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IMPEACHMENT IN THE KENYAN LEGAL CONTEXT

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DECLARATION

I, SELINA NELIMA MUCHUNGI declare that this thesis which I submit for the Master of Laws Degree at the University of Nairobi Law School is my original work and has not previously been submitted at another University.

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This thesis has been submitted with my approval as the University of Nairobi Supervisor.

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DEDICATION

I wish to dedicate this work to my family; my husband Kevin Kakai for his endless support, understanding and selflessness and my daughter Hadassah Kakai for her love, understanding and endurance during this study. You will always be remembered.

I would also like to dedicate the work to my mother, Ruth Muchungi for her encouragement and prayers and for offering her leadership throughout my school life.

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LIST OF ABBREVIATIONS

KANU	Kenya African National Union
MCA	Member of the County Assembly
UK	United Kingdom
US	United States
CGA	County Government Act
MP	Member of Parliament
VP	Vice President

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ABSTRACT

The laws on impeachment in Kenya appear only to be on paper but not in practice. The people and institutions mandated to implement the process have constantly failed to follow the laws and the legal procedures that govern it. More often than not, the process has been politicized hence clouding the objectivity of the actors in the process. This has led to impeachment as a tool being abused and/or misused. The existing laws are insufficient to address these challenges. There is thus an urgent need to amend them or enact more laws to address these issues. Similarly, new policies need to be put in place to deal adequately with the process.

The researcher has employed mixed methods approaches, which included case study methodology, comparative research methodology and qualitative methodology to identify, analyze and explain different applications of the laws on impeachment in Kenya and other countries and doctrinal research methodology whose relevance was to help the researcher to look at the law as well as reports to examine how the country has performed so far.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 BACKGROUND

The word impeachment means a proceeding of a criminal nature against a public officer, before a quasi-political court, initiated by a written accusation called “articles of impeachment”.¹

According to Plunkett, originally, impeachment was invented by the British Parliament in the 14th century to control royal appointees.² It empowered the British Parliament to function as a court where the House of Commons would prosecute, that is, impeach a public officer before the House of Lords.³ The Good Parliament of 1376 produced the first recorded and recognized cases of impeachment. A case in point is the impeachment of William the 4th Baron Latimer which is the earliest recorded impeachment in the Parliament of England. He was impeached on account of various charges that were brought against him among them treason and bribery. He was accused of selling the castle of Saint Sauveur (a town in Quebec, Canada) to the enemy and impeding the relief of Becherel, a town in France. He was also accused of taking bribes to have captured ships released and also retained fines paid to the King. He took money from the crown and pretended to be paying loans which were fictitious.⁴ Latimer’s case marked impeachment as a means of initiating criminal proceedings against a public official who had committed an impeachable offence and also established it as a method of trial.⁵ Upon his impeachment, he was fined and imprisoned in the year 1375. He was later pardoned in October, 1376.⁶

¹ <https://the-lawdictionary.org>

²Plunkett T.F.T., ‘The origin of Impeachment’ Journal article published by: Cambridge University Press vol. 24, 1942-<https://www.jstor.org>

³ Ibid

⁴ <https://www.revolvy.com/page/William-Latimer%2C-4th-Baron-Latimer>

⁵Plunkett T.F.T., ‘The origin of Impeachment’ Journal article published by: Cambridge University Press vol. 24, 1942-<https://www.jstor.org>

⁶ <https://www.revolvy.com/page/William-Latimer%2C-4th-Baron-Latimer>

The other example that stands out is that of the impeachment of the 1st Duke of Buckingham, Thomas Osbourne. He was impeached on account of bribery charges. It was alleged that he took a bribe from the East India Company. Thomas Osbourne's case is relevant because it established an important precedent; an official set to be impeached cannot be pardoned even by the King himself.⁷

In the Kenyan context, impeachment was introduced by the new constitution of 2010. The president and county governors are among public officials that can be impeached.

The president during the old constitutional dispensation could be removed from office only under two circumstances. The first instance is if he was found to be incapacitated either physically or mentally⁸ while the second instance is if parliament passed a vote of no confidence in him.⁹

After independence, the president became hungry for power. He yearned for absolute power where the other branches of government would be subject to the Executive. To do so, he had to introduce a constitutional order that would allow him to act outside the structures of the constitution. To achieve this, several and continuous amendments were made to the constitution and any real or perceived resistance on presidential power was removed. This saw a steady rise in the power the president possessed.¹⁰

Between the years 1964 and 2008 there were 27 amendments to the old constitution.¹¹ They dismantled the original federal system of government first and then whittled down the checks and balances that existed in the old constitution. The powers of the president kept on increasing as the powers of the legislature and the judiciary decreased. The most significant was the 1982

⁷ <https://www.britannica.com/biography/Thomas-Osborne-1st-duke>

⁸ section 12 of the Constitution of Kenya, 1963

⁹ section 58 of the Constitution of Kenya, 1963

¹⁰ Kenya National Assembly Official Record (Hansard) 23/03/2010

¹¹ Khamadi S., 'Amendments in Kenya's first Constitution', <http://www.monitor.co.ke/2015/03/16/amendments-in-kenyas-first-constitution/>

amendment which introduced Section 2A to the constitution thereby converting Kenya into a one party state, Kenya African National Union. All political power in Kenya was vested in KANU which was the ruling party. For one to vie for any political office, he or she had to be a member of KANU.¹² This gave rise to ‘presidentialism.’ There was dominance and centralization of state power in the president leading to basically a complete failure of other state institutions. The president wielded immense power that could rarely be checked because he basically controlled all the arms of government. The other arms of government could not check his powers and with eradication of multi-partism, the president’s power could not be controlled. It was almost impossible under the old constitution scenario to remove the president.

The president could prorogue parliament and even dissolve it at any time. The national assembly on the other hand needed the votes of a majority of all the members to pass a resolution declaring that it had no confidence in the president. In such circumstances parliament would stand dissolved whether or not the president failed to resign from his office after the passing of that resolution.¹³

The parliament was at the mercies and whims of the president. Though it had the ability to vote and declare that it had no confidence in the president, there was what was referred to as a suicide pact. The life of the house was dependent on the term of the president in the office. The president’s resignation would mean dissolution of parliament but then again the members of parliament in such a case would have no intention or desire to end their own term. Parliament was thus placed in a paradoxical situation with the end result being a triumphant dictatorial executive.¹⁴

The judiciary like the parliament was immensely controlled by the president who had the sole powers to appoint the chief justice. He similarly had power to appoint puisne judges save that the

¹²Kenya National Assembly Official Record (Hansard) 23/03/2010 -<https://books.google.co.ke/books>; Khamadi s., ‘Amendments in Kenya’s first Constitution’, <http://www.monitor.co.ke/2015/03/16/amendments-in-kenyas-first-constitution/>

¹³ Section 59 of the Constitution of Kenya, 1963

¹⁴ Kenya National Assembly Official Record (Hansard) 23/03/2010 -<https://books.google.co.ke/books>

Judicial Service Commission was mandated to offer advice on who to appoint as such.¹⁵ He could revoke such appointments and was equally involved in the removal of judges.¹⁶

The Judicial Service Commission was similarly under the president's control since most of its members were his appointees.¹⁷ The members of the Public Service Commission were also appointees of the president¹⁸ including the Attorney-General.¹⁹

Apart from the appointments, the sitting president was not subject to criminal or civil proceedings. The law was such that criminal proceedings could not be brought and/or sustained against the president while he held office or against any person while duly appointed to exercise the functions of the office of president. Similarly, civil proceedings could not be brought and/or sustained against the president or any person while exercising the functions of that office.²⁰

Article 143 of the current constitution is a replica of section 14 of the old constitution. However, under the current constitution, the president's immunity does not extend to a crime for which he may be prosecuted under any treaty to which Kenya is party to and which prohibits such immunity.²¹

The new constitution of 2010 introduced impeachment in our laws. The president can be impeached on grounds of violation of a provision of the constitution or of any other law, where there are serious reasons to make the parliament believe that he has committed a crime under

¹⁵ Section 61 of the Constitution of Kenya, 1963

¹⁶ Section 62 (4) of the Constitution of Kenya, 1963

¹⁷ Section 68 of the Constitution of Kenya, 1963

¹⁸ Section 106 (2) of the Constitution of Kenya, 1963

¹⁹ Section 109 (1) of the Constitution of Kenya, 1963

²⁰ Section 14 (1) of the Constitution of Kenya, 1963

²¹ Article 143 (4) of the Constitution of Kenya, 2010

national and international law or for gross misconduct.²² Impeachment was further extended to county governors.²³

The national assembly is empowered to review the president's conduct in office and initiate the process of removing him from office. The senate on the other hand considers and determines any resolution to remove the president from office in accordance with Article 145.²⁴

The framers of the new constitution conceived that with the introduction of impeachment in our constitution, the president's powers as had been in the old constitution would be reduced or curtailed. The lives and terms of parliament and the executive are no longer intertwined and what is most important is the fact that the parliament can now check the executive by impeaching a sitting president without having to end its own term.

Once two-thirds of members of the national assembly support a motion to impeach, they send it to the senate. The senate must decide whether the allegations have been substantiated and may appoint a committee to investigate the allegations. If the allegations are substantiated, the senate will accord the president an opportunity to be heard before voting on the charges. In case two thirds of members of the senate vote to uphold any of the charges brought against the president, the president will be convicted and he at that point he will cease to hold office.²⁵

The procedure for impeaching a governor is similar save that in place of the national assembly it is the county assembly that moves the motion and recommends to the Senate.

Impeachment is particularly important in the case of the president since it removes the immunity spelt out under Article 143.²⁶ Any public official including the president is assigned powers under

²² Article 145 (1) of the Constitution of Kenya, 2010

²³ Article 181 of the Constitution of Kenya, 2010

²⁴ Article 96 (4) of the Constitution of Kenya, 2010

²⁵ Ibid

²⁶ Ghai J.C., 'Trying to understand impeachment process' -<https://www.the-star.co.ke/news/2014/02/14>

the constitution for specific purposes and not for abusing their office. It was the order of the day during the old regime for the president to overstep his mandate.²⁷ The intention of the framers of the current constitution when they introduced impeachment was that presidents and other public officials would understand the limits of their powers and respect and be committed to their responsibilities. It was intended to stop abuse and corruption and to restore confidence in government. They wanted to break away from the wrong culture and practices of abuse of state power and authority that had taken root. Impeachment was meant to be a statement that state power must be exercised in accordance with the purposes and objects of the constitution. The use of power by public officials must at all times be in an honorable and dignified manner. The officials are meant to understand that their decisions must be impartial and objective and mainly in the interest of the public interest. They must make decisions that are not influenced by nepotism, tribalism, improper motives or corrupt practices.²⁸

Apart from that, the president and other state officers are forewarned that their actions especially in their public and official lives and in some cases even in their private lives either while alone or while associating with other people will be checked.

Any personal conduct or interests that may conflict with public or official duties must be avoided.²⁹ The president and state officials must protect constitutional values, including the promotion of human rights and national unity.

In addition, the framers of the new constitution saw the need for legal reforms and institutional reforms since most public institutions had basically failed having been taken over by the president.

²⁷Ghai Y.P., 'Kibaki has abused his office' <https://www.pambazuka.org/governance/kenya-kibaki-has-abused-his-office>

²⁸ Ibid

²⁹ Ghai Y.P., 'Kibaki has abused his office' <https://www.pambazuka.org/governance/kenya-kibaki-has-abused-his-office>

1.1 STATEMENT OF THE PROBLEM

The laws governing impeachment in Kenya appear only to be on paper but not in practice. Out of the forty seven governors, so far only one (Hon. Martin Nyaga Wambora of Embu county) was subjected to the full impeachment process and convicted by the senate whose decision was however overturned by the court.³⁰ The impeachment process in relation to other governors like the former Nyeri Governor Nderitu Gachagua (late) and Murang'a Governor Mwangi Wa Iria only reached half way as the motions were only successful at the county assembly level.³¹

Others like the Machakos Governor Alfred Mutua,³² Governor Cornel Rasanga of Siaya County,³³ the then Bomet Governor Isaac Ruto³⁴ only remained attempts to impeach. There was also an attempt to impeach His Excellency the President Uhuru Kenyatta.³⁵ In all these cases, the process of impeachment faltered yet there was hue and outcry by members of public and members of the county assemblies that they were involved in misappropriation of funds or activities that could amount to abuse of office. In addition, the process was employed so frequently and casually thus diminishing its potency.

There was also failure by parties involved in following legal procedures leading to abuse of the process.

³⁰ Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] e KLR

³¹ <https://www.standardmedia.co.ke/article/2000214433/nyeri-governor-nderitu-gachagua-impeached-2/9/2016>

³² <https://www.standardmedia.co.ke/topic/Impeachment-motion>

³³ Ibid

³⁴ <http://www.nation.co.ke/counties/Fresh-bid-to-impeach-Governor-Ruto/1107872-3131606-i75n8p/index.html>

³⁵ <https://www.standardmedia.co.ke/topic/Impeachment-motion>

1.2 STATEMENT OF OBJECTIVES

This project seeks to do the following:

1. Investigate the challenges being faced by the actors in the legal system in implementing the existing laws on impeachment in Kenya.
2. Explore measures needed to be put in place to make the impeachment process significant, practical and successful in order to achieve its intended goals.
3. To discuss the possible amendments and new policies that could be made to existing laws
4. Propose recommendations to the Kenyan Parliament on the need to amend the existing laws.

1.3 RESEARCH QUESTIONS

This project aims to answer the following research questions:

1. What challenges are being faced by actors in the legal system in implementing existing laws on impeachment in Kenya?
2. What legal measures need to be put in place to make the impeachment process in Kenya more significant, practical and successful in achieving its intended goals?
3. What possible amendments and new policies could be made to the existing laws?
4. What recommendation should be made to the Kenyan Parliament when it comes to amending the existing laws?

1.4 HYPOTHESIS

The researcher assumes that enforcement of laws governing impeachment in Kenya is faced with challenges. Most actors in the impeachment process have blatantly disregarded the existing laws and laid down procedures thus hampering its implementation.

It is an assumption that the instruments used for the study will give valid and viable information.

1.5 JUSTIFICATION OF THE STUDY

Impeachment as a process poses critical implications and consequences which may be negative or positive. The outcome has ramifications not just on the individual being impeached but on the entire society in terms of political, economical and even social life.³⁶ It creates fears and uncertainties among investors and the business community and drives the markets down. Any form of crises and in this case a constitutional crisis can never be good for the markets.³⁷ It is therefore important that the process be properly understood and applied to achieve the purpose for which it was meant.

Secondly, there is a scarcity of materials on this topic since very few Kenyan scholars have written on it. The existing laws on impeachment have several loopholes as evidenced by their ineffectiveness. All these make impeachment and its process a grey area. The effect of it is that many people who are or are likely to be affected by the process have very little or no understanding of impeachment or the need for the process.

The national and county assembly, the senate and even the courts have had to grapple with the procedure on how to go about with the implementation of the laws. At times they have had to employ ad hoc means to solve cases brought before them. This has seen a lot of back and forth between the assemblies and the judiciary.

There is also general confusion on what impeachment involves due to the constitutional standard for impeachable offenses.³⁸ There is need to understand the process and the applicable standard of proving such offences and the point at which impeachment process should be employed. This project seeks to tackle these issues.

The findings and recommendations of this study could lead to making of new laws on impeachment and/or amendment of the existing laws governing impeachment and improvement

³⁶Craig B., 'The Impact of Presidential Impeachment on Markets',-www.schroders.com/.../impeachment/the-impact-of-presidential-impeachment-on-markets

³⁷ <https://www.phxplan.com/presidential-impeachment-impact-on-the-stock-market/>

³⁸ <https://www.phxplan.com/presidential-impeachment-impact-on-the-stock-market/>

in their application. This project unlike the other studies on impeachment in Kenya goes a notch higher by not only recognizing that there is a gap in the way the laws on impeachment are applied, it also offers recommendations on how to deal with these problems.

1.6 LITERATURE REVIEW

Raoul Berger in 'Impeachment: An Instrument of Regeneration', argues that there appears to be no consensus on what the role of impeachment was in the olden American democracy. He goes on to argue that there was similarly no consensus as to its role in the English history.³⁹ According to Berger, there are people who view impeachment as a fallacy and so they fail to consider the most important institutional aspect.⁴⁰

He suggests that impeachment should be used as an institutional remedy rather than partisan remedy for politicians who are after power or who slyly use it to force a transfer of power to those they want to be in power. He continues that impeachment should be about making a clear statement about what will befall those who abuse power at the same time serve to put reasonable restrictions on the conduct of those likely to succeed and take over such offices. Those interested in a system with checked or limited powers should welcome and embrace it.⁴¹

The observation made by Prof. Raoul Berger to the extent that the purpose for which impeachment is supposed to achieve has been misunderstood is very accurate. More often than not, the process comes down to partisanship if the vote follows party lines. For an official who finds himself in a minority party, often the threat is enough to force him to stand down before his guilt or otherwise is determined. The author however discusses impeachment in the context of the US. This study will be Kenyan based. In the US, impeachment has been employed sparingly when it comes to the president. For other public officials especially members of the judiciary; the success rate of impeachment has been high. In Kenya there has been no single success. This study seeks to find out the gap in our Kenyan laws that may be contributing to this state of affair.

³⁹ Berger R., 'Impeachment: An Instrument of Regeneration', Article in the Harper's Magazine, January 1974.

⁴⁰ Ibid

⁴¹ Ibid

David Stewart, one of the recent American scholars and writers on this topic also argues that there is confusion concerning what impeachment is. The confusion he says is not novel as it has been experienced since the ratification of the American Constitution in the year 1788. He states that there is a bit of clarity on what treason and bribery mean. The confusion comes in because of the interpretation of high crimes and misdemeanors.⁴²

He goes further to state that although impeachment is made to appear like a judicial process, the actual fact is that it is more political. It involves the congress removing a leader who is voted in by a section of the nation and sometimes the only public official selected by the whole nation. For that reason he argues that a president should not be impeached merely because his policies are unpopular. If a leader can justify his actions Stewart argues that he should not be impeached.⁴³

In Kenya, the process has been marred by confusion with a lot of back and forth between the assemblies, and the senate, and the judiciary. This Stewart argues has been caused by failure to define the constitutional threshold of the offences that warrant one to be impeached.⁴⁴

Stewart similarly does not argue from the Kenyan perspective which this study seeks to do.

Arthur Schlesinger wrote as follows on impeachment:

“The genius of impeachment lies in the fact that it can punish the man without punishing the office. The trick is to preserve presidential power but to deter presidents from abusing that power.”⁴⁵

Impeachment to him is a tool to control those in power. It ensures that no single man is above justice or the law. Impeachment is one of the balances and checks on the presidency and the power that accompany that office. This power has to be checked because just as it is able to do

⁴² Stewart D., ‘Five Books on Impeachment’ -<http://davidostewart.com/2014/09/five-books-on-impeachment/>

⁴³ Ibid

⁴⁴ Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] e KLR

⁴⁵ Schlesinger A., ‘Reflections on impeachment’, 67 Wash. L Rev. (1999)-www.signature-reads.com

good, it can also bring harm. The same power that is meant to serve the Republic may also mean the power to bring disgrace to it.⁴⁶ This sentiment holds true. Tools of impeachment should be used only as checks within a democracy.

Most scholars and writers in so far as this study is concerned have only gone as far as discussing the history of impeachment, what it is and what its purpose should be in the respective jurisdictions. Though some agree that the process has generally been unsuccessful, none has written on what exactly is causing this problem particularly in Kenya.

Locally there are very few scholars who have written on impeachment. The most notable ones Prof. Yash Pal Ghai and Cottrell Ghai have only written articles which elaborate on the impeachment process but they did not touch on how unsuccessful the process has been.

Prof. Ghai in his article, ‘President broke the law: now what?’ argues that the president should respect and safeguard the constitution and that it is the role of the Attorney General to advise him to do so. However, in case he fails to heed to such advice, then impeachment should be employed against him. He acknowledges that it is not easy to impeach a president since the process will turn out to be a money-spinning affair and will no doubt be politicized.⁴⁷ Prof. Ghai only mentions a few challenges of impeachment and does not look at the solutions to these challenges.

Cottrell Ghai in her article ‘Trying to understand the impeachment process’ gives a history of the origin of impeachment and its provisions under the Kenyan laws. She touches on a number of challenges being experienced in Kenya with impeachment. She mentions the interpretation of what amounts to an impeachable offence, politicizing the process, the standard of proof to be applied for impeachable offences, the period within which impeachment should be concluded which to her as provided in the laws is too short.⁴⁸ She however did not go beyond identifying the challenges.

⁴⁶ Ibid

⁴⁷ Ghai Y.P., ‘President broke the law: now what?’ -<https://www.standardmedia.com> – accessed on 14/12/2018

⁴⁸ Ghai J. C., ‘Trying to understand Impeachment Process’ – <https://www.the-star.co.ke> –accessed on 14/12/2018

Dr. John Mutakha Kangu on his part delved into grounds for impeachment of governors and the procedure under the County Government Act, 2012 and the Constitution of Kenya, 2010. He went further to discuss the justiciability of the removal process to the extent that it is only the senate with the authority to conduct impeachment. However, if the courts find that there was contravention of the constitution and the law in the removal process, it must intervene by granting appropriate reliefs.⁴⁹Dr. Mutakha like other scholars in Kenya did not tackle the general failures of the process.

There are Kenyan Constitutional law scholars who have written widely on constitutional matters but they are yet to write on the impeachment process in Kenya. There are other scholars who have written on alternative forms of checks and balances placed on the three arms of the government. Dr. Nkatha Kabira and Mr. Waikwa Wanyoike for example have written on Commissions while a few others have written on the right to recall the members of parliament. There is a gap in the existing laws on impeachment which needs to be addressed, hence this study.

1.7 RESEARCH METHODOLOGY

The methods used in this research are mixed method approaches. The research entails case study methodology, comparative research methodology, qualitative methodology and doctrinal research methodology. The research will be conducted based on existing resources mostly using internet searches and library searches. The reason is this method of data collection is low cost, fast and easily available. The researcher will rely on both primary data and secondary data. Primary data will include the Constitution of Kenya, Acts of Parliament, government reports and subsidiary legislation. Secondary data will include text books, journals, articles, book reviews, internet sources including online libraries amongst others. Library research and internet searches will seek to interpret the constitution, judicial decisions and scholarly writings on impeachment. Doctrinal research methodology is relevant because it aids in analyzing the law and identifying the legal issues that need to be researched on while comparative research methodology will help

⁴⁹ Mutakha KJ., Constitutional Law of Kenya on Devolution, Strathmore University Press, Nairobi, 2015

the researcher in identifying, analyzing and explaining the similarities and differences in impeachment process in other countries.

1.8 THEORETICAL FRAMEWORK

1.8.1 Legal Positivism Theory

Legal positivism is the unquestioning acceptance of laws. The law is accepted as it is laid down in statutes. John Austin one of the proponents stated as follows:

“The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text....”⁵⁰

The most influential criticisms of legal positivism is its failure to give morality its due. It also gives a very limited understanding of what the functions of law are especially as regards the human life structure. Lastly the theory fails to recognize the rule of law.⁵¹

The positivist approach is relevant in this study because it looks at the written law as it is and whether it is being followed and enforced to the latter. The other reason is because positive law is procedural in nature and helps in understanding what the law is and its application. This theory has led to the discovery that though there are laws on impeachment in Kenya, they are not being followed to the latter. The theory has also been instrumental in finding and recommending legal solutions to the challenges for example by suggesting possible amendments to the existing laws.

⁵⁰Green L. ‘Legal Positivism’, Stanford University Library of Congress Catalog Data: ISSN 1095-5054, first published on Fri Jan 3, 2003, available at <https://plato.stanford.edu/entries/legal-positivism/>

⁵¹Green L. ‘Legal Positivism’, Stanford University Library of Congress Catalog Data: ISSN 1095-5054, first published on Fri Jan 3, 2003, available at <https://plato.stanford.edu/entries/legal-positivism/>

1.8.2 Legal Realism Theory

They argue that law should be reduced to judges' decisions even when legal rules or statutes are determinate.⁵² They argue that often judges make new laws.

One of the most influential proponents of this theory was Oliver Wendell Holmes, Jr. He wrote that law is not just about logic but experience too. That while determining cases brought before them, judicial officers do not merely rely on law or legal provision. They also consider what is fair in the circumstances, public policy and at times other personal values. Jerome Frank another realist felt that legal rules in general were not important and that judicial outcomes depended on many factors which could be extra-legal.⁵³

The criticism has been that the theory tends to exaggerate the indeterminacy of laws.⁵⁴

Further the theory may not apply outside judge-led trials in common law courts.⁵⁵

Realist approach will aid in facilitating the understanding of the judge made laws on impeachment. This theory will also help in understanding how the courts as one of the actors in the system views impeachment. Kenyan courts have made various pronouncements on impeachment issues. Some of these decisions are not purely based on the written laws but what the judges thought was the correct determination of the issues at hand. These decisions have eventually formed part of the laws on impeachment. The courts in essence have been part of offering guidance to other actors in the impeachment process on how to implement the process of impeachment.

⁵² Green M.S., 'Legal Realism as Theory of Law', William & Mary Law Review, Vol. 46, pp. 1915-2000, available at <http://scholarship.law.wm.edu/wmlr/vol46/iss6/2>

⁵³ Tumonis V., 'Legal Realism & Judicial Decision-making', Mykolas Romeris University, 2012, 19(4), p. 1361-1382, available at <https://www.mruni.eu>

⁵⁴ Ibid

⁵⁵ Tumonis V., 'Legal Realism & Judicial Decision-making', Mykolas Romeris University, 2012, 19(4), p. 1361-1382, available at <https://www.mruni.eu>

1.8.3 Natural Law Theory

It maintains that law comprises a dual system. There is always a higher or superior law than the laws made by man. It is not pure since it is based on morality and ethics. Law is that which is right and which by reason enables man to choose between good and evil. It is a discovery of universal standards in morality and ethics.⁵⁶ Thomas Aquinas was one of the natural law proponents.

The criticisms of the theory includes the difficulty in interpreting what is good and wrong since people can have different interpretations and also because human behaviour is shaped by the environment, the conditioning, training and education among other things.⁵⁷

The researcher is looking at law from the perspective of what it ought to be and not merely what is contained in the books and statutes in order to realize the gaps in them and to find out challenges faced in implementing the impeachment process. This theory has been vital in identifying that the challenges in implementing the impeachment process do not just lie in the laws. They also lie in the manner that those charged with the duty of implementing those laws have interpreted and applied them.

1.9 LIMITATIONS

Impeachment affects top members of the executive and the judiciary who are difficult to find and disclose information.

Furthermore impeachment has a wide scope. It is both at the county level and national level. This work will thus focus specifically on impeachment of the president and governors within Kenya and the paper will be desk based.

⁵⁶ 'Natural law-Philosophy-All about philosophy' available at <https://www.allaboutphilosophy.org>

⁵⁷ Sullivan S.O., & Pecorino P. A., Deontology theories: Natural Law, 2002, 'The problems of natural law,' available at www/qcc.cuny.edu

1.10 CHAPTER BREAKDOWN

Chapter 1 has introduced the background of the study with an overview of statement of the problem, statement of objectives, research questions, hypothesis, justification of the study, literature review, research methodology, theoretical framework and limitations.

This will be followed by chapter 2 which is a discussion of the Kenyan impeachment laws. This Chapter is divided into two main parts. The first part will discuss the law as it is in Kenya on the impeachment of the president and the governors while the second part will deal with the challenges of the impeachment process in Kenya.

The third chapter will be on impeachment in other jurisdictions and the best practices that have been employed in the impeachment process and a brief comparison with the Kenyan impeachment process.

The last chapter will be on the measures needed to be put in place to make the impeachment process successful in achieving its intended goals. It will also conclude the research and make recommendations.

CHAPTER TWO

KENYAN LEGAL FRAMEWORK ON IMPEACHMENT AND CHALLENGES

2.0 Introduction

This chapter shall be discussed under two parts. The first part focuses on the Kenyan Legal framework on impeachment. It will look at what the constitutional provisions on impeachment are *vis-a vis* other legislative provisions concerning impeachment. The first part of this chapter also offers an explanation of functions and powers of each actor in the impeachment process.

The second part will focus on the challenges being faced by the various actors in carrying out their mandate during the impeachment process.

PART ONE

2.1 The Constitution of Kenya, 2010

2.1.1 Provision on Impeachment of the President

The constitution stipulates how the president can be impeached.⁵⁸ The process is set in motion at the national assembly. The law requires that a member who wishes to impeach the president before moving such a motion be supported by at least a third of all the members of the assembly. The circumstances that may lead to the president being impeached include a belief that he has grossly breached a provision of the constitution or has seriously infringed any other law or where there are serious reasons for believing that he has committed a crime under national or international law; or for gross misconduct.

After the motion has been moved it must get support from two thirds of all the members of the house before the speaker of the national assembly can communicate the lower house's resolution to the speaker of the senate. On being informed of the national assembly's resolve, the speaker of the senate convenes a meeting of the senate to hear charges against the president. While the

⁵⁸ Article 145 of the Constitution of Kenya

proceedings are ongoing, the president is not required to step aside. He is allowed to continue performing the functions of the office pending the outcome of the proceedings.

The senate has two options; either to conduct the impeachment proceedings in plenary or establish an eleven member special committee to investigate the matter. During investigations the president has the right to appear and be represented by legal practitioners of his choice either before the full house or before the special committee as the case may be. If the house finds that the allegations against the president have not been proved, the matter closes at that stage. However if the finding is that the accusations have been established, first of all the respondent in this case the president is given a chance to be heard in defence. Thereafter, the senate votes on the accusations.

Two-thirds of all the members of the senate need to vote to uphold any impeachable charge and if that happens the president ceases to hold office.

2.1.2 Provision on Impeachment of Governors

The constitution similarly stipulated how a county governor may be impeached.⁵⁹ A governor can only be removed from office if there are reasons for believing that he has grossly breached the provisions of the constitution or any other law for that matter; or where it is believed that he has committed a crime under national or international law. A governor can also be impeached for abuse of office or gross misconduct. The constitution does not provide the method for ousting county governors in case of such violations. The County Government Act, 2012 comes in handy.

⁵⁹ Article 181 of the Constitution of Kenya

2.2 The County Government Act, 2012

2.2.1 Provision on Impeachment of Governors

The procedure for removal of a county governor is found in County Government Act, 2012.⁶⁰ First of all, a motion has to be introduced by one member of the assembly by informing the speaker about it in writing. Such motion must get the backing of a third or more of all the members of the house for it to be admitted. After being deliberated on by the assembly, it must get the support of two thirds or more of all the members of the county assembly before it is taken to the Senate. It is only after these requirements are met that the senate speaker is informed of the lower house's resolve to impeach the governor. It is not necessary for the governor to step down as these processes go on. The law allows him to continue holding office and conducting his duties and functions until the final decision is made.⁶¹

Upon the matter shifting to the senate, the speaker calls for a meeting of all the members in order to hear the accusations against the governor. The members have an option of either hearing the matter in plenary or appoint an eleven member special committee to investigate the matter. Before the investigations are concluded, the respondent in this case the governor will be afforded a chance to appear and defend himself either in person or by legal representation.⁶²

If the senate finds that the accusations lack merit, the case is brought to a halt at that point. If however the accusations are found to be meritorious, the senate retreats to a closed session for further deliberations. Thereafter, each member votes to either convict or acquit the governor on the allegations. The governor continues to hold office if they vote to acquit but he ceases to hold office if convicted.

⁶⁰ Section 33

⁶¹ Ibid

⁶² Ibid

An unsuccessful motion can be introduced to the senate again but it has to wait until after three months have passed from the time it is rejected.⁶³

The grounds for impeaching either the president or the governor are more or less similar. The procedure for their removal though is stipulated in different legal frameworks. For the president, the procedure is spelt out in the constitution whereas for a governor it is found in the County Government Act, 2012.

2.3 Actors involved in Impeachment Process

There are three actors involved in the impeachment process. At the initial stage, it is either the national assembly in the case of the president or the county assembly in case of a governor. The senate ordinarily comes in at the second stage in both scenarios. The third actor is the courts. They come in at any stage of the proceedings once either party to the proceedings approaches them. In other jurisdictions like South Korea, courts come in at the second stage of convicting an impeached official. In other instances, courts act as the final arbiter and so come in at the tail end of the impeachment process.

2.3.1 House of Assembly

The national assembly in the case of the president and the county assembly in the case of a governor set the ball rolling. A member thereof with the support of at least a third of all the members moves the motion. Later on in the proceedings, if the motion gets the support of at least two-thirds of all the members of the house assembly, the process moves to the senate.

2.3.2 Senate

Upon receiving the motion and the resolution of the house assembly, the speaker of the senate convenes a meeting of the senate to hear charges against the president or the governor as the case may be. The senate may resolve to appoint a special committee to investigate the matter. The senate affords the president or the governor an opportunity to be heard during investigations. It is the senate that is mandated to vote to uphold any impeachable charge after finding that the

⁶³ Section 33

charges have been substantiated. The senate thus holds the power to bring the president's or the governor's tenure in office to a close.

2.3.3 Courts

Often courts have been accused of usurping the powers of other arms of government when it comes to its involvement in the impeachment process. They have been accused of issuing orders unnecessarily which inhibit the operations of the parliament. Several public officials including governors when faced with impeachment or even threats of impeachment often run to court to get orders to stall the process. Courts have however not been cowed by such accusations.

The courts have actively been involved in the impeachment process. In the case of *Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others*,⁶⁴ it was held that the High Court has supervisory role over impeachment proceedings and a constitutional jurisdiction to hear and determine any issue arising from impeachment proceedings. Courts decide constitutional questions which arise from the impeachment process.

In *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others*,⁶⁵ it was held that the court has jurisdiction to intervene where there was a violation or threatened violation of the constitution in pursuant to and in exercise of the jurisdiction of the court under Article 165 of the constitution. It has power to interrogate any act said to be undertaken pursuant to the provisions of the constitution and can supervise the other organs in the performance of their duties but only in exceptional circumstances at the intermediary stage. Additionally, the court must always exercise caution when dealing with other organs of government or bodies constitutionally mandated to act. Each case must be considered on its merits.

In the case of *Martin Nyaga Wambora & 33 Others -v- County Assembly of Embu & 4 others*⁶⁶, it was held that the conduct of the county assemblies and the senate should only raise the court's attention if they act contrary to what the norm is.

⁶⁴ [2014] e KLR

⁶⁵ [2015] e KLR

⁶⁶ HCCP No. 7 of 2014, [2015] e KLR

PART TWO

2.4 Challenges in Implementation of the Laws on Impeachment

Being a fairly new concept in our jurisdiction, having been introduced by the Constitution of Kenya 2010, no doubt implementation of laws on impeachment has had its fair share of challenges. Some of the major challenges are discussed hereunder.

2.4.1 Lack of objectivity

The Constitution of Kenya 2010 gave various institutions like the senate, the county assembly and the parliament immense power compared to the previous constitution. Among the powers they wield is that of impeaching the president and the governors. That power has however been subject to abuse. The process has been unfair with marked malice. There appears to be supremacy battles pitting governors, senators, members of parliament and members of the county assembly.

A keen look at what instigates most impeachment processes reveals pure witch-hunt and blackmail against those targeted even though coated with the spirit of fighting corruption. It has been used to settle scores or for selfish gains. Most impeachments in Kenya are fuelled by political differences and disagreements over allocation of contracts and tenders. Still there are cases where differences in job appointments have led to threats of impeachment being leveled against the public officials. It is in the public domain that there are unscrupulous groups that used to dictate how the former local authorities are manned that have now taken over the county governments.⁶⁷

The governors are left with no option but to facilitate the award of contracts and tenders to these crooked cartels or to members of the count assemblies if they are to survive the entire term in office. The current state of affairs unless tamed will compromise the implementation of important government policies and relevant pieces of legislation in counties.

⁶⁷ 'We must streamline Law on Impeachment' -<https://www.kenya-today.com/news/fwamba-impeachment-law-in-kenya> (accessed on 27/2/18)

Several governors across the republic are being held at ransom by some members of their county assemblies apparently for failing to work at their whims. In most cases, these county assembly members have the backing of unscrupulous groups and their intention is to frustrate the working of the Governors if they fail to dance to their tune. This is corroborated by the fact that for most governors targeted, no offence has been confirmed. Currently impeachment is too open to a lot of interference.

The lack of objectivity has been fuelled by people who take advantage of the civic information gap. The public is fed with the wrong information and they blindly believe that those involved in impeaching the governors or president are doing it for the benefit of the greater public unknowing to them that it is all mind games.

In the Supreme Court of Nigeria case of *Hon. Muyiwa Inakoju & Others v Hon Abraham Adeolu Adeleke and 3 others*⁶⁸; quoted and relied upon by our court in the case of *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*⁶⁹, the court observed as follows;

“It is not a lawful or legitimate exercise of the constitutional function in section 188 for a house of assembly to remove a governor or a deputy governor to achieve a political purpose or one of organized vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the house does not like the face or look of the governor or deputy governor in a particular moment or the governor or deputy governor refused to respond with a generous smile to the legislature house on a parliamentary or courtesy visit to the holder of the office.....section 188 is a very strong political weapon at the disposal of the house which must be used only in appropriate cases of serious wrong doing on the part of the governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the legislature to police a governor or deputy governor in every wrong doing. A governor or deputy governor, as human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross violations.

⁶⁸ S.C. 272/2006

⁶⁹ [2014] e KLR

Accordingly, where a misconduct is not gross, then section 188, weapon of removal is not available to the house of assembly.”⁷⁰

In *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*⁷¹ while following the Nigerian case of Hon. Muyiwa Inakoju⁷² similarly held that the removal of a governor through impeachment should not be taken lightly and that it should not be used for ulterior motives. In our constitution Article 181 sets very high standards for removal of a governor.

In *Stephen Nendela v County Assembly of Bungoma & 4 Others*,⁷³ Justice Mabeya held that the county assembly has to exercise extreme objectivity and adherence to principles of fair administration of justice. Where the motion to remove a member of the executive committee is not based on complaints from members of the public but from the assembly members themselves, great caution should be exercised to avoid condemning the state officer before even hearing him or her.

2.4.2 Misunderstanding the role of impeachment

Understanding what impeachment is and its uses and application is very essential to any democracy. Unfortunately, it is not just the members of public who lack knowledge on what it is and its uses and applicability but even the actors who are vested with this very power. Misunderstanding can easily render it a useless power or cause it to fall into relative disuse. Impeachment has become a threat to the institutions it was meant to protect because political actors do not understand its meaning and purposes. Impeachment has been pursued as a partisan remedy to force a transfer of power as opposed to using it as an institutional remedy. The politics of numbers is quite common in Kenya. Whoever has more numbers in the house is more likely to be the one to control it. Impeachment which is dependent on numbers in Kenya therefore has been used to settle scores or for selfish gains.

⁷⁰ Hon. Muiywa InakoJu & Others v Hon. Abraham Adeolu Adeleke and 3 others; S.C. 272/2006

⁷¹ [2014] e KLR

⁷² Hon. Muiywa InakoJu & Others v Hon Abraham Adeolu Adeleke and 3 others; S.C. 272/2006

⁷³ [2014] e KLR

There is a high temptation to use impeachment to remove a leader or official who has been elected by a majority of the citizens. In democracies where the president is elected by members of the legislature as opposed to the electorate, the temptation is much higher since the legislature will want to install their own choice as president and ignore the electorate's will.⁷⁴

This misunderstanding has led to the wrong people being targeted for impeachment, or for the wrong reasons or for no reason at all so as to subdue them or corruptly influence them.

2.4.3 Confusion on the Constitutional standards for impeachable offences

There is no clarity on what amounts to an impeachable offence particularly while referring to gross violation as a ground for impeaching the president or governor. There is no legislation or decision where it is stated what amounts to gross violation.

Secondly when the law talks of impeachment on account of a belief that the president or governor has committed a crime under national law or international law, it is not specified how and who should make the decision. People's views vary and so pegging such a serious matter and decision on a belief not only trivializes the impeachment process but exposes it to abuse.

Thirdly, gross misconduct is not defined and for a governor what constitutes abuse of office is not clearly stipulated. There appears to be no constitutional threshold of the offences that warrant one to be impeached.

In most jurisdictions including the US and UK, impeachment requires a "high crime or misdemeanor." In the UK it is felt constitutional history needs to be considered carefully because the phrase high crime or misdemeanor has a unique interpretation taking into account their legal tradition.⁷⁵

⁷⁴ Raoul Berger, 'Impeachment: An instrument of Regeneration', Harper's Magazine, January 1974.

⁷⁵ Berger R., 'Impeachment: An instrument of Regeneration' - Harper's Magazine, January 1974.

Provisions on what amounts to impeachable offences in Kenya appear to have been lifted from the English and American laws. The danger is that the interpretation of these provisions differs from one jurisdiction to another.

In the UK, impeachable offence ranged from subversion of the Constitution, usurping Parliament's power, abuse of power, neglect of duty, corrupt practices and misadvising the King. Some of the offences were not crimes per se but they were put under the category of high crimes and misdemeanors at the time the constitution was adopted.⁷⁶

Courts in Kenya have tried to define what the constitutional threshold for impeachable offences are but this study suggests that they have failed to bring it out clearly. At one point courts have held that it is the county assembly and senate to decide the threshold but at other times, the courts have taken upon themselves to explain the threshold.

In *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*,⁷⁷ the honourable judges pronounced themselves on this issue that the best judges to determine whether the charges presented against the governor are in accordance with Article 181 of the constitution are the two houses. The constitution has given the power of judging the merit of the charges to those two houses, that is, the house assembly and senate when it comes to impeachment.

Even after holding as much, the court again pronounced itself as follows:

“We are therefore satisfied that we have the jurisdiction to interpret at this stage the meaning of the word “gross” as used in Article 181(1) of the constitution. In this interpretation, we will not be questioning the merit of the decision of the senate, but we will be formulating a guideline on what constitutes gross violations of the constitution and the law bearing in mind the office of the governor in devolved government structure.”⁷⁸

⁷⁶ Ibid

⁷⁷ [2014] e KLR

⁷⁸ *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* [2014] e KLR

The court went on to define ‘gross’ violation and what it constitutes as was defined by the Supreme Court of Nigeria in *Hon. Muyiwa Inakoju & Others v Hon Abraham Adeolu Adeleke*. The word ‘gross’ the court found meant in general terms acts that are atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking which words express some extreme negative conduct.⁷⁹

As to what constitutes gross violation, the Supreme Court stated as follows;

“The following in my view, constitute grave violation or breach of the constitution (a) interference with the constitutional functions of the legislature and the Judiciary by an exhibition of overt unconstitutional executive power, (b) Abuse of the fiscal provisions of the constitution, (c) abuse of the code of conduct for public officers, (d) disregard and breach of chapter IV of the constitution on fundamental rights, (e) interference with local government funds and stealing from the funds, pilfering of the funds including monthly subventions for personal gains or for the comfort and advantage of the State Government, (f) instigation of military rule and military government, (g) Any other subversive conduct which is directly or indirectly inimical to the implementation of some other major sectors of the constitution”.⁸⁰

The Kenyan judges similarly agreed with the Nigerian Supreme Court’s definition on what constitutes gross violation. However, their conclusion seemed to suggest that each case has to be determined based on its unique facts. What is most important is that the decision should have regard to the constitutional provisions or any written law that is said to have been breached.

The Supreme Court was categorical that in their interpretation, not every infringement of the constitution or law can lead to the removal of a governor. There must be a demonstration that the infringement is serious. As to what constitutes gross violation, they stated that the standard to be used must take into account the purpose of Article 181(1) of the constitution. They set out what

⁷⁹ Ibid

⁸⁰ *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* [2014] e KLR

they thought was the yardstick to be employed in measuring accusations brought against the governor as follows; that is that the accusation must:

- (a) Be serious, substantial and weighty.
- (b) There must be a nexus between the governor and the alleged gross violations of the constitution or any other written law.
- (c) The charges framed against the governor and the particulars thereof must disclose a gross violation of the constitution or any other written law.
- (d) The charges as framed must state with degree of precision the Article (s) or even sub-Article(s) of the constitution or the provisions of any other written law that have been alleged to be grossly violated.⁸¹

2.4.4 The dilemma of similar outcomes (déjà vu)

When the president or governor is impeached, the deputy takes over for the period that is left of the term.⁸²

It has to be borne in mind that it is the governor who nominates the deputy governor. It is only the county governor who is directly elected by registered voters in the county.⁸³ The deputy governor is nominated by the county governor who has been duly elected.⁸⁴

This prevailing situation poses two challenges. Firstly it may as well be an extension of the old regime since the deputy governor assumes the office of his 'boss'. Impeaching the governor alone and not the deputy if successful may not have cured the existing rot. The end result of impeaching only one of them may thus not be felt.

⁸¹ Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others [2014] e KLR

⁸² Article 182 (2)

⁸³ Art 180 (1)

⁸⁴ Art 180 (6)

The second challenge is that having not been the one elected by the registered voters within the county, the deputy county governor may not be suited to represent the electorate. The fact that he is only nominated, were a by-election to be carried out, there is no guarantee that he would be the people's favourite.

2.4.5 Corruption and Partisanship

Impeachment in Kenya currently is a highly influenced process. It is open for members of parliament in the case of impeaching the president and members of the county assembly in case of impeaching governors to be influenced to vote in a certain way. Powers behind the removal of the president or governor may bribe members of parliament or members of the county assembly to vote in a particular way. The president or governor on the other hand may bribe their way out to survive impeachment.

Impeachment in most cases has been used to punish individuals because of their political affiliations. It has equally been used by corrupt cartels and members of either house to intimidate and threaten the governors to give in to their corrupt demands.

The politics of numbers worsens the situation. Where an official presides over an office where majority of members are from the opposition party controlling both houses, it is very easy to impeach them. The flip side is where the official's party controls both houses, it will be politically unappealing for them to vote to impeach him. Violations are thus overlooked at the expense of the public.

2.4.6 Fair Procedure

The reason why the county assemblies' decisions on impeachment have been overturned by the courts is failure to follow the due process for instance failing to give the person sought to be impeached a hearing. The other reason is the assemblies going against court orders.

In *Stephen Nendela v The County Assembly of Bungoma & 4 Others*⁸⁵, Justice Mabeya held that Section 40 (4) of the CGA requires the county assembly's select committee's considerations to

⁸⁵ [2014] e KLR

be in accordance with the rules of natural justice. The person being probed has to be given a hearing.

In the *County Assembly of Bungoma & 2 others v Stephen Nendela & 2 others*⁸⁶, the Court of Appeal while dealing with Justice Mabeya's decision agreed with the learned judge that the issue of fairness is one of the tenets of the principles of natural justice which is articulated under Article 47 of the constitution. That being the case, they agreed that it was Mr. Nendela's right for the assembly during the disciplinary proceedings to observe administrative action.

The judges went on to hold as follows:

“As stated, it was the 1st respondent's statutory right under Section 40(3)⁸⁷ of the Act “to appear and be represented before the select committee during its investigations.”

Though the two cases related to the removal of a member of the county executive, it is imperative to note that the law requires every respondent to be accorded a fair hearing or for those seeking his removal to act in line with the principles of natural justice.

Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others,⁸⁸ lays emphasis on these provisions. In part of its decision, the court took the view that the resolution proposing the removal of a governor from office involves a process in which a motion is tabled in the county assembly. It is then debated before it is either approved or rejected. It went on to state that this is the process that triggers the removal proceedings at the senate in the event that the motion is approved. Since it is at the county assembly that adverse findings against the conduct of a governor while in office are first made, and it is those findings in the form of a resolution that lead to the removal proceedings at the senate. The outcome at the senate may affect the governor's political right to hold an elective office. The court went on and found as follows:

⁸⁶ [2017] e KLR

⁸⁷ The County Government Act, 2012

⁸⁸ [2014] e KLR

“.....we are persuaded to find, which we hereby do, that even at the county assembly the right to a hearing must be accorded to a governor at any time that the motion proposing removal from office is being debated before it is approved or rejected.”⁸⁹

The same court held that failure of section 33(1) of the County Government Act, 2012 to make provision for a governor facing a proposal of his removal from office to be given a hearing is the lacuna in law. That section 33 should be read as a whole and that the right to a hearing provided for by section 33(2)⁹⁰ to a governor facing removal proceedings at the senate was sufficient to satisfy the legal requirement for a fair hearing. Furthermore, the court found that even though Section 33(1)⁹¹ of the Act does not provide expressly for the right to be heard, there is a presumption in the interpretation of statutes that rules of natural justice will apply whenever administrative decisions with a potential to adversely affect an individual are made.

In conclusion, the court found that the County Assembly of Embu violated the 1st Petitioner's right to fair administrative action enshrined under Article 47 of the constitution.

The same case of *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*,⁹² deals with the challenge of failure to obey court orders. The proceedings before the house were found to be void since members chose to proceed in full knowledge that there existed a court order barring them to do so.

On account of the members' disobedience of the court order, the three Judge bench determined in their judgment, that any proceedings taken after the issuance of the order was a nullity. The court went ahead to quash the county assembly's resolution to impeach the governor together with the Gazette Notice that contained the senate's resolution of impeachment the governor.

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² [2014] e KLR

It is trite that whatever is done in defiance of court orders is a nullity in law. It is however not uncommon for members of the county assembly and the senate to go against the orders of courts in their quest to have governors impeached.

The other challenges related to fair procedure is late service of notification to enable the respondents (governors) to adequately prepare for their defence. There is also failure to afford them sufficient time to appear and present their cases before the assemblies, incidences of respondent's counsels being denied audience and cases where the houses disallow some evidence being produced during the proceedings. Most of these challenges were manifest in the Stephen Nendela's case.⁹³

2.4.7 Disregard for public participation in the impeachment process

Being leaders elected by voters and members of the electorate, public participation before the impeachment process is set in motion is quite vital. In most cases however, the houses and the senate proceed on without involvement of members of the public. See the case of *Amina Rashid Masoud v Governor Lamu County & 3 others*⁹⁴ where the court held that where the committee is not based on complaints from members of the public but from the assembly members themselves, great caution should be exercised to avoid condemning the state officer before even hearing him or her.

The court equally made observation on the provisions of section 40 (2)⁹⁵ and 40 (3)⁹⁶ that care should be taken to ensure those involved in voting on a motion are an adequate number. The court must have felt that there is a higher likelihood of few people being influenced to vote in a certain way as opposed to when there are more.

In the rare occasions when the assemblies have invited members of the public to make reactions concerning impeachment, they have done so in a haphazard manner. There is no law regulating

⁹³[2014] e KLR

⁹⁴ [2016] e KLR

⁹⁵ The County Government Act, 2012

⁹⁶ Ibid

how public participation should be conducted. Merely carrying out advertisements in the print media in the strict sense and meaning of the term does not amount to public participation. There are very limited people who have access to newspapers or who can be said to keenly follow what goes on in the media. The poor majority are of course not among those who have access to such advertisements. Illiteracy and inability to access information among members of public also affects effective participation. So many people in Kenya cannot read or write.

2.4.8 Delays

Prolonged hearings result to public discontent and mounts pressure on the houses to speed up the process of impeachment and bring it to a quick conclusion. Delays in Kenya are occasioned by various factors among them deliberate disruption of the sessions by a portion of members who do not support the motion. They employ unorthodox ways to ensure nothing important goes on during impeachment sessions. There is another faction of the house that chooses to abscond thus ensuring that there is no quorum to debate the motion. There is also the misuse of courts purposely to stall the process. The official sought to be impeached may resort to rushing to court at every interval of proceedings seeking all manner of remedies. This largely contributes to a delayed process.

The practice is not only common in Kenya but also in Nigeria and in the USA where courts are actively involved during the impeachment process.

2.4.9 Competence of House and Senate members

Impeachment apart from being a legal and political issue is relatively a complex matter. Unfortunately, most house representatives are neither trained nor prepared. Impeachment requires gathering of evidence including documents, drafting of motions and tabling the same before the House, questioning of witnesses, cross-examination and oral testimony. Most members are not lawyers and have little or no knowledge on legal matters. Similarly, there are a number of senators who do not possess the necessary training, expertise and/or experience to enable them handle impeachment matters in a competent manner. On the other hand they face off with the defense counsels who are usually experienced trial advocates. Those sought to be impeached in most cases employ the best available advocates to defend them.

The Constitution of Kenya provides that for anyone to qualify to be elected as MP, among other things must possess certain educational, moral and ethical requirements as set down in the constitution or by an act of parliament.⁹⁷ Under the Elections Act, 2011 such a person should hold a certificate, diploma or other post secondary school qualification acquired after a period of at least three months study and recognized by the relevant Ministry.⁹⁸ Further qualifications under the Act are a replica of the requirements provided for in the constitution.⁹⁹ The level of academic qualification needed for one to become a member of parliament is not commensurate with the seriousness and the roles that go hand in hand with that office.

The educational requirements for members of the county assembly are a certificate, diploma or other post secondary school qualification.¹⁰⁰ These qualifications are the bare minimum and not commensurate with the seriousness of the office and the onerous tasks such a person is required to perform. The other qualifications include that one must be a Kenyan citizen for at least 10 years before the election, be a registered voter and not owe allegiance to a foreign state.

The qualifications for a senator are equally not proportionate to the weight of that office. It is only the president, the governor and their deputies that must be holders of degrees from a university recognized in Kenya.

The calibre of representatives in our political institutions pose a serious challenge especially when it comes to the impeachment process which requires members to possess sufficient knowledge on constitutional provisions, evidentiary issues, current affairs and the law generally.

⁹⁷ Article 99 (1)

⁹⁸ Section 22

⁹⁹ Section 24 of the Elections Act, 2011

¹⁰⁰ Section 25 of the Elections Act, 2011

2.4.10 Frequency

Kenya has had a spate of governors' impeachments and yet the only one that was confirmed by the senate is that of the Embu Governor, Hon. Martin Wambora. Luckily we are yet to have serious attempt to impeach the President but mere threats. In the case of governors if this continues unchecked, it will threaten development in the counties. Greedy MCAs will not allow governors to settle in office and serve their people. Most governors know too well that they have to please the house members to survive the entire term without drama even if that will threaten service delivery. Most of these processes are started to intimidate governors or coerce them into submission. It has been proved that impeaching a governor at the county level is quite simple.

2.4.11 Chaotic proceedings

One challenge being experienced in Kenya during impeachment is frustration of the process by members of the House. One way is by introducing chaos either by all or a section of the house. In Nairobi County Assembly for example, it was a common occurrence that whenever a member wished to table an impeachment motion against the former Governor Dr. Evans Kidero, chaos would erupt making it impossible for the session to go on. Some MCAs would claim that their signatures were forged and that they were not consulted on the matter.

In other circumstances, debates fail to kick off due to lack of quorum. A section of members choose to abscond the sittings making it impossible for any meaningful debate to go on.

2.5 Conclusion

This Chapter has given a summary of what various actors in the impeachment process do. It has also looked at the laws on impeachment both as they are in the books and statutes and the judge made laws contained in case laws. It has also identified a number of challenges plaguing the Kenyan impeachment process. The chapter that follows will be a comparative study on how other countries have handled the process, whether they face the same challenges experienced in Kenya and how they have dealt with them.

CHAPTER THREE

IMPEACHMENT IN OTHER JURISDICTIONS

3.0 Introduction

A number of countries have employed impeachment as a tool to fight corruption and other vices by high office holders. This Chapter will focus on five of these countries drawn from five continents: the United Kingdom in Europe, the United States of America in North America, Brazil which falls within South America, Nigeria which is in Africa and lastly South Korea in Asia.

Some scholars have suggested that impeachment as a process originated from the United Kingdom and that is why it is one of the countries under focus. The United States developed on the process having been a colony of the United Kingdom and has since used it in a more modernized and democratic fashion. Brazil on the other hand is unique taking into account that it is the country that has most recently used the process to impeach two of its presidents. In Nigeria, the process has been used frequently against its governors but with a lot of flaws. The process of impeachment there is quite swift but with little regard to the rule of law. Luckily, the Judiciary has come to rescue those aggrieved by the processes and decisions thereto. In South Korea the process was used against the president but the decision was overturned by the court in what was referred to as judicialization of politics. The involvement of courts in both Nigeria and South Korea in overturning the decisions of the legislature may be considered an affront to the principle of separation of powers but again it is a demonstration that the judiciary should not lie low where there are clear irregularities in the impeachment processes.

This Chapter thus gives an overview of how impeachment has been employed in other countries. It looks at the successes and the failures of the process in the selected countries and most importantly gives examples of public officials who have been subjected to impeachment, for which offences, under which circumstances and the outcome thereof.

3.1 United Kingdom

3.1.1 Impeachment in Medieval England

A primitive form of impeachment developed in England in the early medieval period before A.D. 1300. Parliament's role often seems to have been simply to ratify the decision made by the king against an official or other subject. This allowed the king to avoid creating the impression of tyrannical behavior by disguising his intentions as a governmentally reviewed and approved course of action.¹⁰¹

3.1.2 Parliament Impeachment

Impeachment by the Parliament in England emerged in the year 1376. The same year, two English subjects were impeached by parliament, one a noble and the other a commoner and London merchant. Both the noble, Lord William Latimer, and the commoner, Richard Lyons, were accused of misusing royal funds for personal interests. This time round, it is the parliament and not the king that initiated the proceedings. It ordered the immediate arrest of Lyons and Latimer, but Latimer demanded that written charges be submitted first. He also insisted on time to review the charges and prepare a defense, followed by a proper trial before the House of Lords. Although formal written charges were never produced, Latimer was given time to prepare his defence and he was tried before the upper house as he had requested.¹⁰² This is how the basic structure and proceedings of modern impeachment were established. Formal charges of wrongdoing are brought by the lower house followed by a trial on those charges in the upper house, during which the lords serve as both judge and jury.¹⁰³

Since then parliament began to treat impeachment as a way to check and curtail royal power. They could try any peer (noble) or commoner for "high crimes and misdemeanors." In practice the crimes included treason, bribery, misuse of public funds, incompetence in office, inappropriate or illegal influencing of the king's favor, corruption, oppression, drunkenness and

¹⁰¹ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹⁰² Ibid

¹⁰³ Ibid

vulgarity.¹⁰⁴ Parliament could issue criminal punishments for individuals convicted of impeachment charges, including jail time and even death by execution.¹⁰⁵

During the seventeenth century, parliament began to aggressively assert its right to impeachment and to attempt to influence policy by removing high-ranking royal representatives. A two-tiered system developed in which the actual trial was held by a higher council. The colonial assemblies had the power only to impeach officials but since they could not try them, they had to call on governing councils or provincial councils to hear the charges, weigh the evidence, and decide the punishment upon conviction.¹⁰⁶ Colonial impeachment was more of a form of protest against the crown than a genuine mechanism for removal of colonial rulers.

3.1.3 Impeachment procedure in the UK

The impeachment process is not provided for in legislation or the standing orders of the commons. The procedure is described in the first edition of Erskine May.¹⁰⁷ The starting point is the House of Commons which has the mandate to determine whether an impeachment should be commenced.¹⁰⁸ A member from the House of Commons institutes the proceedings by accusing the official of any of the impeachable offences; be it high treason or of certain high crimes and misdemeanours. He has to support his claim or charge with proof before moving that the official targeted be impeached. If the house finds that the charge is merited and there are sufficient grounds to support the accusation, they at that point agree to the motion. They also order or direct the member who moved the motion to proceed to the lords to have the accused impeached.¹⁰⁹

¹⁰⁴ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Erskine May, *Parliamentary Practice* 1st ed 1844 p376; Caird J.S., 'Impeachment '-House of Commons Library, Briefing paper number CBP 7612, available at www.parliament.uk/commons-library/papers@parliament.uk

¹⁰⁸ Ibid

¹⁰⁹ Ibid

The house then appoints what is referred to as a commons committee which is mandated to draw the articles of impeachment. The articles are then debated by the members of the house. It is only articles which the house is agreeable with that are delivered to the House of Lords. The accused will be required by the Lords to give written responses to the accusations. Such responses are then communicated to the commons. The commons after considering the answers by the accused may choose to give their own rejoinder to the Lords. If the commoners decide to go on with impeachment, the Lords proceed to order the accused to appear before them if he is a peer. However a commoner is arrested and taken to the Black Rod. The Lords though may have the accused released on bail pending the hearing and determination of the case.¹¹⁰

Once that is done, the commons have to appoint what they call ‘the managers’ who are like prosecutors in a criminal case. Their role is to prepare the evidence for the trial process. The Lords summon witnesses for both parties on their behalf. The accused is entitled to a defence counsel. The impeachment trial is near similar to a criminal trial. There is the examination of witnesses, cross-examination and re-examination. Once that is concluded, the Lord High Steward puts the question to each peer on each of the charges whether to convict or not. If the accused is found guilty on any of the charges, judgment is not pronounced instantly unless and until demanded by the commons. This was so because the commons even after the accused being found guilty had a choice to pardon him. It is noteworthy that the power to pardon lay with the commons since they are the ones that instituted the charges. The sovereign or the King could not pardon the accused under the Act of Settlement.¹¹¹

3.1.4 When impeachment was used

The earliest impeachment and the first to be recorded was that of Lord Latimer. He was impeached in the year 1376. In the entire history of England, there have been approximately

¹¹⁰Murphy J., *Impeached*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹¹¹ *Ibid*

seventy impeachments only with the last impeachment procedure being employed in the year 1806 against Lord Melville albeit unsuccessfully.¹¹²

Impeachment in the UK is considered obsolete. It has not been used for decades now. UK instead uses other means to make their officials accountable. Impeachment was utilized in the old era because it was viewed as the only way to make the members of the executive accountable. The parliament and the judiciary then had very little supervision of government power. Over the years and with modern politics, different means emerged or developed and substituted impeachment as the only way to check the executive. These mechanisms include parliamentary questions and independent committees of inquiry. Public officials are also made accountable through the doctrine of collective cabinet responsibility, the use of confidence motions and utilization of judicial review process.¹¹³

The 1967 Select Committee on Parliamentary Privilege advocated for abandonment of impeachment formerly through enactment of law. Until now, there is no such legislation that has been passed or introduced for debating. The recommendation of the Select Committee was reiterated in the third report of the Committee on Privileges in 1976-77. In the year 1999, the Joint Committee on Parliamentary Privilege Report stated the circumstances where impeachment had taken place previously were so different from the present day that the procedure may be deemed outdated.

Impeachment in parliament in the UK was a medieval means of removing the protection given to a royal servant whom the commons found objectionable but could not otherwise persuade the crown to dismiss. Ministerial responsibility to the house is the modern means of tackling that

¹¹² Murphy J., *Impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹¹³ Caird J.S., 'Impeachment' -House of Commons Library, Briefing paper number CBP 7612 available at www.parliament.uk/commons-library/papers/parliament.uk

problem.¹¹⁴It is argued that impeachment in Britain is dead and can only resurrect in a different form from the previous one.¹¹⁵

However in 2004, four decades after the said recommendations, members of parliament threatened to impeach Tony Blair, the former Prime Minister over the Iraq war record. They wanted to table a motion before the house calling for the former public official's impeachment.¹¹⁶Tony Blair had in 2003 wrongly claimed that Iraq was in possession of chemical or biological weapons or was making efforts to develop nuclear weapons which posed serious threat to the UK's national interest and was likely to inflict damage upon the region and cause instability in the world. The parliament felt that the former Prime Minister's claims were misleading and that there was no real threat that could have necessitated the invasion of Iraq in the year 2003.

It proceeded to prepare the motion which set out the accusations and grounds for impeaching Blair. The motion appeared formally in one of the list of future business in one sitting but it did not have primacy in terms of the business of the house. Subsequently, the same motion was repeatedly re-tabled as an item of business but the parliament never found time to debate it until the resignation of Blair as Prime Minister and a Member of Parliament in the year 2007.¹¹⁷ There were further threats in 2016 to bring a motion to impeach him over the same issue but this was seen as wastage of time since impeachment is employed in respect of public office holders only.

Previously those impeached suffered a much serious fate. Lord Lovat for example after being impeached for high treason in the house and found guilty by the House of Lords was hung,

¹¹⁴ McKay W & Johnson CW., *Parliament & Congress Presentation & scrutiny in the Twenty-first Century*, Oxford University Press, Inc., New York (2010) p511

¹¹⁵ Ibid

¹¹⁶ "MPs plan to impeach Blair over Iraq war record" 26 August 2004 *The Guardian*-[https:// www.theguardian.com](https://www.theguardian.com)

¹¹⁷ Ibid

drawn and quartered.¹¹⁸In the modern days, such treatment would most definitely be frowned upon since there are better and more humane ways of dealing with offenders. Impeachment was used previously because as stated before in this study, there were no other means which parliament could use to dismiss an individual holding office under the crown. Be that as it may, in the history of the English Parliament, there is no Prime Minister who was ever impeached. Ministers on the other hand were impeached before the modern concept of the cabinet was established.

3.2 United States of America

3.2.1 Impeachment in the United States of America

The US impeachment was adopted from England having been its colony. On attaining independence, the American people and their delegates did not feel comfortable with the idea of electing a president if they could not remove him or oust him from office between elections in grave circumstances.¹¹⁹ The president, vice president and all civil officers can be impeached.¹²⁰ Federal judges and cabinet members can be impeached but not senators or house representatives.¹²¹

In essence, only public officials and not private citizens can be impeached for crimes committed in office rather than for misdeeds that may have occurred in private life. The punishment that would result upon impeachment and conviction is removal from office and the possible barring

¹¹⁸ Caird J. S., 'Impeachment '-House of Commons Library, Briefing paper number CBP 7612 available at www.parliament.uk/commons-library/papers@parliament.uk

¹¹⁹ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹²⁰ Article 2, Section 4, Clause 1 of the Constitution of United States

¹²¹ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

of future office holding. No criminal penalties such as jail time could be ordered by the body that judged impeachment charges and the death penalty is certainly out of the question.

Impeachable offenses include treason, bribery, or other high crimes and misdemeanors against the United States public officials.¹²² Impeachment in the US is a constitutional remedy provided for by the constitution.¹²³ It is used by congress to get rid of federal officials found guilty of impeachable offences from office. Strictly speaking, impeachment's purpose is to maintain US government integrity as opposed to it being a form of personal punishment.¹²⁴

3.2.2 The House Role and Impeachment Proceedings in the House of Representatives

The house of representatives has the sole power of impeachment.¹²⁵ The impeachment process begins with only two individuals: the person who is suspected of wrongdoing and the person who complains about it. An official complaint of misconduct in office is filed with the House of Representatives. The complaint can be filed by almost anyone including citizens.¹²⁶ Ordinarily however, the complaint is made by a representative of the house or legislature, a special prosecutor or the president in cases in which charges against judges or other nonpresidential officials are being sought.¹²⁷

¹²² Article 2, Section 4, Clause 1 of the Constitution of United States

¹²³ Articles I and II of The Constitution of the United States

¹²⁴ McKay W and Johnson CW, *Parliament & Congress Presentation & scrutiny in the Twenty-first Century*, Oxford University Press, Inc., New York (2010) p511

¹²⁵ Article 1, Section 2, Clause 5 of the Constitution of the United States

¹²⁶ Murphy J., *The Impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001; Caird J.S., 'Impeachment '-House of Commons Library, Briefing paper number CBP 7612 available at www.parliament.uk/commons-library/papers@parliament.uk

¹²⁷ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

On receiving the official complaint of misconduct, the House of Representatives must determine whether there is any merit. They refer the matter to the house's judiciary committee which has jurisdiction over the federal judiciary, criminal law enforcement, and administrative procedure. The complaint is then usually forwarded to one of the judiciary committee's subcommittees.¹²⁸

A lawyer for each political party reviews the accusations and makes a report on their findings. If more information is needed, the subcommittee is given the authority to conduct further investigations and gather evidence on the misconduct the official is accused of in order to determine whether it will recommend formally charging him. Sources of evidence include committee investigations, materials from grand jury hearings and criminal trials, subpoenaed documents and live testimony before the committee.¹²⁹

If the evidence gathered during the investigation by the judiciary committee is strong enough to support charges of impeachable misconduct, the committee drafts one or more articles of impeachment. These are formal charges of wrongdoing. It also writes a report of findings, stating its recommendation to the house to adopt the articles of impeachment against the official in question. If no compelling evidence is gathered or if there is evidence of wrongdoing but the offense is not considered impeachable misconduct, the committee reports these findings to the house and the impeachment process stops immediately. On receiving the articles of impeachment and the judiciary committee's recommendation, the full house may revise the articles and can drop some or add more charges/articles of impeachment not drafted and recommended by the committee.¹³⁰

House members study the articles and the committee's findings and recommendations. They then deliberate on the indictment before voting on the same. The vote may be on all of the articles of impeachment at once or each article may be voted on individually. A simple majority vote in

¹²⁸ Ibid

¹²⁹ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹³⁰ Ibid

support of the articles results in their passage. This signifies official charging of the accused by the House of Representatives and the accused at this point is considered to be impeached.¹³¹

3.2.3 House Managers

The final step in the house before the impeachment process shifts to the senate is the appointment of house managers.¹³² These are house representatives who are chosen to “prosecute” or argue the case against the impeached official in the senate. They are usually drawn from both political parties to avoid the appearance of a politically motivated attack on the impeached official. They are chosen from the ranks of representatives who had voted in favor of impeachment. Managers can be appointed by the house’s resolution although in the olden days they were elected by the speaker of the house upon such authority being bestowed on him by the resolution.¹³³ The house managers orally impeach or accuse the official in the senate chamber. They read out the articles of impeachment.

Once proceedings shift to the upper house of congress, senators serve as jurors sitting in judgment of the impeached public official. The chairperson of the house managers then requests that the senate order the impeached official to respond to the charges contained in the articles of impeachment. The chairperson also requests a conviction on the charges and the resulting punishment. The managers oversee and actively prosecute the official in the upper house.

¹³¹ Murphy J., *The impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹³² Ibid

¹³³ Halstead T.J., ‘An Overview of the Impeachment Process’ CSR report for Congress, available at <https://www.senate.gov>

3.2.4 The Senate's Role and the Impeachment Proceedings in the Senate

The senate's role is to hear and try all impeachments since that is its sole power.¹³⁴ Before the trial begins, the members either take an oath or they affirm.¹³⁵ The senate while conducting impeachment proceedings is guided by the Rules of Procedure and Practice.¹³⁶ If it is the president being impeached, the Chief Justice of the Supreme Court chairs the trial.¹³⁷ He or she oversees the process and rules on all procedural questions, including what evidence can be presented or cannot be presented in the trial. The Chief Justice's rulings can however be overturned by the senators with a simple majority vote. The senators remain silent during the trial although they submit written questions for witnesses to the Chief Justice. In presidential impeachments, the president can appear to testify on his or her own behalf but he or she can also request the senate to be absent. In that case, the lawyers handle the entire defense.¹³⁸

The "jury" composed of senators listens to house managers and defense lawyers.¹³⁹ Both parties present evidence, call witnesses and cross-examine witnesses. After each side has presented its case, the senate meets in private and deliberates on the charges and the evidence against the accused official. After thoroughly discussing and debating the case, the senators vote.¹⁴⁰ Two-thirds of the senators must vote "guilty" on any given indictment for there to be a conviction.¹⁴¹

¹³⁴ Article 1, Section 3, Clause 6 of the Constitution of the United States

¹³⁵ Article 1, Section 3, Clause 6 of the Constitution of the United States; Rule III of the Rules Of Procedure And Practice In The Senate When Sitting On Impeachment Trials

¹³⁶ Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials

¹³⁷ Article 1, Section 3 Clause 6 of the Constitution of the United States; Rule IV of the Rules Of Procedure And Practice In The Senate When Sitting On Impeachment Trials

¹³⁸ Murphy J., *The Impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Article 1, Section 3 Clause 6 of the Constitution of the United States

The argument is that impeachment is an issue of great importance and requires an extra amount of care, debate, and consideration, ensuring that crucial thoughts are given at all time before reaching at the decision. This requirement also helps guarantee that a leader would not be removed hastily in the heat of a political moment. If the charges were politically motivated or part of a personal or party grudge rather than true offenses that harmed the office and the nation, it would be less likely that two thirds of the senators would in good conscience be able to vote for conviction.¹⁴²

If the official is convicted whether on one of the accusations or on more articles of impeachment, he or she is automatically removed from office. The officer presiding over the proceedings proceeds to pronounce the decision of conviction and the removal from office of the accused. Where an individual has already been convicted on one of the articles, the senate may choose not to vote on the remaining articles since this is considered to be unnecessary. It matters not whether a conviction is on only one of the accusation or more since the outcome is the same; removal of the official from public office.

The senators can decide to vote on additional punishment if any. They can decide to prevent the official from ever holding a public office again.¹⁴³ This requires only a simple majority vote. In the case of a president who is both impeached and convicted, the vice president immediately assumes the presidency.

An official convicted on articles of impeachment cannot be pardoned by the president and convicted presidents cannot be pardoned by future presidents. A conviction in the senate also does not shield the official from the filing of criminal charges since the impeachment proceedings are only meant to remove the wrongdoer and prevent him or her from committing

¹⁴² Murphy J., *The Impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹⁴³ Article 1, Section 3, Clause 7 of the Constitution of the United States

further crimes while in office. It is up to the judicial system to try the official on the charges that relate to his or her criminal acts and assign the appropriate criminal punishment.¹⁴⁴

The impeachment trial can be conducted in one of two ways. Traditionally the trial would be conducted before the full senate. The second way is where a portion of senators referred to as the senate committee would be appointed to conduct the proceedings. New rules were established that allowed the senate to create a special committee of 12 senators to hear the evidence of the parties. This also addressed the issue of senators who felt the process was complicated and time consuming.¹⁴⁵

The senate committee acts just as the full senate would by gathering evidence, hearing testimonies and ruling on motions put forth by the house managers or defense counsel. After receiving the evidence that relates to the misconduct of the official and hearing the defense's counterarguments, the committee writes up a transcript of the testimony it has heard. It presents this to the full senate along with a statement of the undisputed facts of the case and a summary of the evidence that relates to the aspects of the case that are disputed by the House managers and the impeached official's lawyers. The senate committee's proceedings and all testimony may also be videotaped. When the case returns to the full senate, senators can view the video tapes if they wish to help them gain more information and make up their minds about the official's guilt or innocence.¹⁴⁶The committee at this stage does not make an opinion on guilt or innocence or make any recommendation about how the senate should vote.

The full senate then goes over all of the evidence and testimony gathered and after reviewing the materials and evidence; the senators meet and discuss how satisfied they are with the quality and

¹⁴⁴ Murphy J., *The Impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹⁴⁵ Ibid

¹⁴⁶ Ibid

relevance of the testimony. If they feel that anything is lacking, they can call witnesses to testify before them or have evidence resubmitted. Once satisfied that the evidence is reasonably complete and that a suitably clear, detailed and accurate picture of the case has emerged, the senators listen to the closing arguments of the house managers and the defendant's lawyers.¹⁴⁷

The senators then debate among themselves the evidence that they have received and whether it points to the guilt or innocence of the impeached official in private. At this stage, members of the special senate impeachment committee can finally express their opinions about the defendant's guilt or innocence and recommend how to vote.¹⁴⁸

In nonpresidential impeachment trials, the senate would also hear and decide arguments concerning what evidence should and should not be allowed to be presented and which trial proceedings were or were not constitutional.¹⁴⁹

In the United States, there has never been a presidential conviction and impeachment is equally uncommon. Proceedings have been initiated against 62 federal officers since 1789 and only 17 of them have been impeached. This includes 2 presidents. Only 7 of the 17 were convicted on the respective articles of impeachment and removed from office, all of them judges.

Notable examples of impeachments in the US include President Nixon in 1974 who brought proceedings to a halt by resigning and President Clinton in 1998 who was found not guilty by the senate in 1999.¹⁵⁰

¹⁴⁷ Murphy J., *The Impeachment Process*, Chelsea House Publishers, 1968, 132 West 31st Street, New York NY 10001

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ McKay W and Johnson CW, *Parliament & Congress Presentation & scrutiny in the Twenty-first Century*, Oxford University Press, Inc., New York (2010) p511

3.2.5 The Impeachment of Richard Nixon

President Nixon's impeachment arose from a scandal that occurred in the year 1974 which came to be known as the Watergate scandal.¹⁵¹The president wanted to be reelected for a second term in office but the political climate was so hostile that he feared he would lose. There was thus need for vigorous campaigning if he was to secure a second term in office. His rivals of course were in the Democratic camp while he was a Republican. In order to disrupt the Democratic presidential campaigns some of his campaigners among them James McCord, Virgillio Gonzalez and Frank Sturgis organized and broke into the Democratic Party's national headquarters at the Watergate apartment at night and vandalized the office.¹⁵²They were however not lucky to escape. During their illegal activities they tipped off an alarm response which alerted guards at the hotel of the presence of intruders in the building. That led to their arrest. There was a lot of effort from the government of Nixon to cover-up the issue since they were directly involved but during investigations, most of the men who were arrested caved in to the pressure from investigators and gave away the government's involvement. When Nixon's staff members were questioned, they revealed that there was in place a committee mandated to ensure the re-election of the president. The committee engaged in dirty dealings including privately tapping conversations between the president and his aides.¹⁵³

The president denied any involvement with the burglary incident. He was ordered to release the secret tapes but he declined. His contention was that he enjoyed executive privilege and that he did not want to jeopardize national security. As this was going on, most of his staff members who were adversely mentioned all subsequently resigned. Eventually it took the orders of a federal judge and the intervention of the Supreme Court to have Nixon hand over the tapes. Even then, he held on to some of the tapes while a portion of what he surrendered had some conversations erased.

¹⁵¹Greve JE, 'What Richard Nixon's Impeachment Looked Like', (Aug. 5, 2014) - <http://time.com/3063704/nixon-impeachment/>

¹⁵² 'Watergate Scandal', available at <https://www.history.com/topics/1970s/watergate>

¹⁵³ Ibid

In early 1974 the house passed a resolution authorizing the judiciary committee to commence proceedings to impeach the president. This was done and formal impeachment hearings began in mid 1974.¹⁵⁴ The first article of impeachment that was brought against him was obstruction of justice which the house passed. Later two additional charges of abuse of office and contempt of congress were drawn and again they were passed by the house.¹⁵⁵

When the Supreme Court ruled that the president had no option but to provide the missing tapes, Nixon decided to resign on 8th August, 1974.¹⁵⁶ This was after he was found to have been involved in the cover up. Upon his resignation the Congress of the United States decided to drop the charges against him. His Vice President Gerald Ford took over at the helm of the nation and he chose to pardon Nixon. The essence of the president's pardon meant that Nixon could not be put on trial for any misdeeds he might have engaged in while he held the office of the President.

3.2.6 The Impeachment of Bill Clinton

Bill Clinton's impeachment was quite unique in the sense that the charges against him arose out of his private associations as opposed to his work while in public office. There were sexual harassment allegations that were brought by a lady called Paula Jones. During investigations of these allegations, Monica Lewinsky a former intern at the white house was summoned. She was questioned over an alleged affair she had with the president but she denied.¹⁵⁷ This became a public and a national spectacle. Though at first she refuted all claims of existence of the affair the denials were short lived. As fate would have it another lady Linda Tipp who worked with her happened to have recorded Monica in secret while she was discussing her affair with Clinton. The president similarly initially denied all allegations pertaining to the affair. Later a grand jury investigated him regarding the affair with Monica and that is when he conceded to having had an affair. On that account, the investigator Kenneth Star presented to the congress a report

¹⁵⁴ '1974 House begins impeachment of Nixon' available at <http://www.history.com/this-day-in-history/house-begins-impeachment-of-nixon>.

¹⁵⁵ 'Impeachment, Watergate Info' available at <http://watergate.info/impeachment>

¹⁵⁶ Ibid

¹⁵⁷ Glum J., 'Bill Clinton Impeachment Facts: How Monica Lewinsky Scandal Affects Hillary's Presidential Campaign', - INTERNATIONAL BUSINESS TIMES (July 26, 2017, 2:02 PM), available at <http://www.ibtimes.com/bill-clinton-impeachmentfacts-how-monica-lewinsky-scandal-affects-hillarys-2394926>

enumerating eleven reasons why the President had to be impeached. Star's report claimed that the president's actions of having an affair were inconsistent with his constitutional obligation to devotedly execute the laws. The investigator also accused him of committing perjury and abusing his power.¹⁵⁸

On 20th December, 1998 the president was impeached on two out of the eleven drawn charges being perjury and obstruction of justice. Clinton chose to stay put in his office during the entire process. He was later acquitted on both charges in early 1999 after trial before the senate. Conviction could only arise upon two-thirds of the senate's members voting in favour of either charge but they failed to.

The impeachment case of President Bill Clinton is notable because it demonstrated that in the United States it is possible for an official including the president to be impeached on account of nearly any circumstance. Clinton's sins were having an affair and failing to admit the truth. It is arguable whether impeachment was necessary under such circumstances and whether by merely having an affair with another adult could affect his ability to faithfully execute the laws. It has been argued that Clinton's impeachment was as a result of a political feud by a highly one sided House of Representatives.¹⁵⁹

3.2.7 Consequences of impeachment in the United States

During the impeachment process the official or president as the case may be need not vacate his office. The official is allowed if he so wishes to hold office awaiting the senate's decision. United States of America is a strong democracy where power is distributed in a relatively even manner among the three arms of government. The framers of the constitution were therefore concerned that in case the president was suspended during the process, the other branches of government would receive a lot of power. This would in turn put the government in an insecure position. They felt that even with the process ongoing, the government would be in much safer

¹⁵⁸ Glum J., 'Bill Clinton Impeachment Facts: How Monica Lewinsky Scandal Affects Hillary's Presidential Campaign', - INTERNATIONAL BUSINESS TIMES (July 26, 2017, 2:02 PM), <http://www.ibtimes.com/bill-clinton-impeachmentfacts-how-monica-lewinsky-scandal-affects-hillarys-2394926>

¹⁵⁹ Ibid

place if the president still held office. There could be disadvantages to this state of affairs especially in weak democracies. There is a higher risk of the official or president sought to be impeached if he is corrupt or if he knows his fate to hurriedly pass a law or issue an executive order that would be favorable to him or offer him some form of protection.

The procedure adopted in the US may be okay as compared to nations with a powerful executive. The United States enforces its checks and balances in a more efficient way and may not see the risk of an impeached official staying in office.

It also depends on which offences the official has been impeached. It is arguable that it would have been grossly unfair to remove Clinton from office merely because of having an illegitimate affair with another woman since such acts cannot possibly be perceived to pose any threat to the other branches of government or the citizenry.

Once convicted though, any public official or the president is permanently barred from holding any public office. There is no leeway for such an official ever holding public office again and so the risks of future abuses are absent.

3.3 Brazil

3.3.1 Impeachment in Brazil

The power to try impeachable offences in Brazil is vested in the federal senate. The officials that are subject to such trials include the president and the vice-president.¹⁶⁰ The president of the Supreme Federal Tribunal presides over the proceedings and a conviction may only be rendered by two-thirds vote of the federal senate.

The Brazilian Constitution sets out a comprehensive list of impeachable offenses.¹⁶¹ Provisions on impeachments are much lengthier and have been amended on several occasions owing to the country's traditional changeover to democracy over the years.

¹⁶⁰ Article 52 of the Constitution of Brazil, 1988

¹⁶¹ Article 11 of the Constitution of Brazil, 1988

3.3.2 Impeachment under the Brazilian Constitution

Impeachable offenses under the Brazilian Constitution are known as *crimes de responsabilidade*, or crimes of responsibility.¹⁶² Examples of acts that constitute impeachable offences are infringement of the federal constitution, usurpation of the powers of the legislature and judiciary and non-compliance with the laws and court decisions.¹⁶³

The constitution does not make provisions for the procedure to be adopted during the impeachment trials. This is to be found in what the constitution refers to as a special law which establishes rules of procedure and trial. The law that currently governs impeachment trials apart from the constitution is Law 1079 of 1950. It classifies what impeachable offences are and provides for rules and procedures to be followed during trial.¹⁶⁴

3.3.3 Procedure under the Constitution

The chamber of deputies has exclusive power to institute impeachment charges against public officials. It is only until two thirds of the members of the chamber of deputies accept an indictment against the president or any other official for that matter, that he can be tried. For impeachable offences, trials are usually conducted before the federal senate.¹⁶⁵

The speaker of the lower chamber of congress accepts a petition for impeachment. He forms a congressional committee to examine the accusations and decide if removal is justified. The legislator in charge of preparing the committee report on the fate of whoever is sought to be impeached recommends that proceedings move forward to remove the person from office. The chamber of deputies/lower house then votes on impeachment. At least two-thirds of the deputies have to vote for impeachment for the motion to pass.

¹⁶² Article 29-A, Article 50 of the Constitution of Brazil, 1988

¹⁶³ Article 85 of the Constitution of Brazil, 1988

¹⁶⁴ Rattinger A., 'The Impeachment Process of Brazil: A Comparative Look at Impeachment in Brazil and the United States', -<https://repository.law.miami.edu/umialr>

¹⁶⁵ Article 86 of The Constitution of Brazil, 1988

3.3.4 The Role of the Senate

After the lower chamber vote the process then moves to the senate which has to decide with a simple majority vote whether to accept the charges. If charges are accepted the president is ordered to temporarily leave office awaiting the decision of the senate trial. In that case, the vice president takes over his office. The senate trial is presided over by the Chief Justice of the Supreme Federal Tribunal. The president can only be removed from office if two-thirds of the senators vote in favor of his removal.¹⁶⁶ If that happens, the vice president serves as president for the remainder of the president's term. The trial has to be held and determined within one hundred and eighty days. If that period lapses without the senate reaching a verdict, the president is restored back to his office. In Brazil there is an option of appealing the impeachment process as long as it is not legal.

There is a marked difference between the laws that govern impeachment in Brazil. Law 1079 is at variance with the constitution on some aspects in that upon impeachment the penalty for the official is to lose his position and cannot hold or exercise any public function for a period of five years. The current Brazilian Constitution on its part bars the impeached official from holding office or exercising the functions of his office for a period of eight years.¹⁶⁷

There are times when it is quite conflicting when it comes to choosing which law to follow in a given impeachment process. It is however argued that Law 1079 is given more weight compared to the constitution. There have been occasions when both laws were incorporated in the process. An example is the impeachment of the former President Fernando Collor. His impeachment was carried out pursuant to Law 1079 and the special rules drafted by the Chief Justice of the Supreme Court being the presiding officer of the senate trial. However upon his conviction, Collor was barred from holding public office for eight years an indication that the current constitution came into play at the last stage. This also signifies that the senate appreciates the Constitution during the impeachment process and in some situations may elect to follow its provisions.

¹⁶⁶ Article 52 of the Constitution of Brazil, 1988

¹⁶⁷ Article 52 of the Constitution of Brazil, 1988

3.3.5 The Impeachment of Fernando Collor de Mello

Fernando Collor was the first Brazilian President to be directly elected. He served as president from 1990-1992.¹⁶⁸ Though he started off well, he resorted to a political device called *medida provisória* commonly used by Brazilian Presidents. The rationale of this device was to bypass Brazil's Congress.¹⁶⁹ The Constitution of Brazil allows presidents to issue decrees or orders with the force of law. When such orders are issued they are meant to immediately take effect. The challenge was that this was only in theory. They were considered to be provisional until adopted by the congress and the adoption had to be within 30 days for them to be effective. If congress failed to adopt them within the stipulated time they became void ab initio.

In situations when congress failed to adopt them, Collor would routinely reissue them. Congress out of embarrassment could either adopt them as law or reject them. Collor implemented this device a record 141 times in 1990 alone.¹⁷⁰ This behaviour and approach annoyed several members in congress some of whom opted to challenge this conduct in court. Congress eventually received a bit of reprieve when the Supreme Court ruled that reissuing provisional decrees was an unconstitutional procedure especially where they had specifically been thrown out by congress. In the year 2001 congress sought to conclusively deal with this challenge by adopting Constitutional Amendment No. 32. This law forbid presidents from issuing provisional decrees in certain areas such as nationality, citizenship, political parties and rights and budgetary matters.¹⁷¹ The Amendment further limited validity of these decrees to sixty days only. The period could only be extended once for a further sixty days.¹⁷²

¹⁶⁸ Buchanan E., 'Petrobras scandal: Brazil's former President Fernando Collor de Mello 'took bribes' from firm', INTERNATIONAL BUSINESS TIMES (Feb 25, 2015), <http://www.ibtimes.co.uk/petrobras-scandal-brazils-former-presidentfernando-collor-de-mello-took-bribes-firm-1489438>.

¹⁶⁹ Skidmore T., 'The Impeachment Process and the Constitutional Significance of the Collor Affair, in Corruption and Political Reform in Brazil: The Impact Of Collor's Impeachment'

¹⁷⁰ Ibid

¹⁷¹ Keith S. R., 'Separation of Powers in Brazil'

¹⁷² Ibid

Apart from his annoying conduct, Collor failed to stabilize Brazil's declining economy while at the same time he was accused of being corrupt. In mid 1992 he was accused of operating a corruption scheme through his campaign treasurer Paulo César Farias. In September of the same year congress instituted impeachment proceedings against him on two grounds. The first one was that he allowed the breach of law and order and secondly that he behaved in a way that was contrary to the dignity, honor and decency of the office. He pleaded not guilty in the senate and contended that the charges that had been brought against him could not pass the threshold of impeachment. He argued that whatever he was accused of were not indictable common crimes. He also argued that the legal provisions that the senate relied on were vague and unconstitutional since they fell short of establishing a criminal offense. When it became obvious that he could not stop the senate process he resigned.

Though Collor later resigned in an attempt to prevent his trial by impeachment the Senate voted to continue its impeachment proceedings.¹⁷³ On 30th December, 1992 the senate managed to reach the required two-thirds majority and voted 76-3 to convict on charges of official misconduct. He was subsequently charged with ordinary criminal charges before the Supreme Court but was acquitted due to what was called lack of valid evidence.

3.3.6 The Impeachment of Dilma Vana Rousseff

In 2014 authorities uncovered a bribery scandal at the state-run oil firm Petrobras which was the largest Latin American company then.¹⁷⁴ The scam ran into billions of dollars. The scheme which later came to be known as Operation Car Wash, began in 2004. Ten years later in 2014 federal investigations were commenced. The nature of the scandal was such that contracts that had been awarded to this company were exaggerated. The bribes that were received as a result of the exaggerated contracts were shared by three Brazilian political parties including the Workers Party (which Rousseff belonged to) that had previously formed a ruling coalition. Other smaller

¹⁷³ Blount J & William R. L., 'Brazil President Resigns in Wake of Impeachment', - L.A. TIMES (Dec 30, 1992), http://articles.latimes.com/1992-12-30/news/mn-2585_1_vice-president.

¹⁷⁴ Watts J., 'Dilma Rousseff impeachment: what you need to know- the Guardian briefing', - The Guardian (Aug. 31, 2016), <https://www.theguardian.com/news/2016/aug/31/dilma-rousseff-impeachment-brazil-what-you-need-to-know>

parties too benefited from the bribes including projects initiated by the government. It became the order of the day for officials and politicians to either bribe or receive bribes as this was necessary for building coalitions with other political parties. It has to be noted that Brazil has several political parties and historically, there is no single party that has ever had a majority of members in congress. There is thus a high temptation for the ruling party or coalition to offer bribes to gain support in the congress. Bribes may be in the form of money or the offer for cabinet posts. The scandal damaged several businesses since Petrobras had sub-contracted other smaller companies that were primary suppliers. They were heavily affected when all contracts that Petrobras had been awarded were suspended. As a consequence several of them wound up.¹⁷⁵

Though Rousseff was known not to take bribes she was suspected to have known what was going on since she sat in the board of directors of the giant Corporation as its head. There were suspicions that she received funds in an unlawful way to boost her re-election. She also did not take any measures to avert the illegalities. A total of thirty seven petitions were filed to impeach her but the chamber of deputies came to a finding that only charges that related to budgetary issues were meritorious.¹⁷⁶

Rousseff put up a fight against the proceedings terming them a coup d'état against her. She felt her opponents wanted her out of office to give them a smooth sailing chance into the office of the president during the next presidential election.¹⁷⁷ She was especially dismayed that such grounds could be used to impeach her yet the administrations prior to hers had practiced similar schemes without impeachment proceedings being brought against them.

¹⁷⁵ Watts J., 'Dilma Rousseff impeachment: what you need to know- the Guardian briefing', The Guardian (Aug. 31, 2016), <https://www.theguardian.com/news/2016/aug/31/dilma-rousseff-impeachment-brazil-what-you-need-to-know>

¹⁷⁶ Romero S., 'Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote', - NY TIMES, (Aug. 31, 2016), <https://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html?mcubz=0>.

¹⁷⁷ Brazil impeachment: Key Questions, BBC NEWS (Aug. 31, 2016) <http://www.bbc.com/news/world-latin-america-36028117>.

Collor and Rouseff's impeachment did not both augur well with majority of the citizens. Most of them felt the two were treated like sacrificial lambs on account of the country's inability to regain from its economic crises. Their impeachments may have equally been influenced by their personality. They were viewed as highly arrogant politicians. Rouseff for example was too arrogant to make compromises or hold discussions on any issue even with her own party members. Her personality often turned members of her own party against herself. She had a stubborn and harsh demeanor that could have aided her to alienation and this fuelled the process.¹⁷⁸

On 17th April, 2016 the Brazil Congress' lower house voted overwhelmingly to impeach Rouseff.¹⁷⁹ They in actual sense surpassed the requisite two-third majority required to send the charges to the senate. The senate required only a majority vote to decide whether to begin the impeachment process or not. Its decision was made on 12th May, 2016 when they too voted and with a significant margin resolved to begin the process. Immediately the decision to begin impeachment was made the President was suspended from office. Again on the 9th August, 2016 the senate voted on whether to proceed with the impeachment and officially charge her¹⁸⁰ and once again the majority who were for impeachment carried the day. Rouseff was subsequently charged and convicted by the senate after managing to get the required two-thirds support from all the members. The conviction saw her leaving the president's office to her vice president Michel Temer who took over as the new president.

In Brazil impeachment requires the senate members to vote twice, first on whether to convict an official or not and second whether the officials political and civil rights should be taken away or not. This is contemplated under the sole paragraph of Article 68 of law 1079. Under that law, the official upon conviction and upon a successful vote of two third of all members is barred from

¹⁷⁸Jacobs A., 'Dilma Rouseff, Facing Impeachment in Brazil, has alienated many allies', - NY TIMES (May 1, 2016),<https://www.nytimes.com/2016/05/02/world/americas/brazil-president-dilma-rousseff-impeachment-alliesalienated.html>.

¹⁷⁹Brazil impeachment: Key Questions, BBC NEWS (Aug. 31, 2016),<http://www.bbc.com/news/world-latin-america-36028117>.

¹⁸⁰ Ibid

holding any public office for a period not exceeding five years. As per the constitution though, the official is barred for eight years.¹⁸¹For Rouseff's case the senate on the second vote failed to reach the requisite two-thirds majority. This meant that Rouseff retained her political rights.¹⁸²

Soon after taking over office the Attorney General brought corruption related charges against Temer.¹⁸³The chamber of deputies rejected pleas to waive his immunity and proceeded to vote to commence impeachment proceedings against him.¹⁸⁴He however survived the threat until the end of his term in October, 2018. Jair Bolsonaro is the man who will take over at the helm of the nation in the New Year after winning the October, 2018 elections.

Impeachments in Brazil have not yielded much. They can be equated to political change overs. Numerous forms of corruption have persisted in the government while the economy is still unstable. Further as it has already been stated elsewhere in this chapter there is a contradiction in provisions between Law No. 1079 and the constitution. It is important that Brazil consolidates its laws to better clarify the impeachment proceedings especially as regards the number of years an impeached official should be barred to hold office.

3.3.7 Consequences of impeachment in Brazil

Once impeached the public official including the president is suspended from the duty of holding office pending the outcome of his trial. The framers of the constitution figured out that this was one of the measures to curtail the powers of the president during such a critical moment of his tenure. On the contrary though, the Brazilian President still has vast powers. Nevertheless, suspension from duty may still be considered a safer practice. In nations with strong executives

¹⁸¹Article 52 of the Constitution of Brazil, 1988

¹⁸² Flynn D. & Haynes B., 'Brazil's Senate Votes to Remove President Dilma Rouseff From Office', - Huffington Post (Sept. 1, 2016), http://www.huffingtonpost.com/entry/dilma-rousseff-impeached-brazil_us_57c6f89ee4b0e60d31dc8599.

¹⁸³'Brazil Corruption Scandals: All You Need to Know', -BBC NEWS(July 13, 2017), <http://www.bbc.com/news/world-latin-america-35810578>.

¹⁸⁴ Phillips D., 'Brazil's President Keeps Job as Congress Votes against Corruption Charges', - The Guardian (Aug. 2, 2016), <https://www.theguardian.com/world/2017/aug/03/brazil-michel-temer-president-corruption-chargesvote>.

there is a greater possibility and leeway for the public official to continue acting corruptly with the aim of protecting himself as the impeachment process goes on.

Upon conviction an impeached president loses his office. In addition he is banned from holding any public office for a period of eight years from the date of conviction according to the constitution. As per law number 1079 the official or president is banned for five years. There is thus a leeway for such an officer only five or eight years later to run for the same office and in such circumstances if successful may commit the same or even worse acts.

If the offence for which the president or any other official is convicted by the senate is criminal in nature, he will still be liable to being subjected to the judicial process notwithstanding the initial punishment received on account of impeachment.¹⁸⁵

3.4 Nigeria

3.4.1 The Process for impeaching a President in Nigeria

The process for impeaching a president in Nigeria is provided for under the constitution.¹⁸⁶ Since the Nigerian Parliament is bi-cameral, the process of impeachment starts in the national assembly before moving to the senate. The accusations against the president are raised by not less than one third of the National Assembly members. They draft the allegations and upon signing present the written notice of the allegations to the president of the senate.

The president of the senate causes the said notice to be served on the public official and on each member of the national assembly. The office holder has a right to respond to the allegations in the notice and such reply is served on each member of the national assembly. Each house of the national assembly shall then resolve by motion without debating whether or not the allegations

¹⁸⁵ The Constitution of Brazil, 1988

¹⁸⁶ Section 143 (1) of the Nigerian Constitution, 1999

shall be investigated. The motion passes if it is supported by the votes of two thirds majority of all members of each house of the national assembly.¹⁸⁷

After the passing of the motion, the president of the senate requests the Chief Justice of Nigeria to appoint a panel of seven persons of unquestionable integrity and not being members of any public service, legislative house or political party to investigate the allegations. The president or holder of an office under investigation is given an opportunity to defend himself either in person or opt to be represented before the panel by advocates of his own choice.¹⁸⁸

The findings of the panel are communicated to both houses. If the report is to the effect that the allegation has not been proved there shall be no further proceedings in respect of the matter but if the allegations are found to have been proved the national assembly first mulls over the report. In case two thirds of members of each house resolve to support the panel's report, it is adopted. At that point the president or the holder of the office shall stand removed from office as from the date of the adoption of the report.

3.4.2 Consequences of impeachment

Upon the adoption of the report by the national assembly the president stands impeached and must immediately leave office. The office of the president then passes to the incumbent vice-president. Once the resolution is adopted there is no recourse to any court of law or judicial proceedings. The president cannot challenge the decision of the panel or the national assembly. An impeached president loses this pension for life upon impeachment.¹⁸⁹

¹⁸⁷ Ibid

¹⁸⁸ Section 143 (1) of the Nigerian Constitution, 1999

¹⁸⁹ Section 143 of the Constitution of Nigeria, 1999; 'The Process for impeaching a President in Nigeria'- <https://lawpadi.com/process-impeaching-state-governor-nigeria>

3.4.3 The Process for impeaching a State Governor in Nigeria

The process is provided for under the constitution.¹⁹⁰ The national assembly is mandated to commence the process by accusing the governor of gross misconduct in the performance of the functions of his office. This has to be in writing and signed by one third or more of members of the national assembly. The speaker of the house of assembly causes the written notice of allegations to be served on the governor and any reply by the respondent to the allegations in the notice is served on each member of the house of assembly. Thereafter the house of assembly resolves by motion supported by the votes of not less than two thirds majority of all its members without any debate whether or not the allegations shall be investigated. If the motion passes, the Chief Judge of the state at the request of the speaker of the house of assembly appoints a panel of seven persons who in his opinion are of unquestionable integrity not being members of any public service, legislative house or political party to investigate the allegations. The official under investigation has a right to defend himself in person and be represented before the panel by advocates of his own choice.¹⁹¹

If the panel makes a report that the allegation has not been proved, proceedings shall come to a halt. However if it finds the allegation against the holder of the office has been established, the house assembly will have to consider the report. Where two thirds or more of all members of the house support the findings in the report, it shall be deemed to have been adopted. The adoption of the report signifies the removal of the governor from office.

The constitution provides that the proceedings or determination of the panel or of the house of assembly is final. The courts are barred from entertaining or questioning any matter relating to such proceedings.

3.4.4 Consequences of impeachment

Upon the adoption of the report by the state house of assembly the governor stands impeached and his office passes to the incumbent deputy governor. The law provides that after the final

¹⁹⁰ Section 188 of the Nigerian Constitution, 1999

¹⁹¹ Section 188 of the Nigerian Constitution, 1999

resolve of the house and panel no one can challenge the decision in a court or in judicial proceedings.¹⁹²

Whereas there is no president in Nigeria who has ever been impeached, several state governors have been impeached since 1999.

3.4.4.1 Dieprieve Alamesiagha

He was a governor of Bayelsa State. His impeachment was on allegations of misappropriating public funds. There was a general feeling that his woes began when he parted ways with the former President Olusegun Obasanjo. Owing to the fact that corruption was rampant in the country and nearly all public officers were culpable, there is no way that only one man could be singled out and be punished. Obasanjo was known for being vindictive and no doubt played a major role to have the governor removed from office. Furthermore during that same period the federal government constantly meddled in the affairs of Bayelsa State with a view to undermine the governor. It eventually sought to remove him from office via impeachment. The impeachment process was conducted under tight security and funds were made available for those who participated. This saw the removal of the governor from office.¹⁹³

3.4.4.2 Joshua Dariye

He was the former Governor of Plateau State. He was removed from office by the house of assembly on allegations of financial impropriety. The process was quite unconstitutional as the house disregarded the rule of law. Only five members of the house of assembly were present during the impeachment process which was conducted on November 13, 2006 again with the support of the federal government. The process was unconstitutional since there was no quorum in the house to impeach the governor. The governor used this loophole and successfully appealed against the process. The court reinstated him to his office.¹⁹⁴

¹⁹² 'The Process for impeaching a State Governor in Nigeria' -<https://lawpadi.com/process-impeaching-state-governor-nigeria>

¹⁹³Kumolu C., 'Impeachment as a crude weapon: The Nigerian experience' available at <https://www.vanguardngr.com/2014/07/impeachment-crude-weapon-nigerian-experience/>

¹⁹⁴ Ibid

3.4.4.3 Peter Obi

The former Anambra State Governor was impeached on 2nd November, 2006. The house of assembly members again voted to impeach the governor under heavy security very early in the morning at 5.00a.m. Deliberations to impeach him took only one hour before the decision to impeach was arrived at. The former President Obasanjo was involved in the impeachment since he wanted Obi to join and support the ruling party in the subsequent elections. Obi did not agree to Obasanjo's proposition. He got reprieve from the courts and was reinstated to office.¹⁹⁵

3.4.4.4 Alhaji Rashidi Adewolu Ladoja

He was impeached because of his political differences with Chief Lamidi Adebibu. Each governor received N65 million as security vote every month. Whereas the governor felt the money was meant for public service the chief wanted a portion of it because he had supported the governor's election to office. Ladoja was also an ally of the then VP Abubakar Atiku who was at loggerheads with the president. In his case only eighteen legislators were present to impeach him. The law required at least twenty legislators to conduct impeachment proceedings. Luckily for him on 7th December, 2006 the Supreme Court reinstated him.¹⁹⁶

3.4.4.5 Ayodele Fayose

He was the Ekiti State Governor. He was impeached after being accused of financial misconduct and murder. Though a former supporter of Obasanjo, they disagreed and parted ways. The president sent the Economic and Financial Crimes Commission to investigate him and afterwards the members of the house impeached both the governor and his deputy Mrs. Biodun Olujimi on 6th October, 2006 leaving the office to Friday Aderemi the state speaker. Since the president wanted only the governor impeached and not his deputy and was unhappy with the state being

¹⁹⁵Ibid

¹⁹⁶Kumolu C., 'Impeachment as a crude weapon: The Nigerian experience.' –

<https://www.vanguardngr.com/2014/07/impeachment-crude-weapon-nigerian-experience/>

left in charge of the speaker, he appointed Brig-Gen. Adetunji Olurin to solely administrate over the matters of the state on 19th October, 2006.¹⁹⁷

Nigeria does not keenly follow its laws when it comes to impeachment processes. For all the mentioned impeachments democratic process were not followed. They were all engineered by the president or people close to the president who felt offended by the governors' conduct or who did not dance to their tunes.

Furthermore although the constitution provides that an impeachment resolution once passed cannot normally be challenged, experience has established that courts can determine the legality or otherwise of the process leading up to the removal of the elected official. It may be argued that it is only the process that is challenged in court.

Nigeria's impeachment process can be lauded for its simplicity and swiftness. There is very little room for the back and forth witnessed in Kenya between the assemblies and the court. It also provides mechanism where the office holder is given a chance to be heard in person and be represented by advocates.

The downside is that the opportunity for the office holder to defend oneself is absent at the initial stages. The accused comes in when the process is already at an advanced stage. It becomes an uphill task to undo what has already been done. The perception created by the houses once they vote to support the motion that paves way for investigations by the panel cannot be erased easily.

The process heavily relies on the judicial arm of government yet impeachment as it is known is mostly a parliamentary process. The constitution provides that the chief justice in the case of impeachment of a president or the chief judge in the case of a governor appoint a panel to investigate the office holder. The panel's findings once adopted by the members of the national assembly are final. Impeachment is a legislative tool for checking the powers of the other two arms of the government and so by including the judicial arm to actively take part in the process,

¹⁹⁷Ibid

there is an overlap of the functions of the two arms of government. It has to be borne in mind that it is the president who appoints the chief justice¹⁹⁸ and the chief judges¹⁹⁹ on the recommendation of the National Judicial Council subject to confirmation by the senate.

The process is thus also likely to create conflicts where the official impeached decides to seek relief from the court as a result of a flawed process. In that case, the very court that was part of the process will sit to determine the legitimacy of that process.

3.5 South Korea

3.5.1 Impeachment in South Korea

The Constitution of the Republic of Korea 1988 provides for impeachment of the president, the prime minister and justices of the constitutional court among other public officials.²⁰⁰ The grounds for impeachment are violation of the constitution or other laws in the performance of their official duties. In such cases the national assembly passes a motion for impeachment which is supposed to be proposed by one third or more of the total members and shall require a concurrent vote of a majority of the total members of the national assembly for passage. For the president the motion of impeachment has to be supported by a majority of the members of the national assembly and approved by two thirds or more of the total members of the national assembly.

Where a motion for impeachment passes against the official, he is suspended from carrying out his duties or exercising his power until the impeachment process is determined. The effect of the final decision on impeachment if successful does not extend further than removal from public office. That decision however does not shield the impeached official from criminal or civil proceedings being instituted against him.

¹⁹⁸ Article 131 of the Constitution of the Federal Republic of Nigeria

¹⁹⁹ Article 150 of the Constitution of the Federal Republic of Nigeria

²⁰⁰ Article 65 of the Constitution of the Republic of Korea, 1988

3.5.2 Impeachment Process under Korean Law

Impeachment is a method by the National Assembly of Korea to control other branches of government especially since theirs is a governmental system in which the president has more power than the other arms of government. The grounds for impeachment vary. They include violation of the constitution or other laws among others. They however do not include acts of immorality, political incompetence or policy mistakes.

The impeachment provisions for the president are found both in the constitution and the Constitutional Court Act.

The process starts with a motion for impeachment being introduced against the official sought to be impeached. If it approved the president or official steps out from his office until the Constitutional Court of Korea makes a final decision on the impeachment case.²⁰¹ During the impeachment process the constitutional court adjudicates over the proceedings while the chairman of the legislation and justice committee of the national assembly acts as the representative prosecution commissioner. The chairman essentially conducts the trial. He is the one who examines the president.²⁰²

The constitutional court should make its decision on impeachment within 180 days.²⁰³ It needs at least six out of nine judges to uphold the impeachment motion of the national assembly.²⁰⁴ If the impeachment motion is finally approved by the constitutional court, the incumbent president is removed from office. This paves way to a new election for the president which has to be conducted within 60 days.²⁰⁵

²⁰¹ Article 65(3) of the Constitution of the Republic of Korea, 1988

²⁰² Article 49 (1) of the Constitutional Court Act, 1988

²⁰³ Article 38 of the Constitutional Court Act, 1988

²⁰⁴ Article 113 (1) of the Constitution of the Republic Of Korea, 1988

²⁰⁵ Article 68 (2) of the Constitution of the Republic of Korea, 1988

3.5.3 Impeachment of President Roh Moo-Hyun

President Roh was impeached over his public remarks in December 2003 and February, 2004 that the citizens should be actively involved in the fight to achieve civil revolution. According to him that could only be attained by the citizens supporting his party (which was then in power) in the upcoming general election.²⁰⁶The opposition Grand National Party and Millennium Democratic Party at that time had the majority of members in the national assembly. They accused Roh of violating the Public Official Election Act of Korea. The relevant provision that he was said to have violated was to the effect that Roh being a public official was prohibited from influencing elections or the electoral processes.²⁰⁷ The National Election Commission of Korea a state agency mandated to supervise electoral processes²⁰⁸ruled that the remarks of President Roh constituted improper attempts to influence elections and that these activities violated the Act.²⁰⁹ Based on that ruling the opposition parties sought to impeach the president. They passed a motion to commence the process on 12th March, 2004 which easily sailed through. Roh was thus suspended and his office taken over by the Prime Minister Kun to perform an *ad hoc* presidential role awaiting hearing and determination of the matter by the Constitutional Court of Korea which is the final arbiter.²¹⁰

After deliberations the court held that the president's actions amounted to a violation of the Constitution and the Public Official Election Act of Korea. The most vital part of the decision though was when the court held that the violations were not so serious as to amount to an impeachable offence. The decision was not unanimous but a majority of the judges held that the president's infringement was not unconstitutional enough to warrant his removal from office.²¹¹ The court nevertheless did not offer any dissenting opinion because it was concerned with building political stability and stopping endless political confrontation.²¹²The constitutional court

²⁰⁶ Jonghyun P., 'The Judicialization of Politics in Korea', available at <https://pdfs.semanticscholar.org>

²⁰⁷Ibid

²⁰⁸ Article 114 of the Constitution of the Republic Of Korea, 1988

²⁰⁹ The Public Official Election Act of Korea

²¹⁰ Jonghyun P., 'The Judicialization of Politics in Korea', - <https://pdfs.semanticscholar.org>

²¹¹ Jonghyun P., 'The Judicialization of Politics in Korea', - <https://pdfs.semanticscholar.org>

²¹² Ibid

held further that the president violated the duty of political neutrality in elections and electoral processes. More so when he criticized the decision of the National Election Commission being a public official he violated the Public Official Election Act. As per the court though, the violations were insignificant as they did not pose any threat to constitutional democracy.²¹³

The court felt that the acts of the president were a minor breach that could not sufficiently amount to an impeachable offence. The judges held that public officials could only be impeached for “grave violations.” A determination of what amounts to grave violation is a balancing act. It is about weighing the negative impact or the harm of the acts to the constitutional order and the likely effects in case the official is removed from office.

The charges against President Roh had more to do with his political ideology. Like the young generation of the electorate he had a passion for progressive politics and hoped that one day, his country would eventually reunite with North Korea. On the other hand, those against him were opposed to these policies. Being part of the older generation, they dreaded a unification of the two countries. They held scary memories of the Korean war and opted for more conservative political ideas. The ideological differences were thus at the centre of President Roh’s impeachment.²¹⁴

The decision was politically important because this was the first time in Korea for the court to decide on a case touching on a president’s impeachment. It was equally the first time for a court in Korea to get involved in a case that carried so much political weight. In addition, it was important because the Constitutional Court asserted its own political authority and made it known to all and sundry that it had the power and mandate to safeguard Korea’s constitutional democracy.²¹⁵

²¹³ Jonghyun P., ‘The Judicialization of Politics in Korea’, - <https://pdfs.semanticscholar.org>

²¹⁴ Ibid

²¹⁵ Jonghyun P., ‘The Judicialization of Politics in Korea’, - <https://pdfs.semanticscholar.org>

3.5.4 Impeachment of Park Geun-hye

Park was the first woman president in South Korean history. She was impeached on 10th March, 2017 and succeeded by Prime Minister Hwang Kyoahn as acting president. Park's impeachment and criminal charges resulted from allegations that she colluded with her close friend Choi Soon-sil to force large Korean Companies like Samsung to contribute millions of dollars to two nonprofit organizations controlled by Choi. She used her power to daunt and coerce several companies into making donations for their favored projects. In some cases the president and her friend promised to accord such corporations favorably government treatment in the future. Those companies that did not bow to their intimidation or false hopes were threatened into submission.²¹⁶

A bill was introduced to impeach her and the national assembly voted overwhelmingly in its favour by 234 against 56. The constitutional court similarly upheld the impeachment in a unanimous 8-0 decision.²¹⁷ Subsequently on 6th April, 2018 she was convicted and sentenced to 24 years in prison for abuse of power, coercion and bribery. The Chief Judge Kim Se-yoon apart from the prison sentence fined her 18 billion Korean won which is about USD 17 million.²¹⁸

3.6 Conclusion

The impeachment process differs from one country to another even though the reasons why impeachment was constitutionalized are somewhat similar. The outcomes also tend to be different. There are countries like in the US where an impeached official stays in office until after the entire process is complete while in others like Brazil and South Korea, the official is suspended from office. In most of the selected countries impeachment leads to loss of office and

²¹⁶Fermin-Robbins J., 'The Impeachment of South Korean President Park Geun-hye' available at <https://www.carnegiecouncil.org>

²¹⁷Case on the impeachment of the President (Park Geun-hye); Case NO. : 2016Hun-Na1, KCCR, - <http://english.court.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do?searchClassCode=ENEXECLSS&searchClassSeq=560>

²¹⁸ 'Park Geun-hye: South Korea's ex-leader jailed for 24 years for corruption' - <https://www.bbc.com/news/world-asia-43666134>

a bar to holding public office in future. It is only in Brazil where an impeached official is allowed to hold public office again after either a lapse of eight or five years depending on the law applicable. In Kenya, an impeached official continues to hold office until the entire process ends.

From the study there is a danger of an impeached official holding on to power especially in nations with strong executives or those that are democratic. Depending on the powers they possess they can manipulate laws to protect themselves. They can interfere with the final impeachment process and can manipulate the electorate to favour them. In the US it is safer to let the official stay on since their political structure is more democratic and they have strong government institutions.

CHAPTER FOUR

NEED FOR REFORMS IN KENYA AND RECOMMENDATIONS

4.0 Introduction

Impeachment remedies a wrong committed during governance. It is not meant to act as a punishment to an individual. It only targets officials who are unfit to hold public office if their conduct infringes the public trust bestowed on them. Impeachment requires members of both houses to be principled and neutral.²¹⁹ The proper use of impeachment is as a constitutional restorative meant to protect a constitutional government and the citizens' rights and freedoms.

Impeachment is driven by the parliament's struggle to contain a rogue and greedy executive that attempts to hoard and usurp all power and exercise tyranny; an executive that exceeds the bounds of its authority. This power constitutes a deliberate breach of the doctrine of separation of powers. An official sought to be impeached cannot plead executive privilege as a way to defend himself or to stop the process.²²⁰ It should be an essential restraint against arbitrary one-man rule and the arbitrary use of executive power. It should be used to make it clear that abuses cannot be taken as precedent by future elected leaders.

Failure by a democracy to make use of impeachment has its own consequences. There is an implication that the abuses of the leaders are acceptable. It also means that the careful balance between the legislature, executive and judiciary created by the constitution has been erased. The executive would have triumphed as the branch of government with paramount power since those charged with authority to check its excesses would have failed to do so.²²¹

It goes without saying that the Kenyan impeachment process is far from perfect. The second chapter highlighted some of the hurdles that have hindered achievement of the goals of impeachment. Having looked at some of the practices in other jurisdictions, this chapter will focus on some of the measures employed by other countries that need to be put in place in the

²¹⁹ Black C., 'Impeachment: A Handbook'

²²⁰ Youngjae L., 'Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective' - http://ir.lawnet.fordham.edu/faculty_scholarship/448

²²¹ Ibid; Berger R., 'Impeachment: An instrument of Regeneration', - Harper's Magazine, January 1974.

Kenyan context to make impeachment an effective process and tool and to ensure it is employed only for its intended goals. The chapter similarly marks the conclusion and makes recommendations on how to surmount the challenges highlighted.

4.1 Recommendations

4.1.1 Standards of proof

Impeachment is a special kind of trial. It is neither criminal nor civil in nature. This being the case, the standard of proving impeachable charges should differ from both criminal and civil trials. The standard should not be as high as proof beyond reasonable doubt but should not be as low as balance of probability. The best standard should be overwhelming preponderance of evidence. The standards of a criminal trial do not apply because the process is not meant to punish the individual. Moreover the law allows prosecuting an individual for an act for which he or she was impeached since it does not amount to double jeopardy. The standard should however not be too low such that it becomes simplistic. The very purpose of impeachment would have been defeated.

4.1.2 Competence of House and Senate

Impeachment apart from being a legal and political issue is relatively a complex matter. Unfortunately most house representatives are not trained or prepared. Impeachment requires gathering of evidence including documents, drafting of motions and tabling the same before the house, questioning of witnesses, cross-examination, and oral testimony. Most members are not lawyers and have little or no knowledge on legal matters. As in the case of representatives, many senators also lack the requisite experience, expertise and/or training to deal competently with impeachment matters. On the other hand they face off with the defense counsels who are usually experienced trial advocates.

It is recommended that the houses should be allowed to delegate some of its role when it comes to gathering and analyzing evidence and even during trial like while cross-examining witnesses to advocates or to have permanent trained staff to guide the house representatives on how to conduct such proceedings. External experts for example from the forensic department, police, lawyers, accountants can facilitate the houses.

The academic qualifications for all members of the two houses and the senate should be raised owing to the nature of the roles they are supposed to play. The lowest level of academic qualifications should be a university degree from a recognized university either in Kenya or overseas.

4.1.3 Delays

As already stated prolonged procedures result to public discontent and mounts pressure on the houses to end the impeachment trial as soon as possible. It is recommended that pretrial conference be conducted in order to narrow down issues. Pretrial conferences also aid both parties and the houses to know the number of witnesses each party will call, determine the nature of their evidence and its relevance. Repetitive or irrelevant testimonies can be waived to avoid delays.

A few representatives can be chosen to act as house managers or prosecutors against the official sought to be impeached. At the same time there should be provisions limiting the number of defence counsel. Such provisions should specify the number of advocates to make presentations before the houses and the senate.

The Senate could rely on testimonies, evidence and decisions from prior trials of the impeached official to speed up its information gathering process. It could also more frequently use smaller committees to conduct the trial allowing it to proceed more quickly while the majority of senators carry on their usual legislative business. These committees could be staffed by senators who have particular experience of impeachment trials or are at least well-versed in matters of law. An alternative to this would be to delegate certain trial responsibilities such as evidence gathering to outside experts who can perform the tasks more quickly and knowledgeably.

When it comes to delays occasioned by the court processes this study recommends that an aggrieved person be allowed to apply to the high court for reprieve only on account of violation of his constitutional rights during the proceedings within the shortest time possible but not against the substantive decision of either house or the senate. Frivolous applications to the courts should be penalized.

On the flip side, though generally delays are discouraged the process should not be rushed so much as to amount to a denial of justice. Adequate time should be afforded to the official sought to be impeached to prepare his defence. The time limits should not put pressure on either side to wind up the process just for the sake of it. Time should be sufficiently allocated for proper investigations to be conducted, sufficient evidence to be collected, witnesses to be examined and the official to give his defence.

4.1.4 Frequency

Impeachment charges bring discredit on the government and its officials and can cause uncertainty and chaos in a nation. It cuts short the term of a democratically elected leader. It goes against the will of majority of the people. It is also likely to cause political turmoil brought about by a lacuna in administration until a new leader is elected. It is therefore wise that the process be resorted to very infrequently. It is the hope of all framers of the constitution that the mere threat of impeachment would make public officers to carry out their work with integrity. The proceedings should be approached with all the caution and reluctance that are appropriate to the significance and unsettling power of the impeachment process. Frequent threat of impeachment waters down its potency and efficacy. It should not be resorted to until and unless it is very necessary. It is more lethal when used sparingly.

4.1.5 Threshold for impeachable offences

The constitution did not envisage casual transgressions to form part of the list of impeachable offences. If we make impeachable offences to be just any perceived offence we would have made the president and the governors lackeys to the houses and the senate. An impeachable offence should dictate a pattern on the basis of which future behavior can be predicted.²²² The question impeachment poses is whether the public will need to be defended against similar behavior in the future.

In order to ensure a worthwhile trial and a good chance of conviction, the official's crime must be serious, must be related to his or her official duties and must have compromised the office and

²²² <https://heinonline.com/article/2017/03/the-power-and-purpose-of-impeachment/>

the nation. The crime must be so grave that majority of members irrespective of their affiliate parties support impeachment. The fear of the damage that has been done and can be done in the future by the official in question must be felt by the majority and such fear must outweigh the natural desire for stability and continuity. The offence or violation should be such that the damage caused by the actions endangers the constitutional order and democracy and the only remedy is removal of the official from office. Examples would be infringement on the human rights, separation of powers, independence of judiciary, parliamentary institutions and multi-party system, corruption and abuse of power. Party politics should not play a role in any impeachment proceeding. Members should be committed to impartial truth and justice and the preservation of integrity in all branches of government.²²³

4.1.6 What amounts to impeachable offence?

The Korean Laws are more detailed especially under the Constitutional Court Act when it comes to what impeachable offences are with the advantage that it is much easier for them to decide what actions amount to impeachable offences. What is however clear in all these countries is that public officials can only be removed through the process of impeachment on account of “grave violations” which are interpreted by weighing the negative impact of these violations or the damage of the violations to the constitutional order *vis a vis* the likely effect that such official’s removal is likely to have on the public. Essentially public interest should be paramount.

The confusion that is being experienced in Kenya over what amounts to an impeachable offence is partly because our laws are a bit vague. The risk of leaving the interpretation of what amounts to impeachable offences to the members of the county assembly and the national assembly is that every individual is likely to interpret the phrase differently based on personal standards. It is clear that not every wrong act by a public official constitutes an impeachable offence. Kenya would do well if it went the Korean way of including in the laws the nature of offences that are impeachable. That way the process will only be resorted to in the clearest of cases.

²²³ Gerhardt M., ‘The Constitutional Limits to Impeachment and its Alternatives’, Texas Law Review, Vol.68, number 1, 1989 available at <https://heinonline.org>

4.1.7 Public participation

It is important to have the public take part in the impeachment process. Public participation being one of the national values and principles of good governance cannot be ignored in such an important process. This is especially so because impeachment is meant to remove a person democratically elected by the people. There is need to get their views and outlook of the whole process. Public participation will come in handy to sort the perception of witch hunting and malice against whoever is sought to be impeached. Additionally, it will be difficult for people to be held at ransom or be blackmailed by a few house representatives. The laws need to be amended to have the inclusion of public participation in the impeachment process.

Public participation should however be understood to be more than merely advertising in the print media. An alternative way requiring members of the public to give their views other than through the media should be devised. Considering a country like Kenya where levels of illiteracy are high and the poverty index is high, requiring that public participation be through media is too onerous a task. The public could be called upon to make their views in public forums to be organized and held near their constituencies.

Intertwined with public participation is the need to conduct civic education. If members of public are to participate effectively they require being an informed lot. This will curb the urge by members of the county assemblies and the members of national assembly taking advantage of the civic information gap to feed the public with wrong information.

4.1.8 Introduction of stiffer penalties for members who frustrate proceedings

To curb this challenge, stiffer penalties in form of hefty fines and denial of allowances need to be introduced. Members who engage in such vices should be barred from attending subsequent meetings whose number can be agreed upon by the house. They can also be barred from running for political offices.

4.1.9 Overreliance on impeachment

There is a tendency by most nations resorting to impeachment with a hope that it will cure all ills in society. This has proved not to be true. There must be other checks and balances on the executive branch apart from impeachment. The judiciary and legislature have other means of

checking the excesses of the executive and dealing with truant officials and should be supported to fulfill their responsibilities in accordance with the constitution. Impeachment alone is not likely to solve all problems that a country faces especially when it comes to governance issues. Brazil for example is still grappling with corruption even after impeaching two of its presidents within a short period of time of each process. Nigeria has had a record impeachment of governors yet this has not helped in scaling down corruption.

4.1.10 Fair hearing

In *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others*²²⁴ the court found that whoever is sought to be impeached even at the county level no doubt is entitled to be heard or be given the opportunity to be heard. It is uncontested that the process of removal of a governor is a quasi-judicial process and the rules of natural justice must apply and be observed. At every stage of the proceedings the official should be accorded an opportunity to respond to the allegations.

Ensuring a fair procedure is also advantageous in the sense that it reduces time wastage. Delays caused by court cases filed by parties who fell aggrieved by the process will be reduced. There will be no back and forth between the assemblies and the courts.

4.2 CONCLUSION

Impeachment is a powerful and important tool in any democracy but only when used solely for the purposes it was intended for. As already discussed it keeps every position including the most powerful one accountable to the people. It protects the constitution and prevents the abuse of power by members of the executive and in some countries members of the judiciary. Impeachment signifies the rule of law; that no one is above the law. It is not a power contest where the legislature dominates over the executive. It is not punitive and is not meant to exact vengeance. It is meant to protect the public against future acts of recklessness or abuse by public officials.

Since it is both quasi-judicial and quasi-political in nature, the process should aim at achieving fairness, impartiality, and legality in decision making. It requires inquiry into the facts and the

²²⁴ [2015] e KLR

law without partisan or narrow political bias. It is a powerful instrument meant to place checks and balances on other arms of government. Though the process in Kenya at the moment has several flaws, it is still a crucial constitutional instrument. The challenges being experienced at the moment in Kenya concerning the process can well be surmounted by taking into account the recommendations highlighted in this study.

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