

**THE EFFECTS OF UNDERMINING JUDICIAL INDEPENEDNCE ON THE RULE OF
LAW IN KENYA**

BY

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DECLARATION

I declare that this research report is my original work and has never been submitted to any other institution for the award of a Bachelor's degree, diploma or certificate.

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APPROVAL

This research report has been submitted to me as the supervisor for approval, leading to the award of a Bachelor's degree in law of Kampala international university.

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02/04/2011
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DEDICATION

This research is dedicated to my parents Mr. John Mbau Mwangi and Nancy Muthoni Mwaniki because without their moral and economic support I wouldn't have made it. I also dedicate this research to Mr. Kalinaki for his close supervision and support. I cannot forget my colleagues Boos Murithi and Allan Mugambi with whom ideas have been shared to make this a success. A special dedication goes to Esther Wambui for moral support and perseverance throughout the research.

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List of abbreviations

ICJ	International Commission of Jurists
JSC	Judicial Service Commission
ICC	International Criminal Court
TFJR	Task Force for Judicial Reforms

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Abstract

This study has sought to address the levels of deterioration of Rule of Law in Kenya due to the undermining of judicial independence in the country. In studying the effects of undermining judicial independence on the Rule of Law, this study seeks to find the redresses available to solve the imminent problems brought about by the deterioration of Rule of Law in Kenya.

This study adopts a descriptive design since the researcher seeks to establish solutions to significant problems. Simple random sampling and purposive sampling were employed to come up with one hundred respondents. The study employs both qualitative and quantitative methods of data collection. Open ended questionnaires as well as unstructured interviews were used in order to obtain descriptive information void of bias. Closed ended questionnaires were also employed for the ease in computation during presentations.

The study showed that a higher percentage about over 70% of the respondents agreed that judicial independence is a myth and as such, Rule of Law is also an illusion. The key conclusions of the study were that in order to ensure that Rule of Law is operative; the upholding of the doctrine of judicial independence is a crucial element.

CHAPTER ONE

SECTION ONE: INTRODUCTION

1.0 Overview

This section will look at the background of the study that the researcher will embark on. The researcher will first look at Rule of Law with Judicial independence being an integral part of Rule of Law as well as other principles that make up the doctrine of Rule of Law. This section will also look at the statement of problem, purpose of the study, the hypothesis to be tested by the study, the objectives to be achieved, the scope as well as the significance of the study.

1.1 Background

Law is in general a principle which sets out to regulate the people's behavior in the society, to ensure protection of people's rights, to establish procedures and regulations, to govern transactions among individuals and most importantly, to maintain political, economic and public order.

Rule of Law

For any country to be said to be democratic, to be able to sustain peace and order, it must be capable of uplifting the doctrine of Rule of Law. The reality about the concept of Rule of Law is that the term has no fixed meaning; it has been described as "an exceedingly elusive notion" giving rise to a "rampant divergence of understandings. But to sum up this doctrine/ maxim in simple and clear terms, the Rule of Law entails the notion that; no one is immune to law or in other terms, no body is above the law. All actions of the government whether the executive, legislature, or the judiciary must be backed and conditioned by law. The law must stand above

all and the government being the custodian of the law and power must exercise such power to the benefit of the public.

For the doctrine of Rule of Law to be said to operate, the underlying criteria of Rule of Law must be operational. Some of the most important include; *devolution of power, a formally independent and impartial judiciary, laws that are public, the absence of laws that apply only to particular individuals or classes, the absence of retroactive laws, provisions for judicial review of government action and the doctrine of natural justice.*

Devolution of power entails the concept that the judicial, executive and legislative powers of the state must not be vested on the same entity or body. There must be separation of power into the three arms of the government and as such, the judiciary should be independent of the rest of the arms of the government for the Rule of Law to be said to be functioning in the given community or state.

Equality before the law is a principle of Rule of Law which ensures that all individuals are equal before the law irrespective of their social, political or economic prospects. The Constitution of Kenya 2010 stipulates under article 27(1) that every person is equal before the law and has the right to equal protection and equal benefit of the law. The provisions of the old constitution were vague regarding this matter. It sought to give a list of discriminatory situations by stating that the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, sex, tribe, and place of residence or other local connection, political opinions, color, creed or sex¹.

¹ Section 82(3)

Natural justice or procedural fairness is a legal philosophy used in the determination of just, or fair, processes in legal proceedings. In common law legal systems the term natural justice refers to the notion of procedural fairness and may incorporate the following guidelines:

- A Right to Advanced Warning. Contractual obligations depriving individuals of their Rights cannot be imposed retrospectively.
- A person accused of a crime, or at risk of some form of loss, should be given adequate notice about the proceedings.
- A person making a decision should declare any personal interest they may have in the proceedings.
- A person who makes a decision should be unbiased and act in good faith. He or she therefore cannot be one of the parties in the case, nor have an interest in the outcome. This is expressed in the Latin maxim, *nemo iudex in causa sua*: "no man is permitted to be judge in his own cause".
- Proceedings should be conducted so they are fair to all the parties - expressed in the Latin maxim *audi alteram partem*: "let the other side be heard".
- Each party to a proceeding is entitled to ask questions and contradict the evidence of the opposing party.
- A decision-maker should take into account relevant considerations and extenuating circumstances, and ignore irrelevant considerations.

To this effect, corrupt or compromised judges cannot be said to be impartial a criteria crucial in the determination of natural justice.

The most crucial principle of Rule of Law is the principle of **judicial independence** which is to the effect that the judiciary should be insulated from the legislative and the executive power. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. The judges should be able to perform their functions without fear, favor, ill will, bias or prejudice. They should be able to make decisions based on conscientious understanding of the law free from direct or indirect extraneous influence, inducements, pressures, interference or threat from any person or entity. This is the most important principle of the Rule of Law without which the Rule of Law cannot exist.

Several tenets are also imminent under the principle of judicial independence. These include; security of tenure, adequate payment (including exemption from taxation) in order to deter corruption immunity from civil and criminal prosecution arising out of actions or omissions of a judge in the carrying out of his or her mandate and the controlled vetting of the judicial officers.

The sad reality however is that despite the legal provisions put in place in respect of safeguarding judicial independence, judicial independence has remained a myth and this has led to drastic negative effects on Rule of Law in general.

Deterioration of Rule of Law

Due to the culture of impunity brought about by the ineffectiveness of the judiciary, Rule of Law in Kenya has in the years drastically deteriorated to alarming status. Natural Justice is a myth in Kenya as no one is informed of the reason to an arrest as well as cases of police unconstitutional detainment, when it comes to relief through the courts, equality does not practically exist. The rich or politically powerful as well as government institutions will always have their way.

For instance, the Kenya Police which seems to have a perception that it is above the law has resulted to carrying out extra judicial executions of alleged criminals with the courts doing nothing to stop the onslaught. Recently in 2007 there was a confrontation between the minister of security Hon Michuki and the chief Justice Evans Gicheru with regards to the low conviction rate of criminals under the judicial system. The minister blamed the courts of releasing charged criminals as soon as the police handed them over to the jurisdiction of the court. The Chief Justice on the other hand pointed a blaming finger on the police claiming that they did a shoddy job in collecting evidence and as such the courts could not get convictions where evidence of crime is not proven beyond reasonable doubt and further that the police was encroaching on the independence of the judiciary. This argument culminated with the Minister for Security giving a shoot to kill order to the police for any criminal caught in the act of committing crime since there was no essence of forwarding him to the courts only to be released.

This contention between the two arms of the government has led to the extra judicial execution and disregard of human rights in Kenya.

The fight against extra judicial killings has over time gained momentum with the Minister for Constitutional and Judicial Affairs Hon. Martha Karua being on the fore front with the help of Human Rights groups. This fight has not ended well for some of the campaigners. The Oscar Foundation has been at the forefront of protests about alleged extra-judicial killings by police. The protest followed the publication of a UN report by Professor Philip Alston in 2009 into police operations in Kenya. It was, by UN standards, highly critical, accusing the police of being a law unto themselves and of killing with impunity. Professor Alston called for the sacking of Kenya's police chief, Hussein Ali, and the resignation of the Attorney-General, Amos Wako. The

Kenyan government rejected the report (which they had commissioned) and accused Professor Alston of exceeding his brief, which was to draw up an independent assessment of alleged illegal killings by police. On 5 March 2009 During his weekly media briefing, Dr Alfred Mutua, the Kenyan government spokesman, accused the human rights organization (The Oscar Foundation) headed by Mr. Oscar Kingara of being a front and a fund-raising body for a banned criminal sect called the Mungiki. Some hours later, Oscar Kamau Kingara the founder of Oscar Foundation and John Paul Oulu were shot at close range while their car was standing in traffic during Nairobi's rush hour. The public perceived this as a bid to try and stifle the ongoing protest against the killing of the Kenyan youth in the pretence of getting rid of crime in Kenya.

Since it is a tenet of Rule of Law that a person is to be presumed innocent until proven guilty by a court of competent jurisdiction and as such; his trial must be a fair hearing with observation of the rules of natural justice. Any police officer who executes an alleged criminal should be arraigned in court and given the ultimate sentence of death for unlawfully taking the life of another. This would curb the prevailing tradition that a police is above the law and effect justice on the victims.

1.2 Statement of problem

It is eminent that non observance of the principle of judicial independence has caused deterioration of the doctrine of Rule of Law in Kenya to the extent that the state has failed to maintain political, economic and public order.

This research will seek to address the extent to which disintegration of the doctrine of Rule of Law has been brought about by the undermining of judicial independence. The study will look into the rampant corruption of judicial officers and how this culminates into deterioration of Rule

of Law in Kenya. A corrupt Judiciary cannot be an impartial nor can it be an independent judiciary.

1.3 Purpose of the study

The purpose of this study will be to find out to what extent the Rule of Law in Kenya has deteriorated due to lack of acknowledgement judicial independence. The next purpose will be to find a sort of healing process which if initiated shall reinstate the Rule of Law in Kenya and to find out what machineries can be implemented to reduce corruption and compromise in our judicial system as well as punish those implemented. This objective shall be achieved by the testing of the hypotheses that “undermining of judicial independence not only causes deterioration of the Rule of Law, but makes the realization of Rule of Law a mere illusion.”

The study will also seek to find out Kenya's judicial situation in light of international standards on the independence of the judiciary. The study will also examine the extent to which the new Constitution promulgated in September has sought to cure the impending problem.

1.4 Research hypothesis

In light of the realization that undermining of judicial independence has adverse effects on the Rule of Law, this study will test the hypothesis that “undermining of judicial independence not only causes deterioration of the Rule of Law, but makes the realization of Rule of Law a mere illusion.”

1.5 Research objectives

The objectives of this study will be to find out to what extent lack of judicial independence affects the Rule of Law in general. Also, the study will seek to find out how the society has been

affected by mediocre governance brought about by the culture of impunity which is as a result of deterioration of Rule of Law in Kenya or the lack of it. The study will seek to find ways of redressing this anomaly and how Rule of Law may be reinstated.

1.6 Scope of study

This study will be carried out in Nairobi city, Kisumu city and Mombasa town. The issues to be covered in this study will be the role of Kenyan courts in terms of giving redress to the people and whether the courts are effective in such. If not, the researcher shall require the respondents to give opinions as to why they think that such redress is not effectively administered and how such influences the Rule of Law in Kenya. The researcher shall also revolve around the scope of whether as required by law, the judicial system has been occasioned the independence by the other arms of the government or administrative bodies so as to be said to effectively deliver justice without influence. The variables to be considered shall be the effects of undermining the doctrine of judicial independence on the Rule of Law in general; undermining judicial independence being the independent variable while its effect on Rule of Law being the dependent variable. The study will also cover other relative factors that may influence the application of the issue at hand other than the prevailing stated variables.

The research shall gather information from the regime of the old Constitution to the newly promulgated one.

1.7 Significance of the study

The law and specifically the constitution provide that the courts in the exercise of their power should administer justice irrespective of the seeker's social or economic status². This study shall seek to address the plight of the poor who because of economic constraints or lack of political power are unable to get the attention of the courts who appear to predominantly give undue redress to the rich or politically powerful often to the detriment of the poor since they are either corrupted or unduly influenced by powerful politicians or the government. The study shall also bring out the effects of non equality before the law on the general political and social structure of the country. The beneficiaries of this study shall thus be the poor and young people of Kenya who are often lack redress because of the corrupt nature of the judiciary. Since it is eminent that the courts have been lax in providing justice equally, the significance of this study will be to address this issue in order to ensure that this anomaly is brought to light and a solution be found without delay so the people can stop suffering while they have a right to redress from the courts without any form of discrimination. Furthermore, more importantly, the results of this research will greatly contribute to the existing knowledge, theories and recommendations created by earlier researchers on this subject.

² Article 167

SECTION TWO: LITERATURE REVIEW

1.1.0 Overview

This section will clarify the research problem as well as indicate what has previously been studied and written on the subject of the study. It will comprise of a collection of different extracts according to the themes of study. It will look at the interconnection between the Rule of Law and Judicial Independence and how they are dependent on each other.

1.1.1 Judicial independence

Judicial independence is the principle to the effect that the judiciary should be politically insulated from the legislative and the executive power. That means that, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. However, although majority of the states claim to uphold this principle, it is not the case in practice.

The issue of undermining judicial independence is not a recent one; it dates back to when the judicial system itself began. According to the article "*Provincial Judges Reference*" by Justice Gerald La Forest³, in the United Kingdom and its predecessor states, judicial independence emerged slowly where under the Norman monarchy of the Kingdom of England, the king and his *Curia Regis* held judicial power. Later, however, more courts were created and a judicial profession grew. In the fifteenth century, the king's role in this feature of government thus became small but nevertheless, kings could still influence courts and dismiss judges as they pleased. The Stuart dynasty used this power frequently in order to overpower Parliament. After

³ Paragraph 305

the Stuarts were removed in the Glorious Revolution of 1688, some advocated for the guarding of the judiciary against royal manipulation. King William III finally approved the Act of Settlement 1701, which established tenure for judges unless Parliament removed them.

The issue of judicial independence in Kenya alike has risen up a storm over the years. To begin with, the former constitution of Kenya⁴ which has recently been removed provided no express provision providing or calling for upholding of judicial independence. The newly promulgated constitution⁵ on the other hand clearly stipulates under Article 160 *that in the exercise of judicial authority, the judiciary 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*. Furthermore, the article articulates that in lawful performance of judicial functions, a member of the judiciary shall not be liable in an action or suit in respect of anything done or omitted from being done in good faith. The comparison of these two documents is evident that the people of Kenya have come a long way in trying to facilitate the doctrine of judicial independence.

According to Odhiambo T Oketch in his article *Kenya: Judiciary, the Rule of Law, and Muthurwa Market*, the problem with the judiciary in Kenya has been that the officers appointed to these offices have been *kow towed* to the whims of the executive instead of swearing fidelity to the Rule of Law. The root of this problem he states is the mode of appointment of judicial officers. Odhiambo states that the political nature of appointment of these officers operates to undermine judicial independence because the judicial officers feel indebted to owe allegiance to the appointing body rather than Rule of Law. This he claims is evident from some judicial decisions which defy logic and are generally inconsistent with the law.

⁴ 1962 constitution

⁵ 2010 constitution

The appointments that Odhiambo is talking about are those under the 1962 constitution which are that the chief Justice is to be unconditionally appointed by the president while the rest of the judges are to be appointed by the president but on the advice of the Judicial Service Commission.

According to Ababu Namwamba, the Vice Chairman of the Parliamentary Select Committee on the constitution (before the referendum and subsequent promulgation) Kenya would shift from the current trend where judges are appointed by a commission beholden to the President to a future where appointment would be vetted and approved by Parliament and more so vacant positions should be advertised and filled on the basis of equity, equality and expertise. Also, all the subsisting judges would then after the promulgation be subjected to vetting.

Odhiambo goes ahead to speculate that for judicial reforms to be effective in reinstating the Rule of Law in Kenya, there must be a clean up not only of the affected judicial officers but also the clean up of the structures which have made the judicial system ineffective in the first place.

1.1.2 Rule of law

Rule of Law operates under the general premise that all citizens are equally subject to the law and entitled to its protection. Under the Rule of Law, rulers are as subject to law as ordinary citizens are. Under the Rule of Law, no one *creates* the law in any sense that excludes him from the reach of legal rules. Perhaps the most celebrated confounder of the principles of Rule of Law and their operation is A. V. Dicey. In his book; *Introduction to the Study of the Law of the Constitution*⁶, Dicey stated that the Rule of Law comprises three ideals: (a) law prevails over arbitrariness and discretionary power, (b) “every man is subject to the ordinary law of the realm and amendable to the jurisdiction of the ordinary tribunals,” and (c) “the general principles of the

⁶ 8th Edition

constitution are as the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts,” rather than the result of legislation. Dicey contrasts the Rule of Law with “arbitrariness and discretionary power.”

Lon L. Fuller purports to add to Dicey’s views by observing that, to the extent that law is a system of rules, it must display an “inner morality” conveyed by the requirements of generality, publicity, non-retroactivity, clarity, consistency, possibility of compliance, stability, and “congruence between official action and declared rule.” According to him, Retroactive laws, for example, cannot possibly be followed, and so frustrate the ideal of rule-governed persons. Retroactive laws defeat the very purpose of the law, which is to guide action⁷.

Jürgen Habermas’s in an article *Between Facts and Norms* 1996 came up with what he terms as the “discourse theory” which seeks to illustrate the account of the Rule of Law as conceptually presupposed by democracy. On this view, the Rule of Law excludes domination of some persons by others, and so enables free, equal, and rational participation in political decision making.

According to Jeremy Waldron in an article *Nomos 54: Getting to the Rule of Law* develops a conception of the Rule of Law that emphasizes the centrality of procedural guarantees in the courtroom, such as rights to an attorney, to an impartial judge, and to a fair trial. Procedural guarantees should be respected. He argues that those subject to law are entitled to non-arbitrary treatment so as to protect the dignity of individuals as “active intelligences.”

In 1959, an international gathering of over 185 judges, lawyers, and law professors from 53 countries, meeting in New Delhi and speaking as the *International Commission of Jurists*, made

⁷ *The Morality of Law*, rev. ed

a declaration as to the fundamental principle of the Rule of Law. This was dubbed the Declaration of Delhi. They declared that the Rule of Law implies certain rights and freedoms, that it implies an independent judiciary, and that it implies social, economic and cultural conditions conducive to human dignity. The Declaration of Delhi did not, however, suggest that the Rule of Law requires legislative power to be subject to judicial review.

The *International Bar Association* has not been left behind in the enunciation of the operation of Rule of Law. The Council of the International Bar Association passed a resolution in 2009 endorsing a substantive or "thick" definition of the Rule of Law which entails; An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law.

Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.

The Rule of Law is the foundation of a civilized society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.

Also, the *World Justice Project*, an organization specializing in the promotion of Rule of Law throughout the world bases its definition upon 16 factors and 68 sub-factors, organized under the following set of four principles, or bands:

1. The government and its officials and agents are accountable under the law;
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient;
4. Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

1.1.3 Nexus between judicial independence and Rule of Law

Makau Mutua put it in the most precise terms in his book *“Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya”* when he stated that constitutionalism and the Rule of Law are the central features of any political democracy that respects human rights. He states that an independent judiciary is the linchpin of the schemes of checks and balances through which the separation of powers is ensured and thus is the essential guardian of the Rule of Law.

The underpinning reality is thus that any undermining of the judicial independence will most avertedly lead to the Rule of Law being a mere illusion or myth. Mutua goes ahead to claim that without an independent judicial system, there is no guarantee that the executive will respect the Rule of Law and act within established legal norms. Thus although the notion of judicial independence is a tenet of the collective nature of the Rule of Law, its denial is more significant because the courts themselves are the guardians of the Rule of Law in general and without it, all the other tenets are in-operational.

SECTION THREE: METHODOLOGY

1.2.0 Overview

This chapter will deal with the research design, sampling procedures which will include simple random and purposive sampling, sampling size, methods of data collection which will include interviews and questionnaires, research procedure and the method of analysis.

1.2.1 Research design

This study will adopt a descriptive design since the researcher will seek to establish solutions to significant problems. This will be achieved by collecting information based on the people's attitudes and opinions. The researcher will identify the respondents to be questioned and then construct questions that will solicit the desired information. The researcher will identify the means by which the survey will be conducted and summarize the data in a way that will provide the desired descriptive information. The study will involve Kenyans of different social classes, of the ages from 20 years to 60 years.

1.2.2 Sampling Procedure

The sampling procedures that will be used in this study are simple random sampling and purposeful sampling. The researcher will employ these sampling techniques because they will enable an in-depth knowledge of the study using a small population sample from each of the selected respondents. Simple random will enable the researcher to give the respondents an equal chance of being selected therefore minimizing bias in the research. Purposive sampling on the other hand will allow the researcher to use cases that have the required information with respect

to the objectives of the study. This notion is supported by Mugenda O.M. in her book *Research methods: Quantitative & Qualitative approaches* (2003).

1.2.3 Sample

The researcher will mainly engage subjects of different social set ups, of average education (secondary level) that have average background knowledge of the legal systems. Because the knowledgeable and politically instigated youth are more inclined to participate, the researcher will mainly interview young people of the working class and thus will look at people in town centers. For the working groups especially the concerned professions for instance the legal practitioners, non- governmental organizations and police, work experience and academic qualifications will be reported. The sample will consist of about fifty respondents.

1.2.4 Instruments

The study will involve a variety of research instruments to collect data and these will include both the open and close ended questionnaires. Open ended questionnaires will achieve the purpose of allowing for a free and spontaneous response from the respondents and this will be helpful seeing that the research will be based on the people's views and beliefs. Close ended questionnaires on the other hand are easier to analyze and save time since they are in immediate usable form. The combination of the two types of questionnaires will provide informed data as they will cut across the board thus eliminating bias.

Another instrument of gathering data the researcher will use is the un-standardized oral interview which will generally have the same effect as the open ended questionnaire in that, the respondent will not be subjected to a set of already formulated responses. The respondents will be free to formulate their own response freely without direction from the interviewer and thus give the

findings a qualitative nature. The interviews will be oral so as to save the respondent's time and to increase the chances of corporation since most respondents will not have time to write down responses. Interviews have been preferred because according to Gupta's *Research methodology and statistical techniques* (1999), they give an opportunity to probe detailed information on an issue. Interviews will make it possible to obtain data required to meet specific objectives of the study. Interviews are also more flexible than questionnaires because the interviewer can adapt to the situation and get as much information as possible hence advantageous.

The instruments will have a set of about ten questions which will not be of a personal nature. For the interviews, the information will be put down in writing while for the questionnaires; they will be administered and collected immediately after the respondents have filled them.

1.2.5 Data analysis

Basing on the different instruments of collecting data that the researcher will use, the data will be analyzed both scientifically and thematically. Data obtained from the close ended questionnaires will be mathematically computed to give statistical data in way of charts and graphs. This way the researcher will know how many people are inclined to either affirming or nullifying the research hypotheses. On the other hand data obtained from the open ended questionnaires and unstructured interviews will be analyzed to provide a test for the hypotheses.

CHAPTER TWO

INTRODUCTION

2.0 Overview

This chapter is going to cover the background of this study by extenuating on what was the objective behind this study. It will also outline on what scope was used in the study as well as the statement of the problem at hand

2.1 Background

In light of the prevailing deterioration of the rule of law in Kenya, it was prudent to try and find the fault line in order to find a cure for the eminent threat facing Kenya's credibility in exercising democracy and maintaining of economic, social as well as political stability. In the study, it became imminent that where judicial independence is taken for granted and is undermined, the rule of law cannot be said to govern any civilization. This study therefore set out to find the solutions to the problem at hand by first looking at the various tenements of rule of law and judicial independence, their interrelationships and how solutions can be arrived at to ensure the smooth running of the system.

Rule of law is a wide principle capable of several definitions but it contains certain basic tenets which are general no matter the diversity in definition. These include; the notion that; no one is immune to law or in other terms, no body is above the law. All actions of the government whether of the executive, legislature, or the judiciary must be backed and conditioned by law. The law must stand above all and the government being the custodian of the law and power must exercise such power to the benefit of the public.

Independence of the judiciary entails the concept that the judiciary should be insulated from the legislative and the executive power. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. The judges should be able to perform their functions without fear, favor, ill will, bias or prejudice. They should be able to make decisions based on conscientious understanding of the law free from direct or indirect extraneous influence, inducements, pressures, interference or threat from any person or entity.

The two greatest impediments to judicial independence are the undue interference and influence in judicial duties by the state organs and the corruption that runs deep in the judiciary. The Waki report pointed to the lack of political will to prosecute persons in high authority for serious offences, whether illegal appropriations of land, embezzlement of astounding sums of money, incitement to ethnic hatred and violence and killings. The initiation and termination of prosecutions are politically driven, so that when private groups have tried to bring highly placed suspects before the courts, the Attorney General has terminated the trials. The judiciary has the reputation of extreme corruption, and subservience to the government. The Waki Commission says, "...nothing short of comprehensive constitutional reforms will restore the desired confidence and trust in the judiciary⁸"

Due to the lack of judicial independence, the courts have resorted to making rulings that reflect the interests of either the government or the economically powerful who more often than not corrupt the judges. For instance, Thomas Patrick Gilbert Cholmondeley styled the Honorable from 1979, a Kenyan farmer of British ancestry and a great-grandson of the famous Lord Delamere, one of the first and most influential British settlers in Kenya In April 2005, shot a

⁸ Page 463

Kenya Wildlife Service game ranger on his ranch under the claim of self-defence. The murder case against Cholmondeley was dropped before going to trial. In May 2006, he was again taken into custody and held at Kamiti Maximum Security Prison for shooting a poacher on his Soysambu estate near Lake Naivasha. Cholmondeley's murder trial began on 25 September 2006. On 7 May 2009, he was acquitted of murder, but found guilty of manslaughter⁹. He was sentenced to serve 8 months in prison and was released on 23 October 2009. The court's verdict caused an outcry from the public who were not convinced that justice had been done. Most claimed that either the court was corrupted by Cholmondeley himself or that Britain had a hand in the matter.

Judicial independence is ensured by several factors which include immunity from prosecution for acts done or omitted in the exercise of their judicial duties, security of tenure which protects Judges from sham disciplinary procedures or removal from judicial office, save in very clearly defined circumstances and in accordance with the due process of law.

2.2 Statement of problem

This study investigated what was the result of undermining judicial independence on the rule of law in Kenya. The independence being a crucial aspect of the principle of the rule of law, any interference with it is bound to have adverse effects to the other principles which together with it make up the rule of law.

The problem that this study sought to address was the rampant injustices being occasioned to the weak members of the society. Since their only solace against the executive or the rich is the judicial system, any sort of ineffectiveness of the judiciary leads to the detriment of this group

⁹ Republic V Thomas Gilbert Cholmondeley criminal Case No 55 of 2006

without redress. The problem at hand is that independence of the judiciary is a myth and so then rule of law cannot be in existence. Instead of the judiciary carrying out their mandate as set out by the constitution, they are either corrupted by the rich or mighty or are unduly influence by the executive and hence totally disregard their loyalty to the rule of law.

The deterioration of rule of law has come to a level where for instance the police rarely bother to arrest wrong doers since they claim that the judiciary is not doing its work of convicting them when charged. This has led to the unprecedented rise in extra judicial killings perpetrated by the police. This has led to insecurity of young men in Kenya who are not afforded the presumption of innocence as stipulated by the constitution. The police have resulted in behaving as if they are not under the law in Kenya. This study has sought to address this problem and more so to find a middle ground where judicial independence may be reinstated to ensure the existence of the rule of law.

2.3 Purpose of the study

The general purpose for carrying out this study is to find out to what extent the rule of law in Kenya has deteriorated due to lack of acknowledgement judicial independence and then from there, to find solutions to the problem stated above by attaining the much needed judicial reforms. If judicial independence is to be reinstated for the benefit of rule of law in general, ways have to be found for the implementation of structures which will seek to ensure the judiciary is brought back to owing allegiance to rule of law rather than bending to the whims of powerful individual or the other arms of the state often to the detriment of the weak.

2.4 Research hypothesis

This study sought out to test the hypothesis that “the rule of law is illusory or non existent where judicial independence is undermined or denied”. In light of the major part that the judiciary plays in a state governed by the rule of law, undermining of its independence means that rule of law is in itself non existent.

2.5 Research objectives

The objective of this study was to find ways of reinstating the rule of law in Kenya in general the main way being to ensure judicial independence is attained and in this way, the arbitral rule is eliminated to the benefit of the weak since the courts will be forced to address all issues equally without undue influence. This study seeks to ensure that according to the principle of Rule of Law, all individuals in Kenya are below and answerable to the law no matter the status of these individuals. This study will ensure that Kenya is stabilized socially, economically and politically and that the judicial situation in Kenya is brought up to par with the international standards on judicial independence.

2.6 Scope of study

This study sought to encompass a sample from Nairobi city, Kisumu city and Mombasa town comprising the total of 50 respondents for purposes of collecting research information. The issues covered were the role of Kenyan courts in terms of giving redress to the people and whether the courts are effective in such. If the respondents answered in the negative, she/he was required to give opinions as to why they think that such redress is not effectively administered and how such influences the rule of law in Kenya. The researcher also revolved around the scope

of whether as required by law, the judicial system has been occasioned the independence by the other arms of the government, administrative bodies or other individuals so as to be said to effectively deliver justice without influence. The variables considered were the effects of undermining the doctrine of judicial independence on the rule of law in general; undermining judicial independence being the independent variable while its effect on rule of law being the dependent variable. The study also covered other relative factors that may influence the application of the issue at hand other than the prevailing stated variables

2.7 Significance of the study

This study sought to find a redress for the miserable state that the Kenyan population suffer due to the stifling of rule of law in Kenya such as the denial of justice brought about by undue influence and corruption of the judiciary to the effect that some rulings do not reflect the state of the law.

The beneficiaries of this study are the economically weak. This is because since they are not in positions of either political or monetary power, they are unable to attain justice as the powerful will always orchestrate the court proceeding to their benefit at the expense of the weak. If this undue influence and corruption are removed, judges will be able to give decrees and judgments based on the merits of the case and the operation of law and as such, justice will be served.

2.8 Review

It is imminent that undermining of judicial independence operates to destroy the whole operation of the rule of law and if ways are found of reinstating or ensuring the judiciary conducts its business free of any undue influence, the rule of law would become operational as all branches

of the government and powerful individuals who are in the habit of influencing courts to get judgments which are beneficial only to them would be answerable to law. The weak would thus have the equal opportunities of getting redress from the courts. The next chapter reviews the related literature which has already been written by different writers or researchers on the research topic.

CHAPTER THREE

LITERATURE REVIEW

3.0 Overview

This chapter reviews the related literatures which have addressed the issue of the doctrine of the rule of law and judicial independence in Kenya and their relationships. It also looks at the previous recommendations by others who have engaged in a similar study. This chapter will show the level of interrelationship that the Rule of Law and Judicial Independence such it is impossible to have one without the other. It will look at several salient features of the Rule of Law with the independence of the Judiciary being at the end.

3.1 Rule of law

Rule of law is a wide principle capable of several definitions but it contains certain basic tenets which are general no matter the diversity in definition. These include; the notion that; no one is immune to law or in other terms, no body is above the law. All actions of the government whether of the executive, legislature, or the judiciary must be backed and conditioned by law. The law must stand above all and the government being the custodian of the law and power must exercise such power to the benefit of the public.

Rule of Law entails certain features which include: Devolution of power, formally independent judiciary, the upholding of Human Rights and the upholding of the principle of Natural Justice in a country. This is in addition to the salient features mentioned above.

Devolution of power: entails the concept that the judicial, executive and legislative powers of the state must not be vested on the same entity or body. There must be separation of power into the three arms of the government. French writer Montesquieu who is commonly treated as the founder of the modern day doctrine of separation of powers, in *The Spirit of Laws* (1748) in his description of the English Constitution distinguished the legislative, executive, and judicial functions. He stated that *“Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge would have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”*

The other feature is that courts must ensure that principles of natural justice are followed in determination of suits. **The principle of Natural Justice** as a principle of Rule of Law must be observed if a country is said to be governed by the Rule of Law. Natural Justice entails the notion that in any form of proceedings, fair hearing must be occasioned to the parties in the proceedings. It is evident in the constitution under several rights and fundamental freedoms. These include, the right to access information under article 35 (1) which includes information held by the state, any individual and that such information is needed for exercise or protection of any right or fundamental freedom, fair administrative action as set out under article 47 which stipulates that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Access to justice is also enshrined under article 48 which states that the state shall ensure that all persons access justice and if any fee is required,

for it to be reasonable and not impede access to justice. Articles 49-51 provide for the rights of arrested persons from arrest, to hearing and to detention. Arrested persons under the doctrine of natural justice have a right to be informed promptly in a language they understand the reason for the arrest be informed of their right to remain silent and the consequences of not remaining silent. They have a right to communicate with their lawyers or any person who may assist them. At the hearing, they have a right to have the dispute resolved in public before a court or impartial body. A fair trial above all includes the right to be presumed innocent until proven guilty. If detained, the detainee retains all rights and freedoms stipulated under the Bill of Rights save for those that are inconsistent to the detention.

3.2 Judicial independence

The Rule of Law upon which the principle of constitutionality is founded depends on an independent judiciary to authoritatively interpret and enforce the law. As H.W.R Wade in his book - *Administrative Law* (1988) - at p.24 writes, the principle of the Rule of Law means: “that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive”.

The above notion brings alive the principle of judicial review. The primary method by which the courts exercise their supervisory jurisdiction over public bodies to ensure that they observe the substantive principles of public law is by way of the application for judicial review. Under this procedure, prerogative remedies of Certiorari, Prohibition, and mandamus, Declarations, Injunctions or Damages may be awarded¹⁰.

¹⁰ Civil Procedure and Practice in Uganda (Ssekaana Musa and Salima Namusobya Ssekaana)

The former constitution of Kenya¹¹ provided no express provision providing or calling for upholding of judicial independence although over time it was contended that the decision of the Privy Council in *Liyanage v. R* (1967) 1 A.C. 259 gave the judiciary independence from the other arms of the state. In this case, it was decided that the arrangement of the Constitution in parts among them one headed ‘Judicature’ demonstrates an intention to separate the judicial power from the legislature and the executive. The Privy Council held that: “These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature.

The newly promulgated constitution¹² on the other hand clearly stipulates under Article 160 *that in the exercise of judicial authority, the judiciary 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.*

The Chief Justice Hon Mr. Justice Evans J. Gicheru in an article *Independence of the Judiciary: Accountability and Contempt of Court*, submitted that the relationship of the members of the executive and legislative institutions of the government with the Judiciary has in the recent past been characterized by three attitudes the first of which is taking the Court as a necessary step before extra-judicial (and illegal) mass action to justify the subversion of rule of law in the pursuit of the litigants’ interests. Secondly, the process of the Court and its decisions have been held in outright contempt and have been disobeyed by factions of the executive and the legislature that are adversely affected and thirdly, the legislature has arrogated itself the role of a supervisor of the discharge by the Court of its judicial function. This has taken the form of discussions through question time in Parliament on matters pending before the court. None of

¹¹ 1962 constitution

¹² 2010 constitution

these attitudes come near to the desirable mutual respect between the institutions of the government under the constitutional doctrine of Separation of Powers by which the three institutions of government should respectively perform their special functions and thereby uphold the rule of law and good governance.

Corruption: The Kenyan judicial system has always been perceived as being corrupt and the corruption should be addressed as an obstacle to the Rule of Law. In 2004, the International Commission of Jurists and its national section, ICJ - Kenya conducted a mission to examine the state of judicial independence in Kenya. The 5-day mission sought to evaluate Kenya's judicial situation in light of international standards on the independence of the judiciary. The Honourable Justice Dr. George W. Kanyeihamba of the Supreme Court of Uganda lead the Mission with The other mission members being prominent Nigerian lawyer Mr. Clement Nwankwo and ICJ Lawyer Cecilia Jimenez and Mr. Philip Kichana who represented the ICJ-Kenya. The mission met with members of the judicial, executive and legislative branches of government, the legal profession, the Law Society, legal academics and civil society. An ICJ report on the mission would be published with practical recommendations to the Kenyan Government and other relevant actors. This project aimed to contribute to Government moves towards an independent and impartial judiciary in Kenya.

The Mission examined the state of judicial independence and accountability in Kenya following the political and government changes in 2002. The ICJ met with and received views from various stakeholders in the Judiciary and legal fraternity, donor community, civil society and the media and came up with the mission's report which was released to the press. The ICJ regards its

findings and recommendations as part of the broader framework of ongoing judicial, legal and constitutional reforms in Kenya.

One of the findings of the mission was that Corruption in the administration of justice as well as in the judiciary remains a serious impediment to the rule of law in Kenya. That While corruption is a principal obstacle to the proper functioning of an independent Judiciary in Kenya, anti-corruption measures themselves must be implemented in order to strengthen and not to weaken the separation of powers and the independence of the judiciary.

The findings of the mission were also to the effect that in the exercise of implementing measures to investigate implicated judicial officers, the wrong methods were used. The anti-corruption measures within the radical surgery were not conducted in accordance with international standards. In particular, the individualized public naming of allegedly corrupt Judges and Magistrates and the pressure exercised to force their resignation violated principles of due process and security of tenure.

What happened was that In September 2003, the Hon. Justice Aaron Ringera and his committee prepared and presented a report on corruption and integrity in the judiciary to the Chief Justice Evans Gicheru. The report outlined various instances of corruption within the Judiciary and in an unprecedented step named judicial officers implicated in the alleged corrupt practices. A total of 105 judicial officers including 23 judges and 82 magistrates were named in the report. Soon thereafter, two tribunals were set up by the President to investigate the named judges. The naming and consequent shaming of the judges, hanging them out to dry, without first hearing their side of the story meant that the finding that the charges/complaints against them were *prima facie* evidence of corruption was premature and unfair. The threats accompanying the naming, to

resign or face a tribunal; the withdrawal of the benefits of judgeship like housing and salaries before due process had been set in motion contravened both commonwealth tradition and judicial precedent. The violation of rules of natural justices amounted to the violation of the rule of law itself as this is one of the principles of rule of law. The maxim one is *innocent until proven guilty* must always hold.

Appointment of judicial officers

The appointment process of judges in Kenya has for a long time been marred with immense political interference. Judges have over time been appointed for other considerations other than merit including political, ethnic and other affiliations. It is no wonder that the late Chief Justice Chesoni was bankrupt at the time of his appointment. According to the old constitution, the appointment of the Chief Justice was done by the president unconditionally while the appointment of judges was by the president in accordance with the advice of the JSC¹³. The catch here was that the Judicial Service Commission was itself not an independent body being comprised of members appointed by the president himself. The new constitution of 2010 seeks to alleviate this anomaly; Article 166 stipulates that the Chief Justice and his Deputy shall be appointed by the president on the advice of the JSC and subject to approval by parliament. The other judges shall be appointed by the president in accordance with the recommendation of the JSC. Here, the Parliament has the power of veto if the president appoints a Chief Justice whom the parliament has no faith with. Furthermore, the JSC under the new constitution enjoys autonomy and thus cannot easily bend to the whims of the president. This new provision is more certain and transparent with a limited likelihood of political appointments.

¹³ Section 61

Security of tenure

It is a tenet of Judicial Independence that the judges should be occasioned security of tenure so that they can carry out their mandate without fear of termination if at all they make a ruling in contrast with the interests of either the government or powerful individuals. Early last year, It came to the point where the Prime Minister Hon. Raila Odinga and the then Minister for Justice and Constitutional affairs insisted on Judges signing performance contracts. Chief Justice Evans Gicheru and other senior members of the bench contend that such a move will undermine judicial independence in Kenya. The removal from office of Judges of courts should be in clear cut terms sanctioned by law.

Article 168 of the Constitution provides that a judge of a superior court may only be removed from office on grounds of inability to perform the functions of that office arising out of mental or physical incapacity, breaching the code of conduct prescribed for judges of the superior court by an Act of Parliament, Bankruptcy, Incompetence or Gross misconduct or misbehavior. The removal of judge may be initiated by either the JSC on its own motion or on the petition of any person to the JSC.

The Bangalore Principles are also intended to establish internationally accepted standards of ethical conduct of judges in order to realize the judicial independence necessary for the maintenance of the rule of law.

These set out rules for removal of Judges operate to minimize witch hunting tendencies against judges and thus preserving their tenure in office. In addition to providing proper procedures for the removal of judges on the grounds of incapacity or misbehavior that are required to support

the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered in order to uphold Rule of Law.

Immunity

Section 6 of the Judicature Act, Chapter 8 of the Laws of Kenya provides for judges' professional immunity in these terms: *"No judge or magistrate and no other person acting judicially, shall be liable to be sued in a civil court for an act done by him in the discharge of his duty whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of."*

Article 16 of the United Nations Basic Principles of the Independence of the Judiciary, professional immunity of the judges is given as follows:

"Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the state, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."

However, it is stipulated in *The Latimer House Principles*, that criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial function; such proceedings will be employed to guard against interference with judicial independence as a means of upholding the Rule of Law For instance to punish corrupt judges.

The judiciary has over time come up with modes of carrying out self assessments and accountability in order to minimize external interference in its affairs. This is because according to Evans Gicheru, it is now generally accepted that the Judiciary, like its counterparts in the executive and the legislature, must be held accountable to the discharge of its constitutional

mandate of judicial function¹⁴ and that The only question that arises is as to who it is to be accountable to and the method or mechanism of accountability. He states that judicial accountability is the process by which the judiciary is responsible to the people on whose behalf it exercises the judicial power under the Constitution and the law of the country.

The principle of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

International perspective of judicial independence

Kenya is a member of the International Community. As a result it is a signatory to several international instruments that inform and set norms for and of judicial independence. Though not all the treaties on judicial independence have been ratified by Kenya, these treaties set the core international standards that should be observed to facilitate judicial independence

The Key International Law Instruments on Judicial Independence include:

- Universal Declaration of Human Rights, adopted in 1948
- The International Covenant on Economic, social and Cultural Rights, adopted 1966
- The International Covenant on Civil and Political Rights, adopted in 1966
- The Optional Protocol to the International Covenant on Civil and Political Rights, adopted in 1966

¹⁴ Independence of the Judiciary: Accountability and Contempt Of Court

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at abolition of the death penalty, adopted in 1989

Kenya has ratified the following International instruments on judicial independence namely:

- Covenant on Economic, Social and Cultural Rights, in 1976
- Covenant on Civil and Political Rights, in 1976.

Chavangi Aziz Tom set out to investigate whether Kenya has done enough to meet the normative values set by the international community in various instruments, on the nurturing and maintenance of the judiciary as a separate but co-equal arm of government (equal to the executive and legislative arms of government) and gave recommendations on how best to ensure that the Kenyan practice converges and coincides with the international normative order on judicial independence in a book dubbed *The Kenyan Government Performance In Fulfilling Its Obligations Under The International Law On Judicial Independence*.

From the International Instruments on Judicial independence there are standards laid down relating to judicial independence, which standards are clearly set out in the *Basic Principles on the Independence of the Judiciary*, which was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985. These standards are universal and they have a direct impact on Kenya as many of the provisions (although not all) found in the international instruments are enshrined in the Kenyan constitution. These are:

- The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary Article 107.

- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason Article 108.
- The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law Article 109.
- There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law Article 110.
- The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. Article 111.
- It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions Article 112.

In accordance with the *Universal Declaration of Human Rights*, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality

The old Constitution had expressly vested executive authority in the

President¹⁵, and law making power in parliament¹⁶; the Judiciary did not enjoy the same and it could have been argued that in such circumstances the Judiciary would never be equal to the other arms of the government.

Several of the international instruments and their Normative Standards on Judicial Independence were enshrined in chapter 4 and 5 of the old constitution. These included the following Vis-a-Vis the Basic Principles on the Independence of the Judiciary.

Section 62 provided for the security of tenure for judges which also included the Chief Justice. This section converged with article 12 which provides for a guaranteed tenure for judges;

- Section 62(1) stated that judges will vacate their offices only after attaining retirement age which currently is set at 74 years. Article 11 provides for the age of retirement which shall be adequately secured by law;
- Section 62(3) talked about the removal of judges from office, and how such removal is effected if the judge fails to perform his functions either by way of infirmity of body or mind or from any other cause or for misbehavior. Article 18 provides for suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties;
- Section 62(4) talked about a tribunal set up by the President under Subsection 5 of section 62, which tribunal would recommend to the President the removal of a judge if it were found that he was unable to perform the functions of his office as aforesaid or for misbehavior, the removal of the Chief justice was provided for in section 62 (7) of the Constitution. Article 17 envisages a situation whereby if there is a charge or complaint against a judge in his judicial or professional

¹⁵ Section 23

¹⁶ Section 30

capacity, then that complaint or charge shall be processed expeditiously and fairly under an appropriate procedure, and subjecting the judge to a fair hearing;

- Section 70 (b) provided for freedom of conscience, of expression and of assembly. This section corresponded with article 8 and 9 which provides for freedom of expression and association.

- Section 77 (1) stated that if a person was charged with a criminal offence then the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. The same applied to civil matters under section 77 (9) of the Constitution.

Articles 2, 5, and 6 respectively have provisions for judicial officers to decide matters impartially, for everyone to be tried by ordinary courts or tribunals using established legal procedures, and that the proceedings be conducted fairly and that the rights of the parties are respected.

Apart from the constitution there are other statutes like the Judicature Act, which give protection to judges and magistrates or any other persons acting judicially from being held liable and be sued in a civil court for an act done or ordered by him in the course of his duties.

Article 16 provides for personal immunity of judges from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

The Kenyan government performance vis-a-vis the standard of judicial independence as set out in the UN basic principles on the independence of the judiciary was appalling owing to how small an extent that Kenyan Constitution implemented the recommendations. Nothing less than a constitutional reform would address this problem. With the promulgation of the new constitution in September 2010, more implementation of the international instruments was realized.

According to Azizi Tom's research findings, the then Regime did not provide for a situation

where the judiciary can control its own budget, the terms of holding office, security, adequate remuneration, conditions of service and pensions were not adequately adequately secured by law, that the appointment of Judges by the President on advice of the JSC was not at par with international norms and that the old constitution belately mentioned the independence of the judiciary and still did it vaguely.

3.3 Review

This chapter dealt with the related literature on the select topic, what previous researchers have found in their respective but similar studies. The next chapter will address the methods used in collecting data for the study.

CHAPTER FOUR

METHODOLOGY

4.0 Overview

This chapter deals with the approaches used in the data collection for this study. The study entailed the use of sampling procedures, which included simple random sampling, purposive sampling. The chapter also looks at sampling size, methods of data collection which include interviews and questionnaires, research procedure and the method of analysis.

4.1 Research Design

This study adopted a descriptive design since the researcher sought to establish solutions to significant problems. This was achieved by collecting information about the people's attitudes and opinions. The researcher constructed questions that solicited the desired information and identified the respondents to be surveyed according to the likelihood of exposure on the research topic. The researcher identified the means by which the survey would be conducted and summarized the data in a way that provides the desired descriptive information. The study will involve Kenyans of different social classes, of the ages from 20 years to 60 years.

4.2 Sampling Procedure

The sampling procedures that were used in this study are simple random sampling and purposeful sampling. The researcher employed these sampling techniques because they enable an in-depth knowledge of the study using a small population sample from each of the selected respondents. Simple random enables the researcher to give the respondents an equal chance of being selected therefore minimizing bias in the research. Purposive sampling on the other hand

allows the researcher to use cases that have the required information with respect to the objectives of the study. This notion is supported by Mugenda O.M. in her book *Research methods: Quantitative & Qualitative approaches* (2003).

4.3 Sample

The researcher mainly engaged subjects of different social set ups, of average education (O-level) that have average background knowledge of the operations legal and administrative systems. Because the knowledgeable and politically instigated youth were more inclined to participate, the researcher mainly interviewed young people of the working class and thus looked mainly at people in town centers. For the working groups especially the concerned professions for instance the legal practitioners, non- governmental organizations and police, work experience and academic qualifications was reported. The sample consisted of fifty respondents.

4.4 Instruments

The study involved a variety of research instruments to collect data and these included both the open and close ended questionnaires. Open ended questionnaires served the purpose of allowing for a free and spontaneous response from the respondents and this was helpful seeing that the research was based on the people's views and beliefs. Close ended questionnaires on the other hand are easier to analyze and save time since they are in immediate usable form. The combination of the two types of questionnaires provided informed data as they cut across the board thus eliminating bias.

Another instrument of gathering data the researcher used is the un-standardized oral interview which generally has the same effect as the open ended questionnaire in that, the respondent was not subjected to a set of already formulated responses. The respondents were free to formulate

their own response freely without direction from the interviewer and thus give the findings a qualitative nature. The interviews were oral so as to save the respondent's time and to increase the chances of cooperation since most respondents did not have time to write down responses. Interviews have always been preferred because according to Gupta's *Research methodology and statistical techniques* (1999), they give an opportunity to probe detailed information on an issue. Interviews make it possible to obtain data required to meet specific objectives of the study. Interviews are also more flexible than questionnaires because the interviewer can adapt to the situation and get as much information as possible hence advantageous.

The instruments had a set of about ten questions which were not of a personal nature. For the interviews, the responses were put down in writing while for the questionnaires; they were administered and collected immediately after the respondents filled them.

4.5 Data Analysis

Basing on the different instruments of collecting data that the researcher used, the data was analyzed both scientifically and thematically. Data obtained from the close ended questionnaires mathematically computed to give statistical data in way of charts and graphs since they are statistical data. This way the researcher finds out how many people are inclined to either affirming or nullifying the research hypotheses. On the other hand data obtained from the open ended questionnaires and unstructured interviews were analyzed thematically in order to test for the hypothesis.

4.6 Review

This chapter provided for instruments and methods of data collection in the field as well as modes of the data analysis. The next chapter will look at the findings of these instruments and procedures as well as look at the data analyzing.

CHAPTER FIVE

PRESENTATION AND DATA ANALYSIS

5.0 Overview

This chapter is going to cover the findings of the research itself according to the analysis of data obtained from the respondents.

The objective of this study was to find ways of reinstating the rule of law in Kenya in general by ensuring judicial independence is realized. This was to be achieved by testing the hypothesis that the Rule of Law is a mere illusion where Judicial Independence does not exist. The hypothesis was tested by asking the questions set out in the Appendices.

Table 5.1

Do you think that the Judiciary in Kenya is Independent from the executive and Legislature?	Yes	No	Total
Frequency (fo)	12	38	50
Percentage (%)	24%	76%	100%

Source (field study)

The information from this table obtained from the first question of the second questionnaire showed that only 24% of the respondents were confident that the judiciary was afforded ample

independence. 76% on the other hand were of the view that the Judiciary is in no way independent from the rest of the arms of the government.

Table 5.2

Do you think the appointment of Judges in Kenya is transparent?	Yes	No	Total
Frequency (fo)	9	41	50
Percentage (%)	18%	82%	100%

The information in this table was obtained from the second question of the second questionnaire.

Here, more respondents lacked faith with the transparency in appointment of judges with only 18% responding positively. 82% of the respondents suggested that the appointments were not transparent.

Table 5.3

Do you think the Judiciary is corrupt	Yes	No	Total
Frequency (fo)	39	11	50
Percentage (%)	78%	12%	100%

The above results were borne by the third question of the second questionnaire, from the results, only 12% were of the view that the Judges and Judicial officers were not corrupt, the other 78% on the other hand observed that the judiciary was corrupt.

Table 5.4

1) Do you think that Judges should be punished for wrongs committed in exercise of duty?	Yes	No	Total
Frequency (fo)	24	26	50

Percentage (%)	48%	52%	100%
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On whether judges should be punished for wrongs committed in exercise of duty, the vote was nearly split in half. 52% voted no while the rest were of the view that the judges should not be occasioned immunity.

Table 5.5

Do you think machineries to punish Judges tamper with judicial independence?	Yes	No	Total
Frequency (fo)	29	21	50
Percentage (%)	58%	42%	100%

The information in the above table was obtained from answers to the 5th question of the second questionnaire. 58% of the respondents were of the view that machineries put up to punish judges may cause interference with the independence of the judiciary.

Table 5.6

Do you think that Kenya meets the international requirements for judicial independence?	Yes	No	Total
Frequency (fo)	17	33	50
Percentage (%)	34%	66%	100%

66% of the respondents felt that Kenya did not meet the internationally set rules for an independent judiciary. The rest of the 34% felt it did.

Table 5.7

Do you think that everyone or everybody is under the law in Kenya?	Yes	No	Total
Frequency (fo)	3	47	50
Percentage (%)	6%	94%	100%

48% overwhelmingly voted that some individuals or entities were above the law in Kenya

Table 5.8

Do the courts give justice to all citizens of Kenya equally?	Yes	No	Total
Frequency (fo)	10	20	50
Percentage (%)	20%	80%	100%

80% of the respondents felt that justice is not occasioned on all in equal footing.

Table 5.9

Basing your answer on the above answers, do you think that the Rule of Law is operational in Kenya?	Yes	No	Total
Frequency (fo)	20	30	50
Percentage (%)	40%	60%	100%

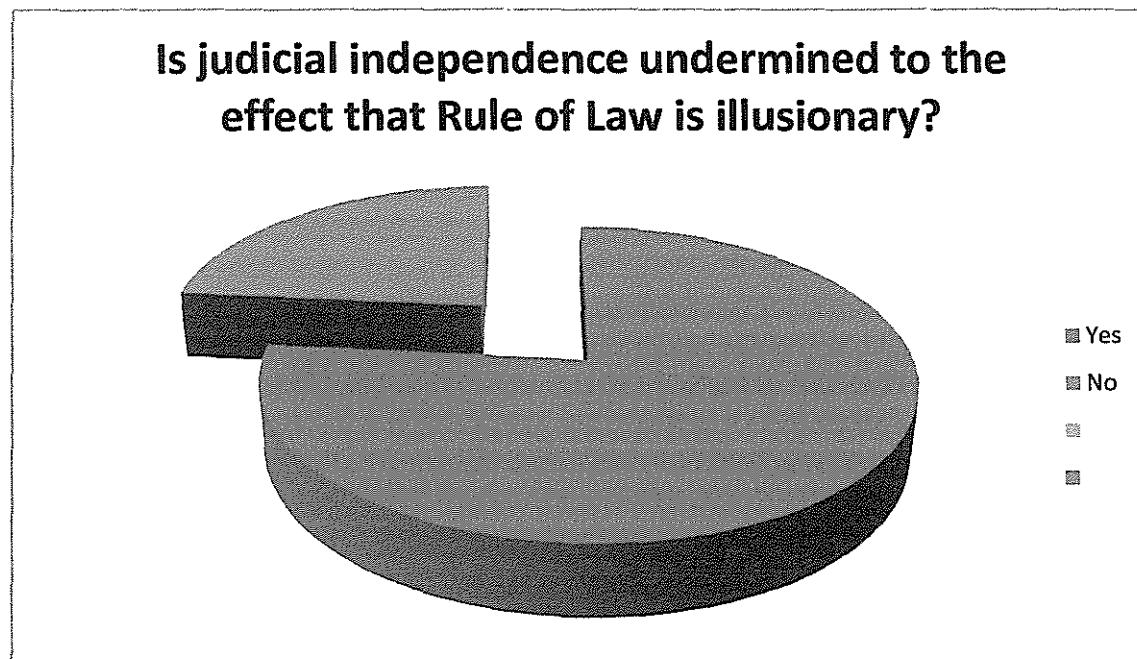
More than half of the respondents were of the view that the Rule of Law is not operational in Kenya.

Since tables 1,2,3,6,7,8 and 9 bared results that directly dealt with attainment of rule of law, the researcher analyses this data by finding the average of the results in order to come up with a pie chart. $76\% + 82\% + 78\% + 66\% + 94\% + 80\% + 60\% = 536$

$$536 \div 7 = 76.6\%$$

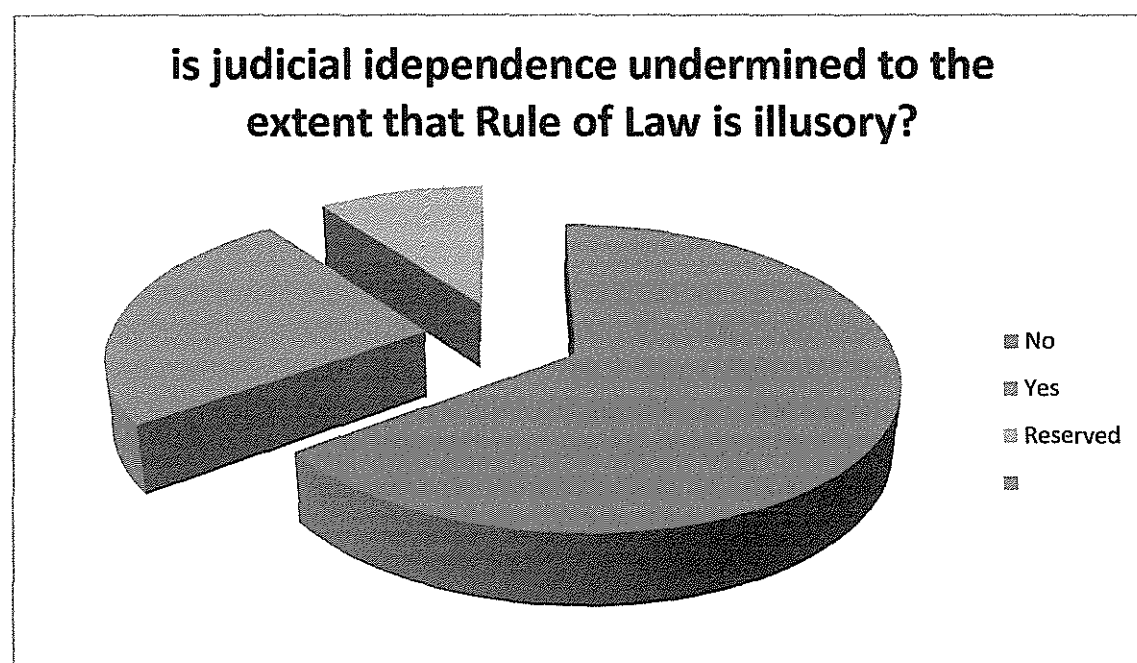
Using this analysis, 76.6% of the respondents were of the view that Rule of Law is undermined in Kenya.

Chart 5.10



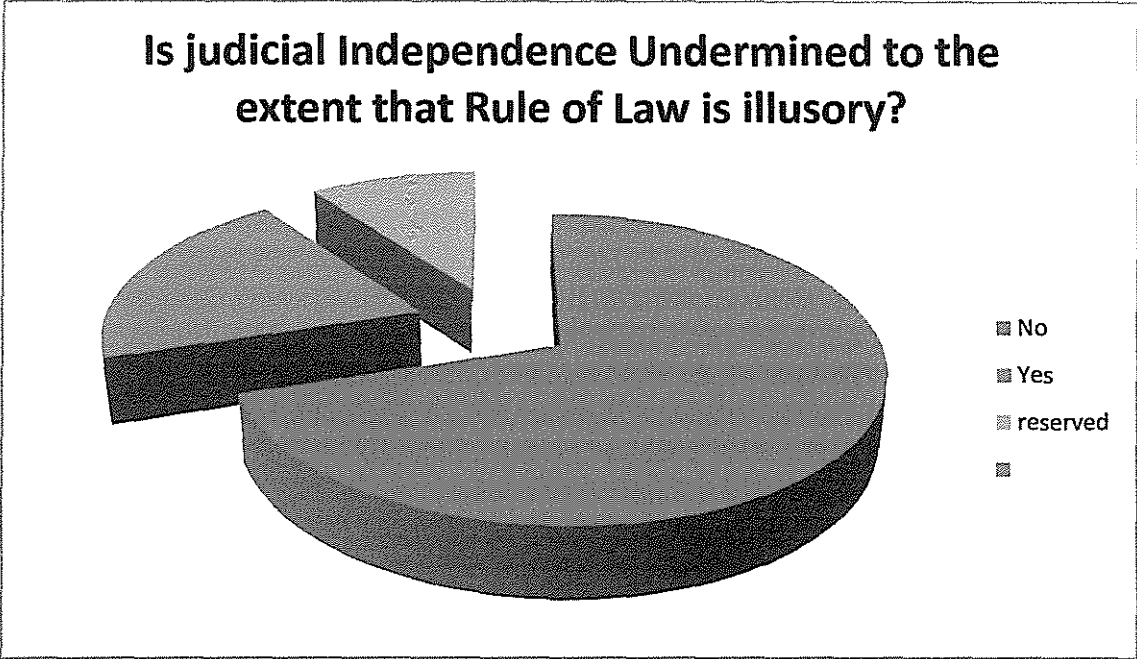
The first questionnaire and the interview solicited a diversified response. On the first questionnaire in relation to the 3rd, 8th, 9th and 10th question, 13 out of 20 respondents responded negatively, 5 responded positively while 2 reserved.

Chart 5.11



On the interview, out of 10 people interviewed, in relation to questions 4, 9, 10, 11 and 12, seven respondents responded negatively while two responded positively. One did not respond.

Chart 5.12



CHAPTER SIX

DISCUSSIONS, CONCLUSIONS AND RECOMMENDATIONS

6.0 Overview

This chapter will look at the discussions of findings arrived at in the study in relation to the introduction and the literature that was reviewed. All the concepts of the study in relation to previous research will be covered here. This chapter will also cover the conclusion which will be in relation to the research hypothesis and research problem questions. The chapter will lastly look at the recommendations suggested.

6.1 Discussions

The general purpose for carrying out this study is to find out to what extent the rule of law in Kenya has deteriorated due to lack of acknowledgement judicial independence and then from there, to find solutions to the problems brought about by deterioration of the Rule of Law. From the data collected from respondents, the findings show that very few individuals in Kenya have faith in our judicial system with the most observing that the Judiciary is either corrupt or compromised by the other arms of the state. Most felt that the mode of appointment of Judges is either politically motivated or lacks transparency all together. These beliefs have culminated into the public claiming that Rule of Law does not exist since all individuals are not equal before the law and neither are all individuals under the law in Kenya; some entities seem to be above the law.

From the first pie chart, it became evident that only 23.4% of the respondents believed that Rule of Law actually exists and is operational the other 76.6% have totally lost confidence in our

judiciary to uplift Rule of Law due to the partial nature of administering justice brought about by the corruption of Judges and court officials.

Previous researches have actually come up with figures close to these. This led to the government instituting major vehicles for reform such as the *Task Force for Judicial Reforms* to investigate the situation on the ground and to come up with solutions as fast as possible. These findings therefore are consistent with the previous findings in literature.

6.2 Conclusions

This study was motivated by the level of injustices being occasioned to Kenyans due to lack of effective redress from their courts of law. This situation has become so notorious that Kenyans are now opting for international courts to solve issues they themselves would have normally solved with ease. For instance the perpetrators of the 2007/2008 post election violence will have to be tried in the International Criminal Court at The Hague because the public totally disagreed with the case being tried in Kenya for fear of lack of redress to the victims. This study seeks to find a cure to this problem by ensuring that the confidence of the people regarding their judiciary is restored and the only way to do this is by finding ways to ensure that the Judiciary is independent so that it can carry out its functions of uplifting the Rule of Law without fear or favor.

- 1) According to the findings it is clear that the judiciary in Kenya lacks autonomy from the rest of the arms of the government. This is a serious breach of the major criteria of a country governed by Rule of Law.
- 2) It is also evident that the appointment of the Judges and Judicial officers is still perceived as non transparent even with the promulgation of the new constitution which has

implemented most of judicial reform recommendations for the attainment of judicial independence. The problem was that the appointment on advice of the JSC by the president was retrospective keeping in mind the officials of the JSC were themselves appointed by the president so this was not a transparent way of appointment since the officials of JSC would still serve the interests of their appointing officer. With the new constitution, this setback is minimized by achieving a degree of autonomy of the JSC where the officials will from now be appointed basing on elections from several entities.

- 3) The corruption in our judiciary runs deep basing on the interest based rulings favoring the rich or the other governmental bodies. This is the major inhibitor of judicial independence since powerful individuals do not want to be subjected to law and therefore corrupt judges to get rulings that are beneficial to there interest. The provision that Judges should be exempted from tax because of the nature of their work and to minimize corruption has proved to be ineffective as Judges still solicit bribes for favors in legal matters. This corruption destroys the notion of impartiality and equality before the law.
- 4) The status of judicial independence in Kenya in relation to the internationally set standards was for long viewed as wanting. But with the promulgation of the new constitution, several implementations will raise the standards of the state of judicial independence to bring it at par with the international recommendations.
- 5) From the data obtained, the processes of punishing judges for misconduct during exercise of judicial duty are encouraged. Although there have been contentions that the punishment mechanisms may they themselves occasion interference of the judiciary, the need to streamline the system is more critical. All that needs to be done is for the trials and subsequent pronouncement against the Judges be subjected to the rules of natural

justice in order to uphold the Rule of Law which this study seeks to rejuvenate. The current method of internal assessment by the judiciary is called for as it minimizes undue interference of the affairs of the judiciary.

- 6) The study has affirmed the hypothesis that the undermining and subsequent deterioration of judicial independence has caused adverse effects on the Rule of Law to the extent that to a large extent, Rule of law can be said to be an illusion in Kenya. The mere fact that the Judiciary would rather bend to the whims of the government and corrupting individuals rather than owe allegiance to the Rule of Law, certain principles of Rule of Law have been lacking in Kenya these include the notion that the government and its officials should be subject to the established laws of the land, that there should be equality of all persons before the eyes of the law irrespective of their social status or political opinions and that fundamental human rights should be respected by all entities. The fact that the culture of impunity exists, the law has often been bended by the powerful to benefit their interests with utter disregard of the consequences this has to the rest of the citizens. The study has shown that the mere realization of judicial independence will reinstate Rule of Law in Kenya. If the courts could uphold the law without fear or favor, Rule of Law would not only be theoretical and illusory but would be practical.

6.3 Recommendations

- 1) Now that the new constitution has expressly provided for the independence of the judiciary, practical measures should be implemented to ensure the constitution is

complied with. Drastic measures should be taken against any entity that purports to unduly interfere with the judicial process in addition to the already prevailing measures of contempt of court. Devolution of powers should be practical with the mandate of the executive and legislature with regards judicial matters being clearly demarcated to reduce the tendency of undue interference of the judiciary.

- 2) Corruption of the judiciary should be dealt with promptly in order to ensure the public trust is revived. More stringent measures should also be undertaken to discourage would be corrupt judges. Moreover, the clean up should entail the whole judicial body from the Judges to all the judicial officers like the clerks and registrars as well as other entities like the police who most likely interact with judicial system.
- 3) The appointments of the Judges of superior courts should be as transparent as possible by ensuring that the Judicial Service Commission is autonomous. The history of the appointee should be investigated to ensure that the appointee is of good conduct and not prone to corruption.
- 4) When it comes to investigation of misconduct, the rules of Natural Justice should be upheld. The investigative bodies should also avoid crossing the line in their investigations so as not to cause more interference with the functions of the judiciary by threatening the constitutionally enshrined security of tenure of Judges.
- 5) The state should encourage popular justice in a bid to restore faith and trust to our judicial system rather than condone the institution of litigation in foreign courts.
- 6) With regards the public, the state should carry out enlightenment institutions where the public would be educated on the current reforms taking place as well as education on the reforms being implemented by the new constitution so as to solicit confidence in the

judicial system. The state should also encourage the founding of additional public bodies which will serve to represent the interests of the politically and economically weak. This would create a body capable of blowing the whistle each time a court seeks to give judgment based not on the merit but on undue influence or corruption. Furthermore, the public should be more involved in judicial reforms committees to ensure the public regains confidence in the system.

- 7) The culture of impunity should be ended by the expedient arraignment of any state official or entity which purports to infringe on the human rights of Kenyans enshrined in the constitution. Specifically, the police should be targeted and brought to book each time they execute a suspect. This is because the death sentence should only be passed by a court of competent jurisdiction and not the police. This would serve to show that the police are not above the law and reinstate Rule of Law in Kenya.
- 8) Subsequently, more research is apparently needed on the appointment of judges and its operation on judicial independence as well as the most precise method of checking the judiciary without occasioning further interference on the judiciary.

6.4 Review

This chapter discussed the research findings in relation to the research problem and provided the conclusions and the recommendations of the researcher.

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APPENDICES

APPENDIX A: TIME FRAME

Proposal writing	1 month (September 2010)
Preparation & piloting of instruments	2 weeks (October 2010)
Collection of data	2 weeks (October 2010)
Data cleaning & organization	3 weeks (November 2010)
Data analysis and interpretation	2 weeks (November 2010)
Preparation of first draft of the report	1 month (December 2010)
Writing and submission of final report	January 2011

APPENDIX B: PROPOSED RESEARCH BUDGET

Equipment& stationary (paper for making questionnaires and writing down interviews)	300 Ksh
data access	300 Ksh
Travelling expenses	1000 Ksh
Research assistance	500 Ksh
Data analysis	100 Ksh
Secretarial services & binding	1500 Ksh
Grand total	3700 Ksh

APPENDIX C: INSTRUMENTS

QUESTIONNAIRE 1

Dear respondents as part of my requirements to the award of a Bachelors Degree in Law at Kampala International University. I am administering this questionnaire to collect information on the effects of undermining judicial independence on the rule of law in Kenya. Please answer as honestly as possible.

INSTRUCTIONS

1. Do not write your name anywhere on this questionnaire.
2. For section A, tick where appropriate.
3. For section B, write down appropriate responses.

SECTION A

Gender: Male. ☐ Female.. ☐

Ages 20-29 ☐

30-39 ☐

40-49 ☐

50-59 ☐

60-above ☐

Education Background

Primary ☐ O-level ☐ A-level ☐ Degree ☐ Other ☐

SECTION B

- 1) What is your take on judicial independence?.....
- 2) What is your take on Rule of Law.....
- 3) Do you think that the Judiciary in Kenya is Independent from the executive and Legislature?.....
- 4) Do you think the appointment of Judges in Kenya is transparent or is it political?.....
- 5) Do you think the Judiciary is transparent or is it corrupt?.....
- 6) Do you think machineries to punish Judges tamper with Judicial independence?.....
- 7) Do you think that Kenya meets the international requirements for independence of the judiciary? If yes to what extent.....
- 8) Do the courts give justice to all citizens of Kenya equally?.....
- 9) Do you think that everyone or everybody is under the law in Kenya?.....
- 10) Do you think that the Rule of Law is existent in Kenya? If yes to what extent?.....

QUESTIONNAIRE 2

Dear respondents as part of my requirements to the award of a Bachelors Degree in Law at Kampala International University. I am administering this questionnaire to collect information on the effects of undermining judicial independence on the rule of law in Kenya. Please answer as honestly as possible.

INSTRUCTIONS

1. Do not write your name anywhere on this questionnaire.
2. For both sections A & B, tick where appropriate.

SECTION A

Gender: Male. ☐ Female.. ☐

Ages 20-29 ☐

30-39 ☐

40-49 ☐

50-59 ☐

60-above ☐

Education Background

Primary ☐ O-level ☐ A-level ☐ Degree ☐ Other ☐

SECTION B

- 1) Do you think that the Judiciary in Kenya is Independent from the executive and Legislature? Yes ☐ No ☐
- 2) Do you think the appointment of Judges in Kenya is transparent? Yes ☐ No ☐
- 3) Do you think the Judiciary is corrupt? Yes ☐ No ☐
- 4) Do you think that Judges should be punished for wrongs committed in exercise of duty? Yes ☐ No ☐
- 5) Do you think machineries to punish Judges tamper with judicial independence? Yes ☐ No ☐
- 6) Do you think that Kenya meets the international requirements for judicial independence? Yes ☐ No ☐
- 7) Do you think that everyone or everybody is under the law in Kenya? Yes ☐ No ☐
- 8) Do the courts give justice to all citizens of Kenya equally? Yes ☐ No ☐
- 9) Basing your answer on the above answers, do you think that the Rule of Law is operational in Kenya? Yes ☐ No ☐

INTERVIEW GUIDE

1. What do you understand on judicial independence?
2. What is your take on Rule of Law?
3. Do you think the two are interrelated? If yes how?
4. Do you think that the Judiciary in Kenya is independent from the executive arm or the legislature? If no to what extent is the interference?
5. Does the interference cause the courts not to honor their mandate effectively?
6. Do you think that the Judiciary is corrupt? If yes is the corruption entrenched so as injustices are being carried out?
7. Do you think that modes should be established for the punishment of judicial officers in exercise of their duties?
8. Do punishments towards Judges misconduct occasion interference of judicial duty?
9. Do you think that Kenya meets the international requirements for judicial independence?
If yes to what extent?
10. Do you think that every citizen, body or entity is under the law in Kenya? If not who practically not?
11. Does every citizen in Kenya have equal access to justice in Kenya? If no, why is that?
12. Considering all the above answers, do you thin that the Rule of law in Kenya exists? If yes to what extent?