

**SEPARATION OF POWER IN AFRICAN GOVERNMENTS.
A CASE STUDY OF KENYA UNDER THE NEW CONSTITUTION
2010.**

BY

MAINA JAMES MWANIKI.

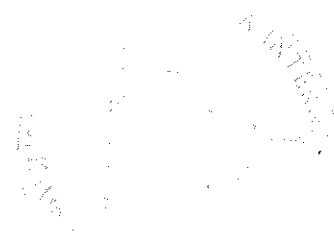
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SUPERVISOR

DR. BITTOK K TITUS

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Declaration.

I hereby declare that this dissertation is my original work and does not include any material copied or in any other way acquired from any other presentation.

I further declare that this dissertation including the contents herein as a whole have never been presented before in any university or institution of higher learning before.

Signature 

Date 31/5/2011

MAINA JAMES M.

(Student)

Approval.

This is to certify that the research of MAINA JAMES M. who has been under my Supervision and is now ready for submission to the faculty of law for the award of a degree of law of Kampala International University.

Signature  Date 

 DR. BITTOK K TITUS.

(SUPERVISOR)

Acknowledgement.

I hereby acknowledge that Dr. Bittok K. Titus has been my supervisor throughout this dissertation and I highly appreciate all the support and guidance that he has accorded me throughout this time.

I accept and acknowledge all comments and criticism made by him in regard to this proposal as they were made for the best outcome of this work.

Signature 

Date 31/5/2011

MAINA JAMES M.

(Student)

Dedication.

I hereby dedicate this piece of work to my family, and my lecturers who have given me a lot of guidance all through this course.

Special thanks go to my mother, Mrs Irene Njeri Maina for her relentless support and mentorship that she has shown from the beginning until this point. It is because of her encouragement and strength that I was able to complete my studies.

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A) LIST OF ACRONYMS.

1. AG _____ Attorney General
2. CJ _____ Chief justice
3. IIBRC _____ Interim Independent Boundaries
Review Commission.
4. IIEC _____ Interim Independent Electoral Commission
5. ECK _____ Electoral Commission of Kenya.
6. DPP _____ Director of Public prosecutions.
7. C.O.B _____ Controller of Budget.
8. LSK _____ Law Society of Kenya.
9. FIDA _____ Federation of Women Lawyers-
Kenya chapter
10. MP _____ Member of Parliament.
11. NCCK _____ National Council of
Churches of Kenya.
12. JSC _____ Judicial Service Commission
13. Psc _____ Public Service Commission

1.0 BACKGROUND

The principle of separation of powers is a system of vesting power of the state in separate branches that is the executive, legislature and the judiciary¹.

The separation of power is a model for the governance of a state. This model was developed in ancient Greece and came into wide spread use by the Roman public as part of the unmodified constitution by the Roman public society.

Under this model, the state is divided into three branches each with separate and independent powers and areas of responsibility such that there shall not be concentration of power on one organ of government. The full implementation of this principle is the cornerstone of democracy.

The function of these three state organs, the inter-relations between them and the conflict that arises in the course of the execution of their functions is the backdrop of this study.²

The term trias politica or separation of powers was coined by Charles- Louis de second at baron dela Bre'de et Montesquieu, an 18th century French social

¹ (dictionary.reference.com).

² www.ncls.org/default.aspx

(en.wikipedia.org/separationofpower)

and political Philosopher. His publication "spirit of laws" is considered one of the greatest works in political history and jurisprudence.

It also inspired the constitution of the United States. Under this model therefore, the political authority of the state is divided into the legislature, executive and judicial powers. He asserted that to promote liberty, these powers must be separate and acting independently.³

1.1 STATEMENT OF THE PROBLEM

In the past, separation of power among state arms was hard to even define. Most African governments were dictatorships where power was concentrated in one arm of the government that is the executive. The executive authority overrode the legislature and judicial arms of government. It was a situation where one man's word was law.

The principle of separation of power is enshrined in constitution that this country (Kenya) has had since independence. The old constitution for instance had always stipulated the specific functions of the three arms of government and the limits of such power. However, the exercises of these functions were greatly inhibited by political influence especially by those close to power.

With the increase in the levels of literacy and civilization in the society came the cry for democracy and the protection of human rights. This resulted in

³ www.ncis.org/default.aspx].

the enactment of the new constitution which has clearly stipulated the establishment of the three arms of the government namely the legislature, executive and the judiciary. This includes all the constituent bodies under them mandated to assist the respective organs in the performance of their functions.

This dissertation will take an in-depth glance of these organs their powers, bodies associated to them and the possibility of achieving full separation of power in the exercise of their functions as enshrined in the new constitution of Kenya.

1.2 OBJECTIVES, HYPOTHESIS

1.21 OBJECTIVES

1. To examine how the new constitution of Kenya ensures there is separation of power in the government.
2. To assess the powers conferred on the three organs of government and the extent of their authority.
3. To examine the possibility of conflict between the three organs of the government in the exercise of their powers.
4. To evaluate the significance of various bodies created under these organs and their role in ensuring independence between these organs.
5. To examine the effect of doctrine of separation of powers in achieving a system of checks and balance in the Kenyan government.

6. To compare and contrast the Kenyan situation to other sovereign states in Africa in regard to separation of powers.

1.22 HYPOTHESIS

- 1) The new constitution of Kenya has a major role in anchoring the principle of separation of power in the government.
- 2) The new constitution is the more extensive and elaborate in ensuring that there is separation of power as opposed to the old constitution.
- 3) The excesses in authority of arm of government against the other in the new constitution defeats the aim of achieving checks and balances in the government.

1.3 LITERATURE REVIEW

Democracy in African states, Kenya in particular has always been yearned for since independence. To achieve this dream, there has been always the need to divide state power among the various arms of the government.

There has also been the need to ensure effective governance of a state in all corner of the government. The major challenge in achieving these two aims is lack of full and proper implementation of the doctrine of separation of powers.

There have been excesses in power where one arm of the government seems to override the other two arms in the exercise of their functions. This

is normally the case where the executive authority has usurped the powers of the legislature and the judiciary.

These excesses have been evident given the several calls for the separation of power made by various personalities in the legal profession.

On the 18th September 2008, the CJ, while addressing newly sworn in advocates called for the independence of the judiciary. He said that this is one of the fundamental pillars of democracy as it will enable the judiciary exercise its functions without interference of the executive and the legislature. Further to this statement, Dr.P.L.O. Lumumba, a senior counsel and lecturer at the University of Nairobi categorically stated that you can survive a botched executive or a botched legislature but no one can survive a botched judiciary.

There are several cases where the three arms in government have been in conflict with each other. Some of these cases are:

In the case of the⁴, the presiding judge Justice Nyamu, on 11th November 2008, issued an injunction preventing the parliament from amending the constitution to disband the Eck until the petition presented before him was heard and determined. The orders were to stop any legislative or executive action against the Eck.

⁴ *eck v/s ag, iiec and the speaker (2008) (unreported)*

However on November 2008 parliament through house speaker Kenneth Marende overruled the stay orders allowing sweeping reforms to disband the Eck. Parliament entirely greeted the ruling with outrage. They claimed the high court had overstepped its mandate .the members of parliament accused the judiciary of usurping the powers of parliament.

The CJ insisted that the judiciary acted within its powers in issuing the orders. On a statement issued on 29th November 2008, he said that the judiciary had the powers to rule on any controversial matters in the country. He added that only the judiciary had the powers to disband any constitutional office or body in government.

The parliament on the other hand was bent on the opinion that the decision by the judiciary to bar the government and by extension the legislature from disbanding the Eck was unconstitutional⁵.

A similar case arose in 2009. In this case⁶ the presiding judge, Justice Daniel Musinga on 4th of September 2009, declared two hundred and ten districts created in the Moi and the Kibaki regimes since 1992 null and void. This was a constitutional petition where the petitioners sought a declaration that the

⁵ ([www.article.wn.com/view/parliament overrules high court](http://www.article.wn.com/view/parliament%20overrules%20high%20court))

⁶*Job Momanyi, Titus Okoda and Peter Nyamoti v/s ag and iibrc,*

creation of ^{Kisii} Nyamira north district was unconstitutional. In a 16 page ruling, J Musinga said the Districts and Provinces Act⁷ named 46 districts only.

He added that a district was an important administrative and political region that is recognized by the constitution and any variation of its boundaries had to be done with the total adherence of the law. "The power to create districts review or vary boundaries was exclusively vested in parliament and the constitution was clear on this issue. Iibrc was duly appointed and should be left to do its job."

This was viewed as a move by the judiciary to interfere with the functions of the executive by transferring powers normally conferred on the executive to the legislature. The executive reacted to this ruling by a statement issued by the president stating that the powers to create districts was vested in his office and he supported his statement with the fact that some of the districts were created before the iibrc was established⁸.

A third case example is the⁹ where the church leaders in Kenya brought a constitutional petition against the government seeking a declaration that the inclusion of the kadhi's court in the new constitution was unconstitutional. A three judge bench made up of the learned Justice Joseph Nyamu, Roselyn

⁷ of 1992

⁸ (www.mzalendo.com/Kenyan high court outlaws 210 districts)

⁹ *ncck v/s ag (2010) (unreported)*

Wendoh and Emukule on 24th of May 2010 declared the said inclusion illegal and discriminatory.

On the 25th of May the petitioners went on press to herald the ruling and urged the government to implement the ruling saying the decision should have come much earlier. However on 26th May, in sharp reaction to the declaration by the legislature, the mp for South Imenti Hon. Gitobu Imanyara moved a motion in parliament to censure the three judges on their ruling in the Kadhi's court.

He claimed that the three had overstepped their mandate and saw the ruling as an attempt by the judiciary to impede the passing of the new constitution in the coming referendum. This was the first attempt in Kenya's history for the legislature or any part of it to censure the judiciary¹⁰.

The latest case in point is¹¹ where the petitioners sought a declaration that the nomination of members to the constitutional offices of the AG, CJ, DPP, and C.O.B was unconstitutional. These nominations were made by the president on 28th January 2011 to parliament for debate in accordance with the constitution.

In his ruling on 12th February, Justice Daniel Musinga held that it would be unconstitutional for the state to carry on with the progress of approving

¹⁰(article.wn.com/view/2010/05/26)

¹¹*Isk, fida and others v/s ag (2011)(unreported)*



nominees for the offices of the cj, dpp, Ag, and based on the presidential nominations. He found the nominations to be unconstitutional as all nominees were male and no explanations were given as to why there were no women among the four. The nominations were thus in contravention of article 27(4) and (5)¹² of which prohibits any form of discrimination on grounds of sex, article 27(3) which guarantees gender equality and article 129 which requires executive powers to be exercised in accordance with the constitution.

The ruling brought into sharp focus the exercise of executive powers and set a precedent where relevant parliamentary committees may inquire into the process of decision making by the executive thus subjecting the executive powers to the checks of parliament¹³.

On the 18th February, the speaker of the national assembly, Kenneth Marende rejected the judicial appointments made by the President. In his statement he stated; "the constitutional requirements are not met when the national assembly receives a list of nominees where there is open disagreement between the president and the prime minister. It is unconstitutional and the unconstitutionality cannot be cured by any act of this house or its committees nor a vote on a motion in this house." He

¹²Of the constitution

¹³ (www.mzalendo.com)

directed the two to reach a consensus before resubmitting the names to parliament for final approval.

This was largely seen by the members of the cabinet as a move by the legislature to undermine the executive. Others saw it as attempts by the judiciary embarrass the executive while a third group was of the opinion that this was a joint effort by the judiciary and the legislature to censure the executive¹⁴.

This kind of situation has been checked by the new constitution whose provisions are clear on the functions of the different organs of the government.

Chapter one¹⁵ provides for the sovereignty of the people.

Article one in this chapter states that all sovereign power shall be vested in the people of Kenya and shall be exercised in accordance with this constitution.

Article three further states that the sovereign power is delegated to the following state organs;

- a. Parliament and legislative assemblies in the country governments.

¹⁴ (www.somalipress.com)

¹⁵ Supra(11)

b. National executive and executive structures in the country governments.

c. Judiciary and independent tribunals.

This article brings in the doctrine of separation of powers in the constitution. Article three specifically outlines the various arms of the government and gives them right to exercise state power.

The doctrine of separation of power is also enshrined in many constitutions around the world.

The concept of separation of power is embedded in the 1st 2nd and 3rd articles of the United States constitution. The United States model of separation of powers was designed to prevent one arm of government from holding too much power. This is done by providing a system of shared power through checks and balances.

In Mexico, the Mexican constitution has explicitly divided the government into three branches, the Executive, the Legislature and the Judiciary. Each has the power to execute its functions while fully independent of the other. This signifies the concept of separation of power in the government.

In Canada, there is a legislature which comprises of the house of commons and the senate, an executive made up to the prime minister, the cabinet and the judiciary comprising of the supreme court, court of appeal and other subordinate courts. This show that each arm of the government is made up

of bodies that assist in effective and independent exercise of its functions as required under the doctrine of separation of power.¹⁶

This study will be based on the extent of the checks and balances in African governments, a case study being the Kenyan government under the new constitution and also the possibility of having the system in control for an indefinite period. The research will take an in depth look at the new constitution, its provisions and regulations.

1.4 SIGNIFICANCE AND SCOPE OF THE STUDY

1.41 SIGNIFICANCE

The prime significance of this study is to assess the existence of the doctrine of separation of powers in the Kenyan government and to examine the extent of the doctrine as contained in the functions of each arm of government and the powers conferred on each arm under the new constitution.

This study will involve an analysis of the Kenyan case as opposed to other commonwealth states in Africa. The research will further compare and contrast the provision of the new constitution as opposed to the old constitution in regard to separation of powers.

¹⁶ (www.usconstitution.net/constitutionaltopic)

1.42 SCOPE

The Kenyan territorial boundaries form the main geographical scope of this research. This study will extensively examine the constitution, its challenge and its possible successes.

The research will also highlight the situation in other African states and compare the same with Kenya in regard to separation of power. Any possible conflicts that are in existence or will most probably exist in the execution of functions between the three arms of government will be addressed in the course of this study.

1.5 RESEARCH METHODOLOGY

This will employ the following methods of data collection

i. Library research

This method will involve use of text books, statutes, and quotes from legal scholars.

ii. Internet search

This method will involve the use of websites in search of information.

iii. Newspapers, journals and any other research contained in the media.

This method will involve the use of print media and other related literature.

In addition to using the Kenyan constitution, this research will touch on the constitutions of other African states namely Rwanda, Uganda and Tanzania. These states were chosen on the basis that they are commonwealth states, are members of the east African community, and also the mode of

governance in each of these states is very similar to the other. The relations between these states are also very cordial.

Chapter 2 THE NEW CONSTITUTION ON SEPARATION OF POWER

2.1 THE NEW CONSTITUTION

The new constitution of the republic of Kenya came into force in the year **2010**. This year will go down in history as the year when Kenyan citizens gave birth to the 2nd republic.

The new constitution was passed first by parliament after it was drafted by the committee of experts. Parliament approved the draft from the committee without much amendment.

The draft constitution was later subjected to a referendum in the month of August 2010 which involved the citizens of Kenya voting for or against the draft. The people of Kenya voted in favor of the draft. More than half of the electoral population approved the draft.

The draft was later assented by the president during the promulgation ceremony held on the 27th August 2010¹⁷, in very colorful event attended by many dignitaries including foreign heads of states following the promulgation. The constitution was later published in the Kenya Gazette to give in the force of law.

The new constitution thus replaced the old constitution on the date of publication and is currently the supreme law of the land. The constitution

¹⁷ Daily nation 28th august 2010.

creates 2 levels of government. These are the national government and the county government.

The national government comprises of the national assembly, senate, judiciary, president and the cabinet. The county government comprises of the county executive and the county assembly.

2.2 THE ARMS OF GOVERNMENT CREATED UNDER THE CONSTITUTION.

A) THE NATIONAL GOVERNMENT.

There are 3 arms of government created under the new constitution.

i) LEGISLATURE

This arm is established under chapter 8¹⁸. Part 1 of this chapter establishes the parliament and its role in the government under article 93 & 94 respectively.

The parliament is divided into 2 levels that is the national assembly and the senate. These levels are provided under the same 2 articles mentioned above. These articles also provide for the functions of each of these levels of legislature.

Article 93¹⁹ states that there shall be a parliament comprising of the national assembly and the senate which shall perform their functions in accordance

¹⁸ of the constitution

with this constitution. This section creates both the national assembly and the senate as constituents of the legislature. It is on the basis of this provision that there are individuals elected to these 2 houses

Article 94 (i) provides for the role of parliament. It states that legislative authority of the republic shall be vested upon and exercised by parliament. This section outlines the main function of parliament in the government. The legislative authority of parliament is further supported by article 109 which provides that legislative power shall be exercised by parliament through bills passed by parliament and assented to by President. These 2 provisions clearly vest all legislative authority of the state on parliament.

The role of the national assembly as a part of parliament is contained under article 95. This role includes:

- a) Deliberate on and resolve issues of concern to the people under article 95 (2),
- b) Enact legislation in accordance to other provisions of the constitution under article 95(3),
- c) Determine the allocation of national revenue between different levels of government under article 95(4) (a),

¹⁹ Supra (2)

d) Appropriate funds for expenditure of the national government and other national state organs.

e) Review on the conduct of the office of the president and deputy president and other state officers to initiate the process of removal from office

f) Exercise oversight over state organs.

The role of the senate is outlined under article 96 of the constitution as follows:

a) Considering, debating and approving bills concerning counties under article 96 (2)

b) Exercises oversight over natural resources allocated in counties under article 96 (3)

c) Oversight of state officers by considering and determining any resolution to remove the president or deputy president from office.

The exercise of these powers may most likely result to conflict between the legislature and other arms of government. This is because the 2 houses have been tasked with reviewing the conduct of state officers in the executive especially the president and deputy president. Other functions include the oversight of state organs as well as approval of funds to the other arms of government. This is in effect interfering with the affairs of the executive which is against the doctrine of separation of power.

The membership of parliament shall include Mp's for the national assembly & senators for the senate. The offices in parliament shall be comprised of the speaker and deputy speaker. This provided under article 106(i) of part 3 of this chapter.

ii) **THE EXECUTIVE**

CHAPTER 9²⁰. This chapter establish the executive arm of government and provide for its functions and powers. It is this chapter that creates the executive authority of government. It is also this arm that provides for the exercise of the executive authority of the state.

Article 129 under part 1 of this chapter provides that executive authority derives from the people of Kenya and shall be exercised in accordance with the constitution for the well being and benefit of the people of Kenya. This provision establishes executive authority of the state and gives the perimeters of its exercise.

Article 130 provides for the national executive to be the president, deputy president and the cabinet. This provision creates the offices that head the executive. These offices are essential in the exercise of executive authority.

Part 2 of this chapter provides for the authority of the president. Article 131 (3) (1) (b) under this part provides that the president shall exercise executive authority of the republic with the assistance of deputy president

²⁰ Supra(3)

and cabinet secretaries. Article 152 (3) states that a cabinet secretary shall not be an MP. This provision grants the executive independence from the legislature in the execution of its functions. This makes the exercise of executive power independent of the legislature and the judiciary.

Other offices in the executive include the principle secretaries under article 155 (i) AG under article 156 (1), DPP, under article 157(1) secretary to the cabinet under article 154 (1). Appointments of members of the executive shall be made by the president with the approval of parliament under article 132 (2).

This provision gives the legislature power to interfere with executive appointments by way of approval. It keeps the executive in check but on the other hand undermines the authority of executive state organs. This interference is contrary to the principle of separation of power.

iii) **THE JUDICIARY**

This is established under chapter 10²¹ of the constitution. It is this chapter that creates judicial authority of the state which is essential to the checks and balances principle. Article 159 under part 1 of this chapter states that judicial authority is derived from the people and shall be exercised by the courts and tribunals established under this constitution. This article provides

²¹ Supra(4)

for the exercise of judicial authority in the government and further provides for the source of such authority.

The independence of the judiciary in the exercise of its function is stipulated under article 160 of the constitution. This provision ensures that the judiciary is not interfered with in the administration of justice. Article 160(2) prohibits the variation of a judge's remuneration or retirement benefits of a retired judge to his disadvantage. This provision restores confidence of the judiciary on its top officers which is essential in achieving its independence.

Article 160 (5) prohibits the institution of any legal action, based on anything done or omitted in good faith and in lawful performance of judicial function. This provision gives the judiciary immunity from criminal or civil proceedings arising from acts done while on duty. Such immunity is paramount in judicial independence.

The members of the judiciary and their offices are established under Article 161. The judiciary shall consist of judges of supreme courts, magistrates of other judicial officers and staff as stipulated under article 161 .(1). This provision creates the offices in the judiciary. These offices are essential in the exercise of judicial functions as it is the persons in these offices that exercise the authority.

The judiciary shall be headed by the CJ assisted by the deputy CJ and the chief registrar who shall be the chief accounting and administrative officer of the judiciary. This is provided under article 161(2).

B) THE DEVOLVED GOVERNMENT.

Chapter 11 of this constitution establishes the devolved governments which are the county governments. This is a branch of government that is based at the grass root level. This chapter creates the arms of government at these level.

Article 176 provides that there shall be a county government consisting of a county assembly, a county executive committee. This provision creates the 2 arms of government at the county level.

i) County assembly.

The members of the county assembly shall be elected by the voters. The county assembly shall be headed by a speaker as provided under article 178 (2) of the constitution. This provision creates the head office of the assembly. This office is essential in the performance of legislative functions by this body.

The county assembly shall have the legislative authority over all matters concerning the county. This is stipulated under article 185(2) .This provision creates legislative authority of the county and confers this authority upon

the county assembly to exercise it for the benefit of the people in the county.

The county assembly also has oversight authority over county executive committee and other county executive organs. This authority should be exercised in respect of the principle of separation of powers. This principle is difficult to achieve under this circumstances as the legislative arm of the government has been put in a superior position against the executive.

ii) **County executive committee**

The executive authority of the county shall be vested upon the county executive committee. This is pursuant to Article 179(1). This provision creates the executive authority of the county and vests the same upon the county executive. This provision shows that it is only the committee that is empowered to carry out executorial duties of the county.

The membership of the executive committee shall include the governor, his deputy and other persons appointed by the governor who are not members of the assembly. This provision creates the offices in the executive which include the head of the executive and his assistants. The holders of these offices have the power to exercise all executive powers of the county for the benefit of the people of that county.

The function of county executive committee shall include implementing county legislation and national legislation with in the county among others

as provided under article 183 (1). This provision stipulates the duties to be carried out by the committee in the exercise of their powers. These duties are in accordance to the standard function of the executive which is implementing the law.

The arms of the Government in the county include: the executive by way of the county executive committee and the legislature by way of the county assembly. This shows that the principle of separation of power at the county level can only be exercised between these two bodies. It also shows that the only powers that can be exercised at the county level are only those conferred upon the legislative and the executive.

The judicial arm of the Government is only vested in the National Government as per section 8 and of part 1 of the 4 schedule²².

²² Supra(3)

2.3 THE BODIES CREATED UNDER THESE ARMS

A) THE EXECUTIVE

i) Constitutional Implementation Commission

This commission is established under section 5 of the 6 schedule²³. The members should be persons with experience in public administration, human rights and government under section 5(3). This provision creates the offices in this commission which are essential in executing the powers of the commission.

The function of the commission shall include monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement this constitution under section 5(6). This provision shows that the commission's main mandate is overseeing the implementation of the constitution.

This power enables this commission to look into the affairs of the judiciary, executive and the legislature. This commission acts as a supervisory body to these arms. This duty may conflict with the principle of separation of power as the commission which has been established under the executive can influence the internal affairs of the legislature of the executive.

²³ of the constitution

B) THE JUDICIARY

i) Judicial service commission

This commission is established under part 4 of chapter 10²⁴. Article 171 of this chapter states that there shall be a judicial service commission. It is this provision that creates this commission. The members of the commission shall include among others the A G and a person nominated by the public service commission. Others are supreme court judge one court of appeal Judge, a high court judge, 2 advocates and 2 people representing the public . The appointments are made by the president with the approval of the National Assembly.

The function of the JSC shall include promoting and facilitating the independence and accountability of the judiciary as well as the efficient, effective and transparent administration of the justice. The commission shall also recommend persons to be appointed as judges to the president, review and make recommendation of the condition of service of other judicial staff.

This function as stipulated above will be difficult to achieve due to a number of reasons. The first reason is that the appointments to the commission are made by the president who is in the executive. This allows the executive to determine the people to sit in the judiciary. Secondly the appointments have to be approved by the national assembly. This gives the legislature a hand in

²⁴ of the constitution

determining who heads the judiciary. Thirdly the members of the commission include the a g and a representative of the p s c. These offices are established under the executive and their representation in this commission amounts to executive interference in the judiciary.

2. JUDICIARY FUND.

This is established under article 173.this article creates the fund in the judiciary. The fund shall be administered by the chief Registrar of the judiciary and shall be used for the administrative expenses of the judiciary under Art173 (1) (2).This provision stipulates the functions of the fund in the judiciary. The creation of this fund is a move in guaranteeing judicial independence as it enables the judiciary to take charge of their own expenses without the influence of the executive.

The estimate of expenditure of financial year shall be a charge on the consolidated fund ,paid into the judicial fund after approval by National Assembly under article 127(4) (5).This provision subjects the judiciary to the legislature as it is parliament that determines the amount of money to be used by the judiciary. This kind of situation contravenes the principle of separation of powers.

C) THE LEGISLATURE.

1. Parliamentary service commission.

This commission is established under the article 127 of the constitution. It is this article that creates the commission in the legislature. The members of the commission shall be the speaker and mp's nominated from both houses and 2 people appointed by the parliament not being mp's. This is provided under article 127 (2) (1).

This provision shows that the entire membership of the commission is made up of persons in the legislature. This in effect guarantees the independence of the legislature from the executive and the judiciary in the management of their affairs. The implementation of this commission is in accordance with the principle of separation of power.

The function of the commission shall include providing services and facilities to ensure the independence and effective functioning of parliament under article 127 (6). This function shall be difficult to achieve as some of the members of this commission are also members of the executive. This situation allows interference of the judiciary by the executive thus inhibiting judicial independence.

Chapter 3. THE EFFECT OF THE NEW CONSTITUTION ON SEPARATION OF POWER

3.1 THE POSSIBLE CONFLICTS OF POWER BETWEEN THE ARMS.

i) Appointments.

The appointments of various offices holders either in the legislature or in the judiciary is bound to generate confusion between the respective arms. The appointments of the CJ and his deputy as well as the AG, DPP, Cabinet secretaries and other officials in the executive must be with the approval of parliament. This is provided for in this constitution as mandatory requirement.

This gives the legislature immense power of control over both the judiciary and the executive as it determines who sits in what position in those arms. Such influence and interferences of one arm over the other two is a clear contravention of the doctrine of separation of powers in the government.

Such conflicts is evident in the recent case where the president nominated names to parliament ^{to} approval. The nominations were for various offices in the judiciary and executive. The high court declared the nominations unconstitutional on basis of gender balance while the National Assembly declared the same nominations unconstitutional as the president had violated the constitution and stated that it would not debate on the names let alone approve them.

ii) Allocation of the funds.

The allocation and distribution of funds in both the national and the county government is approved by the parliament. The allocation of funds by the National government and other state organs is also approved by the parliament. This is pursuant to article 95 (4) of the constitution.

Such authorities may affect the effective performance of the particular arm of the government. This is because insufficient funds approved for use by various states organs may inhibit the delivery of service by that organ. There is also the risk of the legislature undermining other arms by allocation of meager sums of many thus learning the respective arms underfunded.

An example of the possibility of such occurrences is the Judiciary fund. This is a fund established under article 173 to cater for the expenses incurred by the judiciary in the exercise of its functions. The expenditure of the fund or any monies thereof can only be paid to it after approval by the National Assembly.

This clearly shows that it is the legislature that determines the amount of money to be spent by the judiciary in any financial year. Such a case shows an intrusion into the affairs of the one arm of the government by the other which negates on the principle of separation of power.

iii) The membership of service commission.

This refers to the membership of various commissions for example the parliamentary service commission and the judicial service commission. The JSC for instance is made up of among others the AG and one member from the public service commission as per article 172 (2). These 2 members hold offices that fall within the executive arm of the government. Their presence in the judicial service commission puts them in the position where they can influence in the judiciary.

This includes determining who sits as a judge and reviewing and recommending the terms of services of the judges and other judicial staff. If the principle of separation of power was upheld while constituting this commission it should include people from the judiciary and possibly the civil society. The inclusion of the executive in the commission gives a loophole of one arm determining the affairs of the judiciary which is contrary to the principle of separation of power.

This loophole may also affect the independence of the judiciary in the sense that it is the jsc that should promote the accountability and independence of the judiciary.

3.2 THE EFFECT OF PARLIAMENT^{am} SYSTEM OF GOVERNMENT ON THE PRINCIPLE OF SEPARATING OF POWER.

A parliamentary system of the government is one which the legislature makes all the major decisions in the state.

These decisions includes formulation of the government policies, the vetting of the persons to hold constitution~~a~~ offices, oversight on implementation and executive of policies and the law as well as determining the allocation and distribution of funds to various states organs in the government.

The new constitution²⁵ provides for such a system. All government functions are centered on the parliament which is made up of National Assembly and the senate. It is a parliament that has been tasked with the function of approval of names into constitution offices, approval of funds to the^b spent in the exercise of judicial and executive power as well as vetting the action of members of the executive and the judiciary especially the members at the helm of those 2 arms of the Government .

This provides a situation where one arm government appears to be superior to the other 2 arms hence determining the mode of execution of their function such a scenario show lack of separation of power between the 3 arms of government.

²⁵ of Kenya

A good example of conflicts of power as a result of this system of government was witnessed in the vetting of members for the jsc. The members were nominated by their respective groups and include superior court judges and advocates. The judges were nominated by their colleagues in the bench while the legal Affairs committee of parliament insisted that it had to vet the individual before they were formally appointed to offices.

This sparked outrage from the particular individuals as they protested the move by parliament. They contested that there was no constitutional provision that the committee to vet the jsc members one of the advocates nominated was Mr Ahmednasir Abdullah who was very vocal against the vetting process by the parliament .He stated that the nomination by the Isk which he is a part of was a clean bill of health and was thus qualified to join commission.

This resulted to a heated exchange of words with the committee as the latter re-affirmed that since the constitution provided for a parliamentary system of the government and it had every right to vet them

Another example is the recent nomination of the names of Dr Willy Mutunga for the post of chief justice and Mrs. Nancy Barasa for the post of deputy cj²⁶. These nominations have been sent to parliament for approval before

²⁶ www.mzalendo.com

formal appointment into offices. This kind of situation raises a lot of questions in regard to the separation of power.

Previously it was unheard of for the legislature to interfere or discuss the conduct or functions of judges. This constitution not only allow the discussion but also shows the individuals once fully nominated by the jsc can only be formally appointed to offices after a green light from parliament.

This in effect shows that it is parliament that determines who heads the judiciary an issue that clearly contravenes the checks and balance principle.

A third example is the constitutional requirements that the president nominates names of executive office holders to parliament for approval after which he may appoint them .This undermines the president as it subjects his authority to that of parliament.

The executive thus appears to be a rubber stamp of parliament's authority in regard to the designation of persons to that carry out executive function and hold constitutional offices in the executive. This issue contravenes the doctrine of separation of power.

Chapter 4. THE CONSTITUTIONS OF OTHER AFRICAN STATES.

4.1 RWANDA CONSTITUTION

Rwanda is a presidential republic. Its constitution provides for a presidential system of government. The constitution of Rwanda provides for the 3 arms of government that is executive, judiciary and the legislature.

The executive is headed by the president who is the head of government. It also provides for a cabinet and a P.M appointed by the president. The appointments are not subject to parliament's approval.

The constitution also provides for a parliament. The parliament is a 2 chamber that is the chamber of deputies and the senate. The senate is the upper chamber while the chamber of deputies is the lower chamber.

The parliament has limited powers of oversight over the executive. This is essential in the separation of powers as guarantees independence of the executive from the legislature. The main function of the parliament is make laws it also determines administrative boundaries in the country. However the administrative divisions include provinces and districts. This gives the legislature powers mostly exercised by the executive.

The constitution further establishes the judiciary. The judiciary is independent of the executive and legislature arms apart from the fact that the president and the senate are involved in the appointment of Supreme Court judges. The human rights watch has alleged political interference of

the judiciary by the other two arms in the appointment of judges and pressure in the making of decisions.

The constitution provides for two types of court: ordinary and specialized. The ordinary courts are the supreme courts, high court and regional courts. The specialized courts are the martial and the Gacaca courts, a traditional system of administering justice.

Each province is headed by a Governor appointed by the president with parliament's approval.

The constitution came into ^{force} face after passing of a national referendum in May 21 2003.

4.2 UGANDA CONSTITUTION

This constitution came into force in 1995 after a national referendum. This constitution provides for the 3 arms of government namely the Executive, Judiciary and the Legislature.

The legislature is established under chapter 6²⁷. Article 77 of this constitution clearly states that there shall be a parliament of Uganda. The membership of parliament shall be members directly elected from the people as well as representatives from among others the army. This is in accordance to article 78 (2).

²⁷ of the constitution of Uganda

This provision brings in executive influence into the legislature by allowing military representatives into parliament which is against the checks and balances principle.

The functions of parliament are provided under article 79 (1). It states that parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda. This provision is further supported by article 91 which empowers parliament to exercise legislature authority by passing bills to be assented by the president.

The legislature shall be headed by the speaker and the deputy speaker whose offices are established under article 82. The two shall be elected by MPs. The election of the speaker shall be presided over by the chief justice or a judge designated by him. This provided under article 82 (5). This provision brings interference of the legislature by the judiciary as it allows a judicial officer to control and oversee the affairs of the legislature.

The executive is provided for under chapter 7²⁸. Article 98 of this chapter creates the presidency. This article provides that the president shall have precedence over all persons in Uganda and from him in descending order shall be the V.P, speaker and chief justice.

²⁸ Supra(1)

This hierarchy presents the legislature as being higher than the judiciary as the speaker is placed higher than the chief justice. This shows one arm of government as being superior to the other.

The executive authority of Uganda is vested on the president, who shall exercise it in accordance with the constitution and other laws of Uganda. This is proved under article 99. Other officers in the executive who shall assist in executive authority shall be the Vice President, A.G and DPP. These officers shall be appointed by the president with the approval of parliament.

This is pursuant to article 111,119 and 120 respectively. This provision gives an allowance for the legislature to interfere in the affairs of the executive by allowing them decide who holds those offices and for what term.

The judiciary is established under Chapter 8²⁹. Article 126 states that the exercise of judicial authority shall be by the courts, shall be derived from the people and exercised in the name of the people and in conformity with the constitution. This provision vests judicial authority with the courts .This provision is supported by article 129 which outlines the courts of judicature as the supreme courts, court of appeal, high court and other magistrates courts.

The judiciary shall be independent in the execution of its functions and shall not be subjected to the authority of any person or body. This provision under

²⁹ of the constitution of Uganda

article 128 guarantees judicial independence which by pre-requisite in the separation of powers. This provision is supported by article 128(2) which prohibits any person from interfering with the judiciary in the exercise of its functions. Article 128 (4) further gives immunity to any person exercising judicial authority from any action or suits. This gives confidence to the judicial in the exercise of their powers.

Article 146 establishes the judicial service commission, a body running the affairs of the judiciary but appointed by the president with the approval of parliament. The members of the commission shall include, among others, the A.G and one person from the public service commission as per article.

This provision allows for a lot of interference by the executive and the legislature. This is because the appointments can only be valid if made by the former upon approval by the latter. This is very fatal on the issue of separation of powers in the sense that it is that commission that recommends person for appointment as judges as well as review the terms of service of judicial officers as per article 147.

4.3 TANZANIA CONSTITUTION.

The constitution of Tanzania provides for the 3 arms of government just like other common wealth states. The state of Tanzania is a united republic thus the government is termed as the government include the Executive, Judiciary and the legislature.

The executive is established under chapter 2³⁰. section 33 under this chapter creates the presidency of the united Republic .He is the person who heads the executive.

The exercise of executive authority is provided under section 35. It states that executive functions shall be discharged by the V.P prime minister and cabinet on behalf of the president. Section 36 further empowers the president to establish and abolish any office in government. These provisions has a presidential system of government with the president having, unchecked powers over the executive. There is little interference from the legislature. Such independence is encouraged under the separation of powers.

The president is deputized by the V.P whose office is created under section 47. Other officers of the executive are the prime minister under section 51 and the cabinet under section 57. These officers are appointed by the president. He exercises this power dependently like the Kenyan situation.

³⁰ of the constitution of Tanzania

The legislature is established under chapter 3³¹. Section 62 under this chapter creates the parliament and states that it shall consist of the president and the national Assembly. This allows the president to appear as the head of the legislature. This is in conflict with the principle of separation of power as he appears to head 2 arms.

The parliament in Tanzania is comprised of one level that is the national assembly. This assembly consists of MPs as provided under section 62 (2) these members shall be elected by the people.

The legislature authority of Tanzania is vested upon parliament under section 64. It empowers the national assembly to handle all union matters concerning legislation.

The judiciary is established under chapter 5³². Section 108 under this chapter establishes the high court. This court shall be presided by a judge. Section 117 establishes the court of Appeal. This is the highest court of Tanzania unlike Kenya, Rwanda and Uganda all of which have supreme courts. The court of appeal shall be presided over by a judge of appeal.

Other judicial officials include the Registrar of the court of appeal, Registrar of the high court, the Deputy Registrar's and the magistrates who shall prescribe the magistrate courts. These officers shall be appointed by the president under **section 113** of the constitution. This provision allows for

³¹ Supra(4)

³² Of the constitution of Tanzania

the executive interference with judicial affairs as it is the president who makes all the major appointments in the judiciary.

The Tanzanian constitution presents the president as having control over all three arms of the government. This is contrary to the principle of checks and balances as none of the other 2 arms is in check of the executive. This system of government allows the executive to override the legislature and the judiciary.

Chapter 5 CONCLUSIONS,RECOMMENDATIONS AND BIBILIOGRAPHY.

5.1 CONCLUSION.

Separation of powers is a principle of governance that was developed in the Western states of Europe. During the colonial period, the principle was introduced in Africa and there have been attempts to fully establish it in African governments.

Separation of power entails distinguishing the 3 arms of authority with each other so that they independent in the exercise of their functions.

This system has been said to be the cornerstone of the governance of a state as it upholds the rule of law.

The system also ensures democracy in any state as every arm is free to exercise its functions diligently and efficiently without being subject to any person or authority.

However the principle is yet to be fully adopted by the states in Africa. Most of the governments here have either applied a presidential system or parliamentary system of governance. These systems greatly inhibit the checks and balances principle.

A presidential system of government is one where the head of state and government exercises control of the other arms of government. His powers are not checked by the other 2 arms of government but the law has given him the authority to exert influence on the affairs of the other 2 arms.

Such a scenario has been witnessed in the states of Rwanda and Tanzania. The state of Rwanda has adopted a purely presidential system where major functions and powers of the government are centered on the executive. This kind of situation gives the president immense powers to control the legislature by recalling or dissolving parliament as well as the judiciary by appointment of judges, magistrates and court Registrars.

The system of government contravenes the principle of separation of power as one arm of government is empowered by law to control and determine the affairs of the other 2 arms.

Tanzania has a similar system of government where the president exercise executive authority is the head of parliament as well as makes judicial appointments. This shows that the president is supreme as he appears on all arms of the government.

Such supremacy is against the achievement of democracy as it is not possible to keep him in check in case of any excesses that he may engage in during the execution of his authority.

This kind or system has at times been referred to as executorial dictatorship. This is because the head of the executive controls all other arms of the government and his authority is above those arms.

A parliamentary system of governance is one which the legislature possesses immense powers over the executive and the judiciary.

Most functions of the other 2 arms of government can only be done with the approval of parliament.

The system also allows parliament to approve funds... by the judiciary in the execution of functions as well as approving the names of persons to be appointed to head the judiciary. It is this kind of system that defeats the principle of separation of power. This is because it vests controlling powers of the state upon one arm of government to the detriment of the other 2 arms.

This in effect subjects all functions of the executive and the judiciary to the whims of the legislature thus giving the latter an advantage of undermining the formers. This can only be termed as parliamentary dictatorship.

Most African governments employ either of those 2 systems of governance thus it is difficult for the continent to fully achieve the separation of powers into their governments.

5.2 Recommendations.

Having assessed the situation of African governments in regard to separation of power. I hereby make the following recommendations to the governments in a bid to fully achieve the principle of checks and balances.

- 1.** That the parliamentary system of government be abolished. It should be replaced with a hybrid system of government.

This kind of system allows at least 2 arms of government to participate in the making of key decisions in the implementation of government functions.

- 2.** That the presidential system of government be abolished. It should be done away with as it vests all government power on one person. This system should be replaced with a hybrid system of government. This system will provide sufficient situations that will keep the executive in check in the performance of other functions.

- 3.** That the appointments to various offices created by the constitution be made by the respective arms of government under which they fall.

This will enable the respective arms to determine their own affairs without necessarily exerting influence on one another thus being fully independent.

- 4.** That the independent commissions established under the various arms of government should review their membership.

This is aimed at eliminating any involvement by one arm into the affairs of the other. For example the JSC should not include the AG or the representation of the PSC as this would lead to executive interference in the determination of judicial affairs.

5. That the government establishes a fund for each arm of government and there be an independent body that determines allocations of money into these funds. This will enable each arm to regulate and determine its own expenditure as well as be in full control of its funds without the interference of any other arm of government.

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