. It is recommended that the three should not be nominated for appointment for the reasons set out in the memorandum.”¹⁷²

Some LSK Council members and Federation of Women Lawyers (FIDA) wrote two-page letters to support the three candidates.

The section of the LSK Council members stated that:

“We would like to put it on record that according to the Society’s records the three Advocates: Mr Philip Kipchirchir Murgor SC, Prof Kameri Annie Gathiru Patricia, SC and Hon Lady Justice Martha Koome Karambu, Judge of the Court of Appeal are members of the Law Society of Kenya. There are no complaints of professional misconduct and neither do they have nay past or pending disciplinary cases against them before the Advocates Disciplinary Committee.”¹⁷³

The Federation of Women Lawyers’ (FIDA’s) press statement argued that:

“We are concerned about the prevalence of disparaging and unfounded allegations against women who compete for public positions in Kenya. These tactics are designed to insulate male candidates from competing on merit, effectively winnowing down the list of candidates by tarnishing the most qualified candidates.”

¹⁷¹ See Memorandum to JSC - Recruitment of CJ and Supreme Court Judge 29-3-2021.

¹⁷² *Ibid.*

¹⁷³ Memorandum to the Judicial Service Commission on shortlisted candidates for interview of Chief Justice and Judge of the Supreme Court dated March 29, 2021 by Nelson Andayi Havi (suspended) President of the Law Society of Kenya.

Further:

“We urge the JSC to reject these desperate underhanded attempts to hijack public participation to skew the recruitment process to deny highly qualified and competitive female candidates an equal opportunity to seek public office to make way for less competitive candidates.”¹⁷⁴

The LSK President and numerous advocates argued that the letters were bare denials and did not specifically counter the complaints, evidence and arguments and that in any event the writing of the two letters had been procured by some of those complained against¹⁷⁵

The issues elaborated included at least four (4) related to the suitability and qualifications of Prof Kameri Annie Gathiru Patricia, SC for Chief Justice. First, possible conflict of interest in working at Strathmore Law School while still an employee of the University of Nairobi Law School. It was reported that:

“the professor was also asked why she took an unpaid leave from UoN to go to start a law school at Strathmore. She taught at Strathmore between 2009 before returning to UoN. The JSC Commissioners wanted her to explain if it was not a conflict of interest to start an institution that was to compete with her employer for law students.”¹⁷⁶

Did working at Strathmore Law School compromise the interests of the University of Nairobi Law School, her employer?

She stated that:

“I was young and restless. I was in my 40s.”¹⁷⁷

Was this a constitutionally and legally permissible limitation and exception (L&E) to the general rule (GR) on conflict of interest in Kenya, especially in the Judiciary?

¹⁷⁴ See Federation of Women Lawyers (FIDA-Kenya) press statement the recruitment of the Chief Justice on March 31, 2021. Some have argued that FIDA should address the complaints and concerns; that FIDA had not come to the defence of Ag. Chief Justice (DCJ) Philomena Mwilu even when a five judge High Court bench found that the Ag. CJ was being intimidated or “revisited” by the President...

¹⁷⁵ See LSK President Nelson Havi’s 78 page memorandum to JSC. See also Chapters 9 and 10 under structure and legal method of the Judiciary in Kenya and Africa....

¹⁷⁶ Kamau Muthoni (2021) “Hunt for CJ: Law professor grilled on academic breach,” *Standard*, Nairobi, April 14, 2021, at <https://www.standardmedia.co.ke/nairobi/article/2001409574/hunt-for-cj-law-professor-patricia-kameri-grilled-on-academic-breach> (accessed April 14, 2021). See also Chapters 3 and 10 of CODRALKA 1.

¹⁷⁷ Jillo Kadida (2021) “‘I was young and restless’: Prof Mbote defends self after starting rival Law School,” *Star*, Nairobi, April 13, 2021, at https://www.the-star.co.ke/news/2021-04-13-i-was-young-and-restless-prof-mbote-defends-self-after-starting-rival-law-school/?utm_medium=Social&utm_source=Twitter#Echobox=1618302285 (accessed April 13, 2021).

Second, integrity issues related to the authorship or copyright infringement and plagiarism claims regarding a property law book at Strathmore Law School.¹⁷⁸ It was reported that:

“Prof Mbote was also questioned on the ownership of a property law book. Her three former students claimed that she claimed copyright to the book that was theirs.”¹⁷⁹

How would questions on breach of academic integrity by judicial officers affect the public image and perception of the Judiciary in Kenya and Africa?

Third, her role in the Building Bridges Initiative (BBI) constitutional reform process vis-à-vis her expected role as Chief Justice (CJ). Prof Kamari Mbote SC said she was tasked by the BBI Secretariat with reading the Building Bridges Initiative (BBI) Report 2019 at Bomas of Kenya on November 27, 2019.¹⁸⁰ Was her role in the constitutional reform process a reasonable bar to her candidacy for the Chief Justice with regard to public perception?

Fourth, Prof Kamari Mbote was also questioned over allegations of plagiarism and claim of ownership of a concept paper by Prof Migai Akech to secure funding from Ford Foundation without attributing ownership.¹⁸¹

The Law Society of Kenya President Nelson Havi, Advocate indicated that:

“Prof Mbote is accused of passing off the work of Prof Migai as hers and using her office to instigate a malicious complaint against Prof Migai when the transgression was raised with the PSC.”¹⁸²

¹⁷⁸ Brian Wasuna (2021) “Academic Kamari-Mbote taken to task over BBI, role, disputes with colleagues and students,” *Daily Nation*, Nairobi, April 14, 2021, at <https://nation.africa/kenya/news/cj-interviews-prof-kamari-mbote-explains-to-jsc-her-role-in-bbi-3360430> (accessed April 14, 2021). See Ben Sihanya (2016, 2020) *IP in Kenya and Africa: Transferring Technology for Sustainable Development*, Sihanya Mentoring and Sihanya Advocates, *op. cit.*; Ben Sihanya (due 2021) Ben Sihanya (due 2021) *IP in Kenya and Africa: Transferring Technology for Sustainable Development: Cases and Materials*, Sihanya Mentoring and Sihanya Advocates, *op. cit.*; Ben Sihanya (due 2021) *Copyright and Creativity in Kenya and Africa*, *op. cit.* (JSD thesis at Stanford Law School being published).

¹⁷⁹ Kamau Muthoni (2021) “Hunt for CJ: Law professor grilled on academic breach,” *Standard*, Nairobi, April 14, 2021, at <https://www.standardmedia.co.ke/nairobi/article/2001409574/hunt-for-cj-law-professor-patricia-kamari-grilled-on-academic-breach> (accessed April 14, 2021).

¹⁸⁰ Brian Wasuna (2021) “Academic Kamari-Mbote taken to task over BBI, role, disputes with colleagues and students,” *Daily Nation*, Nairobi, April 14, 2021, at <https://nation.africa/kenya/news/cj-interviews-prof-kamari-mbote-explains-to-jsc-her-role-in-bbi-3360430> (accessed April 14, 2021), at 8.

¹⁸¹ See Law Society of Kenya President, Advocate Nelson Andayi Havi’s Further memorandum of the Law Society of Kenya (LSK) on shortlisted candidates for interview for Chief Justice and Judge of the Supreme Court presented to the Judicial Service Commission (JSC) pursuant to Notice for submissions of information dated 17th February 2021. ...

¹⁸² *Ibid*, at 2....

Relatedly:

“She was confronted to explain why she did not acknowledge Prof Migai Aketch when she used a concept note he developed to source for funding from Ford Foundation. The concept note in question is about searching for balance and reflections on Kenya's presidential election in 2013, which she used to get funds from Ford.”¹⁸³

The constitutional value and principles requirement in Art. 10 (national values and principles of governance), and Chapter 6 especially Art. 73 (responsibilities of leadership) include high integrity and ethical standards that applies to the office of the Chief Justice (CJ). What is the impact of serious allegations including plagiarism and lack of integrity on the eligibility of some of the candidates for the Chief Justice? What is the applicability of the principles established in the Report of the Tribunal to Investigate the Conduct of the DCJ?¹⁸⁴

The complaints against Justice Martha Koome of the Court of Appeal included her being part of a bench that sat at night to overturn a High Court decision on unconstitutional and irregular appointment of returning officers in 2017...¹⁸⁵

There were also complaints on Mr Fred Ngatia, applicant for the Chief Justice, by the Atheist in Kenya Society (AIK). These were related to his role as President Uhuru Kenyatta's Advocate during the contested 2013 and 2017 general elections, including the *Raila v. IEBC*, Presidential Election Petition No. 1 of 2017.

Relatedly, the AIK stated:

“Senior Counsel Fred Ngatia defended President Uhuru Kenyatta's disputed win in a presidential election filed by Raila Odinga in 2013 and 2017. It is obvious that his personal interests are likely to be contrary to his loyalty to the Kenyan public as Chief Justice. We lack confidence in SC Fred Ngatia's ability to safeguard the rights and freedoms of Kenyans to ensure protection for all.”¹⁸⁶

¹⁸³ Jillo Kadida & Annette Wambulwa (2021) “Mbote questioned over unethical use of colleague's work,” *Star*, Nairobi, April 14, 2021, at <https://www.the-star.co.ke/news/2021-04-14-mbote-questioned-over-unethical-use-of-colleagues-work/> (accessed April 14, 2021).

¹⁸⁴*op. cit.*.....

¹⁸⁵

¹⁸⁶ Atheists in Kenya Society (AIK) letter to the Judicial Service Commission dated April 12, 2021 on “Senior Counsel Fred Ngatia: Ongoing interviews for position of Chief Justice of Kenya.”

The complaints against the applicants were also debated in the context of the interviews in April 2021 in South Africa of Judge Dhala Pillay, for Constitutional Court judge. Justice Pillay was questioned with regard to likely conflict of interest due to her alleged relationship with African National Congress (ANC)'s National Executive Committee member Hon Derek Hanekom, and Public Enterprises Minister Mr Pravin Gordhan.

During her interview, South African JSC Commissioner remarked:

“Judge, I am going to argue in a closed session that you are nothing but a political activist. You are no judge, and you deserve no high office. If anything, you are also factional and belong to Pravin's [Gordhan's] faction and you are pursuing factional battles using the bench.”¹⁸⁷

Also, she was interrogated with regard to having had lunch with the then South African President, Jacob Zuma at his Nkandla home, during her tenure as a Commissioner of the Independent Electoral Commission (IEC). Remarkably, she also allegedly ruled in favour of Mr Hanekom in a defamation case by Mr Derek Hanekom against former President Jacob Zuma in 2019.¹⁸⁸

How would her relationship with these public officials affect her role as a Constitutional Court judge in South Africa?

Relatedly, how would Mr Fred Ngatia's working relationship with President Uhuru Kenyatta influence the independence of the Judiciary in Kenya? How would Mr Ngatia ensure the separation of powers and checks and balances with regards to the excesses of the Executive?

9.9 Administrative Process, Alternative Dispute Resolution and Judicial Process, Procedure, Remedies and Sanctions in Kenya and Africa

Justice may be sought or found in many rooms (or fora) in Kenya and Africa.¹⁸⁹ These include administrative process; alternative dispute resolution (ADR), including traditional dispute

¹⁸⁷ Jeanette Chabalala (2021) “‘You are nothing but a political activist’- Malema tells ConCourt judge candidate Dhaya Pillay,” *News24*, April 13, 2021, at <https://www.news24.com/news24/southafrica/news/you-are-nothing-but-a-political-activist-malema-tells-concourt-judge-candidate-dhaya-pillay-20210413> (accessed April 14, 2021).

¹⁸⁸ Zintle Mahlati (2021) “Judge questioned over lunch with Zuma and friendship with Gordhan during JSC interviews,” *IOL*, April 14, 2021, at <https://www.iol.co.za/news/politics/judge-questioned-over-lunch-with-zuma-and-friendship-with-gordhan-during-jsc-interviews-f0e08a9e-65dc-41ee-93b0-772f83fe3fcb> (accessed April 14, 2021).

¹⁸⁹Cf. “*forum non conveniens*” in conflict of laws (private international law); forum shopping; judge or magistrate shopping.... Cf. Andreas F. Lowenfeld (2008) *International Economic Law*, Oxford University Press (2nd ed.); Paul B. Stephan, Julie Roin and Don Wallace (2004) *International Business and Economics Law and Policy*, LexisNexis, (5th ed.).... Cross reference Marc Galanter (1981) “Justice in many rooms: courts, private ordering, and indigenous law,” 19 *Journal of Pluralism & Unofficial Law* 1-47....

resolution (TDR); civil process, criminal process;¹⁹⁰ admiralty process; and court martial process....¹⁹¹

Justice or judicial process and procedure are as important as substantive judicial powers, jurisdiction, functions and structure....

Moreover, procedure is the hand maiden of substance....¹⁹² And some of the foregoing are both matters of substantive and procedural law. What is jurisdiction? In *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989],¹⁹³ the Court of Appeal developed a principle that has influenced administrative affair, justice, litigation and scholarship in Kenya. Nyarangi, J. stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”¹⁹⁴

The question of jurisdiction is not a matter of discretion by a court of law. The jurisdiction of a particular court is expressly provided for in the Constitution or the relevant statute. Relatedly, the court in South African case of *Jacobs and Others v. S.* [2019] held that whether a matter, including applications for leave to appeal, falls within the jurisdiction of a court, the court can decline to hear and determine it based on at least three (3) factors. First, whether there is likelihood of success. Second, whether the contentious matters raises any important question of law. Third, to what extent the decision of the Court may affect the general populace.¹⁹⁵

How has jurisdiction, standing to sue (or *locus standi*), among other factors, featured in litigation?

9.9.1 Judicial Process and Procedure in Kenya and Africa

While procedure is significant, the Constitution of Kenya 2010 recognized that a slavish approach to standing (or *locus standi*) had visited injustice in numerous cases including *Wangari Maathai v. Kenya Times Media Trust (KTMT); ICTM*,¹⁹⁶ *Kenneth Matiba v. Moi*¹⁹⁷....

¹⁹⁰ See discussions in Ben Sihanya (2016; 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya; Ben Sihanya (forthcoming 2021) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya....

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¹⁹³ *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1...

¹⁹⁴ *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1, *ibid.*

¹⁹⁵ *Jacobs and Others v. S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC).

¹⁹⁶ *Wangari Maathai v. Kenya Times Media Trust (KTMT); ICTM*

There are at least seven (7) resolutions to the standing problem. First, Article 159(2)(d) guarantees substantial justice without undue regard to technicalities of procedure. It doesn't mean procedure is unimportant.¹⁹⁸ Second, Art 22 (enforcement of the Bill of Rights) Constitution establishes the *locus standi* (or capacity to sue) of litigants who may approach the courts on alleged violation of human rights and the Bill of Rights. The Constitution of Kenya 2010 expanded the scope of persons who can approach the courts....

Third, sec 3A of the Civil Procedure Act, (saving of inherent powers of court) states:

“nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Fourth, Court of Appeal (Presidential Election Petition) Rules, 2017,....; Fifth, Supreme Court (Presidential Election Petition) Rules, 2013; Sixth, revised Presidential Election Petition Rules, 2017.....

Seventh, Oxygen Rules under Article 159(2) which expands the discretion of courts to invoke the overriding objective principle to promote justice to all regardless of procedural technicalities....¹⁹⁹

What of preliminary objections? *Mitu-Bell Cases*?²⁰⁰

¹⁹⁷

¹⁹⁸ Kenyan cases since 2010 indicates there is a delicate balance on focusing on substantial justice without undue regard to technicalities of procedure.... Compare public interest litigation (PIL) and social action litigation (SAL) in South Africa, Nigeria, India.... Gordi Udejah (2019) “Stakeholders canvass public interest lawyering,” *The Guardian*, Aba, Nigeria, at <https://guardian.ng/features/law/stakeholders-canvass-public-interest-lawyering/> (accessed 5/5/20); Jeremy Perelman (2005) “Access to justice, public interest lawyering, and the right to legal aid in South Africa,” 41 *Stan. J. Int'l L.* 357 (2005).... Some of the leading promoters of public interest lawyering in Kenya and Nigeria, historically, are CMG Argwings Kodhek (“Mau Mau lawyer”), Dr Oki Ooko Ombaka, Pheroze Nowrojee, John Khaminwa, James Orengo, Jackson Awele, Ben Sihanya, Chidi Odinkalu (Nigeria).... See also Chapter 22 on Lawyers, public interest lawyering and constitutional democracy in Kenya and Africa.

¹⁹⁹ See also *Ndathi Mwangi & 3 Others v Benson Lumumba Ndivo* [2017] eKLR where the appellant relied on the provisions of Order 42 Rule 35 of the Civil Procedure Rules and section 79B of the Civil Procedure Act to convince the court to invoke the overriding principle. Justice C. Meoli allowed the appeal by invoking the overriding principle under section 3A of the Civil Procedure Act. See also the debates on inherent powers in Chapters 5, 6, 7, 8, 9 (above), 10, 11, 12....

²⁰⁰ *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR; *Mitu-Bell Welfare Society v. Attorney General & 2 Others* [2013] eKLR; *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR.... The residents of Mitumba Village had occupied land that allegedly belonged to the Kenya Airports Authority (KAA). The Supreme Court held that where the landless occupy public land, they have a protectable right to housing by virtue of having occupied the land for a long period of time....cross ref....Ochiel Dudley on Mitubell II 2021 case..... See Annette Wambulwa (2021) “Court orders compensation of 3, 000 families evicted from Wilson,” *Star*, Nairobi, January 12, 2021, at <https://www.the-star.co.ke/news/2021-01-12-court-orders-compensation-of-3000-families-evicted-from-wilson/>

9.9.2 Judicial Remedies and Sanctions in Kenya and Africa

What are Judicial remedies, reliefs, redress, sanctions?....

Art. 23 (authority of courts to uphold and enforce the Bill of Rights) list some of the remedies that courts may award. See Chapters 9 [to discuss...]. These include injunctive reliefs, declaration of rights, conservatory orders and a declaration of the invalidity of any law that contravenes the Bill of Rights.

Courts may also formulate new remedies....

9.10 Comparing Administrative, Alternative Dispute Resolution and Judicial Process in Kenya and Africa

A brief analysis of the administrative process, ADR process and judicial process in Kenya and Africa brings into sharp focus the quest for justice and roles of the Legislature, Executive and Judiciary in that process.

9.10.1 Administrative Process in Kenya and Africa

Administrative process are the most common ways of resolving disputes and conflicts.... These include (re)conciliation, negotiation, good offices,....

The parties resolve the dispute directly or they involve a trusted party and respected third party but still play the main role in decision making. The outcome is not (always) legally binding not does it (always) set a precedent....

Thus Art. 60(1)(g) on the principles of land use and management provides:

“encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.”

One of the key Afro-Kenyanist traditions and experience is that (councils of) elders often acted as the good offices....

Traditional dispute resolution (TDR) mechanisms are stipulated under Article 159(3) of the Constitution.... This is one of the foundations for the (council of) elders playing a role in solving land disputes.²⁰¹

“3 Traditional dispute resolution mechanisms shall not be used in a way that—
(a) contravenes the Bill of Rights;

(accessed April 8, 2021). Cf. South African cases....land, shelter, housing, livelihood, and structural interdict generally...including *Grootboom*The debate on adverse possession, prescriptive rights as limited to constructing shelter, not land ownership, in public v. in private land....Justice David Majanja in 2021 Chief Justice interviews....

²⁰¹ Cf.... 1981 amendments....

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
(c) is inconsistent with this Constitution or any written law.”

What are traditional dispute resolution mechanisms? The repugnancy clause (Art. 159(3)(b)) is problematic and reminiscent of its use in the *SM Otieno*²⁰² case and the colonial Tanganyika (later Tanzania) case of *Gwao bin Kilimo v. Kisunda bin Ituti* (1938)²⁰³ (opining that Africans only participated in “wife purchase” had no concept or practice or tradition of marriage, hence the relationship was “wife purchase” which could not lead to non-compellability of a “spouse” as known in English criminal law of evidence.... [IFLAC briefly]....²⁰⁴

The practice has been that instead of developing Afro-Kenyanist or Tanzanian common law, some parties, the Executive, or courts focused on comparing African customary practices with English common law or the African customary practices *inter se*. And (some) African customary laws are always regarded as repugnant or inferior...²⁰⁵

What are the merits and demerits of administrative process?

9.10.2 Alternative Dispute Resolution in Kenya and Africa

What is alternative dispute resolution (ADR) in the narrow and broad sense in Kenya and Africa? How does it relate to administrative process? Quasi-judicial process? Judicial process? ADR is sometimes referred to as the private ordering;²⁰⁶ justice being pursued “in the shadow of the law”....²⁰⁷

The people of Kenya and Africa as well as the Constitutions, substantive and procedural civil, criminal, admiralty and martial procedure laws have increasingly encouraged alternative dispute resolution (ADR).

²⁰² *Virginia Edith Wamboi Otieno v. Joash Ochieng Ougo & Another* (1987) eKLR Civil Case No. 4873 OF 1986.

²⁰³ *Gwao bin Kilimo v. Kisunda bin Ituti* (1938) TLR403.... *Republic v. Amkeyo* EAPLR [1917-1918]4; *Wango v. Dominiko* (1958) E.A. 124.

²⁰⁴ Cf. Andrew Lyal (1988) “Gwao bin Kilimo: The Administrators’ reaction,” Vol. 32 No. 1 *Journal of African Law* at 64-71; Leon Sheleff (2000) *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, Routledge (1st ed); Bart Ruezaura (1995) “Towards a cultural understanding of the interplay between children’s and women’s rights: An Eastern and Southern African perspective,,” 3 *International Journal of Children’s Rights*, 333-368; Ruezaura (1993) “Uncovering reality: excavating women’s rights in African family law,” 7 *International Journal of Law, Policy and the Family*, 314-369; Ruezaura (1993) “Constraining factors to the adoption of Kiswahili as a language of law in Tanzania” 37(1) *Journal of African Law*, 30-45....

²⁰⁵ See Chapter 1, 3, and 18 of CODRALKA 1....; Okoth Ogendo (1989) “The role of customary law in Kenya’s legal system: An old debate revisited,” *op.,cit.*; Okoth Ogendo (1988) “Law and Government,”.... Handbook....

²⁰⁶

²⁰⁷ Robert H. Mnookin and Lewis Kornhauser (1979) “Bargaining in the shadow of the law: The case of divorce,” Vol. 88, No. 5, *Yale Law Journal*, 950-997.

ADR includes the administrative processes discussed above as well as mediation, arbitration, and mediation-arbitration (med-arb). The last three are the main ADR mechanisms encouraged by courts through their diversion policy on Alternative Justice. There are more training opportunities in mediation and arbitration. And the Chartered Institute of Arbitrators (CI Arb) is working to promote it, including through the CI Arb qualifications and accreditation....²⁰⁸

ADR thus applies in at least three contexts... First, where the Constitution or the law stipulates, for instance, that litigation and jurisdiction of courts is ousted totally, or only allowed after ADR. An example is section 23 of the Sixth Schedule on the vetting of judges and magistrates.²⁰⁹ Remarkably, there are some non-arbitrable matters like criminal cases....²¹⁰

Second, contracts,²¹¹ agreements and treaties often have ADR clauses....²¹²

Third, courts, tribunals, and bodies may order ADR in suitable cases....²¹³

Some of the recent questions in constitutional democracy, jurisprudence and legal sociology in Kenya and Africa is whether ADR, and especially arbitral awards, are appealable directly to the Court of Appeal.²¹⁴

How do tribunals fit in this ADR model? What are the merits and demerits of ADR?

9.10.3 Civil litigation and procedure in Kenya and Africa

Civil procedure is essentially adversarial in Kenya, whereby every party is expected to prepare, brief, and present or argue their case before a supposedly independent, disinterested, professionally, legally trained arbiter, adjudicator “umpire”. The adjudicator is employed by the

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²⁰⁹ See Judges and Magistrates Vetting Board Act; Chapter 9 on “Judicial Power, Structure, and Independent Accountability in Kenya and Africa: Interests, Process and Outcomes.”....Any other examples?

²¹⁰ Consider plea bargaining; withdrawal of criminal complaints....

²¹¹ Cf. Raymond William (R.W.) Hodgkin (1975) *Law of Contract in East Africa*, East African Literature Bureau, Nairobi.... this important book needs a thorough revision in the light of conceptual and pragmatic developments in contract law in Kenya and Africa.... BS to work on constitutional sources and regulation of contract in Kenya and Africa....in Chapter 16 on Policy Planning and Public Administration contract and or plan.....; in Chapter 8 on Public Finance (procurement);...and on the discredited social contract theory (consent , consensus, “contract” as the basis of constitutional democracy, legitimate domination)....

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²¹⁴ See *Synergy Industrial Credit Ltd v. Cape Holdings Limited* [2019] Petition No. 2 of 2017. The court held that an appeal on a decision on an arbitral award can only lie to the Court of Appeal where the High Court, in setting aside the award, steps outside the grounds set out in section 35 of the Arbitration Act.

people through the State of the Judiciary... These are the judges, magistrates. Kadhis, Registrars,²¹⁵ and Commissioners of Assize.²¹⁶

Parties with (better) lawyers, more money to prepare evidence, engage expert witnesses.... May win. In such a situation, “the haves come out ahead...” to quote Prof Marc Galanter, the leading legal sociologist....²¹⁷

Article 159 is however emphatic that there should be justice for all; just without delay because justice delayed is justice denied; and that justice should be administered without undue regard to technicalities of procedure.²¹⁸ Thus there is room for an inquisitorial civil justice process in Kenya,²¹⁹ even if not to the level of the French inquisitorial system.²²⁰

These issues are crucial especially in cases involving complex matters like transactions in innovation, technology transfer, intellectual property, banking and finance, public finance, and criminal matters, especially, murder, fraud, conspiracy, and cybercrime,²²¹

9.10.4 Criminal litigation and procedure in Kenya and Africa

The criminal justice process has a minimum of two parties: the suspect or accused and the state... Although the State may be absent, may take over and continue, or may take over and discontinue a private prosecution subject to Art. 159, 49, and 50....²²²

There are numeral processes that are subject of litigation in Criminal Justice System: inquiry, investigation, search or arrest warrant, arrest, bail, bond,²²³ prosecution,²²⁴ remand, adduction of evidence, participation of witnesses²²⁵ and victims of crime, witness protection....²²⁶

²¹⁵ The Registrars judicial powers and functions include....

²¹⁶

²¹⁷ Marc Galanter (1974) “Why the “haves” come out ahead: Speculations on the limits of legal change,” Vol. 9, No. 1, *Law and Society Review Journal*, 95-160. I am grateful to Prof Rajeev Dhavan, an Indian law scholar, Supreme Court litigator and public intellectual who first introduced me to this article in his presentation on (public interest) litigation as a game... with “one shotters” (e.g. first time offenders) and “repeat players” (e.g. A-G, DPP or recidivists)... See his chapter, Rajeev Dhavan (1994) “Law as concern and concern about law: Reflecting on law in development,” in Yash Vyas (ed) *Law in Development in the Third World*, University of Nairobi. He made the presentation in the 1992 law and development conference in Nairobi Kenya.... I have used these and related materials in researching, teaching and litigating Constitutional Law, Comparative Constitutional Law as well as Law and Development over the years. See also Rajeev Dhavan (1990) “Law as struggle: Public interest law in India,” 2 N.L.S.J. 53-61; Prof Galanter and Prof David M. Trubek are some of the most widely cited legal sociologists....

²¹⁸ Art 159(2)(d), s. 3 Judicature Act,, respectively.

²¹⁹ To elaborate.

²²⁰

²²¹

²²² Cf. Private prosecution of Vice President George Saitoti over Goldenberg case *Raila v. George Saitoti* (Private Prosecution on Goldenberg) (1985); private prosecution of Mrs Lucy Kibaki by journalist Clifford Otieno.... *Otieno Clifford Richard v. R.* (2006) eKLR Misc Civil Suit 720 of 2005....

The burden of proof is (always) on the prosecution (DPP). It is based on the principle that he who claims must prove....²²⁷

The standard of proof is (always) beyond reasonable doubt. Thus, the accused need not prove their innocence. Once they cast doubt in the prosecution (DPP's, "States" or People's) case, the accused "walks."²²⁸ Are the investigating, arresting and prosecution agencies sufficiently competent, resourced, independent?²²⁹ These include the Directorate of Criminal Investigations (DCI), National Police Service (NPS) and the Director of the Public Prosecutions (DPP)....

There are at least three (3) possible outcomes in a criminal trial: First, not guilty. Second, guilty. Third, innocent.... The last is rarely pronounced by courts. Guilty means the accused committed the offence as charged under the relevant substantive penal or criminal law; that there is sufficient evidence to support the charge; and that the appropriate procedure has been followed.²³⁰

Not guilty usually means that there may be an error in linking the crime as charged to the substantive law, or that there is no sufficient evidence... Thus Jomo Kenyatta should have been found "not guilty" of managing Mau Mau in 1953;²³¹ and OJ Simpson was also not guilty of killing (or felony upon) his wife Nicole Simpson and her friend Ron Goldman (in October 3, 1995)....²³²

²²³ See Judiciary (2015) *Bail Bond Policy Guidelines*, Judiciary, Kenya Gazette, at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf (accessed 5/5/20).

²²⁴ Cf. Art 157, Criminal Procedure Code, Cap 75.... Office of the Director of Public Prosecution (2019) *Guidelines and Explanatory Notes*, at <https://www.odpp.go.ke/odpp-diversion-guidelines-explanatory-notes/> (accessed 5/5/20).

²²⁵ Cf. Witness Protection Act, 2018; Whistleblowers Protection Act, 2017.... Whistleblowers incentives and programs in tax administration (controversial) in anti-corruption strategies....; why should citizens, lawyers be required to snitch on other citizens? on clients? Is the distinction between tax avoidance (lawful tax planning) and tax evasion (criminal tax dodging?) blurred?.... See also the BBI 2020 Report proposals on awarding whistleblowers 5% of the money recovered from the proceeds of corruption under proposed Art. 139(g).

²²⁶

²²⁷ Sec. 109 of the Evidence Act, Cap 80.

²²⁸

²²⁹ As the case law on Friday arrests (*kamata kamata* Friday) cases demonstrated, constitutional and legal process in criminal matters should be investigate, arrest, prosecute.... Not arrest, investigate, prosecute unless there is a very good case.... See....

²³⁰ Cf. William Musyoka (2013) *Criminal Law*, LawAfrica, Nairobi; Patrick Kiage (2010) *Essential of Criminal Procedure in Kenya*, LawAfrica, Nairobi; Momanyi Bwonwong'a (1994) *Procedures in Criminal Law in Kenya*, East African Educational Publishers.

²³¹ There was no sufficient evidence to convict him; he was too shrewd for the British colonialists....

²³² The *OJ Simpson* case turned on poor adduction of ("glove don't fit") evidence and a record of African lynching by the criminal (in)justice system in the US, especially Los Angeles. Cf. Johnie Lee Cochran Jr (1996) *Journey to Justice*, ...; Johnie Lee Cochran (2003) *A Lawyers Life*, St. Martin's Griffin...; F. Lee Bailey (1971) *The Defence Never Rests*, Signet Publishers....

What is the political economy,²³³ cultural politics, and legal sociology of criminal law and justice in Kenya and Africa? Is there profiling in terms of class, tribe, gender Or age in criminal investigations, arrests, prosecution, adjudication? Cross reference Arts. 27, 48, 49, 50....

In the context of BBI debates, the DCI, and Dr Francis Sang and John Mutonyi advanced arguments for the independence of DCI from the Inspector General of Police. They argued that DCI needed financial, administrative and operational independence to attract and retain expertise,....²³⁴

What are the merits and demerits of the criminal justice system in Kenya and Africa? Should (some) criminal cases be resolved or settled through ADR? Civil litigation?²³⁵

9.10.5 Merits and demerits of alternative dispute resolution and litigation in Kenya and Africa

Alternative dispute resolution (ADR) and litigation are often compared using some key variables or parameters. First, technical effectiveness. Second, timeousness, expedition.... Third, cost effectiveness. Fourth, procedural simplicity...And fifth, precedential value and *stare decisis* (the decision stays or endures).

Some have argued that ADR scores better than litigation in all these five variables. That is not necessarily accurate. I draw examples mainly from innovation, technology transfer, intellectual property,²³⁶ land, environmental and natural resources, money, banking and finance, public finance, and education, training, research, innovation and mentoring (ETRIM).

First, while ADR provides an easier opportunity to secure technically trained and sophisticated mediators or arbitrators rather than generic adjudicators, Kenya and Africa has some experienced technically or technologically sophisticated judges and magistrates. Thus, even some may have been trained, they have developed interest, and can match technically trained mediators, arbitrators and panelists in tribunals.²³⁷

²³³ See Issa G. Shivji (1995) "The rule of law and Ujamaa in the ideological formation of Tanzania," 4.2, *Social & Legal Studies*, 147-174 *op. cit.*; Alan W. Norrie (1993) "Criminal justice, the rule of law and human emancipation: a historical and comparative survey," In Sammy Adelman and Abdul Paliwala (eds.) (1993) *Law and Crisis in the Third World*, Hans Zell Publishers_ See also Chapter 8 of CODRALKA 1 on Executive Powers, Functions, and Structure in Kenya and Africa...

²³⁴ See also Chapter 12 on Regulating and Administering Criminal Justice and Security in Kenya and Africa....

²³⁵

²³⁶ See Ben Sihanya (2016; 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya; Ben Sihanya (forthcoming 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya.

²³⁷

Of course the establishment of the Commercial and Tax Court in Kenya,²³⁸ the Court of Appeal for the Federal Circuit (CAFC) in US and IP courts²³⁹ in some States (like Thailand) have developed judicial expertise formally. Thus, about 80% of IP decisions are correctly decided even though the reasoning or *ratio decidendi* or analysis may be technically inaccurate. An example is an industrial design (ID) case in which the judge focused on civil procedural matters at the expense of technical intellectual property (IP)...²⁴⁰ And in another, the judge emphasized “labour and effort” as being the basis of copyright existence and ownership.²⁴¹ In another, a judge used the doctrines copyright, patent, and utility model interchangeably.²⁴²

Second, litigation takes time and there is a huge backlog of cases in the magistrates courts (...), High Court (...),²⁴³ Court of Appeal (...)²⁴⁴ and even Supreme Court (...).²⁴⁵ No clear data exists on alternative dispute resolution (ADR) and such data are needed. Indeed, some High Court Divisions have been giving hearing dates even more than one year down the line.²⁴⁶ The matter has been made worse by limited funding, limited judges and magistrates and delayed gazetting of judges by President Uhuru Kenyatta, as well as the novel COVID-19....²⁴⁷

Some innovations, including due to COVID-19, will help. These include online filing and service of pleadings, and submissions.²⁴⁸ In some cases, matters have been heard digitally through Zoom, video conferencing, among others.²⁴⁹

Yet mediation and arbitration are not always more expeditious. In some cases on innovation, technology transfer and IP, delays have been caused by the need to harmonize the diaries of three busy arbitrators (compared to one judge).²⁵⁰ Some of the arbitrators are in any event engaged full time on other matters (unlike a judge who is a full time adjudicator).²⁵¹

²³⁸

²³⁹

²⁴⁰See Ben Sihanya (2016; 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya; Ben Sihanya (forthcoming 202) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials*, IL & SM, Nairobi & Siaya.

²⁴¹ Ben Sihanya *ibid*. There are at least six (6) definitions of originality including skills and judgement, selection and arrangement, labour and effort are the likeliest important.

²⁴² Ben Sihanya (2016; Reprinted 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya; Ben Sihanya (forthcoming 2021) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL, SM & Sihanya Advocates, Nairobi & Siaya. *op.cit*

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²⁴⁹ See National Council on Administration of Justice (NCAJ) Directives, 2020.

²⁵⁰ What about a bench of more than one judge?

²⁵¹

Third, there have been arguments that civil and criminal litigation are costly because of advocates,²⁵² filing²⁵³ and related fees....²⁵⁴ Should expert witness be necessary, there are extra research and documentation costs.

Remarkably, in some cases, mediation and arbitration can be more costly. This is mainly because the parties have to pay lawyers, filing fees, and especially, the arbitrators who largely charge high fees based on their expertise, time and judgement.²⁵⁵ And some parties to the arbitration have frustrated and sabotaged the process by merely saying they do not have money, as happened in the arbitration of Nairobi Law Society of Kenya, Nairobi Branch elections of 2018.²⁵⁶ Notably, judges and magistrates do not charge parties; they are paid by all tax payers.²⁵⁷ Of course hidden litigation costs have been associated with bribes taken in the litigation and adjudication chain.²⁵⁸

Fourth, procedural technicalities have been a major challenge in civil litigation, and much less in criminal litigation. These have been improved with amendments to the Civil Procedure Act and Civil Procedure Rules in 2010 and subsequently.²⁵⁹ with regards to proceedings including chamber summons, certificate of urgency applications,²⁶⁰ affidavits,²⁶¹ notice of motions,²⁶² petitions,²⁶³ judicial review applications,²⁶⁴ complaints,.... [To reorganize these].

²⁵² Advocates fees are regulated by contract, Advocates Remuneration Order, 2014, Law Society of Kenya's Advocates Disciplinary Committee, Advocates Complaints Committee (at A-G), and resort to the High Court....

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²⁵⁶ ...See *Nelson Andayi Havi v. Law Society of Kenya & 3 Others* [2018] eKLR. There were at least three (3) issues. First, whether the Petitioner had attained the relevant constitutional and legal requirements to qualify for nomination as LSK Chair. Second, whether section 18(1)(a) of the LSK Act offends Art. 24, 25 and 27 of the Constitution. Third, whether there was sufficient public participation in the enactment of the LSK Act, Art. 24 is limitation of rights and fundamental freedoms; 25 is on fundamental rights and freedoms that may not be limited or "super rights". Art. 27 is on equality and freedom from discrimination. The High Court (Justice John Mativo) held that the minimum requirements for qualification to vie as the LSK President were subject to the doctrine of limitation under Art. 24 of the Constitution, and that for a court to invalidate a legislation or legislative process, there must be sufficient evidence "beyond doubt" to support the same. Justice Mativo also opined that what constitutes public participation by Parliament is weighed based on what was considered reasonable public participation in the circumstances. What was the political economy of the *Havi* case in the LSK establishment, High Court and Court of Appeal? How did that political economy, the politics of the Senior (Counsel) Bar...See Ben Sihanya (forthcoming 2021) "Integrating the law academy, the bar and the bench in Kenya and Africa for constitutional democracy" and the Kenyatta II succession influence the role of LSK under ss. 4 and 6 of the LSK Act following Advocate Nelson Havi's election as LSK President in 2020? See also debates on the appointment of the Chief Justice and Supreme Court of Kenya (SCORK) Justice, 2021 in Chapter 9.8.

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²⁶⁰ See Order 2 of the Civil Procedure Rules....to summarize....and cite case law on the pleadings, affidavits, etc....

²⁶¹ *Ibid.*

²⁶² *Ibid.*

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Significantly, major procedural reforms and simplification had already been made and continue to be made in criminal procedure, especially the elimination of preliminary proceedings in murder trials.²⁶⁵

In civil procedure, constitutional petitions to protect and enforce the Bill of Rights under Articles 22 and 23 embody a simpler and less complex procedure, compared to the judicial review applications for “prerogative orders” under the Civil Procedure Rules²⁶⁶.... While judicial review (JR) under Order 53 is still an option, it is less complex and should be made even simpler to comply with Article 22, 23, 47, and 159 of the Constitution on focusing on substantial justice without undue regard to procedural technicalities.....²⁶⁷ The amendments made to the civil and criminal procedure after 2019 address some of these issues.

Yet mediation and arbitration which generally involved simple filing and procedures are becoming more formal just like litigation. Indeed, the more ADR processes become more formal and standardized, the more procedurally complex they become, thus losing the flexibility (and justice?) of informality.²⁶⁸

Fifth, civil and criminal litigation has the main merit of being reported and being relied on as *stare decisis* (the decision stays). However, this only applies to the decisions of “courts of record” being the High Court, Court of Appeal, and the Supreme Court. Given that magistrate courts and tribunals have jurisdiction on issues including intellectual property (IP), innovation, and technology transfer, and given that some of them deliver considered orders, rulings, and judgements, these should be reported.²⁶⁹

²⁶⁴See Order 2.... See generally George V. Odunga (2006) *Digest on Civil Case Law Procedure*, LawAfrica, Nairobi.

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²⁶⁶ Historically, Judicial review was a voltage industry, with its twin procedure of seeking leave before filing the JR application.... And the leave to file did not always act as a stay.... The JR specialists included Pheroze Nowrojee, the late JR Kowade of M/S Waruhiu, K’Owade and Ng’ang’a Advocates, among others.

²⁶⁷ See *Republic v. Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR, Judicial Review 378 of 2017; *Philomena Mbeti Mwilu v. Director of Public Prosecutions & 3 Others*; *Stanley Muluvi Kiima* (Interested Party); *International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR Petition 295 of 2018; Peter Opondo Kaluma (2009) *Judicial Review in Kenya*, LawAfrica, Nairobi.

²⁶⁸ Cf. the rise and decline of epistolary jurisdiction of the hidden Supreme Court in public interest litigation (PIL) or social action litigation (SAL). Cf. Upendra Baxi (1985) “Taking suffering seriously: Social action litigation in the Supreme Court of India,” 4 *Third World Legal Studies*, 107-132; Rajeev Dhavan (1994) “Law as concern and concern about law: Reflecting on law in development,” *op. cit.*....; Dhavan (1994) “Law as struggle: Public interest law in India,” *op. cit.*....

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Significantly, some cases may not be heard in public,²⁷⁰ or reported or the reports may be redacted.... These rules apply in the hearing and determination of cases on trade secret, confidential information, or know how, under Uganda Trade Secrets Protection Act, 2009....²⁷¹

Most mediation and arbitration cases are not reported²⁷² even though many are analyzed by legal academics and some are cited in litigation...²⁷³ Moreover, mediation and arbitration outcomes bind only the parties. This brings to the fore the debate on precedent: matters in *personam* (binding the conscience, the person) and matters *in rem* which bind the world, like property rights.

There is need for deeper studies and reform on the nexus, and how to reduce the demerits, and enhance the merits of litigation and ADR in Kenya and Africa.

9.11 Promotion, Remuneration, Transfer, Discipline, Demotion, Dismissal of Judges, Magistrates and Judicial Staff in Kenya and Africa

Increasingly, there are debates on the appointment, remuneration, promotion, transfer, discipline, demotion and dismissal of judges, magistrates, judicial officers and staff in Kenya and Africa.

9.11.1 Promotion of Judges, Magistrates and Judicial Staff in Kenya and Africa

Judges are appointed from the subordinate or superior court benches, from the bar,²⁷⁴ from in-house counsel or from the academy.²⁷⁵ The major wave of appointments from the bar began with Mr Evans Johnson Gicheru and Mr Richard Otieno Kwach who were appointed Justices of the Court of Appeal by President Moi in 1988.²⁷⁶

Judges appointed from the academy included justices Prof O.K. Mutungi, Prof J.B. Ojwang', Prof Joel Ngugi, William Musyoka, Mr Steve Katembu Kairu, Dr Willy Mutunga, and Dr Smokin Wanjala.....²⁷⁷

²⁷⁰ Some criminal or civil cases may be heard *in camera* (in appropriate chamber or with a few in court) in entirety or only in some instances....

²⁷¹ See the Uganda Trade Secrets Protection Act, 2009, at <https://ursb.go.ug/the-trade-secrets-protection-act-2009/> (accessed March 26, 2021).

²⁷² Which ones are reported?

²⁷³ Verify.....

²⁷⁴ The major wave of appointments from the bar began with Mr Evans Johnson Gicheru and Mr Richard Otieno Kwach who were appointed Justices of the Court of Appeal by President Moi in 1988?....

²⁷⁵.... The last two served in other occupations or professions between leaving the academy and joining the Judiciary.... How have (erstwhile) law academics and scholars performed on the bench? What must law academics and scholars do to be effective judges, Chief Justices?... i.e. to balance legal and administrative theory, and pragmatism? To balance jurisprudential and constitutional rigour, administrative, procedural and economic efficiency, and prudence, political leadership for judicial independence and accountability?

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²⁷⁷ ...See also Chapter 9.8 on the appointment of the Chief Justice and Supreme Court of Kenya (SCORK) justice 2021; Ben Sihanya (forthcoming 2021) "Integrating the law academy, the bar and the bench in Kenya and Africa,"

Significantly, the interviews for the Chief Justice and Supreme Court Justice in April 2021 are debated in the context of the relationship between the Kenyan law academy and the Judiciary. It is argued that there is need for deeper and more productive engagement or integration among the law academy, the Bar, the Bench, the rest of the Government and the Kenyan people, as the April 2021 interviews for the Chief Justice demonstrated.²⁷⁸

This is partly because the judicial power, function and office and especially the Chief Justice's role require a balance between theory and pragmatism. Relatedly, legal and administrative theory is good but not conceptualism or abstraction. And pragmatism is good but not mechanistic processes. Hence the need for a balance.

At least three (3) issues have arisen. First, the JSC has tended to prefer magistrates or judges....²⁷⁹ Second, judges appointed from the bench have generally been remunerated better.²⁸⁰ Third, while some regard appointment to the Superior Courts from the Subordinate Courts as promotion, others argue that these are different career paths, hence these may be compared as any other (special) appointment not promotion....

9.11.2 Transfer of Judges, Magistrates and Judicial Staff in Kenya and Africa²⁸¹

There have been debates on administrative matters in the Judiciary touching on judges, magistrates, and judicial officers to various stations. How do these affect part heard or other incomplete cases? What do good administrative procedures provide on transfers? What does the

op. cit....Richard Posner (2016) *Divergent Paths: The Academy and the Judiciary*, *op. cit.*... Bork.. Anita Hill and aftermath...Positive engagements in Kenya and Africa.. Academy, Bar training, KSL, pupillage, research assistance, Bar, LSK, ICJ(K), Judiciary, JTI, CLE...

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²⁷⁹ Court of Appeal appointments in 2019.

²⁸⁰ See *Sollo Nzuki v. Salaries and Remunerations Commission & 2 Others* [2019] eKLR (per Justice George V. Odunga, Machakos) The Petitioner argued that remuneration of judges by the SRC was on the basis of whether judges were appointed from “outside the judiciary” or “were serving in the judiciary.” Justice Odunga held that disproportionate remuneration for judges of equal status was discriminatory within the meaning under Art. 27 as read with Art. 41(2) of the Constitution Art. 27 stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law. Art. 41(2) stipulates that every worker has the right to *inter alia*, fair remuneration. Sam Kiplagat (2019) “Judges win Sh 100, 000 per month in pay case,” *Business Daily*, Nairobi, December 18, 2019, at <https://www.businessdailyafrica.com/bd/economy/judges-win-sh100-000-per-month-in-pay-case-2274120> (accessed April 8, 2021)....

²⁸¹To discuss Chief Justice or other judges transfer of cases- from one judge or magistrate to another from one station to another.... E.g the cases in the Moi administration regarding extra-judicial killings (Karanja?) The family was represented by Dr Oki Ooko Ombaka....What of during Kenyatta I, Kibaki? Kenyatta 2? the case in Machakos regarding Magistrate and police officer (killing of an advocate).... See Judiciary (2016) “Transfer of cases from one station to another furthers access to justice” at <http://kenyalaw.org/kenyalawblog/transfer-of-cases-from-one-court-to-another-furthers-access-to-justice/> (accessed 6/5/2020); What about CJ Maraga’s directive in 2018 that all anti-corruption and economic crimes case to be heard in Nairobi. See.....

Judiciary transfer policy provide on reasons for and timelines of initiating and effecting a transfer?²⁸²

.....To discuss transfer of cases....²⁸³

There have been at least three (3) types of transfers. First, voluntary transfer, mainly requested to address personal, family, health, or educational commitments....²⁸⁴ Second, involuntary transfers effected on the practice that some judicial officers should not stay in one station for longer than three (3) years.²⁸⁵ Third, involuntary, political, disciplinary, punitive transfers... These include the post 2014 transfers of Justice George Vincent Odunga,²⁸⁶ Justice Chacha Mwita,²⁸⁷ Justice Wilfrida Okwany....²⁸⁸

What of Justice Mumbi Ngugi's transfer from the Constitutional and Human Rights Division to Kericho in 2017? Did she request it as alleged? Did she succumb to some political pressure for her pre 2015 progressive and principled decisions? What explains her post 2016 decisions and especially following her transfer to lead the Anti-Corruption and Economic Crimes Court in Nairobi? For instance, her decision in the *Moses Kasaine Lenolkulal* case?²⁸⁹

Some judges were transferred from Nairobi to the then less prestigious stations under Moi and A-G Charles Njonjo.²⁹⁰ Some even resigned.²⁹¹

9.11.3 Discipline and vetting of Judges, magistrates and judicial staff in Kenya and Africa.... (to separate Discipline from vetting; to discuss Judiciary Ombudsman and maladministration in the Judiciary....)

What is the rationale or justification for discipline and vetting of judges, magistrates and judicial staff in Kenya and Africa? What is the standard? Why should it be higher in a generally normless

²⁸² Chief Justice Willy Mutunga in his 120 Days speech in 2011 titled "Progress Report on the Transformation of the Judiciary the First Hundred and Twenty Days."

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²⁸⁵ To verify.

²⁸⁶ Kenya Law Reports (eKLR) (2018) "High Court Judge's postings: Transfer of High Court Judges with effect from April 4, 2018," at <http://www.kenyalaw.org/kl/index.php?id=4685> (accessed April 7, 2021); Justices George Vincent Odunga, Chacha Mwita and Wilfrida Okwany in Kamau Muthoni (2019) "Chief Justice moves five judges," *Standard*, Nairobi, February 4, 2019, at <https://www.standardmedia.co.ke/nairobi/article/2001311985/chief-justice-moves-five-judges> (accessed April 7, 2021).

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²⁸⁹ *Moses Kasaine Lenolkulal v. Director of Public Prosecution* [2019] Eklr (ACC. Rev. Application No. 25. Of 2019); *Ferdinand Ndungu Waititu Baba Yao & 12 Others v. Republic* [2019] eKLR, Anti-Corruption Revision No. 30 Of 2019 Consolidated with (Revision Application No. 29 & 31 of 2019); *Ferdinand Ndung'u Waititu Babayao v. Republic* [2019] eKLR, Civil Appeal No. 416 of 2019.

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or ethos-less (normless?) Kenyan public service?²⁹² Is it unfair to insist that judges, magistrates and judicial staff should be like Caesar's wife, blameless....²⁹³ Who judges the judges?²⁹⁴

What is the role of professional bodies in their discipline? The role of courts?

At the Bomas constitutional negotiations, there were two (2) extreme views on judicial reform. First, the human rights activists and Kenyans generally sought to have all judges and magistrates resign and leave office upon the Draft Bomas Constitution 2004 coming into force. Second, the judges generally argued that the Judiciary should not be discussed at, nor reformed through Bomas. They filed a case in court....²⁹⁵ The compromise was the vetting....²⁹⁶ First, what were the principles and rules? Second, the process? Third, the outcome and impact on the Judiciary? On the legal profession and justice systems in Kenya?

9.11.4 Judicial Disciplinary, Dismissal processes and Tribunals in Kenya and Africa²⁹⁷

The discipline and dismissal of judges has been conducted using at least three (3) methods. First, judicial tribunals under the Constitution. Second, the Ringera report, 2003.²⁹⁸ And third, through the Judges and Magistrates Vetting Board, a transitional measure under section 23 of the Sixth Schedule.

In the late 1990s, there were national and international concerns regarding judicial incompetence, inefficiency and corruption. Section 17, Constitution of Kenya Review Act, mandated the Constitution of Kenya Review Commission to:

“examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary.”

²⁹² Numerous reform initiatives and especially BBI Report 2020, were based on normless less; anomie.... Cf. Emile Durkheim's structural functionalist theories of society; Hans Kelsen's normative system; Max Weber's legitimacy or legitimate domination, including legal rationality, values (charisma and tradition) and legal sociology generally.... See also Chapter 8 on Executive Power, Functions and Structure in Kenya and Africa....

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²⁹⁴ Should Judges, magistrates, and Kadhis be held to abstract standards when the Public Service have been corrupted by the President and Executive generally? See proposed Art. 172 (Office of the Judiciary Ombudsman) in the Constitution of Kenya (Amendment) Bill, 2020; JB Ojwang' (2011) "Judicial Ethics and Judges? Conduct: The complaints mechanism," at <http://kenyalaw.org/kl/index.php?id=1937> (accessed March 30, 2021).

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²⁹⁶ See Chapters 9 and 10....

²⁹⁷ Criminal? Civil?....

²⁹⁸ Report of the Integrity and Anti-Corruption Committee of the Judiciary, 2003 (Ringera Report).... Report of the Committee on the Administration of Justice, 1998 (Kwach Report)....

This mandate was specifically carried through the constitutional reform process and debates in 2004, and tribunals to address judicial incompetence, corruption and rule of law in the Kenyan Judiciary.

9.11.4.1 The Kwach Committee on the Administration of Justice Report in Kenya and Africa

The Richard Kwach Committee was appointed on January 7, 1998 to investigate and recommend reforms to ensure proper administration of justice. The Committee made recommendations with specific focus on judicial rectitude, remuneration, and privileges including Mercedes Benzes.²⁹⁹ The two recommendations were implemented... under the Daniel arap Moi presidency that was keen to make judges and magistrates happy as long as they supported his dictatorial ethnic kleptocracy.³⁰⁰

The Kwach committee also proposed that the vetting process of judges including the Chief Justice should be more competitive, merit-based and fair. It stated:

“...rigorous vetting is necessary before appointment of judicial officers. The appointments process must be transparent and tailored to identify individuals of the highest integrity for recruitment. There must be a transparent and merit-based judicial appointment system.”

However, the then Chief Justice Benard Chunga did not fully implement the Kwach Committee report before his ouster....³⁰¹

9.11.4.2 The Panel of Eminent Judges in Kenya and Africa

The panel of eminent Commonwealth judges made several findings on judicial corruption especially allegations of bribery in the Judiciary and misconduct of judges.³⁰² The then Chief Justice Bernard Chunga casually dismissed their findings. He argued that.....³⁰³

The Report of the panel of eminent judges proposed fundamental legal, institutional and administrative reform and restructuring of the Judiciary. This was partly due to the increased negative public perception and lack of public confidence in the independence of the Judiciary.

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³⁰¹ See Gazette Notice (2003) “Appointment of Members of a Tribunal to investigate the conduct of the Honourable Justice Bernard Chunga, Chief Justice of Kenya,” Vol. CV(21) February 21, 2003.

³⁰² Report of the Advisory Panel of Eminent Commonwealth Judicial Experts (2002) “The Kenya Judiciary in the New Constitution,” Constitutional Review Commission, at <https://gazettes.africa/archive/ke/2003/ke-government-gazette-dated-2003-02-21-no-21.pdf> (accessed March 30, 2021).

³⁰³ He sarcastically posed: “experts for what and for whom?” See Consumers Federation of Kenya (COFEK) (2019) “Ex-CJ Benard Chunga to chair DPP taskforce on inspectorate unit,” June 28, 2019, at <http://www.cofek.co.ke/index.php/news-and-media/2452-ex-cj-benard-chunga-to-chair-dpp-taskforce-on-inspectorate-unit> (accessed April 6, 2021);....

9.11.4.3 The Ringera Committee Report: “Radical Surgery in the Judiciary”

The Moi succession and ...Kibaki NARC administration were influenced by debate and especially rhetoric on “radical surgery” in the Judiciary.³⁰⁴

In 2003, Justice Aaron Ringera was appointed by Chief Justice Gicheru to chair the Integrity and Anti-Corruption Committee of the Judiciary in Kenya.

The terms of reference (ToR)? The Committee was tasked with investigating the then rampant corruption in the Judiciary. This was affecting the dispensation of justice, access to justice and exacerbating the negative public perception towards the Judiciary.

Committee members?³⁰⁵

The Ringera report recommended the resignation or dismissal of judges and magistrates in what the Kibaki-Gicheru-Kiraitu and Ringera system popularized as “radical surgery.”³⁰⁶

The report led to the resignation of 18 judges of the High Court, 5 Court of Appeal judges, 82 magistrates, and 142 judges of subordinate courts. Some of the judges including Justice Philip Waki successfully challenged the recommendations on the grounds of lack of due process,³⁰⁷ and non-adherence to the principles of natural justice....³⁰⁸ The publication of the “List of shame” was also criticized for compromising the security of tenure of the judges, since they were forced to resign or face suspension without benefits.

In all these, the guidelines should have been the Constitution, the law, the Bangalore Principles of judicial independence.³⁰⁹ ...and the Commonwealth House (Latimer) principles....³¹⁰

But the main objective was largely met: Pack courts with Kikuyu judges and magistrates most of who had preferred the private Bar and jobs in parastatals, state corporations or related ministries, departments and agencies (MDAs), and semi-autonomous Governmental agencies (SAGAs).

That was as long as the Kenyatta I administration extended to them Government work or briefs and related State largesse,³¹¹ or part of what Prof ES Atieno Odhiambo calls the “Kenyatta

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³⁰⁶ ...International Commission of Jurists (ICJ) (2005) “Kenya: Judicial Independence, Corruption and Reform,” at
³⁰⁷ “Uncorroborated evidence,” at https://www.icj.org/wp-content/uploads/2012/04/kenya_judicial_independence_report_2005.pdf (accessed March 30, 2021)....

³⁰⁸ ...*Ibid.* In the post 2010 dispensation, these are now stipulated under Art. 47 on fair administrative action and the Fair Administrative Action Act (FAAA), 2015....

³⁰⁹ ...See the United Nations Office on Drugs and Crime (UNODC) (2002) “Bangalore principles of Judicial conduct,” at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (accessed March 30, 2021)....

³¹⁰ Commonwealth (2004) “Latimer House Principles,” <https://thecommonwealth.org/history-of-the-commonwealth/latimer-principles> (accessed March 30, 2021). These were debated in the BBI process, especially on the composition of the Judicial Service Commission (JSC)... See Sihanya due 2021) “BBI and constitutional reform debates on the Legislature, the Executive, the Judiciary, the Bill of Rights and Devolution,”....

³¹¹ Firms close to Njonjo and Kenyatta I and their affiliated tribal elites monopolized and overcharged for Government briefs.

bequest”....³¹² They also preferred the private Bar as long as the Judiciary paid poorly and since the Judiciary was simply that - a service.³¹³

And when Moi took over, he embarked on massive training of Kalenjin lawyers to take over the Bar and Bench³¹⁴....

When later Ringera sought to be a Supreme Court judge of CJ, he was confronted with arguments and evidence of his denial of fair administrative action, due process and natural justice or dismissal of judges without evidence.³¹⁵ He pleaded he had been young.... Young?

By 2003, Ringera was 53 (DOB 1950) and had been the holder of LLB and LLM degrees,a Kenyan advocate, Senior Lecturer, in evidence, and human rights, no less, Head of the Department of Public Law at the University of Nairobi Law Faculty (later Law School). He even acted as Dean on occasions, He had been a Partner,³¹⁶ Solicitor General, Judge?³¹⁷

Through their rabid tribal, bigotry, malice and reckless conduct, Kibaki, Gicheru, Kiraitu and Ringera selectively and clinically killed many careers and livelihoods which had been built painstakingly over the years.³¹⁸

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³¹⁵ Peter Mwaura (2013) “Is Justice Ringera fit to lead JSC probe?” *Daily Nation*, Nairobi, December 6, 2013, at <https://www.nation.co.ke/oped/opinion/Aaron-Ringera-Judicial-Service-Commission-Tribunal/440808-2102012-5hj0k0/index.html> (accessed 5/5/20); Kamau Muthoni (2016) “Judiciary ‘radical surgery’ haunts Ringera in Chief Justice interview,” *Standard*, Nairobi, September 7, 2016, at <https://www.standardmedia.co.ke/article/2000215004/judiciary-radical-surgery-haunts-ringera-in-chief-justice-interview> (accessed 5/5/2020); Patrick Lang’at (2016) “Judiciary “radical surgery” in 2013 comes back to haunt Aaron Ringera at JSC interview,” *Daily Nation*, Nairobi, at <https://www.nation.co.ke/news/Judiciary-radical-surgery-haunts-Ringera-at-CJ-interview/1056-3371126-15ma6p3/index.html> (accessed 5/5/20).

³¹⁶ He had been a partner at M/S Kamau Kuria Kiraitu and Ringera Advocates, and at M/S Oraro (and Rachier?) Advocates.... Cf. Ringera’s arguments regarding his role as Director of Kenya Anti-Corruption Authority Committee (KACA)....That two judges had been chairs of Kenya Law Reform Commission (KLRC). See...; [to discuss in]... See Chapter 3 on “Constitutional Values, Principles, Policies and Politics in Kenya and Africa.”

³¹⁷See also Prof Patricia Kameri Mbote’s assertion that she was “young and restless” in her 40s when she made decisions on starting a law school at Strathmore as the Dean between 2009 to 2012 and when the authorship issues arose. . See Kamau Muthoni (2021) “Hunt for CJ: Law professor grilled on academic breach,” *Standard*, Nairobi, April 14, 2021, at <https://www.standardmedia.co.ke/nairobi/article/2001409574/hunt-for-cj-law-professor-patricia-kameri-grilled-on-academic-breach> (accessed April 14, 2021); See also Chapter 9.8 on appointment Chief Justice and Supreme Court Justice in 2021. In both cases did the matter complained of at that time stop? In both cases was there remedial action or an apology.....in the context of the Supreme Court Justice interviews 2016 and 2021? Cf .. *Trusted Society v. Mumo Matemu* five judge the HC decision vis a vis the Court of Appeal, and SA authorities on moving on after an integrity challenge... Saul becoming Paul...

³¹⁸e.g.....cf. Selective “political justice” under Kibaki and Mutunga’s Judges and Magistrates Vetting Board (JMVB) under Sharad Rao....cf. those found unsuitable: Okubasu, Omolo, Bosire, Nyamu vis-à-vis those found suitable...Erastus Githinji, Alnasir Visram (who were gate keepers) in the Moi,-Kibaki-Kenyatta 2 administrations....

Those who live by manipulating the law like Aaron Ringera, Kiraitu, Gicheru,³¹⁹ Benard Chunga, Cahrles Njonjo, Kibaki.... shall die by the law.... professionally... politically... like Charles Njonjo...³²⁰

9.11.5 Judicial Tribunals in Kenya and Africa: Rules, Composition, Process, Evidence and Determinations

Significantly, judicial disciplinary tribunals include the tribunals on Justice JB Ojwang (Supreme Court of the Republic of Kenya (SCORK)),³²¹ Justice (Rtd) Nancy Baraza (Deputy Chief Justice (DCJ)),³²² Supreme Court of the Republic of Kenya (SCORK); Justice Philip K. Tunoi,³²³ Justice Joseph Mbalu Mutava,³²⁴ Justice Martin Muya....³²⁵

9.11.5.1 Sources of Power and Rules on Judicial Tribunals

There are at least three (3) sources of rules on judicial tribunals in Kenya among others. First, Constitution of Kenya 2010. Article 169(1)(d) states:

“any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).”

Article 169(2) states:

“Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).”

³¹⁹ Kibaki later announced Kiraitu’s “resignation” following Anglo-Leasing. Kiraitu deal with the ethical, legal and political issues through poetry....and vanished in Peter Kagwanja (2012) *Kiraitu Murungi: An Odyssey in Kenyan Politics*, Kenway Publications, Nairobi.

³²⁰See the Miller (Njonjo) Commission of Inquiry.... See also Chapter 10 of CODRALKA 1 on Judicial Power, Structure, and Independent Accountability in Kenya and Africa....

³²¹ ...Kamau Muthoni (2019) “Why tribunal cleared Ojwang’ and indicted the Judicial Service Commission,” *Standard*, Nairobi, August 6, 2019, at <https://www.standardmedia.co.ke/nairobi/article/2001336934/why-tribunal-cleared-ojwang-and-indicted-the-judicial-commission> (accessed March 29, 2021).

³²² ...See the *Report and Recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza* [2012] eKLR.

³²³Nzau Musau (2016) “Secrets of Justice Philip Tunoi tribunal report to President Uhuru,” *Standard*, Nairobi, December 4, 2016, at <https://www.standardmedia.co.ke/kenya/article/2000225681/secrets-of-justice-philip-tunoi-tribunal-report-to-president-uhuru> (accessed March 29, 2021).

³²⁴ Nancy Agutu (2019) “Uhuru fires judge Joseph Mutava for gross misconduct,” *Star*, Nairobi, April 4, 2019, at <https://www.the-star.co.ke/news/2019-04-04-uhuru-fires-judge-joseph-mutava-for-gross-misconduct/> (accessed 20/4/2020).

³²⁵ Moses Njagi (2020) “Tribunal asks President Uhuru to sack Justice Muya for gross misconduct,” *Standard*, Nairobi, March 21, 2020, at <https://www.standardmedia.co.ke/article/2001365034/tribunal-asks-president-to-sack-judge-for-misconduct> (accessed 20/4/2020).

This constitutional provision mandates Parliament to make legislation on the rules and procedures regards the operations of tribunals as created under Art. 169(1) Constitution of Kenya 2010.³²⁶

Second, Article (172?)....

Third, Judicial Service Act, 2011....

Equally significant are include tribunals on Chief Justice Bernard Chunga (stillborn),³²⁷ Waki,³²⁸ Nambuye,³²⁹ and Moijo ole Keiwua,³³⁰

.....

9.11.5.2 Constitution and Composition of Judicial Tribunals in Kenya and Africa

How and when are these tribunals constituted? By whom? For what?³³¹

9.11.5.3 Procedures and Evidence in Judicial Tribunals in Kenya and Africa

Are there any (mandatory) procedures? (for example composition and quorum? What is the role of assisting counsel?³³² What is the evidentiary burden³³³ and standard³³⁴ (of proof), among others?³³⁵

9.11.5.4 Determinations of Judicial Tribunals in Kenya and Africa

Numerous tribunals were established and most of their decisions contested in the High Court in the context of the “radical surgery” following the Ringera report.³³⁶ As discussed, these were

³²⁶ Cf. Draft Tribunals Bill, 2015....quote....

³²⁷ Chunga was hounded out of office through demonstrations organized by the Kiraitu-Kibaki group, in the same way the Njonjo team hounded out the first African Chief Justice, Maluki Kitili Mwendwa in the wake of coup attempt allegations. Chunga was replaced by Evans Gicheru who facilitated the rigging and swearing in of Kibaki at night in 2007. The long term rigging process was partly facilitated by former Chief Justice Gicheru’s appointment of only one judge to hear all judicial review applications, and in Nairobi. The judge was always pro-Executive And CJ Gicheru rushed to swear in Kibaki at State House ... as a dispute raged on the validity of the Presidential vote.... See also Chapter 8, 9, 10, 11, 12 of CODRALKA 1.....

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³³² This was controversial in the Goldenberg inquiry where Kamau Kuria was overbearing; always invoking the name of the then appointing authority- President Kibaki.

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³³⁶ Kyela Fraser Leakey and Ben Sihanya (August 2004) a study for Transparency International (Kenya) on Anti-corruption Measures v. Independence of the Judiciary in Kenya....

mainly intended for tribal dominance or personnel changes in the Judiciary rather than judicial reforms and thus constitute a dangerous precedent....

How do the Kibaki-Gicheru-Kiraitu- Ringera “radical surgery” or judiciary pogroms and purges relate to the disciplinary matters ... regarding other judges and judicial officers?

Some have sought to compare the purge to the matters regarding former DCJ Nancy Baraza and former Chief Registrar of the Judiciary, Gladys Boss Shollei,³³⁷ and the case of DCJ Philomena Mwilu?³³⁸ And what of the Justice GBM Kariuki murder case?³³⁹

Some argued that the women have been treated unfairly under the rules and also in comparison to men. Others argue that political and tribal³⁴⁰ interests played a greater role than gender. What is the role of the DPP, Commission on Administration of Justice (CAJ) and National Gender and Equality Commission (NGEC) in disciplinary and quasi-judicial matters...³⁴¹

In the BBI debates, the JSC submitted that there should be a distinction between cases that lead to JSC recommending a tribunal to dismiss a judge which may turn a retention verdict,³⁴² and JSC being able to otherwise discipline judges without a tribunal...³⁴³ Clause 43 of the Constitution of Kenya (Amendment) Bill 2020 proposed an amendment to Article 172 COK 2010 to provide that JSC may “receive complaints against judges, investigate and discipline judges by warning, reprimanding or suspending a judge.”

9.12 Retirement Age for Judges, Magistrates, and Judicial Officers in Kenya and Africa

What is the constitutional and legal age of judges, magistrates and judicial officers in Afro-Kenyan constitutional democracy? Article 167 of the Constitution provides that “a judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.”

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³³⁸ ...See also *Okiya Omtatah Okiiti v. Judicial Service Commission; Philomena Mbeti Mwilu & Another (Interested Parties)* [2021] eKLR which sought at least three matters. First, to block the DCJ from assuming the Office of Chief Justice upon retirement of former CJ David Maraga. Second, a declaration that the JSC had violated the Constitution by failing to hear four (4) petitions against DCJ Mwilu for her removal. Third, a compelling order against the JSC to hear and determine the 4 petitions; Sam Kiplagat (2021) “Court lifts order barring deputy CJ Mwilu from office,” *Business Daily*, Nairobi, February 1, 2021, at <https://www.businessdailyafrica.com/bd/news/court-lifts-order-barring-deputy-cj-mwilu-from-office--3276442> (accessed March 29, 2021). ...

³³⁹ ...See Justice George V. Odunga awarded Justice GBM Kariuki KES 5 Million as general damages for malicious prosecution in *G.B.M Kariuki v. Attorney General* [2016] eKLR; Sam Kiplagat (2016) “Judge GBM awarded Sh5m for ‘malicious’ prosecution,” *Star*, Nairobi, January 19, 2016, at <https://www.the-star.co.ke/news/2016-01-19-judge-gbm-awarded-sh5m-for-malicious-prosecution/> (accessed March 29, 2021).

³⁴⁰

³⁴¹ Cf. Arts. 59 (Kenya National Human Rights and Equality Commission)...Art. 157 (Director of Public Prosecutions),... Office of the Director of Public Prosecution Act, 2013; Prosecution Policy Guidelines, National Prosecution Policy, 2015; Commission on Administrative Justice (CAJ) Act, 2011 (CAJ), Commission on Administrative Justice Act Regulations 2013

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³⁴³

The retirement age was to be determined by statute under section 62 of the 1969 Constitution. Section 62(1) stated:

“Subject to this section, a judge of the High Court³⁴⁴ shall vacate his office when he attains such age as may be prescribed by Parliament.”

Section 61(2) of the Constitution, 1969 (as amended) as read with section 9 of the Judicature Act provided for 74 years as at 27/8/2010, the effective date of the 2010 Constitution. Article 167(1) provides:

“A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.”

The provision was later amended to 70 years:

“(1) subject to subsection (2), the age at which a person holding the office of a judge shall retire shall be seventy (70) years.”

And added:

“(2) Notwithstanding subsection (1), a person holding the office of a judge may elect to vacate office at any time after attaining the age of sixty five (65) years.”³⁴⁵

Article 167(2), (3) and (4) make special provisions regarding the retirement (age) of the Chief Justice as follows:

“(2) The Chief Justice shall hold office for a maximum of ten years or until retiring under clause (1), whichever is the earlier.

(3) If the Chief Justice's term of office expires before the Chief Justice retires under clause (1), the Chief Justice may continue in office as a judge of the Supreme Court.

(4) If, on the expiry of the term of office of a Chief Justice, the Chief Justice opts to remain on the Supreme Court under clause (3), the next person appointed as Chief Justice may be selected in accordance with Article 166 (1), even though that appointment may result in there being more than the maximum permitted number of Supreme Court judges holding office.”

The question of the tenure of judicial officers has been widely debated in various jurisdictions, with regard to succession and transition, ensuring continuity in the Judiciary and safeguarding the Judicial independence against interference by the other arms of Government, especially the Executive.

³⁴⁴ Why not the Court of Appeal?

³⁴⁵ Did Chief Justice Mutunga retire one year earlier (at 69) in 2016 to allow appointment of his succession in readiness for the August 2017 General Elections? Or was 70? He spoke of errors in his identification documents. See....

9.12.1 Retirement of Magistrates, Kadhis, Judicial Officers and Judicial Staff in Kenya and Africa

What are the retirement ages of magistrates, Kadhis,³⁴⁶ Commissioners of Assize, chairpersons and members of judicial and quasi-judicial tribunals?³⁴⁷

9.12.2 Retirement of Judges in Kenya and Africa

The judicial retirement age had (reportedly) been the same for all judges. It changed from 68 to 70, to 72 to 74 under the 1969 Constitution and the Judicature Act, Cap 8. It is argued that these were changed at the influence of the then Attorney-General (A-G) Charles Njonjo and President Jomo Kenyatta who wished to retain the malleable Sir James Wicks as Chief Justice.³⁴⁸

In the US, Supreme Court justices serve for life. There may be a vacancy on early retirement,³⁴⁹ impeachment,³⁵⁰ or death.³⁵¹ Is there need to amend the Constitution of Kenya on the retirement age at 70? Some argued that 75 is generally fine for Supreme Court Judges,³⁵² organic³⁵³ or super

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³⁴⁷ In April 2020, Kenyans questioned the appointment of Justice (Rtd) Erastus Mwaniki Githinji as the Chairperson of the Tax Appeals Tribunal. The Chairperson should be one qualified to be a judge. At the time of his appointment, Justice (Rtd) Githinji had retired after attaining the age of 70 years. Yet there are so many young(er) and better qualified Kenyans. The judge had been retrogressive in the High Court and Court of Appeal and nicknamed “an enemy of the Constitution....” See *Chama Cha Mawakili v. CS Finance Ukuru Yattani*, Justice (Rtd) Githinji....; Maureen Kakah (2020) “Court blocks Erastus Githinji’s appointment to Tax Appeals Tribunal,” *Daily Nation*, Nairobi, April 30, 2020, at <https://www.nation.co.ke/news/Court-blocks-Justice-Erastus-Githinji-appointment/1056-5538816-b716hz/index.html> (accessed 5/5/20).

³⁴⁸ Edit, cross ref with earlier discussions on retirement.... Most of the points on retirement should be in this section-not earlier....

³⁴⁹ For instance, Justice Anthony McLeod Kennedy (“the decider”) (1988-2018) to give President Donald J. Trump an opportunity to appoint a Republican successor? He had been appointed by President Ronald Reagan.... What of Justice Sandra Day O’Connor voting in favour of Bush in *George W. Bush v. Gore* (2000) mainly because she intended to retire under a republican President who would appoint her successor? See *Bush v. Gore* 531 U.S. 98 (2000)....

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³⁵¹ E.g....

³⁵² See the rulings by the various judges of the supreme Court in *Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v. Judicial Service Commission & Judiciary* [2016] eKLR, Petition No. 11 & 12 of 2016. Cf. Ben Sihanya (2016) “Judges exit age ruling laudable,” *Standard Digital*, Nairobi, June 17, 2016, at <https://www.standardmedia.co.ke/article/2000205523/judges-exit-age-ruling-laudable> (25/3/2020); Sunday Nation Team (2015) “Judges’ retirement age row and its role in 2017 polls,” *Daily Nation*, Nairobi, August 15, 2015., at <https://www.nation.co.ke/news/politics/Judges-Retirement-Judiciary-Constitution-General-Election/1064-2834624-vtpj54z/index.html> (accessed 25/3/2020); Special Correspondent (2019) “Kenya’s Supreme Court: Old wine in new bottles,” *The Elephant*, Nairobi, May 16, 2019, at <https://www.theelephant.info/features/2019/05/16/kenyas-supreme-court-old-wine-in-new-bottles/> (accessed 25/3/2020).

³⁵³ Organic scholars and intellectuals in the sense used by the Italian neo-Marxist Antonio Gramsci.... See Gramsci (1999) *Prison Note Books*, Elec Books, London; Issa Shivji (2019) “The battle of ideas: the social responsibility of intellectuals in building counter-hegemony,” *The Elephant*, February 9, 2019, at <https://www.theelephant.info/oped/2019/02/09/battle-of-ideas-the-social-responsibility-of-intellectuals-in-building-counter-hegemonies/> (accessed 5/5/20); Issa Shivji (2018) “The metamorphosis of the revolutionary intellectuals,” *Agrarian South: Journal of Political Economy*,...; ES Atieno Odhiambo (2005) “Hegemonic enterprises & instrumentalities of survival: Ethnicity and democracy in Kenya,” at B. Berman, W. Kymlicka, & D. Eyoh (Eds.) *Ethnicity and Democracy in Africa* Boydell & Brewer, 167-182....

professors,³⁵⁴ or some (progressive) Presidents or premiers.³⁵⁵ What of the youth bulge? Was the composition, appointment and poor performance of many “oldies”³⁵⁶ without special qualifications in the Kenyatta-Ruto administration a major motivation for the argument by the youth that all ought to retire at 50 or 55 years?³⁵⁷

The retirement (age) of judges is becoming contentious partly because of questions regarding their individual and collective (poor) performance,³⁵⁸ the demand for judicial opportunities and increased numbers of qualified candidates who occupy occupations that are (economically) suboptimal....

The people of Kenya won a major battle in the Supreme Court’s decision of June 14 and June 16, 2016.³⁵⁹ There were four key outcomes. First, the retirement age for judges is constitutional and remains 70 years as stipulated in the Constitution and not 74 years.

Second, the Supreme Court reversed the unconstitutional, illegal and irregular orders of Justice Njoki Ndung’u of May 27, 2016 that had enabled Deputy Chief Justice Rawal and Justice Tunoi to cling to public office like a property right despite the High Court³⁶⁰ and Court of Appeal decisions.³⁶¹

The Court of Appeal decision would stand. Third, Justices Ibrahim and Wanjala opined that there may be public perception they are likely to be biased, partial or conflicted.

And fourth, at that time, the Supreme Court did not have the five judges required under Article 163 to hear the intended appeal. The Judicial Service Commission had declared the vacancies under Part II of the Judicial Service Act.³⁶² But the Government Printer had declined to publish a Special Gazette notice on June 15, 2016.³⁶³

The Supreme Court’s decision was largely a 3:2. That is the Chief Justice, Justices Ibrahim and Wanjala on the one hand, and Justices Ojwang and Njoki on the other.³⁶⁴

³⁵⁴ As opposed to pseudo scholars and political professors.

³⁵⁵ See debates on presidential or premier age in Kenya in Chapters 8, 11 and 12 of CODRALKA 1 on “Executive Power, Function, and Structure in Kenya and Africa: Concepts, Theory and History (Practice, Tradition, Custom, Convention); on “President and Deputy President in Kenya and Africa” respectively).

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³⁵⁷ See (tabulate) newspapers on the list of elderly appointees without any special qualifications...

³⁵⁸ This includes incompetence, contrived decisions, retrogressive jurisprudence, and corruption...

³⁵⁹ Portions of this part were first published as a newspaper article. See Ben Sihanya (2016) “Judges exit age ruling laudable,” *Standard*, Nairobi, 17/6/2016, at <https://www.standardmedia.co.ke/article/2000205523/judges-exit-age-ruling-laudable> (accessed 26/11/2019). The current author developed the article from an earlier Facebook post, upon the request of *Standard* Managing Editor, Mr Kipkoech Tanui.

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The Court had decided and became *functus officio* or was no longer empowered to act especially because they ruled that they are incompetent or impartial. Moreover, there couldn't be an impartial Supreme Court bench in that period as decided on June 16, 2016.

What are the highlights of the opinions? First, Justice Ibrahim was reflective and contrite about some decisions he had made including his perspectives on 74 years. He sought to clarify the conflict of interest generally and in this case. He disagreed that “necessity” required them to sit.³⁶⁵ To him, public interest, integrity, justice and the judicial oath were key in delivering justice.

Justice Wanjala “clarified” the Chief Justice’s administrative role vis-a-vis other judges.³⁶⁶ And that Justice Njoki’s decision was irregular partly because she set hearing dates which is the CJ’s function in consultation with the Supreme Court Registrar under the Supreme Court Act.³⁶⁷ Justice Wanjala recused himself since he had participated in the JSC committee that made the decision to implement the constitutional retirement age.³⁶⁸

Former Chief Justice Willy Mutunga emphasized on what he called the CJ’s “monarchical” powers but which had been checked by powers of the President of the Court of Appeal and the Principal Judge of the High Court. Checks also applied to individual judges.

He insisted that it was right for him to bring forward the inter-party hearing by constituting the five-judge bench to hear the matter. Justice Rawal had actually moved to Njoki with lightning speed claiming urgency but Kalpana Rawal and Tunoi who sit in the Supreme Court were now unhappy with a date earlier than Justice Njoki’s June 24. He was “baffled.” It was also the CJ’s opinion that the national values and principles of good governance, integrity, accountability and transparency must be the guiding principles³⁶⁹ of the Judiciary.³⁷⁰

He expressed a middle-ground opinion on disqualification or recusal and on other issues. Pragmatism? Reaching out to both sides of the bench? Justice Ojwang and Njoki largely dealt with issues in a doctrinal, general and contrived manner.³⁷¹

They opined that Justice Njoki had the power to hear the Rawal application alone and that the CJ had no power to countermand her decision.³⁷²

Justice Njoki Ndung’u agreed. And that the five-judge bench was competent. That JSC will always have two Supreme Court Judges and that the JSC will continue to be a litigant. That it

³⁶⁵ Necessity is partly a Kelsenian concept and argument... to justify his theory of revolutionary legality..... See Chapter 9 below on Judiciary in Crises and Revolutionary Situations in Kenya and Africa.

³⁶⁶ To quote....

³⁶⁷ To quote...

³⁶⁸

³⁶⁹ See Art 10 of the Constitution. See also Chapter 3 above on Constitutional Values, Principles, Policies and Politics: Agency and structure in Kenya and Africa.

³⁷⁰

³⁷¹ To quote....

³⁷²

cannot be right that the Supreme Court cannot in any case hear JSC matters. Sometimes the facts or the law were manipulated especially by Njoki. She focused on the Supreme Court Act, 2011, Rules, and Regulations to justify her one-judge decision rather than Article 163(2), which requires five judges for any “proceedings.”

To her, those were “not proceedings.” Both were emotional and temperamental. Justice Njoki changed from calm, to smiling, to anger. Justice JB Ojwang’ started off collected but appeared angry most of the time. However, he was less angry than during the arguments by JSC lawyers and Mr Okiya Omtatah, the interested party and the applicant whose preliminary objections were key. Both Justices have never shown any (keen) activism, passion, interest or emotions for justice, for instance, in the Presidential election petitions of *Raila v. IEBC* of both 2013³⁷³ and 2017.³⁷⁴

They claimed that the petitioners could also be called “ordinary” litigants facing a State agency, yet the two were super litigants. The two justices took most of the court’s six or so hours. Remarkably, the two justices (Petitioners) selectively relied on the case of *Mukisa Biscuits* as the basis of throwing out Omtatah’s preliminary objections, claiming he had emphasised contested facts.³⁷⁵

Yet the retiring judges’ objections were not subjected to the same test. This was a procedural technicality that under Article 159, should not bar a litigant’s quest for justice.³⁷⁶

Significantly, there was better judicial, administrative and intellectual leadership from the Chief Justice (CJ). Kenyans won a fight for the rule of law, justice and constitutional democracy. But the court remains politically and ideologically divided well into the 2017 presidential election petitions and beyond... This is partly a legacy of Chief Justice Willy Mutunga’s inability to lead the Supreme Court and the Judiciary administratively, judicially, and ideologically from day one and especially his cow-towing to the Kibaki-Kenyatta faction in the 2013 presidential elections.³⁷⁷

³⁷³ *Raila Odinga v. Independent Electoral and Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta and William Samoei Ruto*, Supreme Court Petition No. 5 of 2013, at Nairobi.

³⁷⁴ *Raila Odinga & Stephen Kalonzo Musyoka v. Independent Electoral & Boundaries Commission & 2 Others*, Presidential Election Petition No. 1 of 2017. In both petitions, they were passionately supportive of the status quo; the sitting President....

³⁷⁵ *Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors* [1969] EA 696; To clarify the point in *Mukisa Biscuits* and how and why it was misapplied....

³⁷⁶ To clarify....

³⁷⁷ See Ben Sihanya (forthcoming 2021) CODRALKA 1 & 2 especially Chapter 29 on Presidential election in Kenya 2013, 2017 and beyond; See also critique by Yash Ghai, Makau Mutua, Wachira Maina, Maina Kiai, George Kegoro, John Githongo....

My argument has been that the people of Kenya won a major battle in the Supreme Court's decision of June 14 and June 16, 2016 when the Supreme Court of Kenya failed to affirm the Court of Appeal's decision of the Judges retirement age as 70.³⁷⁸

9.13 Judicial Independent Accountability in Kenya and Africa³⁷⁹

What is judicial accountability? Independent accountability? What is the constitutional and legal framework on judicial independent accountability in Kenya and Africa? What is the constitutional sociology (including juridical or legal method) and political economy informing judicial independent accountability in Kenya and Africa? Is there correlation or connection between judicial independent accountability and sustainable development?

Judicial independence encompasses independence of courts from the control of the Executive, the Legislature and other agencies. Article 1 of the UN Basic Principles of the Independence of the Judiciary stipulates that states have an obligation towards ensuring the independence of the Judiciary through constitutionalizing. This was part of the recommendations of the Panel of Eminent persons in 2002 who proposed the vesting of judicial powers in the Constitution of Kenya to safeguard the functional and institutional independence of the Judiciary.

Independence and accountability of the Judiciary are key to the realization of the rule of law, social, political, cultural, technological and economic stability of any state. Judicial independence is two-fold: First, it includes institutional and individual independence. Judicial independence is provided for under Article 160 (independence of the judiciary) of the Constitution:

- “(1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
- (2) The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office.”

³⁷⁸ See analysis in Ben Sihanya (2016) “Judges exit age ruling laudable,” *Standard*, Nairobi, June 17, 2016, at 14, at <http://www.standardmedia.co.ke/article/2000205523/judges-exit-age-ruling-laudable/?pageNo=2> (accessed 10/12/2018). Constitutionally, the retirement age is 70. Some lawyers I have discussed this matter with opine that judges (and I can add professors and presidential or premier politicians) are not over age while some are mature at or beyond 70. The matter needs further debate even as we implement the 70 year retirement age rule. For instance, for professors, emeritus professor position should be partialised in Kenya and Africa.....

³⁷⁹ See also Chapter 10.8 on Securing Independence, Performance and Accountability of the Judiciary in Kenya and Africa below.... Independence and accountability of the Judiciary; Judicial Service Commission.... Should be treated as separate from and also as intertwined with JSC. Hence Chapter 10.8 and BBI debates and proposals on Office of Judiciary Ombudsman under Art. 172A, (BS to reorganize these).

Moreover,

“(3) The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund.

(4) Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

In the post-2017 era, judicial independence faced numerous challenges ranging from intimidation by the Executive and Legislature,³⁸⁰ budgetary cuts,³⁸¹ refusal to appoint judges by the President,³⁸² allegations of corruption,³⁸³ verbal attacks by other independent offices,³⁸⁴ frivolous accusation of judicial officers,³⁸⁵ among others.

Relatedly, President Kenyatta II attempted to usurp the powers and functions of the Judiciary through Executive Order No. 1 of 2020 where he allegedly “restructured” constitutional commissions and independent organs, and tribunals in direct contravention of their functional independence under Art. 249(2) of the Constitution. This was the crux of the matter in *Law Society of Kenya v. Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* (2020). Justice John Makau issued a conservatory order against this unconstitutional directive in order to safeguard and uphold the independence of the Judiciary and

³⁸⁰ Patrick Lang’at (2017) “Uhuru, Ruto hit out at Supreme Court,” *Daily Nation*, Nairobi, September 2, 2017, at <https://www.nation.co.ke/news/Uhuru-meets-governors-MCAs/1056-4080158-mu9652/index.html> (accessed 25/3/2020); Cyrus Ombati (2017) “Deputy CJ Philomena mwilu driver shot in an attack along Ngong Road,” *Standard Digital*, Nairobi, October 24, 2017, at <https://www.standardmedia.co.ke/article/2001258320/deputy-cj-philomena-mwilu-s-driver-shot-in-an-attack-along-ngong-road> (25/3/2020).

³⁸¹ Judiciary (2019) *Statement by Chief Justice David Maraga on Judiciary Budget Cuts*, at <https://www.judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/> (accessed 25/3/2020); Damas Kiprono (2019) “Judiciary budget cuts unconstitutional and disingenuous” *Standard Digital*, Nairobi, October 31, 2019, at <https://www.standardmedia.co.ke/article/2001347472/judiciary-budget-cuts-unconstitutional-and-disingenuous> (25/3/2020). In 2021, Rtd Chief Justice David Maraga accused President Kenyatta II of intent to “cripple the Judiciary” through budget cuts....

³⁸² *Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR, Petition No. 369 of 2019....

³⁸³ Walter Menya (2019) “Damning petition to JSC details bribery claims against top judges,” *Daily Nation*, Nairobi, March 10, 2019, at <https://www.nation.co.ke/news/Damning-petition--details-bribery-claims-against-top-judges/1056-5017332-10vbfowz/index.html> (25/3/2020).

³⁸⁴

³⁸⁵ Cf. Tob Cohen murder probe; DCJ Philomena Mwilu’s alleged tax evasion case... , Mr Babu Owino, MP bail ruling by Hon Francis Andayi and Justice Luka Kimaru.... see Faith Nyasuguta (2020) “Magistrate disqualifies himself from Babu Owino’s attempted murder case,” *Star*, Nairobi, February 18, 2020, at <https://www.the-star.co.ke/news/2020-02-18-magistrate-disqualifies-himself-from-babu-owinos-attempted-murder-case/> (accessed March 30, 2021);

constitutional commissions and independent organs (CCIOs) under Chapter 15 of the Constitution.

9.14 Powers and Functions of Administrative and Quasi Judicial Tribunals in Kenya and Africa

What are the constitutional and legal framework of the powers and functions of administrative and quasi-judicial tribunals in Kenya? What is the institutional and administrative framework of tribunals in Afro-Kenyan constitutional democracy?

Article 1(3)(c) of the Constitution recognizes the Judiciary and independent tribunals as State organs to which sovereign power is delegated by the people of Kenya.³⁸⁶ Article 169(1) further defines subordinate courts under the Judiciary to include “local tribunals”³⁸⁷ as may be established by an Act of Parliament. What are their powers and functions?³⁸⁸

Tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. They supplement ordinary courts in the administration of justice.³⁸⁹

Tribunals do not have penal jurisdiction.³⁹⁰ Tribunals, like the courts, have to respect the Bill of Rights³⁹¹ in their decisions and not be repugnant to justice and morality or be inconsistent with the Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court.³⁹²

9.12.1 Structure and legal method of tribunals in Kenya and Africa

What are judicial tribunals or judicial commissions of inquiry?³⁹³ What are quasi-judicial tribunals?³⁹⁴ What are administrative tribunals?³⁹⁵ What is their structure? How do they relate to the courts?

Out of the over 50 tribunals in Kenya, 20 have been transited to the Judiciary in compliance with the Constitution.³⁹⁶ Tribunals are coordinated through the office of Registrar of Tribunals

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³⁸⁸ Discuss. Cross reference to Chapter 9.... below....

³⁸⁹ See Judiciary (2017) “Tribunals,” at <https://www.judiciary.go.ke/courts/tribunals/> (accessed 25/11/2019). In what category do land and company registries fall? To discuss....

³⁹⁰ *Ibid*

³⁹¹ Chapter 4 of the Constitution. See also Chapter 4 of CODRALKA 1 on Participation and representation in Kenya and Africa.

³⁹² *Ibid*

³⁹³

³⁹⁴

³⁹⁵

³⁹⁶ Kenya Law (2019) “Know your Tribunals,” at <http://kenyalaw.org/kl/index.php?id=9050> (accessed 26/11/2019).

established by the Judicial Service Commission (JSC).³⁹⁷ There has also been more than 100 tribunals before the decision to “rationalize” them....³⁹⁸

[To develop a typology on tribunals since independence and to discuss the full list including tribunals not listed under the 20 judicial tribunals].

The following 20 tribunals are under the Judiciary....To discuss their respective jurisdiction....³⁹⁹

1. Business Premises Rent Tribunal (BPRT)
2. Competent Authority
3. Communication and Multimedia Appeals Tribunal
4. Competition Tribunal⁴⁰⁰
5. Co-operative Tribunal
6. Education Appeals Tribunal
7. Energy Tribunal
8. HIV & Aids Tribunal
9. Industrial Property Tribunal (IPT)⁴⁰¹
10. Legal Education Appeals Tribunal⁴⁰²
11. Micro and Small Enterprises Tribunal (MSET)
12. National Civil Aviation Administrative Review Tribunal (NCAART)⁴⁰³
13. National Environment Tribunal (NET)
14. Political Parties Disputes Tribunal (PPDT)⁴⁰⁴
15. Public Private Partnership Petition Committee
16. Rent Restriction Tribunal (RRT)⁴⁰⁵

³⁹⁷ See Judicial Service Commission Act. See report of the Committee on the Establishment of Tribunals, Chaired by Court of Appeal Justice Kathurima M’Inoti.... to cite appropriately....

³⁹⁸ See Annex....

³⁹⁹ To discuss some of the matters they have handled....compare the Table 9.5.6 on tribunals under Kenyan law from *Omtatah v. Judicial Service Commission & 2 Others; Katiba Institute (Interested Party)* [2021] eKLR above...

⁴⁰⁰ See the following statutes on the four named tribunals.....

⁴⁰¹ Industrial Property Institute is established under the Industrial Property Act, 2001 (amended 2016). See also Industrial Property Tribunal Rules, 2001. Cf. the Bill that problematically proposed to consolidate the (Kenya) IP institutions, Intellectual Property of Kenya (IPOK) Bill, 2020.... See also discussions in Ben Sihanya (2016; 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya; Ben Sihanya (forthcoming 2021) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials*, IL & SM, Nairobi & Siaya....

⁴⁰² Sec. 29(1) of the Legal Education Act, 2012; Draft Legal Education Appeals Tribunal (Practice and Procedure) Rules, 2021, at <http://kenyalaw.org/kenyalawblog/leat-practice-and-procedure-rules-2021/> (accessed March 26, 2021).

⁴⁰³ Civil Aviation Act, 2013; Civil Aviation (Certification of Air Navigation Service Providers) Regulations, 2018.....

⁴⁰⁴ Cf roles or and concurrent jurisdiction of political party dispute resolution mechanism; IEBC tribunal, High Court....

⁴⁰⁵ See the following statutes govern the four tribunals.....

17. Sports Disputes Tribunal
18. Standards Tribunal
19. State Corporations Appeals Tribunal and,
20. Transport Licensing Appeals Board.⁴⁰⁶

9.14.2 Composition of Tribunals in Kenya

What is the composition of tribunals? What is the rationale? Most tribunals have three categories of key human resource management. First, the Chair of tribunal usually appointed by the President or Cabinet Secretary in Charge via a Kenya Gazette notice. Second, members of the tribunal which vary from to ... Third, staff (the secretariat...). There is limited policy and authoritative reports on tribunals. The few include Taskforce on Alternative Disputes Resolution (ADR) (or diversion policy);⁴⁰⁷ and report on Tribunals reform...⁴⁰⁸

What are their qualifications? What interests do they represent? What are the key performance indicators (KPIs)?

9.15 Administrative Judicial Bureaucracy in Kenya and Africa⁴⁰⁹

This section focuses on the Executive and administrative structure and functions of the Judiciary. Article 171 provides for a Judicial Service Commission (JSC) which is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice (Article 172).

It is to consist of the Chief Justice, a representative from each of the superior courts, the A-G, two advocates, a nominee of the Public Service Commission, and two members of the public. This diversity is supposed to ensure breadth and independence of the Commission and add credibility to their decisions.⁴¹⁰

A-G Emeritus Amos Wako⁴¹¹ and Justice Isaac Lenaola have spoken on how JSC operated pre-2010 Constitution.⁴¹²

⁴⁰⁶ See the following statutes govern the four tribunals.....

⁴⁰⁷ Under the Constitution, Statutes, policy and judicial and administrative practice, courts requiring or encouraging ADR including Traditional Dispute Resolution (TDR). See Art 159 of the Constitution.

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⁴⁰⁹ See CODRALKA 1 & 2, and the class discussions and materials on judicial administrative bureaucracy.

⁴¹⁰ See Judicial Service Commission (2019) *Memorandum of the Judicial Service Commission to the Building Bridges to Unity Advisory Task Force (BBI)*, Judiciary, Nairobi, August 2019, at <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/119368/Memorandum-of-the-Judicial-Service-Commission.pdf> (accessed 15/4/2020)....

⁴¹¹

⁴¹² Justice Lenaola's comments at Judges' and Magistrates' Conference, KSMS 2011 at which Ben Sihanya presented on the Judiciary's role in constitutional democracy....

Under the 1969 Constitution and relevant statutes, the executive has been playing a role in Judicial administration and Parliamentary administration. Judicial administration is undertaken by the Judicial Service Commission (JSC) created under section 68 of the 1969 Constitution, and the Service Commissions Act, Cap 185.⁴¹³

The administrative officials include the Chief Justice, Presiding Judge, Registrar, and the Court Administrators.⁴¹⁴ The Judiciary had literally tended to rely on the financing or goodwill of the National Executive and administration, and especially the District Commissioner (DC) and the provincial administration, to operate.⁴¹⁵

The 2010 compromise was that judges and magistrates be vetted. Thus section 23(1) of the Sixth Schedule provides:

“(1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.”⁴¹⁶

In 2012, a Judges’ and Magistrates’ Vetting Board (JMVB) was constituted to assess the incumbent judges’ and magistrates’ suitability.⁴¹⁷ Vetting of Kenyan judges was concluded in January 2013. Out of a total of 53 judges, 13 were deemed unfit to continue service while 40 were retained. The 13 include Riaga Omolo, Samuel Bosire, Emmanuel O’Kubasu, Joseph Nyamu,⁴¹⁸ Jeanne Gacheche,⁴¹⁹ Joyce Khaminwa,⁴²⁰ Mary Ang’awa, Nicholas Ombija, Leonard Njagi, Joseph Sergon, Muga Apondi, Abida Ali Aroni and Murugi Mugo.⁴²¹ The cases should be seen in the context of other decisions by the Judges’ and Magistrates’ Vetting Board.⁴²²

⁴¹³

⁴¹⁴ Ringera Report..., Kwach Report..., Report of the Commonwealth Judges Association... *op.cit.* to cite accurately (earlier ...above... and cross reference here).

⁴¹⁵ The District Commissioner was the Chairperson of the District development Committee (DDC) and the District Security Committee (DSC). See chapter... of CODRALKA 1 on

⁴¹⁶ Section 23(1) of the Sixth Schedule....

⁴¹⁷ Vetting of Judges and Magistrates Act, 2011.

⁴¹⁸ Judges and Magistrates Vetting Board, Determination concerning the judges of the Court of Appeal, April 25, 2012.

⁴¹⁹ Judges and Magistrates Vetting Board, Third Announcement, Determinations Concerning the Judges of the High Court, August 3, 2012.

⁴²⁰ Judges and Magistrates Vetting Board, Fourth Announcement, Determinations on Suitability and on Request for review, September 21, 2012.

⁴²¹ Law Society of Kenya Circular, Judges and Magistrates Vetting Board, Fifth Determination in Respect of the Judges of the High Court, December 21, 2012.

⁴²² *Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others* [2014] eKLR. To develop a typology: Court of Appeal, High Court....

In *Kenya Magistrates & Judges Association v. Judges & Magistrates Vetting Board and the Attorney-General* (2014),⁴²³ the petitioner argued that Articles 168 and 172 of the Constitution have established mechanisms for dealing with such issues as arise subsequent to the effective date. And that the Board is a transitional body, intended to aid in the transition from the old to the new era and was not supposed to have continuous mandate as this would negate the principle of harmonious co-existence of institutions.⁴²⁴

Justices Roselyn Nambuye, Mohammed Ibrahim and Jeanne Gacheche (all of whom were declared unfit to continue serving as judges) applied for review of the decisions to have them vetted out of the Judiciary.⁴²⁵ In its fourth determination, the Vetting Board declared Justice Roselyn Nambuye and Mohammed Ibrahim suitable for fresh vetting whereas the verdict against Jeanne Gacheche was upheld and a chance to have her removal reviewed by the Vetting Board was denied.⁴²⁶ Both Justices Roselyn Nambuye⁴²⁷ and Ibrahim⁴²⁸ were reinstated upon review in a decision published under the Board's sixth determination.⁴²⁹

Section 23(2) of the Sixth Schedule of the Constitution states that:

“A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.”

Does section 23(2) of the Sixth Schedule to the Constitution on the process of removing a judge from office oust the jurisdiction of the High Court? Did the High Court have supervisory jurisdiction over the Judges and Magistrates Vetting Board? Remarkably, in constitutional and administrative law, a decision inconsistent with fair administrative action⁴³⁰ process, due process, or natural justice is reviewable on numerous grounds These include the failure to adhere to due process, principles of natural justice including the right to be heard.... Moreover, no law can (easily) oust High Court's jurisdiction.⁴³¹

Standards have been greatly raised in the Judiciary with regard to conduct in the past few years. In 2012 the former retired (first) Chief Justice Nancy Baraza was removed on the account of

⁴²³ *Kenya Magistrates & Judges Association v. Judges & Magistrates Vetting Board and the Honourable Attorney-General* (2014) eKLR, Constitution Petition No. 64 of 2014.

⁴²⁴ What are the achievements of the Judges' and Magistrates' Vetting Board...

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⁴²⁶

⁴²⁷

⁴²⁸ See Chapter 17 of CODRALKA 1 on Administrative and Regulatory Law, Process, Bureaucracy and Justice in Kenya and Africa.

⁴²⁹ Judges and Magistrates Vetting Board, Sixth Determination, *Jeanne W. Gacheche & 6 Others v The Judges and Magistrate's Vetting Board & 2 Others* [2012] eKLR... relevant determinations....

⁴³⁰ Arts. 2(4), 47, 165(3)....

⁴³¹ To discuss.....

misconduct.⁴³² Court of Appeal Justice Kalpana Rawal was subsequently named the Deputy CJ in February 2013 and thereafter sworn in on June 3, 2013.

Are there controls on professional competence of Judges? Is judicial performance or output assessed in terms of justice, fairness, legal method, and development of jurisprudence or legal sociology, or mainly on the number of cases handled and/or backlog? How else does one explain the incompetent, contrived and incoherent decisions, especially a decision of “we have no jurisdiction.”⁴³³

Formerly, most cases were dismissed on technicalities of procedure. What are the roles of the Chief Registrar of the Judiciary, Chief of Staff,⁴³⁴ Registrars, Directors, Executive Officers, judicial security officials....?

The “Shollei (CRJ) saga,”⁴³⁵ as the media called it, raised important issues on the core functions of the Judiciary: judicial v. para-judicial functions and officials; Chief Justice v. Chief Registrar of the Judiciary’s roles; regulation and administration of procurement, human resource management (including recruitment, deployment, remuneration, discipline...); the judiciary’s financial management; JSC allowances (KES 80, 000 per sitting⁴³⁶ plus others totaling to over KES 1 million per month?).⁴³⁷

Mrs Shollei was allegedly employed at the level of a Supreme Court Justice. That gave her at least three (3) advantages. First, it gave her a lot of power to determine so many matters regarding judiciary administration. Second, it gave her the capacity and clout to deal with Judges, judicial officers and staff as co-equals or boss. Third, her job group assured her of

⁴³² See *Report and Recommendation into the conduct of the Hon. Lady Justice Nancy Makokha Baraza* [2012] eKLR...

⁴³³

⁴³⁴ The Chiefs of Staff in the formative stages were Duncan Okello (formerly of Society for International Development (SID)), then Conrad Bosire (formerly of Strathmore Law School) The establishment of the offices was litigated inv.; Cf. Paul Ogemba (2011) “Mutunga appoints first Chief of Staff,” *Daily Nation*, October 4, 2011, at <https://www.nation.co.ke/news/Mutunga-appoints-first-Chief-of-Staff/1056-1248096-lbf25bz/index.html> (accessed 6/5/2020).

⁴³⁵ See Isaac Ongiri (2013) “Secretary Francis Kimemia criticises Gladys Shollei suspension,” *Daily Nation*, at <http://mobile.nation.co.ke/News/Kimemia+criticises+JSC+over+Shollei+suspension+/-/1950946/1960862/-/format/xhtml/-/mtplj/-/index.html> (accessed 8/10/2013); Paul Ogembo (2013) “Chief Registrar Gladys Shollei to respond to graft claims Tuesday,” at <http://mobile.nation.co.ke/News/Shollei-to-respond-to-graft-claims-Tuesday/-/1950946/2013974/-/format/xhtml/-/d6w114/-/index.html> (accessed 8/10/2013).

⁴³⁶ There were allegations that in some cases, some members of the JSC would have upto two sittings in a day.... See....

⁴³⁷ Most Kenyans were outraged by the quantum of allowances.... See Kipchumba Some (2013) “Judicial Service Commission members mint millions every month from sittings,” *Standard Digital*, Nairobi, Saturday, September 28, 2013 at <http://www.standardmedia.co.ke/article/2000094444/judicial-service-commission-members-mint-millions-every-month-from-sittings> (accessed 15/4/2020). JSC contested the SRC’s capping of the allowances? Meetings? JSC argued in “their own courts” that SRC was interfering with JSC’s independence?... See Cf. Joseph Wangui (2020) “SRC to pursue case seeking to cut MPs pay after court nod,” *Sunday Nation*, Nairobi, May 3, 2020, at 25, at <https://www.nation.co.ke/news/politics/SRC-justifies-decision-to-reduce-MPs--allowances/1064-4362106-p964j6z/index.html> (accessed 6/5/2020).

extremely generous remuneration, privileges, and prestige. Ms Anne A. Amadi was then employed allegedly at the level of a magistrate....⁴³⁸

9.15.1 The Chief Registrar of the Judiciary in Kenya and Africa

Article 161 of the Constitution of Kenya 2010 provides for a Chief Registrar of the Judiciary, who is to be the chief administrator and accounting officer of the Judiciary. As at March 2021, the office holder was Hon Anne Atieno Amadi. In addition to the functions conferred by Article 161 of the Constitution, Section 8 of the Judicial Service Act, No. 1 of 2011 provides for additional duties of the Chief Registrar. He or she is to:

“(a) be responsible for the overall administration and management of the Judiciary;
(b) perform judicial functions vested in the office of the Chief Registrar by law;
(c) exercise powers vested in the office of the Chief Registrar by virtue of any law or regulation and give effect to the directions of the Chief Justice...”

Moreover, the CRJ’s function is to:

“(d) account for any service in respect of which monies have been appropriated by Parliament and for which issues are made from the exchequer account;
(e) be the authorized officer for the Judiciary, who shall be responsible for the efficient management of the day-to-day operations and administration of human resources in the judicial service;
(f) be in charge of support services in the Judiciary and in particular planning, and development, and the organization of staff;
(g) monitor and enhance administration and office procedures to maximize on efficiency and the quality of service;
(h) plan, prepare, implement and monitor the budget and collect, receive and account for revenue...”

The CRJ’s functions and duties are also to:⁴³⁹

“(i) prepare reports and proposals on administrative issues;
(j) be in charge of the procurement of all stores, and the management and maintenance of all physical facilities;
(k) maintain and develop co-operation with key staff in the public service and other institutions and agencies; and
(l) ensure the efficient devolution of the administrative units to county levels, including a High Court Division in each county;
(m) perform such other duties as may be assigned by the Chief Justice from time to time.”

⁴³⁸ Ms Anne Amadi has an LLB, LLM.... And had served as a District magistrate II in 1990 and later as a Resident Magistrate.... She had years post graduation experience as at the time...

⁴³⁹ To develop a typology of CRJ’s powers, functions and duties. To indicate what would fall under the accounting officer of the Judiciary *vis-à-vis* of the JSC.....

The Chief Registrar of the Judiciary has at least two (2) key functions in the judicial system. First, the CRJ acts as the chief administrator of the Judiciary. Second, the CRJ is the chief accounting officer. These functions must be contextualized and problematized with regard to the nature of relationship between the CRJ and other relevant institutions and arms of Government in the exercise of its constitutional mandate.

9.15.2 Chief Registrar of the Judiciary's Powers and Functions in Kenya and Africa

What is the role of the following executive agencies in the work of the Chief Registrar of the Judiciary (CRJ)? National Treasury? Salaries and Remunerations Commissions (SRC)? Ethics and Anti-Corruption Commission (EACC)? Director of Criminal Investigations (DCI)? Director of Public Prosecutions (DPP)? What of the National Assembly (NA)?

In the presidential system (2010-) should an official be summoned by the National Assembly to account for the Judiciary? Judicial Service Commission (JSC)? Who? When Chief Justice Willy Mutunga was summoned by the National Assembly, many lawyers and law scholars, including present author argued that he should not present himself as that would undermine separation of powers and checks and balances.... Senate? County Assemblies? Chief Justice (CJ)? Judges? Magistrates? (quasi-judicial and administrative tribunals?)....

9.16 Judiciary Fund and Judicial Service Commission Funding in Kenya and Africa

Judicial powers, functions and independent accountability have been adversely affected by insufficient funding and lack of financial independence or autonomy generally. Article 173 of the Constitution of Kenya 2010 establishes a fund known as the Judiciary Fund. It is to be administered and managed by the Chief Registrar of the Judiciary (CRJ). The Fund is to be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.⁴⁴⁰

Each financial year, the Chief Registrar is required to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.⁴⁴¹ On approval by the National Assembly, the expenses are to be a charge on the Consolidated Fund and the funds are to be paid directly into the Judiciary Fund.

The Fund is to be funded from at least four sources. First, money appropriated by the National Assembly out of the Consolidated Fund. Second, any grants, gifts, donations or bequests. Third, moneys allocated for that purpose from treatments, fees or levies administered by the Judiciary. Fourth, moneys accruing to or received by Judiciary from *any other source*.⁴⁴²

⁴⁴⁰ See the Judiciary Fund Act, 2016.

⁴⁴¹ The BBI debate considered Parliament's role – the question of shared responsibility of public finance....

⁴⁴² Art 173 of the Constitution.... My emphasis.

Significantly, non-compliance with some of the rules and regulations led to serious problems under the first Chief Registrar of Judiciary Mrs Gladys Boss Shollei and led to the disputes and litigation between her on the one hand, and the JSC and the Chief Justice, on the other hand, relating to the administration of Judiciary and JSC and particularly administration of funds.⁴⁴³

Independent judicial funding was to be a deviation from the norm where the Judiciary depends on the Ministry of Finance and the National Treasury for its funding. Further, it is to present its budget directly to Parliament, which budget, upon approval, is charged on the Consolidated Fund. This was supposed to make the Judiciary more autonomous than under the 1969 Constitution and law.

Relatedly, in 2019, the then Acting Cabinet Secretary for the National Treasury and Planning proposed to cut the Judiciary's recurring and development budget for the 2019/20 financial year by half, allegedly based on the revenue performance of the financial year 2018/19.⁴⁴⁴ This action threatened the operations of the Judiciary and its independence. The Law Society of Kenya (LSK) sued the Cabinet Secretary in charge of National Treasury, Mr Ukur Yattani, and others.⁴⁴⁵

LSK's argument was that the proposal was made without consideration of the actual estimates of the Judiciary's expenditure, which should only be considered and approved by the National Assembly. That the conduct had obscured the constitutional rules of fairness (Article 47), participation of JSC, Chief Registrar of the Judiciary (CRJ), and public participation (Arts 1, 10, 38.....). LSK also argued that this contravened Article 173(4) of the Constitution⁴⁴⁶ and Regulation 80(1) of the Legal Notice No. 34 of the Public Finance Management Act No. 18 of 2012.⁴⁴⁷

9.16.2 Judicial Service Commission in Kenya and Africa

What are the powers and functions of JSC?⁴⁴⁸ [To link with the relevant sections in Chapters 8 of CODRALKA 1].

What are the Judicial Service Commission (JSC) equivalents in South Africa? Nigeria? Uganda? Tanzania? USA? UK?

⁴⁴³ Kurian Musa (2013) "Gladys Boss Shollei sues JSC for illegal sacking, violation of rights," *Standard Digital*, Nairobi, November 2, 2013, at <https://www.standardmedia.co.ke/article/2000096689/shollei-sues-jsc-for-illegal-sacking-violation-of-rights> (accessed 15/4/2020).

⁴⁴⁴ This was through Circular No. 14A dated 24th September 2019.

⁴⁴⁵ See *Law Society of Kenya v. Cabinet Secretary, National Treasury and the Attorney General*, Petition No. 425 of 2019.

⁴⁴⁶on the Judiciary Fund....

⁴⁴⁷ See *Law Society of Kenya v. Cabinet Secretary, National Treasury and the Attorney General*, Petition No. 425 of 2019

⁴⁴⁸ Cf. Chapter 20 CODRALKA 1 on Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities.....

9.16.1 Powers and functions of the Judicial Service Commission (JSC) in Kenya

What are the constitutional and legal frameworks on the powers and functions of the Judicial Service Commission (JSC) in Kenya and Africa?

Under Article 172(1) of the Constitution, the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall:

- “(a) recommend to the President persons for appointment as judges;⁴⁴⁹
- (b) review and make recommendations on the conditions of service of--
 - (i) judges and judicial officers,⁴⁵⁰ other than their remuneration; and
 - (ii) the staff of the Judiciary;⁴⁵¹
- (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars,⁴⁵² magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
- (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and
- (e) advise the national government on improving the efficiency of the administration of justice.”

The functions can be summarized to the following three (3). First, to recommend appointment of Chief Justice (CJ), Deputy Chief Justice (DCJ), and Judges. Relatedly, the JSC appoints judicial officers and judicial staff. Second, JSC recommends the disciplining of judges, and disappointment of judicial officers. Third, to secure the independent accountability of the Judiciary.

What is the optimal composition of the Judicial Service Commission (JSC) in Kenya to ensure effective exercise and performance of its powers and functions, and to secure diversity among stakeholders?The JSC is composed of the Chief Justice as Chair, one Supreme Court Judge, once Court of Appeal Judge, one High Court judge and one Magistrate (one male and one

⁴⁴⁹ To develop a typology on JSC powers and functions.... e.g. First, recommend appointment of CJ, DCJ, Judges, and appoint judicial officers and judicial staff. Second, recommend disciplining of judges, and discipline and disappointment of judicial officers. Third, secure the independent accountability of the Judiciary.... Other typology?

⁴⁵⁰ Section 2 of the JS Act states; “judicial officer” includes a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament, other than the courts established to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.”

⁴⁵¹ Section 2 of the JSC Act defines “judicial staff” means persons employed in the Judiciary but without power to make judicial decisions, and includes the staff of the Commission.

⁴⁵² To define categories... There is Chief Registrar of Judiciary, Deputy Chief Registrar of Judiciary; Registrars of all levels of courts (verify), namely,, Deputy Registrars.... Pre-2010, there was only one Registrar (of the High Court), serving all Kenyan courts and based in Nairobi. The last was Ms Lydia Achode, later Principal Judge of the High Court.... from April 2018, (having succeeded Justice Richard Mwangi)to take both to Principal Judge Section.

female), two representatives of the Law Society of Kenya (LSK) (one male and one female), a representative of the Public Service Commission (PSC), and the Chief Registrar to the Judiciary.

9.16.2 Composition, challenges and prospects of Judicial Service Commission in Kenya⁴⁵³

To integrate more on Bangalore Principles, Latimer (House) Principles, BBI debates some of which are discussed elsewhere in these Chapters 9 and 10....]

The Bangalore principles (2002) recognize six (6) principles of judicial conduct. First, independence, impartiality, integrity, propriety, equality, competence and diligence.⁴⁵⁴....

The Commonwealth Latimer (House) principles acknowledged the fundamental importance of the separation of powers and interdependence between the Legislature, Executive and Judiciary as key principles in attaining good governance, constitutional democracy and sustainable development.⁴⁵⁵....

Under Article 171(2) of the Constitution, the Judicial Service Commission consists of -

- “(a) the Chief Justice, who shall be the chairperson of the Commission;⁴⁵⁶
- (b) one Supreme Court judge elected by the judges of the Supreme Court;⁴⁵⁷
- (c) one Court of Appeal judge elected by the judges of the Court of Appeal;
- (d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;⁴⁵⁸
- (e) the Attorney-General;⁴⁵⁹

Equally important are:

- “(f) two advocates, one a woman and one a man, each of whom has at least fifteen years’ experience, elected by the members of the statutory body responsible for the professional regulation of advocates;⁴⁶⁰

⁴⁵³ See also Chapter 20 CODRALKA 1 on “Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities.” See also Ben Sihanya (2019) “Securing judicial independence and accountability in Kenya,” Vol. 10, Issue No 11, *Nairobi Law Monthly*, 38-43....

⁴⁵⁴ Bangalore principles of Judicial conduct (2002) “The Bangalore Draft Code of Judicial Conduct 2001,” adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

⁴⁵⁵ Commonwealth (2004) “Latimer House Principles,” <https://thecommonwealth.org/history-of-the-commonwealth/latimer-principles> (accessed March 28, 2021).

⁴⁵⁶ Does this role of the Chief Justice conflict with the CJs role as Head of Judiciary? Cf. the Chief Justice and Speaker are the Chairs of the JSC and PSC respectively. Some argue that the President is not the Chairperson of the Public Service Commission. But the President appoints members to the Public Service Commission. The BBI discussions considered these complex issues.

⁴⁵⁷ Because almost all Supreme Court of Kenya Justices wanted to sit in the Judicial Service Commission, the compromise was that the then Deputy Chief Justice Philomena Mwili represent the Supreme Court....

⁴⁵⁸ Employment and Labour Relations Court (ELRC) and Environment and Land Court (ELC) not represented. Is there judicial inbreeding?

⁴⁵⁹ The A-G represents the Executive and the public in the JSC.

⁴⁶⁰ Where are law professors or lecturers?... That is the legal academy or legal educators at University Law Schools? Bomas and other reforms considered the important.... Too many lawyers? But this is a legal matter... It is expected that a Health Commission would mainly have doctors. Here, it should be 2 advocates in active practice,

- (g) one person nominated by the Public Service Commission; and
- (h) one woman and one man to represent the public,⁴⁶¹ not being lawyers, appointed by the President with the approval of the National Assembly.”⁴⁶²

The JSC and especially the JSC election of one (1) male LSK representative on May 9, 2019 was key to judicial independence and accountability. Thus, it captured the attention of lawyers, President Kenyatta, the Executive, the Judiciary and the public interest. And there were (decoy) candidates who answered to President Kenyatta’s political and tribal preference in JSC. Nonetheless, the JSC has recorded some achievements.⁴⁶³

The Building Bridges Initiative (BBI) 2020 Report proposed an amendment to Article 171 to provide for the inclusion of the Judiciary Ombudsman in JSC, hence Article 171 of the Constitution of Kenya (Amendment) Bill 2020. Critics alleged that this proposal would interfere with the independence of the Judiciary?⁴⁶⁴ The intent of this proposed amendment was to address maladministration and indiscipline in the Judiciary to promote access and fair administration of justice to all.

9.17 Summary of Findings, Conclusions and Reforms Judiciary in Kenya and Africa

This Chapter has addressed at least three (3) key research questions and arguments on judicial powers, functions, and independent accountability in Kenya and Africa. I made three (3) key findings. First, the Judiciary is one of the three co-equal arms of Government. It is not “the third arm”.... It includes the courts, tribunals, and “bodies” and indeed judges, magistrates, Kadhi’s, judicial officers and judicial staff.

Second, the juridical power, function and structure has been adversely affected by politicization of the Judiciary,⁴⁶⁵ judicialization of politics,⁴⁶⁶ and juridification of society, politics and political

and one law professor in practice... That is, those who understand and practice issues being administered and regulated and have prescient perception of the issues.....

⁴⁶¹ Non lawyers to represent the community and lay person’s understanding of the justice system. But they should have expertise, interest and experience in governance and public affairs.... Most were included merely for the vote in JSC decisions....and/or... have been clueless wheeler dealers, including.....

⁴⁶² Names of the first post 2010 and the 2019/20 members are former (Rtd) Chief Justice David Maraga, Commissioners Aggrey Muchelule (High Court judge), Prof Tom Ojienda, former Attorney-General Prof Githu Muigai, Chief Magistrate Emily Ominde, Prof Margaret Kobia, Commissioners Mwara Deche, Kipng’etich Bett, Winfred Guchu and Chief Registrar of the Judiciary Ms Anne Amadi.

⁴⁶³ The candidates were Prof Tom Ojienda (defending), Macharia Njeru (former Chairman of Independent Police Oversight Authority (IPOA)), Mr Alex Gatundu, who was expected to and did step down for Mr Macharia Njeru, Mr Githii Irungu also stepped down.... and Mr Charles Mong’are Onguto (on “also ran” and provider of comic relief from the beginning)....

⁴⁶⁴ *KTN News* (2020) “Will the creation of Ombudsman erode the independence of the judiciary? BBI on Judiciary,” *KTN News*, November 3, 2020, at <https://www.standardmedia.co.ke/ktnnews/news-centre/video/2000198916/will-the-creation-of-ombudsman-erode-the-independence-of-the-judiciary-bbi-on-judiciary> (accessed December 4, 2020). See Chapter 6, and 89 above (specifically where we discussed on the BBI proposals vis-à-vis the Office of the Judiciary Ombudsman).....

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⁴⁶⁶

economy in Kenya and Africa.⁴⁶⁷ Third, reform, including debates in the context of the Building Bridges Initiative (BBI) (have) rightly addressed the question of separating the Judiciary and the Judicial Service Commission (JSC).⁴⁶⁸

Thus, the Judiciary, Bar and the legal academy have the constitutional powers and competence to secure justice, the rule of law and human rights in normal times, and in emergency, war, terrorist attack, disaster, strike, crisis, coup, coup attempt, mutiny, revolutionary times. These include health or medical pandemics, epidemics or emergencies like in the age of the coronavirus 2019 pandemic (COVID-19), HIV/AIDs, Ebola, malaria, (Spanish flu), Black death, small pox, or war, disasters, among others.⁴⁶⁹

There are three key recommendations or proposals for reform. They are related to the BBI discussions. First, to secure independence and accountability of the Judiciary, the Judiciary and Judicial Service Commission (JSC) should be strengthened, and also separated administratively.

The Judiciary and JSC should be funded appropriately, as one of the three arms, organs, or branches of Government and second, as an independent constitutional commission which is intended to promote independent accountability of the Judiciary.

Second, the Judiciary has the power to decide all cases, disputes, conflicts or matters whether “political” or not. The Judiciary should engage progressive politics in the sense of helping decide among contested constitutional legislative, regulatory, and administrative, policy and political options or choices.

Third, there are urgent constitutional, legislative, regulatory, administrative, and policy reforms to secure justice, the rule of law, human rights, constitutional democracy and progressive legal sociology.

The Judiciary must guard the rule of law, judicial independence and accountability, and in the National Anthem’s credo: “let justice be Kenya’s shield and defender.”

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⁴⁶⁸ See submissions by the Judicial Service Commission (JSC) (not Judiciary?) to the Building Bridges Initiative (BBI). One of the key proposals was that the Chief Registrar of the Judiciary (CRJ) remains the accounting offices of the judiciary while a separate officer be appointed the Secretary for the JSC....

⁴⁶⁹ See also Chapters 1, 4, 6... CODRALKA 1...; Ben Sihanya (2016; 2020) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, IL & SM, Nairobi & Siaya; Ben Sihanya (2021) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materialst*, (IPILKA 2), IL & SM, Nairobi & Siaya.

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

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email: sihanyamentoring@gmail.com; info@sihanyaprofadv.co.ke (use both)
url: www.innovativelawyering.com; www.sihanyaprofadv.co.ke