A CRITICAL ANALYSIS OF THE INDEPENDENCE OF JUDICIARY IN KENYA, BEFORE AND AFTER THE PROMOGULATION OF THE 2010 CONSTITUTION.

A Thesis

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BY

GULENYWA SALINDER ANERTIA

LLM/7189/121/DF

SUPERVISOR

Dr. RONALD KAKUNGULU MAYAMBALA

DECEMBER, 2013

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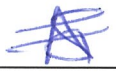

GULENYWA SALINDER ANERTIA

LLM/7189/121/DF

13TH DECEMBER, 2013

Date

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This Thesis entitled "***A CRITICAL ANALYSIS OF THE INDEPENDENCE OF JUDICIARY IN KENYA, BEFORE AND AFTER THE PROMOGULATION OF THE 2010 CONSTITUTION***" prepared and submitted by ***GULENYWA SALINDER ANERTIA*** in partial fulfillment of the requirements for the degree of a Master of laws -Public International Law; has been examined and approved by the panel on oral examination with a grade of .....

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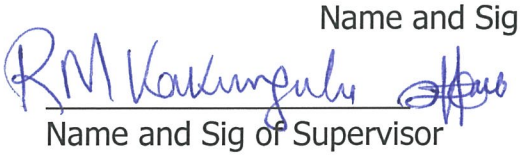

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_____

Name and Sig. of Panelist

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Name and Sig. of Panelist

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Name and Sig. of Panelist

Date of Comprehensive Examination: _____

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_____

Name and Sig of Director, CHDR

_____

Name and Sig of DVC, CHDR

DEDICATION

I dedicate this research work to my mum-Alice Gulenywa, my dad – Albert Gulenywa, siblings-Allan Gulenywa, Alentrice Gulenywa, Aldrinah Gulenywa, Aldrin Gulenywa, Annick Gulenywa, Aloe Gulenywa, Alba Gulenywa, my niece- Annabell Njeri Oketch , and all my friends ,especially Issack Hassan, for his assistance in my research and for the moral and financial support he has offered, all my course mates Zegabe, Sempala and Hassan, along with the entire administration of Kampala International University.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHR	-	American Convention on Human Rights
ECHR	-	European Convention on Human Rights
CMJA	-	Commonwealth Magistrates and Judges Association
SR	-	Special Rapporteur.
ICCPR	-	International Covenant on Civil and Political Rights
UDHR	-	Universal Declaration of Human Rights (1948)
ICC	-	International Criminal Court
JSC	-	Judicial service commission
UN	-	United Nations.
NGO	-	Non Governmental Organization.

LIST OF STATUES

1. *Constitution of Kenya(2010).*
2. *Magistrates' Courts Act Cap 10.*
3. *Judicial Service Act No. 1 of 2011.*
4. *Public Officer Ethics Act, 2003 (Act No. 4 of 2003).*
5. *Kenya Gazette as Legal Notice No. 50.*
6. *Universal Declaration of Human Rights (1948) (UDHR).*
7. *International Convention on Civil and Political Rights (1976) (ICCPR).*
8. *African Charter on Human and People's Rights (1981).*
9. *United Nations ('UN') Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26.*
10. *August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.*
11. *The vetting of Judges and Magistrates Act (Amendment), 2011.*
12. *European Convention on Human Rights (ECHR).*
13. *American Convention on Human Rights (ACHR).*
14. *UN Principles.*

LIST OF CASES

1. *Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa HCCC No. 190 of 2010],*
2. *Joseph Kimani Gathungu v. The Attorney-General & The International Criminal Court, Mombasa H.C.Const.Ref.Appl.No.12 of 2010].*
3. *Scott v. Stansfield [1868] L.R. 3 Ex. 220.*
4. *Queen v. Kirby ex parte Boilermakers's Society of Australia (1956) 94 CLR 254.*
5. *Myers v. United States, 272 U.S. 106, 293 (1926).*
6. *Northern Pipeline Construction Company v Marathon Pipeline Company (1982) 458 U.S. 50 at 60.*
7. *Beauregard v Canada 1986 CarswellNat 1004 at para 24.*
8. *R v Director of the Serious Fraud Office [2008] EWHC 714 at paragraph 76.*
9. *Bradley v Fisher (1871) 80 U.S. 335 at 347.*
10. *Mogambi Mong'are v Attorney General & 3 others[2011] Eklr.*
11. *Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC).*
12. *R v Quinn; ex parte Consolidated Foods Corporation (1977) 138 CLR 1 at 11.*
13. *Olo Bahamonde v Equatorial Guinea.*
14. *S v Mamabolo (E TV and Others Intervening) 2001 (5) BCLR 449 (CC) para 16-17.*

15. *South African Association of Personal Injury Lawyers Vs Heath, Willem Hendrik, The Special Investigating Unit, President of the Republic of South Africa and the Ministers of Justice [1995(4) SA 877 (CC); 1995(10) BCLR 1289 (CC)]*

16. *Executive Council Western Cape Legislature and Others V President of the Republic of South Africa and Other[Case CCT 27/00]*

17. *The Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches Vs The State and The President of Malawi, The Inspector General of Police, Army Commander Misc. Civil Cause 0f 2002.*

18. *Kisya Investments Ltd v. Attorney General & Another of 2005,*

19. *Findlay v. UN (1997) the European court of Human Rights.*

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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, therefore, this thesis contends that there is a contextually symbiotic link between separation of powers and judicial independence. 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 the law on judicial independence. 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 and judicial practices in guaranteeing judicial independence. Instances of violation of judicial independence 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 scrutinized. 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.

CHAPTER ONE

THE PROBLEM AND ITS SCOPE

Introduction

This chapter presents the background, problem statement, purpose of the study, specific objectives, research questions and corresponding hypotheses, scope and significance of the study, definition of the key terms, review of related literature, and methodology of the study and chapterization of the thesis.

To study the above, there are some questions the researcher attempted to answer in her study of a critical analysis of the judiciary.
As the idea of "judicial independence" commands glowing and nearly unanimous approval, but any serious consideration of its meaning and operation quickly uncovers arrange of problems and ambiguities.[1]

Background of the study

The research focused on a critical analysis of the independence of judiciary in Kenya. Judicial independence is a concept referred to regularly in the context of political announcements, discussions about court decisions, and the relationship between the government of the day and the Judiciary. It is an important concept that lies at the heart of our

[1] For an excellent introduction to those problems and complexities, see judicial independence at the crossroads: an interdisciplinary approach (Stephen B. Burbank & Barry Friedman, eds., 2002). For a recent study examining the functional role of judicial independence in a democracy, see Matthew C. Stephenson, *"When the Devil Turns . The Political Foundations of Independent Judicial Review,* 32 J. Legal Stud. 59 (2003).

democratic system of government, and because of that, it tends to be taken for granted.

Furthermore, historically, the Judiciary in Kenya, as well as all other institutions of governance, were founded upon the belief that the law emanates from the sovereign command. Simply put, law as it is, is the sovereign command. The doctrines upon which Kenya's jurisprudence is founded presupposes a certain understanding about law, what it is and what it is good for.[2]

Therefore, the study dates back when Kenya became independent in 1963, where later on the Constitution of Kenya was adopted in 1964 and provided for the separation of the powers of the executive, legislative and judicial branches of government.

As most former British colonies, the Kenyan legal system is based on English common law, with significant elements of customary law and Islamic law. The Judicature Act sets out the court structure.[3] This is also further elaborated in the Magistrate`s Act Cap 10.[4] The Constitution may be defined in terms of governance as the law that seeks to define, distribute and constrain the use of state power so that power is applied to the Objectives for which it was invented and in the manner in which it was intended.[5]

In addition, Under the Kenyan Constitution, the Supreme Court is

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[2] Nkatha Kabira, Commissions, A Site of Encounter between Africa's Legal Thought and British Legal Thought: The Case of Kenya. SJD Dissertation in Progress.

[3] The Judicature Act chapter 7, Laws of Kenya.

[4] Magistrates Courts Act chapter 10, Laws of Kenya.

[5] John Mutakha Kangu, "The Social Contractarian Conceptualisation of the Theory and Institution of Governance", 1 Moi University Law Journal, p. 21

the highest-level court followed by the Court of Appeal, then the High Court.[6] The Court of Appeal has jurisdiction to hear appeals from the High Court, which in turn has unlimited original jurisdiction in civil, criminal and other matters, as well as powers of constitutional interpretation and jurisdiction to hear appeals from subordinate courts. The judicial service Commission (JSC) is headed by the Chief Justice.[7] The President shall appoint (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and (b) all other judges, in accordance with the recommendation of the Judicial Service Commission. (2) Each judge of a superior court shall be appointed from among persons who (a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.[8]

Therefore, it would be important to note that the judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community. Social, political and economic changes, in recent times, in most countries, have confronted the courts and judges with new challenges and new problems.

The centralization of the responsibility and supervision of court administration and judicial administration has raised the issue of the relationship between the judiciary and the executive, and made it necessary to examine and delineate the boundaries of the scope of executive control on judges, courts and judicial administration, and court financing. It was also necessary to review the rules, traditions, and

[6] Constitution of Kenya(2010), Chapter 10,Part 2,163,164,165.

[7] Constitution of Kenya (2010), Chapter 10, Part 2,163.

[8] Constitution of Kenya(2010), Article 199.

practices governing the conduct of judges off the bench, in the various areas of activities.

A modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole. The concept of collective judicial independence may require a greater measure of judicial participation in the central administration of the courts including the preparation of budgets for the courts, and depending on one's view of the nature of judicial independence, the extent of judicial participation may range from consultation, joint responsibility with the executive, or exclusive judicial responsibility[9], all the above is still a challenge in the Kenyan judiciary.

However, the Constitution of Kenya, 2010 provides for strengthened, independent and functional institutions, especially the Police, the Judiciary and the Legislature. Further, the Constitution expressly safeguards judicial independence and provides a more reformed judiciary to foster independent, impartial and expeditious access to justice and rule of law for all,which the researcher is going to elaborate further in her study.

The Manifesto of a modern Kenyan Judiciary finds its anchorage in Article 159 of the Constitution of Kenya. The Constitution provides that judicial authority is derived from the people and vests in and shall be exercised by or under this Constitution. The people bestow power upon the Executive, the judiciary and the legislature. These organs exercise their delegated power during their good behavior. There are inbuilt mechanisms in the Constitution to deal with the question of abuse of that

[9] Shimon Shetreet and Jules Deschenes, Judicial Independence: The Contemporary Debate (1985 Martinus Nijhoff), Ch. 33.

power. It is from this premise that the first transformation vision tenet emerges. The Judiciary under the new Constitutional dispensation must of necessity shift from one that views law as emanating from sovereign command to one that embraces the sovereignty of the people as paramount.[10]

The Constitution provides as follows:

159 (2) In exercising Judicial Authority, the courts and tribunals shall be guided by the following principles: -

> *Justice shall be done to all, irrespective of status; Justice shall not be delayed;*
> *Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); Justice shall be administered without undue regard to procedural technicalities;and The purpose and principles of this Constitution shall be promoted.*

159(3) Traditional dispute resolution mechanisms shall not be used in a way that, Contravenes the Bill of Rights;Is Repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or Is inconsistent with this Constitution or any written law.

Moreover, the judiciary should help ensure that the country government observes the rule of law in the governance process. It is recognized that

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[10]Constitution article 159(2),(3).

the rule of law, upheld by an independent and incorruptible Judiciary, is an essential bulwark of democracy.[11]

Judicial independence is a significant component of governmental culture in every country. It is shaped by the relations between the branches of government, and is one of the basic values, which lie at the foundation of the administration of justice. Judicial independence must be supported by the political climate and social consensus. The political leadership and the professional and legal elite must work together to develop a culture of judicial independence along several very significant guidelines and levels. They must do this in a long and gradual process[12]

Security of tenure is constitutionally guaranteed for the Judges of the Court of Appeal and the High Court.[13] These Judges vacate their office only upon clocking retirement age.[14] They may be removed while in office only on grounds of "inability to perform the functions of his office" or for "misbehavior".[15] In any of these cases, and upon advice of the Chief Justice, the President shall appoint a tribunal, which shall inquire into the matter and recommend whether the Judge in question shall be removed.[16] The President can remove the Judge only upon the

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[11] John Haberson (2012) "Judiciary on course to true independence," *Nairobi Law Monthly* Vol. 3, issue No. 1, January 2012, pp. 6-7.

[12] Shimon Shetreet, Creating Culture of Judicial Independence: The practical challenge and the conceptual and constitutional infrastructure, in Shimon Shetreet and Christopher Forsyth: The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges, Ch. 2 (Martinus Nijhoff, 2008).

[13]Constitution of Kenya(2010) Chapter 10, Part 2,167.

[14]Constitution of Kenya(2010) , Chapter 10, Part 2,168.

[15] Constitution of Kenya(2010), Chapter 10, Part 2,168.

[16] Constitution of Kenya(2010), Chapter 10, Part 2,168.

recommendation of such a tribunal[17].This prevents intimidation and corrupt blackmail from higher authorities thus promoting independence of the judiciary in Kenya.

In Kenya, the basic foundation of election has been well entrenched in the Constitution, whereby Kenya has instruments as parts of its law this has been well stated in Article 2(5)[18] which is to the effect that the general rules of international laws shall form part of the laws of Kenya, while sub section (6) states any treaty or convection ratified by Kenya shall form part of Kenya law under the Constitution.

The existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attacks, harassment or persecution as they carry out their professional activities in the defence of human rights. They should in turn be active protectors of human rights, accountable to the people and must maintain the highest level of integrity under national and international law and ethical standards.[19]

Statement of the problem

For many years, the Judiciary was considered a "Department" or the "third" arm of government, imputing that the institution was not equal

[17]Constitution of Kenya(2010),Chapter 10, Part 2,168.

[18] 2010 Constitution of Kenya, Article 2(5)

[19] The 2010 Constitution of Kenya under Chapter 10, Part 1, and Section 167.

to the executive or the legislature[20].This subordination of the Judiciary in the supposed "hierarchy" of organs of government not only undermined its development, but also exposed it to several forces, which led to its decline. Jurisprudentially, the subordination of the judiciary went against Montesquieu's tripartite system and his original concept of the equality of the three arms of government[21]

Since independence, the judiciary has remained the weakest of the three arms of government and also the least functional. The judiciary has lacked independence (both operational and financial) and has totally failed in its core mandate to dispense justice in adjudicating disputes or determining cases in a timely fashion. Indeed, the 2007 election-related disputes degenerated into violence mainly because those who felt aggrieved by the announced results did not have faith that the judiciary with its history of bias and open support for the executive, and the regime in power, could offer justice and redress.[22]

In addition, over the years, the Judiciary has been accused of its historical failure to efficiently, effectively and fairly arbitrate over politico-legal disputes. In democracies, the role of the judiciary is not confined only to arbitration of purely legal disputes, but also legal issues for a political nature, such as elections, legality of governmental power, constitutional review and interpretation and enforcement of human rights. In the 1980s and 1990s, the courts of law were accused of interpreting the law in such

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[20] Final Report of the Task Force on Judicial Reforms (The Justice Ouko Report)

[21] *Barron de Montesquieu, Charles-Louis de Secondat* (Stanford Encyclopedia of Philosophy)". first published Fri Jul 18, 2003; substantive revision Wed Jan 20, 2010.

[22] Ibid 21.

cases without regard to the political and social realities, as well as the aspirations of the needs of the Kenyan people.[23]

Public power takes many forms, and is presumptively exercised by virtue of constitutional authority, and in the public interest its main agency being the executive branch of government. [24]:

"The foremost characteristics of the Executive, as the main repository of public decision-making in any country, are: the commanding role in matters of war and peace; the management of international relations...through diplomatic initiatives; the authority in respect of internal order...[Practical factors], however, have placed various other items on the Executive's agenda, and notable in this respect are responsibilities in matters of economic and social welfare."

Such powers by their very nature are not only ill defined, but also far-reaching; and while in motion are so easily abused, or annexed for partisan, or personal ends. And whenever that happens, the resulting damage falls upon either the public interest, or the individual. Where the public interest suffers most, and it lacks the legal personality to seek specific redress, it becomes a diffuse public claim, to be resolved by the electorate at periodic elections, or to be scrutinized by the elected Parliament during its sittings. But on many occasions, the victim of abuse

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[23] A Manifesto of a Modern Judiciary, By The Hon. Lady Justice Nancy Baraza Deputy Chief Justice of the Republic of Kenya/Vice-President of the Supreme Court of Kenya 2011.pg 4.

[24] *Ojwang, JB., (1990) Constitutional Development in Kenya: Institutional Adaptation and Social Change Nairobi: Acts Press p 96.*

of public power is the citizen. The citizen has no capacity to move the nebulous electorate, or the cumbersome Parliament, to solve his or her grievance. It is the judiciary that comes in handy, as a structured institution, at which a claim can be lodged at the registry, and set for hearing before a court, within a determinable period; and the court is invested with jurisdiction and power to determine the question, and issue binding decrees. The exercise of public power is accountable to the electorate and the legislature only in the long and medium terms; but in the short term, within the constitutional set-up, the individual can only look to the judiciary, for redress.

However, in the scheme of power, and of the efficacy of institutions, the Judiciary is not able to compete with an Executive, which has its roots in the Legislature. Just as Alexander Hamilton, in relation to early constitution making in the United States of America, thus said,[25]

"Whoever considers the different departments of power must perceive that..the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution...the executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or the wealth of the society and can take no active resolution whatever. It may truly be said to have neither Force nor Will but mere judgement..." – so does it remain the case today, and in most countries of the world.

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[25] *Hamilton, A., (1788) Federalist: Judiciary Department New York: McLeans No 78.*

The above problems were worthy needed for investigation and address the legal enforcement measures and made the recommendations in line with the findings of the study.

Rationale of the study

The study will assist the researcher to examine how the judiciary functions and whether it is independent in ensuring that the rule of law is observed and its accountability to the community in Kenya.

It will also enable the respondents to be able to know more about the way in which the judiciary operates and why it gives the results it has given since its establishment.

The study will boost the documentary literature of Kampala International University and enable more researchers use the information for future references.

Scope of the study

Contextual scope

This study focused on a critical analysis of the independence of the judiciary in Kenya,

It also focused on the doctrine of Separation of powers and the constitutional enhancement of judicial independence in Kenya.

Geographical scope

The study was carried out in Kenya, before and after the 2010 Constitution of Kenya came into force.

Time scope

This study covered the judicial period before and after the constitution of the Kenya (1964-2010) mainly focusing on the independence of the judiciary in Kenya.

Objectives of the study

General objective

To critically analyse the independence of the judiciary in Kenya before and after the 2010 constitution.

Specific objectives

i. To analyze the legal framework of judicial independence in Kenya
ii. To analyze the extent of practical application of judicial independence in Kenya
iii. To analyze the effects of separation of powers on the independence of the judiciary in Kenya
iv. To analyze the challenges facing judicial independence in Kenya.

Research Questions

i. What are the legal frameworks of judicial independence in Kenya?
ii. What are the extents of practical application of judicial independence in Kenya?
iii. What are the effects of separation of powers on the independence of the judiciary in Kenya?
iv. What are the challenges facing judicial independence in Kenya?

Research methods

Qualitative method

To conduct study on a critical analysis of the independence of the judiciary in Kenya, the researcher used the method of qualitative method of research by critically analyzing Unpublished reports/ records; Published reports, Case studies; Conference abstracts, Newspaper articles, other media coverage; Information accessed through the Internet and any other authentic available sources of information that was documented.

In conclusion of this part, the researcher looked at the issue of whether the current provisions of the law deny absolute limits of the independence of the judiciary in Kenya in accordance with the practical legal standards.

Lastly, the researcher used this method because it is more convenient and appropriate for her research as there are previous literatures on the same study so what she did was critically analyse them.

REVIEW OF LITERATURE

Concepts, Ideas, Opinions from Authors/ Experts

Independence of judiciary does not mean merely independence from outside influences but also from those within. A former justice of India is of the opinion that dangers from within have much larger and greater potential for harm than dangers from outside.[26] Dam differentiates between structural independence and behavioral independence. The latter, according to him, is more important than the former.

P.A. Oluyede argues that the meaning of independence of judiciary in terms of separation of powers. That, each and every organ of the state must act independently. He continues arguing that, there is no liberty if the Judiciary is not separated from Legislature and Executive. Where it is joined with Legislature, the life and liberty of the subjects would be exposed to arbitral control; for the judge would then be a legislator. Where it is joined with Legislative power, the judge might behave with violence and oppression. There would be an end to everything, where the same manor the same body, whether of the nobles or of the people top exercise those three powers that of enacting law, that of executing public relations and of trying the causes of individuals[27]

According to *Martin Partington* , judicial independence relates centrally to the constitutional functions of judges in interpreting and applying law outside the constraints of internal government departmental policies.

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[26] Chief Justice (Retd) J. S. Verma, 'New Dimensions of Justice', Universal Law Publishing Co Ltd (March 30, 2004) P-18.

[27] P.A. Oluyede, Administrative Law in East Africa, Kenya Literature Bureau, 1973- Kenya

Martin Partington argues that, the key claim made for adjudicators of all kind is that they must not only be, but be seen to be independent. Adjudicators not perceived as independent will be compromised in the eyes of the public, particularly by those in relation to whom adjudicators are reaching the decision.[28]

The former term as used here, refers to the way in which government is constitutionally structured. Does that structure lend itself to independence of judiciary? Behavioral independence resides in the judge as a person. Is the judge independent that is, not just dispassionate and free from bias, but willing to take difficult positions to resist political or any external pressure, to reject any temptation of corruption and to make truly independent decisions? Prof. Dam refers to the British constitutional system.[29]

Beryl de Wet observes that although the independence of the judiciary is imperative in modern African societies, it was never known in the pre-colonial era. She describes the judicial process in pre-colonial Africa as community-orientated[30] and that it did not observe the requisite independence and impartiality practiced by western courts.[31]She attributes the reluctance by Africans to accept independent courts, to colonialism where courts were set to entrench the colonial rule in Africa.

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[28] M. Parlington, Introduction to the English Legal System , Second Edition, page 246, Oxford University Press,2000-2003, Newyork-United States of America.

[29] Kenneth W. Dam, 'The Judiciary and Economic Development' Journal of the University of Chicago LawSchool, March 2006, available at www.law.uchicago.edu/lawecon/index.html.

[30] De Wet (1998) 1 African Legal Studies150.

[31] As above, 157; Lindholt (1997) 99.

Even in the post-colonial era, she asserts, Africans still regard the judiciary as an instrument of control and coercion.[32]

According to *H. R. Khanna*, "it is not test of the independence of judiciary that it can hold the scales even in ordinary run of cases between obscure citizens". The real test of independence of judiciary arises when times are abnormal, when the atmosphere is surcharged with passion and emotion, when there is brooding sense of fear, when important personalities get involved and when judicial processes are used by those in power to get their political objectives. At such time it is judiciary which is on trial.[33]

Justice Munir while criticizing the Chief Court of Sindh questioned the role of Judiciary by asking, whether it was a wise exercise of discretion for the judiciary to reinstate in power a deposed government by issuing enforceable writs against a de facto government.[34] The Chief Justice's view appears to be that it is the duty of the judiciary to set the seal of approval on anything that comes to stay de facto regardless of the unconstitutionality, illegality, impropriety or immorality of its origin.

In *Asma Jilani's case*,[35] the Supreme Court over-ruled the doctrine of revolutionary legality applied in Dosso's case as 'an empty theoretical

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[32] As above, 153.

[33] Justice (Retd) H. R. Khanna, 'Judiciary in India and Judicial Process' P- 25.

[34] Justice (Retd) K. M. A. Samdani, 'Role of the Judiciary in the Constitutional Crises of Pakistan' P-67.

[35] Miss Asma Jilani V. The Government of Punjab and Mrs. Zarina Gauhar V. the Province of Sindh, PLD 1972 SC 1391. Malik Ghulam Jilani (father of Asma Jilani) and Altaf Gauhar (husband of Zarina Gauhar)

concept'. The court disallowed the possibility that the military could abrogate the fundamental law of a country in the name of martial law. The court observed that if the argument was valid that the proclamation of the martial law by itself led to complete destruction of the legal order, then the armed forces did not assist the state in suppressing disorder but actually created further disorder, by disrupting.

According to *Md. Awal Hossain Mollah* argued that, judicial independence is defined, in this report as a Judiciary uninhibited by outside influences which may jeopardize the neutrality of jurisdiction, which may include, but is not limited to, influence from another organ of the government(functional and collective independence), from the media (personal independence), or from the superior officers (internal independence)[36]

Kenya has been in the process of constitutional review for the last decade. The preliminary products in the forms of various drafts of a much laborious and mostly participatory process that is still going on indicate much hope for offering solutions to many of the hindrances to justice

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were arrested under martial law regulations. Asma Jilani (currently known as Asma Jehangir) challenged the arrest of her father in Lahore High Court and Zarina Gauhar challenged the arrest of her husband in

Sindh High Court. Their writ petitions were rejected by the High Courts for want of jurisdiction as the courts could not challenge or issue any order against martial law authorities or martial law regulations.

Both Asma and Zarina filed appeals in the Supreme Court against the decisions of the High Courts.

[36]Md. A. H. Mollah, Separation of Judiciary and Judicial Independence in Bangladesh, University, Rajshahi-6205, Bangladesh-2004.

identified in the laws in terms of gaps and excesses. The Constitutional Review draft of 25th March 2005, the Bomas draft, contains provisions that would create constitutional principles for domestication of most of the core International Human Rights instruments. Such a step would then lead to enact enactment of laws on which Kenyans can base their claims within the judicial system.

Hilaire Barnett, explains Independence of Judiciary by relating it to Separation of Powers. Theauthor quotes the statement of Aristotle (384-322BC). Aristotle proclaimed that:

"There are three elements in each constitution in respect of which every serious law giver must look for what is advantageous to it; if this are well arranged, the constitution is bound to be well arranged and the difference in constitutions are bound to correspond to the difference between each of these elements. The three are: Deliberative which discusses everything of common importance, The Official (Executive) and the Judicial element[37]."

The Judiciary should be independent of both the Parliament and Executive. It is the feature of Judicial Independence which is of prime importance both in relation to government according to law and the protection of liberty of citizens against the Executive[38]

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[37] Aristotle, the Politics (384-322bc). Reproduced from H. Bernett,Constitutional and Administrative Law, 4th Edition, Cavendish Publishing Limited, Sydney, Australia, Cap 5. Page 108-133-2002.

[38] H. Bernett,Constitutional and Administrative Law, 4th Edition,Cavendish Publishing Limited, Sydney, Australia,Cap 5. Page 108-133-2002.

The above definition is not so different from this, as promoted by the Baron de Brede et de

According to *Montesquieu in [1748],* independence of judiciary was stipulated as, "When the legislative and executive powers are united in the same power, or in the same body of magistracy, there can be no liberty. Again there is no liberty if the power of judging be not separated from legislative and executive power". His definition concentrates more on distinction of powers of the three state organs[39]

The Kenyan Constitution provides for an independent judiciary; however, in practice the judiciary is often corrupt and subject to executive branch influence. The President has extensive powers over appointments, including those of the Attorney General, the Chief Justice, and Appeal and High Court judges. The President also can dismiss judges and the Attorney General upon the recommendation of a special presidentially appointed tribunal. Although judges have life tenure (except for the very few foreign judges who are hired on contract), the President has extensive authority over transfers.[40]

Therefore, it should not be within the power of Executive Government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts

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[39] Montesquieu,The Spirit of Laws 202, (David Wallace Carrithers Edition, 1977) (Book Xi, Chapter 6, Paragraphs5, 6)-1748, Geneva, Switzerland.

[40]U.S. Department of State Report on Human Rights Practices - 2001.

during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of the office[41].

Judicial Independence and accountability are rule of law concepts, whose institutional aspects have been attended to far more than the access to justice aspects. This is why codes of conduct have been adopted but not as the enforceable basis for ordinary people making complaints. Yet access to justice is a fundamental human right. Access to justice should be used increasingly as a measure of the development of the independence and accountability of the judiciary[42].

The subject of judicial independence has received an extensive coverage. Erike Mose[43] identifies as the starting point, Article 8 of the Universal Declaration of Human Rights (UDHR).[44]

This he considers being a key provision because it translates into practice its object by requiring that there should be established, at the national level of the UN Member States, effective remedies for the implementation of the human rights enshrined in the declaration. He links it further with Article 10 which provides for the establishment of independent and impartial tribunals.[45]

Part of the argument the Kenyan government has made the whole of this year against the International Criminal Court (ICC) taking up cases

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[41] The Chief Justices of the Australian States and Territories (1997), *the Principles on Judicial Independence.*

[42] Winluck Wahiu (2005), *independence and accountability of the judiciary in Kenya.*

[43] Mose 'Article 8' in Alfredsson & Eide (1999) 187.

[44] UNGA Res 217 (III) of 10 December 1948.

[45] Mose (n 31 above) 195.

against six of its citizens is that the judiciary is on the path of reform and within a year will be able to meet international standards of justice[46].

In his previous writings, Shimon Shetreet has identified six principles which he has defined as providing an essential constitutional infrastructure for the protection of judicial independence. These principles of constitutional protection of judicial independence are as follows: (i) the rule against ad hoc tribunals, (ii) the prohibition against intentionally stripping courts of their jurisdiction and diverting cases to other tribunals with a view to having those cases disposed of by tribunals that do not enjoy the same conditions of independence as the original courts, (iii) the standard-judge principle, or the ordinary-judge principle, which requires that judges be selected to hear cases by a predetermined internal plan or assignment schedule prior to the commencement of the case, (iv) the requirement of post-decisional independence of the judgment and its respect by the other branches of the government; (v) that judges must not be part of the administrative arm of the executive branch; rather, they should be viewed as independent constitutional or statutory officers of the state, and completely separate from the civil service, and (vi) changes in the terms of judicial office should not be applied to present judges unless such changes serve to improve the terms of judicial service.[47]

A careful analysis of the work of both these writers reveals that most of the writers have critical view that there is a clear indication that

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[46]http://www.judiciary.go.ke/index.php?option=com_content&view=article&id=2123&Itemid=2123.

[47] S 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 275-332.

the debate of whether the judiciary is indeed independent is still incomplete, especially when we are talking about Kenya.
Therefore my aim is to try and fill that gap in my study of a critical analysis of the judiciary in Kenya.

Operational definition of key terms

For the purpose of this study, the following terms are operationally defined:-

Constitutional Law: **-** is the body of legal rules that determine the constitution of a state

Independence of judiciary: **-** is the concept that the judiciary needs to be kept away from the other branches of government. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. Judicial Independence is vital and important to the idea of separation of powers.

Judicial review: **-** commonly refers to the authority of the court both to review the constitutionality or validity of legislative acts and to pass upon the constitutionality or validity of executive and administrative acts, and to disregard, or direct the disregard of such acts as are held to be unconstitutional or as violative of applicable statutes.

Individual independence: **-** involves a variety of factors that help ensure that judges can act free from the influence of any outside sources

Human rights: **-** are "commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. (Human rights are thus conceived as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights or as legal rights, in both national and international law.

Challenge: - hindrances or unforeseen circumstance to make the intended activities or a law which is difficult to achieve.

Chapterization of Thesis

Chapter One

This chapter presentes the background of the study which revealed the problem that was worthy for investigation. The objectives of the study that was formulated, the research questions in line with the objectives of the study, null hypothesis was presented, scope and rationale of the study indicated in this chapter. Definition of terms, review of related literature that revealed what other scholars have contributed to the study. Methodology of the study was used to identify ways of how research was carried.

Chapter Two

This chapter discusses the legal framework of judicial independence in Kenya Here the research will focus mainly on the evolution of the judiciary in Kenya and independence of the judiciary before and after the promogulation of the Constitution.

Chapter Three

This chapter looked at the extent of practical application of judicial independence in Kenya, and the effects of separation of powers on the independence of the judiciary in Kenya.

Chapter Four

This chapter looked at the challenges facing judicial independence in Kenya.

Chapter Five

This chapter looked at the recommendations and conclusions. This based on the findings of a critical analysis of the judiciary in Kenya.

CHAPTER TWO

THE LEGAL FRAMEWORK OF JUDICIAL INDEPENDENCE IN KENYA

Introduction

The Judiciary consists of judges and magistrates, and paralegal staff that are largely accountable to the Judicial Service Commission (JSC). Structurally, the Judiciary consists of the Supreme Court, other superior courts, and subordinate or magistrate courts. The Judiciary remains an agency of the national government. It is not devolved, although it is to under go various forms decentralization.

The judiciary has the power through judicial review mechanisms to review executive and administrative conduct or actions of the state, state organs, state departments, and state officials. Judicial review commonly refers to the authority of the court both to review the constitutionality or validity of legislative acts and to pass upon the constitutionality or validity of executive and administrative acts, and to disregard, or direct the disregard of such acts as are held to be unconstitutional or as violative of applicable statutes[48]

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[48] Paul Craig (2008) *Administrative Law,* Sweet & Maxwell, London; Peter Kaluma (2009) *Judicial Review: Law Procedure and Practice* LawAfrica Publisher, Nairobi *;* F.P. Feliciano, *"The application of law: some recurring aspects of the process of judicial review and decision making"* 1992 American Journal of Jurisprudence 17-56, 19. See also Gichira Kibara (2011) "Reforming the Judic iary: Responsiveness and accountability of the Judiciary," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Series, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011.

Judicial Independence under both the Constitution and the Judicial Service Act create measures that not only give the judiciary complete autonomy but also put in place process and procedure that enhances that independence. *Article 159* is the starting point. In *159(1)* it states: *"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this constitution".*

Defining the concept of judicial independence

Judicial independence is the concept whereby the judiciary needs to be kept away from the other branches of government. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. Judicial Independence is vital and important to the idea of separation of powers. In the case of *Segars-Andrews v. Judicial Merit Selection Comm'n,*[49] *"judicial independence is the idea of keeping the judiciary away from the other branches of government. The main objective behind granting judicial independence is to avoid the improper influence on the court from the other branches of government, or from private or partisan interests. It is also referred as independence of the judiciary. Judicial independence is not for the protection of judges, although it is often thought of in that context today. The principle of judicial independence is designed to protect the system of justice and the rule of law, and thus maintain public trust and confidence in the courts. With judicial independence, the winners are everyone"*

With regard to the "higher judiciary", it is the Head of State who makes the appointments: at his own discretion in the case of the Chief Justice;

[49] 387 S.C. 109 (S.C. 2010)].

and with the advice of the Judicial Service Commission, in the case of the remaining judges. The only qualification is that the appointee is to satisfy the prescribed professional requirement[50]; and the conditions are: being or having been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth, or in the Republic of Ireland, or a court having jurisdiction in appeals from such a court; being an advocate of the High Court of Kenya of not less than seven years' standing; having held certain professional qualifications provided for in the Advocates Act[51], for a cumulative period of at least seven years.

The members of the "higher judiciary" are accorded tenure of office, and are to retire only upon attainment of retirement age[52], though they can be removed from office for misbehavior, where a duly appointed tribunal has investigated their conduct and recommended termination of service.

Such safeguards will, no doubt, make some contribution to the principle of judicial independence; but they would not be sufficient, if there is no unwavering commitment, at the political level, to the ethos of independence of the judiciary. Such a commitment must, in the case of Kenya, be seen as dependent on a strengthening of democratic traditions, which focuses the nation's attention upon certain irreducible values, seen as a mark of political civilization.

There is a notable element in the Kenyan governmental set-up, and with regard to the Judiciary, which is clearly unfavorable to judicial independence. The Judiciary lacks control over the financial resources,

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[50] *Constitution of Kenya sections 61, 64.*

[51] *Advovates Act (cap 16).*

[52] *Constitution of Kenya section 22(1).*

which it requires to fund its operations, being squarely dependent on Executive cum Parliament, which determines the annual budgets. If the Judiciary must always look to other constitutional agencies for essential funding, this is likely to compromise its independence. Ideally, a proportion of the government revenue ought to be dedicated to the Judiciary's operations, and should be payable outside the framework of periodic approvals.

The Iindependence of the judiciary in Kenya before the year of promulgation.

In addition, it should be noted that the Chief Justice wielded immense powers that may have threatened the independence of judges. For a long time, the judiciary was treated as a branch of the public service. This status changed in the early 1990s when it was placed under the charge of the chief justice, whose powers were thereby enhanced. As the head of the judiciary, the chief justice wielded wide-ranging but unregulated powers, including the power to determine which judges hear what cases, where litigants can file their cases and how, supervising and disciplining judges and other judicial officers, allocation of office space, housing, and cars for judicial officers, transferring judicial officers from one geographic station to another, and initiating the process of removal of judges.[55] Because the exercise of these powers was not circumscribed, they could be abused to the detriment of judicial independence and accountability. Thus, judges confronted with these powers might have been inclined to do the chief justice's bidding.

The system for appointing judges has been open to abuse since it establishes no standards or criteria for vetting candidates. Thus a recent task force established to examine the question of judicial reform noted that "The process through which candidates for appointment are currently

identified and vetted by the Judicial Service Commission is neither transparent, nor based on any publicly known or measurable criteria and is certainly not competitive."[53] Accordingly, the individuals who become judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Further, *Section 61* of the old Constitution gave the president power to appoint judges in an acting capacity. This power was inimical to judicial independence since an acting judge awaiting confirmation would be vulnerable to executive pressure. For the most part, therefore, judges have not been insulated from external influences.

In the case of the judiciary, the failure to regulate the president's and the chief justice's powers of appointment and dismissal, as well as the administrative powers of the latter, often aided human rights violations and economic crimes and undermined the legitimacy of the judiciary as a forum for dispute resolution. These powers have been exercised in ways that, respectively, undermine the institutional autonomy and authority of the judiciary and the independence of judicial officers. As a result, judicial officers are not only insecure in their positions, but may also become enablers of human rights violations and corruption.

With respect to the removal of judges, *Section 62* of the old Constitution provided that the chief justice and other judges could be dismissed by the president for inability to perform the functions of their office or for misbehavior if an impartial tribunal recommended their removal. Unfortunately, the old Constitution failed to establish due process mechanisms to ensure that the process of removal including the exercise

[53] Republic of Kenya, Report of the Task Force on Judicial Reforms 2009, 32.

of the power to recommend the establishment of a tribunal was transparent, impartial, and fair. So the threat of removal then served to operate as the proverbial sword of Damocles, in the sense that judicial officers never knew when it might strike.[54]

The independence of the judiciary in Kenya after the year of promulgation.

In the first place, the new Constitution disperses judicial authority. Although the chief justice is still the head of the judiciary, the new Constitution establishes three superior (in addition to subordinate) courts. These are the Supreme Court, the Court of Appeal, and the High Court. [55]

It also establishes the offices of Deputy Chief Justice (as the Deputy Head of the Judiciary) and Chief Registrar of the Judiciary, who is the judiciary's chief administrator and accounting officer *(Article 161)* and shall administer the Judiciary Fund established by *Article 173* to enhance the financial autonomy of the judiciary. The new Constitution distributes power within the judiciary by providing that the chief justice will preside over the Supreme Court, while the Court of Appeal and the High Court will each be presided over by a judge elected by the judges of these courts from among themselves *(Article 164).*

Article 166 of the new Constitution seeks to give the judiciary autonomy from the executive. It states that the president will now appoint

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[54] Thus the Kenya Section of the International Commission of Jurists, *Judicial Independence, Corruption and Reform* (2005) on 20, observes "The possibility that they could be next in line to be publicly castigated and removed from office without due process has lowered the general esprit de corps of the judiciary as a whole."

[55] *Constitution of Kenya section 163-165*

the chief justice and judges of the superior courts, subject to the recommendations of the Judicial Service Commission and the approval of the National Assembly. The membership of the Judicial Service Commission has been expanded. Thus *Article 171* empowers the president to appoint one man and one woman who are not lawyers to "represent the public" in the commission. The subordinate courts, practicing lawyers, and the legal academy will also be represented in the commission.

Article 168 of the new Constitution provides for the power to dismiss judges. Unlike before, the process of removing the chief justice and judges will now be initiated by the Judicial Service Com-mission. Acting on its own motion, or on the petition of "any person," this commission is required to give a hearing to the affected judge and to send the petition to the president only when it is satisfied that there are grounds for removal. Upon receiving the petition, the president is then required to appoint a tribunal to inquire into the matter. In the case of the chief justice, this tribunal consists of the Speaker of the National Assembly (as chair), three "superior court judges" from common law jurisdictions', one advocate of 15 years standing, and two other people with experience in public affairs. In the case of other judges, the composition of the tribunal remains the same, except that the three

Furthermore,the Constitution establishes a fundamental principle, namely that judicial authority is derived from the people. This authority must therefore be exercised with the sole objective of fulfilling the aspirations of the People as espoused in the new Constitution. The Constitution creates the basic architecture for judicial Transformation. For example, it grants the Judiciary independence by providing that it "shall not be subject to the control or direction of any person or authority". In

exchange for this constitutional guarantee of independence, the Constitution then prescribes clear principles that the Judiciary must adhere to in exercising judicial authority, namely:[56]

"a) The Judiciary must do justice to all irrespective of status;

b) The Judiciary must not delay justice; instead it must provide justice expeditiously;

c) The Judiciary must promote alternative forms of dispute resolution;

d) The Judiciary must administer justice without undue regard to procedural technicalities; and

e) The Judiciary must protect and promote the purpose and principles of the Constitution."

The foregoing quote, I believe, finds clear support in the ***Constitution of Kenya, 2010*** under which the Judges have taken their oath of office, and which must, today, be taken as the crucial element in the ***grundnorm*** whereupon rests the entire legal order. Prior to this occasion, and upon reflecting on the essential character of the current Constitution [in ***Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa***[57] I had thus, from Court forum, remarked:

> *"I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period.* ***Whereas the earlier Constitutions were essentially programme documents*** *for regulating governance arrangements, in a manner encapsulating the dominant political*

[56] Article 159 constitution of Kenya, 2010.

[57] HCCC No. 190 of 2010],

theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010."

Judicialism is the philosophy that the political and governmental edifice in a country is optimally designed only when its central pillar is ***the judicial process***. The judicial process is, in this case, regarded as a friendly, and people-focused mechanism, because it does not arbitrarily exclude anyone, so long as there is due compliance with rules of ***locus standi***; it does not discriminate between the weak and the strong; it has expedient and objectively-designed procedures for the conduct of proceedings; it is a listening and hearing mechanism; it is sensitive to questions of merit; it resolves all justiciable disputes, including those entailing conflicts within the political establishment; it has a definite claim to legitimacy; it hands down its decisions with finality; it has an appellate structure for self-rectification, or affirmation; it has good cause to demand obedience, of all and sundry. The Judiciary, thus, is the classical instrument of institutionalized governance founded on merit and principle: this is the justification for the doctrine of judicialism. The governance set-up under the ***Constitution of Kenya, 2010*** is one of constitutionalism, and, *ipso facto*, a system in which judicialism is a central pillar.

The Judiciary's functioning, within the principle of judicialism, is required[58] to be *independent*: the exercise of judicial authority *"shall not be subjected to the control or direction of any person or authority."* Judicialism founded on the dictates of the *grundnorm*, is expressed in *Article 259(1)* which provides that the Constitution is to be interpreted in a manner that: *"promotes its purposes, values and principles" [259(1)(a)]; "advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights" [259(1)(b)]; "contributes to good governance" [259(1)(d)].*

The Director of Public Prosecutions shall exercise these functions independently without interference, control or direction of any other person or authority. We further recommend that the Director of Public Prosecutions should be appointed by the President in accordance with the recommendation of the Public Service Commission after consultation with the Parliamentary committee responsible for legal and Constitutional affairs. The Director of Public Prosecutions should be appointed from among persons of proven integrity and moral character qualified to be appointed a Judge of the High Court. The Public Service Commission shall consult with the Judicial Service Commission prior to making its recommendation. With the creation of the office of Director of Public Prosecutions, the Attorney General would retain the conventional functions set out under *section 26 (2)* of the Constitution. He would act as the principal legal advisor to the government of Kenya. By *section 36* of the Constitution, the Attorney General is an ex-officio member of the National Assembly. Although he is not entitled to vote in the National Assembly, he is presently entitled to participate in debate.[59]

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[58] [Art.160(1)]
[59] Under section 26 (2) of the Constitution of Kenya 2010.

The Constitution of the Republic of Kenya of 2010 provides for strengthened, independent and functional institutions, including especially the Police, the Judiciary and the Legislature. These critical institutions are no longer susceptible to executive manipulation.

Further, the Constitution expressly safeguards judicial independence and provides a more reformed judiciary to foster independent, impartial and expeditious access to justice and rule of law for all.

The Constitution also provides for two pronged approach to the concept of separation of powers where State power has been separated and dispersed both vertically and horizontally thereby creating a double security to the rights of the people in which the different governments control each other, at the same time that each is controlled by itself.

How **the Judicial Service Act No. 1 of 2011** enhances independence of the judiciary

The cardinal role of the Judiciary in any contemporary scheme of "***good governance***", underlies the significance of judicial ethics in Kenya under the current Constitution. The historical context depicted in this paper has shown that, even prior to the adoption of the Constitution, one of the Judiciary's main challenges was the maintenance of ethical conduct, as a basis of public confidence in the Courts.

As the focus of the *current Judicial Service Code of Conduct and Ethics* is the individual Judge, it is to be assumed that there will be, put in place, the appropriate institutional arrangements for the enforcement of that

Code. Today, the requisite institutional set-up is, certainly, the *Judicial Service Commission* established under the Judicial Service Act, 2011. Since such a structured and duly-empowered institution had not existed in 2003 when the *Judicial Service Code of Conduct and Ethics* was published, it follows that this instrument was ahead of its time, and so it could not, in practice, serve as a regular basis for enforcing judicial ethics. It is unsurprising, hence, that the "enforcement" of judicial ethics, well up to the date of promulgation of the new Constitution (2010), has been essentially an individual-Judge enterprise, without any object of enforcement other than the removal of Judges from office, for one reason or another. It is not surprising either, that an institutional basis for the application of a wide range of disciplinary measures, for Judges, has yet to be developed; and any member of the public bearing a grievance would have found solutions in nothing short of the removal of the Judge. In the case of ***Joseph Kimani Gathungu v. The Attorney-General & The International Criminal Court, Mombasa***[60]

it was noted that: the governance obligation of constitutionalism and judicialism presupposes the existence of a *stable and fair Court system* operating with *impartiality* and *integrity* and enjoying the *confidence of the public*; and such principles are already well-recognized in international norm and practice. The task now falling due is to perceive the *Kenyan framework* for judicial ethics.

The foundation is the ***Constitution of Kenya, 2010***, a document of the primary character which I had the occasion, judicially, to thus typify:

> *"A scrutiny of the several Constitutions Kenya has had since Independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the*

[60] H.C.Const.Ref.Appl.No.12 of 2010].

Constitution of 2010 is dominated by a 'social orientation', and as its main theme, 'rights, welfare, empowerment', and the Constitution offers these values as the reference-point in governance functions. Such a public-values orientation, in my opinion, readily interfaces with the objectives of international law...."[61]

The commitment to *ethics*, and especially, *judicial ethics*, in Kenya's current constitutional set-up. It is necessary, at this stage, to illuminate the details of the place of judicial ethics in the Kenyan constitutional order, and in the operative law intended to fulfill the terms of the Constitution.

Therefore, the relevant provisions are set out in *Chapter 6* of the Constitution, bearing the rubric, *"Leadership and Integrity*". Judges and Magistrates are named as "*State officers*" under Article *260*. The mandate of all State officers "*is a public trust" Article 73(1)(a);* and all such officers carry "*the responsibility to serve the people, rather than the power to rule them" Article.73(1)(b).*

[61] The case of *Joseph Kimani Gathungu v. The Attorney-General & The International Criminal Court, Mombasa* H.C.Const.Ref.Appl.No.12 of 2010].

Furthermore,the Public Officer Ethics Act, 2003 (Act No. 4 of 2003) enhances the independence of the judiciary ;**The Judicial Service Commission, indeed, in 2003 formulated the** *Judicial Service Code of Conduct and Ethics*, **which was published in the** *Kenya Gazette* **as Legal Notice No. 50. The said Code, which is an important part of the applicable law on judicial ethics, thus provides in Rule 22:**

> *"Where an officer has committed a breach of this Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act, 2003, Judicial Service Commission Regulations or the Constitution as the case may be."*

The scenario emerging is that the position of the Judge, in relation to ethical conduct, is that he or she is amenable to a ***range of sanctions***: removal at one extreme, and other modes of disciplinary action at the other extreme. What remains undefined is the content of such modes of disciplinary action; and such a state of uncertainty is undesirable.

In addition, the Magistrates' Courts Act Cap 10 also enhances the independence of the judiciary

The Resident Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as are for the time being conferred on it by - (a) the Criminal Procedure Code; or(b) any other written law.[62]

Under *section 5 (1)* Subject to any other written law the resident magistrate's Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in

[62] Section 4 Magistrates act cap 10.

dispute does not exceed one hundred thousand shillings, or three hundred thousand shillings where the court is held by a principal or a senior resident magistrate and five hundred thousand shillings where the court is held by a chief magistrate or a senior principal magistrate:[63]

Therefore, the exercise of judicial authority, the Judiciary, as constituted by *Article 161*, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.[64] The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office but also the remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund.

Subject to *Article 168(6),* the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge. A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.[65]

And independent judiciary is a fundamental element of democracy. Various international treaties including the Universal Declaration of Human Rights (1948) (UDHR),the International Convention on Civil and Political Rights (1976) (ICCPR)and the African Charter on Human and People's Rights (1981)contain provisions affirming the importance of this principle. For instance, *Article 14 of the ICCPR* states that:

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[63] Magistrates' Courts Act Cap 10 5. (1)

[64] Article 161 of 2010 Constitution of Kenya.

[65] Ibid Article 168(6).

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Similarly, *Article 26 of the African Charter* declares that:"State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter".[66]

In **Scott v. *Stansfield*,**[67] Justice Baron rejected an action for slander made out against a judge relying on this statement of law: *"It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."*[68]

Conclusion

[66] Article 26 of the African Charter.
[67] [1868] L.R. 3 Ex. 220.
[68] Watson, Garry, "The Judge and Court Administration" in The Canadian Judiciary (Toronto: Osgoode, 1976) at 183.

In conclusion, the legal provision that provide for an independent judiciary both locally and internationally.

The statutes mainly provide for the importance of having a judiciary that is independent and impartial.

And the main reason for advocating for an independent judiciary is to have democracy and justice to all.

CHAPTER THREE

THE EFFECTS OF CONSTITUTIONALISM AND THE DOCTRINE OF SEPARATION OF POWERS ON THE INDEPENDENCE OF THE JUDICIARY IN KENYA.

Introduction

In essence, the doctrine of separation of powers is that for a free and democratic society to exist there must be a clear separation between the three branches of government, namely:

The Executive: which is the branch that executes the business of government. It comprises the President, Vice-Presidents and Ministers, the Public Service, the Defence Forces, the Police Force and other law-enforcement organisations. All the administrative, law-enforcement and coercive organs of the State fall within the Executive Branch, making it potentially the most powerful of the three branches of government unless its powers are subject to limitations.

The Legislature: which is the law-making branch. **The Judicial branch:** which interprets the law. It comprises judicial officers and the courts over which they preside. In Kenya the courts are divided into superior courts, namely the Supreme Court, court of appeal and the High Court, and the lower courts, which are principally magistrates courts and customary-law courts. There are also specialized courts such as the Khadhi Court, the Industrial Court and the Martial Court.

If one of these branches encroaches upon the functions of the others, so the doctrine goes, freedom and the rule of law are imperiled. If, for example, the Executive (i.e. the President) makes laws and enforces

them, then we no longer have the rule of law but rule by a man or woman, and the governmental system will tend towards autocracy and tyranny.

In short the doctrine states that, liberty and human rights can flourish only where each branch sticks to its proper role.

As guardians of their countries' constitutions[69] and the rights of individuals, judges must uphold the law at all times. This rule stems from the principle of separation of powers. Under this doctrine, the three arms of government legislative, executive, and judicial are required to be autonomous in their work. This requires each arm to guard itself from undue influence by the others.[70]

The separation of powers is crucial in any constitutional state.[71]Judicial

[69] See also *Joseph Kimani and Others v. The Attorney General and Others* High Court of Kenya at Mombasa, Petition N0. 669 of 2009 at 11, delivered 5 January 2010 (Ibrahim J) (unreported) (Describing courts are the "ultimate custodian of the Constitution").

[70] See also Williams J in *Queen v. Kirby ex parte Boilermakers's Society of Australia* (1956) 94 CLR 254 at 301 (The doctrine of separation of powers requires the three arms of Government to be kept 'separate and distinct").

[71]In the United States, for instance, this point was emphasized during the debates over whether to ratify or reject the Federal Constitution. Alexander Hamilton, James Madison, and John Jay, *The Federalist with The Letters of "Brutus"* in Terence Ball (ed) (Cambridge: Cambridge University Press, 2006) at 234-240 (per Madison). Much later, Justice Brandies stated that separating the branches of government is crucial, not only to "avoid friction" between the three arms of government, but also to "save the people from autocracy." *Myers v. United States*, 272 U.S. 106, 293 (1926). See also Hamilton, Madison, and Jay, *supra*, note 18 at 234 ("The

independence is particularly important, as without it, it would be difficult for an individual to ensure the protection of his or her human rights from infringement by the state.[72] Indeed, judicial independence is the "lifeblood of constitutionalism."[73]

The words of Kriegler J. in the South African case of ***S v Mamabolo (E. TV and Others Intervening)***,[80] distinctly explain the role of the judiciary:

> *"In our constitutional order the judiciary is an independent pillar of the State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of the separation of powers it stands on equal footing with the executive and legislative pillars of the State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse or no sword, the judiciary must rely on moral authority. Without such authority*

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accumulation of all powers legislative, executive and judiciary in the same hands [could lead to] tyranny").

[72] In order to cement the independence of the judiciary, judges in Kenya and Zimbabwe have life tenure, subject to good behavior. Section 62 of the Kenyan *Constitution*; sections 86 and 87 of the Zimbabwean *Constitution*. See also Justice Brennan in *Northern Pipeline Construction Company v Marathon Pipeline Company* (1982) 458 U.S. 50 at 60 ("The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well").

[73] *Beauregard v Canada* 1986 CarswellNat 1004 at para 24.

it cannot perform its vital function as the interpreter of the Constitution, the arbiter of disputes between organs of the State and, ultimately, as the watchdog over the Constitution[741] *and its Bill of Rights – even against the State."*

Furthermore, the independence of the judiciary from the other arms of Government plays a central role in preserving and promoting the integrity of courts.[75] Independence also ensures that disputes are adjudicated based on their factual and legal merits, not on political considerations. In other words, judges should be free to act on their "own convictions, without any apprehension of personal consequences" to themselves.[76]

The doctrine of "the separation of powers" as usually understood is derived from Montesquieu, whose elaboration of it was based on a study of Lock's writings and as imperfect understanding of the eighteenth century English Constitution. Montesquieu was concerned with the preservation of political liberty

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[74] 2001 (5) BCLR 449 (CC) paras 16-17.

[75] See also *R v Director of the Serious Fraud Office* [2008] EWHC 714 at paragraph 76.

[76] *Bradley v Fisher* (1871) 80 U.S. 335 at 347. See also soft law principles, as reflected in the United Nations ('UN') *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paragraph 2.

The principle of separation of powers differentiates between the powers held and exercised by the legislature, the judiciary and the executive. The principle of separation of powers contains an element of independence of the three separate arms of government.

Judiciary should be separate and independent ,this separation means that the judiciary should be able to work without interference from the executive or the legislature, and that judges should be able to judge cases independently, impartially and in accordance with the law. A judge should not be an instrument of politics, and a judge should not be political worker who executes decisions of the executive. A judge is subject only to the law, and the law should not be used to influence verdicts as the law is intended to be general and neutral.

The effects of the 1963 constitution on the independence of the judiciary in Kenya and the current reforms introduced by the 2010 constitution on the independence of the judiciary in Kenya .

The Constitution may be defined in terms of governance as the law that seeks to define, distribute and constrain the use of state power so that power is applied to the objectives for which it was invented and in the manner in which it was intended.

The 1963 Constitution gave the president complete discretion in the appointment and dismissal of the Chief Justice; while the Chief Justice has had extensive administrative powers over the functioning of the courts. Together, these powers have undermined the legitimacy of the judiciary and the decisional independence of judicial officers. As a result, many judicial officers are insecure in their positions. The system for appointing judges has also been open to abuse, since it establishes no standards or criteria for vetting candidates. Accordingly, the individuals who become

judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Although the Constitution required courts to be independent and impartial, there were no constitutional provisions on immunity of judicial officers, thus judges and magistrates were not ensured immunity from executive-branch pressure. Judges and magistrates who acted with independence and impartiality to the executive's detriment have been penalised by transfers to outlying stations.

The Constitution also failed to establish due process mechanisms to ensure that the process of removal was transparent, impartial and fair. The importance of this issue was highlighted by the Integrity and Anti-Corruption Committee established in 2003 to investigate corruption in the judiciary (the Ringera Committee). While the purge of judges that followed the Ringera Committee's recommendations was partially welcomed, and it fulfilled the technical letter of the 1963 Constitution's requirements for dismissal of judges, it was at the same time heavily criticised for failing to respect basic due process and therefore for implicating some judges who were not in fact guilty of corruption. Some judges were not even informed of the action that was to be taken against them.[77]

However, the Constitution of Kenya, 2010 promises to fundamentally alter the relationship between the Judiciary, the Legislature and the Executive by reintroducing the time honored cornerstone principles of the

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[77] Kenya Justice Sector and the Rule of Law *DISCUSSIONPAPER* ,Patricia Kameri Mbote and Migai Akech,A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011 pg 7 para 2,3

Constitutional supremacy, parliamentary sovereignty and judicial independence.

The 2010 constitution has laid down elaborate mechanisms to guarantee judicial independence in the execution of its judicial and interpretive functions. Kenya now has a more reformed judiciary that is independent, robust and functional[78].

These constitutional structural arrangements laid down by the drafters of the Kenyan Constitution intended to ensure the protection of human rights, recognition of the principle of separation of powers and the promotion of democratic, transparent, accountable and participatory governance which are examined in great detail in the subsequent sections.

In addition, the structural arrangement of the Constitution provides for clear separation of powers, checks and balances. Every legal system requires rules that specify the major institutions and officials of government, and determine which of them is to do what and how they are to interact, and how their membership or succession is to be determined, and so forth.

In addition the principle of separation of powers is a positive edit in the Constitution of Kenya, 2010 and is now recognised and respected as a permanent and indispensible feature of Kenya's constitutional system. The constitution promises to fundamentally alter the relationship between the Judiciary, the Legislature and the Executive by re-

[78] The vetting of Judges and Magistrates Act (Amendment), 2011 provides for the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution. The vetting is aimed at weeding out corrupt and inefficient judges and magistrates.

introducing the time honoured cornerstone principles of the Constitutional supremacy, parliamentary sovereignty and judicial independence.

Even as the reformed judiciary counter checks the executive and the legislature, there is need to check the judiciary itself against encroachment into the provinces of executive competence and Parliamentary sovereignty. To prevent the judiciary from overreaching its constitutional mandate, the doctrine of *stare decisis* has been used to limit the courts. If the court rules that a law is unconstitutional in a particular case and then different parties petition the court with another challenge on the same legislation, a court bound by *stare decisis* must again rule that the law is unconstitutional.

If the court lacked the command of *stare decisis,* perhaps the court might feel more inclined to rethink its decision, but a court limited in its discretion does not have the luxury. Therefore judicial review is claimed as a right of the court to limit the legislature and executive, and stare decisis is imposed as a political product of the common law limiting the court.[79]

In the area of constitutional reform, it was not so long ago when the Judiciary itself was considered an obstacle to the realization of a new Constitution, when in 2002, a section of Judges sought judicial orders to stop the discussion and adoption of provisions relating to the Judiciary in the Draft Constitution. This was on done on the basis that the Judges

[79]HUMAN RIGHTS, SEPARATION OF POWERS AND DEVOLUTION IN THE KENYAN CONSTITUTION, 2010: COMPARISON AND LESSONS FOR EAC MEMBER STATES..By Prof. Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla at PG. 15.

would be adversely affected by the proposals. While the Judges' application was not founded on a policy of the Judiciary, it reinforced public perceptions that the Judiciary was unable to facilitate political transformation through its role as a fair, impartial and effective arbiter in the process of constitution making.[80]

However, the current constitution has laid down elaborate mechanisms to guarantee judicial independence in the execution of its judicial and interpretive functions. Kenya now has a more reformed judiciary that is independent, robust and functional[81]

Article 166[82] of the new Constitution seeks to give the judiciary autonomy from the executive. It states that the president will now appoint the chief justice and judges of the superior courts, subject to the recommendations of the Judicial Service Commission and the approval of the National Assembly. The membership of the Judicial Service Commission has been expanded. Thus *Article 171*[83] empowers the president to appoint one man and one woman who are not lawyers to "represent the public" in the commission. The subordinate courts, practicing lawyers, and the legal academy will also be represented in the commission.

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[80] "*Barron de Montesquieu, Charles-Louis de Secondat* (Stanford Encyclopedia of Philosophy)".

[81] The vetting of Judges and Magistrates Act (Amendment), 2011 provides for the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution. The vetting is aimed at weeding out corrupt and inefficient judges and magistrates.

[82] The Constitution of Kenya 2010

[83] The Constitution of Kenya 2010.

Article 168[84] of the new Constitution circumscribes the power to dismiss judges. Unlike before, the process of removing the chief justice and judges will now be initiated by the Judicial Service Com-mission. Acting on its own motion, or on the petition of "any person," this commission is required to give a hearing to the affected judge and to send the petition to the president only when it is satisfied that there are grounds for removal. Upon receiving the petition, the president is then required to appoint a tribunal to inquire into the matter. In the case of the chief justice, this tribunal consists of the Speaker of the National Assembly (as chair), three "superior court judges" from common law jurisdictions, one advocate of 15 years standing, and two other people with experience in public affairs. In the case of other judges, the composition of the tribunal remains the same, except that the three judges need not be sourced from other common law jurisdictions. Although the affected judge has a right to appeal to the courts, the president is empowered to "act in accordance with the recommendations of the tribunal." Save for the fact that the power of the president to appoint members of the tribunals is unregulated, the new Constitution introduces due process and certainty in the exercise of the power to dismiss judges; this may enhance security of tenure and independence of judges.

Another notable feature of the new Constitution is that it provides a framework for the vetting the judiciary. It requires the current chief justice to leave office within six months after it takes effect (Clause 24, Sixth Schedule).It requires Parliament to enact a law within one year after it takes effect that establishes mechanisms and procedures for vetting the

[84] Ibid 56.

suitability of all judges and magistrates to continue to serve in accordance with the values and principles established in *Articles 10 and 159*[85].

By regulating the president's powers to appoint and dismiss judges, and by dispersing the chief justice's administrative powers, the new Constitution promises to enhance the independence of the judiciary. It expands the membership of the Judicial Service Commission so that it includes ordinary members of the public for the first time. In this way, the new Constitution is likely to facilitate ac-accountability in the exercise of judicial power, thereby enhancing the legitimacy of the judiciary, a lack of which has contributed to the violation of human rights.

The applicability of the doctrine of separation of powers and its effect on the independence of the judiciary in Kenya.

For many years, the Judiciary was considered a "Department" or the "third" arm of government, imputing that the institution was not equal to the executive or the legislature.*86*This subordination of the Judiciary in the supposed "hierarchy" of organs of government not only undermined its development, but also exposed it to several forces, which led to its decline. Jurisprudentially, the subordination of the judiciary went against Montesquieu's tripartite system and his original concept of the equality of the three arms of government.[87]

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[85] The Constitution of Kenya 2010.

[86]Final Report of the Task Force on Judicial Reforms (The Justice Ouko Report) .

[87] "*Barron de Montesquieu, Charles-Louis de Secondat* (Stanford Encyclopedia of Philosophy)".

The main issue in the case of ***Dennis Mogambi Mong'are v Attorney General & 3 others***[88], was, did *the VJM Act violate the Principle of Separation of Powers and the Independence of the Judiciary?*

The Court stated that the Act was enacted pursuant to *Article 262*[89] and *section 23* of the Sixth Schedule to the Constitution. That section required Parliament to enact legislation for establishing mechanisms and procedures for vetting of judges and magistrates, and it was specifically stated in the section that such legislation was to operate despite the provisions of the Constitution providing for the independence of the Judiciary and the tenure and the manner of removal from office for judges -Article *160, 167 and 168*[90]. The section was part of the Constitution and as such, the vetting procedures were a constitutionally mandated derogation from the provisions regarding the independence of the judiciary.

Therefore, the principle of separation of powers had to yield to the dictates of the Constitution. South African case of ***Minister of Health v Treatment Action Campaign***[91] . However the Court failed to distinguish this case from the case before it and crucially point out that the TAC case clearly illustrates that judicial activism in constitutional adjudication is viable and part of modern day constitutional jurisprudence. The South African court therefore found that it has powers to evaluate the reasonableness of measures taken by government, where they are challenged for being unconstitutional. Thus where appropriate, the theory

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[88] [2011] Eklr.

[89] "*Barron de Montesquieu, Charles-Louis de Secondat* (Stanford Encyclopedia of Philosophy)".

[90] Ibid.

[91] (TAC) (2002) 5 SA 721 (CC).

of separation of powers would not preclude that Court from making orders that have policy implications, and such a ruling does not result in a breach of the theory of separation of powers.

Jacobs J in ***R v Quinn; ex parte Consolidated Foods Corporation,*** where he noted that the separation of judicial power ensures that the rights of citizens are protected by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example[92]

[92] *R v Quinn; ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

Iinternational law and the independence of the judiciary.

The role of the judiciary in the UDHR was recognised through the inclusion of *Articles 8 and 10*, which respectively entitles individuals to be afforded effective remedies before competent, independent and impartial tribunals whenever any of their rights are threatened.[93]

To facilitate the actualisation of the promises made under the UDHR, in December 1966 the UNGA adopted the International Covenant on Civil and Political Rights (ICCPR).[94] In its preamble the ICCPR reaffirms the principles enshrined in both the UN Charter and the UDHR, the quest for peace and justice. *Article 2(3)* obliges State Parties to ensure the provision, on the domestic level, of effective remedies for persons aggrieved by abuses of their rights and freedoms. The role of the judiciary is specifically acknowledged under *Article 14 of the ICCPR* which in part provides: " *All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or his right and obligations in a law suit, everyone shall b entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.* "

This provision had a bearing In ***Olo Bahamonde v Equatorial Guinea,*** the UN Human Rights Committee observed that failure to separate the functions of the judiciary from those of the executive, and the executive control of the judiciary, all fell foul of the spirit of *Article 14(1) of the ICCPR.* On November 1985 the UNGA adopted the Basic Principles on the Independence of the Judiciary (UN Basic Principles).[95] Article 1 requires governments to ensure the independence of the judiciary through the implementation of the principles in the domestic justice systems.[96] The instrument is divided into five subheadings: the

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[93] Mose 'Article 8' in Alfredsson & Eide 31.

[94] UNGA Res 2200 (XXI) of 16 December 1966. Entered into force on 23 May 1976.

[95] UNGA Ress 40/32 & 40/146.

[96] Ibid.

independence of the judiciary; freedom of expression and association; qualifications, selection and training; conditions of service and tenure; and, disciplinary, suspension and removal of judges.[97] The principles enshrined in both rights and duties for judges while at the same time requiring governments to ensure the independence of the judiciary.

In April 1994 the UN, on the recommendations of the UNHRC appointed Mr. Param Cumaraswamy as a Special Rapporteur (SR) for the promotion of judicial independence world-wide. Lord Steyn recounts, *inter alia,* that the reason for the appointment of the Special Rapporteur was triggered by the increase of attacks on the independence of the judiciary in many countries.[98] Therefore, the basis for the SR's mandate has been related to the conviction that an independent and impartial judiciary and independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.[99] The SR has thus observed: *An independent judicial system is the constitutional guarantee of all human rights. The right to such a system is the right that protects all other human rights. Realisation of this right is a sine qua non for the realisation of all other rights.*[100]

Other measures have been taken by the International Association of Judges (IAJ)[101] and the Commonwealth Magistrates and Judges Association (CMJA).[102] Thus, on 17 November 1999, the IAJ endorsed "The Universal Charter of the Judge (UCJ)" which equally emphasises the

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[97] Ibid.

[98] Steyn (2001) 8 *DHRJ* 65.

[99] UN Special Rapporteur on the Independence of Judges and Lawyers: <http://www: oneworld.org/SCF/incr/srijl.htm> (accessed on 11 October 2003).

[100] Ibid.

[101] UN General Assembly (UNGA) Ress 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Van der Merwe (2000) 2 *(JJOASA)169*

[102] About the CMJA: Background: <http://www.cmja.org/about.htm#background> (accessed on 16 October 2003).

need for independent judiciaries. *Article 1 of the UCJ* provides: *The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.*[103]

The CMJA has amongst its objectives, the advancement of the administration of law by promoting the independence of the judiciary.[104] Its membership comprises judicial officers and legal professionals from the Commonwealth countries. Meetings are convened on a regular basis in which delegates share their experiences concerning the judiciary and the protection of human rights in their countries. The Victoria Fall Declaration of 1994 made by the CMJA is illustrative of the objectives of the association as follows: *The rule of law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws. Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formerly protected by constitutional guarantees, the best protection rests in the support of the government and the people on the one hand, and the competence and confidence of the judges and magistrates in the performance of their offices on the other.*[105]

The independence of the judiciary is also recognised at the regional level of the UN Member States. *Article 6 of the European Convention on Human Rights (ECHR)* impart provides:" *In the determination of his civil rights and his obligations or of any criminal charge against him, everyone is*

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[103] As above.

[104] About the CMJA: Background: <http://www.cmja.org/about.htm#background> (accessed on 16 October 2003).

[105] CMJA Conference Report (2000), inner cover.

entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[106]

Under the Inter-American system, *Article 25(1) of the American Convention on Human Rights (ACHR)* provides that: "*Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.*"[107]

A commentary to Canon 1 of the American Code of Judicial Conduct of 1990 (Code)[108] states that the defence to the judgements and rulings of courts depends upon public confidence in the integrity and independence of judges. It states further that the judges' integrity and independence depends in turn upon their acting without fear or favour. Canon 3 of the Code further states:"*A judge must perform his duties fairly and impartially. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute . . .*

Conclusion

In conclusion, chapter three has mainly looked at the doctrine of separation ,how it has been applied in Kenya, and how it has promoted judicial independence in Kenya.

In addition, Chapter three has also discussed the constitution both the previous provision on the judiciary and the current reforms that have been provided for in the 2010 constitution, and their effects on the

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[106] Adopted by the Council of Europe on 4 November 1950, Rome. Entered into force on 3 September 1953.

[107] See 'Judicial Ethics in South Africa' (March 2000).

[108]See Nyalali 'Judicial Ethics and Accountability' in Ajibola & Van Zyl (1998) 199-200.

independence of judiciary. Where the researcher has discussed the drastic changes that have ensured an increase in the independence of the judiciary in Kenya.

Finally, chapter three has also looked at international provisions and practice of the independence of the judiciary.

CHAPTER FOUR

THE CHALLENGES FACING THE APPLICALIBILITY OF THE INDEPENDENCE OF THE JUDICIARY IN KENYA

It is quite apparent, from the foregoing account, that judicial independence will remain a more distant ideal in Kenya, than is the case in the economically advanced countries of the West. The very diverse social condition greatly complicates the political profile, and brings forth a much varied scheme of partisanship at the "Executive Stall;" and such a setting is, at least potentially, a major compromise to the independence of the judiciary.

There is a notable element in the Kenyan governmental set-up, and with regard to the Judiciary, which is clearly unfavorable to judicial independence.

Lack of finances

The justice sector is financed by the government by way of the normal budgetary process and procedures that are laid down for the entire government system. A call circular on budget ceilings for both capital and current expenditure is provided by the Budget Controller. These ceilings are based on the performance of each ministry, including those in the justice sector, and on their ability to provide a sound justification for any proposed activity in the budget. Currently, there is no special and separate budget for the judiciary. The budgetary process in respect of the judiciary is part of the broader budgetary process of the government. The judiciary sources its budget from the regular government coffers.

The other common challenge when it comes to finances that has been experienced by the institutions in their attempts to improve their

relevance, efficiency and effectiveness has been the inadequacy of financial and human resources, which are blamed mainly on resource constraints

The Judiciary lacks control over the financial resources which it requires to fund its operations, being squarely dependent on Executive-cum-Parliament which determines the annual budgets. If the Judiciary must always look to other constitutional agencies for essential funding, this is likely to compromise its independence. Ideally, a proportion of the government revenue ought to be dedicated to the Judiciary's operations, and should be payable outside the framework of periodic approvals.

Therefore, financial security is crucial to maintaining individual independence preventing other branches of government from using threats of salary reduction to influence judges[109]. Financial security includes adequate remuneration and protections against the arbitrary reduction or suspension of judges' salaries. Similarly, the adequate provision of resources allows the "judicial system to operate effectively without any undue constraints which may hamper" independence.[110]

In ***Valente v Queen***, the Canadian Court observed.....The essence of such security is that the right salary and pension should be established by law and not subject to arbitrary interpretation by the executive in a manner that could affect judicial independence[111]

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[109] (UN Principles, section 11; Latimer House Principles, section IV[b])

[110] (Latimer House Principles, section IV[c]).

[111] Quoted by Froneman (1999) 1 *JJOASA* 135 137; Michalakis (2001) 373-381.

The decision of the SACC in S v Mamabolo (E. TV Intervening),[112] per Kriegler J, is apposite as follows:"In our constitutional order the judiciary is an independent pillar of the State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and legislative pillars of the State; but in terms of political, financial or military power it cannot hope to compete. it is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter of disputes between organs of the State and, ultimately, as the watchdog over the Constitution and its Bill of Rights-even against the State.[113]

The success or failure of judicial control of the abuse of power, whatever form such control may assume, depends on the judges being independent of those wielding the power. Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government. For there can be no protection against abuse of power, even when safeguards are enshrined in the Constitution, if the judges who have to interpret these

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[112] See *S v Mamabolo* (*E TV and Others Intervening*) 2001 (5) BCLR 449 (CC) para 16-17.

[113] Ibid para 16.

whenever the government is challenged are only puppets of the government".[114]

Public power "executive stall",

For judicial independence, public power is problematic from two standpoints the first of which has already been considered. Where public power takes perceptible management and administrative form, its main ramifications, on the negative side, are: (a) whether it involves a distortion of prescribed procedure, and seeks to benefit a subjective cause; and (b) whether it oppresses and deprives the individual, in one way or another. Such injuries of public power are precisely the ones the Judiciary has endeavored to set right. It is because the lines of propriety have been prescribed, and so the Judiciary can readily hold the power-wielders to account

The second dimension of public power, however, is more intrinsic in the social institutions, and it has not lent itself readily to the cutting edges of the recognised legal techniques. Not only has this dimension of public power escaped judicial control, by-and-large, but, more disturbingly, it has taken command of the very sources of the momentum of public institutions, and has had impacts even upon the character of the judiciary itself. We are concerned with the creation of leadership, in relation to Legislature-cum-Executive, and in relation to Judiciary.

> Leadership of the Executive Branch has emerged in tandem with the process of electing a Legislative Branch. But, electing a

[114] Dias, RWM., (Ed) (1976) Jurisprudence London: Butterworths 4th Edn p.129.

> Legislative Branch is a function dominated by the partisan interests which have sprung up, by their unregulated dynamics, from the grassroots. The partisan interests that brought forth the parliamentarians, a number of whom then graduated to the "Executive Stall", remain alive, through and through.

Then, how is the judicial cadre brought into being? Not directly from the grassroots. Indeed, the judicial calling is more elitist; it takes considerable learning and specialisation. So the judicial cadre has been sourced by somebody; and the partisan stand characterising those in the "Executive Stall" could not have been entirely indifferent, as the judicial cadre was being selected.

Corruption

The Kenyan Constitution provides for an independent judiciary; however, in practice the judiciary is often corrupt and subject to executive branch influence. The President has extensive powers over appointments, including those of the Attorney General, the Chief Justice, and Appeal and High Court judges. The President also can dismiss judges and the Attorney General upon the recommendation of a special presidentially appointed tribunal. Although judges have life tenure (except for the very few foreign judges who are hired by contract), the President has extensive authority over transfers.

The Chief Justice is a member of both the Court of Appeals and the High Court, which undercuts the principle of judicial review. Military personnel are tried by military courts-martial, and verdicts may be appealed through military court channels. The Chief Justice appoints attorneys for military personnel on a case-by-case basis.

Finally, In addressing corruption as an obstacle to the rule of law, the Government set up the ***'Integrity and Anti-corruption Committee of the Judiciary in Kenya, 2003'*** to implement policy known as "radical surgery"[115]. The committee cited credible evidence of corruption on the part of five out of nine Court of Appeal Judges (56%), 18 out of 36 High Court Judges (50 %) and 82 out of 254 magistrates (32 %) in its Report.[116]Prior to informing the accused of the allegations against them, however, a 'List of shame' was published in the media, naming the judges and magistrates implicated in the report. The Acting Chief Justice publicly advised those named on the list to resign quietly within two weeks or be suspended without pay or privileges and face tribunals. Justice Waki, a judge of the Court of Appeal, and one other judge, challenged the allegations against them, and after securing a public hearing, achieved their reinstatement in late 2004.[117]Of the 82 magistrates implicated, 70 were 'retired' by the Judicial Service Commission in the public interest. The process of publicly naming individual judges and magistrates as corrupt without giving them prior notice of charges against them was widely criticized, as was the pressure placed on them to resign from office. These actions were seen to compromise judicial independence, including security of tenure, and undermine the right to due process.[118]

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[115]The committee was chaired by Honourable Justice Ringera.

[116] he report of the Integrity and Anti-corruption Committee of the Judiciary, 2003 (the Ringera Report) at 46.

[117] ibid.

[118] Iinternational Commission of Jurists(ICJ) Report, Kenya: Judicial Independence, Corruption and Reform, April 2005 at 17-26

Abuse of power

In the case of the judiciary, the failure to regulate the president's and the chief justice's powers of appointment and dismissal, as well as the administrative powers of the latter, often aided human rights violations and economic crimes and undermined the legitimacy of the judiciary as a forum for dispute resolution. These powers have been exercised in ways that, respectively, undermine the institutional autonomy and authority of the judiciary and the independence of judicial officers. As a result, judicial officers are not only insecure in their positions, but may also become enablers of human rights violations and corruption.

The system for appointing judges has been open to abuse since it establishes no standards or criteria for vetting candidates. Thus a recent task force established to examine the question of judicial reform noted that "The process through which candidates for appointment are currently identified and vetted by the Judicial Service Commission is neither transparent, nor based on any publicly known or measurable criteria and is certainly not competitive."[119]

Accordingly, the individuals who become judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Further, Section 61 of the old Constitution gave the president power to appoint judges in an acting capacity. This power was inimical to judicial independence since an acting judge awaiting confirmation would be vulnerable to executive pressure.

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[119] Republic of Kenya, Report of the Task Force on Judicial Reforms 2009, 32.

As stated above, in Kenya, appointments to the Judiciary at the lower level (of Magistrates) is the responsibility of the Judicial Service Commission, established under s.68 of the Constitution, and presided over by the Chief Justice, who is the head of the Judiciary.

Given the considerable numbers who occupy the magistracy, it is not in the very nature of things possible to subject the process of appointment to an undue amount of partisan influence; besides these appointments are made competitively, on the basis of interviews. So in that regard, conditions for independence, in the measure in which they attach to mode of employment, are not necessarily compromised. Whether or not this will contribute to judicial independence, must thereafter depend on the terms and conditions of service; and by all accounts, these should be improved, so as to stabilize the many serving magistrates, as appropriate.

With regard to the "higher judiciary", it is the Head of State who makes the appointments: at his own discretion in the case of the Chief Justice; and with the advice of the Judicial Service Commission, in the case of the remaining judges. The only qualification is that the appointee is to satisfy the prescribed professional requirement[120]; and the conditions are: being or having been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth, or in the Republic of Ireland, or a court having jurisdiction in appeals from such a court; being an advocate of the High Court of Kenya of not less than seven years' standing; having

[120] Constitution of Kenya sections 61, 64.

held certain professional qualifications provided for in the Advocates Act[121], for a cumulative period of at least seven years.

The members of the "higher judiciary" are accorded tenure of office, and are to retire only upon attainment of retirement age[122], though they can be removed from office for misbehaviour, where a duly-appointed tribunal has investigated their conduct and recommended termination of service. In ***Valente v Queen,*** the Canadian Court observed:*Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence . . . .* [123]
Such safeguards will, no doubt, make some contribution to the principle of judicial independence; but they would not be sufficient, if there is no unwavering commitment, at the political level, to the ethos of independence of the judiciary. Such a commitment must, in the case of Kenya, be seen as dependent on a strengthening of democratic traditions, which focuses the nation's attention upon certain irreducible values, seen as a mark of political civilization.

For the most part, therefore, judges have not been insulated from external influences.for instance Legislation on fair administrative action should be supplemented by stronger judicial action on the failure, neglect or refusal of public officers to comply with court orders. In the well-known ***Kisya Investments Ltd v. Attorney General & Another* of 2005,** the High Court has adopted an interpretation of the

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[121] Advocates Act (cap 16).

[122] Constitution of Kenya section 22(1).

[123] Quoted by Froneman (1999) 1 *JJOASA* 135 137; Michalakis (2001) 373-381.

Government Proceedings Act which precludes courts of law from issuing orders 'for enforcing payment by the government of any money or costs'. This precedent should be directly addressed by the legislation on fair administration action requiring courts to interpret the Government Proceedings Act and other relevant statutes in a manner that fulfils the broad intentions of the new constitution, especially government respect for the rule of law.

Lack of proper applicability of the doctrine of separation of powers

There is a notable element in the Kenyan governmental set-up, and with regard to the Judiciary, which is clearly unfavourable to judicial independence. The Judiciary lacks control over the financial resources which it requires to fund its operations, being squarely dependent on Executive-cum-Parliament which determines the annual budgets. If the Judiciary must always look to other constitutional agencies for essential funding, this is likely to compromise its independence. Ideally, a proportion of the government revenue ought to be dedicated to the Judiciary's operations, and should be payable outside the framework of periodic approvals.

However, that the judiciary must be independent does not, suggest that it should operate absolutely independent of the other organs of government. Nor is it suggested that the other organs have to be operationally detached from each other. The separate allocation of functions only prevents the abuse of power by any of the organs and ensures effective and efficient delivery of services to society.

Lack of proper judicial appointments

The judicial appointments process also impacts on individual independence. Judicial appointments "should be made on the basis of clearly defined criteria and by a publicly declared process"[124]. The appointments process must also "safeguard against judicial appointments for improper motives", and people selected should "be individuals of integrity and ability with appropriate training or qualifications in law"[125]. If the appointment of judges were not based on well-defined criteria or not open to public scrutiny, the executive could try to appoint judges who shared its beliefs and would be unlikely to challenge government acts. Similarly, if appointments are based on merit as opposed to party allegiance or other inappropriate factors, judges will be less likely to feel that they need to favour the people who appointed them.

Merit-based appointments also help ensure that judges have the necessary legal education and experience, both of which help foster and reinforce the importance of judicial independence. Furthermore, to protect independence, any system of promoting judges "should be based on objective factors, in particular ability, integrity and experience"[126]. If judges believe that the content rather than the quality of their decisions will impact on their likelihood of being promoted, they might be reluctant to make decisions upon which the government will look unfavourably.

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[124] (*Latimer House Principles*, section IV[a]).

[125] *UN Principles*, section 10).

[126] (UN Principles, section 13).

Lack of impartiality on the judicial officers

The Kenyan Code was established in 2003 by the Judicial Service Commission in terms of *section 5(1)* of the Public Officer Ethics Act 2003. That section requires each commission responsible for a public service sector to establish a specific code of conduct and ethics for the public officers for which it is responsible.

Section 11(3) states that a public officer may accept a gift given in his official capacity but, unless the gift is a non-monetary gift that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer's organization. This sub-section is incompatible with the very stringent international rules relating to the acceptance of gifts by judges, especially if the gift is offered to the judge in his official capacity[127]

Section 11(5) states that the prohibition imposed by section *11(2)(c)* on the use for the personal benefit of himself or another of information that is acquired in connection with the public officer's duties and which is not public, "does not apply to the use of information for educational or literary purposes, research purposes or other similar purpose." It would be improper for a judge to use information gathered in the course of his official duties which is not public to be used by him or disclosed to others for educational, literary, research or similar purpose. However, most court documents ought to be available to the public except those referred to in article *14(1) of the International Covenant on Civil and Political Rights (ICCPR).*[128]

[127] The Public Officer Ethics Act.
[128] Ibid.

A commentary to Canon 1 of the American Code of Judicial Conduct of 1990 (Code)[129] states that the defence to the judgements and rulings of courts depends upon public confidence in the integrity and independence of judges. It states further that the judges' integrity and independence depends in turn upon their acting without fear or favour. Canon 3 of the Code further states:"*A judge must perform his duties fairly and impartially. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.*

Conclusion

In conclusion chapter four has mainly discussed the various challenges that are facing the applicability of independence of the judiciary in Kenya.

In summary they include: lack of finances ,this has led to the judiciary relying on the executive and legislative governments for financial aid leading to their decisions being influenced,; executive stall where the executive has more power and influence than the judiciary,; corruption where most judicial officers are corrupt,; abuse of power, where most arms of government take advantage of the powers they have to influence the judiciary,; Lack of proper applicability of the doctrine of separation of powers, this has definitely affected the independence of the judiciary greatly, Lack of proper judicial appointments, this has been overshadowed by corruption and external influences,; Lack of impartiality on the judicial officers, this has led to abuse of judicial decisions.

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[129]See Nyalali 'Judicial Ethics and Accountability' in Ajibola & Van Zyl (1998) pg 199-200.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS OF THE STUDY ON THE INDEPENDENCE OF THE JUDICIARY IN KENYA

Introduction

This research has sought to critically analyze the independence of the judiciary in Kenya. It is now beyond doubt that, the success or failure of judicial control of the abuse of power, whatever form such control may assume, depends on the judges being independent of those wielding the power.

The significance of the independence of the judiciary include: An independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law.

Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government. For there can be no protection against abuse of power, even when safeguards are enshrined in the Constitution, if the judges who have to interpret these whenever the government is challenged are only puppets of the government"

The notion that the third arm of the constitution, the judiciary, should be entirely separate from both the legislative and the executive powers, seemed...to be based on more solid foundations than the somewhat arbitrary division between the legislature and the executive.

As compared, therefore, to the other organs of government, the Judiciary must be well anchored upon a foundation that does not flinch at pangs inflicted by the public power, nor pander to attractions of things allied to such power.

Recommendations

Security of tenure

Article 168 of the new Constitution circumscribes the power to dismiss judges. Unlike before, the process of removing the chief justice and judges will now be initiated by the Judicial Service Com-mission. Acting on its own motion, or on the petition of "any person," this commission is required to give a hearing to the affected judge and to send the petition to the president only when it is satisfied that there are grounds for removal. Upon receiving the petition, the president is then required to appoint a tribunal to inquire into the matter.

In the case of the chief justice, this tribunal consists of the Speaker of the National Assembly (as chair), three "superior court judges" from common law jurisdictions, one advocate of 15 years standing, and two other people with experience in public affairs. In the case of other judges, the composition of the tribunal remains the same, except that the three judges need not be sourced from other common law jurisdictions. Although the affected judge has a right to appeal to the courts, the president is empowered to "act in accordance with the recommendations of the tribunal."

Save for the fact that the power of the president to appoint members of the tribunals is unregulated, the new Constitution introduces due

process and certainty in the exercise of the power to dismiss judges; this may enhance security of tenure and independence of judges.

Vetting of judicial officials

Another notable feature of the new Constitution is that it provides a framework for the vetting the judiciary. It requires the current chief justice to leave office within six months after it takes effect (Clause 24, Sixth Schedule).It requires Parliament to enact a law within one year after it takes effect that establishes mechanisms and procedures for vetting the suitability of all judges and magistrates to continue to serve in accordance with the values and principles established in *Articles 10 and 159*.

Independent finance bodies

Article 173 of the constitution creates the Judiciary Fund that will be administered by the chief registrar of the Judiciary. Under *Article 173(3) (4)* the Chief Registrar prepares the annual budget of the judiciary, places before the JSC for approval and then transmits it to parliament for approval. This has done away with the previous process in which the Treasury could ultimately decide on the budget of the judiciary.

All judicial units to have financial and operational autonomy delinked from the district treasuries i.e. own finances and physical infrastructure and motor vehicles to avoid executive interference.

Generally, the independence of the judiciary is not only advantageous to courts, but also is of great benefit to litigants, the general public, and the international human rights movement. Thus, courts must take a lead role in ensuring that the right to vote is respected,

protected, and promoted at all times.[130] In keeping with their oaths of office, judges must defend the constitution of their countries. They must be bold spirited.[131] Their decisions must be grounded on sound legal reasoning. They should be prepared to make decisions that do not sit well with the administration in power. A judge should "feel compelled to select" those constitutional "values and principles" that promote "equality and dignity."[132]

However, for this objective to be realized, an enabling environment must exist. This subsection evaluates some of the judicial reforms that could be adopted as a means of achieving this goal. These initiatives could restore and promote public confidence in and guarantee the independence of the court system. Improvements could also ensure that decisions are based on the rule of law.

Transparency and promptness are essential components of an efficient system of justice.[133]

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[130] As experience in Malawi shows, an objective judiciary can play a central role in protecting democracy. Siri Gloppen and Edge Kanyongolo, "The Role of the Judiciary in the 2004 General Elections in Malawi,"

[131] See also George Christie and Patrick Martin, *Jurisprudence: Text and Readings on the Philosophy ofLaw* (Minnesota: West Publishing Company, 1995) at 933 (arguing for an "active judiciary").

[132] Jackie Dugard, "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation," (2007) 20 *Leiden Journal of International Law* 965 at 81.

[133] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, "Promotion and Protection of all Human Rights, Civil and Political, Economic, Social and Cultural Rights, Including

Although judicial reforms could be counterproductive in transitional states,[134] it is apparent that changes must be made to the courts if the rule of law is to prevail. For the judiciary to be fully independent, as envisioned by international human rights laws,[135] it is imperative to review the selection process[136]

Prevention of abuse of power

For instance, Legislation on fair administrative action should be supplemented by stronger judicial action on the failure, neglect or refusal of public officers to comply with court orders. In the well-known

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the Right to Development," A/HRC/8/4 (13 May 2008) paragraph 43.

[134] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: "Civil and Political Rights, Including the Questions of Independence of Lawyers and Judges," A/HRC/4/25 (18 January 2007) paragraph 22; "Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice and Impunity," A/62/207 (6 August 2007) paragraph 27.

[135] See articles: 26 of the *Banjul Charter*; 37 of the *CRC*; and 14 of the *ICCPR*.

[136] See "The East African Community Observer Mission Report: Kenya General Elections December,2007," available at http://www.parliament.go.tz/bunge/docs/ealanews.pdf (visited 19 April 2009) at 9; Commonwealth Secretariat, "Report of the Commonwealth Expert Team: Antigua and Barbuda General Election, 23 March 2004, available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BF3B45C53-F1A0-4557-873D-46EFCBBEE90E%7D_FinalReportOFTheCETAntiguaAndBarbuda.pdf (visited 19 April 2009) at 9.

***Kisya Investments Ltd v. Attorney General & Another* of 2005**, the High Court has adopted an interpretation of the Government Proceedings Act which precludes courts of law from issuing orders 'for enforcing payment by the government of any money or costs'. This precedent should be directly addressed by the legislation on fair administration action requiring courts to interpret the Government Proceedings Act and other relevant statutes in a manner that fulfils the broad intentions of the new constitution, especially government respect for the rule of law.

The judicial power is meant to be a check against all powers of government without exception, except that the judicial power must be exercised within the limits confined thereto. A matter of national defense, national interest, national welfare is not necessarily beyond the jurisdiction of judicial power.[108]

In the ***Executive Council Western Cape Legislature and Others V President of the Republic of South Africa and Other*[137] (*The Western Cape case*)** the court enforced the principle of separation of powers by setting aside a proclamation of the President on the grounds that the provisions of the Local Government Transition Act (Act 209 of 1993) under which the President had acted in promulgating the proclamation was inconsistent with the separation of powers required by the constitution and accordingly invalid.[138]

Again ***In South African Association of Personal Injury Lawyers Vs Heath, Willem Hendrik, The Special Investigating***

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[137] *1995(4) SA 877 (CC); 1995(10) BCLR 1289 (CC)*

[138] The Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches Vs The State and The President of Malawi, The Inspector General of Police, Army Commander Misc. Civil Cause 78 of 2002

Unit, President of the Republic of South Africa and the Ministers of Justice[139] the Constitutional Court of South Africa dealt with the issue of separation of powers among other issues. The matter first came before Coetzee AJ who considered the appointment of a judge under The Special Investigating Units and Special Tribunals Act of South Africa to head the Special Investigation Unit. The court of first instance held that the functions the first respondent was required to perform under the Act as head of the SIU were not inconsistent with the independence of the judiciary. The court also held that under the South African Constitution there is no express provision dealing with the separation of powers, and that it was not competent for a court to set aside a legislative provision on the basis that it violates what, at best for the appellant, is no more than a "tacit" principle of the Constitution. He held further that the United States and Australian authorities relied upon by the appellant were not relevant, because the constitutions of those countries provide for a rigid separation of powers, whereas the South African Constitution does not do so.

Another instance is in the case of In *Findlay v. UN* (1997) the European court of Human Rights held that "***the irremovability of judges by the executive must in general be considered as a corollary of their independence***". From the perspective of their personal independence, it is crucial that the judges are not subordinated hierarchically to the executive or the legislature. It is a fundamental requirement of judicial independence that judges at all levels should not be subordinate or accountable to other branches of government especially the executive. Judges are accountable to the constitution. As

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[139] *Case CCT 27/00.*

Kennedy explains*: the bedrock of . . . democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing.*

Review of the Commissions of Inquiry Act

There is a need for review of the Commissions of Inquiry Act, including the provisions surrounding appointment of sitting judges as commissioners in non-judicial processes.

Commissions of inquiry are a tool used by the executive and therefore tend to be political in nature. They are therefore not in the realm of judicial decision-making and can open judges who sit on them to situations of conflict of interest if from the evidence, triable issues are raised.

Moreover, if matters raised in the commission are subjected to judicial review, there is the likelihood of a High Court judge sitting in judgment over a matter overseen by a Court of Appeal judge as the chair of the commission. In the circumstances, and to maintain the decorum of the court, judges should not serve on commissions of inquiry. Such exemption is important for enhancing the independence of the judiciary. In addition, new legislation should enhance the autonomy, transparency and accountability of commissions.[140]

Adherence to the bill of rights

The new 2010 constitution includes within its bill of rights a new provision on 'fair administrative action', stating that 'every person has

[140] Kenya Justice Sector and the Rule of Law *DISCUSSIONPAPER* ,Patricia Kameri Mbote and Migai Akech,A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011 pg 11 para 3.

the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair'[141]. It requires legislation to be enacted within four years that would give force to this right, in particular by allowing for review of all administrative action by a court or tribunal. Applying to all public officials and agencies, this law would establish principles and procedures for controlling governmental power to ensure that public authorities do not abuse the powers granted to them by the constitution and acts of Parliament. It should regulate the procedures and acts of public administrators by, for example, guiding the initiation of investigations of complaints against public functionaries, and provide for remedies and applicable orders directing parties to conform to governing statutes or rules. It should also entrench the principles of natural justice to ensure fairness and procedure and reasonableness in decision-making.[142]

Judicial Review

An important element of the functions of the courts is the exercise of judicial review of legislative and executive acts. This entails the power to strike down executive acts or pieces of legislation if inconsistent with the constitution. Modern democratic constitutions tend to expressly provide for the power of judicial review.[143]American Constitutional history records that one of the founding fathers, Thomas Jefferson, fiercely attacked judicial review as undemocratic, elitist and violation of the principle of separation of powers. This tends to explain

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[141] Constitution of Kenya 2010(article 47).

[142] Kenya Justice Sector and the Rule of Law *DISCUSSIONPAPER* ,Patricia Kameri Mbote and Migai Akech,A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011 pg 10-11 para 3.

[143] See Section 108(2) of the Republic of Malawi Constitution

why despite being supported by more than half the delegates to the Constitutional Convention, the term judicial review is conspicuously absent from the Constitution of the United States. [144] Judicial review, while not being synonymous with judicial activism, is a valuable deterrent in that the State and other Branches of it must take it into consideration before they act lest they risk the court's rebuke. Judicial review allows the courts to be counterweight to the other Branches. Without judicial review the judiciary would be too weak to play its role in the system of separation of powers as envisaged by democratic constitutions.[145] It is important that the court understands the scope of judicial review in order that the power be used appropriately without creating judicial tyranny.

The purpose of judicial review is to correct erroneous decision-making. [146]The duty of the court to check the abusive acts of another branch of government which in a non- democratic State would constitute a political question immune to judicial intervention is by the process of judicial review an important aspect of democratic governance.

Training

The independence of the judiciary is further threatened by its poor performance due to the poor conditions of service, poor funding and severe shortage of qualified personnel. These problems contribute

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[144] It was the case of *Marbury V Madson* (1803) that lay the foundation for modern judicial review in the United States of America.

[145] " The Role of the Independent Judiciary" by Susan Sullivan Lagon in Freedom Papers 4 .

[146] See also *Hira and Another V Booysen and Aonther 1992 (4) SA 69(A) 193-4.*

both to poor quality decision-making and also to the backlog of cases in the courts. The issue of resources will need to be urgently addressed by the new Chief Justice, playing an advocacy role with the Minister for Justice and Kenya's development partners for increased support to the judicial system.[147]

The training of judges, magistrates, registrars, their assistants, clerks and other human resources: by raising the level in training institutes, improving the quality of the instructors, adapting the content of training programs to the current changes (i.e., cyberspace law, comparative constitutional law, business law, international commerce law, competition law, consumption law, intellectual and industrial property law, gender and equality laws, international criminal law, etc.), and reexamining the training methods. It is also necessary to increase the number of areas of specialization in order to meet the quick progress and growing complexity of law. Also very importantly, structuring the teaching of ethic and practice codes, encouraging comparative and international law studies, teaching foreign languages, and opening up training institutes both to the national economic and social environment and the international one.

Transparency and Accountability.

The Constitution and the Judicial Service Act compel the JSC to ensure that the judiciary is run in a transparent and accountable manner. Further the judiciary is under the law accountable only to the

[147] Kenya Justice Sector and the Rule of Law *DISCUSSIONPAPER* ,Patricia Kameri Mbote and Migai Akech,A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011 pg 8 para 3

people. Transparency has a number of derivatives. First, in the recruitment of judicial officers, the Constitution and the Judicial Service Act mandatorily requires the process to be open to the public, and that the process is done in a competitive and transparent manner. *Article 172(2) reads as follows*:

"In the performance of its functions, the Commission shall be guided by the following:

1. Competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and

2. The promotion of gender equality.

It is thus clear that in terms of even the recruitment of both judicial officers and non-judicial staff, the JSC must strictly comply with the criterion set out in the Constitution. The JSC is a live to the delicate balancing act it has to do in the recruitment of judicial officers. It is also a live to both the gender issues and regional balance when it comes to such recruitment. It must however be appreciated that the primary consideration for appointment remains competitiveness.[148]

Part V of the Judicial Service Act sets in greater detail the procedure for the appointment of both judicial and non-judicial staff of the judiciary. The First Schedule of the Act in great detail expounds upon the procedure that must be adhered to during the recruitment process[149].

[148] Constitution of Kenya 2010.
[149] Judicial Service Act.

It must be appreciated that the JSC has followed the procedure set out in both the Constitution and the Act when it recruited the chief justice, the deputy chief justice, and judges of the Supreme Court and judges of the High court. In fact we set an example to the rest of the world, as Kenya is the first only country that has recruited a chief justice through an open and public participatory process[150].

In conclusion, Kenya has embarked on extensive judicial reforms. They began with the exit of the former Chief Justice six months after the passing of the country's new constitution in 2010. This was followed by a rigorous appointment process which for the first time saw applicants for the position of Chief Justice interviewed by a revamped Judicial Service Commission in the presence of the media. Similarly, applicants for the posts of Deputy Chief Justice and Justices of the Supreme Court were advertised and interviews carried out publicly.

Subsequently, Parliament also passed the Vetting of Judges and Magistrates Act in 2011 to facilitate the vetting of serving judges and magistrates and, if necessary, terminate their employment. Grounds for termination include delayed judgments, lack of integrity and lack of professionalism, among others. The vetting process, which began in 2012, has already led to the termination of the terms of four Court of Appeal judges.

Meanwhile, the judiciary has also started hiring more magistrates to deal with the case backlog in courts across the country. There are plans to ensure that there is a resident judge in each of the 47 counties in order to ensure access to courts across the country.

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[150] See Aurelio Rebelo, *JSC Sets Pace for Adherence to Provisions of the Constitution,* May 23-29, 2011, The EastAfrican at page 10.

Indeed, under the current Chief Justice, the new look judiciary is beginning to bear real fruit. Unlike in the past, courts have not hesitated to pass judgments that impact unfavourably on the executive and senior government figures.

CONCLUSION

In conclusion therefore, the lack of independence of the judiciary has historically been one of the greatest threats to the rule of law in Kenya. The lack of trust in the courts directly contributed to the post-election violence of 2007/2008, and has undermined the rule of law in all aspects of national life.[151]

The new constitution implements many of these recommendations. It seeks to enhance judicial independence and accountability by dispersing judicial authority, giving the judiciary autonomy from the executive, establishing transparent and accountable mechanisms for the appointment of judges, and circumscribing the power to dismiss judicial officers. The 2010 constitution provides for the re-establishment of the Judicial Service Commission, with a new mandate to 'promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice', including by recommending judges for appointment to the president. It also provides for due process in the removal of judges, providing very limited grounds and requiring the adoption of legislation within one year to regulate the use of these powers. The transitional provisions in the sixth schedule to the new constitution require legislation within one year that will establish mechanisms to vet existing judges and magistrates and remove those who are found not to be fit for office.[152]

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[151] Kenya Justice Sector and the Rule of Law *DISCUSSIONPAPER* ,Patricia Kameri Mbote and Migai Akech,A review by AfriMAP and the Open Society Initiative for Eastern Africa March 2011 pg 7 para 1.

[152] Ibid pg 8 para 2

As earlier noted the judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community. Social, political and economic changes, in recent times, in most countries, have confronted the courts and judges with new challenges and new problems. The centralization of the responsibility and supervision of court administration and judicial administration has raised the issue of the relationship between the judiciary and the executive, and made it necessary to examine and delineate the boundaries of the scope of executive control on judges, courts and judicial administration, and court financing. It was also necessary to review the rules, traditions, and practices governing the conduct of judges off the bench, in the various areas of activities. A modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole. The concept of collective judicial independence may require a greater measure of judicial participation in the central administration of the courts including the preparation of budgets for the courts, and depending on one's view of the nature of judicial independence, the extent of judicial participation may range from consultation, joint responsibility with the executive, or exclusive judicial responsibility.[153]

Therefore, the strengthening of judicial independence is a crucial element of the transformation of the judiciary and is fundamental to the creation of a democratic state.

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[153] Shimon Shetreet and Jules Deschenes, Judicial Independence: The Contemporary Debate (1985 Martinus Nijhoff), Ch. 33.

Kenya's judiciary has undergone a number of developments, including a transformation from an all-white bench at the time of independence to a bench comprised of local-born judges today. However, courts in Kenya and Zimbabwe do not have a reputation of fairness and independence. Survey data suggest that many citizens do not trust that courts and judges in Africa are autonomous in their work. In a survey conducted in 2006 and 2007 among thirty-two African countries, including Kenya and Zimbabwe, the Gallup Organization found that just over half of those polled (fifty-three percent) expressed confidence in the judiciary in their country.[154] Moreover, a number of studies have established that courts in Kenya and Zimbabwe cannot discharge their mandates impartially and independently. For instance, in its 2008 report, the Fund for Peace, a nonprofit research and education organization, described the judiciary in Kenya and Zimbabwe as "weak"[155] and "poor,"[156] respectively. Legal practitioners argue that public confidence in the Kenyan judiciary has "virtually collapsed."[157]

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[154] Gallup, "In South Africa, High Level of Confidence in Judiciary," available at http://www.gallup.com/poll/110968/South-Africa-High-Level-Confidence-Judiciary.aspx(accessed 24 November 2008)

[155] The Fund for Peace, "Country Profile: Kenya," availablehttp://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=36&Itemid=61 (accessed 24 November 2008).

[156] Peter Annasi, *Corruption in Africa: The Kenyan Experience* (Dialnet Communication Systems: Nairobi,2004) at 84.

[157] Per Harms DP in *National Director of Public Prosecutions v Jacob Zuma* (573/08) [2009] ZASCA 1(12 Jan 2009) (Farlam, Ponnan, Maya and Cachlia JJA concurring) at paragraph 16. See also Sylvia Bertodano, "Judicial

Simply put, the judiciary in Kenya and Zimbabwe is facing a crisis of confidence.

Therefore, real independence implies that judges should make decisions or conduct review applications "based on the backdrop of the Constitution and precedent without fear of retribution by either the legislative or executive branches."[158]

Furthermore, It must be noted, as earlier mentioned, that for the judiciary to be independent the referenced democratic principles of observance of the rule of law and the separation of powers remain specifically integral.61 The emphasis on the independence of the judiciary does not only serve as an enablement for a government determined to administratively and economically thrive, but also as a curtailer of the abuses of government power. When this power is successfully curtailed the scope for potential abuses is diminished. It is the failure to attain this restraint that would sadly result in violations, sometimes of higher scale, of fundamental rights and freedoms of individuals. This situation can be prevented by the emancipation of the judiciary to play its rightful role as the upper custodian of the rule of law and human rights protection. Sir Harry Gibbs, former CJ of Australia, was once quoted as having expressed that:

Independence in the International Criminal Court," (2002) 15 *Leiden Journal of International Law* 409 at 417 ("For a judge to describe as guilty a man whom his court has not yet tried suggests a lack of the impartiality required of that judge at trial").

[158] Justice Kelly quoted by "A discussion of Judicial Independence with Judges of the United States Court of Appeal for the Tenth Circuit," (1997) 74 *Denver University Law Review* 355 at 356. See also the Canadian Supreme Court in *R v Valente* (1985) CarswellOnt 129 at para 16.

"An independent judiciary is the very cornerstone of any democratic structure. If you destroy the cornerstone the structure will come down; it will collapse . . . If it collapse (sic) we shall be plunged into darkness and the chaos of a totalitarian and dictatorial regimes."[159]

Therefore, In Kenya, appointments to the Judiciary at the lower level (of Magistrates) is the responsibility of the Judicial Service Commission, established under s.68 of the Constitution, and presided over by the Chief Justice, who is the head of the Judiciary.

Given the considerable numbers who occupy the magistracy, it is not in the very nature of things possible to subject the process of appointment to an undue amount of partisan influence; besides these appointments are made competitively, on the basis of interviews. So in that regard, conditions for independence, in the measure in which they attach to mode of employment, are not necessarily compromised. Whether or not this will contribute to judicial independence, must thereafter depend on the terms and conditions of service; and by all accounts, these should be improved, so as to stabilize the many serving magistrates, as appropriate.

With regard to the "higher judiciary", it is the Head of State who makes the appointments: at his own discretion in the case of the Chief Justice; and with the advice of the Judicial Service Commission, in the case of the remaining judges. The only qualification is that the appointee is to satisfy the prescribed professional requirement[160]; and the conditions are: being or having been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the

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[159] Ajibola & Van Zyl (1998) xvi 166

[160] *Constitution of Kenya sections 61, 64*

Commonwealth, or in the Republic of Ireland, or a court having jurisdiction in appeals from such a court; being an advocate of the High Court of Kenya of not less than seven years' standing; having held certain professional qualifications provided for in the Advocates Act[161], for a cumulative period of at least seven years.

The members of the "higher judiciary" are accorded tenure of office, and are to retire only upon attainment of retirement age[162], though they can be removed from office for misbehaviour, where a duly-appointed tribunal has investigated their conduct and recommended termination of service.

Such safeguards will, no doubt, make some contribution to the principle of judicial independence; but they would not be sufficient, if there is no unwavering commitment, at the political level, to the ethos of independence of the judiciary. Such a commitment must, in the case of Kenya, be seen as dependent on a strengthening of democratic traditions, which focuses the nation's attention upon certain irreducible values, seen as a mark of political civilization.

There is a notable element in the Kenyan governmental set-up, and with regard to the Judiciary, which is clearly unfavourable to judicial independence. The Judiciary lacks control over the financial resources which it requires to fund its operations, being squarely dependent on Executive-cum-Parliament which determines the annual budgets. If the Judiciary must always look to other constitutional agencies for essential funding, this is likely to compromise its independence.

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[161] *Advovates Act (cap 16)*

[162] *Constitution of Kenya section 22(1)*

Ideally, a proportion of the government revenue ought to be dedicated to the Judiciary's operations, and should be payable outside the framework of periodic approvals.

Finally the researcher does concludes her research by noting 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.

In the recent happenings in Kenya, the judiciary has been billed as Chief Justice Willy Mutunga succession battle in the Judiciary. Other schools of thought suggest that after the refusal by ousted Judiciary Chief Registrar Gladys Shollei to oblige some members of the Judiciary Service Commission (JSC) placed her in the firing line after she raised the red flag about questionable procurement. Whichever way, since the matter became public in August, the Judiciary has been dragged through the mud, with the credibility of the institution that had regained a modicum of public confidence after years of distrust, rapidly receding. The former Judiciary boss' woes began when JSC members met in Mombasa in August and resolved to rein in her ego, accusing her of obstinacy and high-handedness. She was accused of financial, procurement, employment and administration impropriety in the Judiciary, but defended herself against all the allegations. In due course, the media also landed on e-mail correspondence between the CJ and some Judiciary staff, the most startling was the 31-point plan prepared by a group dubbed the "War Council" in the JSC fight with

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