

**JUDICIAL INDEPENDENCE IN KENYA:
CONSTITUTIONAL CHALLENGES AND
OPPORTUNITIES FOR REFORM**

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by

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Abstract

The judiciary in Kenya has been progressively viewed as subservient to the executive, an upholder of state power and a poor protector of citizens' rights. The rejection of the judiciary as an independent and impartial arbiter of disputes was a major contributor to the post-election violence experienced in December 2007 which resulted in anarchy and massive loss of lives and property.

This thesis contends that there is a contextually symbiotic link between separation of powers, judicial independence and the rule of law. While focusing on the relationship between the judiciary and the executive, the research highlights the dangers of failure to maintain the appropriate balance of power between the executive, judiciary and the legislature, its ramifications to judicial independence and the rule of law. By analysing secondary data and using Kenya as a case study, this relationship is chronologically traced from the pre-colonial, colonial, independence and post-independence periods.

An examination of successive constitutions exposes gaps and weaknesses in constitutional provisions guaranteeing judicial independence. Instances of violation are discussed with examples as confirmation that such protection was minimal, weak and not respected in practice. A high degree of executive intrusion, influence and control was evident *inter alia* in appointments, removal, funding and administration. Cumulatively, these factors contributed to the erosion of personal and institutional independence leading to drastic loss of confidence. Opportunities in terms of implemented reforms, especially the newly promulgated Constitution of Kenya 2010 are scrutinised.

The thesis concludes that even though complete independence from the executive cannot be achieved nor is it desirable, more robust constitutional protection of judicial independence, coupled with a high degree of autonomy can be a strong guardian against violation. New threats are discovered. Further research, constitutional amendments and use of non-legal initiatives are proposed as key for future judicial reform.

Dedication

To, the late Caleb Obiero, my loving father

You inculcated in me the spirit of humility, resilience, hard work, a life time of values
and the quest for perfection just like you lived your life

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Table of Abbreviations

ACTS	African Centre for Technology Studies
ANLEP	Academic Network on Legal Empowerment of the Poor
CIJL	Centre for Independence of Judges and Lawyers
CIPEV	Commission Investigating Post Election Violence
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CMI	Chr. Michelsen Institute
CUP	Cambridge University Press
EAEP	East African Educational Publishers
FIDA	Federation of Women Lawyers Kenya Chapter
HCCC	High Court Civil Case
HCCC	High Court Civil Case
HL	House of Lords
IBA	International Bar Association
IBEA Co.	Imperial British East Africa Company
IBHARI	International Bar Human Rights Institute

ICJ	International Commission of Jurists
IIDRC	Interim Independent Dispute Resolution Court
JSC	Judicial Service Commission
KACC	Kenya Anti-Corruption Commission
KEPSA	Kenya Private Sector Alliance
LSK	Law Society of Kenya
MIT	Massachusetts Institute of Technology
MTEF	Medium Term Expenditure Framework
NARC	National Rainbow Coalition
NLJ	New Law Journal
ODM	Orange Democratic Movement
OUP	Oxford University Press
PNU	Party of National Unity
UCLA	University College Los Angeles
UDHR	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
USAID	United States Aid Agency for Development
WLR	Weekly Law Reports

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Petition No. 4 of 2010

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Petition No. 4 of 2010

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2000

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Statute of the International Criminal Court 1988

Statute of the International Tribunal Court for Rwanda 1995

Statute of the International Tribunal Court for the former Yugoslavia 1993

UN Basic Principles on the Independence of the Judiciary 1985

Universal Declaration of Human Rights 1948

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CHAPTER ONE

INTRODUCTION

In modern society the individual is subject to control imposed by the executive in almost every aspect of life...If the rule of law is to be upheld, there should be an independent judiciary. The citizen must be able to challenge the legitimacy of executive action before an independent judiciary, because, it is the executive that exercises the power of state and because it is the executive in one form or another that is the most frequent litigator in courts. It is from the executive pressure or influence that judges require particularly to be protected.¹

1.1 Background of the Study

This research arose out of the author's experience as a judicial officer (magistrate) in the Kenyan judiciary over a period of twenty years. During this time, the author was exposed to violations of judicial independence by the executive, some so subtle as to evade detection. Ignorance of the workings of the judicial system in Kenya, in relation to the other arms of government, by politicians, the general public, some members of the legal profession and even judicial officers themselves was apparent. The judiciary itself exacerbated the situation by perpetuating an unofficial closed door policy. Information was hard to obtain even on the simplest of factual issues. A discourse on the appropriate balance of power between the judiciary and the executive thus became relevant; a relationship worth analysing.

Judicial independence is a central component of any democracy.² It has institutional and personal dimensions. Institutional independence concerns the capacity of the judiciary as a separate branch of government, to resist encroachments from

¹ Lord Phillip of Worth Matravers, President of the United Kingdom Supreme Court, 'Judicial Independence and Accountability: A view from the Supreme Court' <<http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>> accessed 22 February 2011

² Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in S. Shetreet and J. Deschenes (eds), *Judicial Independence: The Contemporary Debate*, (Martinus Nijhoff Publishers, Dordrecht 1985) 590

political branches and thereby preserve separation of powers.³ Personal independence, in contrast, concerns capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law.⁴

For judicial independence to be achieved there must be some proportionate and adequate separation of powers within government. Separation of powers requires that governmental power be divided between the judiciary, executive and legislature.⁵ The requirement is that each branch is able to check the exercise of powers by the others either by participating in the function conferred on them or by reviewing the exercise of that power.⁶ It is invoked as a mechanism for restraining and limiting government power, or allocating such power.⁷ In other words, separation of powers is essential for an independent judiciary.

Similarly, the requirement of judicial independence, supported by separation of powers is not just good for its own sake. It is meant to further certain virtues and aspirations of the society. These are the values portrayed by the doctrine of rule of law. The need for separation of powers arises not only in political decision making, but also in the legal system, where an independent judiciary is essential if the rule of law is to have any substance.⁸ The rule of law requires, *inter alia*, that government and citizens submit to the authority of the law; that there is equal treatment before the law; and that

³ Charles G Geyh, 'When Courts and Congress Collide: The Struggle for Control of America's Judicial System' (2007) 82 Indiana Law Journal, 1267

⁴ Ibid

⁵ Montesquieu, *The Spirit of the Laws* David Wallace Carrithers (ed) and (tr), (University of California Press, London, 1977) 202

⁶ Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press, Oxford 1998) 15 (Oxford University Press is hereinafter referred to as OUP)

⁷ Roger Masterman, *Separation of Powers in a Contemporary Constitution: Judicial Competence and Independence in the United Kingdom Constitution* (Cambridge University Press, Cambridge 2011) 12 (hereinafter referred to as CUP)

⁸ A W Bradley and K D Ewing, *Constitutional and Administrative Law* (15th edn, Pearson Education Ltd, Essex 2008) 81

there is impartial arbitration of disputes according to law. Both principles require an independent judiciary in order to protect the values that they protect more widely. If the legal doctrines of separation of powers and the rule of law are applied as traditionally understood, it would lead to the existence of an independent judiciary. The question is whether the Kenyan judiciary satisfies these requirements and can be said to be independent.

The concern of this study is the independence of the judiciary in Kenya. Kenya is a constitutional democracy and from the time it attained independence from British rule in 1964, the organisation of its government has been ordered by written constitutions which spelt out the functions of the executive, the legislature, and the judiciary. Inherent in the constitutions was the doctrine of separation of powers, judicial independence and the rule of law. For a long time, there were accusations that the doctrine of separation of powers had practically been replaced by the doctrine of concentration of powers.⁹ That despite its pretence to independence and the rule of law, the Kenyan judiciary was a tool for facilitating and rationalising executive control.¹⁰ The judiciary had subordinated its constitutional mandate of upholding the principles, values and objectives of the rule of law. This state of affairs must, inevitably, concern any student of constitutional law because loss of citizens' faith in the judicial process can lead to an increased propensity to resort to unorthodox means of resolving legal disputes.

⁹ Kiraitu Murungi, 'Relationship between the three Branches of Government' in *Report of the Pan African Forum of the Commonwealth Latimer House Principles on the Accountability and the Relationship between the Three Arms of Government*, (Commonwealth Secretariat, London 2005) 9

¹⁰ Ibid, also see USAID Country Report, 'Radical Changes in the Kenyan Judiciary,' (Kenya Democracy, 2005) <http://africastories.usaid.gov/search_deatils.cfm?storyID=328&countryID=10§or> accessed 1 July 2009

The background to this study is informed especially by the events following the hotly contested presidential elections in Kenya in December 2007. The opposition leaders and members of the Orange Democratic Movement Party (hereinafter referred to as ODM) refused to submit to the jurisdiction of the courts to resolve the election dispute, rejecting the judiciary as an impartial and independent arbiter.¹¹ They instead called for mass action to protest against the stolen votes. Kenyans opted to take the law in to their hands and engaged in violence which caused considerable suffering to thousands of people.¹²

Within days of announcement of the presidential result, close to 500,000 people were forced to flee from their homes,¹³ an estimated 1100 people died and property worth billions of shillings was destroyed, women were raped and children were defiled on a large scale.¹⁴ Intervention by John Kufuor the President of Ghana, Bishop Desmond Tutu, and later the Panel of Eminent Africans under the chairmanship of Dr. Kofi Anan as mandated by the African Union, brokered a political deal between the major political parties. The ODM Party and the Party of National Unity (hereinafter referred to as PNU) consequently agreed to share power, and the fighting stopped.¹⁵ Subsequently, a *de facto* coalition government was formed, albeit outside the constitutional framework since there was no constitutional framework for the existence of a coalition government.¹⁶ The post-election violence threatened the stability of

¹¹ The Report of the Commission of Inquiry into Post Election Violence (CIPEV) 2008 (Government Printer, Nairobi) 16

¹² Edwin O. Abuya, 'Consequences of a Flawed Presidential Election' (2009) 29 Legal Studies 128

¹³ Ibid

¹⁴ CIPEV Report (n 11) 16

¹⁵ The Kenya National Dialogue and Reconciliation Agreement 2007 which later became National Accord and Reconciliation Act 2008

¹⁶ <<http://kofiananfoundation.org>> accessed 2 February 2009

Kenya, a country which had been considered peaceful and stable hence, Kenya's reputation as an oasis of peace in a continent plagued by violence was shattered.¹⁷

These events put the rule of law to the ultimate test. It was a clear pointer to the fact that the institutions charged with the responsibility of ensuring that the rule of law prevailed had failed. Lack of independence and impartiality had failed to create the necessary level playing field for all political actors.¹⁸ The law is quite explicit that if a party is aggrieved with the outcome of an election, the only body with jurisdiction to determine the validity of such outcome is the judiciary.¹⁹ The judiciary was seen as weak, vulnerable to executive pressures and incapable of checking its excesses. It was evident that people had lost faith in the judiciary's ability to dispense justice fairly, impartially and without fear.²⁰

This was a serious indictment that begs for an in-depth interrogation of the judiciary to reconsider its role in an emerging constitutional democracy. It generated a debate which had been going on for quite a while, questioning the independence of Kenyan judiciary from the executive. A commission, established to inquire into the post-election violence, came up with a damning report which confirmed the fears expressed above. The Commission summed up the problem, the subject of this study, in the following words:

As noted in the Akiwumi Report and in a number of articles on Kenyan politics the check and balances normally associated with democracies are very weak in Kenya and are deliberately so. Individuals in various parts of government whether civil service, *the judiciary*, and even in Parliament, understand that irrespective of the laws, the executive arm of government determines what happens. Hence, the state is not seen as neutral but as the preserve of those in power. The syndrome has had

¹⁷ Abuya (n12) 128

¹⁸ *Report of the Constitution of Kenya Review Commission (CKRC): Volume One; The Main Report*, (CKRC Nairobi, 2003) 49, (hereinafter referred to as Ghai Report)

¹⁹ S 44(1) Constitution of Kenya 2008 (Government Printer, Nairobi 2008)) Schedule No. 3

²⁰ Ghai Report (n 18) 206

various consequences: The first is a sense of lawlessness that has led to government institutions and officials being seen as lacking in integrity and autonomy. One result of this is in the 2007 elections was the perception by sections of the public that government institutions and officials including *the judiciary, were not independent of the presidency, were not impartial*. Hence they were perceived as not able to conduct elections fairly. That the public sector institutions were seen as biased and unlikely to follow the rules increased the tendency to violence among members of public.²¹

The Kenyan judiciary had been a disaster waiting to explode, and it did as exemplified by the 2007 post-election violence. The Task Force on Judicial Reforms (hereinafter referred to as Ouko Report) established by the government later in 2008, having reviewed previous attempts to reform the judiciary, confirmed in its report that “following many years of neglect, the judiciary has continued to perform below the expectation of the people and a call has been made for comprehensive reforms of the institution.”²²

Though it is events and circumstances discussed above that triggered the author’s interest in commencing this research, it must be conceded that there are other factors which contributed to the post-election violence in almost equal measure. These include, institutional neglect, corruption, ethnicity, landlessness, poor access to justice, poverty, delays and lack of transparency in the administration of justice, unemployment and existence of criminal gangs.²³ However, rejection of the judiciary as an independent and impartial arbiter of the election dispute can be said to have been ‘the straw that broke the camel’s back’. The need to conduct an extensive in depth study of this subject with a view to appreciating the critical role that the other arms of government, especially the executive, play in securing, protecting and promoting judicial independence became even more urgent. The concepts of separation of powers,

²¹ CIPEV Report (n 11) 29 (Emphasis mine)

²² The Task Force on Judicial Reform, 2009 (Government Printer, Nairobi 2009)

²³ CIPEV Report (n 11) ix, 8, 28, 30 460

rule of law and judicial independence thus require to be revisited in view of the circumstances prevailing in Kenya.

It is important to note that an independent judiciary depends on the legal arrangements that guarantee it, arrangements that are actualised in practice and are themselves guaranteed by public confidence in the judiciary.²⁴ Unless the public accepts that the judiciary is independent, they will have no confidence in the honesty and fairness of the courts.²⁵ Public confidence is a critical characteristic of judicial independence if the judiciary is to claim legitimacy. It is not enough to claim that the judiciary ought to be, or is, independent of government; it has to be seen to be independent.

In view of the above background, it is imperative to consider the questions that this research intended to address as it engages into an in-depth inquiry of the Kenyan judiciary. The aims of the study will be derived from attempts to answer the questions posed.

1.2 Research Questions and Objectives

The research questions on which this study was based are as follows:

What are the respective strengths and weaknesses of the relevant constitutional provisions that guarantee judicial independence on Kenya? This is the central question addressed in this research as suggested by the thesis topic. The study explores the reality of judicial independence in Kenya by interrogating the possible reasons why in

²⁴ Aharon Barak, *The Judge in a Democracy*, (Princeton University Press, Princeton 2004) 77

²⁵ Right Honourable Lord Woolf. Lord Chief Justice of England and Wales, Squire Centenary Lecture – ‘The Rule of Law and Change in the Constitution’, 3rd March 2004, <<http://www.law.cam.ac.uk>> accessed 13 June 2010

spite of constitutional protection, judicial independence was still violated. The aim is to analyse the specific provisions which guarantee judicial independence in Kenya as enshrined in respective constitutional documents, assess their effectiveness against the challenges facing judicial independence and consider the extent to which they provide opportunity for reform of the judiciary.

What factors in the historical development of the relationship between the executive and judicial powers explain the particular vulnerability of judicial independence in contemporary Kenya? The object is to discuss the historical and political processes which have shaped the Kenyan judiciary and assess the extent to which executive domination impacted on its independence and also contributed to its perceived or actual lack of independence.

Have the executive's powers been consolidated and entrenched at the expense of the 'balance' of powers between the executive and the judiciary in Kenya? The study seeks to discuss and assess the extent to which such intrusion or domination has contributed to the perception, or actual lack of independence.

What lessons can we learn from the Kenyan experience with regard to protection of judicial independence? The aim is to explain why constitutional guarantees for judicial independence matter to the Kenyan people and to demonstrate the implications of weak or minimal protection. Some recommendations are proffered.

These questions address the challenges and opportunities for the achievement of judicial independence in Kenya.

1.3 Research Methodology

The interaction between the individuals and the judiciary are laden with values, moral judgments and perceptions and that determines how citizens relate to it as a legal system/ institution and whether they will respect the law or opt for non legal methods in resolving their disputes. Law, being a reflection of social values of a society, makes scientific based methods of inquiry (quantitative methods) inappropriate.²⁶ Conduct of experiments or surveys with a scientific objective may not achieve the best results.²⁷ Qualitative research was much better suited for this study, as it was used to capture the social meanings, definitions and constructions which underpin actions of individuals. This is done in ways which are neither feasible nor desirable via the use of ‘hard’ quantitative data.²⁸ Within the rubric of qualitative data collection method, this study used the documentary research method (the use of documentary sources), case study method and historical analysis.

1.3.1 Document analysis

A document may be defined as any symbolic representation that can be recorded and retrieved for description and analysis.²⁹ Documents abound in everyday life. They comprise written, printed or electronic material that contains information of some sort.³⁰ Sources of documents can either be primary or secondary though the

²⁶ Victor Jupp, *Methods of Criminological Research* (Rutledge, New York 1989) 28

²⁷ Ibid

²⁸ Bill Taylor, Gautama Sinnha and Topoh Ghoshal, *Research Methodology; A Guide for Researchers in Management and Social Sciences* (Eastern Economy edn, Prentice Hall of India, New Delhi, 2007) 5

“Quantitative methods include methods that generate data comprising numbers”

²⁹ Sharlene Nagy Hesse-Biber and Patricia Leavy (ed) *Handbook of Emergent Research Methods*, (Gilford Press, New York 2008) 127

³⁰ Taylor (eds.) (n 28) 114

distinction is not clear cut.³¹ Documents tell us something about what goes on in an institution, and in the case of the Kenyan judiciary, helped in identifying weaknesses in written law, and how these weaknesses have been exploited by the executive to dominate the judiciary. The use of documents exposed the reasons for lack of confidence in the judiciary, and what Kenyans expect of its judiciary in order to regain their confidence. Documents have been used to access the underlying reality.

The documents used in this study included books, journals, statutes, constitutions, magazines, newspapers, government policy papers, research papers, reports both official and unofficial, statistics, cases, mass media records, surveys, television programmes, you tube, bibliographies and web based materials . There was, indeed, a wealth of material to be analysed, a lot of ink having been spilled on the subject of separation of powers and rule of law and how it impacts the independence of the Kenyan judiciary. This is not to suggest that documents available render them less time consuming or easier to deal with than primary data.³² Lack of access to research subjects may be frustrating, but documentary analysis of files and records can prove to be an extremely valuable alternate source of data.³³ This study's preference arose from the fact that data could be easily obtained in libraries physically and electronically.

In this regard, research was conducted in the David Wilson Library and Harry Peach Library in Leicester in the United Kingdom. Online legal databases and websites provided by Leicester University were also used. In Nairobi, Kenya, the Jomo Kenyatta Library system at the University of Nairobi, the Institute of Development Studies library, Kenya School of Law Library and the High Court Library all proved extremely

³¹ Taylor (n 28) 114

³² Alan Bryman, *Social Research Methods* (3rd edn, OUP, Oxford, 2008) 515

³³ Judith Bell, *Doing Your Research: A Guide for First-Time Researchers in Education, Health and Social Science* (4th edn, Open University Press, London, 2005) 127

useful sources of literature. The Kenya National Assembly and the Kenya National Archives provided useful material especially related to Parliamentary debates and historical aspects of this study respectively.

1.3.2 Case Study Method

Within the broader context of this qualitative research method, this study used the case study research method. Case study research continues to be an essential form of social science inquiry.³⁴ Case study approach was particularly appropriate in this case because it provided an opportunity for one aspect of a problem to be studied in some depth.³⁵ These are detailed examination of an event or a series of related events that the analyst believes exhibits the operation of some identified general theoretical principles. In this research the case study is Kenya. The Kenyan case thus contributes to a deeper understanding of the on-going philosophical debates on the separation of powers between the three arms of government and the role of the judiciary in the axis. The concept of separation of powers and its symbiotic relationship with the other constitutional concepts of judicial independence and the rule of law thus acquires a nuanced approach within that context.

Case study method has been noted to be a very popular form of qualitative analysis and involves a careful and complete observation of a social unit, be that unit a person, a family, an institution or even an entire community.³⁶ This in contrast to comparative perspectives provided insights into the Kenyan judiciary and exposed certain issues that were unique to it and that impacted its independence, such as

³⁴ Robert K Yin, *Applications of Case Study Research* (Vol. 34 Applied Social Research Methods Series, Sage Publications, California, 1993) xi

³⁵ Yin (n 34) xi

³⁶ C R Kothari, *Research Methodology: Methods and Techniques* (2nd edn, New Age International Publishers, New Delhi 2002) 13

ethnicity and administrative subtleties which may escape the attention of comparative law researchers in their effort to find a general point of analysis.

1.3.3 Historical Perspectives

This study discusses the relationship between the judiciary and the executive in Kenya in a chronological sequence. It traces the state of independence of the Kenyan judiciary from the traditional justice systems which were in existence before the establishment of a formal judicial system. This is followed by the judiciary during the colonial period when the judicial system was largely informal,³⁷ and the immediate post-colonial period when a formal constitution was adopted. The journey ends with the coming into force of the current Constitution and its early stages of implementation.

But it must be stated from the outset that the current constitution came into force one and a half years after the commencement of this study. This approach has provided the opportunity to test further, and more robustly, the research questions that this study had initially set out to address. The tactics of executive domination, explained below, buttressed the contention that the relationship between the judiciary and the executive in Kenya cannot be properly understood without delving into its history.

1.3.3.1 Historical Significance of the Executive

In a Presidential System of government, the President (executive) is elected directly by the electorate and exercises executive powers. This is as opposed to a Parliamentary System of government where an elected Parliament appoints the

³⁷ J B Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (African centre for Technology Studies Press, Nairobi 1990) 152 (hereinafter referred to as ACTS Press)

executive. The Constitution of Kenya came into force on the 12th December 1963 and declared Kenya a sovereign Republic and a multi-party democratic state.³⁸ The government was organized into the executive, legislature and the judiciary. Each had its defined limits and powers. The President was elected by the people as provided by electoral laws.³⁹ He exercised wide unfettered powers under the Constitution. He *inter alia*, appointed the Vice President⁴⁰ the Chief Justice⁴¹ judges of the superior courts,⁴² members of the Cabinet (including Ministers and Assistant Ministers),⁴³ and the Attorney General.⁴⁴ He exercised the prerogative of mercy.⁴⁵ He had power to dissolve Parliament at any time and cause general elections to be held.⁴⁶ Such powers when enshrined into the Constitution, the supreme law coupled with weak accountability created a perfect incentive for the President to cling to power as discussed hereunder.

In such a presidential system like Kenya, where power was concentrated in the hands of the executive, it is the executive which poses the greatest threat to the other arms of government. Legal scholars and commentators, like De Smith writing way back in 1964 explained that, “In new African countries there exists a wide range of methods of clinging to power, and a population that is well accustomed to receiving and complying with orders issued from above, hence one can hardly be shocked when advantage is taken of the opportunities thus proffered.”⁴⁷ Later, Ojwang writes with regard to the reduced roles of the legislatures in Africa and more particularly Kenya and the Ivory Coast. He explains that “with severe problems of development, of often

³⁸ Constitution of Kenya 1963 (revised edition 2008) s 1 and 2

³⁹ S 5

⁴⁰ S 15

⁴¹ S 62

⁴² S 61

⁴³ Part 2

⁴⁴ S 26

⁴⁵ S 27

⁴⁶ S 59

⁴⁷ S A de Smith, *The Commonwealth and its Constitutions* (Stevens & Sons, London 1964) 235

widespread disunity among the subjects, and with the imported governmental institutions as the basis of legitimate authority, the leaders of these third world states generally found themselves pursuing a course of power centralization”.⁴⁸ Mutua, years later, makes similar observations on consolidation of executive power at the expense of the judiciary.⁴⁹ Judiciaries and legislatures equally suffered relegation to a much reduced role. Legislatures in Africa were equally severely dominated by the executive to an extent that they, too, were weak as against the executive. It is the executive behaviour that requires careful scrutiny. As Lord Phillips points out, “the executive control is ubiquitous in every citizen’s daily life hence it is from the executive pressures or influence that judges require particularly to be protected”.⁵⁰

Be that as it may, this study was alive to the fact that there are other methodological tools that could equally be utilised to answer the research questions and unravel its objectives. Although social surveys, in-depth interviews, and particular observations have been tried, tested and are well respected social research methods, they are not, however, the only ones available nor are they always the most appropriate, convenient or even cost effective methods.⁵¹ Considering time constraints, cost, the availability of material on the topic, albeit scattered in different documents, it is believed that the best tools were selected for an exhaustive, comprehensive and incisive analysis of judicial independence in Kenya.

⁴⁸ J B Ojwang, ‘The Residue of Legislative power in English and French Speaking Africa: A Comparative Study of Kenya and the Ivory Coast’ (1980) 29 International and Comparative Law Quarterly 298

⁴⁹ Makau Mutua, ‘Justice Under Siege; The Rule of Law and Judicial Subservience in Kenya’ (2001) 23 Human Rights Quarterly 96-118

⁵⁰ Lord Phillips (n 1)

⁵¹ Monageng Mogalakwe, ‘The Documentary Research Method- Using Documentary Sources in Social Research,’ (2009) 25, 1 East African Social Science Research Review 44

<http://muse.jhu.edu/journals/eastern_africa_social_science_research_review/v025/25> accessed 22 September 2009

1.4 Contribution to knowledge

While there is widespread conceptual and normative consensus on the importance of the independence of the judiciary, the literature on it in developing countries is meagre.⁵² Gaps in the literature on this theme outside the well established democratic systems have been noted.⁵³ The paucity of scholarship and research on courts in Africa is not new. As Prempeh observes, “outside of the South African Constitutional Court, scholarship or research on courts and judicial activity in Africa is scant”.⁵⁴ Dudziak concurs. While commending Widner’s research on judiciaries in Africa, she quotes a raft of scholars who identify the fact that recent scholarship in Africa has only focused on South Africa and completely overlooked most of the continent as if it were a lawless world, yet the effort of Chief Justice John Nyalali to build the rule of law in Tanzania was an extremely innovative experience which she suggests could immensely benefit the developed judiciaries.⁵⁵ Though the Kenyan judiciary is fleetingly mentioned in books and academic journal articles, it is, more often than not, as an example or as a comparison in a generalised form, referring to Kenya within a regional or African context. Specific longitudinal examination focusing on judicial independence is absent.

⁵² Robert Stevens, *The Independence of the Judiciary: A View from the Lord Chancellor’s Office* (OUP, Oxford 1993) 3. Even mature democracies like Britain has been found wanting on literature on judicial independence

⁵³ Hakeem O Yusuf, ‘Democratic Transition Judicial Accountability and Judicialization of Politics in Africa’ (2008) 50 *International Journal of Management* <http://ssrn.com/abstract=1284653> accessed 16 June 2009

⁵⁴ Kwasi Prempeh, ‘African Judges in their own Cause: Reconstructing Independent Courts in Contemporary Africa’ (2006) *International Journal of Constitutional Law* 592-605, 592 Also see Karen Mingst, ‘Judicial Systems in Sub Saharan Africa: An Analysis of Neglect’ (1988) *African Studies Review*

⁵⁵ Mary L Dudziak, ‘Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa’ (2003) *Michigan Law Review* 1624 She comments on the book by Jennifer A Widner (n 53)

This study was, motivated by the paucity of published scholarly research in African judiciaries and, in particular, the Kenyan judiciary. Laborious library and internet searches conducted so far have yielded only scant disjointed research in the area. A bibliography⁵⁶ prepared on American journals on judicial independence reveal little interest on studies on African courts leave alone the Kenyan judiciary. A later bibliography on a 118 year survey on comparative judicial politics prepared in 2006 by a well known authority in judicial studies, Neal Tate, reveals negligible improvement.⁵⁷ He identifies Africa as one of the regions in which there is little judicial politics research because courts in these regions are perceived to be less important.⁵⁸ The bibliography lists contributions by both political science and legal scholars. There is no contribution in terms of books, monographs, or articles written on the Kenyan judiciary in this bibliography even in a comparative sense. Writings on the judiciary by both lawyers and political scientists from a comparative perspective do not feature the judiciary in Kenya.⁵⁹ The closest such literature comes to Africa, is South Africa,⁶⁰ Tanzania,⁶¹ and Ghana.⁶²

⁵⁶ Amy Atchison, Lawrence T Liebert and Denise K Russell, 'Judicial Independence and Judicial Accountability: A Selected Bibliography' (1999) 72 Southern California Law Review 723, It provides selected books, papers, reports, articles relating to topic of judicial independence and judicial accountability from 1958-1998 both American and international.

⁵⁷ C Neal Tate, 'The Literature of Comparative Judicial Politics: A 118 Year Survey', prepared for presentation on the panel 'Epistemology and Methodology in the Field of Comparative Judicial Studies' of Research Committee on Comparative Judicial Studies', at the 20th World Congress of the International Political Science Association, Fukuoka Japan. July 10, 2006
<<http://sitemason.vanderbilt.edu/files/FE9so8/IPSA%202006%Comparative%20Judicial%20Bis%20UPDA TED.doc>> accessed 15 September 2009

⁵⁸ Tate (n 57) 27

⁵⁹ See Guy Canivet, Mads Andenas & Duncan Fairgrieve (eds), *Independence Accountability and the Judiciary*, (British Institute of International and Comparative Law, London 2006), Peter H Russell and David M Obrien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001), Stephen B Burbank and Barry Friedman (eds) *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, California, 2002), Shetreet and Deschenes (eds) (n 2)

⁶⁰ See the contribution by Hugh Corder, 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa', in Russell and Obrien, cited in (n 78) 194-206

⁶¹ Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, (W W Norton and Company Ltd, New York 2001)

Even though there is no book specifically addressing judicial independence in Kenya, this is not to mean that there is no literature on the Kenyan judiciary. The literature which exists consists of books and articles published under the umbrella of the International Commission of Jurists under various legal themes.

The many taskforces and committees that have attempted to address the problem of judicial independence in Kenya have not provided a holistic analysis based on sound conceptual underpinnings. Previously, these reports were referred to, only fleetingly by commentators, scholars and lawyers to address some aspects of judicial independence relating to the specific issues under reference. This study has taken into account the contents of all the reports, identified the themes related to judicial independence, and carefully selected specific reports as representative of the selected themes (constitutional provisions that guarantee judicial independence), and utilised them as part of a coherent evidence for analysing the erosion of judicial independence in Kenya, in a manner that is lacking in current literature.

The existing literature is not sufficient and lacks analysis in a holistic manner. One of the purposes of this research is to expand the nascent literature on African courts, especially Kenyan courts, which have not been the subject of serious scholarly interrogation.

What is also lacking, which this study positions in perspective, and addresses, is the development of a conceptual definition of judicial independence. This is then applied in a thematic manner by delicately extricating the constitutional aspects related to judicial independence in an attempt to find a balance between theory and practice. In

⁶² A N E Amissah, *The Contribution of Courts to Government; A West African View*, (OUP, Oxford 1981)

this regard this study contributes to the literature on the meaning of judicial independence.

The analysis of opportunities for judicial reform, particularly the recently promulgated Constitution of Kenya 2010, with the aim of assessing the extent to which it limits executive intrusion and control in the judiciary and offers better protection of judicial independence than previous constitutions, is a novel attempt which has not yet been undertaken in such a holistic or scholarly manner.

It may be difficult to pinpoint with precision when Kenya became a democracy. The Westminster Model Constitution of 1963 however, ushered in a new constitutional democracy wherein the relationship between the three arms of government (the executive, judiciary and the legislature) and their limits including the entrenchment of the Bill of Rights was for the first time spelt out. Thus it can be stated that it was in 1963 that liberal democracy was properly introduced in Kenya on attainment of self-rule. The expectation therefore, is that this research should provide a theoretical framework for understanding the approach to judicial independence, within the context of such relationship, particularly in developing liberal democracies.

This research thus endeavours to address the gap in literature on judicial independence in Africa. Specifically, it introduces the experience of the Kenyan judiciary as a contribution towards understanding the practical difficulties in applying the concepts of separation of powers and judicial independence for the achievement of the rule of law objectives in an emerging democracy. It contributes to the on-going exposition of the dangers of failing to separate the judiciary from the executive, the difficulties of applying legal concepts in practice, the perpetual tensions and conflicts

that occur in the processes of the exercise of power between the three arms of government and the appropriate role of judiciaries in the axis. It provides useful contribution to institutional analysis. In future, it is hoped, a balanced and more nuanced understanding and appreciation of how judicial independence should be protected in developing constitutional democracies will develop.

1.5 Outline of Thesis

This chapter has provided an overview of this study. In Chapter Two, a conceptual framework is developed. It discusses separation of powers, judicial independence and the rule of law, including their attendant conceptions. Their inter relationship is rationalised. A theory and definition of judicial independence is also developed as the scope of study is outlined. This conceptual framework is the used as a basis for the critique of the Kenyan judiciary in the rest of the study.

Chapter Three traces the historical background of judicial independence in Kenya, commencing with an analysis of the informal traditional justice systems, followed by the judiciary in the colonial and immediate post-colonial periods. It also describes the political context within which the judiciary developed.

Chapter Four discusses the compromising of judicial independence in Kenya under the Independent Constitution 1964. Drawing examples from experiences and incidences experienced by the judiciary in Kenya, it identifies the gaps in the constitution which exploited or facilitated the erosion of judicial independence during that period. Also identified are the various recommendations made by the selected reform initiative reports in an effort to secure or improve judicial independence.

Chapter Five analyses the attempts made to reverse the erosion of judicial independence with a view to reducing and controlling executive domination. Efforts to reform the judiciary before the promulgation of the New Constitution are briefly discussed and challenges experienced identified. The New Constitution is scrutinised with a view to ascertaining if it has succeeded in reducing or removing executive intrusion in the judiciary. Its compatibility with separation of powers concept and its preferred conception of checks and balances is assessed with a view to confirming whether it provides a strong framework for the creation of an independent judiciary, capable of holding the government accountable as expected by Kenyans. Weaknesses are identified for further consideration.

Chapter Six summarises the study draws conclusions, highlights the research findings, and makes recommendations on the way forward. The next chapter outlines the conceptual framework for judicial independence.

CHAPTER TWO

JUDICIAL INDEPENDENCE, SEPARATION OF POWERS AND THE RULE OF LAW: DEFINITIONS, CONCEPTS AND SCOPE

The aim of Montesquieu's rule of law is to protect the ruled against the aggression of those who rule...It embraces all people... everyone to be precise...It fulfils only one fundamental aim freedom from fear...That is what makes the imperative of the independence of the judiciary. The idea is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and many of its agents from imposing their powers and interests and persecutive inclinations upon the judiciary. The magistrate can then be perceived as the citizen's most likely protector.¹

2.1 Introduction

At a conceptual level, assessing judicial independence requires attention to the principles of separation of powers and the rule of law, which are interrelated concepts. This chapter develops a framework for judicial independence. It discusses what is meant by the concepts of judicial independence, separation of powers and rule of law, the values served by them and the different conceptions thereof. It identifies their essential elements and inter-relationships. These concepts may be easy to explain, but are hard to apply. Their definitions and scope are complex and contested. Scholars, commentators, lawyers and judges discuss them from diverse viewpoints, depending on the type of governmental organisation under study or preferred functions and value. The conceptual difficulty in the application or understanding of these doctrines arises not over the general objectives or inherent values, but in their conception. These derive from various competing normative, conceptual descriptions or even hermeneutical theories which are beyond the scope of this study.

¹ Judith Shklar, 'Political Theory and the Rule of Law' in Judith Shklar and Stanley Hoffman (eds), *Political Thoughts and Political Thinkers* (University of Chicago Press, Chicago 1989) 24-25

The lack of an independent judiciary is the crux of this thesis. Why care about judicial independence? Does it matter that separation of powers and rule of law are contested concepts? What do we mean when we refer to judicial independence? The contention is that judicial independence is an important concept worth discussing. Its principles and values are paramount to the organisation of governments and society in general. Its absence, perceived or actual, is fatal to acceptable organisation of both government and society.

The chapter is divided into five parts. Part one discusses the significance of judicial independence and defines it in institutional and personal perspectives along specifically prescribed parameters. In part two the concept of separation of powers is discussed within the context of the functional (pure) theory and partial (checks and balances) theory. The concept of the rule of law is discussed in part three along 'formal' and 'substantive' conceptions. The former concerns itself with formal nature of law and rules, while the latter is more concerned with the substance thereof. In part four, the term 'judicial independence' is given a working definition within the context of separation of powers (partial version) and the rule of law concepts (formal version). Part five explores the debate about importance of constitutions and briefly discusses the concept of constitutionalism and introduces its implications to contemporary Kenya and outlines the scope of the study. The concepts, coupled with the working definition, are to be used as an analytical tool for assessment, and critique of judicial independence in Kenya.

2.2 Judicial Independence: Why care about it?

All democratic systems, it is argued, share a specific institutional feature, the independence of the judiciary, that is, a set of institutional guarantees aimed at assuring judicial impartiality (in relation to litigants and political branches) and, therefore, citizens' freedoms.² Lawyers, judges and legal academics deploy the term "judicial independence" in many contexts. Its use complements and contrasts with a set of related terms, "power", "separation of powers," and "the rule of law."³ Judicial independence is also regularly portrayed as essential to the rule of law, good governance, economic growth, democracy, human rights and geopolitical stability.⁴

The existence of an independent judiciary is one of the core elements of modern constitutionalism and a cornerstone of democracy and good governance.⁵ Its importance has long been emphasised as key to maintaining the integrity of the judiciary in its role as a site of accountability for executive power.⁶

In Africa, the existence of an independent judiciary is considered one of the core elements of modern constitutionalism and a cornerstone of democracy and good government.⁷ It is observed that prior to 1990, before multiparty democracy gained root, the judiciary in most African countries had been reduced to the handmaiden of

² Carlo Guarnnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP, Oxford 2002) 5

³ Lewis Kornhauser, 'Is Judicial Independence a useful concept?' in Stephen B Burbank and Barry Friedman (eds) *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, California 2002) 46

⁴ Randal Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP, Cambridge 2010) 1

⁵ Charles Manga Fombad, 'A Preliminary Assessment of the Prospects for Judicial Independence in Post – 1990 African Constitutions' [2007] Public Law 234

⁶ Michael Trebilcock & Ronald J Daniels, *The Rule of Law Reform and Development: Charting a Fragile Path of Progress* (Edward Elgon Publishing Ltd, Cheltenham 2008) 59

⁷ Kwasi Prempeh, 'A New Jurisprudence for Africa' (1999) 10 Journal of Democracy 135

various dictatorial regimes and was, thus, incapable of operating efficiently, either as a guardian of the protection of human rights or an impartial enforcer of the rule of law.⁸

It is at the same time generally accepted that the constitution of a modern democracy, governed by the rule of law, must effectively guarantee judicial independence.⁹ The strength of justice depends on the guarantees protecting those who administer it.¹⁰ It would sound eccentric if one was to denounce judicial independence as a bad idea.¹¹ Francis Nyalali, the former Chief Justice of Tanzania (1976-99) speaking from an African perspective reinforces the point when he states that:

Independence of the judiciary, impartiality of adjudication, fairness of trial and integrity of the adjudicator are so universally accepted that one may reasonably conclude that these principles are inherent to any justice system in a democracy...there is no other doubt that these same principles are part of the African dream.¹²

It is not only in Africa and the western world, where the principle of judicial independence is valued. It also has deep roots in Islamic culture.¹³ It is a well established principle in Islamic *sharia* to the extent that all Arab states have proclaimed their fealty to it.¹⁴ The tone of finality in Lord Bingham's comments that "so many eminent authorities have stated this principle and there has been so little challenge to it that no extensive citation is called for," is thus understandable.¹⁵

⁸ Ibid

⁹ Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP, Oxford 2000) 55

¹⁰ Guarnieri & Pederzoli (n 2) 5

¹¹ Jefferson Powell, 'The Three Independences' (2004) 38 University of Richmond Law Review 2

¹² Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, (W W Norton and Company Ltd, New York 2001) 29

¹³ Adel O Sherif and Nathan Brown, 'Judicial Independence in the Arab World: A Study Presented to the Program of Arab Governance of the United Nation Development Programme

<http://www.pogar.org/publications/judiciary/sherif/jud-independence.pdf> accessed 18 July 2010

¹⁴ Ibid

¹⁵ Bingham 'Business of Judging' (n 9) 55

2.2.1. The Normative Value of Judicial Independence

Apart from scholarly writings and contributions by eminent persons, all of which have underscored the importance of protecting and promoting judicial independence, there is a large body of international treaties, declarations, regional instruments, and other global standards which recognizes the necessity of states to having independent judiciaries.

International treaties are replete with provisions requiring independence and impartiality in the dispensation of justice. The Universal Declaration of Human Rights (UDHR) (1948) proclaims that “everyone is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him”.¹⁶ The International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) provides for equality for all before the law and more particularly states that “everyone shall be entitled to a fair and public hearing by a competent, *independent* and impartial tribunal established by law”.¹⁷ The Convention on the Rights of the Child gives children the right to challenge deprivation of their liberty before “a court or other impartial and *independent* authority”.¹⁸ The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) requires states to, “provide everyone within their jurisdiction effective protection remedies through competent national tribunals”.¹⁹

¹⁶ (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art 10 (Emphasis mine)

¹⁷ (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS (ICCPR) art 14 (1) ((Emphasis mine)

¹⁸ (adopted 20 November 1989) UN Doc. A/44/736 art. 37(d) also see African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999) “A child suspected of committing a crime should be placed before an independent and impartial authority or judicial body according to law” art 17 (iv) and 40 (2) (Emphasis mine)

¹⁹ (Entered into force on 30 September 1981) UNTS 1249 Art. 6

Some instruments call upon states to ensure and entrench the protection and promotion of judicial independence. For example, the United Nations Basic Principles on the Independence of the Judiciary provide in part, that “the independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country”.²⁰

Commonwealth countries have severally come together and declared the standards of judicial independence that are desirable of preservation within their jurisdictions irrespective of whether independent systems are in place..²¹ Guidelines are issued in matters relating to appointments, funding, training, ethics and accountability mechanisms and the role of non-judicial institutions. The preamble to the Bangalore Draft Code reiterates the requirement for protection of remedies through independent tribunals. It goes further to set out six values to be observed by judges in the exercise of their judicial conduct.²²

Statutes of international courts make specific reference to judicial independence and provide elaborate procedures respecting and protecting judicial independence in their respective judicial processes. The Statute of the International Court of Justice (ICJ) contains elaborate procedures on the application of independence and impartiality.²³ The same applies to the Statutes establishing the UN Convention on the Law of the Sea,²⁴ the International Criminal Court (ICC),²⁵ the International Criminal

²⁰ UN. Doc. A/CONF.121/22/Rev. 1 (1985) art 60

²¹ Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (Adopted 19 June 1988 at a meeting of the representatives of the Commonwealth Parliamentary Associations, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association)

²² 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 the Chief Justices, held at the Peace Palace, the Hague, November, 25 5-26 2002

²³ Art. 2, 16-20

²⁴ (entered into force on 16 November 1994) UNTS 1833 art 2(1), 7 (1), 11

Tribunal for Rwanda (ICTR)²⁶ and the International Criminal Tribunal for the former Yugoslavia (ICTY).²⁷ The importance of judicial independence in the trial process is stressed.

Even though the texts of these documents may differ in detail, they are unanimous in their approach which defines judicial independence in broad terms to ensure protection of courts from actual or apparent interference of any kind.²⁸ They emphasise independence of the judiciary from the executive and the legislature. They insist on the need to guarantee impartiality in adjudication of disputes including the process. The importance of judicial independence can thus be said to possess a normative appeal internationally.

Virtually every developing country has some program of legal reform focused on the judiciary, and billions of dollars have been spent on promoting independence.²⁹ The executive has been identified as the most serious threat to judicial independence, not only because of its potential interest in the outcome of many of cases, but also because of the enormous powers they have, and can exercise over judges.³⁰ Judges, therefore, need to be insulated from any threats or manipulation that may force them to act unjustly in favour of the state, the emphasis being on undue influence.³¹ Protection of judges from the executive is paramount.

²⁵ UNTS 2187 1998 Art. 2

²⁶ (entered into force on 24 January 1995) UNTS 2420 art 3

²⁷ Art 21

²⁸ Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing Co. England 1999) 43

²⁹ Tom Ginsburg, 'Judicial Independence in East Asia: Lessons for China', in R Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP, Cambridge 2010) 247

³⁰ Fombad (n 5) 236

³¹ Ibid

2.2.2 Defining Judicial Independence: The Contest

While there is widespread consensus on the importance of independence of the judiciary, the concept itself has never been fully unpacked.³² There is a lot of disagreement about what judicial independence means or encompasses. It is a contested and unclear concept. Various attempts have been made by scholars to define³³ and categorise³⁴ judicial independence without much success. No agreed framework exists when it comes to defining judicial independence or categorising judicial independence. To Ginsburg, “judicial independence has become like freedom: everyone wants it, but no one knows quite what it looks like and its aspect to observe.”³⁵ A concrete or consistent definition of the term is elusive.³⁶ Peerenboom attempts to explain what the discord is all about. He says:

The range of disagreement when it comes to judicial independence seems unusually wide. We expect controversy on how to draw the line between proper and improper judicial behaviour in particular cases, but there is uncertainty in allocating the line between proper and improper external influences. Indeed, we do not have anything approaching a consensus even with respect to the normative conditions necessary to have a properly independent branch. There is disagreement about whether or how to criticise the judges and their decisions. There is disagreement about how to explain or justify our institutional arrangements...and, of course, there is pervasive disagreement on about whether our judges exhibit too much or too little independence.³⁷

This problem arises when judicial independence is defined by measuring the degree of independence a judiciary should possess. The assumption here is that the core meaning

³² Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (OUP, Oxford 1993) 3

³³ Stephen B Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, California 2002) provides a good sample of the debates relating to the disagreements over the definition of judicial independence by lawyers and political scientists. Also see Larkins (n 49) 606-611 He reproduces several scholars definition of judicial independence before coining his own definition

³⁴ William C Prillaman, *The Judiciary and the Democratic Decay in Latin America: Declining Confidence in the Rule of law* (Praeger Publishers, WestPort 1967) 16 for a discussion on the various attempts to categorise judicial independence depending on the sources of threats

³⁵ Ginsburg (n 29)247

³⁶ Lydia B Tiede, ‘Judicial Independence: Often Cited, Rarely understood’ (2006) 15 Journal of Contemporary Legal Issues 129

³⁷ Peerenboom (n 4) 2

of judicial independence is already known and the only problems to tackle are its normative content and balance.

However, it must be noted that the problem of definition also arises out of attempts to analyse or measure judicial independence often from diverse disciplinary backgrounds of lawyers, political scientists, and sociologists.³⁸ Hence, judicial independence is defined by the use of diverse theories or concepts. This could be the reason why some writers conclude that the concept is not workable and, hence, not a useful analytical concept.³⁹

Different countries or regions have different or even shared political, social and economic backgrounds or experiences. Some are at different levels of political maturity and compliance when it comes to respect for and protection of judicial independence. This, too, has necessitated the coining of definitions which best suit the specific unique situations in the specific country under study. Part of the problem in defining judicial independence in this sense is that it cannot be observed in its pure “ideal” form.⁴⁰ That indeed, is not possible because even mature democracies, like Britain and United States whose judiciaries are renowned for being highly independent, have not been ‘declared’ as having attained the status of full independence.

Defining judicial independence by identifying diverse sources of threats, may also lead to the use of open ended definitions, or requirements. These include

³⁸ Peter H Russell and David M O’Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, Charlottesville 2001) Burbank and Friedman (eds) Peereboom (ed) generally provides a good sample of the debates relating to the disagreements over the definition of judicial independence by lawyers and political scientists and sociologists

³⁹ Kornhauser (n 3) 45 for example he attempts to analyse judicial independence using the concept of ‘power’

⁴⁰ Dick A E Howard, ‘Judicial Independence in Post-Communist Central and Eastern Europe’, in Russell & O’Brien (eds) (n 38) 92

definitions that require that the judiciary decide matters before them, “impartially, on the basis of facts, and, in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, directly or indirectly, from any quarter or for any reason”,⁴¹ or, those that require judges to “be free...from all sources of influence, whether internal from other judges or, external from government, the media or others”.⁴² These ‘others’ may include family, friends, academic debate, organised crime, cultural beliefs, religious inhibitions, personal biases or, even the latest opinion polls.⁴³ Others define judicial independence, from the angle of whether or not there are desirable checks on judicial power.⁴⁴ That “the use of the term is amoebic, changing shape to fit the particular context within which it is used,”⁴⁵ therefore, offers a reasonable explanation for alleged confusion or disagreements.

These problems of definition, however, provide useful hints to diverse contexts available for analysing judicial independence, and its importance. Each definition serves the purposes which it is intended to achieve. An exhaustive list is outside the scope of this study. It is notable that they all agree to the importance of having a judiciary which is independent, and identify the normative meaning of judicial independence, even as they diverge into their various conceptions.

The point here is to appreciate the reasons why there is a contest about the definition of judicial independence, and why this is normal. Judiciaries are at various stages of development or maturity hence, their needs in terms of protection from

⁴¹ UN Basic Principles (n 20) art 2

⁴² Malleson (n 28) 37

⁴³ Shirley S Abrahamson, ‘Key Note Address: Thorny Issues and Slippery Slopes; Perspectives on Judicial Independence’ (2003) 64 Ohio State Law Journal 6

⁴⁴ Howard (n 40) 93 “Bribery of judges and their threats to their physical safety are obvious examples of the former, while denying judicial review that enforces ‘fundamental’ rights is more desirable. Also see Tiede (n 36) 131. She defines judicial independence considering the amount of discretion judges exercise in public policy areas, including their ability to issue anti government decisions without retribution

⁴⁵ Tiede (n 36) 130

interference are varied, depending on social, cultural, economic and political backgrounds and norms.

Despite the confusion leading to the contest as to the meaning of judicial independence or even the normative conditions necessary to secure it, there must be at least some core principles which everyone agrees, can be used as barometer to test the existence of judges who, can be said to be independent. What therefore do we mean by judicial independence? How can we know it when we see it, when it is absent, insufficient, threatened or, even compromised? This calls attention to the core meaning of judicial independence.

2.2.3 Personal Independence

The meaning commonly invoked when considering the circumstances of the individual judge is that a person is independent if she is able to take action without fear or interference by another.⁴⁶ This will be called personal independence.⁴⁷ It is based on the premise that “judges must be individually and personally free to decide the cases before them impartially, on the basis of the facts before them, and applicable legal norms and principles, without outside influence”.⁴⁸ It means, judicial officers acting impartially. What therefore, do we mean when we refer to the term ‘impartiality’?

⁴⁶ John Ferejohn ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1999) 72 Southern Californian Law Review 355

⁴⁷ The term ‘decisional’ independence is used in American literature. Other terms used are ‘individual’ independence mostly preferred in European literature.

⁴⁸ Justice Edwin Cameron ‘The Need for the Independence of the Judiciary and the Legal Profession’ (Speech) <<http://www.sabr.co.za/lawjournal/2008/december-2008-vol21-no3-pp34-36>> accessed on 24 July 2009

Impartiality means “that judges base their decisions on law and facts and not on any predilections towards one of the litigants”.⁴⁹ Preference of one side over another side in a case is not allowed. Both sides should be equal before the judges’ eyes. Indeed, we don’t expect that judges’ minds are a blank slate; judges have beliefs, values, culture, upbringing, or even personal and political preferences and prejudices. However, it is possible for them to make a conscious effort to avoid personal attributes from affecting their decisions. We cannot be sure that these personal issues will or will not influence the judge’s decision nor can we confirm with certainty that a judge possesses them. However, we can only hope that the judge will do the right thing.⁵⁰

Griffith rejects the notion of impartiality arguing that neither impartiality nor independence involves neutrality.⁵¹ Judges, in his view, are part of the machinery of authority within the state and cannot avoid the making of political decisions.⁵² But that is why judges are required to be objective in their decision making. The purpose of objectivity, we are reminded, is to encourage the judge to make use all of these personal characteristics to reflect the fundamental values of society as faithfully as possible.⁵³

But again with regard to application of the law, a judge is generally expected to exercise “the judicial function independently on the basis of his/her assessment of facts and in accordance with a *conscientious understanding of law*, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any

⁴⁹ Christopher Larkins ‘Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis’ (1996) 44 American Journal of Comparative Law 609

⁵⁰ See generally, Sharman Jeffrey M ‘The Impartial judge: Detachment or Passion’ (1995-1996) 45 DePaul Law Review for a detailed analysis of ‘impartiality’ Also see Abraham S Shirley, ‘Commentary on Jeffrey M Sharman’s Impartial Judge: Detachment or Passion,’ 633-650, 633-635 for that summary

⁵¹ J A G Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press, London 1997) 293

⁵² Griffith (n 51) 292

⁵³ Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton 2004) 76, citing John Alder, *Constitutional and Administrative Law* (4th edn Palgrave Macmillan, London 2002) 104

quarter or, for any reason”.⁵⁴ This definition of personal independence which refers to the judge’s conscientious understanding of the law, may also create the impression that judges in determining cases apply the law as in a purely subjective manner with no other objective considerations. This notion has been severely criticised by both scholars and judges.

Russell finds it unrealistic.⁵⁵ Judicial independence does not mean that a judge can do as he pleases. According to Abrahamson, a judge is not a loose cannon on the deck of justice shooting in any direction he/she wishes, but even if he is free, he is not wholly free.⁵⁶ “He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his ideal of beauty and goodness. He is to draw his inspiration from principle...he is to exercise discretion informed by tradition, methodised by analogy...”⁵⁷ Barak sums up the judge’s duty to be faithful to the law when he states that “the judge’s master is the law. The judge has no other master...he must act without any dependence on another...the judge is subject to no authority other than the law”. This authority includes the authority of case law determined by the courts whose opinions bind the judge. Judicial independence does not mean release from binding precedent or other judicial instructions that bind the judge. These are part of the laws to whose authority the judge must be subject.⁵⁸

There is a lot of debate as to whether judges should follow precedent or how far they should go, but that is not within the scope of this study. It suffices to know that the law is to guide the judge in making those individual decisions.

⁵⁴ UN Basic Principles (n 22) art 2, Draft Universal Declaration on the Independence of Justice (Singhvi Declaration, Bangalore Principles of Judicial Conduct (n 24) para 1.1 (Emphasis added)

⁵⁵ Russell & O’Brien (eds), (n 38) 12

⁵⁶ Abrahamson (n 43) 3

⁵⁷ Benjamin Cordozo *The Nature of the Judicial Process*, (1921) 68 cited in Abrahamson (n 43)

⁵⁸ Barak (n 53) 76 citing John Alder, *Constitutional* 78-79

2.2.4 Institutional Independence

A judge's personal independence is incomplete unless it is accompanied by the institutional independence of the judicial branch designed to ensure that the judicial branch can fulfil its role in protecting the constitution and its values.⁵⁹ Institutional independence, therefore, means protection of the institution of the judiciary from interference from the other branches of government. This principle is founded on the idea of separation of powers between the executive, legislature and judiciary.⁶⁰ I Malleson's words, "Judges are expected to work in an institutional environment that enables them to give, impartially, legally sound decisions without worrying about personal consequences from such decisions".⁶¹ Judges are human and need to be provided with institutional shields against threats and temptations that may come their way.⁶² Judicial independence in this sense, is "a feature of the institutional setting within which judging takes place".⁶³ "No citizen challenging a decision of a government department which affects him wants his case decided by a judge whose tenure or promotion may depend on the goodwill of government, any more than any civil litigant suing such a body for damages in contract or tort".⁶⁴ Institutional independence is therefore symbiotically related to personal independence.

Institutional protection of judicial independence "which involves the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service", according to Raz, "is designed to guarantee that judges will be

⁵⁹ Patricia Hughes, 'Judicial Independence: Contemporary Pressures and Appropriate Responses', (2000) 80 Canadian Bar Review 186

⁶⁰ Malleson (n 28) 45

⁶¹ Cameron (n 48)

⁶² Ferejohn (n 46) 353-354

⁶³ Ibid

⁶⁴ David Keene, 'The Independence of the Judge,' in Mads Andenas (ed), *Tom Bingham and the Transformation of the Law*, (OUP, Oxford 2009) 256 available at www.oxfordscholarship.co. Accessed 31 March 2010

free from extraneous pressure and be independent of all authority, save that of the law and, hence, that it is essential for the preservation of the rule of law”.⁶⁵ When a judiciary is independent in this sense, it guarantees the citizens that their rights will be protected and that those who wield power will be subjected to the rules and shall be ruled by law. A judiciary which is not independent enough to put such constraints on the executive or other powerful individuals run the risk of undermining the values and principles inherent in both rule of law and separation of powers.

The distinct roles of the three branches require that some specific fundamental boundaries be respected by each branch in order to preserve constitutional democracy and the rule of law, hence the theory of checks and balances.⁶⁶ In order to discharge its proper constitutional function, the judiciary must function independently of the legislature and the executive, since this will demand the need to include constitutional safeguards for institutional independence.⁶⁷ The requirement by the legislature to set the budget for the judiciary, or the judiciary’s duty to account to the legislature for the use of funds it has been allocated, is in consonance with the doctrine of checks and balances and does not breach the doctrine of separation of powers. However, if allocation of funds is pegged onto Parliament’s expectation, or demand, that the judiciary will rule in a manner favourable to them then it clearly violates judicial independence.

⁶⁵ Joseph Raz, ‘Rule of Law and its virtue’ in *Authority of the Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 217

⁶⁶ Beverly McLachlin, ‘Judicial Independence: A Functional Perspective,’ in Mads Andenas (ed), (OUP, Oxford 2009) 273 <www.oxfordsscholarship.co> accessed 31March 2010

⁶⁷ McLachlin (n 66) 269, 273 She gives examples of conditions necessary for securing institutional independence as security of tenure, financial security administrative independence which conditions she argues are relative but not absolute since the other branches too have a role to ensure accountability from the judiciary

2.2.5 Relationship Between Institutional Independence and Personal Independence

A reading of the attempts to define and categorise judicial independence reveals two broad dimensions within which judicial independence can be understood namely, personal independence and institutional independence. Institutional and personal independence are connected especially as regards the impact between the main branches of government.⁶⁸ If the executive respects the judiciary as an institution, it is also highly likely that it will to abide by its decisions.⁶⁹ Interference with the independence of the judiciary also has adverse impact on the individual judges in the discharge of their duties and, therefore, likely to have its effects in the sense of the individual judges as well.⁷⁰ When judges are appointed as a result of political or lobbying activities, they are likely to make decisions that favour the appointing authorities in cases before them. If judicial officers make decisions on influenced considerations of corruption, fear of reprisal of any kind, or as a result of a presidential order, then institutional independence and integrity are likely to be compromised. These are some examples of how lack of institutional independence can compromise personal independence.

Different views exist regarding the relationship between these aspects. There are those who argue that this interrelationship can be neatly separated by judges who are ‘courageous’ enough and can still be independent even while experiencing external or internal threats; that the pressure that can be applied institutionally is less of a threat to

⁶⁸ A W Bradley, ‘Relations between the Executive, Judiciary and Parliament: An Evolving Saga’ [2008] Public Law 487

⁶⁹ Ibid

⁷⁰ Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North Holland Publishing Company, Amsterdam 1976) 17

personal independence as long as the judge does not succumb to the pressure.⁷¹ This argument, though relevant with regard to the extent to which the separation of institutional and personal independence can be stretched, is a second best argument since a threat, however negligible, is still capable of undermining judicial independence. The best option is to eliminate the threat altogether and expect that judges will not need to show such courage under any circumstance.

Institutional independence is protected so that personal independence can be fully achieved and vice versa. It would not be wise to only choose to protect one at the expense of the other; both are equally important. A definition of judicial independence should include both personal and institutional aspects taking into account the role of the judiciary in a constitutional democracy. Independence in this regard, it has been held;

Reflects or embodies the traditional constitutional values of judicial independence and connotes not only the state of mind (as articulated in the discussion of individual independence above), but also a status or relationship to others particularly to the executive branch of governments that rest on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships the individual independence of a judge is reflected in such matters as security of tenure, and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.⁷²

Personal and institutional independence must go together and ought to be protected in equal measures.

Another equally important question arises as to whether the judiciary and the judges should be left unchecked. In other words is judicial independence absolute?

⁷¹ David Pimentel, 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges Courage and Integrity' (2009) 57 Cleveland State Law Review 11

⁷² *Walter Valente v Her Majesty the Queen*, (1985) 2 S.C.R 673 cited with approval in the Kenyan case of *Home Park Caterers Limited v Attorney General & 2 Others*, H.C.C.C Petition No. 671 of 2006 <http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=27521159256678394982646> accessed 1 August 2011

Apart from the law and the constitution, what or who guards them so that they too do not overreach their powers? This question is answered below.

2.2.6 Judicial Independence and Judicial Accountability

Judicial accountability, like judicial independence, is a term that is difficult to pin down.⁷³ It “implies the necessity to justify or explain ones past behaviour”.⁷⁴ Even at this basic level, it is clear that decision makers, judges included, are not entirely free and must account for their actions. It is not denied that the judiciary should be accountable, but arguments arise out of the ‘right’ or ‘sufficient’ levels of accountability and the extent to which accountability can enhance or erode judicial independence.⁷⁵ In this category, some argue that “judicial accountability has to be mainly a matter of self policing, otherwise the very purpose of entrusting some decisions to judges is jeopardised”.⁷⁶ Others say that judges are already accountable because they sit in open court, and deliver reasoned judgments which are published and are scrutinised by higher appellate courts, hence sufficient scrutiny.⁷⁷ The higher courts correct mistakes made and justice is done accordingly. To them, any attempt to introduce external accountability mechanisms could amount to a violation of judicial independence.

⁷³ Pimentel (n 71) 13

⁷⁴ Stefan Voigt, *The Economic Effects of Judicial Accountability: Cross Country Evidence* (2008) 25 *European Journal of Economics* 95-123, 97

⁷⁵ See Andrew Le Seuer, ‘Developing Mechanisms for Judicial Accountability in the UK’ in Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds), *Independence, Accountability and the Judiciary* (British Institute of International and Comparative Law, London 2006) 52 for a comprehensive account of the debates within the Commonwealth

⁷⁶ R Cooke, ‘Empowerment and Accountability: The Quest for Administrative Justice’ (1992) 18 *Commonwealth Law Bulletin* 1326

⁷⁷ The Chief Justice of Malaysia addressing Commonwealth Lawyers Association ‘Judicial Accountability Workshop’ in April 2002, cited by Andrew Le Seuer (n 75) 52

Those who hold contrary views argue that calling judges before a public forum, like parliamentary select committees, provides an opportunity to understand what is happening and why and, hence, will not compromise their independence.⁷⁸ This argument is mostly pegged on public accountability required of the judiciary as an institution.

Because of this stand-off, there is popular debate that judicial independence and judicial accountability conflict. But again, the confusion arises over wide interpretations attributed to it. Burbank criticises those who view judicial independence and judicial accountability as discrete concepts at war with each other. He rejects the dichotomy, arguing that they are in fact complementary concepts and should be regarded as allies.⁷⁹ He opines that they are “different sides of the same coin.”⁸⁰ He reminds us that when thinking about levels of executive or legislative control or influence that is compatible with desired levels of independence, we are thinking about accountability.⁸¹

Geyh argues that because accountability “diminishes a judge’s freedom to make herself self-dependant on inappropriate internal or external influences that could interfere with her capacity to follow the rule of law, it promotes the kind of independence needed for judges to adhere to the rule of law”.⁸² He includes another important purpose which accountability serves namely, to “promote public confidence

⁷⁸ K D Ewing ‘A Theory of Democratic Adjudication; Towards a Representative Accountable and Independent Judiciary’ (2000) 38 Alberta Law Review 725

⁷⁹ Stephen B Burbank and Barry Friedman, ‘Reconsidering Judicial Independence’ in Burbank and Barry Friedman (eds.) (n 33) 14

⁸⁰ Stephen B Burbank, ‘The Architecture of Judicial Independence’ (1999) 72 Southern California Law Review 339-340

⁸¹ Ibid

⁸² Charles G Geyh, ‘Rescuing Judicial Accountability from the Realm of Political Rhetoric’ Indiana University School of Law-Bloomington Legal Studies research Paper Series, Research Paper No. 61 September 2006 <<http://ssrn.co/abstract=933703>> accessed 30 June 2009. He does not say what judicial accountability is like S Viogt (n 74), but defines it using a purposive approach

in judges and the judiciary with the objective of stalling any resort to draconian and counterproductive forms of court control”.⁸³ In either case, accountability protects independence as judges are able to place a check on their actions in the knowledge that lack of public confidence in them may lead to unwarranted control that may not be to their advantage.

The perennial struggle is to strike a balance between judicial independence and accountability to ensure that judges are independent enough to follow facts and law without fear or favour, but not so independent as to disregard the fact of law and public confidence in courts.⁸⁴ Lord Bingham observed that the constitutional safeguards that protect judicial tenure do not exist to make life easier for judges, to protect them against the consequences of their own mistakes, or to insulate them against legitimate public criticism. Rather, they exist because “an independent judiciary is recognised as being an essential feature of a free, democratic society...independence involves not only the doing and saying of things that incur public opprobrium”.⁸⁵

Accountability, is expected in both institutional and personal aspects of judicial independence and those who find that independence and accountability are two different concepts split hairs on appropriateness of accountability and degree thereof or tend to define judicial independence or accountability either too widely or too narrowly. Burbank’s argument that judicial independence and judicial accountability are not different concepts is reasonable. The meaning attached to the term ‘judicial accountability’ will apply in so far as accountability mechanisms are built into the law

⁸³ Ibid

⁸⁴ Charles G Geyh, ‘Methods of Judicial Selection and their Impact on Judicial Independence’ (2008) 137 *Daedalus* 87

⁸⁵ Thomas Bingham, ‘The Courts and the Constitution’ (1996-1997) 7 *Kings College Law Journal* 12, 13

as requirements of judicial independence, which allows the judges to be impartial in their application of the law and the judiciary to check on the executive and legislature.

The advantage of defining judicial independence from the perspective of its constitutional role answers the question whether judicial independence is an absolute. Judicial independence in that context is seen not as an end in itself, but that it facilitates the realisation of other ends, like the rule of law. The rule of law demands, that all state organs including the judiciary abide by the law. We then start to see that the judiciary, too, is bound by the law, just like the executive and the legislature. If judges misapply the law consistently, even if the appellate courts correct those mistakes, they will not escape further scrutiny to determine their suitability to continue serving as judges.

The objections noted above, that judicial independence is self accountable, become less seductive. We start wanting “judges who are independent enough of external influences and uphold the rule of law but who are not so independent that they feel free to disregard the law altogether”.⁸⁶ It is for this reason that Burbank’s view that independence and accountability are both sides of the same coin is acceptable. The term judicial independence is used herein to connote judicial accountability in both institutional and personal aspects.

Defining judicial independence using the parameters outlined above helped in clarifying the concept and its limits. For a more comprehensive definition, it is imperative to equally inquire into what we mean when we use the terms ‘separation of powers’ and the ‘rule of law’, in terms of their specific theories and conceptions. It is imperative that their symbiotic relationship with one another and also with judicial

⁸⁶ Charles Gardner Geyh, ‘When Courts and Congress Collide: The Struggle for Control of America’s Judicial System’ (2007) 82 Indiana Law Journal 1267

independence be understood. The final definition will be revealed after explaining the purpose and rationale of judicial independence. Only then, can a meaningful definition of judicial independence finally emerge.

2.3 The Doctrine of Separation of Powers

Within a system of government based on law, there are legislative, executive and judicial functions to be performed and the primary organs for discharging these functions are, respectively, the legislature, the executive and the courts or the judiciary.⁸⁷ It means that government power is to be classified into three categories, and personnel among the institutions are separated.⁸⁸ Separation of powers simply understood refers to the allocation of power and functions among the branches of government’.⁸⁹

The most notable critics of the doctrine of separation of powers are Sir Ivor Jennings and Geoffrey Marshall. Jennings does not deny the existence of the tripartite division, and the corresponding justification thereof, in terms of avoidance of tyranny and despotism.⁹⁰ He stresses that the individual finds true liberty in the state itself, a feature he categorically insists does not exist in the authoritarian states.⁹¹ He denies the relevance of the doctrine. His criticism regards the inability of the doctrine to explain why certain tasks should be assigned to one body and not another. He points out that there is nothing that distinguishes the function of the “judicial” class and the

⁸⁷ A W Bradley and K. D Ewing, *Constitutional and Administrative Law* (15th edn, Pearson Education Ltd, Essex 2008) 83

⁸⁸ M J C Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford 1967) See also Magill (n 89) 1133

⁸⁹ Elizabeth Magill ‘The Real Separation of Powers Law’ (2000) 86 *Virginia Law Review* 1132

⁹⁰ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press Limited, London 1960) 281

⁹¹ Jennings (n 90) 280

“administrative” class even though it is arguable that the former is more independent of political control, operates in public or possesses specialist training than the latter.⁹²

Marshall is emphatic that “the principle of separation of powers is infected with so much imprecision and inconsistency that it may be counted as little more than a jumbled portmanteau for politics which ought to be supported or rejected on other grounds.”⁹³ He comes to this conclusion after analysing the application of the doctrine within different legal institutions in both physical and legal contexts. He finds the rationale for vesting powers in branches as inconclusive, the notion of separation as unclear and no proper justification for the differential treatment.⁹⁴

These criticisms point to the difficulties with the application of the concept. There is uncertainty as to the degree of separation that the doctrine requires. Does it require total separation or partial separation? Second, there is some disagreement about what is separated pursuant to the doctrine. Is it membership or function?⁹⁵ Third, are there competing values which the doctrine is expected to further? Is it liberty of the individual or efficiency of government? Finally, even after identifying these conceptual difficulties in application of the doctrine of separation of powers and their attendant debates, the most important question to ask is how identified difficulties impact on judicial independence and the consequent values of separation of powers that it secures.

Two main schools of thought compete to analyse the separation of powers questions in an attempt to understand the application of the concept, the ‘pure’ (formal)

⁹² Ibid

⁹³ Geoffrey Marshall, *Constitutional Theory* (OUP, Oxford 1971) 124

⁹⁴ Ibid

⁹⁵ Cheryl Saunders, ‘Separation of Powers and the Judicial Branch’

<http://www.adminlaw.org.uk/docs/professor%20%cheryl%20%saunders%20-%202006.doc> accessed on 28 July 2009

and ‘partial’ (functional) separation theory. For the purposes of this study, the terms ‘pure’ and ‘partial’ are preferred.

M. C. Vile has summarised the ‘pure doctrine’ as follows:

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive and judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.⁹⁶

This ‘pure’ approach emphasises the necessity of maintaining three distinct branches of government based on function: one to legislate, one to execute and one to adjudicate. Each branch is expected to exercise power only assigned by it.

Scalia J. once took this extreme position when looking at Article XXX of the Massachusetts Constitution. He said:

[I]n the Government of the Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judiciary shall never exercise legislative and executive powers or either of them; to the end that it may be a government of laws and not of men.⁹⁷

This approach makes an assumption first, that it is possible to identify and group certain powers as legislative, executive or judicial and, second, that these functions are to be kept separate and are not complementary.

⁹⁶ Vile (n 88) 13

⁹⁷ Scalia J in *Morrison v Olsen* 487 US 654,697(1988) cited in Robert Stevens, ‘A Loss of Innocence?: Judicial Independence and the Separation of Powers’ (1999) 19 Oxford Journal of Legal Studies, 368. This view Stevens explains, did not prevail when the federal constitution was drafted in Philadelphia despite article III as checks and balances were the order of the day

On the other hand, the principle of ‘checks and balances’, also akin to what Barendt⁹⁸ calls the ‘partial’ separation theory like the ‘pure’ separation theory, recognises that each of the three branches has a core function and that it is most critical to maintain separation around these core functions. Unlike the ‘pure’ version, it posits that overlap beyond the core functions is necessary and even desirable.⁹⁹ Each of the institutions of state is given some power over the others; their functions are deliberately constructed so that they overlap.¹⁰⁰ It presupposes that a specific function is assigned primarily to a given organ, subject to a power of limited interference by another organ to ensure that each organ keeps within the sphere delimited to it.¹⁰¹ Friction is consequently created between the branches of state; no one institution has absolute autonomy.¹⁰² It requires that each branch of government is able to check the exercise of powers by the other, either by participating in the functions conferred on them or by subsequently reviewing that power. Unlike the ‘pure’ separation theory, it does not require that only one institution exercises a particular function of government.¹⁰³ The checks and balances function make the exercise of powers dependent upon the concerted action by multiple actors.¹⁰⁴

The pure separation theory has been severely criticised. Commentaries exist that expose the conceptual difficulty in the theory and the practical application of the

⁹⁸ Eric Barendt, ‘Separation of Powers and Constitutional Government’ [1995] Public Law 613 also see Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press, Oxford 1998) 16

⁹⁹ Linda Jellum, ‘Which is to be master The Judiciary or the legislature – When Statutory Directives Violates Separation of Powers (2009) 56 UCLA Law Review 861

¹⁰⁰ N W Barber, ‘Prelude to the Separation of Powers’ (2001) 60 Cambridge Law Journal 60

¹⁰¹ B O Nwabueze, *Constitutionalism in Emergent States*, (Associated University Press, Rutherford 1973) 20

¹⁰² Barber ‘2001’ (n 100) 60

¹⁰³ Eric Barendt, *An Introduction to Constitutional Law*, (OUP, Oxford, 1998) 15

¹⁰⁴ Lawrence Claus, ‘Montesquieu’s Mistakes and the true meaning of separation’ (2005) 25 Oxford Journal of Legal Studies 436

doctrine, but only a few are discussed in this chapter as an exhaustive narrative is beyond the scope of this study.

Complete separation of powers is impossible both in theoretically and in practice.¹⁰⁵ When James Madison wrote that “experience has shown us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive and judiciary”,¹⁰⁶ he was aware of the practical difficulty in achieving pure separation. The version tends to “straight jacket the government’s ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure.”¹⁰⁷ The problem with the pure separation version is that it depends heavily upon workable distinctions among the three categories of governmental power, for in order to “place” correctly, one must “identify” correctly, yet that ability to distinguish is elusive.¹⁰⁸ Constitutions that attempt to follow the pure version of the doctrine have been observed to quickly discover its impracticabilities; in that, wherein one institution, normally the legislature, quickly gains ascendancy over the other two and with no powers to wield against the aggressor, the two weaker branches of the state are left at the mercy of the third.¹⁰⁹

In principle, even those who vouch for the pure version concede that “the problem of distinguishing the three functions of government has long been one of the

¹⁰⁵ Bradley and Ewing 14th edn (n 87) 87 See also Claus (n 104) 444 He argues that strict separation especially between law making and law executing and judicial exposition of existing law functions is neither sufficient to promoting liberty or rule of law and not attainable

¹⁰⁶ James Madison, Alexander Hamilton and John Jay: *The Federalist Papers*, Isaac Kremnick (ed), (Penguin Books, Harmondsworth 1987) *The Federalist Papers* No 37

¹⁰⁷ Rebecca Brown, ‘Separated Powers and Ordered Liberty’ (1991) 139 University of Pennsylvania Law Review 1525

¹⁰⁸ M Elizabeth Magill (n 89) 1127-1198, 1127

¹⁰⁹ Barber ‘2001’ (n 100) 60 citing Vile (n 88) 161-162

most intractable puzzles in constitutional law”.¹¹⁰ Some argue that it reduces the effectiveness of government and “undercuts judicial checks on the executive without advancing any principle other than separation for the sake of separation”, and further, that it has even lost sight of the principles underlying separation of powers.¹¹¹ Moreover “to insist upon the maintenance of absolute separation merely for the sake of doctrinal purity could severely hinder the quest for a workable government with no appreciable gain for cause of liberty or efficiency”.¹¹²

Both versions of separation of powers share a common goal, which is to ensure that no one branch acquires too much unilateral power. They only attempt to meet this goal in different ways. Whereas the ‘pure’ version uses “a bright-line rule approach to categorise acts as legislative, judicial, or executive, the ‘partial’ approach uses a factors approach, balancing the competing power interests with a pragmatic need for innovation”.¹¹³

The separation of powers doctrine is best understood when examined through the lenses of the ‘partial’ separation theory. Experience in the United States, Britain, France and Germany, and even Commonwealth governments reveal a clear acceptance of the partial theory. Even Montesquieu conceded that the powers of the branches were to blend and check each other.¹¹⁴

¹¹⁰ Brown (n 107) 1538

¹¹¹ Michael P Robotti, ‘Separation of Powers and the Exercise of Concurrent Constitutional Authority in the Bivens Context’ (2009) 8 Connecticut Public Interest Law Journal 191

¹¹² Dean Alfange, Jr., ‘The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?’ (1990) 58 George Washington Law Review 668, 670

¹¹³ Jellum (n 99) 875

¹¹⁴ Montesquieu, *The Spirit of the Laws* David Wallace Carrithers (ed), and (tr), (University of California Press, London 1977) 75

The criticism levelled against the partial separation of powers is not that it is too rigid, but that it is not rigid enough.¹¹⁵ This arises out of the difficulty in identifying the extent of core functions or the extent to which power should be diffused. How much is enough? How do we know what good balance is?

As much as there are strong leanings towards either version of separation of powers theory, in principle, a certain degree of checks and balances is desirable. The actual practical applications in the manner governments are ordered all reveal a strong inclination to avoidance of concentration of powers which is achieved by checks and balances. Democratic governments have been formed on the basis of the separation of powers theory, but over time and as a result of experiences of each country, adjustments are made to incorporate new practices and ideas with regard to its organisation. If, therefore, one argues for strict separation and casts the theory in stone, it would not be compatible with change which is inevitable.

According to Masterman, “the symbiotic significance and ultimate aims and objectives of separation of powers are more important and far outweigh the debates over the multiple forms with which it may take effect”.¹¹⁶ Moreover, none of the proponents of the pure separation theory deny that checks and balances are necessary or desirable. Their concern is not why, but how, and to what extent. This applies equally to the philosophers credited with the proposition of the doctrine. They, too, did not propose hard and fast rules for the theory. The difference is in the degree of interference. Their contributions were definitely coloured by their appreciation of the different societies and different epochs within which they articulated their respective

¹¹⁵ Martin Reddish & Elizabeth Cisar, ‘If Angels were to govern’: The Need for Pragmatic Formalism in Separation of Powers Theory’ (1991) 41 Duke Law Journal 449

¹¹⁶ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the UK* (CUP, Cambridge 2011) 16

understanding of the theory. They merely suggested the values and the rationale thereof which, when viewed in broad terms, are generally discernible. Proponents and opponents of separation of powers theory including those who propose the different versions do not dispute that the objectives of the doctrine are; avoidance of tyranny, prevention of accumulation of power in a single institution of government at the expense of the other institutions, and prevention of encroachment of one branch on another. They also do not dispute that functions should be separate and the need to balance the equilibrium between the branches is accepted. The trick is to obtain an appropriate balance.

The theory of separation of powers can confidently be said to be good for the organisation of government, and the version of checks and balances, an even better method of appreciating the theory. It places the judiciary in a central and important position in the scheme of power sharing in government. It plays a sacred part in ensuring accountability of government to its people's will as enshrined in the constitution. In this manner, all the branches protect and promote the underlying values of the theory of separation of powers. These values, be it in its 'pure,' ('formalist') or 'partial' ('functionalist') versions, in written or unwritten constitutional form, even in their contested values of liberty or efficiency, can be reasonably discerned to possess the crucial attributes namely, prevention of concentration of power in the hands of one person or group and avoidance of tyranny.¹¹⁷ This study rejects the pure separation theory as unworkable.

Amidst the panoply of divergent views and versions, there is a consensus that the doctrine of separation of powers is a good any democratic government should

¹¹⁷ Also see generally, *Blackstone's Commentaries on the Law of England* (Vol 1 21 London) 146-147 vol. 1 on the law of England

respect and observe. An independent judiciary is necessary in order to achieve the realisation of this very important doctrine. This is because the judiciary is one of the three arms of government charged with the responsibility of checking the excesses of the other two organs. Whatever arguments are advanced in support of, or against, the ‘pure’ or partial’ theories, one fact remains uncontested, that is, that the existence of the judiciary, and more so an independent one which is capable of checking the excesses of the other branches, is imperative. It is this feature of judicial independence which is of prime importance both in relation to government according to law and protection of the liberty of the citizen against the executive.¹¹⁸ The preservation of public liberty, as Blackstone cautions, “cannot subsist long in any state unless the administration of common justice is to some degree separated from the legislature and executive power”.¹¹⁹

In none of the arguments do we fail to find existence or rationale of, an independent judiciary as securing the common objectives of the doctrine of separation of powers. Nwabueze states that “not even the sternest critics of the doctrine of separation of powers deny its necessity as regards the judicial function.”¹²⁰ This is because the rule of law limitations imposed upon executive and legislative actions cannot have much meaning or efficacy unless there is a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of them.¹²¹

Creative, and even robust, tension and disagreement on the nature and extent of function of government is indeed normal and ubiquitous. That is the nature of

¹¹⁸ Hillaire Barnett, *Constitutional and Administrative Law* (Routledge Cavendish London 2006) 100

¹¹⁹ *Blackstone's Commentaries* (n 117) Vol.1, 204

¹²⁰ Nwabueze *Emergent* (n 101)14

¹²¹ *Ibid*

democracy that is alive. The objective though, is to get the checks and balances right so that those tensions can be managed and are not damaging.¹²² The question left unanswered by the proponents and opponents of both theories is; what is the appropriate condition which, when we see, we can say with certainty that power is now correctly balanced and that the checks are at their best? Achieving this balance, it is agreed basically, is the challenge. The contest is only on the extent of use of, or the type of means to use.

A judiciary which is politically independent of government is an essential requirement of the separation of powers doctrine. The exercise of limited government power is essential to the realization of these values. These are the same attributes which underpin the concept of the rule of law. The legal basis of government gives rise to the principle of legality, sometimes referred to as the rule of law.¹²³ An independent judiciary is indispensable in this scheme as it is essential to the rule of law and to the continuance of its own authority and legitimacy.¹²⁴ A judiciary whose independence is in doubt breaches the balance of power conception as it is incapable of checking the excesses of the other arms of government and, subsequently, compromising the rights and liberties of the citizen. Such a judiciary cannot secure the wider values of the doctrine of the rule of law. It is pertinent to engage in a discussion of the doctrine of the rule of law and how it relates to the separation of powers theory and judicial independence.

¹²² Don Mckinnon, 'Rule of Law in Today's Africa' (2006) 32 (4) Commonwealth Law Bulletin 449-655, 654

¹²³ Halsbury's Laws of England 4th edition 2001 Reissue para 6, 308

¹²⁴ Halsburys Laws (n 123) para 303

2.4 The Concept of the Rule of Law

The rule of law has many varied meanings. Like separation of powers, there is not one accepted meaning. It means different things to different people. This lack of unanimity has led scholars to exhibit scepticism as to its meaning and how to identify its values. To Finnis, the rule of law is “the name commonly given to the state of affairs in which a legal system is in good shape”.¹²⁵ Shklar says that “it has become meaningless due to ideological abuses and general overuse. It may well have become another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo American politicians and no intellectual effort need to be wasted on this bit of ruling class clatter.”¹²⁶ To Waldron, it denotes “a little more than hooray to our side”.¹²⁷ Others think that “the problem with the idea of the rule of law is that it seems to be a juristic chocolate factory, a category with no definite content apart from the law itself and hence open to almost any content”.¹²⁸

These comments and views are indicative of the disagreements as to the meaning of the rule of law. As they propound their respective meanings and conceptions of the rule of law, it is clearly apparent among these philosophers and scholars that the rule of law is an important ideal and is an invaluable component of a legal system. There appears to be widespread agreement that the “rule of law” is good for everyone.¹²⁹ We are assured, further, “that the contestation between rival conceptions, deepens and enriches all sides” understanding of the area of value that the

¹²⁵ John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) 270

¹²⁶ Shklar (n 1) 21

¹²⁷ Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida?)’ in I R Bellamy (ed) *The Rule of Law and Separation of Powers* (Aldership 2005) 119

¹²⁸ Iain Stewart, ‘Men of Class: Aristotle, Montesquieu and Dicey on ‘Separation of Powers’ and ‘The Rule of Law, (2004) 4 Macquarie Law Journal 189

¹²⁹ Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, Cambridge 2004) Also See Joseph Raz (n 69) 217

contested concept marks out.¹³⁰ This is in the belief that it is important to identify a meaning to the rule of law, so that we can more identify the principles and values that are inherent in this concept, as this will enable us to more effectively bring about the political and legal reforms that are necessary to advance it.¹³¹

In modern history, the names commonly associated with the formal concept of the rule of law are Albert Van Dicey¹³², Friedrich A Hayek¹³³ and Joseph Raz.¹³⁴ These scholars or philosophers may have targeted different audiences or advocated their ideas against the basic ordering of specific societies or political, social, or economic circumstances prevailing at a particular point in history. Nonetheless, it is still possible to distinguish a general inclination to some common characteristics that define the requirements of the rule of law ideal. First; that the law comprises rules that are certain, announced in advance. Second, that government power must be exercised in conformity with the law. Third, that the law should not be applied discriminately, hence, all persons should be treated equally before the law. Fourth, that it is the courts which

¹³⁰ Waldron (n 127)152

¹³¹ Robert Stein, 'Rule of Law: What does it Mean?' (2009) 18 Minnesota Journal of International Law 296

¹³² A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, London Macmillan, London 1959) 188. To him the rule of law entailed regulating government power, equality before the law and privileging judicial process. He identifies the judiciary as the determinant and medium of enforcement of the rule of law in its formal sense. Also see Simon Chesterman, 'An International Rule of Law?' (2008) 56 (2) American Journal of Constitutional Law 7 for similar comments

¹³³ F A Hayek, *The Road to Serfdom* (2nd edn, Routledge Press London, 2006) 75-76 cited with approval in Joseph Raz, "Rule of Law and its Virtue" in *Authority of the Law: Essays on Law and Morality* (OUP, Oxford) 1979) 210. He identifies three attributes of the rule of law namely generality, certainty and equality. His first and second propositions join issue with Dicey's three propositions. His idea of the rule of law means that "government action is bound by rules fixed beforehand. Rules that will make it possible to foresee with certainty how the authority will use its coercive power in given circumstances to plan ones affairs on the basis of this knowledge"

¹³⁴ Raz (n 65) 210 – 214. According to Raz, the rule of law means "that people should obey the law and be ruled by it". He understands the rule of law through an approach based on principle. He refers to the same laws referred to by Dicey and Hayek. He recognizes that there are indeed some legal systems that may be undemocratic but argues that even though such systems may be worse legal systems, they still conform to the rule of law

should apply the law to disputes between individuals and also between individuals and the state. It is the province of the judiciary to protect the rights of citizens from the overreaching powers of the state.

The general objectives of the rule of law can therefore be crystallised to be; 1) avoidance of concentration of powers, 2) avoidance of tyranny and, 3) the independent role of the court in arbitration of disputes.

It is a standard within legal theory to separate the rule of law conceptions into formal and substantive branches.¹³⁵ Formal conceptions of the rule of law according to Craig, “address the manner in which the law was promulgated (was it by a properly authorised person or in a properly authorised manner, etc.), the clarity of the ensuing norm (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life), and the temporal dimension of the enacted norm (was it prospective or retrospective, etc).¹³⁶ They are not concerned with whether the law was in that sense good or bad law, provided that the formal precepts of the rule of law are met”.¹³⁷ They stipulate the manner and form that the law takes instead of delving into the content of laws. They do not however seek to pass judgment upon the actual content of the law itself.¹³⁸

According to formalists, the rule of law is that of a ‘rule’ conceived as clear prescription that exists prior to its application and that determines appropriate conduct

¹³⁵ Tamanaha (n 129) 91 Some scholars identify four models, namely, Historicist, Formalist, Legal Process and Substantive. See also Fallon (n 184) 5

¹³⁶ Paul P Craig, ‘Formal and substantive conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467

¹³⁷ Ibid

¹³⁸ Ibid

or legal outcomes.¹³⁹ “It requires only that legal directives be rationally comprehensible as mandating particular conduct or outcomes and as long as rules are experienced as effective in guiding conduct, as long as those at whom rules are directed concur in their understanding, their central claim remains intact”.¹⁴⁰ Formal theories thus emphasise the formal aspects of law by describing instrumental limitations on the exercise of state authority.

The substantive versions of the rule of law concept, on the other hand, incorporate the elements of the formal concept of the rule of law, and then go further to add on various specifications as regards the content of the law.¹⁴¹ They are more interested in the content of the law. They conceive the rule of law more broadly as “a set of ideals, whether understood in terms of protection of human rights, specific forms of organised government, or particular economic arrangements, such as free market capitalism”.¹⁴² This requires that the law adopts and protect certain basic moral values.¹⁴³ All rights-based claims against the state are said to fall in this category.¹⁴⁴ Its rationale is that positive law must embody social justice, around which the moral rights and duties which citizens have against each other and the state are structured.¹⁴⁵

One such believer of the substantive conception is Dworkin. He says that the rule of law ideal is that “citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. That these moral and political rights be recognised in positive law, so that they may be enforced upon the demand of

¹³⁹ Richard Fallon, ‘The Rule of Law as a Concept in Constitutional Discourse’ (1997) 97 Columbia Law Review 14

¹⁴⁰ Ibid

¹⁴¹ Tamanaha (n 129) 102

¹⁴² Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 (2) American Journal of Constitutional Law 13

¹⁴³ Richard Ekins, ‘Judicial Supremacy and the Rule of Law’ (2003) 119 Law Quarterly Review 128

¹⁴⁴ Paul Craig, ‘Constitutional Foundations the Rule of Law and Supremacy’ [2003] Public Law 96

¹⁴⁵ Craig [2003] (n 144) 102

individual citizens through courts or other judicial institutions of the familial type so far as this is practical”¹⁴⁶ He suggests that the formal aspects of the rule of law should enforce substantive rights.¹⁴⁷ Proponents of the substantive conception will have regard to the value enshrined in the formal conception for the reason that such values would feature in any theory of justice and, further, that these values will be of relevance when answering the key questions posed by advocates of a right based conception.¹⁴⁸

Both aspects of the rule law have received criticism. Critics of the substantive version of the rule of law point to the increasing genres of rights not previously recognised. Some are of the view, that the specific rights the judiciary is expected to protect are not clearly identifiable.¹⁴⁹ Others see the rule of law as not, for example, addressing the full range of freedoms protected by the Bill of Rights in other countries or in international human rights instruments as are universally agreed.¹⁵⁰

Jennings took issue with Dicey’s conceptions on each of the three aspects of his rule of law theory. On the second proposition of equality before the law, he disagrees that there is equality between an official and an ordinary citizen, as the official has rights which the ordinary person does not possess. He insists that Dicey left out part of the law which gives power and imposes duties upon public authorities.¹⁵¹ But even if that be the case, Dicey did not purport to know all aspects of the law. He stated what he thought was the best idea of what the rule of law meant at that historical point in time to wit, the English legal system. However, Jennings takes Dicey’s propositions too

¹⁴⁶ Ronald Dworkin, ‘Political Judges and the Role of Law’ in R Dworkin, *A Matter of Principle* (Harvard University Press, Harvard 1995) 11

¹⁴⁷ Ibid

¹⁴⁸ Craig [1997] (n 136) 478

¹⁴⁹ Ekins (n 143) 129

¹⁵⁰ Jeffrey Jowell, ‘The Rule of Law and its Underlying Values’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP, Oxford 2007) 22

¹⁵¹ Jennings (n 90)

literally, to the extent that the bigger picture of the ideal of the rule of law is blurred. It may not have been possible to perfectly rationalise and equate with precision, all duties and rights, and create a normative pecking order for each of them.

Marshall, on the other hand, claims that Dicey omitted to register the truism that law, which all citizens find when they get to common courts, may make unequal provisions for some against others.¹⁵² Whether the law may make unequal provisions or not, the fact still remains that that is for the courts to determine. This is the very essence of an independent judiciary whose responsibility is to rectify, through its judgments, such imbalances by interpreting such conflicts or existing gaps, uncertainty or vagueness or even unequal provisions in the rules and processes, hence, enhancing the role of the court in ameliorating the law. Whether some rights are couched in law to be above other rights, as Jennings points out, does not alter importance of rules and manner of making them as propounded by formalists like Dicey. The validity of such rules is a different issue, and is dependent on particular norms in society. The objections do not impact the fact of the importance of existence of the courts as the main arbiter of disputes. These objections expose the conceptual difficulties in the application of the rule of law concept with regard to concept versus practice. They should not, however, detract us from the basic understanding of the concept of holding government accountable to law, equality before the law and exercise of discretion and protection of liberty of the individual, which can only be secured by independent courts wherein judges determine disputes independently impartially and according to law.

Despite varying interpretations and conceptions of the rule of law, there are certain basic underlying tenets that should be adopted and satisfied in every country,

¹⁵² Craig '1997' (n 136) 472 citing Marshall (n 102) 138-139

whatever it's political, legal or cultural traditions and values.¹⁵³ Raz's principle-based version of the rule of law, which is a formalist stance, reasonably articulates the general principles and does not base them on any system, be it social, economic or political. They are applicable to any state or regime which professes to recognise the rule of law. Raz's approach is more appealing as it is universally applicable as compared to Dicey or Hayek whose ideas of the rule of law are informed largely by societal norms and may not be applicable to societies with different backgrounds. The soundness of their arguments however is not disputed.

Endorsing the formal conception does not necessarily exclude the substantive version which, equally, offers other important substantive attributes of the rule of law (rights protection) which are fundamental to society today. Most substantive rights like human rights have been formalised by the inclusion of a Bill of Rights in many state constitutions and other legislation. It is worthy to note that such genres of rights continue to evolve as society evolves, hence, their ability to achieve formal recognition can be said to be a matter of time depending on the country under study.¹⁵⁴ In their recent book, Bradley and Ewing confirm that that social and economic rights are now included in the broadened rule of law thinking.¹⁵⁵ Though they are sceptical that this is in consonant with government action, they conclude, that as needs of national and

¹⁵³ Samuel L Bufford, 'Defining the Rule of Law' (2007) 46 Judges Journal, 16

¹⁵⁴ The Constitution of Kenya 2010 (Government Printer, Nairobi 2010) in Part II has for the first time formally recognises various rights like Political (art. 38), social and economic (art. 42) rights, and even the environmental rights (art. 43) as basic rights which the state is obliged to provide for and protect. These provisions were not expressly provided for under the old Independence Constitution 1964 now repealed

¹⁵⁵ A W Bradley and K D Ewing, *Constitutional and Administrative law* (15th edn, Pearson Education Limited, Essex 2011) 100 - 101

international communities change, there is need to control the discretionary powers of government by rules.¹⁵⁶

It is also true that some of these rights may not be formalised in terms of constitutional or legislative pronouncement as law or, if so formalised, there may exist some ambiguity with regard to their identity or the extent to which they can be protected. But this is the reason why protection of such rights is amenable to wide interpretation and the courts, in their pronouncement of their judgments, can create law, hence formalising their legality or defining their legal boundaries and scope. If substantive ideas are pursued within the identified goals compatible with the formal requirements, then Raz's version of the rule of law would encompass them.

Raz, Hayek and Dicey and Dworkin agree that it is judicial bodies that are charged, among other things, with the duty of applying the law to cases. None of them identifies any other body with the furthering of their ideal of the rule of law, save the judiciary. To this extent, they unanimously restate the importance of an independent judiciary for the achievement of the rule of law irrespective of the finer points of departure in their conceptions. Its absence is simply not an option. Finally, whoever wins the debate on which is the best version of the rule of law conception, or whichever scholar best articulates the rule of law, such debates must be considered against the truism that the rule of law is just an ideal and perfection is not mandatory.

The debate between formal and substantive conceptions of the rule of law does not negate or diminish the role of the judiciary. In all these debates, fears of government overreaching its powers due to undue concentration of political power and avoidance of tyranny, which forms the basis and justification for both separation of

¹⁵⁶ Ibid

powers and the rule of law elements and values has not been denied. An independent judiciary is one of the important means of deterring those concentrations.

Judicial independence, it is confirmed, is a necessary precondition for the observance of separation of powers and also for the achievement of the rule of law.

Lord Woolf buttresses this point. He says:

One of the most important of the judiciary's responsibilities is to uphold the rule of law since it is the rule of law which prevents the government of the day from abusing its powers. Ultimately, it is the rule of law which stops a democracy from descending into an elected dictatorship. To perform this task the judiciary has to be and be seen to be independent of government.¹⁵⁷

Woolf includes another important aspect to the relationship which is the perception of independence. That the judiciary actually upholds the rule of law is not enough. It must also be seen to be independent. If an impression is created that the judiciary is not separated from the executive, then however genuinely it prevents abuse of power by the executive, its decisions, especially those that uphold executive action, can never be trusted to have been devoid of executive influence.

Freedom from fear of arbitrary rule and overreaching of power are core objectives of both separation of powers and rule of law. Separation of powers is essential in maintaining the rule of law because it ensures that decisions are made non-arbitrarily.¹⁵⁸ If the executive is given a blank cheque to determine the fundamental policy of law, the ideal of government under law, government constrained by legal norms announced in advance, is threatened. This is one area in which the doctrine of

¹⁵⁷ Rt. Hon. Lord Woolf, Lord Chief Justice of England, 'The Rule of Law and Change in Constitution' (2004) Squire Centenary Lecture available at www.law.cam.ac.uk accessed 10 June 2010

¹⁵⁸ Sandra Day O'Connor, 'Vindicating the Rule of Law: The Role of the Judiciary' (2003) 2 Chinese Journal of International Law 2

separation of powers serves the ends of the rule of law because separation of powers speaks likewise against unrestricted delegation of power.¹⁵⁹

The rule of law's demand of equality before the law, impartiality in court decisions, and the power of courts to protect rights and review government action, are ends secured and protected by an independent judiciary. Both concepts place the judiciary at the centre of the power balance by identifying it as the equilibrium upon which the interests of the state and the citizen are to be deliberated and determined. To this extent, the judiciary must be independent in order to effectively play its role of bringing about the realisation of the rule of law.

Judicial independence, is thus a crucial requirement of the rule of law, and, is also firmly rooted in the doctrine of separation of powers.¹⁶⁰ Both separation of powers and rule of law requirements cannot be achieved if there is no independent judiciary to convey these requirements to fruition. A definition of judicial independence within the context of these symbiotically inter-related concepts can now be articulated.

2.5 Judicial Independence Re-visited in Context

Judicial independence shares objectives and values similar to the rule of law and separation of powers namely, avoidance of tyranny, avoidance of concentration of powers in the hands of one or more branches of government and impartiality in the application of the law. The significance of judicial independence has been established, and its core meaning clarified. It is now appropriate to identify its rationale and

¹⁵⁹ Denise Meyerson, 'Rule of Law and Separation of Powers' (2004) Macquarie Law Journal 1, available at <http://www.austlii.edu.au/au/journals/MqLJ/2004/1.html> accessed 28 September 2009

¹⁶⁰ Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in S Shetreet and J Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, Dordrecht 1985) 595

purposes. This will help to place it within the full context of separation of powers and the rule of law, subsequent to which a definition will emerge.

2.5.1 Judicial Independence: Its Rationale

The most classic function of the judiciary is to adjudicate claims between private parties or between a private party and the government.¹⁶¹ According to Russell, “citizens want their relations with each other and with their governments to be regulated by well defined laws, setting out mutual rights and duties, and should disputes arise out of such legal rights, then they should be placed before a mutually agreed adjudicator.”¹⁶² Legislatures prescribe the rights and duties of citizens, while the interpretation of the law is the proper and peculiar province of the courts”.¹⁶³ It is their duty to ascertain the meaning of the constitution and statutes.¹⁶⁴

The primary function of the judiciary is to determine disputes of fact and law in accordance with the law as legislated by parliament and expounded by the courts. Chief Justice Marshall in the case of *Marbury v Madison*¹⁶⁵ held that “it is emphatically the province and duty of the judicial department to say what the law is”. Lord Bingham years later reaffirms this position, when he states that “the function of independent judges, charged to interpret and apply the law, is universally recognised as a central feature of the modern state; a cornerstone of the rule of law itself”.¹⁶⁶ The principle of supremacy of the law and that of equality before the law are secured.

¹⁶¹ Russell in Russell and O’Brien (eds) (n 38) 9

¹⁶² Russell & O’Brien (eds), (n 38) 9

¹⁶³ *The Federalist* (n 106) 439

¹⁶⁴ *Federalist* (n 106)

¹⁶⁵ (1803) 5 U.S (1 Cranch) 137, 177

¹⁶⁶ *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56 (sec 42) also see Joseph Raz (n 65) 217, “it is the duty of the courts to determine what the law is”

If the adjudication of disputes between the citizen and the state is influenced by external or political pressure, it becomes impossible to control the exercise of power by political branches of government.¹⁶⁷ The rule of law requirement of pre-eminence of law therefore serves as a check on abuse of power. The government is restrained from over reaching its powers and is adequately checked. To this extent, a judiciary which is independent secures the formal aspects of the rule of law and objectives of separation of powers. Barak opines that “the principle of checks that characterises the concept of separation of powers is at work if the judicial branch has the final authority in cases of dispute, to determine the bounds of authority and legality of activity of the other branches.”¹⁶⁸ Each branch is independent within its zone so long as it acts according to law,¹⁶⁹ but if any of the branches fail to do so, the judiciary is authorised to interfere by way of judicial review or constitutional review and can nullify actions of both arms of government. In this way, the principle of separation of powers is not contravened.

The adjudicative function, though a crucial rationale to judicial independence should not be construed to avail the judiciary complete institutional independence.

MacLachlin explains:

The judiciary cannot be entirely institutionally independent of the legislative and executive branches of governance since it depends on them for the appointment and remuneration of judges as well for the provision of administrative infrastructure...Nor can the judiciary claim justice as its exclusive preserve...The core of judicial independence lies in a narrower concept- independence in exercising the adjudicative functions of the courts. It follows that the preconditions of judicial independence are conditions that are necessary to enable both judges as individuals and the judiciary to carry out their adjudicative function in an independent manner.¹⁷⁰

The concept of checks and balances is very much alive in this explanation in prescribing the institutional limits of judicial independence. We are also reminded that

¹⁶⁷ Meyerson, (n 159)

¹⁶⁸ Barak (n 53) 42

¹⁶⁹ Barak (n 53) 41 explaining the concept of checks and balances

¹⁷⁰ MacLachlin (n 66) 277

there are other functions that the judiciary performs, but these are corollary to its core function.¹⁷¹ The main point of concern here is the core functions.

2.5.2 Judicial Independence: Its Purpose

Judicial independence can also be defined and understood by the purposes it serves. It has an instrumental value, a means to achieve other ends.¹⁷² Judicial independence Burbank adds, “enables judges to follow the facts and the law without fear or favour, so as to uphold the rule of law, preserve the separation of governmental powers and promote due process”.¹⁷³ To Verkeuil, “the purpose of an independent judiciary is to avoid the conflict of interest in a situation in which the decision makers are dependent upon the litigants for their well being and position”.¹⁷⁴ It is instrumental to the pursuit of other values, such as the rule of law or other constitutional values, of which separation of powers is also an important integral part.¹⁷⁵ “When judges are independent, if they are insulated from political or other controls that could undermine their judgment, they will be better able to uphold the rule of law, preserve separation of powers and promote due process of law”.¹⁷⁶

Judicial independence defined in this functional context imports the content of the concepts of the rule of law and separation of powers, which narrows down the definition to only address those relations that bear components of subjection of

¹⁷¹ Judiciary performs other non adjudicative functions see generally, also Peter Russell, ‘The Judiciary in Canada: The Third Branch of Government’ in Russell and O’Brien (eds) (n 38)

¹⁷² Burbank and Friedman (n 33) 11-14 see also Geyh, ‘The Endless Judicial Selection Debate and why it matters to Judicial Independence,’ (2008) 21 Georgetown Journal of Legal Ethics, 1259 for a similar view but points out further that there is disagreement as to the nature of the purposes

¹⁷³ Ibid

¹⁷⁴ Paul Verkeuil, ‘Separation of Powers, the Rule of Law and the Idea of Independence’ (1998-1999) William & Mary Law Review 322

¹⁷⁵ Frerejohn (n 46) 354 He explains how the structure of judicial institutions protects judicial independence

¹⁷⁶ Burbank and Friedman (eds) (n 33) 9, 11-14

government to the law, equality before the law, avoidance of concentration of powers. The scope becomes more defined and less open ended in terms of purpose. It equally identifies more clearly the sources that most proximately have most potential to compromise the independence of the judiciary and delineates the scope of inquiry.

2.5.3 Judicial Independence Defined

Judicial independence is used in this study to mean ‘*the existence of judges, who are not manipulated for political gain, who are impartial towards the parties to a dispute, who apply the law according to the constitution, and who form a judicial branch which has final authority and power to regulate the legality of government behaviour, and whose independence rests on robust constitutional guarantees, and commands a high degree of public confidence*’.

This definition is partly taken from Larkin’s definition of judicial independence within the context of the theoretical and conceptual approach in the first part of his article.¹⁷⁷ The definition captures the core concept and meaning of judicial independence in its personal and institutional sense.¹⁷⁸ It addresses the consequences of the legal arrangements that were designed to protect the judiciary as a third branch of government.¹⁷⁹ It encapsulates the role of the judiciary in a constitutional democracy, as depicted by the symbiotic relationship wherein the doctrine of separation of powers is necessary for the creation of an independent judiciary for the realisation of the rule of law. The constitution which formally distributes functions between the three arms of

¹⁷⁷ Larkins (n 49) 611 Judicial independence refers “to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a part of a judicial branch which has power as an institution to regulate the legality of government behaviour, enact neutral justice and determine significant constitutional legal values”

¹⁷⁸ See, for example, Frerejohn (n 46), Judicial Independent means “Independence of the judiciary from the other branches of government” – Institutional independence

¹⁷⁹ Burbank Stephen, (1999) (n 80) 335: “Judicial Independence means freedom of Courts to make decisions without control by the executive and legislative branches”

government, where the values of the rule of law are formally entrenched and judicial independence is formally guaranteed, is part of this definition.¹⁸⁰ The formal aspect of the rule of law is recognised.

The importance of public confidence to shore the legitimacy of the both the judges decisions and the judiciary are part of the equation. Like separation of powers, and impartiality, public confidence is not to mean that judges should decide cases to achieve popularity or total confidence from the litigant or general public. This is not an absolute requirement since total confidence in the judiciary is unrealistic and not pragmatically achievable considering the adversarial nature of the judicial process. Some room must be left for reasonable perceptions of either independence or lack of it.

Russell's definition is close in context to the above definition. It refers, "not only to relationships between the judiciary and the other parts of government, but, also between the members of the judiciary and each other". It captures the spirit of the shared penumbra in terms of contextual objectives.¹⁸¹ However, he does not qualify the content of the latter relationships between judges and leaves it open-ended. The latter definition is qualified to include relationships that members of the judiciary ought to have with each other *but only to the extent that the same are devoid of political considerations*.¹⁸² This refers to the dangers of internal intrusion which may provide a

¹⁸⁰ *Home Park Caterers Limited v Attorney General & 2 Others, H.C.C Petition No. 671 of 2006*
Judicial independence "is an expression of the constitutional value as it connotes not only a state of mind but also a status or relationship to others for example the legislature and executive branches of government that rests on objective condition or guarantees"
<http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=27521159256678394982646> accessed 10 August 2011

¹⁸¹ Russell & O'Brien (eds), (n 38) 6

¹⁸² Emphasis mine

backdoor route to executive interference.¹⁸³ For example, judges of appeal should not use their appellate jurisdiction to overturn judgments or orders issued against the government by lower courts with the sole intention of authenticating, protecting or furthering political interest. But it is perfectly alright to intervene to correct decisions which are not in consonance with the law and precedent. This definition seals that gap. Defining personal independence in the same conceptual context creates uniformity of purpose.

When judicial independence is defined in this manner, those definitions that require freedom from all others, family, friends, media, academic debate, political discourse in its widest sense,¹⁸⁴ the latest opinion polls,¹⁸⁵ personal bias, private citizens,¹⁸⁶ pressure groups,¹⁸⁷ organised crime, though they may undermine impartiality as effectively as government pressure, are excluded.¹⁸⁸ These sources do not directly participate in the appointment, removal, disciplining, enforcement of court orders, or funding of the judiciary. They do not ensure that the terms and conditions of judges are secured, neither are they charged with the responsibility of executing the laws as interpreted and pronounced by the judges. They are not part of the checks and balances equation between the different arms of government. They do not bear the greatest responsibility for upholding the constitution and the rule of law. They are not directly related to the requirements of the principles of avoidance of concentration of authority, government according to law, which separation of powers shares with the

¹⁸³ Malleon (n 28) 64 Not all interferences with decisions of judges are undesirable for example normal appellate processes

¹⁸⁴ Ibid

¹⁸⁵ Shirley S Abrahamson (n 43) 6 She also includes inter alia, “whims, prejudice and fear”

¹⁸⁶ Keith Rosen ‘The Protection of Judicial Independence in Latin America’, (1987) 19 University of Miami Inter American Law Review 7, Judicial independence means:” ...judges to decide cases...free from...threats from governmental authorities or private citizens”

¹⁸⁷ Robert Stevens, (n 32) 5, Judicial independence means, “independence from improper pressure by the executive by litigants and by particular pressure groups”

¹⁸⁸ See generally, Malleon (n 28) 62-69 for a discussion on individual independence

rule of law and which the judiciary can protect only if it is independent as an institution and if its members apply the law impartially to cases brought before them devoid of political influence. If judicial independence was to be defined within the context of the rule of law only, then, they may be included because, they may draw from the principle of impartiality and equality before the law which may not necessarily affect separation of powers.

There may be situations where such sources can be used by politicians as tools for furthering their political interests, hence undermining both decisional and institutional of independence, not necessarily relationships between judges only. Such a situation can arise when the politicians use the press to attack a court's decision with a view to influencing the outcome of similar cases pending before courts in which the government is a party. There may also be politically orchestrated mass action or demonstrations against judges who are seen as independent and whose decisions the executive does not like in order to force them to resign or to block their promotion. 'Political consideration' is the operating phrase in this definition.

This definition captures the crucial points of interaction most likely to threaten and even compromise judicial independence. It has been necessary to develop a definition which captures in general the constitutional role of the judiciary as entrenched in any state's constitution, and which can be applied to a developing constitutional democracy, like Kenya, which is struggling to maintain the very basics of judicial independence within the constitutional contexts of separation of powers and the rule of law. The guarantees provided for the protection of judicial independence should enable judges and the judiciary to play that role for the attainment of the rule of law ideal which is universal, even if currently in its imperfect form. This definition offers

the best opportunity for testing the veracity of the independence of the judiciary in Kenya. Inappropriate executive intrusion into the affairs of the judiciary will be detectable.

2.5.4 Scope of Study

Larkin's definition of judicial independence captures the meaning of judicial independence in its decisional and institutional sense, as normatively understood within the context of the doctrines of separation of powers and the rule of law. The manner in which he labels the constructs of 'insularity', 'impartiality' and 'authority', allows easy mapping of the selected conceptions, definitions and themes under which constitutional guarantees for judicial independence is grouped in this study, and will be used for that purpose. The construct labels will retain the same meanings, but will be fully fleshed out in terms of substance.

Insularity means that "judges should not be used to further political aims nor punished for preventing their realisation".¹⁸⁹ Having preferred the formal conception of the rule of law, as expressed in the constitution and other laws of the state, the formal set of conditions that guarantee protection for judicial independence fits within this rule of law conception. To this end, the aspects of judicial independence discussed include judicial power, appointments, security of tenure, removal from office, financial autonomy, terms and conditions of service, and other inappropriate politically generated threats that are intended to influence the decision of the judge or judiciary as captured within the protections provided by the constitution and laws applicable.

¹⁸⁹ Larkins (n 49) 609

Impartiality means “that judges base their decisions on law and facts and not on any predilections towards one of the litigants”.¹⁹⁰ This has been discussed above as personal independence, and is the reason why institutional insularity is targeted for protection.¹⁹¹ Impartiality is discussed in the same breadth and measure as insularity either individually or severally or both depending on the theme under discussion.

Authority means “the relationship of the courts to other parts of the political system and society and the extent to which they are collectively *seen* as the legitimate body for the determination of right wrong, legal and illegal”.¹⁹² Though Larkins leaves the parameters of the latter part of construct open and undefined, this study includes public confidence/legitimacy, perceived or actual, as an integral component of this construct. This aspect is in consonance with the definition of judicial independence above.

The term *judiciary*, in its strict meaning, refers to judges of a state collectively, but it is often used in a wider sense to embrace both the institutions (courts) and persons comprising them.¹⁹³ The functional approach of what constitutes the judicial realm, as Russell points out, refers to officials and institutions that perform the judicial function of adjudication, that is, the provision of authoritative settlements of disputes about legal rights and duties.¹⁹⁴ The term *Judges* means judges, magistrates and presiding officers who form part of the judicial branch of government as normatively understood or as defined in the Constitution.

¹⁹⁰ Ibid

¹⁹¹ Part 2.2.4

¹⁹² Larkins, (n 49) 610 (Emphasis in italics mine)

¹⁹³ B O Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government* (St. Martin's Press, New York 1977) 265

¹⁹⁴ Russell & Obrien (eds), (n 38) 9

2.6 Constitutions: Do they matter?

Judicial independence as discussed and defined above is a clear demonstration that it is a critical constitutional concept which deserves adequate protection. It thus becomes necessary to discuss judicial independence within the formal context of the constitution. The point is that the veracity with which judicial independence is protected in the constitution does matter. It will be argued below and shall also be demonstrated in the following chapters that a more robust protection for judicial independence in a democratic state's constitution is indeed indispensable for the establishment of an independent judiciary. In a developing country like Kenya where western liberal democratic principles of the rule of Law and separation of powers are not home grown, then the practical application of these principles as enshrined in the constitution and their implications to judicial independence begin to matter.

A Constitution it is said, is, an important (or even the most important part of a society's basic system of rules.¹⁹⁵ Its rules constitute a kind of basic norm for other laws and rules from which the judicial system and legal application are secured.¹⁹⁶ Subordinate legislation, decisions of courts, and customary law flow mostly from the framework set by the constitution, even though equally important in their own right. It is also generally accepted that a constitution is a formal framework of fundamental law that establishes and regulates the activity of governing a state.¹⁹⁷ It defines and establishes the principal organs of government; it is the source of their authority and

¹⁹⁵ Niclas Berggren, Nils Karlson & Joackim Nergelius (ed), *Why Constitutions Matter*, (Transaction Publishers New Brunswick, 2003) vii

¹⁹⁶ Ibid

¹⁹⁷ Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183-201 184

prescribes the manner and the limits within which their functions are to be exercised, determines their interrelationship,¹⁹⁸ and perhaps most importantly of all, it is concerned with the relationship between government and individuals.¹⁹⁹ Two thirds of the world's largest constitutions bear some explicit protection for judicial independence.²⁰⁰ In situations where judicial independence is weak, threatened, or even absent, the first legitimate port of call is the constitution. It is in the constitution that the legal framework for protection or guarantee for judicial independence is expressed and contained. The challenge lies in the constitution's capacity to faithfully adhere to the dictates of the concepts it purports to espouse and protect.

A brief discussion, on constitutionalism, will be necessary to provide a basic understanding of these terms even if not in detail. This study focuses on the constitutional protection of judicial independence. For purposes of this study, it suffices to know what constitutionalism entails, even if in its descriptive and basic sense, and how it relates to judicial independence.

Constitutionalism is a concept that weighs rights and freedoms of the individual as against powers of the state to govern.²⁰¹ It is a belief in the imposition of restraints on government by means of a constitution.²⁰² It advocates the adoption of a constitution which is more than a power map; its function is to organise political authority, so that it

¹⁹⁸ S A de Smith, *The Commonwealth and its Constitutions* (Stevens & Sons, London 1964)109

¹⁹⁹ Neil Parpworth, *Constitutional and Administrative Law* (4th edn, OUP, Oxford 2006)3

²⁰⁰ David S Law, 'Constitutions' in *The Oxford Handbook of Empirical Legal Research*, in Peter Cane and Herbert M Kritzer (eds) (OUP, Oxford 2010) 383

²⁰¹ Benard Schwartz, *The Great Rights of Man: A History of the American Bill of Rights*, (OUP, Oxford 1977) 145

²⁰² Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press, Oxford 1998) 15

cannot be used oppressively or arbitrarily.²⁰³ This conceptual discourse would be incomplete without placing constitutionalism at the centre of the concepts of separation of powers, rule of law and judicial independence, even if it does not engage in a discourse on the various conceptions of constitutionalism.

It is in the text of a constitution that the concepts of separation of powers, the rule of law and judicial independence are enshrined expressly or impliedly. Professor Nwabueze's idea of constitutionalism is that:

Government is universally accepted to be a necessity, since man cannot fully realize himself...his creativity, his dignity and his whole personality...except within an ordered society. Yet the necessity for government creates its own problem for man, the problem of how to limit the arbitrariness inherent in government, and to ensure that its powers are to be used for the good of society. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.²⁰⁴

The question that the concept of constitutionalism, as described above, begs with regard to the judiciary is whether the textual provisions guaranteeing judicial independence will enable the judiciary to effectively limit the arbitrariness of political power and effectively protect the rights of the citizens against the state, should it overreach its powers. The rule of law is considered a set of closely interrelated principles, that together make up the core of the doctrine or theory of constitutionalism and, hence, a necessary component of any genuine liberal constitutional democratic polity.²⁰⁵ Judicial independence, like separation of powers and rule of law, are all constitutional principles required to serve the general purposes of constitutionalism.

²⁰³ Ibid

²⁰⁴ Nwabueze (101) 1

²⁰⁵ Trevor R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford 2003) 1

As a matter of constitutional arrangement, most of the new democracies have relied heavily on the judiciary to realise the rule of law.²⁰⁶ Those who have been involved in the design and constitutional reconstruction of newly independent states offering advice about relative merits do so because they assume that an independent, autonomous judiciary is an important mechanism for securing the rule of law and will be capable of holding governmental power to account against constitutional norms.²⁰⁷ Institutionalisation of judicial independence, within a framework that offers good prospects for constitutionalism reduces and controls the potentially enormous powers of the state and ruling parties to act arbitrarily.²⁰⁸ When a state has an independent judiciary, it signals the state's commitment to constitutionalism.²⁰⁹

2.6.1 Constitutional Protection for Judicial Independence

Constitutions attempt to guarantee judicial independence in many ways.²¹⁰ But this task of providing some practical security for each arm of government against the invasion of others was identified by the drafters of the American constitution as the most difficult.²¹¹ The question was whether such protection would be sufficient to mark with precision the boundaries of these departments in the Constitution of government, which in their view were mere parchment barriers against the encroaching

²⁰⁶ John E Finn, 'Rule of Law and Judicial Independence in Newly Democratic Regimes' (2004)13 (3) *The Good Society Journal* 12

²⁰⁷ *Ibid*

²⁰⁸ Fombard (n 5) 239

²⁰⁹ *Ibid*

²¹⁰ Barendt *Introduction* (n 197) 133

²¹¹ *The Federalist Papers* (n 106) 309

spirit of power.²¹² As late as the 21st century, this difficulty is recognised as still persisting. Russell claims that, it is only those countries experiencing transformation from “peoples’ democracies” or other kinds of authoritarianism states, which face this difficult question of how to secure minimal requirements for the protection of judicial independence.²¹³ This kind of claim is buoyed by abundant literature on studies of judicial independence in new states transiting from authoritarian rule in Latin America²¹⁴ and Eastern Europe.²¹⁵

This may very well be true. However, the Kenyan experience reveals that this pressing problem is not only pervasive in authoritarian regimes, but that it equally plagues even relatively stable democracies. Until now the problem of how best to secure judicial independence persists as a big challenge in young democracies presumed to have taken off the runway of democracy towards the direction of establishing independent judiciaries. Well established democracies like the United Kingdom, Italy and New Zealand have made major constitutional revisions in later years, and there is an indication of growing international interest in constitutional reform.²¹⁶ New democracies in Europe, Asia, and South Africa have in the recent past introduced democratic institutions which have developed their form and content.²¹⁷

²¹² Ibid

²¹³ Russell & O’Brien (n 38)

²¹⁴ See generally William C Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport CT Praeger, 2000) for a discussion on judicial independence and reforms in Latin America. Also see Maria Sousa, ‘A Brief Overview of Judicial Reform in Latin America: Objectives, Challenges and Accomplishments’ in Eduardo Lora (ed) *The State of Reform in Latin America* (World Bank Publications, Washington 2007)

²¹⁵ See generally, Tom Ginsburg and Tamir Moustafa *Rule by Law: Judicial Politics in Authoritarian Regimes*, (Cambridge University Press, Cambridge 2008), Randal Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP, Cambridge 2010)

²¹⁶ Niclas et al (n 195) viii

²¹⁷ Ibid

This has been largely due to entrenchment of constitutional protection for their judiciaries. The importance of securing judicial independence in a country's constitution, hence the fact that constitutions matter, cannot be emphasised more.

Skepticism towards the actual extent to which constitutions can protect judicial independence is not a new phenomenon. This lack of faith arises out of the assumption that once judicial independence is entrenched in the constitution, then, the judiciary will be independent as a matter of course.

Legal scholars who have conducted empirical research on judicial independence have concluded, that the mere fact that the existence of formal protection for judicial independence in a constitution is no assurance of an independent judiciary.²¹⁸ They argue that a variety of political and economic pressures may influence even the nominally independent judicial systems. Other issues like ideas, ideologies and technological developments are also considered to be equally important determinants of judicial independence apart from constitutional guarantees.²¹⁹

Tyrannical regimes also consider their constitutions as sufficiently guaranteeing judicial independence. A good example is the Soviet Union which guaranteed a variety of rights that were routinely abused. This is as compared to the UK which has long respected a variety of rights in the absence of a written constitution.²²⁰

²¹⁸ Feld L P and Voight S, 'Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary' in R D Congleton and B Swedenbourg (eds), *Democratic Constitutional Design and Public Policy* (MIT Press, Cambridge 2006) 251-258, 267. For an exhaustive analysis of importance of protection offered by constitutions and critique thereof, see David S. Law's Chapter on 'Constitutions' in (n 195)

²¹⁹ Niclas *et al* (n 195)viii

²²⁰ Law (n 200) 381

However in spite of this skepticism, the critics still concedes that those cases where salaries and security of judges are constitutionally protected tend to encourage judicial independence.²²¹ Even though there is some evidence that existence of constitutional protection of judicial independence is not necessarily a precondition sufficient for the observance of judicial independence in practice, it can be confidently stated that it is associated with increased levels of judicial independence.

It could further be argued a state may not necessarily possess a written constitution in order for it to have an independent judiciary. In this regard it is worth noting that countries like Great Britain, Israel, and New Zealand do not have written constitutions, but nevertheless, have independent judiciaries. But if we were to agree with Lord Diplock, that the British Constitution, though largely unwritten, is firmly based on separation of powers²²² of which judicial independence is a characteristic, and also with Tomkins that distinctions between written and unwritten constitutions matter very little,²²³ then David Law's argument that, it matters not whether a constitution is written or unwritten is defensible.²²⁴ What matters is that there should be an appropriate balance of power between the respective arms of government in a manner conducive to the existence of an independent judiciary which contributes to the realisation of the rule of law. It is important therefore, to evaluate the relationship between formal constitutional provisions and constitutional practice as suggested by some scholars.²²⁵

²²¹ Feld & Voight (n 218) 267

²²² *Duport Steels v Sirs* (1980) 1 WLR 142, 212

²²³ Adam Tomkins, *Public Law* (OUP, Oxford 2003) 7

²²⁴ Law (n 200) 380

²²⁵ Elkins Z, Ginsburg T & Melyon J. *The Endurance of National Constitutions*, (Cambridge University Press, New York, 2009) 55

This critical assessment is relevant especially in developing democracies which have embraced the western liberal democratic ideas as embodied in written constitutions.

Nevertheless, textual provisions in the constitution would be effective in protecting judges by preventing politicians from achieving sufficiently high levels of coordination with the intention of defeating the checks and balances imposed by the constitution.²²⁶ In states where the culture of judicial independence is developing, it would be better if the constitution buttressed the protection of judicial independence in order to deter its violation. In such situations absence of, or weak, constitutional provisions for the guarantee of judicial independence would not be an intelligent option. Tomkins's argument that "we need not write rules down for them to be effective or for us to feel bound by them" is appealing but unhelpful under such circumstances.²²⁷

There is no serious contest as to the most important points of interactions or vulnerable areas that require constitutional protection. The need to insulate judges from interference from the executive can be traced back to the Act of Settlement of 1701 in England when judicial independence was assured.²²⁸ Judges were given security of tenure subject only to dismissal by both houses of Parliament.²²⁹ That the judiciary was considered the weakest branch hence, its ultimate dependence on the executive and the need to provide it special protection against interference, was recognised even by the

²²⁶ John Ferejohn (n 46) 356

²²⁷ Tomkins (n 219) 12

²²⁸ Stevens (n 32) 3

²²⁹ Ibid

drafters of the American Constitution.²³⁰ This “natural feebleness of the judiciary and its continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches,”²³¹ led to the identification of certain aspects that were seen to be most vulnerable, hence requiring specific protection.

2.6.2. Implications for Constitutionalism in Contemporary Kenya

Kenya being a constitutional democracy, should adhere to, and respect, the principle of constitutionalism, at least in this very basic sense. This study, which analyses constitutional protection of judicial independence with a view to assessing whether the existence of guarantees of judicial independence in a state’s constitution leads to its observance, considers the same within the context of constitutionalism.

Kenyans have been governed by a written constitution since it obtained self-rule from the British in 1963 and the Westminster Model Constitution came into force. In 1964, Kenya obtained full independence from British rule and achieved its status as an independent state when it repealed the Westminster Model Constitution and the Independence Constitution came into force. In 2010 after a long struggle in an effort to create a home grown, people driven constitution, Kenyans finally succeeded. The Constitution of Kenya 2010 came into force on 27th August 2010.

In each one of these constitutions, the manner and limits of functions of government was set out. It is the texts of these constitutions that comprise the bulk of this study. They are analysed to determine their faithfulness to the constitutional principles of separation of powers, the rule of law and principles of judicial independence. From this

²³⁰ *Federalist Papers* (n 106) 436

²³¹ *Federalist Papers* (n 106) 438 (security of tenure removal), 443 (financial independence, tenure), 444 (judicial authority), 428(appointments)

analysis it is possible to identify absence, weaknesses, threats, or actual violation of judicial independence. Important questions about why the Kenyan judiciary lacks, or is perceived to lack, independence from the executive, despite of the fact that the independence of individual judges and that of the judiciary as an institution is expressly guaranteed in the constitution, can also be as discerned.²³²

2.7 Conclusion

The concepts of separation of powers and the rule of law, both of which require the existence of an independent judiciary, and whose values are served by the principle of judicial independence, have been defined in this chapter. Together with judicial independence, their origins, rationale, purposes and the various conceptions have been explained. With regard to the doctrine of the rule of law, its formal version, which incorporates substantive version, in so far as the substantive aspects are expressed in formal terms, is preferred. Both formal and substantive understandings of the rule of law are served by judicial independence, and are also compatible with the values of separation of powers.

Even though there is some measure of merit and justification in applying the ‘pure’ and ‘substantive’ conceptions of separation of powers and rule of law respectively, judicial independence can be understood more meaningfully, and be assessed more effectively, when viewed through the lenses of the ‘partial’ and ‘formal’ approaches. These versions have more universal appeal. They are visible, flexible, pragmatic, easily adaptable and applicable to the diverse governmental organisations in

²³² Chapters 4 will provide an exhaustive demonstration with examples of how weak constitutional guarantees for judicial independence can negatively impact on judicial independence

both mature and nascent governments. They provide a normative and realistic standard for assessment of judicial independence.

The concepts of separation of powers, rule of law, and judicial independence, are symbiotically interrelated and are core concepts of constitutionalism. Separation of powers demands the existence of an independent judiciary. An independent judiciary preserves and furthers the interests of the rule of law values. The rule of law is considerably weakened in the absence of an independent judiciary. Without an independent judiciary, the concept of separation of powers, including its attendant version of checks and balances, is nothing but rhetoric. Without an independent, impartial judiciary, the values inhered by the rule of law cannot be achieved and preserved. The result would be tyranny, lack of freedom and lawlessness, as neither the rulers nor the ruled will be obliged to obey the law and be ruled by it and/or be subject to it.

It is not denied that conceptual difficulties in applying the doctrines of separation of powers, rule of law and judicial independence exist. Scepticism abounds, but that is normal. Nevertheless, there are general principles that are agreed upon, are universally accepted and can be uniformly applied in all these concepts with a fair degree of predictability that can enable us to understand what we mean when making reference to them.

The conceptual analysis undertaken has contributed to the clarification of the basic components of these contested terms. The principles and values that underlie these doctrines can then be used as an analytical framework for studying the independence of the courts and judges, and for assessing the independence of the

judiciary and hence, provides a foundation for the critique of judicial independence experience in Kenya. The thesis that the Kenyan judiciary is ‘not’ independent, that it is subservient to, and is dominated by, the executive to the extent that it has failed to effectively execute its constitutional mandate of preventing the executive from overreaching its powers can then be tested. These themes, as applied in later chapters of this study, capture the salient features of the judicial system, and even some subtle actions that may impede the achievement of judicial independence in a young and fledgling democracy like Kenya. Of course, the achievement of an appropriate balance is not without challenges.

CHAPTER THREE

THE JUDICIARY IN KENYA: A HISTORICAL BACKGROUND

Loss of freedom seldom happens overnight...oppression does not stand on the doorstep with a toothbrush moustache and a swastika armband. It creeps up insidiously; it creeps up step by step; and all of a sudden the unfortunate citizen realises it has gone.¹

3.1 Introduction

This Chapter traces and analyses the historical events that led to and shaped the current judicial system in Kenya. It engages in this discourse on the premise of the conceptual framework developed in chapter two. The objectives of separation of powers and rule of law concepts which can only be effectively secured by the existence of an independent judiciary are used as litmus paper to test the strengths and weaknesses of the judicial systems in Kenya during the pre-colonial, colonial and immediate post-colonial periods respectively. The expectation is to find out whether the judiciary in Kenya can truly be described as independent of the other arms of government especially the executive. To that extent, the conceptual difficulties in prescriptively applying these principal requirements of separation of powers and rule of law within the context of an independent judiciary are exposed and further explained.

This chronological analysis focuses on the dangers inherent in political systems which do not possess clear demarcation of powers and functions between their judicial and executive and legislative arms of government. The result is a judiciary which was perceived as incapable of effectively checking the excesses of the other arms of

¹ Lord Lane, HL Deb 7 April 1989 vol. 505 col. 1331

government, thus compromising the rule of law values. This anomaly directly impacts on judge's personal independence and also the institution of the judiciary.

Since the current structure of the Kenyan judiciary is a Western, or to be specific, an English model, imported and transplanted into the African system(s) of government, it can be most meaningfully understood from a historical perspective. The problems experienced by the Kenya judiciary over the years have been identified to be as much a result of historical forces as of an inability to meet new challenges in a dynamic manner.² It is for this reason that the creation of a judicial system, during the colonial era, is important for this chapter. This chronology of events is crucial to understanding the current structure, jurisdiction and functioning of the Kenyan judicial system.

The transition from one era to another will shed light onto the ubiquitous perception and claims by scholars of constitutional law, legal anthropologists, political scientists, historians and the general citizenry, that the Kenyan judiciary has neither been independent nor impartial.³ The structures for the guarantee of judicial independence have been weak, and susceptible to exploitation by the executive, to the extent that even after Kenya attained independence, the political class continued to use the judiciary to further its own political interests to the disadvantage of the common citizen.

² Githu Muigai, 'Legal Constitutional Reforms to Facilitate Multi Party Democracy: The Case of Kenya', in J. Oloka Onyango, K. Kibwana and Chris Maina (eds) *Laws & Struggle for Democracy in East Africa* (Claripress, Nairobi, 1996) 536

³ *Report of the Constitution of Kenya Review Commission (CKRC): Volume One; The Main Report*, (CKRC Nairobi, 2003) 49, (hereinafter referred to as Ghai Report) see also ³ Kiraitu Murungi, 'Relationship between the three Branches of Government' in *Report of the Pan African Forum of the Commonwealth Latimer House Principles on the Accountability and the Relationship between the Three Arms of Government*, (Commonwealth Secretariat, London 2005) 9 as examples

The chapter is divided into three parts. Part one is a short exposition of the dispute resolution systems that were in existence before the advent of British rule. Part two discusses the judiciary during colonial period. Part three analyses the judiciary in the immediate post-independence period and the subsisting political context. Focus is on the constitutional developments that were introduced and how this affected judicial independence and shaped the role of the Kenyan judiciary to what it is today. The manner in which the judiciary was established and the role it played during this period is the genesis of the perception that the judiciary in Kenya lacks the requisite independence from the executive. Part four introduces the political background in Kenya. It will become clearer when discussing the violation of judicial independence in chapter four and the attempts to reclaim the same in chapter five that judicial independence in Kenya was wrapped up with the politics of the nation. The argument here is that judicial independent was assaulted most when there was less democratic space and enhanced with improved democratic space.

3.2 Pre Colonial Justice Systems

The history of the Kenya judiciary can be traced back to the advent of British rule, but prior to that period there existed methods of dispute resolution. It was not in the format of formal courts or judiciary in the English sense. Anthropological studies reveal that African ethnic groups lived as autonomous nationalities with their own governance systems.⁴ Within this system, disputes were determined by traditional judicial mechanisms. Indigenous judicial administration was guided by pragmatic considerations. Traditional African societies practised mediation of conflict through

⁴ J. B Ojwang, 'Constitutional Trends in Africa: The Kenya Case' (2000) 10 Journal of Transnational Law & Contemporary Problems, 517-538, 519

elders. The dialectical settings, with opposed counsel upholding their clients' stand before a neutral arbiter, was absent; the 'judges' were as much adjudicators as public policy administrators.⁵ According to Phillips:

In most of the tribes in Kenya, it appears that the indigenous system of justice was very fluid, that there was no standing judicial body, that disputes were adjudicated upon by an ad hoc council of elders, usually within the framework of the lineage system, that the composition of the judicial body was liable to vary with the nature and importance of each individual case, and that the sanction behind its decision was the solidarity of the group. The only step in the direction of an organised judiciary was the recognition of certain elders as traditionally qualified to participate in adjudication, and their recognition was usually based on their seniority as members of the social unit. It needs no argument to show that a system such as this cannot be taken wholesale as part of the machinery of government by a centralised authority.⁶

Phillips identifies only decentralised political communities. There existed centralised political communities, like the Wanga Kingdom in western Kenya and the coastal city states, whose vertical power structures had almost properly developed and had differentiated institutions of the judiciary, legislature and executive.⁷ Another category consisted of those societies which had informal tribunals, the authority of which was assured mainly by the force of etiquette and the threat of ostracism.⁸

In the 1880s Kenya was occupied by tribal groups that governed themselves on the basis of largely informal systems.⁹ There were neither chiefs nor rulers, in the sense in which these terms are understood in political systems with a centralised society, neither were there judiciaries as currently understood which had defined separate functions and powers to check excesses of the executive or ensure that everybody, including the rulers, were subjected to the rule of law. The purpose of this analysis is to

⁵ J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (ACTS Press, Nairobi, 1990) 151

⁶ Phillips, *Report on Native Tribunals in Kenya* (1945), para. 520, (Legal Department, Nairobi 1945) para 520 also cited in Y. P. Ghai and J.P.W.B McAuslan, *Public Law and Political change in Kenya* (Revised edn, OUP, Nairobi, 2001) 132

⁷ Frank K. Matanga, 'Kenya: A Chequered Path to Democracy' (2003) 1 (1) East African Journal of Human Rights and Democracy 32

⁸ See generally, M. Fortes & E. E. Evans-Pritchard (eds), *African Political Systems*, (OUP, Oxford 1961)

⁹ Ojwang, 'Trends' (n 4) 519

illustrate how certain elements and values of judicial independence were applied and practised. The application of these values, that underpin the concept of judicial independence, resonates with the underlying cultural values, hence, effectively responding to justice before the inception of colonial rule.

The justice systems of a few selected tribal communities namely; Luo, Akamba and Kipsigis, are summarised below as illustrations, since an exhaustive narrative is beyond the scope of this study. The communities are selected on the basis of a regional representativeness and also available literature on them. Kenya has 42 ethnic communities occupying seven provinces and the selected communities are sufficiently representative in terms of numbers, cultural background and geographical distribution. The Luo represent Western Kenya, the Kalenjin represent the Rift valley province and the Akamba represent the eastern province. There were 7 provinces in total.¹⁰

3.2.1 The Luo

Among the Luo community, who occupy a large part of the Nyanza Province, the largest geopolitical unit was a chiefdom called *piny*. Every chiefdom had a traditional chief, *ruoth*, who had authority over matters concerning the nation.¹¹ The chief appointed leaders (*jodong dhouidi*) to every clan who were, in turn, assisted by village elders (*jodong gweng*). Some of their duties were to hold meetings as a tribunal to assist the chief in judging cases.¹² These elders were guided by rules and regulations in order to govern the society, and possessed the machinery of enforcement.¹³ Their

¹⁰ Central, Rift Valley, Nyanza, Western, Eastern, Coast and North Eastern

¹¹ Jane Achieng (tln) *Paul Mboya's Luo Kitgi Gi Timbegi*, (Atai Joint Limited, Nairobi 2001) 1

¹² Ibid

¹³ The enforcement arm akin to the police department was called the *ogulmama*.

assembly as adjudicators is regarded as forming a part of the legal institution.¹⁴ In the Luo legal system, cases are linked in a way that is referred to by the proverb “*sembe rombe ipimo gi nyamin*”, which means literally “a sheep’s tail must be measured with another sheep’s tail”. In a legal case, judgement was proclaimed in terms of previous cases of the same kind.¹⁵ Respect for legal precedent was evident. The Luo community also recognised the fact that at times, there could be a case which had no resemblance, “*ma ne pok oneye*”, which means “this has never been”.¹⁶ In such instances, the punishments were left to the supernatural to mete out in the course of time.¹⁷ To this extent, the rule of law requirement that laws should be predictable, public, uniform, and declared in advance, so that people can be guided by them, appears to be partially lacking.

3.2.2 The Akamba

The Akamba community of Eastern Province, it has been observed, did not have any chiefs, although occasionally, a rich person with a commanding personality succeeded in attaining leadership within an extensive territory through higher intelligence, great physical strength or being a great medicine man.¹⁸ The home government was in the hands of a council of elders, the *nzama*. One of the functions of the *nzama* was to act as a court in which all cases were tried and decided.¹⁹ They were the custodians of the tribe’s traditions. Cases were decided in open air before a crowd of interested persons and appropriate punishments meted out.²⁰ The process was

¹⁴ B. C. Ocholla-Ayayo, *Traditional Ideology and Ethics among the Southern Luo*, (The Scandinavian Institute of African Studies, Uppsala 1976) 88

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Lindelom K G *Elements of Life*, (OUP, Oxford 1920) 148-185

¹⁹ Other functions were care and maintenance of religion offering of sacrifices

²⁰ Lindelom (n 17) 221

transparent and the parties were never taken by surprise and were equally treated before the courts.

3.2.3 The Kipsigis

The Kipsigis community of the Rift Valley had no real system of administration. The *Kokwet* (group) was composed of a group or territorial unit amongst whom elders were chosen including the *poynet ab kokwet*, distinguished by his sanctity in judging cases.²¹ The function of the *poynet* in civil matters was very similar to that of the “Justice of the Peace” in England, in that he tried small cases between members of his *Kokwet* with the help of elders.²² In the course of their trials, it is reported that the elders presiding over the cases were “not supposed to side with any party, but they each must examine all possibilities, both favourable and detrimental to the accused”.²³ Here again the element of impartiality of the judge demanded that he avoids bias, applies due process and determine cases according to law. These aspects of personal independence and were clearly demonstrated. The sharing of functions between the chief and the elders existed, even though in a very limited and skewed manner, as we do not find in literature on traditional justice systems, situations where the ruled questioned the wisdom or authority of the ruler or the elders.

3.2.4 Judicial Independence in Traditional Justice Systems

The personal aspect of judicial independence was therefore not alien to traditional African justice. Appointments or nominations of the judges by a political authority (Chief) was also one its features. So were the requirements and criteria both

²¹ J G. Peristiany, *Social Institutions of the Kipsigis*, (Routledge and Kegan Paul Ltd, London 1964)

²² Ibid

²³ Ibid

for appointments and job suitability. Processes of appeal existed. That these ‘judges’ were only the Chief’s advisers and owed their allegiance to him and that the Chief had the last word in any decision making, is also evident.

Society was aware of the traditional laws and customs in advance even though they were not codified. There existed a rule against bias in the African sense; hence, the traditional justice systems bore some attributes of independence, impartiality and equality. Parties, to an extent, were treated equally before the law, but there was no judicial branch. The rule of law in the sense of the ruled and the rulers being all equally subjected to and ruled by the same law was not existent.

There was a sharing of responsibility, and to an extent the tribal leaders made decisions with the advice of elders drawn from the community. There was, of course, some element of separation of powers to the extent that the elders decided disputes and advised the chief accordingly. In terms of vertical independence, the concern for insulation of the elders from political pressure, the kind of concern associated with separation of powers, appeared to be lacking in view of the fact that the chief wore all three hats and elders were merely his advisors.²⁴ The ruler’s powers were not subject to much checks, hence the potential for the rulers to misuse their powers or act arbitrarily, actions that could result in tyranny, could not be ruled out. The rule of law in this sense is hardly mentioned in authoritative treatises on African traditional and political systems. Diescho summarises traditional African political organisations thus:

In the old traditional fiefdoms in Africa...there was only one ruler: with unfettered powers to make laws, interpret and apply them as s/he deemed fit at a given time. The ruler was the legislator, the prosecutor, the judge and the spiritual high priest at the same time and the ruled were treated as subjects – not citizens...he was assisted

²⁴ Same as in England in 1215 when the powers of the legislature, executive and judicial were concentrated in the hands of the king, the Lord’s anointed. See, Tom Bingham, *The Rule of Law* (Penguin Books Ltd, London 2010) 12

by a personally assembled jury of senior councillors who served at his mercy...were accountable to the king, not the people...at times they could convey intercessions to the monarch, however, these intercessions occurred without any hard and fast rules of engagement. The subjects were at the ruler's beck and call...Subjects, often referred to by the ruler as slaves, were obliged to negotiate their own relationships with the ruler – the owner of the people who was throughout his reign above the law.²⁵

The analysis of the traditional justice systems in their informal and non-developed state reveals some evidence of the existence of some of the essential attributes of judicial independence, such as the requirement of impartiality of judges in the process of adjudication (personal independence). Jurisdiction was mostly confined to matters of personal nature under customary laws touching on contracts, land, family, war, famine, crimes, and other forms of social behaviour in each traditional community. These were applied in a vertical manner. Their hierarchical structures were equally conceived as bearing little or no horizontal checks and balances.²⁶ Executive, legislative and judicial functions were accumulated in the hands of one person hence, a recipe for tyranny as Madison had described earlier.²⁷

This analysis is important because it explains in context the historical continuity of judicial systems before and after colonisation of Kenya and even beyond. Even though some measure of judicial independence was appreciated in the traditional justice systems, it appears to have improved to some extent (though insufficiently) in the colonial period as shall be demonstrated in the next part. In both the pre-colonial and during colonial rule the judges are determining disputes outside a state context hence the point being made here is for purposes of historical continuity. The trend improves even further with the enactment of the Westminster Constitution in 1963 as shall be

²⁵ Joseph B Diescho, 'The Paradigm of an Independent Judiciary: Its History, implications and Limitations in Africa' in Osogo Ambani (ed) *Judiciary watch Report: Readings on Rule of Law in Africa* (VII Kenya Section of the ICJ, Nairobi 2008) 30-33

²⁶ V G Simiyu, 'Democratic Myth in the African Traditional Societies', in W O Oyugi and A Gitonga (eds), *Democratic Theory and Practice in Africa* (EAEP, Nairobi 1995) 53

²⁷ James Madison, Alexander Hamilton and John Jay: *The Federalist Papers*, Isaac Kremnick (ed) (Penguin Books, Harmondsworth 1987) 303

demonstrated in the last part of this chapter. The gradual improvement of judicial independence within a non-state context as experienced before independence and also judicial independence within in a state context as experienced after independence need not be viewed as competing themes. These themes should be appreciated and understood as part of the historical development of the growth of judicial independence in Kenya.

3.2.5 Muslim Courts

Apart from the indigenous African judicial systems, there also existed the Muslim judicial system which was practiced along the coastal areas of Kenya according to the religion and culture of Islam. The influence of the Muslim religion came with the control exerted over the dominions of the Sultan of Zanzibar. When the Arabs occupied the coast of Kenya and made it their territory, they brought along with them the practice of the religion of Islam and their subjects too were converted to Islam. Apart from this most of the local Kenyan population at the coast also converted to Islam.

The Sultan of Oman thus created a territory over the coastal strip. He was seen as having some undefined authority over some unidentified area of the East African coast and interior.²⁸ When the British took over the sultanate's dominions in June 1895, by declaring a protectorate over much of what is now Kenya, it was agreed between the Sultan and the British that the practice of Islamic law would be preserved at the coast.²⁹

²⁸ Y. P. Ghai and J.P.W.B McAuslan, *Public Law and Political change in Kenya* (Revised edition OUP, Nairobi, 2001) 2

²⁹ Ghai (n 28)129

During this period there was already established by the Sultan, Muslim Courts. manned by Kadhis who were appointed by the Sultan and applied Muslim law.³⁰ The Kadhis were appointed and paid by the Sultan, or sometimes on the advice of the Muslim scholars, local elders called 'liwalis'.³¹ In places like Lamu and Mombasa, Kadhis came from local prominent families, like the Mazrui in Mombasa.³² This is similar to the African traditional societies, wherein criteria for judicial appointment were tied to eldership or prominence in society with close ties to the rulers. The rulers in both cases were religious rulers. Since they were mainly religious courts which determined only disputes related to Islamic law arising out of personal disputes between persons professing Islamic faith only, their relationship with the political actors in government was virtually non-existent hence their irrelevance to the separation of powers properly so conceived.

3.2.6 Objections to the Traditional Justice Systems

Traditional justice systems have been criticised for not offering equal treatment to the parties. Gender based exclusion has been of particular concern in Kenya, leading to gender discrimination, since the majority of family cases, notably violence, neglect and distribution of property had direct implications for women.³³ Cruel punishment and unfair trial procedures are also identified.³⁴ A study conducted by FIDA Kenya into the traditional justice practices among the communities in the coast province of Kenya

³⁰ Ibid

³¹ R. L. Porwells, Horn & Crescent, *Cultural Change and Traditional Islam on the East African Coast 1800-1900*, (CUP, Cambridge 1987) 151

³² Ibid

³³ Celestine Nyamu Musembi, 'Review of experience in engaging with 'Non-State' Justice Systems in East Africa', <<http://www.gsdrc.org/docs/open/DS37.pdf>> accessed 2 July 2010. For similar objections, see generally, Lillian Timbatemwa-Ekirikubinza, 'Multiple Partnering, Gender Relations and Violence by Women; Reflections from Uganda's Penal Regime' (1998) 4(1) East African Journal of Peace and Human Rights 15

³⁴ Ibid

revealed that the application of the law was generally biased against women as most of the elders were men.³⁵ Such traits conflict with human rights principles and violate the rule of law principle of equal application of the law between parties, which is also a basic principle of judicial independence. These systems have also been described as “inconsistent, unpredictable and discriminatory”.³⁶ Decisions of the elders were often not recorded and appeals from them are difficult.³⁷

These criticisms are not any different from the ones levelled against the rule of law concept by Jennings³⁸ and Marshall³⁹ who also brought to fore attention of the problem of applying the law equally to the general citizenry. Nevertheless, it is arguable that at that point in time, considering the political, social and economic circumstances, the imperfections of traditional justice systems were no different from those of earlier societal organisations of the Greeks, Romans, or even the English societies of the 16th and 17th centuries. Not even the current justice systems of most developed and mature democracies can be said to have achieved perfection.

Critics make the mistake of assessing traditional justice systems without taking into account the changes and developments which have occurred in Kenya for over a century. They make the assumption that the mind-set of the elders have been static and have not evolved to appreciate issues of rights, gender, discrimination and neither have they been affected by globalisation. Even during Montesquieu’s and Locke’s times, the idea of an independent judiciary as we know it today, was not fully developed.

³⁵ ‘Traditional Justice Systems in Kenya: A study of Communities in Coast Province, Kenya’ by FIDA Kenya, available at http://www.cljlaw.com/membersentry/articles/kenya_02Traditional%20Justice.pdf accessed 2 July 2010

³⁶ Ibid

³⁷ Ibid

³⁸ Ivor Jennings, *The Law and the Constitution* 5th Edition, (University of London Press Ltd, London 1960) 201

³⁹ Geoffrey Marshall, *Constitutional Theory* (OUP, Oxford 1971) 97

The rule of law and separation of powers, upon which judicial independence principles are hinged, are historically, not very new concepts. Widner's analogical account of how American courts in the 17th century evolved and succeeded in holding public officials accountable, a lesson she suggests, developing countries could learn from, commences from the premise that "the performance challenges that developing country judiciaries confront now are similar to those that American courts faced during the nineteenth century".⁴⁰ "If we could block out dates," she says, "it would be hard to distinguish a contemporary account of justice system performance in Africa, or Latin America from the complaints that filled pamphlets and political speeches in nineteenth century America".⁴¹ England too experienced similar evolution as recalled by Lord Bingham that, "in 1215, the powers of legislature, executive and judicial were concentrated on the King, the lord's anointed".⁴²

Similar analogy and reasoning is extendable to the traditional justice systems. The fact that the ideals and values were clearly present is indicative of the potential the traditional societies possessed to achieve that which we now perceive to be the ideal rule of law, separation of powers and independent judiciary, as exhibited by mature democracies. The universal necessity for these values as being the most important attribute in any legal system is evident from the above analysis. The concept and values of separation of powers doctrine and the concept of the rule of law is not the preserve of western cultures and democracies.

⁴⁰ Jennifer Widner, 'How Some Reflections on the United States' Experience May Inform African Efforts to Build Court Systems and the Rule of Law', in Siri Gloppen, Roberto Gargarella and Elin Skaar, *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass Publishers, London 2004) 27-29

⁴¹ Ibid

⁴² Tom Bingham, *The Rule of Law* (Penguin Books Ltd, London 2010) 12

The organisational features of the traditional justice systems and its operating systems, however, reveal one major weakness, which is the absence of the rule of law and separation of powers aspect that all persons be subject to the law and that the powers of the rulers be checked. These societies, indeed, appreciated the personal aspects of judicial independence, in their legal processes. They possessed the attributes of Sharman's impartial judge which is faithfulness to the law, open mindedness and freedom from personal bias.⁴³ Though not perfect, at least if objectively assessed, these elements could be discerned. Some even followed precedent. In their rudimentary systems wherein the formal expression of the rule of law did not exist, the societies were aware of the applicable laws and the core meaning of judicial independence in its personal decision making sense. It cannot be said that the traditional justice systems had nothing to offer the western political thought. They complemented the modern legal systems.

However, the absence of the institutional aspect of judicial independence which was not sufficiently developed then, was exploited by the tribal leaders who were, in turn, exploited by the colonial masters who used "divide and rule" tactics to entrench and perpetuate the British rule in Kenya for over 60 years.

3.3. The Colonial Era: 1895 – 1963: The Creation of a Formal Judicial System

The area that is known as Kenya today was delineated by colonial enactments in 1921 and 1926, which in turn were a culmination of a colonisation process running

⁴³ Sharman M Jeffrey, 'The Impartial Judge: Detachment or Passion' (1995-1996) 45 DePaul Law Review

back to around 1886.⁴⁴ The Berlin Conference of 1895, during which the European powers partitioned Africa into their spheres of influence, was the beginning of colonial rule. The declaration of a protectorate over much of what is now Kenya on 15 June 1895, marked the beginning of official British rule in Kenya, a rule which was to endure until 12 December 1963.⁴⁵ The British were faced with the task of developing a legal system that incorporated native, Muslim and English law, thus, the first system of courts in the then East African Protectorate began after 1895 and grew out of the agreements made between the British Government and the Sultan of Zanzibar.⁴⁶ A full judicial system was not established until 1897 when the East African Order in Council came into force.⁴⁷ The East Africa Order in Council 1897, and the Queens Regulations made thereunder, established an embryonic legal system based on a tripartite division of subordinate courts, namely (1) native, (2) Muslim, and (3) those staffed by administrators and magistrates.⁴⁸

The colonial courts comprised of Her Majesty's Court for East Africa, from which appeals lay to her Britannic Majesty's Court situated in Zanzibar, the Privy Council, and the Chief Native Court from which appeals lay to the High court.⁴⁹ This system lasted only five years.

During colonialism, the structure of the courts underwent many changes, from the largely informal judicial system of the pre-colonial period, a new judicial system was introduced with separate provisions for Africans, Muslims and dispute resolution

⁴⁴ G. Kanyi Kimondo, 'Salient Features of the Independence Constitution' in K. Kibwana, G. Kanyi Kimondo and James Thuo Gathii (eds.) *The Citizen and the Constitution* (Claripress, Nairobi 1996) 36

⁴⁵ Ghai (n 28) 3

⁴⁶ Ibid

⁴⁷ Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication', in Philip Kichana (ed), *Constitutional Law Case Digest, II* (Kenya Chapter of the ICJ, Nairobi 2005) 160

⁴⁸ Ibid

⁴⁹ Ghai (n 28)130

organs, village elders, headmen and chiefs empowered to settle disputes as they had done in the pre-colonial period.⁵⁰ These traditional dispute settlement organs gradually evolved into tribunals. They were accorded official recognition in 1907 when the Native Courts Ordinance was promulgated. The Ordinance established Native Tribunals that were intended to serve ethnic groups in Kenya.⁵¹ The Chief Native Commissioner was authorized to set up, control and administer tribunals. The ordinance also established similar tribunals at the divisional levels of each and also authorised the governor to appoint a liwali at the coast to adjudicate over matters between the Muslim communities.⁵² The Chief Native Commissioner was a member of the executive branch of government. This meant therefore that it was the executive which had control of the judicial system.

3.3.1 The Judiciary Under Colonial Rule: An Analysis

Appeals from a Native Tribunal lay to a native Court of Appeal and then to the District Commissioner. The executive branch oversaw the judicial functions by having the last word of determining the law on appeal. It could thus interpret the law in a manner most favourable to the executive and also further the executive's political interests. The idea was that the native system of justice, which the British found at the time of colonisation, should be permitted to continue to operate administered by the same people, i.e., Councils of Elders constituted under and in accordance with the native laws and customs. This was a noble idea in an administrative sense since administrative officers could actually relate to and understand the natives better.⁵³ But the fact that the Councils of Elders were supervised and controlled, not by judicial

⁵⁰ Ibid

⁵¹ < <http://www.go.ke> > visited in 10 December 2008. This is the official website of the Kenya Judiciary

⁵² Ibid

⁵³ Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27 *Journal of African Law* 42-61, 43

officers, but by the administrative officers violated the basic tenets of separation of powers which require separation of judicial functions from executive functions hence, the judiciary so constituted by administrative officers cannot be said or even be objectively seen as independent.

On the other hand, the British or general courts staffed by magistrates, were empowered to apply the English Common Law.⁵⁴ Judges were appointed under the East Africa Order in Council. The judges held office at the pleasure of the Crown and could be dismissed by the Governor on the direction of the Secretary of State without investigation.⁵⁵ African courts on the other hand, were to apply customary laws as long as they were not repugnant to justice and morality.⁵⁶ Provincial Commissioners, District Commissioners and District Officers were given jurisdiction to hear and determine cases as were handled by subordinate courts of the first, second and third class respectively.⁵⁷

Again here the principles of judicial independence requiring that judges have security of tenure were violated. There was absolutely no check on the powers of the governor to dismiss judges. This had the potential of the making of a tyrant who could act as he wished placing him above the law. He was not accountable to anyone for his action hence the rule of law was seriously compromised so was the independence of the judiciary. Ghai explains that during this period, separation of powers was not something the administrative officers felt that Africans understood or wanted.⁵⁸ The

⁵⁴ Ghai (n 28) 130 for an exhaustive exposition of the judicial system under colonial rule, see generally 126-174

⁵⁵ Githu Muigai (n 2)

⁵⁶ Eugene Cotran, 'Tribal Factors in the Establishment of East African Systems' in P. H. Gulliver (ed) *Tradition and Transformation in East Africa* (University of California Press, California 1969) 129. Also see Ghai (n 28) 173

⁵⁷ Courts Ordinance No. 16 of 1931

⁵⁸ Ghai (n 28) 137-138

traditional judges were mouthpieces of the executive, and at all times owed allegiance to the colonial power rather than the tribal group.⁵⁹

The most prominent trend in the evolution of the colonial judicial set up was the maintenance of an official court system, with appeals lying up to the Privy Council in England, running parallel to a native court system, albeit one that was limited to civil matters and one dominated by administrative officers.⁶⁰ On the other hand, the executive, and not the judicial department, had full control over the African court members, and appointed and dismissed them subject to certain conditions; advocates were not allowed to appear before these courts.⁶¹

There was an overlap of judicial and administrative functions, wherein a number of members of the executive (administration officers) also performed judicial functions alongside magistrates. A number of questions arise from this set up. They pertain to institutional and personal aspects of judicial independence, as to whether the administrators and headmen appointed by the Governor and being part and parcel of colonial authority would 1) objectively make independent decisions that affected the interest of the colonial authority, 2) check their own excesses, and 3) be generally free from executive influence. The impact on separation of powers and the rule of law, in the sense of equal subjection of all to the law and equal treatment of all persons in the process of adjudication would be questionable.

⁵⁹ Ibid

⁶⁰ Ojwang' 'Trends' (n 4)152 Also see Rhoda Howard and H Hassman, *Human Rights in Commonwealth Africa* (Rowman Littlefield Publishers, New Jersey 1996) 11 She notes that there was no real independence of the judiciary since the local District Commissioner was normally the prosecutor judge and jury

⁶¹ Cotran, 'Tribal factors' (n 56) 129-130

It is not surprising, therefore, that scholars analysing the legal system during this period come to the conclusion that the judiciary, which was exclusively European, was in law and behaviour, an instrument of colonial power designed for the purposes of administering an occupied people with limited legal rights and applied itself to the settler class, confining its contact with the native to a criminal jurisdiction.⁶² Those who share similar sentiments confirm that “an average African regarded the judicial system in as just as another government department that is there to join the general power of coercion.”⁶³

Kibwana identifies two types of constitutions that existed during the colonial era. The first type described the structure of the colonial government when the country was administered by the Imperial British Company of East Africa (IBEA Co.) before the direct colonisation and after 1895 to 1940s.⁶⁴ The second type was developed in the 1950s and 1960s to accommodate African interests. In his view, these colonial constitutions emphasised the rights of foreigners as opposed to those of Kenyans.⁶⁵ Singh, writing in 1965, reflecting on the judiciary during this period had this to say: “The rule of law has always existed in Kenya in so far as everybody is subject to some law. But it has not been the same law in all cases, equality before the law has not always existed.”⁶⁶ He was referring to discriminatory laws and processes which negated the rule of law idea of equal application of law. Despite implantation of western civilisation and laws, which were based on liberal democratic common law tradition

⁶² Winluck Wahi, ‘The Independence and Accountability of the Judiciary in Kenya’ in F Juuko (ed), *The Independence of the Judiciary and the Rule of Law*, (Kituo Cha Katiba, Kampala, 2005)

⁶³ Ghai (n 28) 174, citing Sir Barclay Nilhill, at Africa Bureau Conference on Kenya and Berlin, May 1956, London

⁶⁴ Kivutha Kibwana, ‘The People and the Constitution: Kenya’s Experience’ in K. Kibwana, Chris Maina and J. Oloka Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress, Nairobi 1996) 344

⁶⁵ Ibid

⁶⁶ Chanan Singh, ‘The Republican Constitution of Kenya: Historical and Background Analysis’ (1965) 14 *International and Comparative Law Quarterly* 878

there was still a yawning gap between applying the core values of separation of powers and rule of law and actual practice.

3.3.2 The Political Economy of Colonialism: Its Implication to Judicial Independence

The colonial state was specifically organised to facilitate economic exploitation.⁶⁷ It was a dictatorship imposed by violence, maintained by violence, characterised by arbitrary rule as an exercise of power without consultation or restraint.⁶⁸ This state of affairs was legitimised by the enactment of a corpus of oppressive laws geared towards control of activities of the African population, creating an all-powerful and unaccountable executive, and was deeply resented by the Africans.⁶⁹ The governments of newly independent states were created to be weak, to the extent that their constitutions and legal structures were never granted sufficient authority in order to ensure in part, their domination by the British Commonwealth resulting into weak legal systems.⁷⁰ Describing the judiciary under colonial rule, Vyas observes that;

During the colonial era the judiciary was an integral part of the executive rather than an institution for the administration of justice. The colonial administration was mainly interested in the maintenance of law and order. It had no respect for the independent of the judiciary or the fundamental rights of the ruled. It was therefore identified as an upholder of colonial rule. To an average citizen, the judiciary as an institution of control of executive power lacked credibility and enjoyed little respect.⁷¹

⁶⁷ Makau Mutua 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 97

⁶⁸ Maloba W O, 'Decolonisation: A Theoretical Perspective' in B A Ogot and W R Ochieng, *Decolonisation and Independence in Kenya 1940-1993* (EAEP, Nairobi 1995) 9-16

⁶⁹ Kenya Human Rights Commission, 'Independence without Freedom: The Legitimisation of Repressive Laws and Practices in Kenya', in Kivutha Kibwana (ed), *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya*, (Claripress Ltd., Nairobi 1998) 115-116. This article enumerates a host of repressive laws which were enacted by the British and enforced by the judiciary

⁷⁰ Ghai (n 28)

⁷¹ Yash Vyas, 'The Independence of the Judiciary in a Third World Perspective' (1992) 11 Article 6 Third World Legal Studies 127

The political and government system during the colonial period buttresses the point made by Vyas and critics alike.

The implication to the judiciary was that judicial independence was obviously neither a priority nor a characteristic of colonial rule. The perception of a weak judiciary, used by the executive to enforce repressive laws for the purposes of perpetuating illegitimate British occupation and subsequent rule, was conceived, and, persisted well beyond the colonial period. A judiciary which is dominated by the political class is unable to apply the law impartially and independently in cases before it, especially when one of the parties is the executive. It is incapable of protecting citizens from tyranny of leaders and/or holding them accountable to the law. The importance of an independent judiciary in a country's legal system, should therefore, not be assumed.

3.4 The Westminster Model Constitution 1963

When Kenya gained self-government in 1963, it received a new constitution that was negotiated between political parties and the British government, called the Westminster Model Constitution. The constitutional proposals were derived from the colonial office in London and were practically similar to those of other colonial countries.⁷² For this reason, the new constitution was styled according to the Westminster Export Model.⁷³ This constitutional order was different from the colonial system and provided a democratic system of government. It was intended to replace the colonial political order.

⁷² Kivutha Kibwana, 'Constitution-building in Kenya, 1960-1992' in K. Kibwana, G. Kanyi Kimondo and James Thuo Gathii (eds), *The Citizen and the Constitution* (Claripress, Nairobi, 1996) 5

⁷³ Ibid

3.4.1 The Political Organization of Government

It established a dominion status, which retained the Queen as the head of state. Executive authority was vested in Her Majesty the Queen and exercised on her behalf by the Governor General.⁷⁴ The Governor could dissolve Parliament, appoint remove and perform the functions of the Prime Minister.⁷⁵ The Prime Minister who was also a member of the Cabinet was to appointed by the Governor General.⁷⁶ Political power was devolved to the people by the establishment of a semi-federal type of regional government.⁷⁷

Each region had a “Regional Assembly consisting of Elected members and Specially Elected members” each drawn from the constituencies within the Region.⁷⁸ The Regional Assembly had powers to make laws relating peace order and good government in the Region.⁷⁹ Each region exercised its own executive authority in matters relating to it save under the supervision of the Governor-General.⁸⁰ Regions generated its funds to be used to govern themselves and were therefore quite autonomous financially, politically and also exercised high levels of executive power.

Some of its salient features were that it contained a Bill of Rights or Civil Rights for the citizens, whose guarantee was to be protected by courts of law and its provision for an independent judiciary, based on the model of the Supreme Court of

⁷⁴ The Constitution of Kenya 1963 Schedule 2 of the Kenya Gazette Supplement No. 105 of 1963 s 72(1)

⁷⁵ S 79

⁷⁶ S 75

⁷⁷ S 91

⁷⁸ S 92

⁷⁹ S 102

⁸⁰ Part 4

Judicature in England.⁸¹ There was established a two tier Parliamentary system of government consisting of the Senate as the upper House and the National Assembly as the lower house.⁸²

3.4.2 The Judiciary Under the Westminster Model Constitution

This 1963 Westminster Constitution was an improvement on the colonial constitution. It lasted for only one year and was repealed by the Independence Constitution (1964). Drastic amendments were made in 1964 when Kenya attained self-government from British rule. In order to appreciate the consequences of amendments to the Westminster Model Constitution, and its historical impact on the independence of the judiciary, it is important to explain and analyse its relevant provisions.

Under the Westminster Model Constitution, a Supreme Court was established at the apex of the court hierarchy and clothed with original civil and criminal jurisdiction,⁸³ with the Chief Justice (hereinafter referred to as CJ) at its head. It was also given the mandate of determining whether executive powers were exercised in accordance with the constitution.⁸⁴ It also established the Kenya Court of Appeal⁸⁵ and an East African Court of Appeal.⁸⁶ At the bottom of the hierarchy were subordinate courts and Kadhis Courts.

⁸¹ Kimondo, 'Salient Features' (n 44) 37

⁸² S 34

⁸³ Kenya Independence Order in Council 1963, s 171(1)

⁸⁴ Kenya Independence Order in Council, s 175

⁸⁵ Kenya Independence Order in Council, s 176

⁸⁶ Kenya Independence Order in Council 1963, s. 177

3.4.3 Appointments

The CJ was appointed by the Governor General, acting on the advice of the Prime Minister, and in addition, the concurrence of the presidents of not less than four Regional Assemblies was required.⁸⁷ This was an important milestone because the Prime Minister who was the leader of the cabinet (executive) and the Regional Assemblies which formed the legislature were involved in selecting the holder of this important office. The focus here was in minimising the control of the judiciary by the executive, through the office of the CJ in line with the separation of powers principle of checks and balances and enhancing judicial independence. A CJ who was appointed as a result of input from the legislature was more likely to be perceived as independent. His management of the judiciary as an institution would not be likely to be biased in favour of only the executive. A CJ appointed by the executive is more likely to be perceived to manage the affairs of the judiciary in favour of the executive.

Appointment to the Judicial Council of members other than the CJ was to be made on the basis of consultations.⁸⁸ The Governor General appointed two persons acting in accordance with the advice of the CJ (as Chairman) from the ranks of the Supreme Court and two appointed with the advice of the Chairman of the Public Service Commission.⁸⁹ The Attorney General was not a member of the JSC.

3.4.4 Removal

Removal of the CJ and the judges of the Supreme Court could be initiated by the Prime Minister, President of any Regional Assembly or the CJ representing the

⁸⁷ Kenya Independence Order in Council 1963, s 172(1)

⁸⁸ Their functions were to advise on appointment of judges and also appoint magistrates and promote and discipline them all with concurrence of the Governor general

⁸⁹ s 184

Governor General.⁹⁰ Removal of Supreme Court judge and puisne judges other than by way of attaining the mandatory retirement age could only be on account of inability to perform the functions of office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.⁹¹ This process could not be commenced unless the Judicial Committee (Tribunal) referred the question of removal to the Governor.⁹²

Should such situation arise, there was provision for the setting up of a tribunal upon recommendation, and subsequent to an inquiry, referred to the Governor General through the Judicial Service Commission.⁹³ This means that the Governor (executive) could only remove the judge after the JSC was satisfied that such removal ought to be effected.⁹⁴ He could not act unilaterally. This elaborate procedure secured the independence of both the individual judge from arbitrary removal and equally protected the judiciary as an institution. It provided the necessary checks on the executive, hence, a proper application of separation powers.

3.4.5 Establishment of the Supreme Court and Court of Appeal

The Constitution also established the Court of Appeal for Kenya and the Court of Appeal for East Africa. The latter was to determine issues that arose within the East African Community. To the extent that the judges of the Court of Appeal for East Africa were to be appointed by their respective states, yet have jurisdiction over disputes arising out of the three states, it is probable that they could have been more independent in their decision making as influences from the political branches would

⁹⁰ S 173(4)

⁹¹ S 173 (3)

⁹² S 173 (4) and (5)

⁹³ S 173 (5)-(7)

⁹⁴ Grounds for removal included physical and mental infirmity and misconduct

be, even if not completely removed, considerably reduced. This court had jurisdiction to determine issues of violations of human rights, which is one of the ways in which courts regulate the powers of the executive to protect individual rights. The elaborate appeal processes that were introduced by this Constitution, albeit in a qualified form, could have had the effect of reducing the levels of executive or even legislative control. This protected the process from interference by the national governments

3.4.6 The Judicial Service Commission

Under the Westminster Constitution, a JSC was established consisting of the CJ as Chairman, two persons appointed by the Governor General on advice from the CJ, two persons appointed by the Governor General on advice by the Chairman of the Public Service Commission.⁹⁵ It was guaranteed independence in that it was not subject to the direction and control of any person or authority.⁹⁶ It could regulate its own procedure but this was subject to checks by the Prime Minister or Regional Assemblies.⁹⁷ Its functions included the advising the Governor on appointment of judges and also their removal. Other functions included appointments, discipline and dismissal of magistrates, Kadhis and other members of the subordinate courts.⁹⁸ They could be removed from office for misbehaviour or infirmity of mind and body only after a tribunal set up by the Governor General found them so unfit.⁹⁹

The active participation by the Commission in the process of removal of judges is one of the features which were repealed in the 1964 Constitution. A majority of its

⁹⁵ S 184 (1) (a)-(c)

⁹⁶ S 184 (2)

⁹⁷ S 185 (3)

⁹⁸ S 172-175

⁹⁹ Article 186 (7)

members were drawn from those who had been appointed following the requisite checks and balances, with input from the legislature. Its members were thus not direct executive appointees. Hence, its membership was devoid of executive presence to a large extent. This was a Council that was objectively balanced and independent.

3.4.7 The Westminster Model Constitution: Some Observations

The Westminster Model Constitution has been lauded by some scholars for its democratic content. Those who appreciate its content are also quick to point out that the Westminster Constitution was an “essentially theoretical document”.¹⁰⁰ Ojwang’ argues that though it appeared to contain the best checks and balances arrangement; it was merely the formal culmination of the state apparatus that had been in place by virtue of the colonial constitution. In his view:

A constitution has practical meaning and durable life where it is evolved in the context of social reality, but it will be artificial and somewhat brittle, where a slim elite enacts it largely to serve minority interests, where it is planted upon a people by a departing imperial power, or where it is entirely the brainchild of technocrats whose primary concern is to have on the ground a reference document to serve public relations purposes.¹⁰¹

If that be the case, then, it has taken the Kenyan people a span of 47 years to come to the reality that the independence constitution may have been to a great extent desirable and democratic. The new Kenya Constitution,¹⁰² which came into force on the 27th August 2010, repealing the 1964 Independence Constitution goes back full circle to re-introduce provisions similar to the repealed Westminster Model Constitution, though with some modification. Specifically, it re-introduces the use of traditional justice systems into the current judicial system;¹⁰³ the Supreme Court,¹⁰⁴ provides for

¹⁰⁰ Ojwang, ‘Trends’ (n 4) 523

¹⁰¹ Ibid

¹⁰² Constitution of Kenya 2010 (Government Printer, Nairobi 2010)

¹⁰³ Art 159 (3)

¹⁰⁴ Art 163

participation of the Legislature in the appointment of the CJ¹⁰⁵ and judges and entrenches judicial independence and enhances its protection by subjecting the executive to more stringent accountability procedures in the manner they relate to the judiciary.

That a people need to make conscious decisions about constitution making only when they are ready to do so is thus tenable.¹⁰⁶ As observed by Mbai, the Westminster constitutional arrangement was impressive creating *inter alia*, a judiciary that was independent, expected to be non-partisan and guided by values of ethics, impartiality, effectiveness and discipline.¹⁰⁷

The repeal of the 1963 Westminster Model Constitution, and its replacement by the Independence Constitution in 1964 exposed the vulnerability of judicial independence as against the backdrop of weak constitutional guarantees.

3.4.8 The Repeal of the Westminster Model Constitution 1963: The Political Factor

The historical development of the Kenya's judiciary or even the rationale for the amendments discussed above would be incomplete if an assessment even if only in a descriptive form is not undertaken within the context of the country's political environment. This part discusses the political environment surrounding the judiciary from 1963 till the 1980s wherein Kenya experienced more robust political and democratic changes which finally led to the total overhaul of the Independence Constitution after 47 years.

¹⁰⁵ Art 166

¹⁰⁶ Ojwang 'Trends' (n 4) 532

¹⁰⁷ C O Mbai, 'Public Service Accountability and Governance in Kenya Since Independence' (2003) 8 African Journal of Political Science, 118-119

At independence, Kenya inherited a political system based on the principle of state sovereignty.¹⁰⁸ This entailed jurisdiction and control over territory, freedom to organize the institutions of the state, a capacity to determine internal affairs and the right to participate in international affairs.¹⁰⁹ All African governments acquired at independence in the 1960s, constitutions that provided for the protection of human rights, separation of powers and independent judiciary including parliamentary bodies, but within a few years, the constitutions were abrogated, nullified and re-written.¹¹⁰ An urgent need was felt to expunge the English model. The reason given was that western constitutional models could not be expected to take root in Africa as such constitutional arrangements were alien and therefore inappropriate.¹¹¹ It was the conviction of some African leaders then, that, “western concepts represented a foreign idea which had no place in African history, tradition and society. That the notions of individual rights and separation of powers were incomprehensible to the African masses.”¹¹²

This could probably have been one of the reasons why the independence model of the Kenyan constitution which replaced the Westminster model, essentially duplicated the colonial government experience which was based on the imperial government policy of domination and subjugation of the ruled. This view is shared by other scholars who have analysed the historical evolution of the Kenyan judiciary. One constitutional law scholar paints a picture of such powerful presidency in these words:

¹⁰⁸ Final Report of CKRC, Final Draft available at <<http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/Main%20report%20CKRC%202005.pdf>> 57

¹⁰⁹ *ibid*

¹¹⁰ Okon Akiba (ed), *Constitutionalism and Society in Africa* (Ashgate Publishing, Aldershot 2004) 1

¹¹¹ Okon (n 110) 9

¹¹² *Ibid*

An entirely new pattern of executive leadership emerged. A president who is both head of state and head of government, combining the formal role of the monarch or governor general with that of the executive prime minister...The constitution document itself designates a particular individual, and this individual is the holder of the totality of constitutional executive authority¹¹³

Mingst concurs, but goes even further by attributing this trend, as not only unique to Kenya, but ubiquitous all over Sub Saharan Africa. She also gives further reasons underlying the trends of executive control of the judiciaries in Africa during the transition from colonial rule to the newly acquired independence status. In her view:

The goal of most independent political leaders was to create strong national governments...Maintenance of national order was the responsibility of the executive not the judiciary. Legal safeguards could be usurped by the executive and judicial remedies bypassed. Thus, at independence, instead of the judiciary developing its own legitimacy, executive inspired and defined political necessity took precedence.¹¹⁴

According to Ogendo, “the constitutional amendments and the process was used to almost exclusively to solve political problems some of which were of a public defensible nature; others private and indefensible”.¹¹⁵

It is not surprising, therefore, that, only one year after the enactment of the Westminster model constitution 1963, Kenya was declared a sovereign Republic on 12th December 1964, and ceased to form a part of Her Majesty’s Dominion.¹¹⁶ Major amendments were made to the constitution, which considerably watered down the spirit and principles of the Westminster Model Constitution. All the three arms of government were drastically affected in terms of balance of power between the three branches.¹¹⁷

¹¹³ Ojwang ‘Trends’ (n 4) 528

¹¹⁴ Karen Mingst, ‘Judicial Systems in Sub Saharan Africa: An Analysis of Neglect’ (1988) *African Studies Review* 138

¹¹⁵ Okoth Ogendo, ‘The Politics of Constitutional Change in Kenya since Independence’, 1963-1969, (1972) *African Affairs* 71, 282 9-34 , 10

¹¹⁶ Constitution of Kenya (Amendment) Act No. 2 of 1964 (Government Printer, Nairobi 1964)

¹¹⁷ The reduced role of Parliament is discussed in chapter 1. Part 1.3.3.1

In one legal Notice,¹¹⁸ her Majesty the Queen of England ceased to be the head of state and was replaced by an executive President. The Governor's constitutional role of was repealed hence the President exercised the Governor's duties too. The Regional Assemblies and all that appertained to them were equally removed and replaced by a one Chamber parliament. Financing of the parliament and entire government was now shifted to the central government. Okoth Ogendo summarises the effect of this amendment as having been,

“devised to embody the fact of national leadership as seen in the eyes of the people, the concept of collective ministerial responsibility and supremacy of Parliament...it marked the erasure of the last marks of political dependency was further used to de-regionalize a large part of the system by carefully drafted clauses, of key provisions of the 1963 document... The entire financial arrangements between regions and centre, especially those relating to regional taxation were revised...regional powers over the establishment and supervision of local authorities were transferred to Parliament.”¹¹⁹

This is but one of the many amendments made by both Kenyatta and Moi governments geared towards expanding executive domination over the other arms of government. An exhaustive account is beyond the scope of this study.

3.4.8.1 The Question of Political Parties

In the governance of democratic states, it is through political parties that peoples' representation in government is usually organised.¹²⁰ Political scientists define political parties as “formally organised groups of people who seek control of

¹¹⁸ Legal Notice No. 28 of 1964

¹¹⁹ Ogendo (n 115)20

¹²⁰ Fredrick O. Wanyama, 'Voting Without Institutionalized Political Parties: Primaries, Manifestos and the 2007 General Elections in Kenya', in Karuti Kanyinga and Duncan Okello (eds), *Tensions and Reversals in Democratic Transitions*, (Society for International Development, Nairobi 2010) 62

government machinery by placing and maintaining their members in public offices”.¹²¹ Once political parties gain control of political power their ideologies, interests inform the policies with they subsequently implement, the laws they pass and even the content of constitution, all being political processes. Institutions created within the context of these processes, the judiciary included, also tend to be a reflection of such divested interests.

Prior to attainment of independence there were two major political parties. Kenya African National Union (hereinafter referred to as KANU) and Kenya African Democratic Union (hereinafter referred to as KADU). They were organised along ethnic lines, the former comprising major tribes and the latter minority tribe but their inception was informed by a common determination which was to defeat colonial domination.¹²²

It is these two parties that represented Kenya in a series of Constitutional Conferences held in London between 1960 and 1963 to negotiate the making of the first independence constitution with the British. KANU preferred a centralised system of government whilst KADU preferred a “regional form of government where each region was to be given powers which would be entrenched in the constitution”.¹²³ “The centre was to have limited powers and the central government was to be on the lines of a federal government”¹²⁴

KADU comprised of less numerous ethnic groups in the Rift Valley and Coast provinces. They were apprehensive of the possibility of being dominated by KANU

¹²¹ La Palambora Joseph, *Politics Within Nations*, (Prentice Hall, New Jersey 1974) cited in Kanyinga & Okello (eds) (n 120) 63

¹²² Wanyama (n 120) 66

¹²³ Singh (n 66) 894

¹²⁴ Ibid

which comprised the country's two largest ethnic groups, the Kikuyus and the Luo from Nyanza who between them comprised nearly 40% of the total population.¹²⁵ It is this apprehension that informed these two diametrically opposed ideologies.

In 1964 KADU the opposition party voluntarily dissolved itself and joined the ruling party KANU hence the merger made Kenya a *de facto* one party state paving the way for a despotic executive.¹²⁶ KANU's idea of a centralised unitary state continued to advance. The Kenya Peoples Union (KPU) was formed in 1966 when Odinga broke away from KANU but Kenyatta swiftly crushed it in 1969 detained all its leaders and abolished it making Kenya a *defacto* one party state as the constitution still provided for a multi-party democracy.¹²⁷ There was no opposition party on the ground. These developments transformed Kenya from an imperial presidency to a personal state dominated by a strong president who had wide sweeping executive powers thus converting Kenya into a one party dictatorship.

Kenya legally became a one party state with the passing of the Constitutional Amendment Act No. 14 of 1982. The political party re alignments described above explains the rationale for the constitutional amendments that changed the organisation of government to suit party ideology and interest.

¹²⁵ David Throup, 'Elections and Political Legitimacy in Kenya', (1993) 63, 3 Journal of International African Institute 371-396, 373

¹²⁶ Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', (2001) 23 Human Rights Quarterly 96-118, 97

¹²⁷ Makau Mutua, 'Human Rights and State despotism in Kenya: Institutional Problems', (1994) 41, 4 Africa Today, 50-56, 50

President Jomo Kenyatta thus quickly created a highly centralised, authoritarian republic, reminiscent of the colonial state.¹²⁸ The constitutional changes after 1964 have generally been described as;

...largely executive minded...aimed at gaining advantages over political opponents. This was through increased executive power and diminution of the capacity and stature of institutions meant to be checks and balances to that power, such as the judiciary, parliament and political parties. The period was also marked by the insistence by the government of the day that...public law generally should not impede governmental action.¹²⁹

It is clear that, like their predecessors, the British,¹³⁰ the new African presidents were not oblivious or ignorant of the concepts of separation of powers and the rule of law. They were quite alive to the significance of an independent judiciary and the crucial role of the courts within that axis. They made a conscious and deliberate effort to disregard values and objectives of these well known and time tested constitutional concepts “in which exercise of governmental power is subject to control,” in order to secure their personal interests with a view to consolidate power and control the masses.¹³¹ The propriety of their decision to consolidate power in this manner is critiqued only because they negotiated a constitution which included in its provisions, the Bill of Rights. This was a clear demonstration that they embraced at least in principle the concept of a liberal democracy. The essence of a liberal democracy we are

¹²⁸ Makau Mutua, (n 67) 98. Jomo Kenyatta was the first President of the Republic of Kenya

¹²⁹ G. Kanyi Kimondo, ‘Constitutional Amendments Between 1964-1990’ in K Kibwana *et al* (eds) *The Citizen and the Constitution* (Claripress, Nairobi 1996) (n 72) 39-40

¹³⁰ Note that the British Westminster Model Constitution provides clear demarcation of functions to the three arms of government and equally provides a much more robust guarantee for judicial independence complete with very effective checks and balances from other branches in their involvement in judicial functions. The British also never used this kind of constitutional framework during the colonial rule, however it was very close to their culture and practice in Britain, save that they do not have a written constitution or a President. The appreciation of the values and objectives of separation of powers and rule of law is very much alive in the Westminster Model Constitution

¹³¹ For quote, see M J C Vile *Constitutionalism and the Separation of Powers*, (Clarendon Press, Oxford 1967) 20

told “is precisely the abolition of popular power and the replacement of popular sovereignty with the rule of law”.¹³²

However it suffices to state that the colonial experience exposed a benefit to be derived from having an independent judiciary: its absence being fatal to the proper organisation of government and protection of individual rights. It also buttresses the argument that strong formal guarantee for judicial independence is an effective barrier to its violation. Absence of such guarantee is one of the reasons why judicial independence was so easily violated, since there was effectively no law that was violated as none existed. This is why the colonial rulers and the incoming President even though they accepted in principle the basic tenets of democracy they ensured that the constitutional frameworks they put in place were weak and when stronger guarantees were provided the same were amended and weakened further in order to avoid the President from being effectively subjected to the authority of the law. According to Muigai, the presidency as created overshadowed and dominated all other constitutional institutions including the judiciary, and undermined the possibility of constitutional accountability, hence this set the tone for subsequent amendments.¹³³

It is not therefore far-fetched to argue that judicial independence in Kenya was and still is, wrapped up with the politics of the system. It is notable that President Jomo Kenyatta (Kenya’s first President) and President Daniel arap Moi who succeeded President Kenyatta upon his death in 1978 and exercised political power till 2002 both accepted these democratic principles as espoused in the constitutions. During this

¹³² Shadrack Nasongo and Godwin Murunga, ‘Prospects for Democracy in Kenya’, in Godwin Murunga & Shadrack Nasongo (ed) *Kenya: The Struggle for Democracy*, (Zed Books Ltd, London 2007) 4

¹³³ Githu Muigai, ‘Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997); A Study in the Politics of the Constitution’, (Unpublished PhD Thesis, University of Nairobi, 2001) 116

period “most amendments and especially those of the 1960’s had a purely governmental-cum ruling party origin and sought in the first place to consolidate the authority of the executive almost at the expense of other organs of government”.¹³⁴ The executive power meteorically ascended whilst the legislature and judiciary were relegated to subordinate power positions. Their respective regimes treated the courts just like any other agency within the executive.¹³⁵ When egregious human rights violations were committed and people were detained without trial and the attorney General even declared the President to be above the law, the judiciary was unable to protect Kenyans against such atrocities.¹³⁶ This situation persisted until the death of President Kenyatta and President Moi took over power constitutionally and continued perpetuating such tactics till he ceased to exercise political power in 2002 after being defeated in an election.¹³⁷

It is on this basis that their attempts to manipulate the constitution are critiqued. The described above inexorably feeds into the challenges to judicial independence as discussed in the next chapter where executive domination is demonstrated and subsequently trends to reverse the same is critically analysed in chapter five.

¹³⁴ J. B. Ojwang’ Constitutional Reform in Kenya: Basic Constitutional Issues and Concepts’, in Report of the CKRC Vol. 5 Part I Technical Appendices approved for issue at the 68th meeting of the Commission held on 10/04/2003 available at <http://www.Idphs.org.za/resource> accessed on 3/3/12

¹³⁵ Makau Mutua (n 67)101-102

¹³⁶ See Makau Mutua (n 67) for an in-depth narrative of the said violations

¹³⁷ The political economy of Kenya during President Moi’s rule is discussed further in the context of review of the old constitution in Chapter Five,

3.5 Conceptual Difficulties: Searching for the Needle in a Haystack

The difficulty of putting into practice the constitutional concepts of separation of powers and rule of law by using judicial independence as a medium for achieving their objectives and appreciating the values they stand for, evidently begins to emerge in this historical analysis of the judiciary in Kenya. It is analogous to searching for a needle (read values) in a haystack. Some explanations have been offered.

Political science scholars, like Mbai, have explained that the Kenyan leaders who took over from the departing colonial masters, in their quest for Africanisation and development or maintenance of law and order, may have used improper implementation strategies towards achieving their goals. He explains that it is the way in which the Africanisation strategy was adopted that undermined the accountability in the public service.¹³⁸

Ojwang, a constitutional law scholar opines that the Independence Constitution was prematurely imposed on Kenyans by the British. That it was the brainchild of technocrats more concerned with public relations.¹³⁹ Others attribute the lack of appreciation by African leaders of the values of the rule of law and separation of powers to their reluctance to adopt the tenets of democracy and accept the rule of law.¹⁴⁰ This it is further explained arose from the rulers traditional backgrounds where “rules were unpredictable and subject to the whims of the incumbent holder of power

¹³⁸ Mbai, (n 107) 118-119

¹³⁹ Ojwang ‘Trends’ (n 4)

¹⁴⁰ Diescho ‘Paradigms’ (n 25) 30

who was the accuser, prosecutor, judge high priest – assisted by a personally assembled jury of senior councillors who served at his mercy and acted at his beck and call”.¹⁴¹

The problem, from the explanations given above it appears, not to be the lack of appreciation of the required values of judicial independence, separation of powers and the rule of law by the colonising powers and the subsequent indigenous African leaders. But rather, the purposes and manner with which they went about consolidating their political control of the newly found freedom from colonial rule.

They scholars are unanimous in their appreciation of the objectives and values of these constitutional concepts and principles. Similarly they agree on the important role the judiciary plays in the achievement of the desired goals. What is important and which must be appreciated, is that it is not so much about the means that the rulers employed to entrench themselves into power. Neither does it matter that they were misguided in their quest to hold onto power.

The point being made is that they were indeed conscious of the requirements of separation of powers and the rule of law, but they intentionally failed to comply accordingly. This study contends that the well tested objectives, the values, the ideal of the concept of checks and balances and the rule of law, as identified in the previous chapter, to wit avoidance of tyranny, equality of all before the law *et al*, are best achievable by the existence of an independent judiciary. Any society in the organisation of its government must strive to achieve these objectives against all odds. Means are adjustable but the ends remain the same. Even if the “imported,” “transplanted” or “theoretical” Westminster Constitution could have been the “brain child of technocrats more concerned with public relations” as critiqued by Ojwang, the salient

¹⁴¹ Ibid

characteristics of separation of powers and the rule of law including their attendant values and objectives was still very much alive.

3.6 Conclusion

The above historical appraisal of the courts gives a clearer picture of the nature of the Kenyan judiciary. It illuminates the theme of subservience and apparent lack of independence in decisional and institutional contexts. It informs the persistent perception that the judiciary is the handmaiden of the executive, a view that continues to subsist.

Traditional African societies and their justice systems lacked an independent judiciary. The rulers combined all the functions of government and were above the law. The judicial systems were incapable of effectively checking the excesses of the executive even though these societies survived in this arrangement for a long time. Even though they appreciated and practiced the core elements of judicial independence in a personal sense, they lacked the institutional independence which compromised their capacity to protect themselves and their subjects from external encroachment. This was due to lack of protection for judicial independence. That their rulers in most cases were not subject to the law hence capable of being tyrannical, was a weakness that was exploited by the incoming colonial masters who successfully imposed their power and laws upon them.

The judicial structure created during the colonial period established a framework upon which the perception of subservience germinated. The colonial judiciary left no desirable legacy as an institution capable of exercising its

constitutional mandate. It was a judiciary which was weak, lacked the appropriate level of independence, and had very weak guarantees for judicial independence. The principles of judicial independence were not adequately protected. The practice was not in consonance with the objectives and values of separation of powers and the rule of law. The perception of the judiciary as a tool of executive control may have started to be felt during this crucial initial period and continued well after Kenya became independent.

When the British left, they bequeathed upon Kenya the Westminster Model Constitution which to a large extent, was more democratic and demarcated functions between the executive legislative and judicial to all the three arms of government. It also provided a stronger constitutional framework for the protection of judicial independence. But no sooner had the British left than the leaders embarked on an assault of the Constitution, amending it to the detriment of both the judiciary and the legislature. The checks and balances inherent in the Westminster Constitution that shielded the judiciary from encroachment by the executive were largely removed. The principles of separation of powers and judicial independence were immediately compromised thus and putting the rule of law under a potential threat.

This historical background reveals that there are salient weaknesses and gaps in the constitutions which when exploited could seriously compromise the independence of the judiciary. The Independence Constitution 1964, may, to a non-discerning eye, have portrayed a well-structured and balanced organisation of the various arms of government, but this analysis will show in the next chapter wherein the provisions of the Independence Constitution is examined, that the guarantees were heavily watered down with the removal of legislative checks on the powers of the president especially

where the judicial functions were concerned. It may have appeared to have all the trappings of formal guarantees of an independent institution with specific safeguards expressly secured. The reality shows a converse situation, no different from the pre-colonial and even colonial times.

The minimal safeguards provided by the Independence Constitution 1964, were not adequate for the purposes of achieving real independence of the Kenyan judiciary especially from executive influence and/or control. This buttresses the thesis that judicial independence can be protected better, if stronger or robust provisions are included in a constitution especially where political machinations have a strong bearing on the integrity of institutions especially the judiciary. Failure to provide appropriate power balance between the different arms of government is dangerous and has the potential of creating a fertile ground upon which tyranny and arbitrariness can grow. This is be explicitly demonstrated in the next chapter where the specific instances of violations of these safeguards are enumerated. The focus is on the negative consequences of failing to secure the principle values and objectives of separation of powers and rule of law and how that failure compromised judicial independence in Kenya between 1964 and 2010.

CHAPTER FOUR

THE COMPROMISING OF JUDICIAL INDEPENDENCE IN KENYA UNDER THE INDEPENDENCE CONSTITUTION

In most countries citizens expect courts to deliver justice. Unfortunately, this has not been the case for the majority of Kenyans who have had an encounter with the judicial system. The judiciary in Kenya is largely viewed as an “agent” of the executive branch and a good proportion of judges and magistrates have been accused of delivering judgments that favour the ruling elite. Judges and other court officials have also been accused of being corrupt, inefficient, incompetent and intolerant to criticism from civil society organisations as well as the general public. This, in turn has led to low public confidence in the judicial system and to a situation where clients look for other options of getting justice other than the courts.¹

4.1. Introduction

Judicial independence in Kenya became a matter of considerable controversy under the Independence Constitution 1964. The Judiciary experienced occasions where its independence was questioned. The administration of justice came into disrepute. Scholars, legal practitioners, civil society, politicians and ordinary Kenyans publicly decried the lack of judicial independence. One writer put it bluntly that “in Kenya today, public confidence in the impartiality of the judiciary has virtually collapsed, which in turn threatens the principles of the rule of law, the very foundation of our young and growing democracy”.² The judiciary admitted that it suffered from lack of independence, identifying this as “one of the biggest threats” the judiciary faces.³ Judges, albeit anonymously, were reported to confirm that:

¹ USAID Country Report, ‘Radical Changes in the Kenyan Judiciary,’ (Kenya Democracy, 2005) <http://africastories.usaid.gov/search_deatils.cfm?storyID=328&countryID=10§or> accessed 1 July 2009 The United States Agency for International Development has since 1990 supported the Kenyan Civil Society organisations to advocate increased independence among key government institutions the judiciary included.

² Peter Annassi, *Corruption in Africa: The Kenyan Experience* (Trafford Publishing, Victoria British Columbia 2004) 2

³ Judiciary Strategic Plan 2009-2012 (The Judiciary, Nairobi 2009) 25

The Judiciary in Kenya is at crossroads. Its authority has been denuded over the years...It is no longer seen as Lion on the throne, but just a mouse squeaking under the chair of the executive. As judges, we violently resent this label, but deep down some of us know that it is true. When faced with claims against the government, we sometimes behave like a river by taking the course of least resistance.⁴

In 2009, the International Bar Association's Human Rights Institute (IBHARI), in conjunction with the International Legal Assistance Consortium (ILAC), sent a fact finding delegation to Kenya to examine the functioning of the justice system in the wake of the 2007 post-election violence. They, too, found no positive change in the state of the Kenyan judiciary.⁵ Their report, released on 15th February 2010, documents "a pressing need for judicial reform". It further observed that "public confidence in the judicial system has completely collapsed" as a consequence of "corruption, delays in court processes, and the costs associated with using the court system."⁶ All these, it finds, "have served to perpetuate a widely held belief among ordinary Kenyans that formal justice is only available to the elite few."⁷ It is not surprising that decisions of Kenyan courts have been described by some scholars as:

... far from satisfactory, both in terms of commitment to democratic values and to its impartiality...the judiciary in many respects is neither free nor independent...it is far removed from the majority of people it was meant to serve...It is not humane and definitely not impartial...Its decisions are unprincipled, misinformed, ignore constitutional principles...They deny themselves jurisdiction to hear matters, they deny plaintiffs *locus standi* to raise desired matters, they refuse to follow clear law or binding precedent, they do not treat cases alike, they are inflexible and conservative.⁸

⁴ Winnie Mitullah, Morris Odhiambo and Osogo Ambani (eds), *Kenya's Democratisation: Gains or Losses* (Claripress, Nairobi 2005) 34

⁵ International Bar Association Human Rights Institute, 'IBHARI Calls for Radical Reform of Kenya's Justice System, in Major Report Released today', (Press Release Monday 15th February 2010 <<http://www.ibanet.org>> accessed 20 July 2010

⁶ Ibid

⁷ Ibid

⁸ Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Philip Kichana (ed), *Constitutional Law Case Digest* (Voll II Kenya Section of the ICJ, Nairobi 2005) 166 He analyses the decisions of the High Court in the colonial and post-colonial period

Even though such distorted jurisprudence and failure to follow precedent may be attributed to corruption or incompetence,⁹ the same may equally have arisen out of domination, direction or interference by the executive.

The cumulative effect of such criticisms created a negative picture of the Kenyan judiciary which, in turn, adversely affected and impinged on the institution's independence record and integrity. A keen examination of the substance of all these complaints point to an apparent lack of independence on the part of the Kenyan judiciary, both institutionally and individually. Lack of accountability and some level of impunity can be discerned. They equally reveal institutional weaknesses which compromise its independence and clothe it in an aura of impartiality. The need to take stock and re-think the concept of judicial independence in Kenya over 45 years after independence is apparent.

These comments on the judicial failings should not blur the overall picture of an institution which is struggling in a fast changing democratic environment to uphold the best standards of conduct. The judiciary has a number of hardworking judges and magistrates who are neither susceptible to, nor fallen victim to political manipulation, but nevertheless, suffer under collective condemnation of the whole institution.¹⁰ Indeed, it is possible that impartial judges can dispense justice under the proverbial palm tree.¹¹ However, such decisions may fail to achieve legitimacy as people may not

⁹ Winluck Wahiu, 'The Independence and accountability of the Judiciary in Kenya' in Frederick W Jjuuko (ed), *The Independence of the Judiciary and the Rule of Law* (Kituo Cha Katiba, Kampala 2005) 110 He analyses human rights cases between 1975 and 2005 Also see analysis by Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96

¹⁰ Mutinda Mwanzia, 'Lawyers Petition Kibaki on CJ' *The Daily Nation* 29 March, 2009 <<http://www.nation.ke>> accessed 18 July 2009

¹¹ Kate Malleson, *The New Judiciary: Effects of Expansion and Activism* (Dartmouth Publishing Co, Aldershot 1999) 8 on the conflict between the judiciary and the executive over resources.

believe that these noble judges are truly impartial and decide cases according to the law, devoid of executive influence.

This chapter discusses the compromising of the independence of the judiciary in Kenya. Documented incidents and weaknesses in law which have threatened, or compromised, or are perceived to have compromised judicial independence in Kenya are highlighted using a thematic approach. The focus is two pronged; 1) to highlight inadequacies extant in the Independence Constitution 1964 which created opportunity for the compromising of judicial independence, and, 2) to expose how lack of judicial independence can threaten the rule of law. Numerous incidents of violation of the independence of the judiciary in Kenya have been documented over the years, but due to lack of space, only a selected few on each theme will be the subjects of this analysis. An overlap of issues between the different aspects of judicial independence and the constitutional concepts of separation of powers and the rule of law is expected as it is normal but inevitable. Mapping the incidents to the respective concept or principle may not exactly therefore be on a *mutatis mutandis* basis. The chapter focuses on the Independence Constitution 1964, which governed the country for forty six years till the year 2010 when a new constitution came into force.¹²

4.2. Reform Initiatives: Brief Background

The quest for judicial and other reforms¹³ commenced immediately after independence. The first three decades after independence saw very little or no direct effort to reform the judiciary. From 1990 onwards, a more intense, structured and

¹² Constitution of Kenya 2010, Kenya Gazette Supplement No. 55, (Government Printer, Nairobi 2010)

¹³ Apart from judicial reforms the constitutional review also addressed social economic and political reforms among many other reforms

consistent interest in the judiciary began to emerge. The institution quickly became a visible focal area of interest. The importance of the role it plays in the democratic system of government began to be accorded priority. The idea of judicial independence, the necessity to separate it from the executive and legislature, and its importance in the achievement of the rule of law, started to feature more prominently in the reform agenda. This trend was attributed to the advent of multi-party politics, coupled with changes taking place elsewhere in the world especially in Eastern Europe and other African countries.¹⁴

By 2009 calls for reform of the judiciary reached fever pitch, especially in the aftermath of the post-election violence in 2007. Local non-governmental organisations, government bodies (including the judiciary), professional bodies, and international organisations, launched investigations into the Kenyan judiciary and authored reports (hereinafter referred to as ‘reform initiatives’) calling for urgent and radical judicial reforms, a clear indication that the state of the Kenyan judiciary was of serious concern both locally and internationally. It became apparent that a more independent judiciary was required. These reform initiatives did not proliferate in any organised or sequential pattern. They can be described in a relational sense as *ad hoc*, incoherent, uncoordinated and in some cases, casual, while some were overtaken by other events and subsequent reports. That does not, however, diminish their purpose, content or relevance.

There were lots of reports. Each body commissioned its investigations and published reports focusing on different issues, purposes and aspects relating to the

¹⁴ P Chitere, L Chweya, J Masya, A Tostensen & K Waiganjo, *Kenya Constitutional Documents: A Comparative Analysis* Working Paper No 7/2006 (Chr. Michelsen Institute (CMI), Bergen, 2006) <<http://www.cmi.no/publications>> accessed 20 March 2011

judiciary in general. They assessed weaknesses of the Kenyan judiciary from diverse points of view, each depending on specific problems and/or weaknesses their initiators wished to illuminate. Their terms of reference were also equally focused on diverse issues ranging from salaries, corruption, rectitude, rule of law, judicial independence, access to justice, physical structures and equipment, corrupt practices in court, security of judges, backlog of cases, internal financial organisation, follow up procedure of cases, training, demystifying court procedures and making it consumer friendly, use of information technology, and general governance issues. These expositions are useful in helping us understand the underlying circumstances within which the Kenyan judiciary discharges its mandate.

A review of the activities carried out by the respective reform initiative committees or task forces reveals that they used generally similar methods to obtain the data to analyse and generate reports. These included countrywide meetings with the Kenyan public, judicial officers, other government bodies, development partners and stake-holders, wherein verbal representations were received regarding the views by Kenyans on how they wanted the judiciary to be reformed. Memoranda were received from all quarters of the Kenyan society, including local and international stakeholders, publicly, but sometimes in confidence. Research was conducted into previous and other related reports. Some committees travelled outside Kenya to other jurisdictions within the Commonwealth, like the United Kingdom, Australia, India and South Africa. The aim was to observe, consult and learn best practices of these countries for comparative purposes. International standards of judicial independence informed the deliberations upon which proposals for reform were made. These reports were fairly

comprehensively informed, allowing for an infusion of both local and international standards and practices of judicial independence.

Reform initiatives must be understood within the context of political, social and economic experiences that Kenya has undergone since independence. Cumulatively, their findings confirm the erosion of judicial independence in Kenya. Most recommendations have substantively been incorporated in the new Constitution 2010. Before this study, no attempt had been made to group the initiatives together and/or subject them to academic or any other analysis specifically targeting judicial independence. Nevertheless, they are unanimous in their primary objective, that is, the search for a more independent judiciary. They all join issue on the fact that judicial independence is important.

Reform initiative reports whose proposals specifically relate to aspects of judicial independence in terms of institutional and decisional independence, and more particularly those that relate to and require constitutional guarantees for judicial independence are specifically analysed. Out of the many reports generated as a result various inquiries into the judiciary, only a few are selected as representative. The basis for the selection is that, some stand out for their relevance, notoriety, impact, detail, specificity or novel contribution with regard to the selected aspects of judicial independence under discussion. An analysis of all reports is outside the scope of this study. Such exercise may lead to unnecessary duplication, considering that later reports comprehensively reviewed previous reports on similar aspects and made similar recommendations, or simply just reiterated them. The reform initiatives mainly relied

on for discussion in this chapter are the Waruhiu Report 1980,¹⁵ Kotut Report 1992,¹⁶ Kwach Report 1998,¹⁷ Kanyeihamba Report 2002,¹⁸ Ringera Report 2003,¹⁹ ICJ Report 2005,²⁰ Onyango-Otieno Report 2006,²¹ and Ouko Report 2009.²² Other reports will supplement this list where appropriate.

4.3 The Compromising of judicial Independence

This study argues that the ease with which judicial independence was compromised or threatened is traceable to inadequate constitutional and/or statutory safeguards which were susceptible to misuse, thereby exposing the judiciary to the control of the executive or perceptions of lack of independence, hence its incapacity to check the excesses of the other arms of the government, especially the executive. Specific aspects of judicial independence discussed in this chapter are 1) separation of judicial function, 2) appointments, 3) tenure and removal, 4) fiscal autonomy 5) the Office of the Chief Justice and; 6) direct interference by the executive, coupled with a ‘hands off’ approach by the judiciary. The prescribed solutions to the problem of erosion of judicial independence as identified by the reform initiative reports are discussed to specifically buttress the argument developed in favour of stronger constitutional guarantees. The rationale of judicial independence principles of the selected aspects of constitutional guarantees is used as a basis for the analysis.

¹⁵ *Report of the Civil Service Review Committee 1979-80* (Government Printer, Nairobi 1980)

¹⁶ *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-92* (Government Printer, Nairobi 1992)

¹⁷ *Report of the Committee of the Administration of Justice 1998*, (Government Printer, Nairobi 1998)

¹⁸ *Report of the Advisory Panel of Eminent Judicial Experts 2002* (Constitution of Kenya Review Commission, Nairobi 2002)

¹⁹ *Report of the Integrity and Anti Corruption Committee 2003* (Government Printer, Nairobi 2003)

²⁰ *Kenya: Judicial Independence, Corruption and Reform, April 2005* (Kenya Chapter, ICJ, Nairobi 2005)

²¹ *Report of the Ethics and Governance Sub-Committee of the Judiciary 2006* (Government Printer, Nairobi 2006)

²² *The Task Force on Judicial Reforms 2009* (Government Printer, Nairobi 2009)

Examples of how other countries have protected the independence of their judiciaries are also discussed, not in a comparative sense, but in an effort to clarify or illuminate the problem under study.

4.3.1 Separation of the Judicial Function

One of the institutional arrangements often looked to as the most fundamental way of protecting judicial independence is some “guarantee” of judicial independence in the country’s written constitution.²³ It is lauded as a good measure of the seriousness with which the principle of separation of powers is taken.²⁴ Indeed, the Independence Constitution has been cited as one of the few in Anglophone Africa that did not clearly establish the judiciary as a separate branch.²⁵ This contributed to the perception that the judiciary was a mere appendage of the executive.²⁶ It has in its provisions specific parts mentioning the executive, legislature and judicature. However the express vesting of power is only mentioned when referring to legislative power as vested in Parliament²⁷ and executive power as vested on the President.²⁸ But when it came to the judiciary, it did not similarly vest judicial power in it. This silence, it was argued, immediately created a perception of a weak foundation of judicial authority and an imbalance of power between the judiciary on one hand and the other two arms of government on the other.²⁹ It was observed that this created a lacuna in the framework of a clear

²³ Peter Russell and David O’Brien (eds), *Judicial independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, Charlottesville 2001) 22

²⁴ Lovemore Madhuku, ‘Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa’ (2002) 42 *Journal of African Law* 232

²⁵ Jennifer Widner, ‘Judicial Independence in Common Law Africa’, in Office of Democracy and Governance, *Guidance for Promoting Judicial Independence*, (Revised edn, USAID Washington DC, January 2002) 36

²⁶ *Ibid*

²⁷ Constitution of Kenya 2008 (revised edn) s 30

²⁸ S 23

²⁹ Kanyehamba Report (n 18) 23

separation of powers, as without separation of powers, there cannot be a truly independent judiciary.³⁰

The structural separations in the Independence Constitution implied the vesting of judicial power in the judiciary, but the lack of direct provision to that effect theoretically could be susceptible to misuse by the executive. Those criticising this arrangement noted it was possible to establish a separate branch of courts, directly under the control of other arms of government, to exercise judicial power in particular cases or in general.³¹ It appeared that the Independence Constitution did not create an independent judiciary and allowed latitude for the erosion of judicial independence.

Some African countries have entrenched in their constitutions provisions which expressly vest judicial power in their respective judiciaries. The Constitution of Ghana, for example, provides that judicial power shall be vested in the judiciary; accordingly neither the President nor Parliament nor any organ or agency of President or Parliament shall have or be given judicial power.³² Similarly, the Namibian Constitution provides that “the judicial power shall be vested in the courts of Namibia...that the Courts shall be independent and subject only to this constitution and the law”.³³ The South African Constitution provides that the judicial authority of the Republic is vested in the Courts and that the courts are independent subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice.³⁴ These are examples of clearly separated functions. Coming from some of the few African

³⁰ Otiende Amolo, ‘Independence of the Judiciary in Kenya, a Wanting Scenario’ in Phillip Kichana (ed) *Judiciary Watch Report, Judicial Reform in Kenya* (Kenya Section ICJ, 2005) 147

³¹ Mona Rishmawi *et al* (ed), *The Harassment and Persecution of Judges and Lawyers* (10th edn, Centre for Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ), Geneva 2000) 250

³² Constitution of Ghana, s 125 (3)

³³ The Constitution of Namibia, art 78

³⁴ The Constitution of South Africa, s 165 ss (1), (2)

countries with relatively strong independent judiciaries, Kenya could learn from them by tailoring its constitution likewise.

The principles of the independence of the judiciary would be rendered meaningless if it were possible to vest some judicial functions in other non-judicial bodies. The executive and/or legislature would simply avoid the judiciary by entrusting crucial matters which touch on the basic rights of individuals to sympathetic bodies that they can easily manipulate.³⁵ The judiciary has neither the power of the sword nor the means of coercion.³⁶ Its real power lies in its pronouncements of what the law is which, in turn, binds the legislature and the executive.³⁷ If that judicial function is taken over by the other branches, it weakens the judiciary and the other branches are prone to abuse that power to the detriment of the citizen and the rule of law. All reform initiatives which discussed this issue strongly recommended that the constitution be amended to expressly provide for vesting of judicial function in the judiciary.³⁸

4.3.2 Enforcement of Court Judgments

Shetreet notes that once a party to a case is awarded a court judgment, he has an inalienable right to the execution of such judgment.³⁹ Any action which frustrates the execution of such judgment violates judicial independence and the rule of law.⁴⁰ Non-adherence to judicial decisions is a major challenge to the independence of the judiciary. If decisions cannot be enforced, the judiciary will lose credibility regardless

³⁵ Lovemore (n 24) 232

³⁶ James Madison, Alexander Hamilton and John Jay: *The Federalist Papers*, Isaac Kremnick (ed) (Penguin Books, Harmondsworth 1987) 437 *The Federalist* No 78

³⁷ Ibid

³⁸ Kwach Report (n 17), Ringera Report (n 19), ICJ Report (n 20), Onyango Otieno Report (n 21), Ouko Report (n 22)

³⁹ Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, Dordrecht 1985) 609

⁴⁰ Ibid

of whether they are working honestly and fairly. Moreover, inability of courts to compel compliance may discourage judges from making difficult decisions as they may ask why they should make enemies if the rulings are not being enforced⁴¹

The immediate former Chief Justice, Evan Gicheru, had decried the lack of mutual respect between institutions of government under the constitutional doctrine of separation of powers between the executive and the judiciary in Kenya. He complained that the processes of the courts and their decisions were held in outright contempt and disobeyed by factions of the executive.⁴² He alluded to the reluctance by the executive to enforce court judgments.⁴³ The Human Rights Committee of the United Nations, while considering the Second Periodic Report on Kenya, also found the frequent failure by the executive to enforce court orders and judgments a cause of concern.⁴⁴

Ngugi attributes the failure by the executive to enforce court judgments to a backlash arising when courts invade the arena of policy making.⁴⁵ He explains that in the Kenyan system of government, fundamental government policy should be made by the political branches which are popularly elected and not by the judiciary.⁴⁶ When courts adjudicate cases which result in making fundamental policy decisions, they are in essence seizing power from elected officials.⁴⁷ The point is that failure to enforce the courts judgments, as Ngugi points out, “actually harms the institutional standing of the

⁴¹ USAID Report (n1)

⁴² Justice J. E Gicheru, ‘Independence of the Judiciary, Accountability and Contempt of Court’ <<http://www.kenyajudiciary.go.ke>> accessed 10 May 2009. Instances include where the National Assembly cast aside the interpretation of a court on the procedure for accessing funds from the Consolidated fund and went ahead to proceed the budget debate giving the executive half of the budget without a statutory basis and several other instances as enumerated and available at www.ogiek.org accessed 10 June 2012

⁴³ Ibid Gicheru

⁴⁴ UN Doc. CDDR/CO/83/KEN (2005)

⁴⁵ Joel M. Ngugi, ‘Stalling Juristocracy while deepening Judicial Independence in Kenya: Towards a Political Question Doctrine’ in *Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives 5 Judicial Watch Series* (Kenya Section of the ICJ, Nairobi, 2007)15

⁴⁶ Ibid

⁴⁷ Ibid

courts.” It creates the perception that the judiciary is weak as against the executive and its decisions cannot be relied upon to protect citizens against the tyranny of the executive, thus compromising its independence, and also violating the concept of separation of powers.

The “court’s judgments” Raz tells us, “establishes conclusively what the law is”, so that “litigants can be guided by their decisions.”⁴⁸ The rule of law requires that no man be above the law and every man, be subject to the ordinary law and the jurisdiction of the courts.⁴⁹ It stresses the equal subjection of all persons to the ordinary law.⁵⁰ If the executive can arbitrarily decide not to enforce the law as interpreted by and established by the judiciary, it then places itself above the law by refusing to subject itself to the jurisdiction of the court decisions. The normative rule of law principles of supremacy of the law and equality before the law, coupled with the institutional frameworks (an independent judiciary) for effective application of the law are thereby weakened. Such government, which performs an act which is not supported by law, violates the rule of law, just as any individual or a group that takes the law into their own hands would.⁵¹

In order to seal these loopholes and avoid the further weakening of judicial independence, some of the reform initiatives recommended that the constitution should be amended to vest exclusive judicial power in the judiciary⁵² and/or contain provisions explicitly requiring that court orders and decisions shall be respected and be

⁴⁸ Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (Clarendon Press, Oxford 1979) 217

⁴⁹ A V Dicey, *Introduction to the Study of the Law of the Constitution*, (10th edn, London Macmillan, London 1959)193

⁵⁰ A W Bradley and K D Ewing, *Constitutional and Administrative Law* (14th edn, Pearson Education Ltd, Essex 2008) 83

⁵¹ George W Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to the Present* (Centenary Publishing House Ltd, Kampala, 2002) 301

⁵² Kanyeihamba Report (n 18) 24

implemented by all persons, entities, organs and institutions of state.⁵³ Such provisions would go a long way in reversing the trends observed.

4.3.3 Appointments

The most remarkable fact about the appointment of judges in most countries is that it is in the hands of the politicians.⁵⁴ Kenya's judiciary is not any different as judicial appointments are made by the President. Executive appointment is the commonest judicial selection method worldwide.⁵⁵ Even under the US Constitution, which enshrines the separation of powers doctrine perhaps in its purest form, appointments to the federal judiciary involve both other arms of government.⁵⁶ While considering the English judiciary, Maleson⁵⁷ concedes that the role of the executive in the appointment process reinforces the arguments that the principle of judicial independence in a collective constitutional sense only applies, practically, to a very limited extent. Further, she states that the judiciary is constitutionally dependent on the executive for its appointments so that all judges can be said to owe their office to a member of the executive. She is nevertheless sceptical that impartiality can be compromised as there is no evidence in the English experience that appointment processes conducted by the Lord Chancellor could influence judge's decision making. This scepticism though reasonable, is much more realistic in nations which have developed such culture and experience like Britain and other mature democracies.⁵⁸ Kenya has a history of executive domination of other branches of government. It lacks the kind of democratic culture developed over centuries by Britain. Maleson's contention regarding the

⁵³ Onyango Otieno Report (n 21) 45

⁵⁴ J A G Griffith, *Politics of the Judiciary* (5th edn Fontana Press, Hammersmith London 1997) 8

⁵⁵ Maleson (n 11) 82

⁵⁶ Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP, Oxford, 2000) 57

⁵⁷ Maleson (n 11) 86

⁵⁸ Maleson however concedes that this situation may change as the power of the judiciary expands

negligible effect of executive appointment on the impartiality of judges though tenable, may not be pragmatically applicable to the Kenyan judiciary considering its history.

Amissah⁵⁹ offers a rationale of executive involvement in judicial appointments, especially of the Chief Justice (hereinafter referred to as CJ) in new nations, as lying in the recognition of the need for complete confidence and cooperation between the head of government and the CJ.⁶⁰ In his view, it is a quasi-political relationship since the CJ is expected to inform the head of state if a judgement would prejudice security.⁶¹ Some constitutions, he further explains, provide for a CJ to exercise presidential powers should the President be absent, hence his argument that the appointment of the CJ be left at the discretion of the President, but for the rest of the judges there be consultations with the Judicial Service Commission (hereinafter referred to as JSC). This justification is not very convincing as it seems to suggest that the requirement for independence should be sacrificed at the altar of personal convenience to the President or security.

The most important political appointments are those of the CJ, Judges of the Court of Appeal, and Judges of the High Court. This section therefore will focus on the vulnerability of the selection processes as observed in the manner of appointment of judges in Kenya.

4.3.3.1 Appointment of the CJ and Judges

Under the Independence Constitution, the CJ was appointed solely by the President.⁶² This was one executive function which defied the concept of separation of

⁵⁹ A N E Amissah, *The Contribution of Courts to Government; A West African View* (Clarendon Press, Oxford 1981)119

⁶⁰ Ibid

⁶¹ Ibid

⁶² Revised Edition, 2008 s 61 (1)

powers, which required that the three respective arms of government check and balance each other's functions. The President made an important executive decision affecting the judiciary, which decision was unchecked by both the judiciary and the legislature. Potentially, the threat of arbitrariness, the antithesis of the rule of law, was real in the absence of any checks. The President took over all appointments with no fettered discretion. The concentration of powers in the executive was evident. That the executive powers had been expanded at the expense of the judiciary is visible.⁶³ The folly of this arrangement is that it exposed the judiciary to abuse by the subsequent executives, thus compromising the independence of the judiciary.

The Kenya Section of the ICJ, in a survey carried out in 2005, lends credence to the above analysis.⁶⁴ 74% of the respondents were of the view that the system of appointing the CJ had affected the administrative structure of the judiciary, making it a political office whose appointment was dependent on the interest of the incumbent Head of State;⁶⁵ 68% of the respondents believed that the then CJ was not independent.⁶⁶ This reveals the weakness subsisting in the Independence Constitution, regarding the appointment processes. Public confidence in the office of the CJ here is evidently was very low as he is perceived to be a puppet of the President. The CJ could influence the decisional independence of judges and magistrates over whom he held enormous administrative authority. The need to urgently amend the constitution to provide for a more stringent appointment process comprising checks by the legislature was evident. Reform initiatives are replete with such proposals made over a long period

⁶³ Under the Westminster Constitution s The President Appointed the CJ with the approval of the Prime Minister and at least four leaders of the regional Assemblies

⁶⁴ ICJ Report (n 20) 93

⁶⁵ ICJ Report (n 20) 14

⁶⁶ ICJ Report (n 20) 15

of time, an indication that no action was taken to remedy the anomalies extant in the Independence Constitution.⁶⁷

With regard to the Judges of the High Court and Court of Appeal,⁶⁸ apart from the legal qualifications, there were no set criteria, or guidelines for the JSC to consider while recommending to the president prospective appointees. The JSC never publicly declared the criteria they used. How they came by the names or how they sieved them to determine which candidates were best suited for the job was not known. Whether they had any discussions with the President about the prospective candidates was unknown and was left to speculation each time an appointment was made. There were no laid down vetting procedures, either as a matter of practice or in any rules to be assessed and in case of any dispute. The public had no stake in the process. The body of professionals from which these candidates were obtained, namely, the Kenya Magistrates and Judges Association (hereinafter referred as KMJA), or, the Law Society of Kenya (hereinafter referred to as LSK), had no input.

Further, appointments to the Court of Appeal followed a similar trend. Sitting judges who were junior in rank would be elevated to the High Court over their more senior counterparts without any criterion. The same applied to junior lawyers from the Bar. The problem with this constitutional arrangement was that between the three different tiers of authority in one institution, all judges possessed similar qualifications, yet the jurisdiction of the courts conferred a pecking order, demonstrating ranking commensurate with seniority, judicial responsibility and official administrative functions. To use Britain just as an example, one can visualise a situation where the

⁶⁷ Ouko Report 2009 (n 22)17-22, ICJ Report 2005 (n 20) 56, Kwach Report 1998 (n 17)10 Ringer Report 2006 (n 19)52, Kotut Report 1990 (n 16) para 70

⁶⁸ S 61 (3) an advocate who has practiced for 7 years either in Kenya or in the Commonwealth country or Republic of Ireland can be appointed as a Court of Appeal Judge or a Chief Justice.

Lord Chief Justice appointed from the ranks of junior High Court judges, by-passing all senior judges of the High Court and judges of the Court of Appeal and also judges of the Supreme Court with no justified explanation or at all.

In Kenya, merit, seniority or other objective criteria or qualifications were not considered. It would not be farfetched to perceive that a rather big ‘favour’ had been extended by the appointee to the appointing authority (executive). Such judges, even if independent and impartial, would not command confidence of the public and would be perceived as not independent of the executive. Decisions made by a judge so appointed, especially those that arise from disputes wherein the executive is a party, would lead the other party or parties to the suit, or the general public to believe that the outcome of such a case can only be in favour of the executive. ‘Judges who have been appointed in this manner may be more likely to promote their own interests over the rights of individuals’.⁶⁹ The perception of lack of personal independence on the part of such appointee would not be easy to dispel in the mind of a reasonable right thinking litigant or person.

In 2005, the Minister for Justice and Constitutional Affairs (under whose docket the judiciary falls), made the following statement while explaining government policy on appointment of judges. He said:

The executive has the direct mandate of the people to carry out certain programmes and implement policies and will ordinarily expect to be backed by the judiciary in implementing what it believes to be good for the people... Inevitably the executive desires a judiciary that shares its philosophy... The NARC Government has consciously identified credible lawyers to take up judicial appointments. This is a trend we intend to continue.⁷⁰

⁶⁹ <http://www.transparency.org/publications/policy_papers/pp_judicial_appointment> accessed 8 February 2009

⁷⁰ Hon Kiraitu Murungi, Minister for Justice and Constitutional Affairs ‘Opening remarks speech at the Symposium on Constitutional Interpretation and Judicial Responsibility’ at Mount Kenya Safari Club on

Hence, two years later, when President Moi of the Kenya African National Union (hereinafter referred to as KANU) Party appointed 28 High Court judges in an acting capacity one week before the general elections, the ICJ expressed concern claiming that these appointments were meant to satisfy political, tribal and or sectarian interests.⁷¹ This could have been a justifiable concern, considering that the National Rainbow Coalition (hereinafter referred to as NARC) Party whose leader was also vying for the presidency was political party whose manifesto and political ideology were quite different from the outgoing party, KANU, which had been in power for 24 years. The perception created was that the appointment of these 28 judges, the highest number ever appointed at once in the history of the Kenyan judiciary, was intended to perpetuate the ruling class's political ideology and also to protect its political and tribal interests should President Moi lose in the elections.⁷²

It is worth noting that these appointments were in an acting capacity and subsequently confirmed to permanent terms by the President. It is arguable that confirmation to permanent terms could have been dependent upon their performance in deciding cases in favour of the government of the day. The perception that judges so confirmed may not have determined disputes wherein the state had an interest independently, or that they would be biased in favour of the ruling party's political ideology, would be hard to dislodge. It could also have largely contributed to the refusal by the opposition to subject their dispute of the outcome of the 2007 presidential elections, leading to the violations of the rule of law that immediately followed.

29th April, 2005 in *Judiciary Watch Report: Judicial Reform in Kenya* (Kenya Section of the ICJ, Nairobi 2005) 176 177

⁷¹ ICJ Report (n 20) 3

⁷² President Kibaki hails from the Kikuyu tribe. The outgoing President Moi hailed from the Kalenjin tribe. Of the 28 appointments, half were from the Kikuyu tribe thus raising concerns of 'court packing' by President Kibaki

While in an acting capacity, these judges lacked security of tenure normally availed to those judges employed on full time basis. They lacked the constitutional protection that shielded them from being removed from office should the executive not be pleased with their decisions. The rule of law requirement that all be treated equally before the law was threatened because of the possibility that the acting judges could be inclined to treat the executive more favourably than they would the citizen whilst determining cases between them. Secondly, the ruling party in the exercise of its executive functions would find opportunity to act arbitrarily and with impunity in the knowledge that such arbitrary action would not be checked by the judges, further compromising the objectives of the concept of separation of powers and its conception of checks and balances. A judicial institution which is sated with judges appointed in the manner described above would not command the confidence of the citizenry and the potential to find unlawful alternative means of solving disputes is real.

Transparency International has stated that where political power plays a significant role in the appointment, promotion and conditions of service of judges, there is a risk that judicial candidates, as well as sitting judges, will feel compelled to respond to the demands of the powerful, rather than act as a check on government or economic interests in protecting civil liberties and human rights.⁷³ If the Minister's words are to be construed to be the official policy of the executive as they appoint judges, then subsequent and prior appointments made by the respective governments over the years could reasonably jeopardise the integrity of the courts and compromise the independence of the judiciary.

⁷³<www.transparency.org/publications/policy_papers/pp_judicial_appointment> accessed 8 February 2009 Transparency international is a politically non partisan global civil society organisation promoting anti corruption strategies

Justice Bagwati of India argues that in third world countries, the executive controls the legislature to the extent that the legislative check has disappeared.⁷⁴ In his view, vesting the power of appointment exclusively in the executive is likely to undermine the independence of the judiciary.⁷⁵ He points out that:

The power of appointment of judges to the superior courts is a large power. Vesting it exclusively in the executive is likely to undermine the independence of the judiciary... If the power of appointment is vested solely in the hands of the executive it is not unlikely that those aspiring for judicial appointments might lobby with the executive with a view to seeking favour of judicial appointment and when they are so favoured by appointment on the bench, they would carry with them a sense of obligation to the executive and unconsciously, if not deliberately, be inclined to support the executive in the adjudicatory process.⁷⁶

If politics play a central role in selection of judges, the judiciary may lack professionalism and may take a political approach when addressing challenges to the legality of government action.⁷⁷ This is more so in the Kenyan experience where the rationale used in making recommendations to the President for appointments is not explained, hence unknown, creating a perception of lack of transparency, especially when positions are never advertised as was always the case.⁷⁸

Another notable incident of intrusion by the executive in appointment process was brought into focus and dramatically played out on 6th December 2007 when the CJ accompanied three newly appointed judges to the State House where the President was to formally swear them into office. The ceremony never took place. They were turned away. No explanation was offered by either side. The matter was subsequently raised in Parliament by the opposition. An Assistant Minister for Justice and Constitutional

⁷⁴ Justice P N Bagwati, 'The Pressures on and Obstacles to the Independence of the Judiciary' in Read Brody (ed), (Vol. 23 *Issue 19 Centre for the Independence of judges and Lawyers Bulletin* (1989) 18

⁷⁵ Ibid

⁷⁶ Bagwati (n 74) 19

⁷⁷ Quigley John, 'Judicial Autonomy in Palestine: Problems and Prospects' (1996) 21 *Dayton Law Review* 699

⁷⁸ Joyce Manyasi, 'Strengthening Democratic Processes in the Kenyan Judiciary: Best Practices, Lessons Learnt and Emerging Trends' in *Judiciary Watch Report* (Kenya Chapter ICJ, Nairobi 2005) 32

Affairs, under which the judiciary is placed, declined to respond arguing that the concept of separation of powers did not allow him to discuss such matters in Parliament as it would amount to interference with the Judiciary.⁷⁹ Two years later, the CJ broke his silence and, in an exclusive interview with a local newspaper, explained that the swearing was aborted because a Cabinet Minister was not informed about the appointments, but was only invited to attend the swearing in ceremony after the appointments had been made by the President upon the advice of the JSC.⁸⁰ The CJ termed this complaint by the Justice Minister, and her refusal to attend the swearing in ceremony which subsequently led to the cancellation of the function, as interference with the independence of the judiciary and publicly accused the executive of interfering in the process of appointment of judges.⁸¹ He further claimed that he was only being criticised by the Minister because he refused to be manipulated by the executive.⁸² The Minister replied alleging that judicial appointments were bedevilled by cronyism and favouritism and that proposed appointees were incompetent.⁸³

Such public altercations expose weaknesses in the appointment process. They confirm fears expressed by critics that the appointment of judges in Kenya is made on political and other considerations and further reveal the existence of heavy executive intrusion in the judiciary. This reflects adversely on personal and institutional independence. On the other hand, it may be argued that this kind of altercation reveals that the judiciary can protest if its independence is being compromised and that this is exactly what the CJ did. That is commendable, but the point being made here is that in

⁷⁹ National Assembly Official Report Wednesday 18th February 2009 9.00am <<http://www.bunge.go.ke>> accessed 17 July 2009

⁸⁰ Peter Atsiaya, 'Me, Resign? Forget it. CJ tells Karua' *The Standard* March 29 2009 <<http://www.eastard.net>> accessed 25 March 2009

⁸¹ Ibid

⁸² Ibid

⁸³ 'Why judges swearing in was cancelled CJ', *The Daily Nation* July 18 2009 <<http://www.nation.ke>> accessed 17 July 2009

spite of that show of independence by the CJ, the President still had the last word. No judge could be appointed even when the JSC advised the President. The swearing in did not take place, hence, in the face of the public, the judiciary still stood out as the weaker branch and the loser. There existed then no provision in the constitution to temper that unbridled presidential power since there was no requirement on the part of the president to accept the advice of the JSC.

That this practice was so rampant to the extent that common citizens viewed the judiciary with a lot of suspicion is exhibited in this comment from a Kenyan expressing his view in a local newspaper. He was concerned that judicial appointments are not done on merit and the process was not transparent. He said:

Perhaps you can talk to your Member of Parliament and arrange a ‘Mbuzi’ (goat) party or somehow worm your yourself to the attention of the Judicial Service Commission...To succeed in bagging one of these posts your socio political connections must be better than the competition...The Commission will claim judges are selected on merit but merit is subjective. Lobbying, knowing the right people is the only process guaranteed to get the Commissions attention about your suitability for appointment. You should not be shy to pull strings, support from the political community or friends in the high places are considered as some of the qualifications to appointment to judgeship in Kenya. The power to select judges is vested in a tiny brotherhood and powerful special interest and political groups and since appointment is by invitation only hence those who are not well known will never make it. Naturally chances of picking the wrong candidate are present.⁸⁴

Such sentiments raise concerns about the appointment processes and qualifications of judges in the Kenyan judiciary to the extent that it’s institutional independence and the impartiality of its judges from the executive and outside influence become questionable.

⁸⁴ Peter Mwaura, ‘How to become a Judge of the High Court in Kenya’ *The Daily Nation*, Friday April 10, 2009 <<http://www.nation.co.ke>> accessed 15 May 2009

4.3.3.2 Appointment of Magistrates

The Magistrates Courts Act establishes the Magistrates Courts.⁸⁵ It defines a Magistrate as a Chief Magistrate, Senior Principal Magistrate, Principal magistrate, Senior Resident Magistrate or District Magistrate as appointed by the Judicial Service Commission holding respective courts.⁸⁶ The Magistrate Court has original jurisdiction to determine criminal cases and civil cases and any other disputes as prescribed by parliament or any other law. The Constitution⁸⁷ provided that Parliament may establish Subordinate Courts. A District Magistrates Court is established under section 7 of the Magistrates Courts Act. It is established for each administrative District as designated by the Judicial Service Commission. The Chief Justice may order designate any or two or more districts wherein all may be deemed to be one district for those purposes⁸⁸ including extending the area of jurisdiction.⁸⁹ The court's criminal jurisdiction is conferred by the Criminal Procedure Code,⁹⁰ though it could also be conferred by other statute.⁹¹

A District Magistrates Court may be first class, second class or third class and each is conferred specific jurisdiction in terms of fines to be imposed in criminal jurisdiction,⁹² or damages in civil jurisdiction. The Chief Justice has powers to set

⁸⁵ Section 1, Magistrates Court Act

⁸⁶ Section 2, Magistrates Courts Act

⁸⁷ Section 69, Constitution

⁸⁸ Section 7(2) Magistrates Courts Act

⁸⁹ Proviso to section 7(2)

⁹⁰ Chapter 75 Laws of Kenya

⁹¹ Section 8 (c) Magistrates Courts Act

⁹² Chapter 75 Laws of Kenya

limits of jurisdiction by way of a Gazette Notice. The District Magistrates Court also has jurisdiction to handle cases arising out of customary law including marriage, divorce, maintenance dowry, pregnancy of an unmarried girl; enticement to marriage or adultery with a married woman. Appeals from decisions of a District Magistrate of the third class in civil cases lie to the Resident Magistrates Court of the first class. Leave must be granted for such appeals to lie to the High Court.

A Resident Magistrates Court is properly constituted when occupied by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident magistrate and Resident Magistrate.⁹³ It exercises jurisdiction throughout Kenya.⁹⁴ It exercises criminal jurisdiction as conferred by the Criminal Procedure Act or any other written law.⁹⁵ The civil jurisdiction is set by section 5 thereof but subject to increase by the Chief Justice by a gazette notice. The limits thereof are also provided for in section 5(1) for all classes of resident magistrates. It also has jurisdiction to deal with cases arising from customary law with an unlimited jurisdiction.⁹⁶ They exercise original jurisdiction at different levels.

Magistrates are employed on permanent terms. Magistracy is a full time job and a lifelong career and is pensionable with a retiring age of 65 years. It is not a part time or one that a member of public can undertake as part of community service as is in the case of Magistrates in the United Kingdom. The above description is indicative of the

⁹³ Section 3 Magistrates Courts Act

⁹⁴ Section 3 (2) Magistrates Court Act

⁹⁵ Section 4 Magistrates Courts Act

⁹⁶ Section 5(2) Magistrates Courts Act

enormous powers that the CJ and the JSC have over the magistracy who owed their career progression to them.

Magistrates were appointed and dismissed by the JSC.⁹⁷ The JSC can delegate powers of appointment, including confirmation of appointment, discipline, or removal of magistrates to any High Court Judge (or acting judge), Registrar or magistrate, but this must be in writing.⁹⁸ Prior to 2003, interviews were hardly conducted. It was not known to magistrates if there were any vacant posts. A magistrate would simply receive a letter notifying him or her that she had been promoted to the next grade. No explanation accompanied the letter. One was in the dark as to why he/she had not been promoted. After 2003, the JSC started conducting interviews but no reasons were ever given justifying one's promotion over the other person. The only change was that one participated in the interviews.

Flaws and misuse in the manner that judicial appointments were made were massive. What, therefore, were the options available which, if implemented, could reverse this trend or seal the gaps which have been identified? Several and varied proposals were made which are worth considering. It was evident that the processes had been opaque and did not allow for clear, transparent, and objective criteria to be applied and verified for all judicial positions including the position of the Chief Justice.⁹⁹ To gain back the lost confidence in the appointment process high levels of scrutiny of those aspiring to hold judicial offices was necessary. Rigorous vetting, geared towards

⁹⁷ S 69 (1) Also under The Services Commissions Act (Chapter 185 Laws of Kenya) Grounds for dismissal include, misconduct (reg. 26), absence from duty without leave (reg. 22) and any act that the CJ may find suitable to warrant dismissal and informs the JSC accordingly

⁹⁸ No such powers had been ever been delegated to Registrar or Magistrates. It was extended only to the level of judge but only in terms of appointments and promotions however the final authority lay with the CJ.

⁹⁹ ICJ Report (n20) 46

recruiting only those with high integrity, was proposed,¹⁰⁰ so was an open and merit based appointments procedure, wherein positions are publicly advertised and interviews conducted.¹⁰¹ This would ensure that only those who are competent are appointed and effectively minimise appointments characterised ‘by nepotism, favouritism, ‘godfatherism’, outright purchase of opportunities’, all elements of corruption.¹⁰² Promotions for any post of magistrates or judges, it was proposed would be preceded by a comprehensive performance appraisal and a thorough background check should be carried out.¹⁰³

There appeared to be a consensus that the processes ought to be more inclusive, but a slight disharmony regarding the involvement of the Legislature was detectable among the different reform initiatives that considered this issue. Some reform initiatives suggested that it should be an internal affair, where magistrates are vetted by High Court Judges, who are in turn vetted by Court of Appeal judges.¹⁰⁴ Others were of the view that the JSC should first vet the nominees before forwarding their names to the President for appointment,¹⁰⁵ completely by-passing the legislature. They argued that such a process “carried the risk of politicisation of the appointments especially at a time when there were no adequate safeguards in the parliamentary process.”¹⁰⁶ Instead, state organs like the Kenya Anti-Corruption Commission, National Security Intelligence Service, and the Criminal Investigations Department should confirm that candidates had no criminal records.¹⁰⁷ In spite of the lack of consensus on this issue, what is clear is that involvement of the legislature is paramount as it is compatible with the concept

¹⁰⁰ Kotut Report (n 16) para 70

¹⁰¹ Kwach Report (n 17) 10

¹⁰² Ringera Report (n 19) 52

¹⁰³ Ibid

¹⁰⁴ Onyango Otieno Report (n 21) 55

¹⁰⁵ Ouko Report (n 22) 21

¹⁰⁶ Ibid

¹⁰⁷ Ouko Report (n 22)124

of checks and balances. To create a stronger judiciary which is acceptable to the other arms of government, each must play a role in the appointment. It is then that no one arm of government can claim total loyalty of the judicial officer.

With regard to qualifications, it was observed that the challenges of the judiciary would be effectively addressed if the judicial officers were of the right calibre, profession preparedness and have positive attitudes. That judges and magistrates be persons of integrity, with appropriate practical experience and training in law,¹⁰⁸ was meant to address the question of ability to match the adjudicative functions of the judiciary with the required competence in matters legal. Proposals were made for entrenchment of these requirements in the constitution.¹⁰⁹ If implemented, the appointing authorities would be compelled to make appointments against known criteria thus sealing the loophole in the Independence Constitution which was silent on educational competence, personal attributes and contained minimal requirement with regard to practical experience.

Renewed calls for urgent and mandatory constitutional reforms led to the enactment of the Constitution of Kenya Review Act 2008, and a possibility of getting a new constitution. Standards began to be specifically defined. Criteria, such as intellectual competence, diligence, and substantive knowledge of law, organisation and administrative skills, written and oral communication skills, high moral character and demonstrated academic qualifications in law suddenly acquired prominence as prerequisites for appointment.¹¹⁰ Even though in the life of the Independence Constitution, the proposal for enhanced criteria on appointments was never

¹⁰⁸ Kanyeihamba Report (n 18) 44

¹⁰⁹ Kotut Report (n 16) Para 25

¹¹⁰ Ouko Report (n 22) 22

implemented, there was a demonstration of a serious commitment towards improving the appointment processes in order to secure only the most qualified, with high integrity and independence. The need to break away from the past opaque appointment processes with the hope of improving the independence of the judiciary from the executive is clearly visible.

4.3.3.3 The Judicial Service Commission and Appointments

Under the Independence Constitution, appointments of all judges and magistrates, including the CJ, were exclusively an executive function. All Judges were appointed by the President upon the advice of the JSC. Magistrates were appointed by the JSC only as provided for in section of the Judicature Act. The legislature was excluded. The separation of powers concept was absent, exposing a serious weakness. Members of the JSC¹¹¹ which comprised the CJ¹¹² as Chairman, the Attorney General,¹¹³ a Court of Appeal and a High Court judge, and the Chairman of the Public Service Commission,¹¹⁴ were all direct appointees of the President. Appointments of judicial officers could then be safely described as an exclusively executive affair of the President and his appointees only. There were no provisions for removal of the members of the JSC or grounds thereof. Just like they were appointed by the president, it was the President to remove them whenever he found it fit by way of gazette notice without any accountability to anyone.

The control of the entire judiciary, in terms of magistracy, was also firmly under the direct control of the executive as the JSC was mandated to remove and discipline

¹¹¹ The JSC was charged with the responsibility of appointing judges and magistrates and also disciplining magistrates among other responsibilities

¹¹² The Constitution of Kenya 1964, s 61 (1)

¹¹³ The Constitution of Kenya 1964, s 109 (1)

¹¹⁴ The Constitution of Kenya 1964, s 106 (2)

magistrates.¹¹⁵ The question that arose was whether the appointments to the judiciary, in which the executive had enormous control and discretion, could undermine the independence of the judiciary and have adverse implications on the rule of law.

Critics argued that since the President was responsible for the selection of all participants in the appointment process, he could exercise considerable influence over their decision-making. There was no sufficient guarantee against appointment for improper motives and judicial impartiality risked being undermined.¹¹⁶ The African Peer Review Mechanism, however, was not so categorical. In their report, they observed that the appointment of the CJ and judges by the President did not, in itself, or automatically, compromise the independence of the judiciary as the officers were guaranteed security of tenure, but they pointed out that a key judicial body, like the JSC, may conceivably align itself with the President, and through this loophole, influence the Judiciary through appointments, promotions and placements of judges.¹¹⁷ If executive influence is ubiquitous in the selection, of judges and magistrates, then such judiciary can reasonably be perceived to be under the control of the executive. Such perception, coupled with the instances of interference discussed herein, could lead to the verdict in the court of public opinion that the judiciary lacked independence and was unable to make the executive to be accountable to the people.

The incidences discussed above make it quite evident that appointments of judges in Kenya exhibited heavy and undesirable executive intrusion. It equally demonstrates that the executive had exploited the weaknesses in the constitution to pack courts with judges who were perceived to be sympathetic to their political

¹¹⁵ S 69

¹¹⁶ Rashmawi 2000 (n 31) 251

¹¹⁷ Africa Peer Review Mechanism: Country Report on the Republic of Kenya, (May 2006)86 <<http://www.nepad.org/2005/files/aprm/APRMkenyareport.pdf>> accessed 17 February 2009

ideologies. Some proposals called for a complete overhaul of the JSC. They preferred that LSK and KMJA elect their representatives to the JSC as opposed to individual judges and magistrates being hand-picked for appointment by the President.¹¹⁸ This arrangement, if implemented, could reduce the possibility of executive influence in the appointment process of judges.

Entrenching these provisions in the constitution was an even better method of preserving and enhancing the protection of judicial independence and the rule of law.¹¹⁹ This would enhance judicial accountability for the reason that its new membership would comprise members of proven integrity who reflect the interest of the public at large as well as the interests of the judiciary.¹²⁰ Its membership, if broad-based and not within the control of any single constituency, would import an element of transparency, thereby enhancing accountability.¹²¹ This, coupled with enhanced functions,¹²² equally entrenched in the constitution, would yield a more independent judiciary capable of commanding respect and confidence of the public. Fixing time limits of service for the members of the JSC¹²³ was reasonable since it could help reduce chances of undue familiarity with powerful lobby groups or interested persons who may want to continuously keep certain persons or groups of persons on the bench.

4.3.3.4 Temporary Appointments: Contract Judges

For a period of 30 years after independence (from 1963-1993) Kenya continued to rely heavily on expatriate judges who were appointed by the government, but whose

¹¹⁸ Kwach Report (n 17) 58 This recommendation was shared by the Ouko Report, which further recommends additional representation by the Kenya Private Sector Alliance (KEPSA) as well.

¹¹⁹ Kotut Report (n 16) para 24 (h)

¹²⁰ Kanyeihamba Report (n 18)

¹²¹ Kanyeihamba Report (n18)

¹²² Kanyeihamba Report (n 18)

¹²³ Kwach Report (n 17) 58.

salaries were subsidised by the British Government, other Commonwealth countries and Ireland. Some local judges were also employed on contract.¹²⁴ At independence, there were very few African lawyers in and hardly any in private practice,¹²⁵ hence a lack of qualified personnel to take up jobs in the judiciary.¹²⁶ It has been alleged that the European settlers banned Africans from legal training until 1961 on the grounds that they would use their training to go into politics.¹²⁷ Even after Kenyan lawyers came of age and took up appointments in the judiciary, the government continued to appoint contract judges.¹²⁸

The major difficulty with a system of fixed appointments is reconciling it with security of tenure.¹²⁹ The practice of having expatriate judges with foreign allegiances raised serious questions of legitimacy, which impacted the independence of the judiciary as there was widespread perception that they were susceptible to pressure from the executive arm of government as they depended on it for renewal of their contracts.¹³⁰ The pressures that can be brought to bear on such judges are well illustrated in the case of Justice Derek Schofield (an expatriate judge appointed on contract terms) in 1987.¹³¹ Justice Schofield refused to renew his contract when the CJ removed him from hearing a case in which he (Justice Schofield) had ordered the police to bring before him a detainee (who later died in custody) under a *habeas corpus*

¹²⁴ International Bar Association Report on the Legal System and Independence of the Judiciary, (1996)11 <<http://www.ibanet.org>> accessed 17 July 2009

¹²⁵ Stanley D Ross, 'The Rule of Lawyers in Kenya (1992) 30 Journal of Modern African Studies 421, 422

¹²⁶ Ibid

¹²⁷ Rhoda Howard and Howard Hassman, *Human Rights in Commonwealth Africa* (Rowman and Littlefield New York, 1986)168

¹²⁸ Ibid

¹²⁹ John Hatchard, Muna Ndulo and Peter Slain, *Comparative Constitutional and Good Governance: An East and Southern African Perspective* (CUP, Cambridge 2004)159

¹³⁰ International bar Association Report on the legal system and Independence of the Judiciary (1996) Vol II available at <www.ibanet.org> accessed 17 July 2009

¹³¹ Hatchard *et al* (n129) 159

application.¹³² He was told by the then CJ (also a contract judge) that if he persisted in handling the case, the CJ would have difficulty in recommending a renewal of his contract.¹³³ Justice Schofield himself confirmed the incident in an interview with the press. When asked about the circumstances of that case he replied:

There were concerns about independence of some judges. The Chief Justice (Cecil Miller) interfered with the Karanja Case and he informed me it was at the behest of the President. This was with a view to achieving a certain judgement.¹³⁴

Asked if this was the reason he resigned, his reply was:

Yes, it was the reason. When the matter came up before me, I was in the process of renewing my contract. There were a series of interventions from the Chief Justice who advised that my contract was in jeopardy. I told him I was willing to pay the price for my principle and independence. When the file was taken away, I resigned.¹³⁵

Similarly, Justice Edward Torgbor, retired after a letter from the then Head of Public Service, informed him that his contract would not be renewed. The contract was due to expire on 13th May 1994. The judge had previously presided over a case in which an application by President Moi was dismissed.¹³⁶

These instances further buttress weaknesses in constitutional guarantees for judicial independence and its negative impact on judicial independence.

4.3.3.5 Temporary Appointments: Acting Judges

The system of appointing acting or ad hoc judges can fulfil a number of useful functions such as to fill a temporary vacancy in the higher court, to help gain experience, to ease an existing backlog of cases, and to serve as a process for assessing

¹³² Ross (n 129) 429

¹³³ Hatchard *et al* (n 129) 159

¹³⁴ David Okwemba, 'Kenya Judge Schofield fights on for Cause of Justice' <<http://www.allafrica.com>> accessed 6 March 2009

¹³⁵ Ibid

¹³⁶ Mona Rishmawi *et al* Ed, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* (CIJL of the ICJ, Geneva 1993-1994)195

suitability for possible elevation to the bench.¹³⁷ The question is whether this provision is reconcilable with judicial independence, since this does not guarantee security of tenure as the acting judges can either end up getting confirmed or not. Between 2003 and 2004 the government appointed judges in an acting capacity. This drew concerns from an advocate who observed that:

The current acting judges work in fear and without confidence as they do not have security of tenure. There seems also to be some sort of competition among the acting judges in an apparent attempt at recognition or for ‘showcasing’. To this extent it can be said that the state has not done much to fulfil its duty to guarantee independence of the judiciary. In fact the state seems to be doing the direct opposite, i.e., to encourage judicial dependence and interference thereof by the other arms of government.¹³⁸

Sir Gerald Brennan reiterates this fear when he says that “judicial independence is at a risk when future appointment or security of tenure is within the gift of the executive”.¹³⁹

Mutua¹⁴⁰ gives an explicit narrative of the hiring of contract judges from the 1960s. He says this was meant to keep the judiciary loyal to the presidency as they could not be removed by constitutional provisions, hence they did not have security of tenure. This was equally exhibited in the manner that their contracts were terminated when the government was not happy with their decisions.¹⁴¹ The Registrar of the High Court, Jacob ole Kipury, explained that since Justice Toghbor had been appointed on contract, he did not enjoy security of tenure under the Constitution, similar to those judges appointed on permanent terms of service. He correctly clarified that the failure

¹³⁷ Hatchard *et al* (n 129)160

¹³⁸ J R Kowade, ‘Separation of Powers and Kenya’s Judicial Performance since 2003’ in Maurice Odhiambo Makaloo & Phillip Kichana (eds), *Judicial Reform in Kenya 2003-2004* (Kenya Section of the ICJ, Nairobi 2005) 40

¹³⁹ F D Brennan, ‘The State of the Judicature’ (1988) 72 Australian Law Journal 34,35

¹⁴⁰ Makau Mutua, ‘Justice under Siege: The Rule of Law and Judicial Subservience in Kenya’ (2001) 23 Human Rights Quarterly 96,105

¹⁴¹ Mutua (n 140) 109, He gives an example where Justice O’Connor’s contract was terminated by a dismissal letter when he refused to go on transfer terming it unconstitutional

to renew the contract was perfectly within the law.¹⁴² This view would seem to except contract judges from the security of tenure safeguarded by section 62 of the Constitution.¹⁴³

Appointment of judges on contract basis is a serious threat to judicial independence and it is even worse in the case where a CJ is serving on contract. This procedure ought to be removed or, in the alternative, all acting judges should be automatically availed similar guarantees for judicial independence as the non-acting judges.¹⁴⁴

4.3.4 Tenure and Removal

The security of judicial office is maintained by appointing judges for life or until a specified age.¹⁴⁵ Longer tenure is generally thought to protect judicial autonomy.¹⁴⁶ The retirement age for all judges under the Independent Constitution was set by Parliament at 74 years.¹⁴⁷ Later on proposals were made for a reduction to 70 years with an option to retire at 65 years with full benefits.¹⁴⁸ The rationale was that this would create room for younger people.¹⁴⁹ These provisions or proposals were not related to the independence of the judiciary neither do they impact on it so far hence no further discussion is necessary at this point.

¹⁴² Rishmawi 1993-1994 (n 136) Justice Torghbor had been appointed on a short term contract with the government and was retired by a letter from the head of public service. He had previously presided over a case in which an application by President Moi was dismissed. Justice LA Couldrey who had presided in that case resigned. He too had been appointed on contract basis

¹⁴³ Ibid

¹⁴⁴ Art. Draft Constitution of Kenya 2005 (Government Printer, Nairobi 2005) Popularly known as the Bomas Draft

¹⁴⁵ Shetreet & Deschenes (n 39) 623

¹⁴⁶ Quigley (n 77) 699

¹⁴⁷ Judicature Act Chapter 8 Laws of Kenya s 9

¹⁴⁸ Kwach Report (n 17) 62 Onyango Otieno Report (n 21) 60

¹⁴⁹ Kotut Report (n 15) para 60.

One aspect that has impacted greatly on the independence of the judiciary is the removal of judges. When judges can be easily and arbitrarily removed, they are much more vulnerable to internal or external pressure in the consideration of cases.¹⁵⁰ The mechanisms for removal and discipline of judges are of vital importance to the independence of the judiciary and the power to remove and discipline judges directly affects individual judges as well as the judiciary as a whole.¹⁵¹ Security of tenure probably the most fundamental guarantees of judicial independence, the reality of which depends largely upon the rules for removal of a judge from office.¹⁵²

Under the Independence Constitution, Judges of the High Court and the Court of Appeal enjoyed security of tenure. They could be removed from office only for inability to perform the functions of their office or for misbehaviour and in accordance with procedures laid down in the Constitution.¹⁵³ When a question of removal arose, it was only the CJ who was authorised to present to the President such information. The President was then required to appoint a tribunal to investigate the matter fully and to recommend to the president that such judge should be removed.¹⁵⁴

Justice Akiwumi does not find any interference by the executive in the removal of a judge from office in the provision requiring establishment of a tribunal before a judge can be removed.¹⁵⁵ In his view, this reinforces the doctrine of separation of powers. Further, apart from the discretion that the President has in selection of the

¹⁵⁰ USAID Report, *Democracy and Governance Guidance for Promoting Judicial Independence and Impartiality* (USAID, Washington, 2002) 19

¹⁵¹ Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, (North Holland Publishing Company, Amsterdam 1976) 85

¹⁵² The Hon. Leonard King, 'The IBA Standards on Judicial Independence: An Australian Perspective' in Shetreet and Deschenes (Eds), (n 39) 411

¹⁵³ S 62

¹⁵⁴ SS 62(4)-(7)

¹⁵⁵ A M Akiwumi 'Towards an Independent and Effective Judiciary in Africa' African Development Forum 11-15 October 2004 Addis Ababa, Ethiopia <<http://www.mhtml:file://F:>> Accessed 17 June 2009

members of the tribunal, he is given no discretion in accepting or rejecting the recommendation of the tribunal.¹⁵⁶ The assumption, therefore, is that in Kenya security of tenure enjoyed by the judges is solid and executive influence is remote. This assumption can only be sustained in the Kenyan situation where the initial appointment of the tribunal is unchecked and lacks input from all the other organs. So even if the decision to be made by the tribunal cannot be changed by the President, it does not deter him from appointing a tribunal to come up with a pre-determined decision, thus defeating the purpose of the whole process. The act of appointment itself still bears connotations of over concentration of powers.

Ogot explains that the rationale of the inclusion of the provisions relating to the removal of judges in the Westminster Constitution 1963 was as a result of the strong desire for the observance of the rule of law that required the presence and continuation of a properly established fair and impartial judiciary free from executive interference.¹⁵⁷ He adds that the mere fact that the Independence Constitution provided an elaborate guarantee against removal from office, did not, however, provide judges with adequate safeguards against possible abuse.¹⁵⁸ These formal provisions may not prevent threats of, and actual removal of individual judges as exemplified by the massive removal of judges in 2003, which exposed weaknesses in this presumably solid constitutional protection and placed under scrutiny the veracity of the removal clauses. This incident will now be discussed in some detail.

¹⁵⁶ Ibid

¹⁵⁷ Bethuel Ogot and W R Ochieng (eds), *Decolonisation and Independence in Kenya, 1940-93* (Eastern African Studies, Nairobi, 1995) 71

¹⁵⁸ Ogot (n 157) 73

4.3.4.1 The Radical Surgery

The year 2002 saw the end of President Moi's 24 year rule in Kenya and the advent of multi-party era. The NARC Government, under President Kibaki, took over power after a general election. It set about what it referred to as 'radical surgery' of a judiciary, which was regarded as corrupt and subservient to the executive under the Moi regime.¹⁵⁹ The Minister for Justice and Constitutional Affairs, Kiraitu Murungi, had promised a radical surgery of the judiciary when the new government came into power.¹⁶⁰

It started with the suspension of the Chief Justice, Bernard Chunga, in February 2003 and the subsequent setting up of a tribunal to investigate his conduct. He resigned from office before the tribunal became operational. President Kibaki then appointed Justice Evan Gicheru as Acting CJ. He immediately established the Integrity and Anti-Corruption Sub-Committee (hereinafter the Ringera Committee) headed by Justice Aaron Ringera, a sitting Court of Appeal Judge, in March of the same year. The mandate of the sub-committee was to investigate and report on "the magnitude and level of corruption in the judiciary, its nature and form, causes and impact on the performance of the judiciary" and "to identify corrupt members of the judiciary".¹⁶¹ The Committee concluded its investigations and presented its report to the CJ on 30th September 2003.¹⁶² It revealed that 18 High Court judges (50%), 82 Magistrates (32%)

¹⁵⁹ Gladwell Otieno, 'The NARCs Anti Corruption Drive in Kenya; Somewhere over the Rainbow?' (2005) 14(4) African Security Review <<http://www.iss.co.za.29/pubs/ASR/14No4/EOtieno.htm>> accessed 25 July 2009

¹⁶⁰ Anassi (n 2) 96

¹⁶¹ Ringera Report (n 19) 1

¹⁶² Ibid

and 5 Court of Appeal judges (56%), and 43 paralegals were implicated in judicial corruption and want of ethics.¹⁶³

The names and summaries of the allegations of all those named, including their photographs, were publicly displayed in the local newspapers and on television networks even before they were notified.¹⁶⁴ It is not known who was responsible for the leakage of the contents of the Report to the media. The CJ is reported to have demanded that those named “resign quietly or choose hard tackle tactics.”¹⁶⁵

What followed was a process of removal of judges that failed to adhere to due process and exposed flaws in the removal process. The CJ was accused of acquiescing to the whims of certain powerful forces in government to pursue the agenda of the executive in the judiciary.¹⁶⁶ Several judges opted to resign, thus lending credence to the view that the government wanted certain judges out of the way, perhaps because they were viewed to be too closely associated with the previous regime or that they would frustrate the new administration’s efforts on both the judicial and political front.¹⁶⁷

When the CJ gazetted the suspension of judges who had refused to resign, and the President appointed a tribunal to investigate their conduct, they were denied salaries and their cars; their wigs allowances and security were withdrawn by the High Court

¹⁶³ ‘Corruption in the Judiciary’, A Paper presented by the Hon. Mr. Justice (Rtd) Aaron Ringera, Director and CEO Kenya Anti Corruption Commission, Wednesday 25 April 2007, the World Bank, Washington <http://www.kacc.go.ke/archives/speeches/Justice_Ringera_Presentation20040047.pdf> accessed 25 July 2009

¹⁶⁴ Daily Nation October 1 2006

¹⁶⁵ Nation team, ‘Justice on Trial, Judges Plot to fight Back over Ringera’s ‘List of Shame’, October 8 2003 <http://www.mail_archive/uganet@kym.net/msg07754.html> accessed 25 July 2009

¹⁶⁶ Kamotho Waiganjo, ‘The Judiciary and Settling of Political Scores: Is it a weapon in the NARC Era?’ in Maurice Odhiambo Makaloo and Phillip Kichana (Eds), *Judiciary Watch Report: Judicial Reform in Kenya 2003-2004* (Kenya Section of the ICJ, Nairobi, 2005) 50

¹⁶⁷ Ibid

Registrar. One of the flaws of this procedure was that the Constitution did not provide the judges under inquiry with any right to be heard. Once a complaint was filed with the CJ and he represented to the President the question of removal of a judge, the representation triggered the process of removal without catering for an immediate process of hearing. This created a perception that the tribunals were mere vehicles leading to eventual removal.¹⁶⁸

First, there was no provision in the constitution as to the time limit within which to set up a tribunal and, second there was no provision as to whether the judges under investigation were to continue serving or whether they stood interdicted, suspended or otherwise. The judges were stopped from discharging their functions without any directions as to whether they would face a tribunal or not. The CJ was not obliged to present to the President the question of removal of any judge. It was within his discretion. The CJ might, in the absence of any legal safeguard, unethically use that information to blackmail judges against whom he has received petitions for removal to make decisions favourable to the state, or he could facilitate removal of state targeted unwanted judges. All he would have to do would be to select from the list of judges against whom petitions had been received, and selectively start the removal process while leaving out some names of those he wished to protect or the executive wished to retain to use later to return favours to the executive in terms of favourable judgments.

Though the Constitution provided for the specific action to be taken when cases of removal arose, it failed to enumerate which specific provisions or rules could seal the loopholes identified by these instances. The CJ used his own unethical procedures and

¹⁶⁸ James Gondi, 'The need for a Disciplinary Process in Addition to the Removal Process for Judges in Kenya: A Comparative Perspective', Phillip Kichana (ed), *Judiciary Watch Report: Judicial Reform in Kenya* (Vol. 1 Kenya Section of the ICJ, Nairobi 2005) 55

has been accused of sacking judges through the press when there was no such provision in the Constitution,¹⁶⁹ hence a weakness in the Constitution. The ICJ's assessment of the ramifications of the radical surgery of the judiciary captured several pertinent issues affecting judicial independence:

The removal of Justice Aganyanya exposed flaws in the process employed...the process is considered a source of embarrassment for the judicial officers involved and brought the judicial institution disrepute ridicule and disrespect...the role of the Chief Justice viz a viz the function of the president under the constitution brings into question the independence and impartiality role...the constitution does not specify how a Chief Justice comes to know that the question of removing a judge has become necessary.¹⁷⁰

Other critics said:

In effect, the so much publicised 'radical surgery' has negatively affected the performance of the judiciary since 2003. The 'surgery' took away the confidence of the judiciary and reduced the provisions of security into mere pieces of paper. Additionally, the 'surgery' has resulted in the judicial officers suffering job insecurity. By itself this is a different form of corruption. It appears that monetary corruption is being replaced with job insecurity¹⁷¹

Others observations have been made to the effect that:

There is absolutely no indication or guidance under section 62(5) of the Constitution as to how the CJ is expected to go about establishing a case for removing a judge. The matter is left entirely in the sole discretion of the CJ and there would appear to be even no obligation whatsoever imposed on the CJ's exercise of his power to observe the rules of natural justice. Accordingly, the absence of express constitutional or statutory provision regarding the exercise of this power is open to abuse and can lead to a miscarriage of Justice.¹⁷²

This confirms the compromising of judicial independence. It further reiterates the separation of powers concept that power which is not subjected to checks and balances can lead to arbitrariness and adversely affect the rule of law. This was evident in the findings in some of the cases filed by some of the dismissed judges seeking, *inter alia*,

¹⁶⁹ Judy Ogutu, 'Suspended Judges say CJ Violated the Law' The Standard June 29, 2006

¹⁷⁰ On the Reinstatement of Justice Aganyanya and the need to reform the Removal process <<http://www.icj.org>> accessed 23 July 2009

¹⁷¹ Kowade (n 138) 39

¹⁷² Onyango Otieno Report (n 21) 19

orders of judicial review against the decision by the CJ and the respective tribunals established by the President to hear their cases.¹⁷³

This is a clear indication that even though the Constitution appeared to provide for secure tenure, it was not comprehensive. There were, indeed, loopholes that could be exploited or misused to the disadvantage of the judges and compromise both decisional and institutional independence of judges. Judges who are easily removable cannot be said to be independent. An institution upon which the executive can intrude with ease to remove judges cannot convince citizens of its capacity to check the excesses of the executive, protect their fundamental rights, and uphold the rule of law.

4.3.4.2 The Aborted Impeachment of the CJ Evan Gicheru

In 2009 another opportunity presented itself. Again here, the veracity of the constitutional provision on security of tenure was put to test thereby exposing gaping weaknesses. A question arose whether the conduct of the then CJ ought to be investigated requiring the President to appoint a tribunal according to the Constitution.¹⁷⁴ The LSK petitioned the President through the legislature seeking the removal of the then CJ, Evan Gicheru, on account of misconduct. What followed was total silence from both the Minister for Justice and Constitutional Affairs under whose docket the judiciary falls, and the President. The Chairman of LSK accused the President of dragging his feet despite numerous complaints against the judiciary. ‘It is three months since we requested this tribunal. We have sent numerous reminders

¹⁷³ *Joseph V. V. Juma v The Chief Justice of Kenya & 6 Others*, Constitution Petition No. 261 of 2009, *Hon. Justice Amraphael Mbogholi Msagha v The Chief Justice & 7 Others*, HCCC Misc. Application No. 1062 of 2004,

¹⁷⁴ S 67 (7)

through the Justice Ministry but in vain', they complained.¹⁷⁵ The process of receiving the petition and also the time limit for acting upon it was not provided by the constitution. Whether the Minister brought the content thereof to the President at that time could not be ascertained. Whether the President received the complaint, could not be ascertained. Hence, the speculation was rife.

The lawyers were intimating that the President had not acted on their request thus protecting his 'appointee', the CJ. It is this exercise of discretion that creates the perception of control and/or subservience, since it could be argued that the President, in protecting the CJ by declining to appoint a tribunal to investigate his conduct, would in turn expect certain favours from him should any cases against the President himself, or even the executive be brought before courts. The Minister, being a politician and member of the executive, could collude with the President not to act on the petition or not to forward the petition to the President, creating the perception that the said Minister, too, was protecting the CJ's interest. This was due to the fact that the procedure to be followed in accessing the President was not outlined in the Constitution.

The President finally responded, after the Minister for Justice resigned from government alleging lack of executive commitment to judicial reforms, and blaming the CJ for blocking reforms and for non-performance by the judiciary.¹⁷⁶ The President declared that he had full confidence in the CJ and found no basis upon which to appoint

¹⁷⁵ Dave Opiyo, 'Act on CJ Petition, lawyers tell Kibaki', *Daily Nation*, Thursday 12 February, 2009 <<http://www.nation.co.ke/news/politics.-1064/527394/-/ygsgfz/-/index.html>> accessed 12 February 2009

¹⁷⁶ 'Justice Ministry has no Mandate' The Standard Online 15 April 2009 <<http://www.standardmedia.co.ke>> accessed 1 April 2009

a tribunal to remove the CJ.¹⁷⁷ This decision could have been correct and even made in good faith and after diligent consideration of the issues raised, but the fact that it was made, with no input, consultation or advice from the JSC or Parliament, negates any merit that could have justified it. The preference by the President for the CJ, over that of the Minister, could reinforce the argument that he was protecting the CJ from impeachment. Just as the same CJ caused the removal of the other judges in 2003, upon receipt of petition, it can safely be stated that when it came to his own petition the same rules did not apply under the same Constitution. The protest by the LSK was simply in consonant with the idea that justice must not only be done, but be seen to be done.

A CJ whose job and reputation are ‘saved’ through such an opaque decision making process by an individual can be said to be likely to return this favour whenever the executive, or even the President personally, calls upon him to ‘help’. The actions of the CJ, who was five years later accused of swearing in the same President ‘at night’¹⁷⁸ after a heavily disputed presidential election results in December 2007, would easily fall prey to this perception of returning a favour to the President. The election results were rejected by the opposition and are part of the reasons which led to the breakdown of law and order. The importance of the role of the CJ as the face of a country’s judiciary and the ramifications which can arise if he is perceived not to be independent is, thus, exposed by this single action of swearing the President into office. The CJ might have had no option but to conduct the swearing in duties once the results were officially announced. He might also have acted in good faith and within the law. But due to compounded perceptions, over the years, that the judiciary as led by successive

¹⁷⁷ ‘Kibaki Dismisses Lawyers Petition against Gicheru’ The Standard 4 April 2009 <<http://www.standardmedia.co.ke>> accessed 1 August 2009

¹⁷⁸ The swearing in was conducted hurriedly at 7.00pm under cover of darkness without the presence of foreign dignitaries and the opposition parties

CJs have been subservient to the executive, breakdown in law and order followed all the same. These events expose deep flaws, gaps, and weaknesses with the possibility of misuse, not to mention the fertile ground upon which perceptions of subservience and lack of independence can quickly germinate and threaten the very rule of law which the CJ is expected to protect or ensure that the judiciary as an institution protects. The CJ exercises administrative functions. For example, he selects judges to hear judicial review, election petitions (for the President and members of parliament) and also constitutional references for the interpretation of the constitution. Consequently, he cannot convince the public that he will undertake these functions without fear or favour. The independence of both the institution and of the judges becomes seriously compromised.

4.3.4.3. The Lack of Disciplinary Procedure for Judges

An absence of constitutional provisions for dealing with situations of serious misbehaviour of judges, which nonetheless, do not warrant removal, was noted by the Onyango Otieno Report.¹⁷⁹ While not every misdeed justifies the removal of a judge, the dignity of the office necessitates the establishment of mechanisms to deal with such cases. Flaws pointed out included the fact that the JSC had no role to play in the removal of judges, even though it plays a vital role in the process of sourcing for and appointing of judges.¹⁸⁰ The CJ, too, had limited options in the exercise of disciplinary control of judges in the absence of formal disciplinary procedures, meaning that there was little opportunity to monitor the conduct of judges.¹⁸¹ Minor complaints could not

¹⁷⁹ Onyango Otieno Report (n 21) 18

¹⁸⁰ Ouko Report (n 22) 22

¹⁸¹ Ibid

be effectively dealt with. It was suggested that such procedures should be formalised.¹⁸² But again, this could be detrimental to judicial independence since the criteria distinguishing which misdeeds are major or minor were unknown.

Such misdeeds, though unacceptable, if not promptly addressed quickly acquire a life of their own, and soon become habitual. This poses a two pronged threat to judicial independence. On one hand, is the perception that those judges who exhibit such behaviour are under the protection of the CJ, the JSC or the executive. On the other hand, it makes judges who engage in such minor misbehaviour vulnerable. They may keep them looking over their shoulders, not knowing exactly when the CJ will decide to act against them upon receiving a complaint or petition from anyone. The uncertainty created by this absence of formal procedures can also be beneficial to judicial independence as it could keep judges on their best behaviour.

The need to provide for disciplinary matters which do not warrant dismissal is critical if the judiciary is to avoid perceptions of lack of independence. One such solution could be to establish a standing subcommittee of the JSC, which would, on a continuous basis, deal with lesser misdeeds.¹⁸³ This could be provided for in the Constitution or statute. This move, coupled with the tightening up of the loopholes identified in the removal process, would greatly enhance the independence of the judiciary and relegate the tendency to expose the judiciary to both external and internal control to the back stage.

The events following the radical surgery teaches an important lesson that security of tenure must be properly secured and should not be left to chance or in the

¹⁸² Ibid

¹⁸³ Ouko Report (n 22) 23 Onyango Otieno Report (n 21) 46

hope that it will be properly used. Failure to do so can easily lead to abuse by those entrusted with power of removal. The ramifications of weak constitutional protection of judicial independence, has been demonstrated. A judiciary which is susceptible to mass dismissals cannot command the confidence of the citizen, is weak against the executive power, and is unable to exercise its constitutional mandate effectively checking the excesses of the executive. Judges who are perpetually afraid that they will be dismissed will always be or appear to decide cases at the behest of the executive. The solutions proffered by the reform initiatives in an effort to seal loopholes identified and to avoid future abuse of power by the executive as enumerated above, are novel and pragmatic. Such recommendations require serious consideration and implementation.

4.3.5 Fiscal Autonomy

The effective functioning of the judiciary depends, in large measure, upon financial and material resources made available to it.¹⁸⁴ According to Shetreet, “a common method of indirect interference with personal independence of judges is touching their purse. It can be their personal purse (remuneration) or their collective purse, the court budgets and resources”.¹⁸⁵ The important point to note here is that interference with the court budget be it in terms of judges’ personal salaries or finances for purchases of equipment, improvement of physical facilities, libraries, motor vehicles, etcetera, in equal measures, threatens both institutional and decisional independence. According to Justice Purchas:

Constitutional independence will not be achieved if the funding of the administration of justice remains subject to the influences of the political market place. Subject to the ultimate supervision of Parliament, the judiciary should be allowed to advise what is and what is not a necessary expense to ensure adequate

¹⁸⁴ King (n 152)405

¹⁸⁵ Shetreet & Deschenes (ed), (n 39) 607

justice is available to the citizen and to protect him from unwarranted intrusion into his liberty by the executive.¹⁸⁶

Widner also captures the challenges of lack of adequate funding, albeit from a different perspective in her analysis of judiciaries in African countries in the 1900s. She observes:

In countries where courts lacked money to publish important decisions, the law was hard for magistrates, judges and litigants to know. In some instances, the statutes themselves were unavailable too. Because judges and magistrates in different courts applied different rules, equality before the law suffered.¹⁸⁷

She connects the lack of financial support for the judiciary to lack of decisional independence.

These circumstances resonate well with the Kenyan situation where budgetary allocations to the judiciary are meagre and/or inadequate. In such cases, the personal competence of judges and magistrates is compromised. Their fidelity to the law is then put to question and it becomes difficult to determine whether their decisions arise from ignorance of relevant laws, corruption, ideological aspects, or simply deference to the executive. Judges deprived of such guarantees cannot be seen to act independently.¹⁸⁸

Barak, though not against provision of adequate funding for the judiciary, nevertheless, cautions that the same should be countenanced by some level of accountability. He says:

In keeping with the principles of checks and balances upon which judicial independence is hinged, the judicial branch must of course be part of the checks and balances therefore the judicial branch should not determine its own budget. The

¹⁸⁶ Bingham, (n 56) 57 citing Purchas, 'What is Happening to Judicial Independence' [1994] New Law Journal 1306, 1308

¹⁸⁷ Jennifer A. Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, (W W Norton and Company Ltd, New York 2001) 30

¹⁸⁸ Carlo Guarneri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, (OUP, Oxford, 2002) 76

judicial branch's budget should be set by the legislative branch, and the judicial branch should give the legislative branch an accounting of the way it is run.¹⁸⁹

This is perfectly in consonance with the principle of checks and balances. Some claim that the justice system is not the only claimant to a nation's resources.¹⁹⁰ That there are other departments of government equally competing for the same resource, hence the judiciary should not be left to determine its own funding is reasonable.¹⁹¹

The Kenyan judiciary is funded from public resources through the Medium Term Expenditure Framework (MTEF) process in which public institutions are grouped into sectors. The judiciary was grouped in the Governance, Justice, Law and Order Sector that brings together the Office of the President, the Office of the Vice President and Ministry of Home Affairs, Parliament, Ministry of Justice and constitutional Affairs, State Law Office, the Kenya Anti-Corruption Commission, Ministry of State for Immigration and Registration of Persons and Electoral Commission of Kenya (and now its successor, the Interim Independent Electoral Commission).¹⁹² Each institution in the sector was subjected to a resource "ceiling" which decision is subject to the discretion of the Minister for Justice and Constitutional Affairs, the parent ministry charged with disbursing the funds.

While the sector approach is intended to achieve a coordinated approach to financing of public expenditure, the judiciary has not received funding commensurate with its needs.¹⁹³ Even though salaries and allowances of judges are paid directly out of

¹⁸⁹ Aharon Barak, *The Judge in a Democracy* (Princeton University Press, Princeton 2006) 80

¹⁹⁰ See generally Brown Wilkinson N, 'The Independence of the Judiciary in the 1980's' [1988] Public Law 44-45

¹⁹¹ Ibid

¹⁹² Ouko Report (n 22) 18

¹⁹³ Ibid

the Consolidated Fund,¹⁹⁴ the budget for the judiciary as an institution is not adequately protected from executive interference. The potential fear is that executive can decline to provide adequate funding to the institution in order to frustrate it and force the hands of judges to decide in a particular manner or settle scores if it is not happy with their decisions.

With regard to the rest of the budget, the judiciary, like all other departments, prepares its budget and the same is forwarded to Parliament through its parent Ministry, the Ministry of Justice and Constitutional Affairs. The Minister can amend the budget without further consultation with the Judiciary. The judiciary is, therefore, completely reliant in its budgetary requirements on the executive. The executive can also slow down the pace of administration of justice by neglecting to pass to Parliament Bills that requisition more funding. The former CJ once accused the Minister of Justice and Constitutional Affairs of failing to push through the Judicial Services Bill that could provide financial autonomy to the judiciary.¹⁹⁵

A close scrutiny of the reform initiatives reveals a consensus that the financial independence of the Judiciary should be entrenched in the constitution. They all urged that the Judiciary should enjoy financial budgetary autonomy, draw up its own budget and deal directly with Parliament. Bold proposals were made by various reform initiative reports to the effect that the State should be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively, hence,

¹⁹⁴ ss 104 (2), 99 'All revenue or other monies raised and received for the proposes of the Government of Kenya shall be paid into or form a Consolidated Fund'

¹⁹⁵ Wahome Thuku, 'Judiciary seeks Sh5 billion to implement Reforms' <<http://standardmedia.co.ke>> accessed 1 September 2009

the call for a direct charge of the finances of the judiciary on the Consolidated Fund coupled with appropriate and elaborate constitutional provisions.¹⁹⁶

4.3.5.1 Terms and Conditions of Service

Judicial remuneration is the other point where, traditionally, there has been concern about judicial independence.¹⁹⁷ The old adage ‘he who pays the piper plays the tune’ is incompatible with judicial independence.¹⁹⁸ Judicial salaries that are too low to attract qualified legal personnel or retain them and enable judges and court staff to support their families in a secure environment prompt judges to engage in bribery.¹⁹⁹

The Kotut Report, observed that:

Financial independence of the judiciary from the legislature and administrative control, is however, not alone sufficient to enhance competence and capacity of the judiciary to administer justice. The Judiciary should have a structure of salaries, conditions of service and related benefits which would free its members from anxiety as to the adequacy of remuneration in relation to society’s high expectation of honour, ability, high standard of competence and integrity.²⁰⁰

It further identified maintenance of independence and enhancement of the rule of law as among other challenges that sufficient remuneration was expected to meet.²⁰¹

The Kwach Report found that the bulk of the woes facing the judiciary revolve around budgetary allocations which cannot cover the basic needs of the judiciary.²⁰² They noted that historically court facilities have not been a priority in the allocation of national budget and this affected the overall perception and image of the judiciary.²⁰³ In

¹⁹⁶ Kanyeihamba Report (n 18) 25 Onyango Otieno Report (n 21) 46 Ouko Report (n 22)1

¹⁹⁷ Russell & O’Brien (n 23)18

¹⁹⁸ Ibid

¹⁹⁹ Global Corruption Report 2007 <<http://www.transparency.org/content/download/18824/257028>> accessed 21 July 2009)

²⁰⁰ Kotut Report (n 16) 5

²⁰¹ Kotut Report (n 16) 7

²⁰² Kwach Report(n 17) 2

²⁰³ Ibid

their tour of courts, they observed that the working environment of the judiciary was unsightly and degrading; they saw dilapidated courts, worn out furniture, poorly stocked libraries, or none at all, with magistrates borrowing basic statutes from the police.²⁰⁴

The Ringera Report documents affirmative evidence from both members of public and judicial officers that poor terms and conditions of service in terms of salaries, housing, transport, and personal security led exposed magistrates and judges to engage in corrupt activities.²⁰⁵ Malicious prosecutions, contradictory decisions by courts (diluted jurisprudence) and wrong convictions appeared to be the order of the day. This, in turn, resulted in loss of confidence because of the perception that courts were not rendering pure justice according to law, hence people were increasingly resorting to extra judicial methods of conflict resolution, such as, the practice of mob lynching of suspects and adversaries.²⁰⁶ It is not only the public who resorted to extra legal means, but even judicial officers went on strike on account of poor terms and conditions of work.²⁰⁷

The role of the judiciary as an independent and impartial arbiter of legal disputes and the guardian of individual rights and freedoms was put under serious threat. The Report concluded that this was attributable to the dependence of the

²⁰⁴ Ibid

²⁰⁵ Ringera Report (n 19) 16

²⁰⁶ Ibid

²⁰⁷ *Joyce Manyasi v Evan Gicheru & Three others*, High Court Misc. Application 920 of 2005 A Judicial Review application in which a magistrate was dismissed by the JSC for participating in a strike action. The High Court later quashed the decision of the JSC and granted an order of *Mandamus* for her reinstatement

judiciary on the executive in matters financial. As at 2005, it was reported that the budget allocation to the judiciary stood at 1% of the total national budget.²⁰⁸

When judges or the judiciary have to lobby the executive to specifically present their request before parliament for a pay rise or creation of better terms and conditions valid concerns as to their independence can be raised. This is because the budgetary procedures require that the Minister for Justice be the one to place the budget of the judiciary before parliament before allocations are made, and he is not obliged to go out of his or her way to vigorously ensure that the funds are obtained or defend the budget. This may require judges to personally call at the minister's offices or meet with him in order to plead their special cases for better terms.

The possibility that the request could be granted upon the agreement that the judges will go slow or be a bit softer on government cases cannot be ruled out. Neither can the possibility that the minister could subtly or pointedly seek favours from the judges. This is a potential threat to both decisional independence and institutional independence. The judges may comply in order to improve their personal financial standing either individually or collectively and violate the principle of judicial impartiality. It may not be possible to know exactly the factors that influence the decisions of individual judges, but this does not take away the possibility that personal circumstances can be one such consideration.

The important point here is that there is need to minimise such possibilities, but still concede the existence of other competing interests. Failure by a judge to be impartial due to lack of knowledge of applicable law, if such failure is a subject of state machination to deny the judiciary funds to access legal material to enable him decide

²⁰⁸ ICJ Report (n 20) 48

according to law, will equally compromise decisional independence. It matters not which party benefits or exactly the reasons that influenced that decision.

4.3.6 The Office of the Chief Justice

Generally, one cannot deny the need for administrative supervision over judges to promote efficiency of judicial administration.²⁰⁹ Therefore, judges must submit to administrative guidance by other judges who are in charge of the administrative management of the court.²¹⁰ This is a potentially powerful method by which the executive can influence judicial decision making through the administrative process. It becomes a threat to judicial independence if cases are allocated with a view to achieving specific desired outcomes. This is so, especially in politically sensitive cases, where the executive has an interest in cases involving violation of fundamental rights or those that require interpretation of the constitution or cases of judicial review generally.

4.3.6.1 Case Allocation

The CJ is the head of the judiciary and exercises the power to allocate duties to judges. He selects judges to head specific divisions of the High Court. He also allocates cases to judges of the Court of Appeal.²¹¹ For example, if the law requires that a matter be heard by three judges, the duty Judge administratively forwards that file to the CJ who selects judges to hear the case. He owes nobody any duty to explain the rationale of the selection, neither are there any rules or policies to guide this selection process. The decision as to which judge is to hear a case is critical to the outcome. When the CJ is seen to be an extension of executive authority in the judiciary in the manner

²⁰⁹ Shetreet & Deschenes (n 39) 643

²¹⁰ Ibid

²¹¹ This is from personal knowledge and experience

discussed above and he is in charge of control of allocation of cases, then the threat to decisional independence becomes very real. This point was aptly captured by the International bar Association when citing instances when such tactics were used by the former CJ. They state that:

... The overriding concern is that during his tenure, Chief Justice Gicheru has allegedly been responsible for 'gate-keeping' that is, using his position as the most senior judicial officer in Kenya to ensure that the political establishment is protected from legal challenge. By way of example of an alleged gate-keeping arrangement, one interlocutor highlighted the appointment by the CJ of what he termed 'politically correct' judges to the Constitutional and Judicial Review Division of the High Court. Another cited a practice whereby judges of the same court are encouraged to refer cases, as a matter of course, to the CJ for directions. The delegation was informed that this practice which has no statutory basis, involves High Court judges seeking the advice of the CJ in cases where they are uncertain as to where influential political interests may lie.²¹²

It was also reported that certain judges were perceived as pro government while others were seen as either anti-government or pro-human rights and that the latter category never got sensitive political cases allocated to them.²¹³ Widner revealed how the office of the Duty Judge in Kenya was grossly abused, by quoting an incident where a judge who had not been assigned duties for a very long time consistently allocated himself all politically sensitive cases and proceeded to dismiss them".²¹⁴

There were complaints that certain judges were rotated only in the constitutional court, hence perpetuating forum shopping.²¹⁵ The Kwach Committee too reported that they received complaints that some judges were serving as duty judge for too long a

²¹² 'Restoring Integrity: An Assessment of the Need of the Justice Systems in the Republic of Kenya', A report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute, February 2010, 37 http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx#2010 accessed 20 July 2010

²¹³ IBA Report 1996 (n 130)

²¹⁴ Widner (n 187) 61

²¹⁵ David Shikomera Majanja, 'The Institution of the Constitutional Court: Which way for Kenya' in Maurice Odhiambo Makaloo and Phillip Kichana (eds) *Judiciary Watch Report: Judicial Reform in Kenya 2003-2004* (Kenya Section of the ICJ, Nairobi 2005) 72

period.²¹⁶ Moreover, the Duty Judge in the Civil Division of the High Court at Nairobi entertained, at first instance, all matters filed under certificates of urgency and also allocated cases to the other judges in the division. He therefore decided which judge heard which case. When this responsibility is not fairly shared amongst all judges, it creates suspicion that the duty judge is being used to protect executive interests to the detriment of the citizen. This is more so since judicial review of administrative action is one area where the judiciary checks the excesses of executive action.

4.3.6.2 Punitive Transfers

Punitive transfers to hardship areas, the withdrawal of work from judges, deliberate case overload, withholding permission to judges to attend both local and international conferences, withholding benefits from individual judges such as housing, pool cars and even demanding to see judgments before their delivery were common.²¹⁷ Interviews conducted by the Kenya Section of ICJ, revealed that most judicial officers perceived transfers as one of the punitive measures used by the CJ to harass and intimidate judicial officers, hence, promoting nepotism and patronage at the expense of smooth administration of justice and development of the rule of law.²¹⁸ This could also be as a result of decisions made by judges who were not liked by the CJ, or the government by extension. The most effective method is the transfer of a magistrate or a judge by the CJ from one court to another, denying them permission to conclude cases already commenced in the former court. Such cases are taken over by other judicial officers. Administrative powers of the CJ can in the circumstances be misused by the

²¹⁶ Kwach Report (n 17) 40

²¹⁷ Frederick W. Jjuuko (ed), *The Independence of the Judiciary and the Rule of Law*, (Kituo Cha Katiba Kampala, 2005) 3

²¹⁸ ICJ Report (n 20)

executive to compromise personal independence of judges or allocate cases to judges who were more likely to deliver judgements in favour of the executive.

4.3.7 Interference by the Executive and ‘Hands-off’ Approach by the Judiciary

Direct interference with cases before courts in Kenya is not a new phenomenon. Examples abound. On 24th May, 1996, President Moi is reported to have warned the judiciary to keep off political party matters, claiming that political parties had constitutions to guide them and that the judiciary would reduce its status by handling such cases. He later repeated this warning at a public rally when he asked the CJ not to hear actions against political parties arguing that political party issues should be resolved internally by the parties.²¹⁹ The case of *James Keffa Wagara & Rumba Kinuthia v. John Anguka and Ngaruro Gitahi*,²²⁰ involved the interpretation of the issue of whether the court could offer redress to a member of the ruling party, KANU,²²¹ who alleged that the nomination process of the party had not been fair as the plaintiffs had not been to witness counting of votes. The defendants, on the other hand, argued that the matter was entirely regulated by KANU nomination rules and, therefore, could not be the subject of the courts scrutiny. The court on a preliminary objection declined to interfere and developed a ‘hands off approach’ to party matters. Even though it cannot be categorically stated that the judge complied with the president’s public warning, it cannot be ruled out. Such decision could have created the perception that the judiciary was subservient to the executive.

²¹⁹ Mona Rishmawi *et al* (eds), *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers*, (CIJL of the ICJ, Geneva 1997) 220, 221

²²⁰ HCCC 724 of 1988 (unreported)

²²¹ KANU was President Moi’s ruling party. It should be noted that this was during the beginning of multi party politics.

In another documented incident, the Vice President reportedly wrote a letter to a magistrate regarding an on-going criminal case, sending wrong signals of judicial independence. The magistrate protested the impropriety of the letter and reprimanded the Vice President. He said:

I humbly point out that your open support for the accused persons in this case has made the trial difficult for they no longer have any respect for the court and are somehow sure that you will order their acquittal²²²

A threat to institutional independence and the rule of law is clearly discernible by the tone of this letter. The immediate transfer of the magistrate from the court which was located within the constituency of the Vice President was seen as extremely inappropriate, indicative of executive meddling in the work of the courts.²²³ Personal independence was also threatened as the CJ did not respond to protect the independence of the court and it is possible that the magistrate was punished by this transfer.

Interference by executive as enumerated in the manner above, coupled with lack of support and/or complicity from the head of the judiciary, highlights the adverse ramifications that the CJ's office can have on decisional independence especially when the CJ is under the influence of the executive. The case of Justice Schofield, discussed above, also neatly fits in this category of telephone law.²²⁴ Implications on both institutional and personal independence are evident.

²²² 'Magistrate asks CJ for protection' <<http://www.propertykenya.com/news/466448-magistrate-asked-chiefjustice-forprotection-from-meddling>> accessed 26 July 2009

²²³ Editorial note, *Daily Nation* (Nairobi 23rd April 2007) Judicial officers being called on telephone to be given instructions on how to decide a case before them

²²⁴ ICJ Report 2005 (n 20)

4.4 Conclusion

The preceding analysis confirms that the Kenyan judiciary has, over a long period of time, experienced challenges to its independence. The experiences discussed highlights the dangers of failing to put into practice the appropriate balances of power between the three arms of government. In the case of Kenya the executive is seen as the dominant arm with an overbearing and controlling attitude over the judiciary and legislature. Legislative or judicial check on the executive with regard to the judiciary was almost non-existent in the constitution. Lack of independence, whether perceived or factual, had a direct influence on citizens' view of justice and impartiality of the courts. Inappropriate or excessive executive intrusion, influence or presence in the judiciary, be it by way of appointment, vesting of judicial power, protection of tenure, or administrative control was replete with undesirable executive intrusion and control. This in turn compromised judicial independence, weakened its structures, eroded public confidence in the Judiciary and threatened the rule of law.

That the executive was the greatest obstacle to the achievement of judicial independence gained even more credence. The executive was largely responsible for the compromising of judicial independence. The judiciary is charged with the function of upholding the rule of law and for it to effectively play this role, it must be independent. The executive and legislature have a role to play in promoting and protecting judicial independence. The difficulties of practically applying these principles of separation of the powers and the rule of law concepts which in turn inform the concept of judicial independence can clearly be attributed to failure by the executive in Kenya to appreciate and respect the objectives and values inherent in these concepts.

This chapter has demonstrated that Kenya's experience with judicial independence falls short of being faithful to the requirements of separation of powers and the rule of law as outlined in chapter two in view of the evidence of heavy concentration of powers in the executive. The Kenyan judiciary therefore, cannot be said to have been independent of the judiciary under the Independence Constitution of 1964.

Reports generated in an attempt to initiate judicial reform were exhaustive in content and scope, candidly exposing the heavy concentration of power in the executive to the detriment of the judiciary. Cumulatively, the legitimate concern for the apparent lack of independence has led to serious crisis of confidence in the judicial system. What is most evident is that for the greater part of 46 years under the Independence Constitution, the executive arm of government charged with the responsibility of developing policies, translating them into legislation and providing a framework for implementation of judicial reforms, made no serious attempts at reversing this negative trend. Evidently, repeated calls (recommendations) for enhanced constitutional protection for judicial independence by way of amendments to the constitution appear to have been ignored. This buttresses the argument, in this study, that the protection provided in the Independence Constitution was minimal, weak, and susceptible to misuse. The Independence Constitution, it can be confidently confirmed, did not provide adequate protection for the independence of the judiciary in personal or institutional aspects. This has been demonstrated by the ease with which the executive, either on its own or with the complicity of the JSC or the CJ, compromised the independence of the judiciary. The argument that weak constitutional guarantees for judicial independence will inexorably translate into a weak judiciary incapable of checking the excesses of executive is tenable. The fact that judicial independence is

protected in the constitution does not deter its violation as exhibited by the instances of direct interferences by the executive in the affairs of the judiciary.

The reform initiative processes, in their numerous recommendations for comprehensive constitutional amendments, largely contributed to the content of the wider constitution review process which generated momentum and finally culminated into the declaration of a new constitution. The next chapter critically analyses the reform initiatives proposals which were implemented within the period under study hereinabove and the new constitution which came into force in the later course of researching this study (2010). It attempts to assess whether the loopholes and weaknesses in the law as identified and highlighted in this chapter have been effectively sealed, thus laying a much better foundation for the birth and growth of a new and more independent judiciary.

CHAPTER FIVE

THE SEARCH FOR AN INDEPENDENT JUDICIARY: IMPLEMENTED REFORMS AND CONSTITUTION OF KENYA 2010; A CRITICAL ANALYSIS

Each country must find a solution which is sensitive to its democratic culture, achieving an effective balance between the powers of the judges and the powers of government and legislature.¹

5.1 Introduction

Kenya's experience, as demonstrated in the previous chapter has revealed that, even though the Independence Constitution 1964 (hereinafter referred to as the Old Constitution) provided a normative framework for protection of judicial independence, the safeguards were minimal, weak and not respected in practice. Evidence provided revealed numerous repeated violations of the principles of separation of powers which in turn created a weak judiciary lacking in independence and perceived to be incapable of protecting citizens against the excesses of the state. This was attributable to the failure by the executive to appreciate the critical objectives and values of the constitutional concepts of separation of powers and the rule of law. Political leaders, it is evidently apparent, continue to struggle with the task of delicately balancing these western constitutional concepts, which are now irreversibly part and parcel of the Kenyan legal landscape. It is against the backdrop of this perennial atrophy, that the judiciary acquired prominence as requiring dire reform.

¹ Lord Irvine of Lairg, "Parliamentary Sovereignty and Judicial Independence" in John Hartchad and Peter Slinn, *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach*, , (Cavendish Publishing Ltd, 1999) 33

In the initial stages of the process of constitution making, Kenyans anticipated a new constitution where the judiciary would be independent and ensure that government acts lawfully at all times.² The judiciary like other key institutions had according to the Kenyan public, become a major violator of human rights.³ Kenyans were making a new constitution which they believed would create a new judiciary that would enhance natural justice, respect for human rights and democracy.⁴

This expectation continued to be amplified even after the promulgation of the New Constitution. The Minister for Internal Security, George Saitoti, whilst contributing to a debate in the National Assembly, stated that:

With the new constitutional dispensation, we are able to build stronger institutions than we had under the Old Constitution...the judiciary was viewed as totally incapable...With the kind of constitution we have put in place, we should be able to put in place a very strong and credible judiciary.⁵

Such a comment, emanating from an elected Member of Parliament, speaking for and on behalf of the common citizen, reasonably reflects the general expectation of Kenyans, on the kind of judiciary they expect to see. It is therefore pertinent to discuss how the New Constitution facilitates, or enhances, the chances of the realisation of judicial independence in Kenya.

Before the enactment of the new constitution, some attempts had been made to implement some recommendations by the reform initiatives as identified in chapter four. The mechanisms put in place with a view to improve judicial independence, are also analysed briefly before the analysis of the new constitution commences.

² *Report of the Constitution of Kenya Review Commission (CKRC): Volume One; The Main Report*, (CKRC Nairobi, 2003) 59

³ CKRC Report (n 2) 111

⁴ CKRC Report (n 2) 71

⁵ National Assembly Official Report 2 February 2011 9.00am 25; Hansard 02.02 11A

<http://www.bunge.go.ke/index/.php?option=com_content&view=article&id=186Itemid=160> accessed 5 March 2011 Comments by George Saitoti, Minister of State in the Office of the President

This chapter is divided into four parts. Part one analyses judicial reforms undertaken before the promulgation of the New Constitution. Part two gives a historical account of the constitution making process till its' promulgation. Part three engages in an examination of the New Constitution by assessing the extent to which its provisions complies with the requirements of checks and balances theory compatible with the establishment of an independent judiciary which can realistically achieve the rule of law ideals. Part five identifies the recommendations which were not taken into account but were part of recommendations made. The analysis is heuristically mirrored against the weaknesses identified in the 1964 Independence Constitution.

Immediately upon the enactment of the 2010 Constitution, the implementation process commenced as mandated by its transitional provisions. To that end some crucial legislation has already been passed by Parliament with the sole objective of breathing life into the framework provided by the New Constitution.⁶ These statutes will also form part of the analysis and will provide useful insights into the behaviour and attitudes of the executive and legislative branches towards the new found enhanced protection of independence availed to the judicial branch by the new constitution. The emerging increased participative role of Parliament as a check on the judiciary and its impact on judicial independence is also discussed. Weaknesses or omissions in the New Constitution are examined, with a view to proffer further proposals for reform, a subject of the next concluding chapter. The thesis that constitutional guarantee for judicial independence is a necessary condition for its observance and further that a more robust protection is an even better method of protecting judicial independence, continue to be tested in this discourse.

⁶ Vetting of Judges and Magistrates Act, Act No 2 of 2011, (Government Printer, Nairobi 2011) and the Judicial Services Act, Act No. 1 of 2011 (Government Printer, Nairobi 2011)

For the purposes of this and subsequent chapters, the Independence Constitution 1964, will be referred to as the Old Constitution whilst the Constitution of Kenya 2010 will be referred to as the New Constitution.

5.2 A Brief Analysis of Reform Initiatives' Achievements

It would be untrue to claim that prior to enactment of the New Constitution, no attempts were made to address the challenges discussed in the previous chapters. Indeed, some commendable interventions were undertaken in an attempt to separate the judiciary from the executive and, also, to improve judicial independence generally. However, the steps taken had no significant impact on judicial independence. The hurdles encountered are discussed. The next section discusses these attempts.

5.2.1 De-linking the Judiciary from the Executive

When the Waruhiu Committee was commissioned in 1985, the judiciary was part of the Public Service and a department under the Attorney General's office. The committee noted that the judiciary was being treated as an appendix of the government instead of a distinct arm, thus compromising the doctrine of separation of powers and eroding the independence of the judiciary.⁷ It blamed the previous committees for failing to appreciate this important distinction.

The Kotut Committee in 1990 further deliberated on this issue more vigorously and reiterated the sentiments expressed by the Waruhiu Committee.⁸ They clearly

⁷ Report of the Civil Service Review Committee 1979-80, (Government Printer, Nairobi 1980) Para 275 277

⁸ Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-92, (Government Printer, Nairobi 1992) para 14

appreciated the functional role of the judiciary within the context of separation of powers and the rule of law. However, a scrutiny of their respective terms of references reveals that an examination on how power ought to be shared between the three arms of government was not included as part of their mandate. They were required to deliberate only on how best the terms and conditions of service of judges could be improved. That may be the reason why they merely acknowledged the importance of separation of powers by simply restating the theory. They focused on only the internal aspects of judicial independence, akin to that which Shetreet refers to as ‘personal independence’, wherein the power to administer personal terms, like salaries and conditions of service, is vested in the judiciary and not shared between the executive and the judiciary.⁹

The limitation in their terms of reference is understandable considering that it was President Moi who established these committees and drew the list of the issues to be investigated. The independence of the judiciary, which requires judicial functions to be separated from that of the legislature and executive as envisioned by Montesquieu,¹⁰ was definitely not part of President Moi’s agenda for the judiciary. Separation of powers whose principle concern is to prevent the concentration of authority by the legislature or the executive¹¹ was not an important issue that the government of the day would have liked to address. Moi’s government had just two years before, deleted from the old constitution the provisions guaranteeing security

⁹ Shimon Shetreet, ‘Judicial Independence: New Conceptual Dimensions and Contemporary Challenges’ in S. Shetreet and J. Deschenes (eds), *Judicial Independence: The Contemporary Debate*, (Martinus Nijhoff Publishers, Dordrecht 1985) 623

¹⁰ Montesquieu, *The Spirit of the Laws*, David Wallace Carrithers (ed), and (tr), (University of California Press, London, 1977) 202

¹¹ M. J. C Vile, *Constitutionalism and the Separation of Powers*, (Clarendon Press, Oxford 1967) 130

of tenure of judges which seriously undermined personal independence of the judges.¹²

Even though the Kotut Committee exceeded its mandate, its recommendations were implemented. On 8th May 1995, President Moi published in the Kenya Gazette a Legal Notice delinking the judiciary from the Civil Service.¹³ This was a commendable step by the executive towards recognising the necessity to secure the independence of the judiciary institutionally. To borrow Shetreet's words the executive appeared to cede power to 'a board composed predominantly of judges'.¹⁴ However, a closer look at the Legal Notice reveals that the Judiciary was delinked from the Civil Service minimally and only with regard to terms and conditions of service. It did not include the larger aspect of institutional independence that requires stronger financial independence, in terms of budgeting and allocation of funds to cater for the newly delinked services, relatively free from interference and control of Parliament and executive.

This was a cosmetic reprieve that did not go to the root of, or solve, the problem of lack of institutional independence. It cannot be concluded that the gazette notice made the judiciary any more independent than it was before, or that there was any intention to make the judiciary a full-fledged arm of government in all aspects. It is not surprising that ten years later, the Onyango Otieno Report recommended that the Gazette Notice be "implemented fully".¹⁵ This was a clear demonstration that the delinking of the judiciary from the executive was not implemented. Under these

¹² Constitutional of Kenya (Amendment) Act, Act No. 4 of 1988

¹³ Kenya Gazette Supplement, Legal Notice No. 3 of 1995

¹⁴ Shetreet & Deschenes (n 9) 623

¹⁵ Report of the Ethics and Governance Sub-Committee of the Judiciary 2006, (Government Printer, Nairobi 2006) 45

circumstances the judiciary was deficient in its capacity to effectively uphold the rule of law idea. The judiciary could not confidently assure litigants and citizens alike of its ability “to prevent the executive and many of its agents from imposing their powers and interests and even persecutive inclinations”¹⁶ upon it and hence protect their rights.

5.2.2 Enactment of the Public Officer Ethics Act

The Public Officers Ethics Act 2003 requires public servants including judges and magistrates declare their wealth every year.¹⁷ It has not augured well as a form of accountability measure since the declarations are confidential and not open to public scrutiny.¹⁸ The procedure for collecting, systemising and disclosing information was found wanting.¹⁹ The asset disclosure information was not adequate to identify property.²⁰ This legislation has been defined as a double edged sword whose purpose is to improve ethics standards but also contains provisions counterproductive to its purposes, like stiff fines or even jail terms for disclosure of the contents of the wealth declaration forms.²¹

In spite of a documented finding that the Act had been grossly violated by the failure of some public officers to declare their wealth as required and by delay in submitting wealth declaration documents, no prosecutions or punishment was meted out to offenders, hence the public was not convinced that this legislation was intended

¹⁶ Judith Shklar, “Political Theory and the Rule of Law” in *Political Thoughts and Political Thinkers*, Judith Shklar and Stanley Hoffman, (University of Chicago Press, Chicago 1989) 24-25

¹⁷ Public Officers Ethics Act, 2003

¹⁸ S 30(1)

¹⁹ Onyango Otieno Report (n 15) 61

²⁰ Ibid

²¹ Migai Akech, ‘Constraining Government Power in Africa’ (2011) 22 Journal of Democracy

for any useful purpose.²² Like the delinking action, it was a mere public relations exercise; an accountability mechanism, that failed to compliment or even strengthen judicial independence.

5.2.3 Establishment of Judicial Service Code of Conduct

The Judicial Service Code of Conduct and Ethics was established under the Public Officer Ethics Act 2003.²³ Its purposes are to establish standards of ethical conduct for judicial officers.²⁴ The Code, however, is just a mere guide but not entrenched in legislation, hence it has no legal effect. Its breach, if any, has not amounted to any disciplinary issue. It has been observed that despite the fact that the code had been in place since 2003, it was not adequate because it lacked an effective force of law, and included vague definitions which did not cover all aspects of conflict of interest.²⁵

5.2.4 Early Reforms: Some Obstacles

It is clear that mechanisms put in place to improve judicial independence including improving accountability did not yielded much success. This section discusses the challenges of implementation.

²² E. B. N I. N Rweria, Director of Efficiency Monitoring Unit, Office of the President, Kenya, 'The Status of Wealth Declarations by Public Officers in Kenya: Are We Getting Anywhere?', available at http://www.marsgroupkenya.org/Reports/Government/feb_07/THE_STATUS_OF_WEALTH_DECLARATIONS_BY_PUBLIC_OFFICERS_IN_KENYA.pdf > accessed 10 June 2011, This report comprehensively documents statistically all governments departments status on wealth declarations citing general non compliance, non provision of funds and lack of prosecutorial powers among the challenges faced in implementation of the legislation.

²³ S 5(1)

²⁴ Preamble para 3

²⁵ Onyango Otieno Report (n 15) 60

5.2.4.1 Lack of Political Will

One of the challenges to the implementation of judicial reforms was lack of sufficient political goodwill for judicial reforms.²⁶ This point is repeated in almost all the reform initiative reports, either expressly or impliedly. The rule of law it is said, ‘is all about politics and restraint of raw political power and judicial reform is thus a long term process highly dependent on political will’.²⁷ Studies on judicial reform across several Latin American countries reiterate this contention and observe that “adequate implementation of reforms depends on committed political and judicial will and a broad base of society support, hence transparency and systematic monitoring is essential”.²⁸ Political will is therefore very important for reform of the judiciary to succeed since it is the executive which has the responsibility for developing policies and implementing them.

One area that can be used to illustrate this lethargy is that of financial independence. To achieve financial autonomy, legislation was required to be enacted to enable the judiciary to access funds directly from the Consolidated Fund. As at 2005 and also 2009, the draft Judicial Services Bill still appeared as pending in the Judiciary Strategic Plans,²⁹ meaning that the executive never acted on it. The Bill was tabled before Parliament by the Minister for Justice and Constitutional Affairs, only after the enactment of the new Constitution.³⁰ It was subsequently debated and passed into law

²⁶ Strategic Plan 2009-2014 (Judiciary, Nairobi 2009)19

²⁷ Gordon Barron, ‘The World Bank and Rule of Law,’ Development Studies Institute 2005 , 29 available at www.lse.ac.uk/depts/destin accessed on 17 October 2010

²⁸ Maria Sousa, ‘A Brief Overview of Judicial Reform in Latin America: Objectives, Challenges and Accomplishments’ in Eduardo Lora edition *The State of Reform in Latin America* (World Bank Publications, Washington, 2007) 100

²⁹ Judiciary Strategic Plans 2009 (n 26) and 2005

³⁰ The Bill was published on 16th September 2010 See Minister for Justice and Constitutional Affairs brief at <http://www.youtube.com/watch?v=SroDcK5hGF8> accessed 9 June 2010

shortly thereafter.³¹ The absence of a justifiable explanation for this delay can reasonably be construed as evidence of lack of political will with the intention of denying financial autonomy to the judiciary.

5.2.4.2 Lack of Effective Implementation Strategies

During the period under study, lack of implementation hindered the realization of judicial reform in Kenya. On implementation of salaries and terms and conditions of service, and related issues, the Waruhiu Report (1980) in their review of reform initiatives since independence, observed that:

Many of the recommendations that were accepted by the government were straightforward and could have been implemented almost immediately. However...many of them took as long as eight years to be implemented and many others have never been looked into...Whatever half hearted implementation that was done, it was piecemeal, uncoordinated and without a clear sense of direction. The result has been that the impact of whatever recommendation that were implemented has been largely dissipated.³²

The Kotut Report (1992), over ten years later, expressed concern that the Waruhiu Report (1980), which had recommended that judges be employed on permanent terms, had not been implemented.³³ Implementation regarding salaries increments was made, not only for the judiciary, but across the whole civil service.³⁴ The Kanyeihamba Report (2002) lamented that, “many of the fundamental recommendations of the Kwach Committee (1998) had not been implemented.”³⁵ Twenty years later, the Ouko Report (2009) still expresses similar concerns that;

Following the delinkage of the judiciary from the civil service in 1993, several studies have been conducted and recommendations made on the ways in which the judiciary could be transformed to meet the ever changing needs and expectations of

³¹ Judicial Services Act, Act No. 2 of 2010

³² Waruhiu Report (n 7) 8

³³ Kotut Report (n 8) para 9(b)

³⁴ Kotut Report, (n 8) para 11

³⁵ Report of the Advisory Panel of Eminent Judicial Experts 2002, (Constitution of Kenya Review Commission, Nairobi 2002)15

Kenyans. Unfortunately, due to lack of resources, and clear framework for implementation, the implementation...has been painfully slow and majority of them have yet to be put to their full effect. Thus, although some reforms have been carried out...these isolated reforms have themselves not been sufficient to bring change that is needed to transform the judiciary into a strong independent institution.³⁶

It is true that attempts to reform the judiciary were half hearted and infrequent; implementation was haphazard and not designed to attend to the root causes of the clearly identified challenges. In fact, most of them completely missed the intended target of entrenching judicial accountability for the purposes of strengthening judicial independence. Instead, some attempts, like the ‘radical surgery’, had the opposite effect of compromising judicial independence.³⁷

This is a clear demonstration that meaningful effective protection for judicial independence squarely lies in the normative order provided by the constitution. Even if administrative and other systemic measures are necessary for the protection of judicial independence, all this is collateral. It is the constitution which is the bedrock of judicial authority upon which judicial role can effectively be underpinned,³⁸ with the consequence of increased independence. The constitution, to borrow David Law’s words, matters.³⁹ There would indeed be no point in debating judicial independence if the inclusion of guarantees is of no consequence in practice.⁴⁰ The following discourse is intended to test the sincerity of the New Constitution as regards guarantees it provides for judicial independence. The actualisation of these guarantees by the statutes enacted immediately thereafter is simultaneously analysed.

³⁶The Task Force on Judicial Reforms 2009 (Government Printer Nairobi 2009) 9

³⁷ The effects of the ‘radical surgery’ on the independence of the judiciary is comprehensively discussed in Chapter 4 under heading 4.3.3.1.

³⁸ Roger Masterman, *The Separation of Powers in the Contemporary Constitution; Judicial Competence and Independence in the UK*, (CUP, Cambridge 2010)26

³⁹ David S. Law, ‘Constitutions’ in *The Oxford Handbook of Empirical Legal Research* in Peter Cane and Herbert M Kritzer (eds) (OUP, Oxford 2010)380

⁴⁰ Ibid

5.3 Constitutional Reform within the Context of Kenya's Political Environment: Tracing the Journey

The Constitution of Kenya 2010,⁴¹ is a product of many years of public participation and input, duly passed and enacted by way of a popular public vote in a referendum,⁴² and followed by an equally popular public promulgation.⁴³ In the 1960's 70's and 80's Presidents Moi and Kenyatta subjected the people of Kenya to an imperial presidency which resulted in a diminished democratic space. During this period, there was correspondingly a growing enlightenment and global developments which increased awareness of individual rights. These developments brought the realisation that centralised executive power as entrenched in the Kenyatta and Moi political regimes, "ought to be subjected to checks and balances and that greater governmental accountability can be realised with operation of greater plurality of decision making".⁴⁴ Thus the current New Constitution is the product of a debate for reforming the Old Constitution which started in earnest in late 1980 and peaked in early 1990's.⁴⁵ It started with the amendment of Section 2A of the Independence Constitution

⁴¹ Constitution of Kenya 2010, (Government Printer, Nairobi 2010)

⁴² Constitution of Kenya Review Act (Referendum Regulations), Gazette Notice No. 10019, Legal Notice No. 66 of 2010, (Government Printer, Nairobi 2010) The results of the referendum shows that about 70% of Kenyans voted in favour of the new constitution.

⁴³ 'Kenya President Ratifies New Constitution' <http://www.bbc.co.uk/news/world-africa-11106558> also see, 'In Pictures, Kenya Celebrates New Constitution' <http://www.bb.co.uk/news/world-africa-11109846> accessed 18 July 2011

⁴⁴ J. B. Ojwang' Constitutional Reform in Kenya: Basic Constitutional Issues and Concepts', in Report of the CKRC Vol. 5 Part I Technical Appendices approved for issue at the 68th meeting of the Commission held on 10/04/2003 available at <http://www.Idphs.org.za/resource> accessed on 3/3/12

⁴⁵ James Thuo Gathii, Popular Authorship and Constitution making: Comparing & Contrasting the DRC and Kenya. For a comprehensive account of the constitutional review process in Kenya, see generally, K. Kindiki & Osogo Ambani eds., *The Anatomy of Bomas: Selected Analysis of the 2004 Draft Constitutions of Kenya*, (Claripress, Nairobi 2005), Morris Odhiambo, Osogo Ambani & Winnie Mitulah, *Informing Constitutional Moment: Essays on Constitutional reform in Kenya* (Claripress, Nairobi 2005)

in 1990.⁴⁶ In 1990, the US Congress conditioned its assistance to Kenya and withheld military aid on grounds related to corruption and human rights violations.⁴⁷ In the local scene The Forum for Restoration of Democracy (FORD), a non-partisan group that brought together churches, politicians, and lawyers made constitutional reform a major issue and insisted that government legalise opposition parties and restructure Kenyan governance.⁴⁸ With both internal and external pressure, Moi's government was under great siege to end his one party dictatorship, embrace democracy and free government institutions from political patronage. The struggle for democratic space and in essence constitutional review commenced.

Between 1992 and 1997, both election years, Kenya experienced the struggle for democratisation with demands for radical constitutional changes, economic and social reform, involving mass action.⁴⁹ Those involved included professional associations (Law Society of Kenya), organised civil society organisations, churches, trade unions, opposition political parties and their supporters and human rights groups.⁵⁰ The international community equally supported and put pressure on President Moi and his government to end one party rule.

This opened the door for democratic political organisation and competitive party politics subsequent to which the first multi-party elections were held in Kenya in

⁴⁶ Constitution of Kenya (Amendment) Act No 1990 Repeal of Act No 7 of 1982 which declared Kenya a *de jure* one party state.

⁴⁷ Kenya Human Rights Commission, 'Independence without Freedom: The Legitimisation of Repressive Laws and Practice in Kenya' in Kivutha Kibwana (ed), *Readings in Constitutional law and Politics in Africa: A Case Study of Kenya* (Claripress, Nairobi 1998) 143

⁴⁸ Maina Kiai, 'A Last Chance for Peaceful Change in Kenya', 45, 2 (1998) *Africa Today*, 185- 196, 186

⁴⁹ Kennedy Masime and Gichira Kibara, 'Regime Transitions and the Institutionalisation of Democracy in Kenya: The December 2002 Elections and Beyond', (2003) 1 *East African Journal of Human Rights and Democracy* 18-19

⁵⁰ *Ibid*

December 1992. But even after elections the general mood in the country was that these amendments did not introduce a genuinely open democracy in Kenya and attention now focused on spearheading comprehensive constitutional reforms.⁵¹ For this reason even though politically there appeared to be some democratic space on account of multi partysm not much was achieved in terms of constitutional, legal and institutional reforms. Ndegwa attributes this inertia to institutional continuity that forestalled the development of a publicly accountable political system as well as actions of individual political actors.⁵² He argues further that KANU the incumbent party with the majority in Parliament controlled the transition and stuck to its previous authoritarian ways as exhibited during its single party years, by restricting the emerging culture of freedoms that is essential to democracy.⁵³ By 1994 democratic agitation in Kenya had become linked with the call for a new constitution which forced President Moi to commence at least some moderate constitutional reforms.⁵⁴

5.3.1 The Review Act

On the 4th of August 1997, the Constitution of Kenya Review Commission was established by an Act of Parliament⁵⁵ to ‘facilitate the comprehensive review of the

⁵¹ Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review 11th October 2010* (Government Printer, Nairobi 2010) also available at http://www.coekenya.go.ke/images/stories/resources/COE_final_report.pdf accessed on 23rd November 2010

⁵² Stephen N. Ndegwa, ‘The Incomplete Transition: The Constitutional and Electoral Context in Kenya’ *Africa Today*, 45 (2) (1998) 193-211, 193, Ndegwa gives an indepth account of the political context of the transition. Similar views and exposition are expressed by Banon 1824

⁵³ Ibid

⁵⁴ Alicia L. Banon, *Designing a Constitution Drafting Process: Lessons from Kenya*, (2007) *Yale Law Journal* 1824-1872, 1824

⁵⁵ The Constitution of Kenya Review Act, Chapter 3A Laws of Kenya Revised Edition (Kenya Law Reporting, Nairobi 2008) available at www.klr.org accessed 1st November 2010

constitution by the people of Kenya and connected purposes'.⁵⁶ One of those purposes was to recognise and demarcate the various state organs including the executive, legislature and judiciary so as to create checks and balances between them to ensure accountability of the government and its officers to the people of Kenya.⁵⁷ One of its functions was 'to collect and collate views of the people of Kenya on the proposal to alter the constitution'.⁵⁸ This Act was part of the minimal constitutional and legislative reforms package adopted prior to the 1997 general elections under the aegis of the Inter Party Parliamentary Group (IPPG) reforms.⁵⁹ In October 1999, the political momentum generated by this development led to the formation of a multi-party Parliamentary Select Committee on Constitutional Review, which had the mandate to recommend how the constitution could be reviewed under a legislative framework provided by the Constitution of Kenya Review Act (as amended in 1990).⁶⁰

The Act required that a review commission be created to engage the public by collecting their views on what they wanted to be included in the new constitution.⁶¹ The next step was to subject the draft constitution to a national convention, where the draft was to be debated amended discussed and adopted.⁶² In this process, the Act provided that the draft could be amended using the 2/3 majority rule, and if this failed, then the

⁵⁶ Ibid Preamble

⁵⁷ Ibid Section 3(c)

⁵⁸ Ibid Section

⁵⁹ CoE Report (n 51)19

⁶⁰ Ibid

⁶¹ S 6-8

⁶² S 18(1)(a) and 27(1)(a) The National Convention comprised 629 delegates drawn from review commissioners, legislators, representatives from Districts, political party representatives, religious groups, professionals and civil society organizations

draft was to be subjected to a referendum.⁶³ The final step if no stalemate was reached was to send the draft constitution to be ratified by Parliament after which a new constitution would be unveiled.⁶⁴

5.3.2 Yash Pal Ghai led CKRC and the BOMAS Conference

In pursuant of the Review Act Professor Yash Pal Ghai a constitutional law expert was appointed chairperson of the CKRC in 2000 to spearhead constitution reforms.⁶⁵ Pursuant to its mandate, the CKRC embarked on a massive programme of public education followed by the collection of the views of Kenyans on a new constitution.⁶⁶ The result was the CKRC draft constitution. According to the Review Act the next step was the constitution of the National Constitutional Conference as earlier explained. However, despite the clear programme for constitutional review in the amended 1997 Review Act, political undercurrents were strong and former President Daniel Moi prorogued Parliament in October 2002 to hold general elections, and thus effectively put the constitutional review process in abeyance.⁶⁷

At the new year of 2002/2003 a significant political change took place in Kenya when Mwai Kibaki defeated President Moi by a landslide in a general election powerfully propelled by a coalition of political parties⁶⁸ within the National Rainbow

⁶³ S 27

⁶⁴ S 28

⁶⁵ For a comprehensive account of the work of CKRC see the CKRC Report 2005 (n 2)

⁶⁶ CoE Report (n 51) 17

⁶⁷ *ibid*

⁶⁸ National Alliance of Kenya (NAK), Democratic Party (DP), Liberal Democratic Party (LDP) and others, LDP and NAK being the main parties

Coalition (NARC) as the ruling party in Parliament.⁶⁹ KANU lost its control of Parliamentary majority. President Kibaki soon thereafter promised to deliver a new constitution to Kenyans within the first 100 days. This was one of the pre-election political pledges. President Kibaki immediately embarked on fulfilling this promise by reviving the stalled review process. He constituted the National Constitutional Conference popularly known as the Bomas Conference.

This conference was inundated with political undertones and manipulations by political parties to the extent that it was heavily politicised. However, before the adoption of this draft at the National Constitutional Conference, “political differences arose and a group of delegates including government officials and members of the civil society walked out in disagreement about the position of the Prime Minister, amongst other matters”.⁷⁰ It was a contest between the Government (including the new Kibaki government elected in 2002), Parliament and the Civil Society bodies and also politicians from the opposition parties.⁷¹ The Conference nonetheless adopted a new draft constitution, known as the Bomas Draft on 23 March 2004.⁷²

5.3.3 The 2005 Referendum

⁶⁹ Anders Narman, ‘Elections in Kenya’, 30 (96) (2003) *Review of African Political Economy*, 341-343, 343

⁷⁰ CoE Report (n 51) 20 The other matters included devolution (whether to devolve power to the regions or retaining a centralized structure of power and Kadhis Courts (whether it should be entrenched in the constitution or not)

⁷¹ Lionell Cliffe, ‘Kenya’s Constitution Reform Referendum’, (2006) 33 *Review of African Political Economy*, 141-142, 142

⁷² Ibid

The draft was finally ready to be taken to parliament for ratification. After a lot of infighting, political gerrymandering and finally court intervention⁷³ the draft was put to a referendum in November 2005. The result was an overwhelming rejection of the draft constitution.⁷⁴ The rejection of the Bomas Draft had nothing to do with the judiciary in terms of the provisions relating to judicial independence. The major issue regarding the judiciary was the inclusion of the Kadhis Courts in the Constitution and not the independence of the Kadhis. Kenya went back to the drawing board to find another road map. Again after the rejection political infighting continued to confront the process. Several retreats were mounted to refine the draft now focusing more on consensus. There were accusations that the government was mutilating the draft.⁷⁵

5.3.4 The 2007 Elections and the 2nd Round of Constitution Reform

By the time the country went into general elections in December 2007 the proposed constitution had not come to fruition. Calls for reform of the judiciary reached fever pitch especially after the aftermath of the post-election violence in 2007. Judicial reforms become even more urgent and the recommendations for the creation of a new judiciary, more radical and far reaching. This was informed by the fact that the judiciary was one of the institutions whose rejection led to the post-election violence.⁷⁶

Kofi Annan and a team of Eminent Persons were identified by the African Union to intervene and find a solution to the raging violence. They finally brokered a political

⁷³ *Timothy Njoya and Others v The Attorney general and Others* HCCC No. of 2004. The court constitutional ruled that the draft be subjected to a public referendum

⁷⁴ 57% of Kenyans rejected the Draft Constitution

⁷⁵ Banon (n 54) 1839

⁷⁶ See chapter one pages 3-7 for a background of lack of public confidence in the judiciary

deal to avert further violence.⁷⁷ The deal was to create a power sharing agreement wherein the office of the Prime Minister with executive powers was created all being outside the provisions of the law as it then stood. The judiciary promptly featured in the agenda setting out those institutions in dire need for reform as identified in Agenda Number 4 of the National Dialogue and Reconciliation Agreement⁷⁸ which later became law.⁷⁹ This set the stage for commencement of another round of constitution review.

Parliament enacted The Constitution of Kenya Review Act 2008 and the Constitution of Kenya (Amendment) Act 2008. The former was meant “to facilitate the completion of the review of the Constitution of Kenya,”⁸⁰ whilst the latter set up the Committee of Experts (hereinafter referred as the CoE) to wrap up the review process. The CoE was tasked with the responsibility of reviewing, identifying and resolving outstanding issues. They were further required to prepare a draft Constitution which was to be placed before Parliament for adoption and subsequent ratification in a national referendum.⁸¹

The CoE in its report identified the politicization of the process, lack of political will deep seated suspicion coupled with lack of confidence in government institutions and consistent failure to complete the review process as some the reasons why Kenyans

⁷⁷ See chapter 1 section 1.1.

⁷⁸ The Kenya National Dialogue and Reconciliation Act 2008

⁷⁹ Kenya National Dialogue and Reconciliation Act 2008

⁸⁰ S 4

⁸¹ Constitution Amendment Act 2008 s 6

were sceptical of the renewed process.⁸² However they finally prepared the Final draft which was placed before the public for a referendum.

The Proposed Constitution⁸³ was subjected to a referendum on the 4th day of August 2010. On this day Kenyans went to the polls to vote for or against this Draft. The result was a vote in favour of the Proposed Constitution.⁸⁴ It was lauded to have attracted;

An unprecedented high voter turn-out of 72 per cent underscored this sense optimism. This was the highest recorded turn out in Kenya's voting process. Also a high number of people, 67 per cent, approved it. Only about 31 per cent disapproved it. The constitution thus sits on a strong bedrock of popular support and legitimacy.⁸⁵

The New Constitution was promulgated on the 27th day of August 2010 in a public ceremony by the President upon appending his signature thereon,⁸⁶ and it immediately became law.⁸⁷ With the promulgation of the New Constitution the Old 1964 constitution was repealed and the people of Kenya ushered in a new constitutional dispensation.

⁸² CoE Report (n 51)24-27

⁸³ The Proposed Constitution of Kenya, 6th May, 2010(Government Printer, Nairobi, 2010)

⁸⁴ The Constitution of Kenya Review Act(Referendum Regulations), Gazette Notice No. 10019, Legal Notice No. 66 of 2010, (Government Printer, Nairobi 2010)

⁸⁵ The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project1 Agenda Item 4 Reforms Long-standing issues and solutions Progress Review Report March 2012 available at

⁸⁶ BBC News, Kenya president Ratifies New Constitution video clip available at <http://www.bbc.co.uk/news/world-africa-11106558> accessed on 15th March 2010

⁸⁷ The Constitution of Kenya 2010, Kenya Gazette Supplement No. 55, Government Printer, Nairobi 27th August, 2010

5.4 A New Constitution: An Independent Judiciary? A Critical

Analysis

An appraisal with regard to its protection of judicial independence is therefore necessary. Below is a critical analysis of the opportunities it provides for the protection of judicial independence. Also included in this discussion are those alternatives that were not adopted. Those that were discarded are contained in part 5.4.9.

5.4.1. Separation of Powers

It is important to note from the outset that nowhere in the New Constitution (or even in the Old Constitution) are the words separation of powers mentioned. This may create the impression that separation of powers is not an important component of this constitution. But most constitutions, it is said, do not include a specific article enshrining the concept of separation of powers.⁸⁸ Barak explains why the absence of the words separation of powers should not be a cause of alarm. He says that;

True, the constitution may not contain an explicit provision recognising the principle of separation of powers. Nevertheless, the principle of separation of powers is a constitutional principle. Such recognition is required by the purposive interpretation of the constitution. This principle may not be written in the lines of the constitution, but it is written between the lines. It derives implicitly from the language of the constitution. It is a natural outgrowth of the structure of the constitution – which distinguishes between the three branches of government and discusses each of them in a separate chapter and from the entirety of their provisions.⁸⁹

In the Kenyan case, therefore, the recognition of the values of the rule of law in the organisation of government, as stated in the preamble,⁹⁰ it can be argued, imports into the constitution the concept, principles and values of separation of powers, a condition

⁸⁸ Aharon Barak, *The Judge in a Democracy*, (Princeton University Press, Princeton 2004) 76 citing John Alder, *Constitutional and Administrative Law* (4th edn Palgrave Law Macmillan, 2002) 44-45

⁸⁹ Barak (n 88) 45

⁹⁰ Para 6

precedent for the existence of an independent judiciary. An independent judiciary we have been so often reminded is a central component of any democracy and a significant principle of the rule of law.⁹¹ A reading of the preamble and a subsequent discussion of the contents of the New Constitution below, will thus inform the separation of powers concept and how it is applied.

5.4.2. The Preamble

The New Constitution proclaims that the sovereign power of the state now resides in and emanates from the people of Kenya.⁹² It recognises the essential values of the rule of law, equality, freedom and human rights as the basis of government.⁹³ This sends a strong signal to the other arms of government, particularly the executive who, as has been documented in earlier chapters, are the greater violators of judicial independence, to respect and protect the independence of the judiciary. All public officers exercising functions of state, including the President, members of parliament, judges and, other judicial officers, are mandated and compelled to act consistently with the purposes and objects of the Constitution, one of which is protection and promotion of judicial independence.⁹⁴

These new provisions, especially the aspiration embodied in the preamble, which did not exist in the Old Constitution, if harnessed genuinely by all arms of government who are now subordinate to the people of Kenya, have the potential to greatly improve judicial independence in Kenya. But whether the executive and

⁹¹ Charles M Fombad, 'A Preliminary Assessment of the Prospects for Judicial Independence in Post – 1990 African Constitutions,' [2007] Public Law 234

⁹² Article 1(1)

⁹³ The Preamble, para 6

⁹⁴ Art 73 (1) (a)

legislature will be faithful in translating these aspirations by putting them into practice will be seen shortly as the implementation process unveils.

5.4.3. Judicial Independence

The New Constitution, unlike the Old Constitution, entrenches the independence of the Judiciary, by expressly proclaiming that, “in the exercise of judicial authority, the Judiciary 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”.⁹⁵ To this extent, the New Constitution *prima facie*, recognises the judiciary as a separate arm of government and bestows upon it the function of exercising judicial authority.

Amendments to the provisions relating to judicial independence have been made more difficult than it was under the Old Constitution. A 2/3rd majority parliamentary vote and also a referendum is now required in order to secure an amendment.⁹⁶ Judicial independence is now better secured and its protection is even more enhanced, which is a good thing. These are new provisions that did not exist in the Old Constitution which only required a 2/3rd majority for any provision to be amended. Protection of judicial independence is not now left only to the whims of the executive and the legislature, but also involves direct public approval.

The institution of the judiciary is identified by naming the courts comprising it as well as the staff (judges and magistrates) who man the respective courts. They are superior courts (Supreme Court, Court of Appeal, and High Court), magistrates and

⁹⁵ Article 1(3) (c) and also Article 160(1)

⁹⁶ Article 255-257

other judicial staff.⁹⁷ Article 161 defines ‘judicial offices and judicial officers’ as also including Kadhis and presiding officers of any other court or local tribunal as may be established by an act of parliament (subordinate courts).⁹⁸ It is the Judiciary so defined under article 160 whose members exercise judicial authority and in addition are constitutionally guaranteed judicial independence.⁹⁹ All members of the judiciary are constitutionally guaranteed immunity from suit in respect of actions or omissions which occur in good faith whilst in performance of their lawful functions.¹⁰⁰

However it is notable that guarantees protecting abolition of office,¹⁰¹ remuneration and benefits, before or after retirement¹⁰² are only availed to the judges of superior courts. Magistrates are excluded. This means that the executive or legislature has power to reduce their salaries, benefits, pensions to their disadvantage at any time. This exposes them to threat of arbitrary action by other arms of government should these arms be unhappy with their decisions. This defeats the purpose of insulating those who determine disputes between the governments and citizens from interference by the government. Personal independence which requires that they be insulated from “executive control which could be exercised through removal suspension, transfer, salary cuts administrative retirements” is not constitutionally protected.¹⁰³ It has been observed that lower court justices are often the ‘forgotten’ persons in judicial reform:

...they play a crucial role in the judicial system given that they hear the vast majority of both civil and criminal cases...are also the places where the most impoverished; powerless and defenceless seek justice and redress. If they have no confidence in lower...courts justices...perceiving them as dispensing a lower form

⁹⁷ Art. 160

⁹⁸ Art 169 (1)(d) also defined in art 260 (interpretation)

⁹⁹ Article 1(3)(c) and also Article 160(1)

¹⁰⁰ Art 160 (5)

¹⁰¹ Art. 160(3)

¹⁰² Art. 160(3) & ((4) as read with art. 168 (6) (relating to suspended judges)

¹⁰³ Shimon Shetreet, ‘Judicial Independence and Accountability in Israel’ (1984) 33 International Law Quarterly 979-1012, 991

of justice, this has a significant detrimental effect on society and the development of the rule of law...including potential resort to self help and informal ways of justice...¹⁰⁴

Perceptions of lack of independence focus on the entire judicial system not just judges alone. The constitutional guarantee for only a very small percentage thereof (judges of superior courts),¹⁰⁵ exposes the bulk of the judicial arm of government to possible tyranny by the executive. With such insufficient guarantees, the other arms have the capacity to adversely affect the independence of the majority of the members of the judicial branch.¹⁰⁶

5.4.4 Financial Autonomy

The New Constitution establishes the Judiciary Fund, which is to be administered by the Chief Registrar of the judiciary.¹⁰⁷ The Fund is to be used for administrative expenses of the judiciary and such other purposes as may be necessary for the discharge of its functions.¹⁰⁸ Each year, the Chief Registrar is required to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.¹⁰⁹ Upon approval by the National Assembly, the expenditure of the Judiciary becomes a direct charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund.¹¹⁰ The bureaucratic executive laden budgeting procedures which exposed the judiciary to manipulation by the executive, whether perceived or actual, appear to have been removed with this shortened process.

¹⁰⁴ Muna Ndulo, 'Rule of Law Programs; Judicial Reform, Development and Post Conflict Societies' (2009) Academic Network on Legal Empowerment of the Poor (ANLEP) Working Paper 2/2009, 19 <<http://www.sum.uio.no/research/networks/anlep>> accessed 5 July 2010

¹⁰⁵ As at 27th August 2010 Kenya had a total of 47 out of 50 judges required by the constitution including the CJ

¹⁰⁶ For further discussion of this point see section 5.4.9.1 below

¹⁰⁷ Article 173(1)

¹⁰⁸ Article 173(2).

¹⁰⁹ Article 173(3)

¹¹⁰ Article 173(4)

The involvement of the National Assembly, in scrutinising the budget, is in line with the checks and balances principle of separation of powers.

The requirement that the CJ must, once every year, give an account on the state of the judiciary to the nation¹¹¹ creates an effective and public audit of its activities, and check on possible misuse or abuse, internally by itself, or externally by the other branches. It injects some amounts of institutional accountability in how the judiciary uses and manages the funds it is allocated. With these provisions in place, one can now state with some degree of confidence that the judiciary has achieved its fiscal independence from the executive. The New Constitution *prima facie* creates an effective platform conducive to the realisation of the financial independence of the judiciary.

But the New Constitution also gives Parliament the power to enact legislation to provide for the regulation of the Fund.¹¹² Parliament, has indeed, exercised this power by enacting the Judicial Services Act 2010.¹¹³ Part IV of the Act contains conditions to be met before the funds can be utilised. First, the judiciary is allowed to raise money, from sources outside the Consolidated Fund, in the form of gifts, grants, donations, or bequests, but it is prohibited from accepting monies pursuant to any conditions which are incompatible with its functions duties or obligations.¹¹⁴ The statute, however, does not state what is to happen should its provisions regarding this prohibition be flouted. The body, which is to vet the receipt of such funds and ensure that the funds are ‘clean’, is not identified. This omission can result in politically calculated delays in receipt or disbursement of funds, especially when allegations of inappropriate receipt of funds are

¹¹¹The Judicial Services Act Section1(2)(b)

¹¹² Article173(5)

¹¹³ Act No. 2 of 2010

¹¹⁴ S. 35

made against the judiciary. It can lead to delays in administration of justice or undermine judicial independence.

The Act establishes the National Council on the Administration of Justice.¹¹⁵ The majority of the members of this Council are largely drawn from the executive.¹¹⁶ If this be the body, or one of the bodies, overseeing receipt or disbursement of funds to the judiciary, then the possibility of conflict of interest cannot be ruled out and such a conflict can affect the functions of the JSC in administering the funds received.¹¹⁷ The danger that the executive may want to control the judiciary's funds, and can even hold them if it is not happy with the decisions of the judiciary, cannot be ignored. Payment out of the fund is again further subjected to all laws.¹¹⁸ These regulations created by the legislature could be counterproductive since the executive can re-introduce through the backdoor executive control or influence in the judiciary thus compromising the intended checks and balances that are desirable.

5.4.5 Tenure of Office: Age of Retirement Reduced

All judges shall retire from office upon attaining the age of 70 years, but may elect to retire at any time after attaining the age of sixty five years.¹¹⁹ A CJ appointed under the New Constitution can hold office for not more than ten years and he can elect to retire earlier.¹²⁰ These are provisions which did not exist in the Old Constitution and are in conformity with the recommendations made by all reform committees. These

¹¹⁵ Art 35(2)(d)

¹¹⁶ S 34, Note that five out of nine members are from the executive

¹¹⁷ See related discussion below (JSC function) 5.4.6.2

¹¹⁸ S 27(5)

¹¹⁹ Art 167

¹²⁰ Article 167(2)

provisions reduce the period of tenure of judges, compulsorily by four years,¹²¹ and optionally, by a further five years, a reduction of seven years aggregate. A cursory look at the official website of the judiciary can give one a rough indication as to their ages, even though it is not indicated because the period they have served in the judiciary is indicated and thus their ages are easily deductible.¹²²

The reduction of retirement age, it can be said, targets the older judges, especially those of the Court of Appeal, who have been on the bench for more than 30 years and are either already past 65 years or approaching 65 years. Most are judges who were appointed by the past political regimes, and who have been perceived as the gatekeepers of the past executive interests. An argument that they are being punished, on account of past decisions, cannot in these circumstances be ignored. If this be the case then it is a violation of judicial independence, more so because a reading of the reports relating to constitutional review does not explain why the age limit has been reduced.

5.4.5.1 Resignation from Office

The New Constitution has introduced a provision allowing the CJ and any other judge to resign from office by giving notice, in writing to the President.¹²³ This provision assumes that a judge can only tender his/her resignation voluntarily and in good faith and for good reason. But that may not always be the case especially considering Kenya's past experience. Resignation can be externally induced contrary to the judge's wishes through pressure, threats, intimidation, some overt and public and

¹²¹ Previous retirement age was 74 years. Judicature Act s 9

¹²² <<http://www.judiciary.go.ke>> accessed on 21 March 2011 This website does not contain bio data for all judges

¹²³ Art 167(5)

others so subtle that it may not be so easy to detect. Misuse cannot be ruled out thus rendering the rationale for security of tenure impotent. Independent judges whose decisions have in the past offended the current politicians or those judges perceived to have been politically minded can be targeted.¹²⁴ Security of tenure is meant to protect judges from any form of pressure internally or externally. The provision is silent as to whether the reasons for resignation should be given. The President is not obliged to disclose the reason(s) for resignation. Neither the JSC, nor the legislature is involved.

This anomaly may not be a threat in more mature democracies, but Kenya's recent past shows that judicial resignations can be abused as discussed in chapter four regarding contract and acting appointments. A number of means, such as politically choreographed countrywide street protests and public criticism and an intentional lack of support from the legislature or executive, are easily capable of inducing forced individual or mass resignations. The independence of the judges would be more secure if their resignation and reasons thereof are channelled through the JSC for thorough vetting so as to ensure that it is not tainted with improper motives by politicians, so that no judge resigns out of undue pressure. The point being made is that this clause can jeopardise judicial independence.

Magistrates do exercise their right to resign and there could be a high turnover which could be good or bad for the judiciary, but no research has been conducted to establish whether political pressure was brought to bear upon those who resigned. Apart from resignation, there are other ways in which judges can be removed from office, the subject of the next section.

¹²⁴ Majority of the current judges and magistrates were appointed during the Moi presidency when political patronage was extremely prevalent in the judicial appointment process

5.4.5.2 Removal from Office: The Chief Justice

The holder of the office of the CJ under the Old Constitution was to vacate office within six months of the promulgation of the New Constitution.¹²⁵ The President was then to appoint a CJ who was also to be a Supreme Court Judge. Technically, the CJ stood dismissed on 27 February 2011.¹²⁶ The obvious explanation here can only be that the judiciary required a major overhaul, in view of the fact that it had lost the confidence of the public. The New Constitution specifically provides that the former CJ vacates office and does not serve under the New Constitution.¹²⁷ It thus affords Kenya an opportunity for the launch of a new independent judiciary and a search for independent judges not tainted by political partisanship. To an extent, the Constitution protects the independence and integrity of the judiciary, as an institution, by giving it a chance to reinvent itself under a new leadership and reclaim its legitimacy. On the other hand, a closer scrutiny reveals that the CJ's right not to be removed from office, save through a tribunal process makes a mockery of the concept of security of tenure.

5.4.5.3 Removal from Office: Grounds

Apart from removal on grounds of mental or physical infirmities which were grounds under the Old Constitution, but still retained, the New Constitution introduces other new grounds for removal. These are: breach of code of conduct prescribed for judges of superior courts by an Act of Parliament; bankruptcy; incompetence or gross

¹²⁵ Schedule Six section s 24(1)(a)(b)

¹²⁶ The CJ had the option of staying on as a Court of Appeal judge and undergoing the vetting process

¹²⁷ Sixth Schedule section 24

misconduct or misbehaviour.¹²⁸ These may appear to improve the independence of the judiciary as they enhance standards of conduct required whilst in judicial office.

However, the absence of any objective criterion to measure levels of incompetence, gross misconduct or misbehaviour may be a hindrance to judicial independence since such ambiguous grounds make it easier to remove judges whose decisions were not liked by the executive, especially during the transition period where current serving judges and magistrates will have to undergo a suitability test before they can be allowed to join the new judiciary. Developing objective criterion or benchmarks for assessing competence where none has existed before and also in the absence of such culture will be a challenge.

The New Constitution has set high standards, but will the government equally match their obligations? This issue may not be common in mature democracies, but in a developing country like Kenya with a history of financial neglect of its judiciary, where judges do not have statutes to enable them to know what the law is, to enable them to make competent judgments, there is a possibility that decisions may be arrived at *per incuriam*, albeit innocently. Sometimes the decisions of the superior (appellate) courts are so inconsistent, that lower courts have difficulty in ascertaining or following the correct precedent. With the newly created grounds of removal on account of incompetence, genuine cases can easily be misunderstood or be used as scapegoats for removing judges.¹²⁹ If reasonably objective criterion is not developed to test the competence of judges, then cases of genuine mistake can be used to remove judges from office under the pretext of incompetence. In this transition period, when judges

¹²⁸ Art 168(1)(a) – (c)

¹²⁹ Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, (W W Norton and Company Ltd, New York, 2001) generally discusses a range of challenges facing African judiciaries

and magistrates will have to face a vetting panel, as shall be discussed below, which will determine their suitability to continue serving in the judiciary or be sent home, such potential threat cannot be ignored. Lack of objective criterion, may lead to violation of, or threaten, the independence of judges, especially those believed to have favoured the executive in the past.¹³⁰ The removal process therefore requires careful re-consideration.

5.4.5.4 Removal from office: Process

The process for removal of judges from office has now been streamlined and placed firmly in the hands of the JSC.¹³¹ In the Old Constitution, this function was solely in the hands of the CJ and the President, who were not obliged to commence the removal process.

The President can now not ignore receipt of a petition for removal or shield errant judges since the New Constitution provides for the procedure to be followed upon receipt of a complaint. The CJ and the President are still involved in the removal process but they no longer undertake the functions alone. The decision is taken by the whole commission which is now composed of ten members of diverse background as opposed to the Independence Constitution wherein all five members of JSC were direct Presidential appointees. This broad based decision making protects the independence of judges, who now need not fear that the CJ can come across certain information and use it to blackmail them or put pressure on them. Chances of personal victimisation by the President or CJ are minimised. It may now be difficult to gang up against or target

¹³⁰ See generally Stephen Lubert, 'Judicial Discipline and Judicial Independence,' (1998) *Journal of Law and Contemporary Problems* 65 He offers an exhaustive exposition of the benefits and dangers of judicial discipline and how it may threaten judicial independence

¹³¹ Art 168(1)

individuals or a group of judges, for example, an ethnic community or individual, for punishment. Incidences like the notorious radical surgery, where judges were removed or forced to resign to pave way for ‘court packing’ may be a thing of the past.¹³²

The process of receiving complaints is now clearly outlined. The JSC can initiate the process of removal on its own motion or upon a written petition outlining the facts constituting the grounds for removal.¹³³ This minimises the practice of removing judges on unsubstantiated allegations.

The President now does not have the discretion of failing to act on the recommendation of the JSC. He has a time limit of 14 days after which he must appoint a tribunal.¹³⁴ In the past, there was no time limit and it is not known how many petitions the President ever received and failed to appoint a tribunal to investigate. The only other person who could provide that information was the CJ who was the direct appointee of the President. Between the two of them, they could easily sweep under the carpet any complaint received from anyone and omit to take any action and no one would know, since there was no formal procedure. Their meetings if any, to discuss such issues was never documented nor required to be documented. The New Constitution thus provides a more stringent transparent process.

With an expanded JSC which has a mechanism of documenting its proceedings, it is easy to disclose the contents of the meetings. With the calibre of members who now sit, or will in future sit on the tribunal including the diversity in their backgrounds; it is almost impossible to collude to remove a judge other than for very well grounded

¹³² Discussed in chapter four at 4.3.4.1

¹³³ Art 168(2)(3)

¹³⁴ Art 168 (5)

reasons.¹³⁵ The likelihood of politically machinated removal is reduced. The procedure is even made more elaborate with inclusion of expert opinions to complement the process where necessary. The process is not allowed to drag as the constitution demands that the same be expeditiously conducted. This avoids a situation where the removal process is used to punish judges by starving them of funds. This tactic had been used under the Old Constitution to punish, publicly ridicule and embarrass judges who were suspended during the purge, as their motor vehicles, wigs, houses medical benefits were withdrawn before their trials were even commenced in an attempt to force them to resign.¹³⁶ Here again accountability mechanisms built into the constitution have the potential of strengthening independence hence confirming, as argued earlier, that independence and accountability are complementary and are different sides of the same coin.¹³⁷

Serving judges and magistrates will have to re-apply for their posts afresh, by subjecting themselves to a vetting process, before they can be cleared to be suitable to continue holding office. It is pertinent therefore to discuss further how this process that enhances judicial independence may also in the converse threaten independence.

5.4.5.5 The Vetting of Judges and Magistrates: Radical Surgery II

The New Constitution required Parliament within one year to enact legislation establishing procedures for vetting suitability of judges and magistrates who were in

¹³⁵ Art 168 (5) A broad range of expertise and knowledge is evidenced by the inclusion of the Speaker of National Assembly (legislature), superior court judges(judiciary) and from common law jurisdictions (international), members of the Law Society of Kenya(professional body), persons with public affairs experience (ensuring public participation), practicing advocates.

¹³⁶ Chapter Four 4.3.4.1 (the radical surgery)

¹³⁷ Stephen B Burbank and Barry Friedman, 'Reconsidering Judicial Independence', in Stephen B Burbank and Barry Friedman (eds) *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, California, 2002)15-16 Also see discussion on judicial independence and judicial accountability in Chapter Two 2.2.6

office as at 27th August 2010 when the constitution came into force.¹³⁸ This is a radical provision which will have the effect of removing serving judges and magistrates from the judiciary. Even though the need for professionalism, morality and integrity were triggered by an upsurge of violations experienced over the years, the manner in which these requirements will be implemented is crucial to ensuring that the independence of the institution and, that of individual judges is not compromised.¹³⁹ The question to be asked is; how has Parliament provided for the constitution of the body that will vet the judges and magistrates to determine whether they continue exercising judicial functions, or they leave the judiciary?

The Vetting of Judges and Magistrates Act, Act No. 2 of 2011, provides that there shall be a Selection Committee which shall recruit members of the Vetting Board who shall determine the suitability of judges and magistrates and remove those found unsuitable, from the judiciary.¹⁴⁰ The composition of the Selection Committee exhibits a heavy presence of the executive. Out of its nine members, five are members of the executive (60%). This is akin to the executive recruiting judges and magistrates. It is interesting to note that, though the JSC will recruit new entrants to the judiciary, it has no say as to which of the serving members will be re-employed. The executive by extension will be responsible for determining the fate of almost the entire judiciary. Abuse of power again here cannot be ruled out.

The Public Service Commission which has appointed the selection panel to vet judges and magistrates is an executive body. It is a department under the President's

¹³⁸ Sixth Schedule Section 23(1)

¹³⁹ See (n 95)

¹⁴⁰ S 7

office. The process shall involve *inter alia* examining past judicial pronouncements.¹⁴¹ The removal or process leading to removal shall be final.¹⁴² This can be interpreted as an attempt to oust the jurisdiction of the courts from checking any unlawful procedures that may be used or questioning the legality of the actions of the statutory body that Parliament has allocated the responsibility of carrying out this task.

From the outset processes, or decisions, made by the statutory body even if they be unlawful arbitrary and oppressive or even discriminatory, are not subject to interpretation by the judiciary, hence, undermining its function of holding these statutory creatures accountable. This amounts to usurpation of judicial authority. The question that would come to mind is whether this ouster clause coupled with stringent heightened requirements which are quite vague, as we shall see shortly, was intentionally meant to exclude the bulk of judges and magistrates from continuing to serve in the judiciary under the New Constitution. There is ample evidence from the previous chapter to the effect that appointments were replete with executive intrusion, hence most judges were appointed by virtue of political patronage and not merit. The current political rulers suffered injustice in the hands of judges who served under the old political dispensation. Now that they are in power, they have the opportunity to punish the judges for delivering judgments which they obviously did not like. They would naturally want to do so whilst completely unchecked. Even though accountability mechanisms have been included in the Act,¹⁴³ this does not ameliorate the concentration of executive power in the Selection Committee.

¹⁴¹ S 18(1) and (2)

¹⁴² S 19(3)

¹⁴³ Part IV generally

This process can, be detrimental to judicial independence if intentionally used as a political tool of reprisal against members of the judiciary. The executive and the legislature can easily gang up against the judiciary by acting as its informal overseers and can be a potential threat to judicial independence. In this regard, the New Constitution will have created a relatively weak framework for the creation of a more independent judiciary.

5.4.6 The Judicial Service Commission

The JSC under the New Constitution has been revamped both in terms of composition and functions. It is often claimed that the makeup of a commission is a determining factor in its effectiveness.¹⁴⁴ Questions concerning who the members are, how long they serve, and who appoints them become important and relevant because they have a bearing on the degree of independence and accountability of the commission.¹⁴⁵ The next sub section commences with an analysis on the composition of the JSC followed by provisions relating to functions.

5.4.6.1 Composition

The composition of the Judicial Services Commission (JSC) under the Old Constitution attracted a lot of criticism. The allegation was that the composition of the JSC exhibited heavy executive presence and control as all the five members of the JSC were direct appointees of the President. As the body charged with the responsibility of advising the President on judges to be appointed to the superior courts, and appointing,

¹⁴⁴ Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing Company Aldershot 1999) 132

¹⁴⁵ Ibid

disciplining and removing magistrates and other judicial staff, the complaint was that its composition under the Old Constitution directly prejudiced judicial independence.¹⁴⁶ The balance of power between the three branches was ill balanced to the detriment of the judiciary. It was heavily concentrated in the hands of the President and, as demonstrated in the previous chapters, and was susceptible to abuse.

The New Constitution has taken cognisance of the recommendations made by the reform initiatives and now provides for an expanded and more diverse membership of the JSC. It now includes the Attorney General,¹⁴⁷ Supreme Court judge,¹⁴⁸ Court of Appeal judge,¹⁴⁹ High Court judge, Magistrate,¹⁵⁰ two advocates,¹⁵¹ representative of the Public Service Commission¹⁵² and two members of public.¹⁵³ “As more institutions become involved in judicial nominations”, we are told, “judges become less beholden to one institution increasing their dependence from any one branch of government”.¹⁵⁴ It is expected that the JSC, as newly constituted, is not dependent upon the executive, and the President does not have any influence in its members’ election. This is a marked improvement from the Old Constitution. It is a positive step towards securing the independence of the judiciary by making sure that political interference is as remote as possible. Concern earlier expressed that the membership, as previously constituted, was drawn largely from the public sector, thereby locking out the potential contribution

¹⁴⁶ See discussion in Chapter Four 4.2.3.3

¹⁴⁷ Art 156 “The Attorney General shall be nominated by the President with the approval of the National assembly and appointed by the President” Note the Attorney General currently sitting in JSC was a direct appointee of President having been appointed under the Old Constitution

¹⁴⁸ Elected by the judges of the Supreme Court, art 171 1(b)

¹⁴⁹ Elected by judges of the Court of Appeal, art 171 1(c)

¹⁵⁰ Elected by Kenya Magistrates and Judges Association, art 171 1(d)

¹⁵¹ Elected by Law Society of Kenya

¹⁵² Art 1711(g)

¹⁵³ Art 171 1(h)

¹⁵⁴ Erick S. Heron, & Kirk A. Randazzo, ‘Relationship between Independence and Judicial Review in Post communist Courts’ (2003) 65 Journal of Politics, 422-438, 426

that other sections of the society may bring in such a body,¹⁵⁵ can now be presumed as laid to rest. Public participation is also now secured by the appointment of two persons, not being lawyers, by the President and approved by the National Assembly, providing the much needed checks and balances.

However, a high executive presence is still detectable in the composition of the JSC as currently constituted now that it is fully functional. The composition of the JSC in its first year did not in practice realistically reduce executive domination in practice. This is because the Attorney General, the Head of the Public Service Commission, the Judges representing the Court of Appeal, High Court and magistrate were all appointed under the discredited appointment process under the Old Constitution. Out of a total of ten members, five were direct descendants of the old order which was accused of being executive minded; three were members of the old JSC. None of the judicial officers, who were members of the JSC as at one year after the promulgation of the New Constitution, had been vetted for suitability for office. The Attorney General and the representative of the Public Service Commission are expected to leave office within one year,¹⁵⁶ and five years respectively at the earliest.¹⁵⁷

The only other new entrants are two representatives of LSK and two persons representing the public one of whom resigned even before the JSC commenced its functions proper.¹⁵⁸ The JSC as at July 2011 had eight members only as opposed to nine. The CJ who also represents the Supreme Court by then had not been appointed,

¹⁵⁵ Ouko Report (n 36)14

¹⁵⁶ Sixth Schedule s. 31(7)

¹⁵⁷ Sixth Schedule s. 20(4)

¹⁵⁸ Bishop Muheria Resigns'

http://www.ktnkenya.tv/new/?page_id=1&id=2000033096&cid=532&story=Bishop%20Muheria%20resigns also see 'Bishop Muheria Leaves Judicial Commission Job'

http://www.youtube.com/watch?v=TxtPGiOo_w both accessed 12 June 2011

the JSC having been constituted before his/her appointment. The strength of members directly appointed by the executive under the Old Constitution as at July 2010 was thus five out of eight. Obviously, the executive presence and its possible influence far outweighed the non executive appointees.

The question central to this chapter as to whether the New Constitution adequately protects the independence of the judiciary and whether it sets a realistic framework for the creating of a judiciary more independent than under the Old Constitution becomes relevant. From the above analysis, one possible answer could be that it is simply a question of “pouring new wine into old wineskins”. “Success of appointments commissions”, it has been argued “depends on the balance of its membership as this will prevent any one section from dominating the commission or the vested interests or groups from which members are drawn from dominating the commission”.¹⁵⁹ The face of the Commission so constituted under the New Constitution is still that of the executive.

The JSC is shaping the future of the new judiciary under the New Constitution and considering that they have completed the task of appointing the CJ, Deputy CJ, judges of the Supreme Court, and judges of the High Court. A member of the LSK alleged that the JSC will not be independent as expected, arguing that apart from the two JSC members elected by the LSK, “the rest are appointees of the normal system”.¹⁶⁰ If there be truth in that accusation that the majority of the members of the JSC are executive minded, are doing the bidding of the executive, and, are still

¹⁵⁹ Chris Himsworth & Alan Paterson, ‘A Supreme Court for the United Kingdom: Views from the Northern Kingdom’ in Guy Canivet, Mads Andenas & Duncan Fairgrieve (eds), *Independence Accountability and the Judiciary*, (British Institute of International and Comparative Law, London 2006)116

¹⁶⁰ Isaac Ongiri, ‘Kibaki, Raila Consult over Nominees for JSC Top Jobs’, The Star (Nairobi, 27 October 2010) 8

interested in perpetuating the interest of the executive as discussed in chapter four, then the danger of excessive executive influence is palpable.

This may have serious implications to judicial independence, since the JSC may be influenced by the executive to appoint judges who they (executive) can easily influence to determine disputes in their favour. Judges so appointed will not satisfy the impartiality test.¹⁶¹ They may not base their decisions on law and facts, but on predilections towards one of the parties; the executive.¹⁶² They may not be free from any pressure from government on how to decide a case.¹⁶³ They may allow the executive to have more power over their decisions, and may be unable to protect the citizens against the transgressions of the state, by not checking the excesses of the executive. In this sense they may not treat the parties before them equally, and hence, may violate the rule of law. That may definitely pose a potential risk to judicial independence in both its institutional and personal aspects.

5.4.6.2 Functions

The New Constitution enjoins the JSC to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.¹⁶⁴ In exercising this function, the JSC shall deal with issues related to appointment of judges, discipline of judicial officers, training and advising the government on how to improve administration of justice.¹⁶⁵ Further guarantee for independence has been accorded the JSC by providing its members

¹⁶¹ See discussion in Chapter two on personal independence 2.2.3

¹⁶² Christopher M. Larkins, 'Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis', (1996) 44 American Journal of Comparative Law 609

¹⁶³ John Ferejohn 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence,' (1999) Southern Californian Law Review 354

¹⁶⁴ Art. 172

¹⁶⁵ Art 172 (1)(a) – (e)

immunity from actions.¹⁶⁶ Their removal from office has to be by way of tribunal.¹⁶⁷ The JSC is now accorded the stature of an independent commission and Parliament is equally mandated to allocate it adequate funds.¹⁶⁸ Remuneration and benefits payable to members are charged directly to the Consolidated Fund.¹⁶⁹ In line with the checks and balances concept, the JSC is mandated to submit a report to the President and Parliament, which report shall be made public, thus enhancing accountability. One thus sees a picture of an institution adequately shielded from any intrusion by the executive or parliament.

The Old Constitution expressly provided that “in the exercise of its function, under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority” hence expressly guaranteeing independence.¹⁷⁰ Its functions then were not even spelt out in the Constitution. Under the New Constitution, the JSC has its functions spelt out and even expanded with several other protective trimmings as indicated above, but the JSC has lost that very important constitutional guarantee of independence. The removal of guarantee of judicial independence from the JSC has the potential of seriously compromising the independence of both the institution which it virtually manages and whose functions it oversees. Judges are expected to work in an institutional environment that makes it possible for them to give impartially legally sound decisions¹⁷¹ Interference with the judiciary as a whole is therefore likely to have a negative impact on the sense of independence of individual

¹⁶⁶ Art 250(9)

¹⁶⁷ Art 251

¹⁶⁸ Art 249(3)

¹⁶⁹ Art 250(7)

¹⁷⁰ Section 68(2) Constitution of Kenya 2008 (Government Printer, Nairobi)

¹⁷¹ Justice Edwin Cameron ‘The Need for the Independence of the Judiciary and the Legal Profession’ (Speech) <<http://www.sabr.co.za/lawjournal/2008/december-2008-vol21-no3-pp34-36>> accessed on 24/7/09

judges.¹⁷² In this regard institutional independence is in danger of being undermined since any arbitrary act by the executive and legislature against it is not expressly prohibited by the constitution.

The JSC, which is charged with the responsibility of “promoting and facilitating the independence and accountability of the judiciary and the efficient and transparent administration of justice”, which are the core functions of the judiciary, is thus exposed to manipulation and control by the executive or legislature and if this actually happens, then the Constitution will not have been violated. Its “capacity to remain autonomous so that it might serve as an effective check against the excesses of political branches”,¹⁷³ cannot be assured.

The Judicial Services Act 2011 as drafted clearly concretises this argument further. It establishes the National Council on the Administration of Justice,¹⁷⁴ with a separate secretariat whose composition again reflects the colour of the executive even though it is chaired by the CJ.¹⁷⁵ Its functions are inter alia to formulate policies relating to the administration of justice,¹⁷⁶ implement monitor and review strategies for the administration of justice,¹⁷⁷ mobilise resources for the efficient administration of justice¹⁷⁸ and *even oversee the operations of any other body (including the JSC) engaged in the administration of justice* (emphasis in italics mine).¹⁷⁹ These are similar functions and/or closely intertwined with the functions of the JSC and are likely to

¹⁷² Shimon Shetreet, ‘The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges’, (2009)10 Chicago Journal of International Law, 285

¹⁷³ Charles Gardner Geyh, Van Tassel, Emily Field, ‘The Independence of the Judicial Branch in the New Republic’ (1998-2000) 31 Chicago and Kent Law Review, 31

¹⁷⁴ Section 34

¹⁷⁵ Section 34(2)-(p)

¹⁷⁶ S 35 (2)(a)

¹⁷⁷ S 35(2)(b)

¹⁷⁸ S 35 (2)(d)

¹⁷⁹ S 35 (3)(c)

conflict. These functions equally affect the core function of the judiciary which is administration of justice and has the potential of informing the trajectory the judiciary takes in regards to the discharge of its functions. Failure to constitutionally guarantee the independence of the JSC, as was stipulated in the Old Constitution exposes the judiciary as an institution and, by extension, its judges and magistrates decisions to influence from the executive and the legislature.

Under the Act, the JSC can make regulations for the better carrying out of its function.¹⁸⁰ This includes but is not limited to developing a code of conduct, making rules regulating financial procedures, developing and implementing policies relating to training and performance appraisal of judicial staff. However, again these activities, once completed, must be presented to the National Assembly for debate and approval before they take effect. This new bureaucracy created by the Act further exposes the judiciary to possible interference by the legislature should they not like the decisions of the judges.¹⁸¹ Again here Parliament has the power to delay or even reject proposals on the training of judges, it can vary or reject the manner of assessment of judges' performances or make stringent financial procedures which may defeat the intended purposes. A Parliament that supervises, or controls, for example, the manner by which judges' performances are assessed or in which countries they are trained or even the content of training they require, is a danger to judicial independence and the rule of law. Malleson discusses comprehensively how training can be used to threaten both decisional and institutional independence, and, explains as an example, that training which dictates how judges should exercise their discretion, is clearly improper

¹⁸⁰ Section 47(1) (2)

¹⁸¹ Section 47(2)

interference and a breach of judicial independence.¹⁸² The potential threats cannot be underestimated.

The issues discussed above raise serious concerns about judicial independence where the JSC is concerned. The point being made here is that these provisions, though in line with the concept of checks and balances, must not be taken at face value as effective and good but must also be assessed carefully with a keen eye on the possibility of abuse, especially considering the fact that the executive has for four decades emasculated the judiciary in Kenya. The checks and balances adopted do not sufficiently preclude overlap between different powers of government or the use of parliamentary checks for improper motives. The JSC is the initiator of judicial appointments processes. The next section thus entails a discussion of the tools or mechanisms that the New Constitution has provided in order to ensure appointments devoid of executive intrusion.

5.4.7 Appointments

Judicial appointment in Kenya has been subject to numerous debates, commentaries and criticism. The most serious being that the process was shrouded in opacity and that judges were appointed not on merit, but on political considerations. The consequence was that the judiciary showed no ability or inclination to uphold the rule of law against the express whims of the executive and senior government officials, their business associates and cronies.¹⁸³ Simply put, the judiciary was seen as the

¹⁸² Malleson (n 144) 170-179, 173

¹⁸³ Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 98

handmaiden of the executive. The discussion below will focus on how the New Constitution has dealt with this challenge.

5.4.7.1 Qualifications

Qualifications for all judges of superior courts are now enhanced under the New Constitution.¹⁸⁴ They now must hold a minimum of a law degree from a recognised university or be advocates of the High Court of Kenya or possess an equivalent qualification in a Commonwealth jurisdiction. Previously, non lawyers could be judges. The CJ, Deputy CJ, and judges of the Supreme Court are now required to have served for a period of no less than 15 years, either as a superior court judge, distinguished academic, legal practitioner or have such experience in other relevant legal field.¹⁸⁵ Judges of the Court of Appeal and High Court require 10 years experience.

The period of experience has been increased by 8 years which is not of any great impact considering that the legal profession from which the judges are drawn has rapidly grown in numbers. It is only sensible that seniority matches the level of growth. But again, the mere fact that a person possesses impeccable qualifications or experience does not necessarily mean that he/she will not be biased or bend backwards to accommodate or serve political interests.

Years of experience has not attracted any significant debate, however, the blanket ten year experience set for judges of the High Court and Court and Court of Appeal may raise independence issues. Kwach Committee had observed that junior judges and lawyers with very little or no practical experience were elevated to higher

¹⁸⁴ Art 166(2)

¹⁸⁵ Art 166 (3) (a) and (b)

courts hence by passing the senior and more experienced judges with no clear criteria.¹⁸⁶ The New Constitution has attempted to address this problem, but only with regard to the difference in years of experience between the Supreme Court and the other Superior Courts, but it has failed to address the tier between the High Court and the Court of Appeal.

Another new requirement is that judges including CJ and Deputy CJ must be persons who possess high moral character, integrity and impartiality.¹⁸⁷ Professionalism, it is said, tends to promote judicial independence and to a lesser extent, accountability among peers.¹⁸⁸ Aspects of integrity, involve the personal profile of judges, their extra judicial activities, the behaviour of judges in private, and their relation with certain organisation.¹⁸⁹ This situation is justified by strict selection procedures or by a tradition where one has to have a well established reputation prior to becoming a judge.¹⁹⁰ Allegations of the appointment of judges who are under criminal investigations or are famous for fixing drug related cases or for fixing petitions for politicians,¹⁹¹ or who negotiate judgements in advance,¹⁹² or are anti free speech, or

¹⁸⁶ The Committee on the Administration of Justice, 1998 (Government Printer, Nairobi 1998)

¹⁸⁷ Article 166 (2) (c)

¹⁸⁸ Bedner Adrian, *Court Reform*, (Amsterdam University Press, Amsterdam 2008) 12

¹⁸⁹ See generally, Soeharno, Jonathan. *Integrity of the Judge: A Philosophical Inquiry* (Ashgate Publishing Group, Abington 2009) 5. The book engages in a comprehensive discussion on the integrity of a judge and its development as an established legal norm. It is replete with examples from both developed and developing countries

¹⁹⁰ Soeharno (n189) 5

¹⁹¹ The Hansard records of the Parliamentary Service Committee meeting held in Naivasha to iron out and discuss the Proposed Constitution of Kenya 2010 as replicated and annexed to the Tenth Parliament – Fourth Session (2011), *Report of the Departmental Committee on Justice and Legal Affairs: On the Nominations to the Offices of the CJ, Attorney General and Director of Public Prosecutions*, (Kenya National Assembly, Nairobi 2011) 70

¹⁹² National Assembly Official Report 1 February 2011 9.00am 43; Hansard 01.02 11
http://www.bunge.go.ke/index.php?option=com_content&view=article&id=186Itemid=160 accessed on 5 March 2011

had committed perjury,¹⁹³ would be reduced, since before such judges are appointed, all these integrity related issues of their private or public life, will be appraised, and only those with clean hands, will be appointed.

5.4.7.2 Process: Act by President declared Unconstitutional

Article 166 of the New Constitution provides that the President shall “appoint the CJ and the Deputy CJ in accordance with the recommendations of the JSC and subject to the approval of the National Assembly. This is a significant improvement and departure from the Old Constitution which provided that “the CJ shall be appointed by the President.” The office of the Deputy CJ which did not exist before has been created.

The National Assembly when it considers any appointment for which its approval is to proceed pursuant to article 124 (4). It tasks the relevant House Committee¹⁹⁴ to consider the appointments, make recommendations and table the same before the House for debate and approval. To this end the committee is empowered by the constitution to summon any such appointee to appear before it for purposes of giving evidence or providing information.¹⁹⁵ Its proceedings shall be held in public.¹⁹⁶ The CJ and Deputy CJ are vetted by Members of Parliament vide the relevant house committee. These requirements bring much needed checks on the executive powers of appointment which under the Old Constitution was lacking.

The transitional clauses further provide that the “the CJ shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after

¹⁹³ The Standard, ‘LSK Claim Kibaki Nominee unfit for Office’
<http://www.standardmedia.co.ke/news/InsidePage.php?id=2000028807&cid=4&> accessed on 25 march 2011

¹⁹⁴ The Parliamentary Departmental Committee on Justice and Legal Affairs

¹⁹⁵ Art 125 (1)

¹⁹⁶ Art 124 (4) (c)

consultation with the Prime Minister, and with the approval of the National Assembly.”¹⁹⁷ This was the procedure contemplated in the transitional period by the Sixth Schedule to the new constitution, before a new JSC was established and brought into operation.¹⁹⁸ The President under the New Constitution cannot not appoint a CJ or Deputy Chief justice without consulting the Prime Minister and should he arbitrarily purport to so act, then he will have overreached his powers and his actions run the risk of being declared unconstitutional, and consequently, null and void.¹⁹⁹

The weakness in this arrangement is that the appointment of the CJ would be determined by two executives who have been forced to share power under a coalition agreement.²⁰⁰ Absence of any input from the judiciary, especially at this critical transitional period obviously compromises the necessary checks and balances. The fears expressed by the Ouko Report that there could be politicisation of the appointment processes by Parliament in the absence of procedural safeguards in the parliamentary process were, therefore, not unfounded.²⁰¹ If Parliament had been able to avoid political bias in the process of appointment of the CJ, then probably a credible non political process could have emerged which may have succeeded in attracting wide public support. However, this was not the case.

¹⁹⁷ Schedule Six Section 24 (2) The Act in its preamble contemplates that the President and Prime Minister shall work together as coalition partners

¹⁹⁸ Schedule Six s 24 (3)

¹⁹⁹ Art 2 (1) (2)

²⁰⁰ Kenya National Dialogue and Reconciliation Mediated by H. E Kofi Annan, Chair of the Panel of Eminent African Personalities, ‘Statement of Principles on Long Term Issues and Solutions’ <http://www.dialoguekenya.org/docs/S_of_p_with_Matrix.pdf> accessed 16 March 2011. This agreement which brought to an end the post election violence experienced in Kenya was signed between the two dominant political parties namely Party of National Unity and Orange Democratic Movement. To date even though the two parties share power and are both in a coalition government they are still deeply divided along party lines in Parliament and make decisions not necessarily on merit and reason but with their respective parties parochial interests.

²⁰¹ Ouko report (n 36)

The ink had hardly dried on the print of the New Constitution when its strength and veracity underwent an acid test pitting the dreaded executive power against the newly acquired robust guarantees for the independence of the judiciary. It all started on the 28th January 2011, when the President wrote a letter to the Speaker of the National Assembly forwarding a list of names as the nominees for consideration for appointment to the offices of, CJ, Attorney General, Controller of Budget, and, Director of Public Prosecutions. For the purposes of this study, focus will only be on the nomination to the office of the CJ, and the relevant provisions thereof. The immediate former CJ was due and expected to vacate office on the 27th August 2011 six months after the promulgation of the New Constitution thus creating a vacancy.²⁰² The President wrote a letter to the Speaker of the National Assembly nominating certain individuals to public service, the post of CJ being one of them. The Prime Minister rejected the nominations, claiming that the President had failed to consult him as provided in the Constitution. The allegation was that the President had violated the provisions of the Constitution.

The JSC, lawyers, civil society, politicians, women organisations²⁰³ including the international community protested the nominations accusing the President of violating the newly promulgated Constitution which Kenyans had fought hard to achieve. A group of nongovernmental organisations and associations filed an application before the High Court.²⁰⁴ They petitioned the court for issuance of declaratory orders *inter alia*, that the nominations by the President had violated articles 3, 10, 27, 129, 13 and 166 of the Constitution and also Sections 12 and 24 of the Sixth Schedule of the constitution. They further sought an injunction to restrain the approval

²⁰² Schedule 6 s 24

²⁰³ <<http://www.youtube.com/watch?v=pogz9eZMbzo>> accessed 19 March 2010

²⁰⁴ *The Centre for Rights Education and Awareness (CREAW) v The Hon. Attorney General*, High Court Petition No. 16 of 2011

and eventual appointment of the nominations made by the President or any other nominations that may be made without compliance of the constitution.

In its judgement, the High Court held that the nominations were unconstitutional for lack of compliance with article 166(1) as read together with section 24(2) of Schedule six of the Constitution, and article 27(3) regarding equal treatment of men and women. It also considered as relevant article 10, which outlines the national values and principles of governance as including, *inter alia*, inclusiveness, equality, transparency, the rule of law and accountability. The court further cited the judges' constitutional oath wherein judges "swore to do justice without fear or favour, bias, affection ill will, prejudice, or any political, religious or other influence and also to protect, administer and defend the constitution and the integrity of the judiciary", as part of the twin principles of constitutionalism and rule of law which had to be incorporated in its decision.

This decision proves several points as to how the New Constitution has expanded and enhanced protection for judicial independence to a greater extent than the Old Constitution which had no such provision save that any law which was inconsistent with the Constitution was to be declared null and void. First, the requirement that "every person" is constitutionally "obliged to respect, uphold and defend the constitution"²⁰⁵ gave the nongovernmental organisation the *locus standi* to successfully bring this claim without having to prove some special or personal interest vested in them or to be suffered in case the independence of the judiciary is violated.²⁰⁶ This is a novel provision in the New Constitution and boosts the independence of the judiciary.

²⁰⁵ Article 3 (1)

²⁰⁶ Several other individuals also filed similar cases seeking a declaration that the President acted unconstitutionally

Anyone can now move to court to protect any violation or threat of violation of the Constitution.

The President is now equally obligated to respect the independence of the judiciary, since the executive authority is now to be “exercised in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit”.²⁰⁷ A President, who practices nepotism, or court packing, in judicial appointments as is evidenced in chapter 4, is not acting in the interest of the people and his actions can be successfully challenged as violating the independence of the judiciary, which is now boldly enshrined, and clearly described, in the constitution. One scholar succinctly summarised the above point, saying;

Litigants are not only provided with a remedy when authorities violate or threaten to violate the constitution, but they may even take action where the alleged violation consists of failure to fulfil constitutional obligations. This may result in a declaration of unconstitutionality for omission to carry out a constitutional obligation and it is to be welcomed in a continent where executives or legislatures are well noted for regularly ignoring implementation of the constitution provisions. This unique remedy is probably designed to cajole or force these two branches to fulfil their constitutional obligations. It is not a matter that lies within their exclusive and absolute discretion.²⁰⁸

The New Constitution clearly states and describes the offending acts, omissions which are now very visible, so much so that even the courts who conceded to be mice “squeaking under the of the chair of the executive”²⁰⁹ have now become like ‘Lions’ and have been provided firm ground, upon which to base its judgments. The judiciary in this case executed its role of stating what the law is.²¹⁰ In declaring the actions of the

²⁰⁷ Art 129 (1) (2)

²⁰⁸ Charles M. Fombard, ‘Post 1990 Constitutional Reform in Africa: A Preliminary assessment of the prospects for Constitutional Governance and Constitutionalism’, in Nhema Alfred & Zeleza Paul Tiyane (eds), *Resolution of African Conflicts: The Management of Conflict Resolution*, (Ohio University Press, Athens 2008) 190

²⁰⁹ See quote, Chapter Four (n 4)

²¹⁰ *Marbury V Madison* (1803) 5 U.S (1 Cranch) 137, 177, Joseph Raz, ‘Rule of Law and its virtue’ in *Authority of the Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 217; Lord Bingham in *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56 (sec 42)

president as unconstitutional, it succeeded in checking the excesses of the executive.²¹¹ It consequently upheld the rule of law by effectively subjecting the President to the authority of the law.

Second, the legislature also grabbed the opportunity to test its new found power to check, whether the President had overstepped his powers under the New Constitution. A motion was tabled before the National Assembly, questioning the constitutionality of the President's action, and seeking intervention by the House Speaker.²¹² In the debate that followed, the Prime Minister (from ODM Party) denied that the President had consulted him before making the nominations.²¹³ The President (PNU Party), through the Vice President, maintained that the President had consulted with the Prime Minister before making the nominations. After a lengthy and heated debate, the Speaker of the National Assembly in compliance with the parliamentary procedures forwarded the dispute to the relevant house committee to deliberate on and report to the House before he could rule on it.²¹⁴ The Parliamentary House Committee on Constitution and Legal Affairs failed to agree as to whether the President had violated the Constitution or not, and a decision was arrived at by way of vote. The majority vote from the President's Party of National Unity carried the day, while the minority vote was from the Prime Minister's Orange Democratic Movement Party. The minority wrote a dissenting

²¹¹ Barak (n 88) 51 "when a branch of state acts unlawfully – whether it exceeds its authority or exercises its authority for unlawful reasons - it is the role of the judiciary, as part of the principle of separation of powers to ensure that the unlawful action is voided"

²¹² National Assembly Official Report 1 February 2011 9.00am 43; Hansard 01.02 11
http://www.bunge.go.ke/index/.php?option=com_content&view=article&id=186Itemid=160 accessed on 5 March 2011

²¹³ National Assembly Official Report 1 February 2011 9.00am 43; Hansard 01.02 11
http://www.bunge.go.ke/index/.php?option=com_content&view=article&id=186Itemid=160 accessed on 5 March 2011

²¹⁴ Ibid

opinion which was forwarded to the Speaker.²¹⁵ The speaker in his ruling whilst overruling the majority vote stated that:

...section 24(2) and 29(2) of the Sixth Schedule to the Constitution requiring consultation subject to the National Accord and Reconciliation Act are not met if the National Assembly receives a list of nominees to constitutional offices, on which there is open and express disagreement between His Excellency, the President and the Prime Minister. Such is not the nomination contemplated by the National Accord and Reconciliation Act, which is part of the Constitution. It is unconstitutional and *the unconstitutionality cannot be cured by any act of this House or of its Committees, or by a vote on a Motion in the House.*²¹⁶

This parliamentary process raises pertinent issues as to whether this process is really an effective safeguard to judicial independence. It is laudable that Parliament moved fast to protect the judiciary from the excesses of the executive. This is a good example as to how involvement of Parliament protects the independence of the judiciary within the context of the checks and balances conception of separation of powers. We start to see the emerging role of Parliament, where it begins to stand up against the executive, not only to protect its own functions from being ignored, or interfered with, but also to protect the other branch from excesses of the executive. The President is now forewarned that he is not above the law; he is subject to it. He also cannot make arbitrary decisions and should he make such attempt, then, his actions will be effectively checked by both the judiciary and Parliament.

The separation of powers doctrine is concerned with the avoidance of concentration of power in one branch of government, by requiring that each branch checks the exercise of others, by participating in the functions conferred to those

²¹⁵ Tenth Parliament – Fourth Session (2011), Report of the Departmental Committee on Justice and Legal Affairs: On the Nominations to the Offices of the Chief justice, Attorney General and Director of Public Prosecutions, (Kenya National Assembly, Nairobi 2011)49

²¹⁶ National Assembly Official Report 17 February 2011
http://www.parliament.go.ke/index.php?option=com_content&view=article&id=184&Itemid=159 44-54, 47 accessed 5 March 2011

other branches.²¹⁷ This function, if consistently discharged by Parliament, as demonstrated in the speaker's ruling as discussed above, can provide a very effective check on the powers of the executive, by holding it accountable.

The possibility of the President directly accessing and controlling judicial appointments is now reduced by Parliament acting as a buffer zone between the executive and the judiciary. The conception of checks and balances which requires that each branch is independent within its zone so long as it acts according to law is applied.²¹⁸ The spiralling loss of confidence in the judiciary fuelled by the perception that the judiciary is not independent of the executive as is commonly believed may just well be on its way to recovery. This is a good example of the permissible extent(s) within which an arm of government can exercise its powers and interfere in another arm's core functions without violating their independence.

The parliamentary procedure, at the same time, may not be an effective safeguard for judicial independence. The result of the debate at Parliamentary House Committee stage shows that partisan political interests, as opposed to merit, were brought into play during the process. The President's party supported the President's preferred candidate and approved an unlawful act by the President. This they achieved by a majority vote. The Speaker had to overrule the majority vote to correct the illegality.

When parliamentary procedure is used to endorse and legalise an unlawful act, it encourages tyranny and violates the rule of law principle which demands that

²¹⁷ Eric Barendt, *An Introduction to Constitutional Law*, (OUP, Oxford 1998) 15

²¹⁸ Barak (n 88) 41 explaining the concept of checks and balances

people should obey the law and be ruled by it.²¹⁹ Had the Speaker not overruled the politically biased decision of the Parliamentary House Committee, he would have paved the way for the list of nominees to be placed before the house for debate and be decided by way of a vote, not on issues of merit, but by a politically biased majority vote. The CJ, if appointed in this manner, could have been a person the President likes, and not necessarily the most suitable candidate. Quigley opines that, if politics plays a central role in the selection of judges, the judiciary may lack professionalism and may take a political approach when addressing challenges to the legality of government.²²⁰ The danger to judicial independence in such situations cannot be overlooked. There is need to carefully re think how such threats to judicial independence by the legislature can be avoided since it may not always be the case that the speaker makes rulings which saves the judiciary's independence from being compromised.

The issue was not competence, qualifications nor integrity of the nominees, but that of a fair, transparent and less executive dominated process. The nominees were not barred from partaking in a constitutionally fair process. It is reported that after these rulings by the Court and Parliament, the President withdrew the list of nominees.²²¹ The correct and lawful procedure was then followed. The JSC advertised the position of CJ and Deputy CJ²²² and conducted interviews in full view of the public in an open transparent meritorious process.²²³ Parliament vetted

²¹⁹ Joseph Raz, "Rule of Law and its virtue" in *Authority of the Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 212

²²⁰ Quigley John, 'Judicial Autonomy in Palestine: Problems and Prospects' (1995) 21 University of Dayton Law Review 699

²²¹ 'Kibaki Withdraws List of Nominees' The Standard 22 February 2011. Also see press conference by President Kibaki at < <http://www.youtube.com/watch?v=EcNhWa8Jydc> > accessed 21 March 2011

²²² Advertisements for the CJ and Deputy CJ were made by the JSC in local daily newspapers with wide circulation in the country on March 5 2011 and also in Kenya Gazette Notice No. 2061 of 2011

²²³ 'Chief Justice Interviews' at < <http://www.youtube.com/watch?v=416CtG7ZUym> > accessed 25 June 2011

and approved the names²²⁴ which were subsequently forwarded back to the JSC who finally forwarded the names to the President and the Prime Minister who made the appointments. The rule of law triumphed since the President had to act according to the law. The theory of checks and balances was practiced to the extent that each branch played its role in its involvement of each others' functions within the required limits. The discussion above clearly exposes the importance of perception of independence as a means of securing legitimacy of government action hence a few more examples below should concretise this point.

5.4.7.3 Do Perceptions Matter? Transparent versus Opaque Appointments; Some Observations

The Interim Independent Dispute Resolution Court (hereinafter referred to as IIDRC), provides us with a good example where appointments using transparent criteria and procedure have improved the legitimacy of the courts and its decisions. The judges of this court were appointed through a system where posts were advertised,²²⁵ applications received, background checks made, interviews conducted, vetting done by Parliament and names forwarded to the President for appointments. In its short life this IIDRC determined only seven cases.²²⁶ It is

²²⁴The Constitutional Implementation Oversight Committee Report 2011 <<http://www.parliament.go.ke/>> accessed on June 16 2011. Also see Adoption of CIOC Report on Judicial Nominees, National Assembly Official Report (Hansard) 14th June 2011 page 14 at <http://www.parliament.go.ke/index.php?option=com_content&view=article&id=184&Itemid=159> accessed 16 June 2011

²²⁵ These advertisement appeared in the Daily Nation, The Standard, The East African, all the local and regional newspapers of with wide circulation in Kenya available both in print and also on the judiciary website <<http://www.judiciary.go.ke>> accessed 10 June 2010

²²⁶ *Priscilla Nyokabi Kinyua v Hon. Attorney General & Another* Constitutional Petition No. 1 2010, *Edris Nicholas Omondi & Others v The Hon. Attorney General & Another* Constitutional Petition No. 2 of 2010, *Mary Ariviza & Another v The Interim Electoral Commission & Others* Constitutional Petition No. 7 of 2010, *Bishop Joseph Kimani & Others v The Hon. Attorney General & Others* Constitutional Petition No. 4 of 2010, *Alice Waihera Mwaura & Others v The Committee of Experts and Others* Constitutional Petition No. 5 of 2010, *Nazlin Umar Fazaldin Rajput v The Attorney General & Others* Constitutional Petition No. 6 of 2010

interesting to note that all applicants who sought to stop the constitutional review process by filing petitions before the IIDRC failed to succeed as all their applications were dismissed. The judgments they subsequently delivered were less jurisprudentially laden and exhibited no novel or exceptional articulation of the law. They were not any different, in content and quality, from that of the regular High Court.²²⁷ In fact in one case one such application was dismissed and judgment was only read after the application had been overtaken by events (the referendum they were attempting to stop had already taken place).²²⁸

It is notable that even though the judiciary was not involved in the processes which it is argued was contrary to the concept of checks and balances this court nevertheless did not receive as much hostility as the main stream judiciary or attract any criticism or even scrutiny by the public or scholars. This may be because they perceived the Court as independent of the executive because of the transparent appointment processes and had no reason to distrust it.

At the other end of the spectrum, still on matters of constitutional review, the High Court in a judgment held that the inclusion of the Kadhis courts in the draft constitution was in conflict with other provisions of the same constitution.²²⁹ This decision was immediately attacked by politicians, lawyers, scholars, the civil society and even the Attorney General. This decision was viewed with a lot of suspicion and clearly the public felt that the judiciary had subverted the law and not

²²⁷ Compare the ruling of the Constitutional Court in *Jesse Kamau & 25 Others v Attorney General*, Misc Civil Appeal No. 890/04 at <http://kenyalaw.org/Downloads_FreeCases/73988.pdf> accessed 10 June 2010, with the ruling in *Nazlin Umar case* (n 226)

²²⁸ See (n 226) *Nazlin Umar case*

²²⁹ *Jesse Kamau & 25 Others v Attorney General*, Misc Civil Appeal No. 890/04, 88 also available at <http://kenyalaw.org/Downloads_FreeCases/73988.pdf> accessed 25 March 2011 The issue of the inclusion of the Kadhis Court (Islamic courts) in the new constitution was a very contentious issue which was very intensely and widely debated and also bitterly opposed by the Christians and other religious leaders and a section of Kenyans

decided the case on the basis of the law, but other politically minded considerations. The court was accused of scuttling the constitutional review process by attempting to sway public opinion in favour of those who were opposing the draft constitution.²³⁰ Suggestions were even made that a tribunal should be set up to investigate the judges who had delivered this judgment.²³¹ A Member of Parliament was reported to have given notice to Parliament to discuss the conduct of the judges concerned.²³² Some politicians attributed this decision to be a backlash from the judges against the provision in the proposed constitution which required that they resign or be vetted afresh.²³³ “Some of them are on their way out, so they will fight to defeat the new constitution”, some commented.²³⁴ The judges were branded as political activists.²³⁵ The Minister of Justice said it was an act of sabotage as the politicians opposed to the inclusion of the Kadhis Courts were hiding behind the judges and, further, that the then constitution had collapsed where the judiciary was concerned.²³⁶ Lawyers said the decision was not only wrong, but also suspect, considering the timing of the judgment which was delivered on the eve of the referendum.²³⁷ It must be noted that the judges who delivered this judgment had all been appointed under processes which were opaque, hence the heavy criticism they received may have been informed by suspicions of political intrusion.²³⁸

²³⁰ ‘Judges on the spot over Kadhis Court ruling’ <<http://www.youtube.com/watch=emstA-idydl>> accessed 8 March 2011

²³¹ *ibid*

²³² <<http://www.youtube.com/watch?=WDBYBBzDtx8ce>> accessed 8 March 2011

²³³ ‘Murungi launches attack on judiciary’ <<http://www.youtube.com/watch?=trw2nEDC>> accessed 8 March 2011

²³⁴ ‘Constitution politics’ <http://www.youtube.com/watch?=V_7agUz-8A4> accessed 8 March 2011

²³⁵ ‘Interrogate Judges’ <<http://www.youtube.com/watch?=X3P12fCC-BD>> accessed 8 March 2011

²³⁶ <<http://www.youtube.com/watch?=76MyKNoIMc>> accessed 8 March 2011

²³⁷ See <<http://www.youtube.com/watch?v=ew-Y33bDu4Q>> ;

<<http://www.youtube.com/watch?=9FPEuHgzTMY&feature=related>> accessed 8 March 2011

²³⁸ See discussion on this point in Chapter four 4.3.3 on appointments

Lord Steyn has previously pointed out that “the judiciary can effectively fulfil its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently”.²³⁹ We may never know if the judges of the two courts actually decided on account of particular politicians’ interest or pressure. But the point being made here is that appointment processes which are transparent will attract public confidence, whereas those shrouded in opacity do not, and further that the manner by which appointments are made inexorably affects the legitimacy of the courts’ decisions.

The New Constitution, with its newly enhanced appointment processes, calls for transparency, and public accountability, and therefore, provides a platform upon which confidence and trust in the judiciary can be achieved for the benefit of the rule of law. This buttresses the argument that if constitutional guarantees are weak then there is the likelihood that judges will be seen to be equally weak and not able to check the other arms of government which will lead to lack of confidence in their decisions and absence of legitimacy in the judicial processes and system, thus eroding judicial independence and consequently compromising the rule of law. This is a reminder that the existence of judicial independence depends on the existence of legal arrangements that guarantee it, arrangements that are actualised in practice and are themselves guaranteed by public confidence in the judiciary.²⁴⁰

The above discussion was meant to only expose the dichotomy between appointments made in an open transparent procedure and those in which weak opaque procedures are used and how it can affect the legitimacy of court decisions. The next section includes *inter alia* a critique the establishment of the IIDRC

²³⁹ Johan Steyn, ‘The Case for a Supreme Court’ (2002) 118 Law Quarterly Review 382 , 388

²⁴⁰ Barak (n 86) 77

arguing that its formation was an executive/Parliament affair devoid of judiciary's input with the potential implication of undermining judicial independence and a threat to the rule of law.

5.4.8 Separation of Judicial Functions

The essence of separation of powers is that it requires a clear demarcation of functions between the legislature, executive and judiciary in order that none should have excessive power and further that there should be in place a system of checks and balances between the institutions.²⁴¹ The question is whether that requirement can be guaranteed under the New Constitution as drafted. Under the Old Constitution, executive authority was expressly vested in the President,²⁴² legislative authority in Parliament,²⁴³ but judicial authority was neither provided for nor recognised. The New Constitution takes cognisance of the reform proposals²⁴⁴ and now expressly recognises the judiciary as a state organ and further vests in it judicial authority. The text reads;

Sovereign power under this constitution is delegated to the following State organs which shall perform their functions in accordance with this Constitution – Parliament... executive...*the judiciary and independent tribunals*”.²⁴⁵

Clearly, judicial authority is not exclusive to the judiciary. Another judicial institution called ‘Independent Tribunals’ (hereinafter referred to as IT), has been added. It is vested with judicial power concurrent, and in equal measure with the judiciary. The words ‘Independent Tribunals’ (read together), appears only once in article 1 (3) (c), and, nowhere else in the constitution. Apart from being so named, it is not defined. It is not declared if the IT will have original or appellate jurisdiction or

²⁴¹ Hillarie Barnett, *Constitutional and Administrative Law*, (Routledge Cavendish, London 2006) 97

²⁴² S. 23 (1)

²⁴³ S. 30 Also see discussion in Chapter four 4.3.1

²⁴⁴ Kanyeihamba Report (n 35) Ouko Report (n 36)

²⁴⁵ Article 1 (3) (c) (Emphasis mine)

both. Their relationship with the newly created Supreme Court is not explained.²⁴⁶ All these issues seem to have been left to the discretion of Parliament. The Constitution does not categorically state that, when established, IT shall automatically access constitutional protection of independence or even accountability as guaranteed to the mainstream judiciary. It would therefore be extremely naïve to so assume.

The New Constitution is silent on whether the mandate of IT will include determining legality of government action. There is a possibility that depending on the statute(s) which may establish them, they could have power and jurisdiction similar to the judiciary. There are specialised courts which have been created by the New Constitution, but their membership and jurisdiction, are clearly spelt out.²⁴⁷ Their decisions are subject to review by the judiciary.²⁴⁸

Prior to the enactment of the New Constitution there were, and still exists, special courts like the military courts (Courts Martial) and a host of administrative tribunals.²⁴⁹ Their decisions are subject to supervision by the superior courts.²⁵⁰ These tribunals are not privileged to exercise judicial authority neither do they enjoy constitutional guarantees for judicial independence under article 160. Clearly again IT are not administrative tribunals.

The reform initiatives reports do not bear evidence of discussion or recommendation to the effect that IT or any other tribunal should share judicial power

²⁴⁶ Art. 16 (3)(b)(ii)

²⁴⁷ Employment and labour relations courts see Art 162 (a) and Environment and use and occupation of land court see Article 162 (b) These are special tribunals already established by the new constitution but awaiting to be put into operation by Parliament through future legislation.

²⁴⁸ Article 162

²⁴⁹ There are over 80 administrative tribunals in Kenya

²⁵⁰ The Armed Forces Act (Chapter 199 Laws of Kenya) s 115 ; The Rent Restriction Act (Chapter 296 Laws Of Kenya) s 8

alongside the judiciary. This provision first appeared in the Bomas Draft²⁵¹ and has been retained since. A scrutiny of the Ghai Report contains no deliberations or rationale of the vesting of judicial power in IT.²⁵² The issues and questions raised therein for discussion at public hearings with regard to the judiciary were framed thus: “Should judicial powers of state be vested exclusively in courts? If not, what other bodies can exercise judicial powers?”²⁵³ These questions were not deliberated upon. The justification for vesting judicial power in the IT alongside the judiciary is therefore not clear. Other questions and issues are exhaustively explained in the report and are compatible with the decision made to include or exclude them.

A thorough scrutiny of the verbatim panel discussions that took place during the National Constitutional Conference in 2003,²⁵⁴ a precursor to the main Draft and the final Bomas Draft Constitution, wherein issues relating to the judiciary were exhaustively articulated, equally reveals no debate on whether judicial power should be vested *exclusively* in the judiciary or *to include other bodies* (emphasis mine). The words ‘IT’ did not feature at all. A CKRC Commissioner, in explaining what constituted the court system, clearly distinguished between courts that form part of the judiciary and any other tribunal which may exercise a judicial or quasi judicial function.²⁵⁵ It is the former that he clearly explained were to be bound by the decisions of the Supreme Court. There was no discussion as to whether the latter, too, were to be equally bound and no one seems to have identified this jurisdictional and/or supervisory

²⁵¹ The Draft Constitution of Kenya 2005 (Government Printer, Nairobi 2005) popularly known as the Bomas Draft Art 1(3)(c)

²⁵² CRKC Report (n 2) 249-263

²⁵³ Appendix III Ghai Report (n 2) 461

²⁵⁴ Constitution of Kenya Review Commission (CKRC), *National Constitutional Conference Verbatim Report of Plenary Proceedings – Presentation of Draft Bill Chapter 9 – Judicial and Legal System*, held at the Bomas of Kenya on the 19th, 20th and 21st May, 2003

<<http://www.constitutionnet.org/files/Presentations.pdf>> accessed 9 June 2011

²⁵⁵ CKRC Verbatim Report (n 252) 7

gap. This provision, it can be said, was approved without deep conceptual considerations.

The tripartite nature of a modern state presupposes a separation of powers between the judiciary, executive and parliament and does not anticipate two and a half branches. Extra organs such as independent courts or tribunals or bodies exercising judicial functions if not properly defined or placed squarely under the supervision of ordinary courts, can be susceptible to abuse. A complete parallel court system in the form of other specialised tribunals and courts, however independent they may be, could be set up to completely bypass the judiciary.

The Spanish experience, wherein specialised tribunals were created by an authoritarian regime in an attempt to limit the sphere of action of ordinary courts which left them independent but powerless, is a good illustration on how judicial independence can be compromised by IT.²⁵⁶ In the Arab world too, reliance on special courts which bypass the judicial system also pose consistent challenge to judicial independence.²⁵⁷ “While it is conceded that these special tribunals are grounded firmly in law, they still undermine the ability of the judiciary to oversee the application of the law”, it is opined.²⁵⁸ The danger is not only inherent in authoritarian non-democratic regimes, but is also alive in democratic regimes, especially young and developing ones like Kenya which is undergoing democratic transition including a one party dictatorship and where abuse of executive power has been ubiquitous.

²⁵⁶ Jose Toharia, ‘Judicial Independence in an Authoritarian Regime: The Contemporary Case of Spain’ (1975) 24 *Journal of Law and Society* 456-496 He calls such action “judicial fragmentation”

²⁵⁷ Adel O. Sherif and Nathan Brown, ‘Judicial Independence in the Arab World: A Study Presented to the Program of Arab Governance of the United Nation Development Programme

<<http://www.pogar.org/publications/judiciary/sherif/jud-independence.pdf>> accessed 18 July 2010

²⁵⁸ *ibid*

In Ceylon, in the case of *Liyanage v The Queen*,²⁵⁹ the Privy Council invalidated legislation in which had created special criminal courts to try specific criminal cases, thus bypassing the regular courts. Lord Pearce termed such action as ‘a grave and deliberate incursion into the judicial sphere’. The problem is not that IT are not necessary; or that they should not be established, but if set up, as in the case of the USA,²⁶⁰ then, their power should not be exclusive, but should be subjected to the control of the courts.²⁶¹ If the IT is set up with the sole objective of bypassing the judiciary, then the executive, and Parliament, will have exercised power that they do not intend to be fettered. They will have connived to side step the constitutional mandate of the judicial function which is to check their excesses. Unfettered power, Bingham says, “is tyranny and despotism...both of which are incompatible with the rule of law”.²⁶²

The creation of the IIDRC, pursuant to a constitutional amendment in the year 2009²⁶³ can be used to illustrate how failure to vest the judicial function exclusively in the judiciary can threaten institutional independence of the judiciary. The amendment effectively created a new section 60A to the Old Constitution allowing the new court to exercise similar functions as the High Court.²⁶⁴ The decisions of this court were shielded from review by any court in the land.²⁶⁵ Attempts by litigants to seek redress before the mainstream High Court failed, as judges declined to intervene, citing section 60 and 60A as conferring exclusive original jurisdiction on the IIDRC.²⁶⁶ It was a parallel court exercising full judicial functions of interpreting the constitution and

²⁵⁹ [1967] 1 AC 239

²⁶⁰ The Constitution of the United States of America, Art III (2)

²⁶¹ Barendt, (n 217) 139

²⁶² Tom Bingham, *The Business of Judging: Selected essays and Speeches*, (OUP, Oxford 2000) 232

²⁶³ Constitution of Kenya (Amendment) Act No. 2009

²⁶⁴ Constitution of Kenya Review Act, Revised Edition 2008

²⁶⁵ S 28 f

²⁶⁶ *Ariviza Case* (n 226) 12

reviewing government action but concurrently operating completely outside the purview and authority of the judiciary as a branch of government.

At this time ODM (which was the opposition party) had entered into a political coalition agreement with PNU (the ruling party).²⁶⁷ Currently there is no opposition party in Parliament to check the functions of the executive save their parochial political interests and, further, all other parties are either PNU or ODM affiliates. With fusion of the two branches, it may well be said that the legislative and executive branches are united in the same person or body; a recipe for tyranny.²⁶⁸ Locke's apprehension that the executive and legislature in such circumstances may exempt themselves from obedience to the laws they make and suit the law both in its making and execution to their own private advantage,²⁶⁹ is valid. If government is able to set up special tribunals to decide certain types of cases which traditionally have been decided by ordinary courts such a move would" as Barendt opines (albeit using different examples but within a similar context), "surely amount to an infringement of judicial power".²⁷⁰ The concept of separation of powers which is concerned with the avoidance of concentration of powers²⁷¹ was negated. Power was, indeed, concentrated in the hands of a 'fused' executive and legislature and left to be checked by a temporary court with a life span of less than one year.²⁷²

The point here is to highlight the dangers of unchecked abuse of executive and legislative power in that there is a possibility that in a bid to avoid the judiciary's

²⁶⁷ Mwai Kibaki of PNU is the President while Raila Odinga of ODM is the Prime Minister. Both have appointed their respective party members to cabinet and nominated some to the National assembly

²⁶⁸ Montesquieu (n 10) 202

²⁶⁹ John Locke, *Second Treatise of Civil Government* Peter Laslett (ed), (CUP, Cambridge 1988) 364

²⁷⁰ Barendt (n 217)131

²⁷¹ Barendt (n 217) 14

²⁷² Constitution of Kenya Review Act, 2009, s 36, "this Act shall expire when the Commission is dissolved. IIDRC was established under this Act. Judges on short tenure may create perceptions real or imagined that they are appointed to facilitate a particular outcome after which they exit

restraining authority, the executive and parliament can collude and create purportedly independent courts to serve their interests. If, therefore, the judiciary in Kenya has consistently failed, for example, to protect citizens' rights against the state and completely lost the confidence of the public, then the best option is to strengthen the judiciary by putting in place reforms to specifically address the failures exposed. The creation of parallel institutions by the Constitution to do the same job is not the best solution. Such attempts are ill considered reforms that may serve executive or political expediency.²⁷³

This loophole in the New Constitution creates a subtle impression that should the judiciary not improve in its performance and live up to the expectations of its newly enhanced status, then there are other options that can be utilised to achieve those expectations. The fact that the Constitution goes further to outline the principles that should govern courts and tribunals exercising judicial authority,²⁷⁴ or provisions relating to the management of public affairs, is no consolation and does not adequately address the fears expressed above.

From the foregoing analysis, it can be concluded therefore with some measure of certainty that the judiciary under the New Constitution is still the weaker branch of government. The threat to the doctrine of separation of powers is real and cannot be ignored. This splitting of judicial power poses the grave danger of undermining judicial independence of the judiciary as currently constituted. The New Constitution thus provides a weak framework for the entrenchment of judicial power. To this extent, it fails to guarantee genuine protection or enhancement of institutional independence of the judiciary as expected. It fails to secure the separation of powers concept wherein

²⁷³ Andenas *et al* (n 159) 26

²⁷⁴ Article 159 (2)

one organ of government should not exercise the function of another (separation of functions).²⁷⁵ The vesting of judicial power in the judiciary is purely cosmetic. It gives power to the judiciary with one hand and immediately takes it away with the other hand making no real difference from the position of the Old Constitution where no such authority was provided. It effectively creates two centres of judicial power, by hiving off some jurisdiction from the judiciary and conferring it to current and future IT.

5.4.9 The Unfinished Business

Not all challenges identified in the last chapter have been addressed by the New Constitution. Indeed, some crucial recommendations and proposals for constitutional reforms have been completely ignored. The following section points out omissions related to magistrates, and matters of discipline.

5.4.9.1 Absence of Security of Tenure for Subordinate Courts

The New Constitution fails to provide security of tenure to magistrates. Magistrates exercise judicial power and are part of the judiciary which exercises judicial authority, yet it piles on more responsibility upon the subordinate courts to hold government accountable to the law.²⁷⁶ Under the New Constitution a magistrate with 15 years' experience can be appointed as a CJ and hence are capable of becoming the President of the Supreme Court and head of the judiciary.²⁷⁷

²⁷⁵ A. W Bradley and K. D Ewing, *Constitutional and Administrative Law*, 14th Edition, (Pearson Education Ltd, Essex 2008) 87 Also see *Blackstone's Commentaries on the Law of England* (21 London Edition 146-147 vol. 1 para 6 for a similar statement is also found in *Halsbury's Laws of England*, para 6

²⁷⁶ Article 1 (3) (c)

²⁷⁷ See article 166 (3) (b) which includes a judicial officer as qualified for appointment as CJ

The New Constitution authorises Parliament to “give subordinate courts original jurisdiction to hear and determine applications for redress of denial, violation or infringement or threat to a right or fundamental freedom in the bill of rights.”²⁷⁸ In the process the subordinate courts so authorised exercise judicial review and declare laws invalid where human rights are infringed.²⁷⁹ This is the same authority that the Constitution confers on the High Court.²⁸⁰ Subordinate courts thus have latent jurisdiction, to hold the government accountable to the citizen by checking its excesses just like the Superior courts. If, therefore, they lack the security of tenure as provided to judges, obviously their independence would be seriously compromised when they exercise these enhanced functions.

Security of tenure has been identified as probably the most fundamental guarantees of judicial independence, the reality of which depends largely upon the rules for removal of a judge from office.²⁸¹ The lack of security of tenure, that which protects magistrates from fearing that should they make decisions that are not liked by the executive they will be removed, is not desirable. The fact that their security is not hinged in the Constitution, but merely left to the JSC to be regulated according to statute which is much easier to amend (simple majority) is itself a danger to the independence of the judiciary too and a serious omission by the Constitution. This recommendation had been made incessantly by most reform initiatives but no proper justification was provided for the omission. To this extent the Constitution has failed to go far enough. Such exclusion is a weakness in the New Constitution that can be easily exploited by a rogue parliament and executive.

²⁷⁸ Art 23 (2)

²⁷⁹ *ibid*

²⁸⁰ Art 23 (1)

²⁸¹ The Hon. Leonard King, ‘The IBA Standards on Judicial Independence: An Australian Perspective’ in Shetreet and Deshpande, (eds) (n 9) 411

5.4.9.2. Discipline

The New Constitution gives the JSC the power to initiate the process of removal and also consider and determine which cases to take forward for removal. It is silent on the processes to be followed in situations where transgressions are proved, but are not serious enough to warrant removal. It does not even mention if these are matters which Parliament should legislate on by providing rules or whether the JSC itself should create rules.

The weaknesses in the New Constitution as identified in the above analysis in this part, coupled with issues left unaddressed, will form the substance of further recommendations in the following chapter. Some conclusions on the above analysis are, however, outlined below.

5.5 Conclusion

Prior to the enactment of the New Constitution 2010, attempts to reform the judiciary did not bear fruit. Slow, piecemeal, half-hearted, uncoordinated approaches coupled with lack of political will adversely compromised the concerted reform initiatives, which were replete with useful recommendations requiring constitutional amendment. These proposals if effectively and robustly implemented could have paved the way much earlier for the creation of a new and independent judiciary in Kenya. Enhanced protection for judicial independence and improved public confidence in the judiciary would have been achieved. A large portion of blame is attributable directly to the executive, whose responsibility it was to develop policies, implement them and

generate legislation or propose constitutional amendments for the enhancement of judicial independence.

It can be stated with some amount of certainty that for a period of 46 years up till the New Constitution came into force, the executive consistently denied the judiciary the opportunity to achieve any meaningful independence, being the holders of the judicial purse. They failed to translate the research, studies and findings of the reform initiatives into government policy with a view to putting into place a plan of action that could be followed through in terms of implementation and legal intervention.

Be that as it may, the political and social background upon which reform initiatives were buoyed to fruition in the form of the New Constitution, is an indication of the importance of judicial independence as a crucial constitutional principle. Recommendations made by the reform initiatives have largely been implemented by the New Constitution. It addresses most of the challenges identified in the previous chapter. Even though some of the recommendations have not been implemented, the New Constitution to a large extent can confidently be said to be a great improvement of the 1964 Constitution as far as the independence of the judiciary is concerned. It entrenches the checks and balances conception of the doctrine of separation of powers which provides a better platform for the creation of an independent judiciary in a manner receptive to the realisation of the rule of law. However, balancing the overlap of functions in the process of regulating the judicial function will require a cautious approach and much more delicate balance and scrutiny. This is to ensure that executive influence is not re-introduced through the back door by members of Parliament who also are members of the executive.

Robust protection of judicial independence in the constitution can provide sufficient motivation to protect judicial independence. This can in turn increase public confidence in the judiciary. When constitutional guarantees were weak, as observed in the last two chapters, it was easy to manipulate the weak provisions and this translated into low levels of confidence and less motivation to protect judicial independence. The newly promulgated Constitution contains more robust protection of judicial independence which, in turn, has increased the confidence of the public and provided the motivation to protect the newly found independence at all costs. It equally gives a strong impetus to the judiciary to fight for its independence, and Parliament to boldly check the powers of the executive.

An unprecedented and substantial dose of judicial accountability mechanisms of transparency, competence, moral integrity and openness and public participation which did not exist in the Old Constitution has been injected in the New Constitution with the consequence of enhanced independence. The judiciary as an institution and judges as individuals are now publicly accountable for their actions and decisions. The manner in which requirements for accountability have been incorporated into and made part and parcel of the constitutional guarantees for judicial independence confirms that judicial accountability and judicial independence are not at war with each other; both refer to the same concept and are simply sides of the same coin. The implementation process so far discussed, demonstrate the necessity to delicately balance both sides of this coin by using known objective criteria, as failure to so do can jeopardise independence.

As to whether the novel and drastic provisions expressly entrenching the independence of the judiciary, imposing stringent accountability mechanisms and

literally setting the stage for a complete overhaul of the institution and its judicial personnel, will sufficiently reform the ailing institution with the resultant effect of achieving true independence is a conclusion that cannot be arrived at within the life of this study. It might be expected that the enhanced guarantees of judicial independence in the Constitution will translate into an improved balance of power between the three arms of government to the extent that the judiciary can be sufficiently seen to occupy an equal position with the executive and legislature.

The analysis on separation of judicial power reveals serious jurisdictional gaps which, if not properly defined, may cause confusion and can even be misinterpreted and be misused. This can compromise the new found authority of the judiciary. The expectation of a strong independent judiciary, capable of protecting the citizen from arbitrary and capricious acts of the other political branches, cannot be assured. The same applies to all other constitutional guarantees for judicial independence discussed in this study. This, however, depends on how the political branches behave in future, or whether political leaders will come to the realisation that an independent judiciary is beneficial not only to the common citizen, but also themselves.

The full realisation of judicial independence will heavily depend on political and legislative will of the other arms of the government as dictated by the constitution itself in its transition provisions. The vigilance of the judiciary itself, the civil society and the Kenyan public, in constantly and consistently policing the implementation and reform process (as evidenced in the recent attempt by the President to ignore the constitution by nominating the CJ and other public officers), will be required. It is the process of implementation which, in the long run, will determine the legitimacy of the anticipated new judiciary under the new constitutional dispensation. This is a task now

placed squarely in the hands of the executive whose duty is to formulate policies and generate bills and place before Parliament for debate for the enactment of legislation to formalise and provide guidance for the realisation of the new judiciary, a process which has already commenced.

Weaknesses have been identified which will need to be addressed in terms of further constitutional, statutory and other non-legal interventions. Be that as it may, excess power accumulated by the executive over the years to the disadvantage of the judiciary as an equal arm of government, it is hoped will be reduced, if not removed altogether. Judicial independence in both its personal and institutional capacity can now be realistically achieved within the framework of the New Constitution.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Research Summary and Findings

This study was prompted by the long standing concerns about the individual independence of judges and that of the institution of the judiciary in Kenya. It finds that the executive powers, as personified in the presidency, had been expanded into, and was ubiquitous in the affairs of the judiciary. The judiciary was justifiably perceived as a tool of executive control over the citizens. There was excessive concentration of power in the hands of the executive which was in many instances used arbitrarily. The executive failed to translate the principles, objectives and values of separation of powers and the rule of law into practice. The result was a judiciary which lacked independence from the executive and failed to command the confidence of the Kenyan public. The incidences enumerated in chapter four clearly point to the fact that judicial independence was constantly compromised by the executive hence the rule of law was threatened. There was absence of any or reasonable checks and balances of executive power. This finding resonates with the first objective of the study in that the dangers of failing to maintain appropriate balances between the arms of government and the consequences that arose or could possibly arise there from has been exposed by the Kenyan experience.

The conceptual analysis in chapter two reveals that the concepts of judicial independence, separation of powers and the rule of law are symbiotically interrelated and that separation of powers can only be achieved with the existence of an

independent judiciary. Both separation of powers and an independent judiciary preserves the purposes of the rule of law which becomes considerably weakened in the absence of an independent judiciary. Without an independent judiciary, separation of powers cannot be said to exist. There is consensus that the three concepts share similar values and objectives which are; 1) avoidance of concentration of powers in any one arm of government, 2) avoidance of tyranny, and, 3) protection of the liberty of the individual. An independent judiciary fits within the axis of separation of powers and the rule of law in that it is through an independent judiciary that these objectives can be effectively achieved.

The study finds that judicial independence is best understood more meaningfully and can be assessed more effectively when viewed through the lenses of the formal and partial approaches to the rule of law and separation of powers respectively. By contextually defining judicial independence in its personal and institutional aspects, it acquires a normative appeal conceptually and internationally. Public confidence is also found to be a major ingredient of judicial independence definition.

With regard to separation of powers, the study finds that complete separation between the arms of government is not possible, neither is it desirable. That tension between the different arms is necessary. There must be some shared functions wherein one arm of the government is allowed to interfere into the functions of the other arms, but the core functions should be left intact to be exercised by each respective arm. The challenge, however, is in determining the appropriate equilibrium or acceptable level(s) of checks and balances. This has to be dependent upon each individual state. Care has to be taken to ensure that the objectives and values of these constitutional concepts as

traditionally understood are not undermined. The conceptual framework developed thus provided a template upon which failure to provide appropriate balance was measured and absence or deviations was easily discerned. The analysis in chapters three four and five wherein the Kenyan experience with judicial independence is assessed, when set against the shared objectives of separation of powers, rule of law and judicial independence confirms that these concepts were not put into practice.

The analysis of traditional justice systems in chapter three reveals that judicial independence was not peculiar only to western democracies. It was also inherent in the traditional African processes of dispute resolution. What was lacking was institutional independence which negated the concept of separation of powers as there were no checks on the executive power. The mature democracies were no different earlier in their respective histories. Judicial independence and its attendant constitutional concepts of separation of powers and the rule of law are therefore not cast in stone. They are in the process of evolution and can only be an ideal. Each country should be judged on its own merit considering its peculiar experience and circumstances. Be that as it may, the study found that there are generally agreed and tested constitutional principles and concepts which can be used as a yardstick to assess the actual independence of a state's judiciary. These normative values and objectives served as a litmus paper for the purpose of highlighting the danger of failing to maintain appropriate balances of power between the arms of government.

The colonial judiciary reveals that the executive power was consolidated to the detriment of the judiciary to the extent that the judiciary was perceived not to be independent of the executive. This exemplified *inter alia* in the overlap of responsibilities between the executive in the form of provincial administrators who

were also performing judicial functions. For example, that the executive had sole power over control of the courts so much so that judges were appointed at the pleasure of the Governor and could be dismissed without any investigation¹ was a recipe for tyranny and absolutism which was contrary to the concept of separation of powers and threatened the rule of law. Here again the existence of dangers of over concentration of powers is highlighted. The symbiotic relationship between the three concepts is confirmed.² The judiciary under the colonial government cannot also be said to have been independent of the executive. The analysis of the Westminster Constitution 1963 was a pointer to the opportunities beneficial to judicial independence if entrenched in the constitution. Appropriate checks and balances were included therein, but the subsequent amendments thereof leading to the enactment of the Independence constitution 1964 negated the gains made and became an obstacle to judicial independence. Constitutional protection of judicial independence was simply inadequate under the 1964 Constitution. The executive took advantage of the loopholes it created and controlled appointments to the JSC and by extension the appointments of all members of the judiciary. Security of tenure was not spared either as exemplified by removal of security of tenure for judges and also the radical surgery in 2003.³ Financial autonomy and judicial power were negligible. Flaws and misuse in the manner that the executive handled the affairs of the judiciary were massive as documented in this chapter posed serious challenges to judicial independence.

Judicial independence in Kenya this thesis also finds was wrapped up with and determined by the political economy of the nation. The political ideologies it has been

¹ See generally discussion in Chapter three at 3.3.3 and also Eugene Cotran, 'Tribal Factors in the Establishment of East African Systems' in P. H. Gulliver (ed) *Tradition and Transformation in East Africa*, (University of California Press, California, 1969) 129. Also see Ghai *ibid* (n 6)173

² See conclusion to chapter two at 2.7

³ See chapter four 4.3.4.1

demonstrated in the analysis of the political context and party politics in chapters three and five⁴ greatly contributed to the relegation of the role of the judiciary and even the legislature. During the colonial period as discussed in chapter three there was little or no democratic space and the political ideology was to rule the colonised state. The rule of law, separation of powers and judicial independence as practiced in the colonising state was not put into practice. The executive therefore all powerful, conducted judicial functions and judicial independence was weakened. When Kenya obtained independence KANU ideologically preferred to pursue a unitary state with a powerful presidency as opposed to KADU's ideology of a devolved government with less powerful president. KANU engaged in political scheme that killed political party competition, outlawed opposition, amended the constitution to suit this purpose by creating a one party state, and again the judiciary's independence was weakened. The clamour for a new constitution and the political context that shaped the subsequent constitutional amendments as discussed in historical background of the new constitution clearly demonstrates the veracity and validity of this finding.

Furthermore, the study exposes how the absence of sufficient checks of the executive function in the judiciary, since the President in most cases acted solely without any constitutional requirement for input by the judiciary itself or the legislature. The challenge of practically applying the principles and objectives of separation of powers was demonstrated not only in the conceptual arguments in chapter two, but also was played out in reality by the Kenyan experience in the latter chapters. That the constitution is a "mere parchment barrier" to the protection of judicial independence as conceived by the drafters of the American constitution is true to a large extent. These

⁴ See discussion of political context and party politics in Chapter 3 Parts 3.3.1 3.3.2 and 3.4.8 and chapter five part 5.3

are some of the constitutional challenges for the protection of judicial independence experienced.

The study confirms the argument that weak constitutional protection for judicial independence has a strong co-relation with lack of independence. It can produce a weak judiciary which may not withstand executive intrusion. Weak protection also contributes to perception of lack of independence even where there is no apparent evidence of impartiality. The analysis of the IIDRC adequately demonstrates this point.⁵ The weaknesses discussed in chapter three and four when contrasted with the much stronger protection afforded in by the New Constitution buttresses further this point. This is also one of the factors that contributed to the weakening of the judiciary in-spite of the fact that judicial independence was protected in the Old Constitution.

Chapter five is the anti-thesis of chapters three and four. The opportunities for enhanced protection of judicial independence in this chapter brings into focus the challenges experienced in the attainment of judicial independence as identified in chapter three and further exemplified in chapter four. That the New Constitution promulgated on 27th August 2010 provides tremendous opportunities for stronger and better protection of judicial independence as opposed to the Independence constitution 1964 is a truism. It has injected desirable checks and balances required for the protection of judicial independence by giving Parliament more powers to check executive functions in the judiciary, and thus, it improves the balances of power between the three arms of government in a positive way.⁶ It improves most aspect of points of interaction between the judiciary and the executive by attempting to

⁵ Chapter Five 5.4.7.3 and 5.4.8

⁶ Chapter Five 5.4.7.2

considerably reduce executive politicisation of the judiciary. The inclusion of transparency and accountability requirements in the exercise of judicial functions has strengthened independence and enhanced legitimacy. It returns an affirmative verdict to the question of how effective constitutional guarantees can succeed in deterring the violation of judicial independence.

The argument that stronger guarantees effectively deter violation is exemplified by the incidence in 2010 wherein the President attempted to appoint a new CJ in contravention of the express provisions of the Constitution.⁷ When more robust protection was included in the Constitution, the courts, and even the legislature, came out strongly and stopped the executive from inappropriately intruding into the core functions of the judiciary. Even the public got the courage to publicly protest the infringement of judicial independence. Weak guarantees are easily violable as exemplified in chapter four. A weak constitutional guarantee is a factor that contributed to lack of or perception of lack of judicial independence in Kenya. The argument advanced in this study that more robust constitutional guarantees for judicial independence are desirable especially in countries like Kenya which are struggling with practically applying western constitutional concepts is vindicated.

The discussion on implemented reform initiatives proposals points at the executive as the greatest enemy of judicial independence. The lack of political will and weak implementation strategies pointed to the failure by the executive to put in place adequate policies geared towards enhancing judicial independence was apparent in the discussions in part one of chapter five. Most reform initiatives were replete with recommendations requiring constitutional amendments for enhanced protection of

⁷ See discussion in Chapter Five 5.4.7.2

judicial independence. These amendments were not implemented for forty seven years. During this period Parliament suffered a relegated role and was equally as dominated by the executive, hence the executive is most responsible for failure to address the recommendations made. This discussion confirms the finding that one of the key factors to which lack of or perception of lack of independence is attributable is undisputedly the failure by the executive to amend the Constitution to provide for stronger protections for judicial independence.⁸ The question asked with regard whether the executive power has been consolidated and entrenched at the expense of the balance of powers between the executive and the judiciary is answered again in the affirmative. This is evidenced by the constant and consistent failure to formally and expressly give more powers to the judiciary in order to bring it to par with the other arms of government.

The weaknesses, gaps in the New Constitution as exposed in chapter five further exposes the power that the executive still possess in the affairs of the judiciary and the potential threat to judicial independence. The experiences with the implementation process are a further proof that constitutional provisions may not completely deter violation of judicial independence. Nonetheless they may reduce the degree or chances of violation and help buoy the legitimacy of the institution and thereby increase public confidence in the judiciary.

6.2 Implications of the Research to the Kenyan Judiciary

The findings discussed above raise serious implications for the judiciary in Kenya. What has emerged from this study is concern is that the judiciary over the years

⁸ The legislature was equally emasculated see chapter one 1.3.3.1

appeared not to make serious effort to protect its own independence even within the minimal protection actually offered by the Old Constitution. The literature analysed did not find any serious attempts by the judiciary to conduct any self-help measures to stave off this massive executive onslaught to its independence. The reform initiatives, especially those which were judiciary driven like the Kwach Report, the Onyango Otieno Report and the Ringera Reports, were mostly of the view that amendments to the Constitution would be the most preferred solution to lack of independence. The assumption appeared to be that once this was done, it would automatically deter the executive from encroaching into the affairs of the judiciary. Apart from feeble one off protests from the CJ⁹ no serious engagement with the executive was forthcoming. The judiciary simply sat back and played victim. This failure by the judiciary to assert its independence is accepted in its Strategic Plan.¹⁰ This is one of the reasons why in spite of constitutional guarantees the judiciary still lacked independence. The judiciary should to consider employing much more robust tactics in protecting its own independence. Public education and public explanations for decisions or even public debates on challenges faced by the judiciary could go a long way in achieving this goal.

This study concerned itself with the relationship between the three arms of government in terms of vertical separation. What is apparent is that the Constitution was much more concerned with institutional aspects of judicial independence. Even though this is important in order to widely protect personal independent it is clear that this latter aspect was largely ignored both in the Old and New Constitution. The analysis of the office of the CJ and the JSC and the evidence of direct interference, as well as the wide berth given to protection for magistrates, is a clear demonstration of

⁹ See chapter four 4.3.7

¹⁰ Judiciary Strategic Plan 2009-2013 (judiciary Nairobi) 25

the lack of concern for personal independence.¹¹ There is need to focus more on strategies that can improve personal independence especially for example streamlining the functions of the office of the CJ. The assumption that once institutional independence is availed then personal independence will be automatically achieved, though true to some extent, should not be left to chance and the exercise of good faith. More effort requires to be placed in understanding the different ways and means with which personal independence can be best secured in the absence of express constitutional interventions. The internal checks and balances must be attended to. The powers of the CJ and the JSC can still seriously threaten or compromise personal independence hence systems ought to be put in place to secure it administratively.

Demand for an independent judiciary, it is also discernible from this study, tended to improve with enhanced democracy. This is revealed by the historical perspective applied to this study. When power was centralised in the presidency and party politics was minimal, the executive intrusion into the affairs of the judiciary was much more pervasive. This is evident during the colonial period where the Governor was all powerful and could dismiss judges without accounting for his actions.¹² The period immediately after independence which witnessed rapid consolidation of powers in the presidency also saw amendments that watered down the independence of the judiciary. The Moi era when the country reverted to single party system saw most violation as exemplified in the last parts of chapter three and also chapter four. The period after 1990 when multi-party democracy was introduced again saw a push towards a more independent judiciary. This trend intensified after the year 2000 when multi-party politics was at its peak. It is then that the quest to amend the Constitution

¹¹ See *inter alia* analysis in Chapter four 4.3.4, 4.3.6 and 4.3.7

¹² Chapter Three 3.3.1

became more urgent until the year 2010 when the New Constitution came into force when power was now shared between many parties. This research thus reveals a correlation between enhanced democratic space in terms of political accountability and separation of powers between the arms of government and judicial independence. This also an area that requires further research especially with a view to assessing how coalition governments can reverse gains made on political accountability and re introduce over concentration of powers which can again threaten judicial independence as discussed in chapter five. The implication of this finding to the judiciary is that it will need to position itself firmly to maintain its independence in spite of oscillating political party re alignment.

Attempts by the New Constitution to address the challenges experienced under the Independence Constitution though commendable, will not automatically make the judiciary independent. Evidence discussed in chapter five shows that the New Constitution may not meet the expectation of balancing powers of the branches adequately. There is indeed some more protection which will require to be secured, hence the recommendations hereunder.

6.3 Recommendations

This study recommends that the judiciary be vested with judicial authority in order to comply with the separation of power wherein core functions are disbursed between the executive, legislature and judiciary. Administrative and independent tribunals which exercise judicial function will still maintain their independence as they function under their respective arms of government albeit independently. However, their decisions should be subjected to scrutiny by the judicial arm of government which

should possess the overall judicial function. The Supreme Court which has now been established can be vested with that power. This recommendation is prompted by the analysis of potential misuse of such tribunals.¹³ This is in order to avoid concentration of powers in the hands of the executive and legislature as they easily can gang up to avoid checks by the judiciary. The Constitution should be amended to exclusively vest judicial power in the judiciary just as it has vested executive power exclusively in the President and legislative power exclusively in Parliament. In this regard this study recommends that the jurisdiction of the Supreme Court be set out specifically in the Constitution and not be left to parliamentary discretion. This is particularly germane considering that in a coalition government like the one currently in place in Kenya, all political parties are sharing power and therefore effectively part of the executive. The existence of an official opposition in Parliament which traditionally checks the executive is extremely minimal or completely absent.

The study also recommends that the Constitution be amended to include provisions on security of tenure for magistrates. In cases they determine they have powers to hold the government accountable just like judges of superior courts. They also comprise persons bearing equal qualifications and competence as is possessed by judges of the superior courts. They are equally exposed to similar standards and are being vetted just like judges. They form the bulk of the judiciary and their numbers and geographical distribution brings them visibly in contact with the common citizen. They are the face of the Kenyan judiciary. If they lack security of tenure then the whole judiciary will be seen not to be independent. Having found that legitimacy is important and an unavoidable feature of judicial independence, this proposal is reasonable.

¹³ See chapter five at 5.4.8

Even though other weaknesses were identified, the ones listed above are the most important and need urgent attention. It may be too early to assess the success of the New Constitution. As the New Constitution continues to be implemented, further research will require to be conducted to assess the progress on whether the opportunities it provides for an independent judiciary is pragmatic or even sustainable.

6.4 Way Forward

The latter part of this discourse revealed the emergence of Parliament as a new source of threat to judicial independence in a manner unprecedented. Its new found power now securely recognised and entrenched in the New Constitution to check the functions of the judiciary was tested by its enactment of the Judicial Services Act No. 1 of 2011 and the Vetting of Judges and Magistrates Act No. 2 of 2011. Parliament, it now emerges, can manipulate, slow down or reverse the new found robustly guaranteed independence of the judiciary. This calls for a paradigm shift away from the belief that the executive is the greatest nemesis of judicial independence. More attention should urgently be focused towards the relationship between the judiciary and the legislature within the context of judicial independence, which has not received sufficient attention in studies of judicial independence in Kenya in the past.

Further research could draw from the Kenyan experience on how the legislature may impact on judicial independence. Focus should be directed towards coalition governments in which opposition parties are part of government leaving the legislative role of checking the excesses of executive largely unguarded. In a government organised under such political arrangement, the two arms of government can easily gang up against the judiciary and usurp its powers, and even functions, thus easily

defeating the primary objective of the separation of powers and the rule of law which requires that concentration of powers in one or more branches be prevented. The judiciary under such circumstances calls for more robust protections than traditionally conceived.

Not all solutions will require legal interventions. The importance of understanding the behaviour of political actors viz a viz the judiciary cannot be ignored. The analysis in chapter three and four clearly brought to the fore the realisation that one of the reasons why the judiciary continues to be weak in spite of constitutional guarantees was not because the political class were ignorant of the values and objectives of separation of powers, but because they chose intentionally to ignore these values and relentlessly pursued a course of weakening the judiciary by using their law making powers and amending the Constitutions to suit their needs whenever necessary. That future politicians will utilise such methods legally even within democratic states cannot be ruled out.

There is a need to identify alternative ways of creating a culture of respect for judicial independence. Research by political scientists like Widner which exposed how judiciary leaders like Chief Justice Nyalali in the case of Tanzania successfully personally engaged the executive by consulting and educating the executive of the importance of protecting judicial independence are worth considering.¹⁴ Research on the perceptions of Kenyan politicians and policy makers towards judicial independence or even education of the political class on the importance of an independent judiciary

¹⁴ See Dudziak's advice to the American judiciary on how even developed countries can learn from developing democracies Mary L Dudziak 'Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa' (2003) Michigan Law Review 1624 She comments on the book by Jennifer A. Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, (W W Norton and Company Ltd, New York, 2001)

with a view to explaining the role of the judiciary in a constitutional democracy would also be worth undertaking. Undertakings along these lines may immensely benefit from interdisciplinary research between legal scholars and political or social scientists in Kenya with a view to changing the attitudes of Kenyan politicians and dissuading them from compromising judicial independence.

Comparative studies on the state of judicial independence in Kenya and other countries facing similar strong executive presence are also worth pursuing. These need not be in the African continent but beyond too. Literature on judiciaries for example in Latin America or Eastern Europe, which countries have emerged from authoritarian regimes could provide useful insights on the role judiciaries should play in the face adverse executive interference. This study having found that there can indeed exist authoritarian tendencies even in liberal democracies, such a suggestion is pragmatic.¹⁵ Countries like Kenya can find many points of convergence or similarities in behaviour of the executive, which could in turn inform better strategies in dealing with the challenges identified.

Perceptions play a significant role in securing or damaging the integrity of the judiciary. The post-election violence was a good example where lack of trust largely contributed to the rejection of the judiciary. Even though the New Constitution injects transparency in certain processes, the analysis in chapter five revealed that this may not be sufficient. Focused and in-depth research into the other causes of lack of confidence in the judiciary as relates to its relationship with the executive can yield some very useful findings which could lead to appropriate solutions to the problem.

¹⁵ See discussion on Separation of Judicial Function 5.4.8

Finally, this study argued that a more robust protection in the text of the constitution will provide a better framework for the realisation of a more independent judiciary than mere minimal guarantees. Stronger guarantees coupled with enhanced accountability mechanisms, appear to have restrained the executive from dipping its hands into the functions of the judiciary. It also gave the judiciary the teeth to fight off inappropriate executive intrusion. The other arm of government (legislature) and the public also found a stronger foothold upon which check executive power and hence protect the judiciary's independence. This was informed by the experience with judicial independence in Kenya exhibited in the third fourth and fifth chapters of this study.

That there is need to go beyond the Hamiltonian apologist view of the constitution as, 'a mere parchment barrier'¹⁶ for the protection of judicial independence, as has been demonstrated. While conceding that it would be desirable to develop a culture of protection of judicial independence as ably demonstrated by the United Kingdom,¹⁷ those democracies which are have not fully developed such culture must first provide much stronger constitutional guarantees not traditionally considered. This strategy it is contended may fast track the achievement of independent judiciaries in relatively new democracies like Kenya in this era of globalisation. Other countries facing similar challenges may learn some lessons from the Kenyan experience.

6.5 Concluding Remarks

Judicial independence in Kenya has traversed a long and winded path riddled with challenges and opportunities. Despite the many challenges experienced, Kenyans

¹⁶ *Federalist Papers* 309

¹⁷ Tom Bingham, *The Business of Judging: Selected Essays* (OUP, Oxford 2000) 55 He sees the British judiciary as a model for other countries

fought tirelessly in an effort to create a more independent judiciary that can protect them from the arbitrary and tyrannical behaviour of the political class. The newly promulgated Constitution has to a large extent positively contributed to the future of judicial independence in Kenya. However as the implementation process unravels, emerging threats have been identified, recommendations have been made and other non legal interventions including further research have been suggested. These issues must be addressed in order for meaningful independence to be realistically achieved. The judiciary must not only be independent. It is equally imperative that its jurisdiction on all matters touching on the interpretation of the law be sufficiently delineated in order to avoid creating a new judiciary which is independent but powerless. The establishment of the long awaited Supreme Court is an opportunity to rectify this oversight.

The judiciary in Kenya, in spite of the New Constitution must visibly satisfy Kenyans that it is independent in order to win their support and protection. The judiciary must assert its independence which it has failed to do in the past. The legislature and the executive on the other hand, must appreciate the importance of practically applying the concepts of separation of powers, rule of law for the achievement of judicial independence, which they ignored for a long time. They must acknowledge the critical role that the judiciary plays in delicately balancing the interests of the state and the citizen. They must also accept that tensions and disagreements exist and are good for them too. The legislature and the executive must embrace the judicial reforms that Kenyans have enacted into the New Constitution, failing which they may jeopardise the gains made. Events like the 2007 post election violence may then be a thing of the past and consequently a new and independent

judiciary fairly and largely free from political control may truly emerge in future.

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