

Governance Ethics & Business: Kenyan Growing Economy at Cross-road in the 21st Century

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Abstract Governance Ethics and business: Kenya at a Cross Road in the 21st Century is an intellectual investigation into what has not worked well so far despite all attributed good reasons. The author has touched on spheres of public behavioural conduct in business affairs to reveal the rot in the entire system. The exploration is backed by tangible cases of how ethical standards are influencing the national economy. The essay acknowledges and compliments reform process and affirmative action especially the legal transformation. But also he admits that change of law and adjustments within the institutions have not transformed governance, public accountability, and work ethics. Reading from the essay one shall get to understand that ethical problems are not a question of having good laws in place but also change of attitude, and winning hearts and minds of leaders.

Keywords Governance, Accountability, Transparency, Work Ethics, Professionalism, Corporate, System of Values

“The whole educational and professional training system is a very elaborate filter, which just weeds out people who are too independent, and who think for themselves, and who don't know how to be submissive, and so on... because they're dysfunctional to the institutions.”

— Noam Chomsky

1. Background

There is no doubt that the world capital market-oriented economy is shaky following the eventful historic ethical crisis within the OAS region. The fact is that the traditional way of doing business is rapidly stumbling in the 21st Century around the globe. Following the Enron scandal of 2001 in the USA which actually revealed how ethics determines the stability of business around the world, it is now certain that when America sneezes we all catch the cold. The crisis facing conventional business and financial systems proved that the system of business relies more on standard of ethics and values other than regulations. Secular economy today is already demonstrating fragility (1) and,

therefore, prone to any dramatic economic depression due to failure of ethical standards. The foresaid consequences are likely to be uncomfortable as shall be demonstrated.

Almost 90.1% of financial scandals are related to leadership, integrity, abuse of power, and institutional collapse. Eventful Enron Incorporation heyday is so far ended while the lesson learned from its moral failure shall keep on haunting businesses as has been explained by Ken Silverstein: “misplaced morals killed the company while it injured all who had gone for the ride”. The behaviour of few smart guys in the room affected communities and generations. Today, America’s moral failings have affected the way one would think of doing business (2) also in Kenya.

“Just as characters matter in people, it matters in organizations” by Justin Shultz (2). Capital market dictates the mind-set of business organizations, in terms of profits, attempts trying to go around the law or even cross the boundaries. Capital market approach in business matters in ethics and morality of society in many ways. If capital market fails the whole socio-economic system goes into crisis.

Kenyan society has had its fair deal in socio-economic crisis due to moral failings comprising ethical malpractices concerning human persons and incorporations. Behavioural traits such as corruption, theft, embezzlement, bribery, forgery and frauds, have been recorded consistently in the Kenyan history since the independence. Goldenberg and Anglo-Leasing are some of the major financial scams linked to moral bankruptcy within the State incorporations.

Devani Triton Oil scandal in 2008(3) involving a famous tycoon Yagnesh Devani is one of the most serious financial scams in the energy sector.

Corruption is about the behaviour of individuals. Most financial scandals happening in Kenya usually involve very powerful political elite and highly connected personalities in the Government rendering such unethical behaviour appear as quasi normal business practice.

Had it not been Whistle-blower, a journalist, John Githongo, who shocked the already normalised system many would have been still in their long slumber (4). His

courageous and heroic move left some of his key opponents very bitter and furious persons. With his revelation of ethical and moral bankruptcy the Government had no option but to play it safely so to avoid furtherance in tainting the already dented ethical reputation world-wide.

Even if the whistle-blower did not continue with his risk taking fight, the aforesaid society is privy of unethical traditions and practices which compelled the government to enact Anti-Corruption and Economic Crimes Act (CAP 65). The State enacted the statute creating the Kenya Anti-Corruption Commission (KACC) to deal decisively with the chronic corruption and economic crimes that wear down its reputation. Only for the Commission to be re-baptized to Ethics and Anti-Corruption Commission(5) (EACC) by the new law Ethics and Anti-Corruption Act, 2011, CAP 65A passed by the 10th Parliament. Finally the *de facto* role of ethics in business organization was sealed by law introducing certificate of good conduct(6) for public employees.

In spite of the *de jure* Ethics and Anti-Corruption Commission(7) and appropriate regulatory measures in place, still the general value system has been systematically collapsing as investors keep on guessing what would be the nature of the next scandals and whether their invested resources would stand the test of time.

A pre-emptive question of concern is how to effectively deal with unethical behaviour in conducting business in an environment where corruption has its tenets in the system. The task to stamp out unethical behaviour is more than over.

Such concern constitutes motivating factor in issues of professional ethics showing increasing commitment in dealing with corruption, fraud, bribery, forgery, and other business malpractices in society. There is a good indicator that many business enterprises are now gearing towards a value system.

The general sentiment is based on attitudinal change no matter what. Managing leadership, integrity, and ethical issues in Kenya (8) might take some time since ethics concerns individuals, their cultures, history, traditions, attitude, and customs which form part and parcel of the entire social system (8).

The rationale behind this urgent demand for ethics and moral standards lies in approved system of values that should control business organizations backed with strong system of law. For instance, there is no business without trust and consumer confidence. And there is no consumer confidence without accountability.

In the recent years Kenyan government has been gradually becoming more cognizant of core values namely public accountability and integrity in leadership. Code of conduct, performance contract, and international standards require a valid system of values necessary to supplement a system of regulations and code of conduct for business to run. Kenya has witnessed politicians rising from poverty to millionaires despite their controlled wages. How they acquire their wealth within a short time in power has been a mystery to economic analysts.

Corruption syndrome in Kenya (9) is a *sui generi* real social cancer and anti-ethical agent that requires profound value oriented mechanism other than enacting good laws, insisting on legal reforms and creating more institutions. The fact is that many investors whether in small and medium enterprises or big business are increasingly losing their fortunes in dubious unethical circumstances despite having good regulations and institutions in place.

Business organization does not only suffer from economic slow-down but also from big ethical and moral derailment in the whole ecosystem that may need attention. There are numerous cases concerning conflict of interests, gender issues in work environments, felonies, cheating and frauds, complacency to dirty business such as failure to comply with business regulations and ethical standards involving both public and private sectors.

In recent years, the public sector has developed affinity of hiring foreign investors especially from People's Republic of China to carry out big tenders. Justification to this effect is not fully disclosed. The probability is that similar local incorporations fall short of international standards including work ethics. The prediction linked to this failure is based on loss of mutual trust in the public procurement, financial structures, auditing bodies including licensed bankers and other financial institutions.

For example, many local constructors have proved to do shoddy jobs while minting public funds which obviously, they share with those who award them such tenders through monetary corrupt deals known as "kick-backs". As this unethical practice involves highly connected personalities and some smart business, legal and political practitioners, legal reform may not be sufficient approach to bring sanity to social pathologies.

Unfortunately, Kenya is not out of the ethical hook yet despite ushering in of the new Constitution in 2010, upholding constitutional principle of the rule of law and reforms (10). Technically, morality is not the guiding principle in deciding which policy and which law to pass in positive legal system which Kenya has been encouraging since its inception.

Colonial laws have not been at home with African customary institutions in which the morality of the people naturally resides. Today Kenya is suppressing customary law and every key institution related to it thereof, an attempt that will deprive the society of its residual key ethical traditions. Legal practice shall now remain exclusively with statutory law which has no proper locus for African morality and consistency.

What matters most in the Kenyan legal system is the expediency of the law other than morality when it comes to the administration of justice. Statutory law is positive law whose main concern is focused on the technicality and procedures other than ethics. Legal positivism which Kenya is privileging insists on pure theory of law dismissing any nexus between law, wisdom, and morality. In this sense, the existing laws cannot uphold ethical issues nor provide long term solution. The constitution of Kenya promotes cultural

heritages of the people but is naïve about being imperative on African ethical principles.

2. Foreign Policy

Preference of awarding multinationals and international corporations tenders in “facing-East” agenda shall not provide lasting solution to ethical questions facing Kenya in the post-modernity time. What is at stake is the study of evolution in work ethics and changes in the understanding of work ethics in the modernity and post-modernity period.

In the post-modern time corruption has become a multi-dimensional social challenge requiring a more profound intellectual research and high level academic debates. Awarding multinationals and foreign incorporations jobs is not the solution to deal with unethical behaviour such as corruption but away of graduating it from being a mere domestic issue to a broad international reality.

Practically nothing changes whether such unethical behaviour emanates from a Chinese or a Kenyan incorporated body. Ethicality pegged on policy choice has been to do away with national corruption deals and impunity. By deploying foreign incorporations to carry out national public works is a leeway of changing the nature of corruption from being local to regional *vis-a-vis* international in character. There is no permanent solution unless there is true attitudinal change and commitment in the top governance. A set of leaders with rational critical, fair and fair minded (11) attitude would transform political practice and business in the public and private spheres.

On the contrary the same political heavy weights are the promoters of grand scale corruption as well as impunity which at the same time, they claim to be busy fighting. The best example is when the 10th Parliament in Kenya watered down leadership and integrity rules in the Bill, making it possible for corrupt and unethical politicians to ascend to the corridors of power. The evidence is that most businesses are still owned by political elites. Leaders are the main shareholders and ultimate beneficiaries of the entire business system. They get gainful employments either directly or through proxies with impunity.

The Transparency International made the following report: *the amended Bill fails to address deficiency of integrity in leadership after the two key provisions were deleted thus lowering standards for leadership contrary to public expectations and in contravention of the letter and spirit of the Constitution* (12).

State officers must adhere to the constitutional provision that a full-time State officer shall not participate in any other gainful employment. Cabinet favours the status quo by allowing for unrestricted directorship in private companies and participation in ‘business undertakings that do not require active participation’. The underlying principle should be to ban employment that is likely to put an officer in a situation of conflict of interest(12)

The whole corruption saga in Kenya has a lot to do with

ethics and governance in the top leadership. Institutionalized corruption is linked more with the integrity in leadership other than simple general public or tax payers.

The government and its institutions have been the hallmarks of the alleged grand-corruption in the bureaucratic system in Kenya. In 2014, Kenya is ranked number 145 out of 175 countries in the world scoring only 25%, a position that is not encouraging(13).

Autocracy or the politics of patron-client (14) proves that some few cases of corruption are successfully prosecuted by the law courts while many others have been almost quashed. For instance, the Goldenberg saga (15); and Anglo-Leasing scandals (16) involving top leadership and political heavy weights have not been successful making it difficult for the prosecution to hunt down servants sparing their masters.

When the government in power and its institutions lack ethical standards and moral authority, it is unlikely to expect anything better in the private sector whose survival obviously relies on the political ethics and good will. Private sector suffers a number of ethical blows- first and foremost, ethical standards of employees and employers. Second, we need to deal with an elephant in the house – negative ethnicity. Third, it is important to link grand corruption in the top leadership with the private sector whose fate is symbiotically related with the public sector(17).

3. "Public Interest" Rule

Ethics has a special concern with public accountability as Prof. Odhiambo reveals: According to Dele Olowu (1993)"public accountability is the requirement that those who hold public trust should account for the use of the trust to citizen or their representatives" . He further observes that "public accountability signifies the superiority of the public will over private interests and tries to ensure that the former is supreme in every activity and conduct of a public official" . Similarly according to Mouftau Laleye (1993) , "public accountability refers to sanctions and procedures by which public officials may be held to account for their actions" (14).

Government officials or State officers must be held accountable by the public in trust while in office. Their services must be in the public interest, meaning, serving the common good. The contrary means that State officers or individuals serve their own or partisan interests due to lack of proper institutional watchdogs and legal frameworks (14). However, despite good legal frameworks and institutions in Kenya, still there is ethical problem in the private and public sectors.

In the private sector, professional practitioners are meant to serve their interests as well as the group interests. Ethics considers business actors to be concerned with the consumer of their services and products (customer satisfaction principle). It is ethical to ensure that services and products are in line with the public interest as explained in corporate social responsibility.

A company that is considered immoral and unethical will simply lose the trust of the public which is its main stakeholder. Losing the public simply means phasing out in business. Therefore every business is bound to pay attention to ethical principles and moral standards expected by the stakeholders.

High culture of the media and other multinationals generate more profit (8). For instance, the Coca-Cola Company limited in Kenya has a big name not only because it is a multinational but it is also seen to reach out to poor communities and offer some social services. The same applies to other major business companies that put some money in building shelters for the poor, painting houses in poor estates, building toilets and extending some charity to the marginalised.

The rule of the game is that businesses must align themselves with ethical principles that would appeal to the public interest. Some companies are involved in feedback and customer survey that would get the opinion of the public. All this is done to build more confidence and trust so that the public can continue to use the products and services.

4. Ambivalences

If the economic growth of Kenya is based on developing strong business institutions, then there must be appropriate rules and proper codes of values in place. Kenya already has comparatively sound commercial laws and very good legal institutions to govern businesses. Decentralization of business administration from national to county should again boost the sector further once the 47 newly created counties enact appropriate regulations and policies to empower business activities.

1. Legislative Ambivalences

It is one thing to have appropriate legislations in both national and devolved governments to regulate business sector but it is another to ensure that there is proper standard of ethical values both in the national and devolved governments. This is a critical ambivalence since some county governments develop a tendency of manipulating business sector by enacting restrictive laws or over taxing the sector.

In attempt to raise revenues to support the Kiambu county, the government came up with Bills that would see burial becoming very expensive for the county residents. The whole Bill raised reactions from interested parties including business operators. A report from the Daily Nation said: *Dying is going to become an extremely costly affair in Kiambu if the county forges ahead with plans in its Finance Bill, 2013*. In a move that the county government says is meant to raise revenue to fund its Sh12.6 billion budget, the region is also proposing to tax farmers before the carcasses of their livestock and pets can be collected for disposal. Some members of the Kiambu County Assembly are a worried lot after receiving death threats and other dire

consequences over their stand against the county's proposed Finance Appropriation Bill 2013 (18).

Similar ambivalences and experiences are also felt across board and in other counties that seek to raise revenues to fund their budgets. Tax bill has been proposed including animals and chickens(19). In the same ambivalent way the Kakamega county has had it rough with business community on awarding of tenders to proxies(20). Kisumu county Assembly went as far as debating how women should sit on motorcycle challenging the wisdom and quality of laws governing business.

In a sadly typical display of sexism, a recently proposed law in western Kenya may prohibit women from straddling a motorbike or bicycle. Women in Kisumu County may soon be forced to sit sideways behind the driver, because apparently straddling a bike or motorcycle is "demeaning" to traditional Kenyan culture(21).

Such ambivalences are proofs of serious ethical turbulence at the governance level. Kenyan business community is getting increasingly concerned with moral values other than mere compliances. Certainly there is need to work on codes and values that shall accompany business. Reports have been made on poor business women trading in sex in exchange of fish at some points. A sign of moral decadence and business ambivalence in Kenya are indicators of ethics and business.

2. Religious Ambivalences

The State in Kenya has always allowed freedom of worship to supplement its moral crisis in human conduct. Religion has Holy Books that contain moral order which the State relies on to make individuals shape up. Paradoxically the same business ambivalence has been noted in religious practices in Kenya urging the government to introduce code of good conduct to regulate unethical behaviour.

Some sort of occults and kinds of worship in Kenya have failed ethical test by blackmailing their faithful communities in the name of God. Religion in Kenya is another moral ambivalence that the State must deal with strategically in order to restore national standard of values.

Some Mosques have been forced to close down when the security officers discovered weapons and outlawed groups planning to commit crimes rendering the holy and sacred places of worship battle fields(22). Some Churches have also failed in ethical test due to commercialization of faith, blackmailing believers of miracle healings and ripping money in the name of God for instance the case of Dr. Prophet Victor Kanyari scandal(18). It is in Kenya that the Government has no control over religion and criminals have found how to make easy wealth in a relaxed ethico-legal regime.

In the name of freedom of worship and human rights Kenyan Governments have severally manipulated religion to justify unethical behaviour leading to a failed moral system. Some corrupt personalities in politics will always get chance in the pulpit to justify their uprightness or corrupt religious leaders in their favour.

Sects, unofficial occults, and belief systems are mushrooming in Kenya at an alarming rate. A serial killer Phillip Onyancha belonged to a cult and his belief was to kill women and drink their blood, he testified (23). Some pastors have been in the saga of stealing children in the name of miracle births while some have been getting money convincing their congregation of planting seeds in order to get blessings while some have been linked with outlawed criminal groups.

Religion in Kenya has been categorized among institutions with no full moral authority to provide ethical guidance for the State. There are ethical ambivalences in the sector of religion which may not add up to the search for a system of values. The criminal case 88 of 2005 involving a Catholic priest and a Bishop is one of the naughty cases in the Kenyan criminal history (24).

Fr. Guyo Waqo Malley and four others, were found guilty on Tuesday of planning and killing the 77-year-old Italian-born bishop in his diocese in Isiolo town. The bishop was gunned down as walked into his house on 14 July 2005. The four were arrested and charged later that year(25).

The State may consider formulating laws to regulate freedom of worship and restore sanity in religion. As this is legally justified, the question remains on the integrity of the State organs. When the Legislature, Executive and the Judiciary fall short of ethical standards and morals the entire social process suffers. Any right thinking person would question moral authority of the State before enacting regulations to restore ethics and morals? The entire system is in moral crisis. Between politics, business and civil society there is no other power that can bring sanity other than education.

5. Hypothetical Direction

Admitting that ethics affects business directly or indirectly, serious companies and business enterprises are considering engaging ethical consultants to train their staff on practical issues. In Kenya, it is manifest that the private sector is getting increasingly conscious of the urgent need of ethics and morals in business in order to create balances in the capital market trends. Companies that are doing well in Kenya may consider committing some extra funds in training their staff and managers on applied business ethics. The failure to build ethical culture in the business sector shall again experience crisis such as that of Enron.

The failure to act now on Competition law and other key financial laws may be tantamount to more loss of confidence from business partners. Such loss of trust cannot only be national and local but regional and international. For instance, Kenya was ordered to pay a big sum of compensation award to some foreign companies that lost their money in Anglo-Leasing Scam, a move that brought different reactions (26). Still more may be in the pipeline if such unethical behaviour is not well tamed. The beneficiaries of the Anglo-Leasing money did not have to pay but all tax

payers had to share the corruption burden.

Universal Satspace (North America) LLC in September 2006 sued the Government over claims of \$12,366,816 (Sh1.4 billion) at the Justice Queen's Bench Division Commercial Court in England. The English court entered judgment entered against the Government of Kenya after its defence and counterclaim was struck out delivered on December 20, 2013(26).

Investors may decide to pull-out their capital from the Kenyan fragile market due to lack of ethics, morals and standards in the system. Such possibilities can see the currency deteriorating and the economy suffering due to related lack of public accountability and bad governance issues (14).

There is too little to smile about the Kenyan economy, if the leadership is not committed enough to implement true reforms, the rule of law, constitutionalism and code of ethics. Unethical culture traversing the Kenyan society is not good for the sustainable economy. The reason being, investors, stakeholders and business contenders are not only from Kenya, but from other cultures. For instance, learning that Anglo-Leasing(27) swindled huge amount of money is already a threat to those who may love to invest in Kenya. Now the policies and regulations the Government put in place can be enough to threaten the investors.

Many people in the world are getting more concerned with ethics and morals more than good acts. Privates and general public are developing sceptical attitude towards unethical practices. Tourism industry in Kenya has been declining due to several factors including insecurity situation and low ethical standard in the system. Foreigners and locals who are interested in the tourism industry would like to see how the Government is dealing with its wildlife, forests, and the entire natural environment. How is the Government treating those who are socially marginalised?

Now many more tourists prefer going to the rural homes, staying with the ordinary poor Kenyans, sharing what they have with local communities other than getting booked in high class hotels. This change of attitude is purely on ethics. It is no longer how you prove to invest in infrastructure but how much you hold the social responsibility.

6. Ethnicity & Nepotism

For over five decades down the line Kenya has been fanning negative ethnicity and pluralism (28). This has created undertones that some ethnic groups have been socially side-lined by the system while others are flourishing in wealth, politics, good life and better services in disregard to the spirit and letter of the Constitution. The main concern of this research is on the general discontent of the majority of the population whose social rights have been negatively affected and how the elite has manipulated ethnicity (14) but not on empirical study of the ethnicity problem.

The questions this essay is raising are: is the government doing enough to restore sanity in ensuring equal

redistribution of wealth? Is the national government concerned with harmonizing all ethnic groups and religious communities especially the minority communities? More than providing answers to the salient questions the interest in this discussion is to provide a platform for further debates on ethical issues.

One can only predict a strong economy and a better system when the greatest number of the population is economically empowered, and more persons have financial power to access their basic needs and are able to pursue happiness.

The gap between the poor and the rich in Kenya is still widening despite the recent improvement and democratic space for the middle social class. Yet there is no proper social welfare state to take care of the unfortunate and the marginalised individuals or groups. Bargain power and possibility to access commodities is still low as compared to other world economies.

There is imbalance in the economy and redistribution of wealth due to favouritism, elitism, and nepotism. A society with so many marginalised persons and inept leaders may not meet its expected ethical standards despite the existence of legitimate legal framework. Presumptively such social injustices could be counter-productive for the entire macro economy and sustainability of wealth.

Kenyan society is best described as “man eat man society” or in Latin, *Homo homini lupus* (man is a wolf to fellow man) (Palutius of 195 BC)(29). The wealthy exploit the poor for their material benefits and gains. As Julius Kabarage Nyerere referred to Kenya as *man eats man society* (30), meaning, the minority rich class exploiting the majority poor class. Extreme capital market theory and capitalism shall only produce inequalities and some imbalances if there is no proper regulatory framework and political good will. Predictive consequence shall be more crimes related to unethical behaviour of the struggle to survive. Therefore, a society where being poor is a crime.

7. Corporate Ethics and International Standards

Kenya adopted capitalism ideology from its on-set (31) as its preferable economic long-term plan. The general market economy it is all about accumulation of wealth, maximizing benefits and accruing all the generated incomes by individuals as explained in the following citation.

The working class are paid to produce goods and services which are then sold for a profit. The profit is gained by the capitalist class because they can make more money selling what we have produced than we cost to buy on the labour market. In this sense, the working class are exploited by the capitalist class. The capitalists live off the profits they obtain from exploiting the working class whilst reinvesting some of their profits for the further accumulation of wealth. - See more at:

<http://www.worldsocialism.org/english/what-capitalism#sth>

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Capitalist systems have their serious ethical hiccups that Kenya cannot avoid. One is ignoring the weak, the oppressed and the marginalized in society. The rich will always get richer while the poor will always get poorer. Capitalism has element of exploitation of the working class by the few tycoons that control means of production and use bureaucratic corruption to hang on power.

The real estate market is an example to unethical business practices in Kenya. Companies and individuals with good money moved to purchase big chunks of lands among pastoralist communities in order to make profit in disregard to distributive and restorative justice principles. The same plight is now facing young counties such as Kajiado, Turkanda, Baringo, Marsabit and others some of whose members rely on land to survive. In some regions this has been followed by violent conflicts and tensions affecting the communities.

Holme and Watt defines Corporate Social Responsibility (CSR) as a duty of every corporate as body to protect the interest of the society at large (32).

Corporate Social Responsibility in Kenya is an urgent issue to be addressed by the government in order to avoid the worst. It is not ethical for companies with big capital to take advantage of the existing commercial laws and apply the principle of “willing seller - willing buyer” to ignore ethical responsibility regarding the rights of the minority or the marginalized.

In the recent years, the incidence of Mt. Elgon where Sabaot Lands Resistance Force (SLRF) community turned hostile against land tenure policies and resistance which ended up in violent conflicts. *Land issues are a fundamental aspect of structural conflicts in Kenya but they have also often degenerated into physical violence. The country has witnessed killings before previous elections in both 1992 and 1997, when alleged enemies of the Moi regime became victims of violence, using arguments over the contrasting land rights of ‘immigrants’ and ‘local communities’. Central to land conflicts in Kenya are issues of ownership, access and use. Land has been the crux of economic, cultural and socio-economic change in Kenya(33).*

Land issues have also determined social ethics in Kenya. Land involves serious frauds, killings, irregularities, theft, cartels and injustices that the government is yet to deal with (34). Faking of documents in the Ministry of Lands is unethical practice in Kenya which has been there since independence and the root cause of land crimes such as land grabbing.

8. Judicial Remedy

Courts are meant to interpret law, enforce it and administer justice. The same high level institution is expected to be prolifically ethical and prudent in dealing with matters concerning justice.

In Kenya, the judiciary has been blamed for grand-corruption. Judges, magistrates, advocates and other court officers have been blamed for unethical behaviour. Contemplating vetting of judges and magistrates in the sixth schedule number 23 of the constitution 2010 was an effort towards rendering the institution more ethical and the Judicial Service Commission has the mandate of investigating the conduct of court officers(10). Whether this process has made the judiciary more transparent and upright is still a subject of time but the lesson has been learned. Mary Driscoll once said, *abuses and excesses shall ever be there but fewer (2)*.

The Judiciary as constitutional institution must satisfy the shareholders but the desire to satisfy the shareholders must be balanced with the need to service all Government operations – all of whom contribute to the State worth. The judiciary must be reinforced with values that build trust as well as more cognizant oversight and notable penalties for immoral acts. Justice must not only be seen to be done but must be done.

Corruption in the judiciary has been considered an ingredient to the Post Elections Violence of 2007/8 and a cause of major scandals. Kenyans lacked confidence in their legal institutions and administration of justice which lead to violence.

The constitution of 2010 envisioned streamlining the judicial services by creating a new Judicial Service Commission and Vetting of Judges and Magistrates Board. Recruitment of judges is no longer the prerogatives of the President as it was in the former. The President cannot appoint or fire judges at his own volition as it used to be in the former law. The motivation towards this constitutional position is to keep up with the principle of judicial independence and impartiality(35) in the legal system accepted by many Commonwealth nations(36).

Checks and balances in the oversight system are to ensure that no institution is absolute, no abuse of power, and there is efficient public accountability (14) for all arms of government. State powers have been eventually shelved among the Executive, the Legislature and the Judiciary in order to ensure more public accountability.

It is in this spirit of the law that the country can achieve expected ethical codes and moral standards in service delivery to the people. At the same time, devolution of certain powers to the counties is meant to ensure improved service delivery to the people at the grassroots level. However, such fundamental reforms in the rule of law must be accompanied by strong ethical foundations.

Petition No. 39 of 2013 involving Chief Registrar versus the Judicial Service Commission reads in parts that: It is the Applicant's case that though this letter did not contain the reasons for termination, the Respondent set out the reasons for her removal in a media release at its website, as follows; Incompetence; Misbehaviour; Violation of the prescribed Code of Conduct for judicial officers; Violation of Chapter 6 and Article 232 of the Constitution; and Insubordination (37). The controversy is mainly on ethical issues other than

compliance.

Another strong court case involving Deputy Chief Justice Lady Nancy Baraza was based on unethical behaviour in public. Lady Justice Nancy Makokha Baraza was the Deputy Chief Justice & Vice-President of the Supreme Court of The Republic Of Kenya [2012] eKLR. *Kenya's deputy chief justice is facing a police investigation following claims that she threatened to shoot a security guard after refusing to be frisked(38)* at village market in Nairobi. She pinched the nose of the security guard and threatened to shoot her. Lady Justice lost her prominent job in the Judiciary due to ethical misconduct. The Deputy Chief Justice apologised but justice was to take its course. One of the serious unethical allegations involved an attempt to bribe the complainant so to withdraw the case but it did not work out well. She lost her dignified position due to ethical gross misconduct (39).

9. Key Challenges

Generally, ethical misconduct in the public sector is a serious problem facing Kenya in the world new order. New media, modern technology of information, social media as well as globalization of culture, are now making it possible for persons to behave ethically and professionally.

Professional ethics ought to be entrenched in the Kenyan system. This call involves all sectors including journalism. It is no longer a secret that ethical standards and values are universal and there is no exception.

1. Intolerance

Ethics in terms of morals shows that Kenya is affected by the world computer crimes or cybercrimes whose control is a global challenge. In the same level there is high level of intolerance emerging from Arab spring. Some Christians are being profiled by Islam fundamentalists under the pretext of terrorists. For example, when a public bus was attacked and Christians were assassinated in cold blood by assailants. Such unknown unfolding situation of conflict assumes religious intolerance which is unethical. It is a big challenge in a country whose record in the freedom of worship has been good.

Social media in Kenya have involved some individuals in using media as means to defame their opponents. Hate crime has been in the spring. Social media is posing urgent ethical challenge that media fraternity and the media council are seeking to remedy.

Nothing of these challenges may be good for business. It is an up-hill to deal with unethical issues that traverse the national borders and Kenya does not have international jurisdiction to deal with unethical and immoral information crossing into her border.

2. Political Arrogance

There are other newly emerging ethical challenges that may upset the business community. Security laws (amendment) Act, 18th December 2014, that seeks to regulate

immigration laws and status of aliens including business community is under debate as Prof. Makau Mutua sees it.

Constitutionalism and the rule of law are the central features of any political democracy that respects human rights. An independent judiciary, the essential guardian of the rule of law, is the linchpin of the scheme of checks and balances through which the separation of powers is assured. Otherwise, there is no other guarantee that the executive -- the "government"--will respect the rule of law and act within established legal norms, processes, and institutions. The constitution is thus not merely hortatory but the fundamental and supreme law of the land, the real and living document that guides, defines, and permits all actions by the state. No individual or official of the state is above the law or can act in defiance of constitutional prescriptions. (40).

Such amendments have been accused of not meeting threshold of human rights and some ethical standards as stated in the above citation. The paradox is when the government is to ensure that there is security for its citizens through amendment certain laws or parts of the constitution. Such dilemma requires ethical evaluation of the decision made by the law and policy makers.

3. Ethics Versus Law

Despite many enacted laws and proper institutions in place, Kenya is still dwindling in business ethics. It can be argued that compliance based approach is not enough but the State needs also value based approach as Silverstein puts it. *Punishment serves as a deterrent. But a clear-cut mission and a corporate code of ethics is crucial. It's the foundation to which boards, managers and workers rely when they reach a fork in the road. It's the principles they use when deciding whether to emphasize short-term gain or long-term stability(2).*

In this article the author proposes that a compliance-based approach be supplemented by a value-based approach in attempts to reduce public service malfeasance. The compliance-based approach per se should not be regarded as the panacea for corruption. It could be argued that such an approach not only reduces malfeasance, but creates additional layers of oversight and reduces public service efficiency and effectiveness. In fact, additional structures and policies could create opportunities for corruption. Conversely, the value-based approach seeks to promote the ethical culture within a public institution. This research builds on an existing body of literature concerned with the ethical culture of organisations. This author identified the Department of Correctional Services as a case study to determine how the promotion of an ethical culture could enhance the implementation of corruption prevention policies. The author makes use of a survey to collect data. The captured data is analysed and subjected to exploratory factor analysis. A total of 11 factors of ethical culture are provided and the correlation between factors is provided with the Pearson's correlation coefficient (41).

10. Kenya at a Cross-road with Historical Ethics

Young democracies such as the Republic of Kenya that got their independence from European colonists may have not had time to develop their own ethical culture and are caught up in the international systems and structures created for them to operate in (14). Political leadership has played the biggest role in setting development agenda and determining the economy. Business sector has been dominated and manipulated by the same politicians who are the law makers, the executives and law enforcers so much so that any moral failure in the top governance shall affect the entire business.

History has it that ethical decadence in the Kenyan system has its roots traced back to the first Government of President Jomo Kenyatta, the first Prime Minister and the first President(9). Besides his great name he is also the leader whose vision determines the modern Kenya (42).

Kenyatta was known also for his inclination and loyalty to the Western Capitalism ideology during the Cold War. His affiliation to Britain and USA characterised his leadership seeing him turning his shoulders against Soviet Union and social communist ideology and its supporters. Kenyatta and the first government of Kenya adopted capital market oriented economy basing its values and principles on profitability, accumulation of wealth that see Kenya making gigantic strides towards economic development other than moral and social development.

The founding father of the nation, Jomo Kenyatta did too little and too late to role out an ethical strategy during his presidency allowing people in power to accumulate wealth and plunder public property. The morals of the people did not succeed to form the basis for his government. During his leadership financial scandals were majorly linked to political heavy weights (mafia) of his time (9). Despite the unethical political cliché around him he campaigned for competitiveness and capitalist principles that saw him parting ways with dissenting opinions. His government (1963-1978) promoted capitalism but discourage social structure.

Modern Kenya has its moral genesis from the very foundation of the nation. The mind and heart of Kenya as a nation never had chance to cultivate a culture of ethics and morals from the beginning. Theft, fraud, grabbing, divisive politics, and many other economic crimes have been not taken seriously by capitalists in power.

Efforts that have been in measure are from external pressures and impositions by donors. Governments have done too little and too late to inculcate ethical principles in the public order and develop a system of values other than regulations (6).

Daniel Arap Moi who succeeded Kenyatta in 1979 campaigned on the platform of "Nyayoism and ideology"(43) meaning following the foot-prints of his predecessor. He was not apologetic of inherited un ethical behaviour such as corruption. In order to stay in power he developed a

laissez-faire attitude. His government did not condemn unethical behaviour in the business sector. It was during his reign that Kenya witnessed grand scale corruption(15), impunity, ethical and professional decadence in 24 years rule (14).

Emilio Mwai Kibaki came into power on the platform of transforming Kenya, fighting corruption and democratizing the whole system. His government campaigned for reforms including introducing some ethics in the system(7). He created an office dealing with ethics and public accountability. It was during his leadership that his PS for the Department of Ethics, and his confidant in ethical issues, John Githongo(27) blew whistle on the grand corruption (4). Despite the President's full awareness of cartels, scams and ethical decadence in his administration he was silent on stealing of public money (monetary corruption) and corrupt deals in his government (bureaucratic corruption) (44) making him part ways with some of his political lieutenants and allies.

As his predecessor, Kibaki adopted financial scandals from his predecessors in 2002 including Goldenberg(15) and Anglo-Leasing(27) which he did not condemn. Kibaki was not populace kind of leader but his approach to economic crimes was tacit on unethical behaviour in his government despite his good will. Electoral fraud and other unethical behaviour were perpetuated.

The newly created Ethics and Anti-Corruption Commission was perceived to be the panacea for restoring ethics and morals in the economic system(7). It was meant to deal with corruption and economic crimes setting pace for a system of values. Prior to this in 1988, the commission (The Office of Ethics Reauthorization Act) did not deliver its mandate due to well-connected corrupt deals in the Office of the President. Kenya had to engage into the pursuit for absolute integrity(45) to render the government more effective and trustworthy.

Ethics and Anti-Corruption Commission was created with a clear mandate to combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption.

Gathii puts it nicely in his writing: This is because the nature of corruption in the county is in large measure a reflection of the disproportionate inequalities of wealth *and* power. Grand scale *corruption* and looting in particular take place within a fairly complex network of individuals and groups with access to enormous wealth, power and influence in both the public and private sector. Dealing with *corruption* as a matter of procedural fairness is insufficient in this context. Any approach to dealing with *corruption* requires a commitment to redressing the disproportionate access to power, wealth and influence that makes *corruption* possible in the first place. The Goldenberg scandal and the case of the Anti-Corruption Authority demonstrate the inadequacy of using procedural safeguards to deal with a case of grand corruption and looting (46).

The cross-road and ethical dilemma the second Republic is faced with is how to ethically cleanse its system ensuring that only men and women of integrity and ethical aptitude can hold positions of leadership. Fight against corruption has been at the discretion of political leadership which in itself does not have clean hands in economic crimes.

Corruption(9) is not simply a domestic problem but it involves several actors within and outside Kenya (47).

Corruption poses serious challenges to the attainment of the Kenya Vision 2030. To this end, Kenya has put in place measures to combat and prevent corruption and unethical practices. The Commission formulated and launched its strategic plan 2013-2018 to guide anti-corruption efforts in the country. The Plan outlines measures to ensure an effective, efficient and ethical public service. The Plan also provides measures to address corruption and unethical practices associated with devolved system of governance in Kenya.(5)

Given the above perception the commission is loaded with obligations and duties to ensure that Kenya is a Corruption-Free-State(9). In addition, Kenya has in place the following laws: *Ethics and Anti-Corruption Commission Act 2011; Leadership and Integrity Act 2012; The Anti-Corruption and Economic Crimes Act; The Public Officer Ethics Act; The Public Procurement 005; Public Procurement Regulation; Witness Protection Act 2006; Proceeds of Crime and Anti Money Laundering Act; Prevention of Corruption Act (repealed); The Constitution of Kenya; The African Union Convention on Preventing and Combating Corruption and others.*

Despite all the good legislations, creation of the office of ombudsman or Commission of the Administrative Justice (48), Director of Public Prosecutions (DPP), Judicial Reforms, and human rights commissions are all relevant institutions that Kenya has in place to deal with integrity and ethical issues in business. They are *inter alia* to deal with leadership, integrity and ethics requirements in the Constitution 2010.

Several reports, namely, Ndung'u, Kiplagat, Ndegwa, Waruhiu and others have not been properly implemented by the successive governments posing serious ethical challenges. The so called institutional corruption is the most difficult type of syndicate to deal with by any government despite the good institutions. Likewise, corrupt leadership cannot fight corruption and lastly, corruption cannot be fought only from outside (46). It is not for the donors to propose strategies to fight corruption but it must be people driven. People must have a culture of ethical values in order to support institutional efforts to fight corruption.

In the recent years Kenya is creating work relationship with Nigeria where political and economic corruption is rampant(9). It is imitating Nigeria in all manners when it comes to ripping off public wealth.

A Nigerian political leader Obafemi Owolowo stated it clearly that "the nation's colonial history may have restricted any early influence in an ethical revolution" (49). The same could be said about Kenya. A thinker from Martinique by the

name Franz Fanon made his analysis about the psychology of the colonised and the coloniser in his widely read book "The Wretched of the Earth" in 1961 saying that colonialism created a negative impact on African system of values (50). The trapping of flash cars, houses and success of colonists may influence the poor to see colonists as symbols of success and to emulate them in different political ways (49).

Ethics and integrity are at the core of sustainable long term success," says Richard Rudden, managing partner at Target Rock Advisors in New York State. "Without them, no strategy can work and, as Enron has demonstrated, enterprises will fail. That's despite having some of the 'smartest' guys in the room(2).

"Each generation must discover its mission, fulfil it or betray it, in relative opacity."— Frantz Fanon, "The Wretched of the Earth".

It is in this sense we can be optimistic about the above moral ambivalences facing Kenya today.

11. Conclusive Remark

Avoiding what would turn to be a lengthy academic analysis of ethical issues such as corruption which is haunting business organization the essay seeks to create a platform for academic debates on business and State measures. The essay has served two key purposes: one - opening up an academic research on ethics in the Kenyan business culture; and two-questioning what has become an obvious style of life – institutionalised corruption.

Business needs predictable environment blended with constitutional principle of the rule of law and a system of rational ethical values. This must be accompanied by a stable political authority, proper educational politics and strong institutions. It is arguable that legal reform and institutional changes are important but ethics as a system of values remains the epitome of any successful economy, democracy and sustainability. Corruption in Kenya is a social issue dealing with communicative actions and how people relate to one another in terms of monetary and bureaucratic gains anchored on change agents. Ethics is not just a question of rationality but a life-world and how people themselves interpret conventional ethical values(51) is what matters most.

An American intellectual of the 21st Century Noam Chomsky once said "Optimism is a strategy for making a better future. Because unless you believe that the future can be better, you are unlikely to step up and take responsibility for making it so."(52).

Kenyans as a people have invested their trust for too long in political leadership and constitutional commissions (smart men in the room) with the hope to make things work better but blatantly failed to take personal responsibility to determine their economic destiny. The Commission for Administrative Justice is also mandated for training civil servants(48) on matters regarding ethics, moral values, code of conduct, and performance contract, but this may only

affect few individuals especially in the Government sector.

In ethics, what matters most is the individual conviction that a better future is possible other than trusting in smart men in the room to do the job for you. Allowing politicians to determine the future for the State has brought Kenya to its present status. The smart men in the room will always come up with policies, strategies, projects and convince all stakeholders endorse it. How about if the smart men in the room are unethical and they lead the entire community into an economic doom as in the case of Enron? Ethical dilemmas are not always white and black. They come with certain complexities and the question can lead to hard choices. The affected will not only be smart men in the room such as managers, Chief Executive Officers but also the entire lot including pensioners, investors, wage earners, creditors and debtors.

In conclusion, ethics is about all of us and each one of us at the same time. Each one of us is a shareholder in the state operations. We should not close our eyes to the behaviour of smart men in the room and stop being critical thinkers. Rather each person in business must be vigilant and ready for any eventuality in business at any time and Kenya must do something on how to deal with her grave ethical challenges.

The state must also comply with her obligations in both international and municipal law. It is in this way governance and the constitutional principle of the rule of law can become reality.

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