CONSTITUTIONAL AND STATUTORY HINDRANCE TO
THE ROLE OF ATTORNEY GENERAL IN KENYA

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THE REQUIREMENT FOR THE MASTER OF LAWS
DEGREE AT THE UNIVERSITY OF NAIROBI.
DECLARATION

I, JAMES O. MARIENGA, do hereby declare that this thesis is my original work and has not been submitted for a degree in any other university.

JAMES O. MARIENGA

This thesis has been submitted for examination with my approval as university supervisor.

ERIC OGWANG
DEDICATION

This work is dedicated to the entire Marienga family whose encouragement and support is always a source of inspiration.
ACKNOWLEDGEMENT

I am particularly indebted to Eric Ogwang whose dedicated and diligent supervision made this thesis to take an intelligent form.

I wish to sincerely thank the Directorate of Personnel Management, Ministry of State for Public Service for granting me the scholarship and paying the tuition fees and other support during the course.

I am also grateful to the State Law Office for granting me the opportunity and other support during my study.

The extremely arduous task of typing this work was accomplished by Winnie with such skill and affection which words are too poor to appreciate.

Those who provided the much needed moral support are not forgotten.

The writer is however responsible for any short-coming in this thesis.
ABSTRACT

The twenty-first century has been ushered by quest for good governance in many constitutional democratic countries. These countries have embraced constitutionalism and democracy within their socio-political order as the basis of good governance. The purpose is to have a government with checks and balances. The current trend to achieve this is by peoples’ empowerment to hold the government accountable through parliament and other government institutions. This is because it has been realised, globally, that good governance is the basis for socio-economic and political development. Good governance includes accountability and transparency, separation of powers and democracy. However, good governance requires sound, effective, responsive institutions which are transparent and accountable to the people. Hence, many countries are striving to introduce legal reforms for purposes of improving governance.

One of the critical institutions which is central to these legal reforms is the office of the Attorney-General. The office of the Attorney-General in an unusual one in parliamentary democracy. In some ways, it symbolizes the difficulties inherent in the doctrine of separation of powers and rule of law. The Attorney General is part of the executive, and generally speaking, a member of the legislature. At the same time, the Attorney-General also owes certain duties to the judiciary. On occasion, these demands have collided leading to the blame of the Attorneys-General and the need for constitutional and statutory reforms of this office.

With current political trend of empowering the people to hold the government accountable through their representatives in parliament, the Attorney General is being seen as people’s lawyer rather than executive’s lawyer in the administration of justice and rule of law. Hence, the need to strengthen the Attorney General’s institutional, adjudicative and administrative independence. A historical background, legal and structural basis of the Attorney General in developing and developed democracies analyzed in this work discloses the framework within which the Attorneys-General operate. Key question answered by this thesis is whether the constitutional independence given to the office of Attorney-General in Kenya is sufficient or is there need for legal reforms to make it more responsive and accountable to the people. These would include constitutional and statutory reforms. This is important bearing in mind that Kenya is currently undergoing constitutional reform.

In considering the main issues, comparative analysis of the office of the Attorney-General in Kenya with reference to other countries, particularly those with similar jurisdictions has been attempted and contrasts outlined.
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CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

The office of the Attorney-General in a parliamentary democracy is an unusual one. In some ways, it symbolizes the difficulties inherent in the separation of powers doctrine. The Attorney-General sits at the cusp of the three institutions. He or she is part of the executive, and, generally speaking, a member of the legislature. At the same time, the Attorney-General also owes certain duties to the judiciary. On occasion, these demands have collided, and led to recriminations, resignations, and even the jailing of Attorneys General. Given these constraints, can there be ever such a thing as an “independent” Attorney General? The independence of the Attorney General from the executive is critical in the administration of justice and rule of law. Attorney General is often required to put the interests of his or her political party, and even the interests of the government as a whole. It is rare that the ministers will be required to do this.

In Kenya, the office of Attorney General is established by the Constitution as an office in the public service. The Constitution provides:

"There shall be an Attorney General whose office shall be an office in the public service."  

The Attorney General is the principal legal adviser to the Government and its agencies. The mission of the office is to provide efficient and professional legal services to the government and public for purposes of facilitating and promoting democracy, rule of law and human rights. Its vision is to be the best law firm in the country. However, this vision appears to be limited to Kenya only. It is high time it be expanded to embrace regional or global dimensions.

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2 Section 26 (1) of the Constitution of the Republic of Kenya
3 Section 26 (2) of the Constitution of the Republic of Kenya
4 The Strategic Plan 2004/5 – 2006/7 of the State Law Office
Section 26 (1) of the Constitution of Kenya places the Attorney General within the public service, which demands absolute loyalty and obedience to the executive\textsuperscript{5}. This is because the Constitution vests the powers of constituting and abolishing offices together with appointments and terminating of such offices in the President\textsuperscript{6}. Further, the Constitution provides that unless one is serving under a contract which does not exceed three years, such a person shall hold the office during the pleasure of the president\textsuperscript{7}. While performing his or her role, the Attorney General is expected to promote and protect public interest and uphold the rule of law. This is a challenging task in democracies grappling with national unity and development under imperial presidency.

However, in practice, the office of the Attorney General in Kenya lacks sufficient institutional, administrative and adjudicative independence from the executive.

Institutional independence and accountability is an important feature of societies in transition from conflict or authoritarian rule. The imperative of this feature has both normative and transformative underpinnings in the context of restoration of the rule of law and democracy. This study argues a case for extending the purview of institutional and adjudicative independence to the office of Attorney General in Kenya in post-independence context. The purpose of institutional and adjudicative independence is to enable such institution perform the challenging constitutional responsibility of maintaining a judicious balance between conflicting interests within governance system by enforcing public accountability\textsuperscript{8}. The driving force behind this inquiry is the proposition that Attorney General’s office at all times participates in governance especially in the rule of law and democracy.

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\textsuperscript{6} Section 24 of the Constitution of the Republic of Kenya

\textsuperscript{7} Section 25(1) of the Constitution of the Republic of Kenya

\textsuperscript{8} ‘Institutional Independence in India’ CUTS International Law and Policy Vol. 30 No.2 April 2008 <http://www.cuts-international.org> (accessed on 29 May 2008);
The office of the Attorney General is one of the critical government institutions in the administration of justice and the rule of law. When National Rainbow Coalition (NARC) came in power in 2003, there was high hope on improving administration of justice and rule of law. Of immediate concern amongst the legal fraternity was independence of the Attorney General. However, the Office of Attorney General which had apparently been independent was made a department under the Ministry of Justice and Constitutional Affairs through a presidential directive.\(^9\) This was considered as a direct executive encroachment on the independence of the Attorney General. Moreover, some recent cases have been handled by the Attorney General which cast doubts on his or her independence from the executive. In the case of Clifford Derrick Otieno v Lucy Kibaki\(^10\), the Attorney General withdrew a case where Clifford a television cameraman had filed a suit against Lucy Kibaki (Kenya’s current First Lady) alleging assault and malicious damage to property at the Nation Media Group’s newsroom. However, even before the matter was entered into the court’s records, the Director of Public Prosecutions entered a *nolle prosequi* under the direction of the Attorney General. The magistrate observed that:

“he feels that the ‘nolle prosequi’ goes against public expectations and tramples on the right of the vulnerable and hopeless in the society. Whichever way the court feels, it could complain about the circumstances of presentation but can not ever reject a ‘nolle prosequi’. That is the law and am bound by it.”

Similarly, in the case of Parsimei Ole Sisima and others v Attorney General,\(^11\) where Thomas Cholmondeley was charged with the murder of a Kenyan Wildlife Service warden at Soysambu Ranch, but before the case could proceed to the trial the Attorney General withdrew the murder charge citing insufficient evidence to support and sustain the murder charge. The abuse and misuse of the Attorney General can be traced to when Kenya African National Union (KANU) regime was in power in the case of Stanley Munga Githunguri v R,\(^12\) where the Attorney General decided to institute criminal proceedings against accused with offences allegedly committed

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\(^9\) Presidential Circular No. 1 of 2008 on Organization of Government Ministries
\(^10\) Miscellaneous Application no. 5 of 2005(UR) at the Chief Magistrate’s Court in Nairobi
\(^11\) Criminal case no. 343 of 2005 at the Chief Magistrate’s Court in Nairobi
\(^12\) No. 2 Miscellaneous Application No. 271 of 1985 , High Court in Nairobi(UR)
over 8 years and investigation completed 6 years ago following a full inquiry and the Office of Attorney General had already decided not to institute or undertake criminal proceedings and closed the file. The High Court, as a Constitutional Court held that the prosecution by the Attorney General was abuse of due process, oppressive and vexatious.

Depending on the legal jurisdiction, the office may have constitutional, statutory, and common law powers to facilitate and effectuate its functions in the society. An effective, accountable, responsive office of Attorney General is necessary for good governance, socio-economic and political development. While performing his or her role, the Attorney General is expected to promote and protect public interest and uphold the rule of law. This is a challenging task in democracies grappling with national unity and development under imperial presidency.

The Constitution recognizes this challenge and provides autonomy to the Attorney General:

“In the exercise of the functions vested in him by subsections (3) and (4) of this section and by sections 44 and 55, the Attorney General shall not be subjected to the direction or control of any other person or authority.” 13

The Constitution also provides the security of tenure:

“The Attorney General may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be removed except in accordance with this section.” 14

In case of removal from the office the matter has to be referred to a tribunal for investigation before the holder can relinquish the office.

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13 Section 26 (8) of the Constitution of the Republic of Kenya
14 Section 109 (5) of the Constitution of the Republic of Kenya
However, the autonomy provided in section 26(8) of the Constitution is weakened by section 26(1) of the Constitution which compromises the independence of the Attorney General by placing the office in the public service where the President has immense appointive and dismissal powers.

The issue of strengthening the autonomy of the Attorney General is critical due to many conflicting functions he or she performs. The Attorney General is part of executive as principal legal adviser; ex-officio member of parliament; state prosecutor; protector of the public interest; and a member of Judicial Service Commission. The challenge to the office’s independence comes into sharp focus when prosecuting senior members of the other organs of the government especially in a presidential system of government with immense executive powers. A critical analysis of the role of the Attorney General in Kenya shows that there is need for statutory safeguards for the office to balance its roles as protector of public interest and public prosecutor against imminent and practical reality of supremacy of the Office of the President or the rise of the imperial presidency in democracies with weak parliamentary system and multi-partyism.\textsuperscript{15}

1.1 STATEMENT OF THE PROBLEM

An efficient and effective State Law Office in Kenya is not only critical in delivery of legal services but also necessary for socio-political and economic development. However, the office of the Attorney General reveals an inherent tension between the legal duties and political responsibilities of the position. This tension in the office arises out of the duties which the office holder has to the law and the courts, the executive, parliament, constituents and political loyalty.\textsuperscript{16} This tension is common in Commonwealth jurisdictions, for instance in United Kingdom Her Majesty’s Attorney General and Solicitor General jointly known as the Law Officers of the Crown for England and Wales have been described as:

“sui generis: not quite like other lawyers; not like other politicians; not quite like other ministers.”

Against this background, the Attorney General possesses a number of “hats”. To quote Lord Goldsmith, QC, the Attorney General represents:

“an intersection point between law and politics who fulfils the role as government minister, legal adviser, prosecutors and upholder of public interest.”

The current Constitution in Kenya like other post-independence constitutions in democracies with weak opposition in parliament favors executive with massive discretionary and appointive powers. In order to promote, protect and uphold the rule of law, and protect the public interest effectively, the Attorney General requires meaningful independence from the executive with immense discretionary powers. The autonomy provided in the current Constitution is grossly inadequate for any meaningful and effective independence of the State Law Office. Moreover, the limited autonomy has not been defined and strengthened by a statute of parliament bearing in mind the many conflicting roles the office plays in the executive, parliament and judiciary.

The purpose of this study is to identify and determine constitutional and statutory factors that negate the independence of the Attorney General and consequently hinder effective delivery of professional legal services for purposes of Attorney General introducing legal reforms to State Law Office.

1.2 JUSTIFICATION FOR THE STUDY

The independence of the Attorney General is very critical in constitutional democratic countries for good governance. The office plays an important role in the

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administration of justice and rule of law. However, in 2003, when National rainbow Coalition (NARC) government came to power the constitutional independence of the Attorney General was encroached by the executive. By Presidential Circular No. 1 of 2003 on Organization of Government Ministries, the Attorney General was placed under the new Ministry of Justice and Constitutional Affairs. However, this institutional arrangement was later revoked and the office of Attorney General delinked from the Ministry of Justice and Constitutional Affairs vide Presidential Circular No. 3 of 2003. However, the risk of repeating this mistake by executive is still there unless some statutory and constitutional reforms are made.

Further, in 2004, the Government introduced Performance Management in the Civil Service as one of the reform initiatives. The State Law Office prepared Strategic Plan 2004/5-2006/7. The Strategic Plan identified many sources of complaints from both the public and government. The complaints included poor legal services delivery, poor representation, incompetent legal advice, and delay in finalizing cases. This poor performance could be attributed to inadequate autonomy and lack of a statute to protect the constitutional independence of the Attorney General. Hence, the rationale for this research. The study is timely and necessary for the following reasons: -

(i) It will identify the shortcomings in the current Constitution which affect the role of the Attorney General.

(ii) It will recommend appropriate legal reforms to enhance the autonomy and improvement of service delivery.

(iii) It will ultimately improve the competency, efficiency and quantity of legal services to the government and public.

1.3 THEORETICAL FRAMEWORK

The basis of good governance in a constitutional democratic government is the constitution. The national constitution articulates the vision of the country, defines the
fundamental principles by which the country is governed, distributes powers within it and plays a critical role of the national-building and consolidating the national state.\textsuperscript{19}

The idea of a constitutional democratic government or constitutionalism connotes a government defined, regulated and limited by a constitution. Thus, constitutional democracy is founded on the principle of checks and balances, namely that different institutions - the executive, legislature and the judiciary while operating independently of one another and act to check each other’s powers. In essence all the institutions are duty bound to uphold the rule of law. This necessitates the precise definition of the role of each institution and that of the public officials. In the absence of role definitions, decisions are taken by persons without the authority to do so, or by the top leadership of the state apparatus. In a constitutional democracy, it is not enough to ensure predictability, control devices to curb bureaucratic excesses are also necessary on at least two grounds; first in the absence of such controls, bureaucrats will use their powers arbitrarily to sabotage the program of administration through corruption and abuse of office; and secondly such powers may be used either in outright violation of the rights of citizens or in more indirect way of bureaucratic insecurity.

Thus, the constitution is something antecedent to government and connotes a system of fundamental principles according to which a nation is governed. In this sense, a constitution embraces not only the frame of the government, but also the relations of the government to the individuals that compose the nation or state. A government operating under written constitution has no more power than is granted to it by the constitution either expressly or by necessary implication.

Essentially, constitution is the basic or fundamental law of the land that serves ‘constitutive’ functions both internally by establishing the structure for the exercise of government power and externally by establishing a convincing sovereign presence to

other nations. It is the law that literally constitutes a country and enables it to run as an entity. It also consists of those core legal values and principles upon which a country and its institutions are founded and establishes how they are run and organized. It stands at the head of a country’s hierarchy of law. If any other type of law e.g. Act of parliament, subsidiary legislation, common law, equity and customary law is inconsistent with it, then that law is null and void, that is, in-operative to the extent of its inconsistency.

It is the constitution that creates the organs of government, clothes them with their powers, and in so doing delimits the scope within which they operate. A government operating under a written constitution must act in accordance with it and any exercise of power outside it is invalid. It operates as a supreme authority.

It is important to note therefore that effectiveness of a government institution depends to a great extent on its constitutional basis and how it relates to other government institutions. This is because the constitution provides the relevant powers. Hence, effectiveness of Attorney General’s office depends on powers given to it in relation to executive and parliament by the constitution. Where the executive has sole discretionary appointive and dismissal powers over the Attorney General, there is bound to be encroachment on the functions and role of the Attorney General leading to bad governance. Since independence, Kenya has witnessed a systematic and deliberate trend of enhancing the presidential powers which have paralyzed the effectiveness of the Attorney General to discharge his or her constitutional mandates competently and independently. Several amendments to the Constitution have been made which have resulted to executive president with enormous discretionary powers in the civil service. This trend has tremendously affected the limited constitutional protection given to the Attorney General.

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20 Supra, Note 15 p.222
23 Ibid
The institutional, administrative and adjudicative independence of the Attorney General is critical factor in governance. A government is universally accepted to be a necessity since people can not fully realize themselves in terms of creativity, dignity and whole personality except within an ordered and organized society with a government. Yet the necessity for the government creates its own problem for the people; the problem of how to limit the arbitrariness inherent in government and ensure that its powers are used for the good of the society. One way of achieving this is through establishment of a constitutional democratic government which protects individual rights and freedoms. A well-ordered and organized society requires of necessity effective institutions to make the laws, execute the laws and adjudicate on disputes. These institutions are created, regulated and vested with powers by the constitution to facilitate their operations. To minimize arbitrary and tyrannical rule due to concentration of these powers in one person or institution, the government must embrace the doctrine of separation of powers.

Professor Larry Diamond explains that the best form of government is a constitutional democratic government in which freedom is constrained by the law and popular sovereignty is tempered by state institutions that produce order and stability. This in effect means a political system in which the individual and group liberties are well protected, autonomous spheres of civil society are promoted and private life is insulated from state control. It offers the best prospects for accountable, responsive, peaceful, predictable and good governance. The accountability of the rulers to the ruled and government responsiveness to the diverse interests and preferences of the governed are the basic goods. So also is the minimization of violence in the political life and of arbitrary action by government. To achieve this in society, there is need for the doctrines of separation of powers and rule of law to be enshrined in the constitution.

24 Supra, Note 22 p.1
25 Ibid p. 1
In the development of democratic institutions, there has been quest amongst political philosophers for a constitutional government which guarantees its people basic rights, including the right to life, civil liberties and own properties. To secure these rights, John Locke asserted that legitimate government rests on the ‘consent of the governed’. He argued that men in civil society enter into a contract with their government. The citizen is bound to obey the law, while the government has the right to make laws and to defend the commonwealth from foreign interference all for public good. Locke asserted that when any government becomes lawless and arbitrary then the citizen has a right to overthrow the regime.\textsuperscript{27}

However, it was French philosopher Baron de Montesquieu who advocated separating and balancing powers between the executive, legislative and judicial branches of the government as a means of guaranteeing the freedom of the individual.\textsuperscript{28}

The theory of separation of powers had been expounded by early philosophers for instance Aristotle who in 4\textsuperscript{th} century BC had recognized that the “the rule of a master is not constitutional rule’ meaning that arbitrary and tyrannical rule was not just rule.\textsuperscript{29}

Modern principle of the separation of powers was formulated by French philosopher Baron de Montesquieu in the following proposition:

> "When the legislature and the executive powers are united in the same person or in the same body of magistrate, there can be no liberty; if the judicial powers be not separated from legislature and executive, life and liberty of the subjects would be exposed to arbitrary control for the judge might behave with violence and oppression. There would be no liberty to subjects were the same man or the same body be it if the nobility or the people to exercise those powers, that of

\textsuperscript{29} Aristotle, Politics, Book One VII
implementing the public resolutions and that of adjudicating the causes of individuals.  

It is essentially a theory of government, the objectives of which are the protection of liberty and the facilitation of good government by appropriate specialization. It is now accepted that separation of powers is necessary for constitutional democratic government. Separation of powers operates as checks and balances on the government.

In its classical form, the doctrine of separation of powers embodies the following:

(a) government is divided into three separate branches, namely, executive, legislature and judiciary
(b) each of these bodies a specific function is allocated—law-making, execution and adjudication
(c) each branch must confine its activities to its remit and not encroach on the functions of the other branches
(d) the personnel of the three branches must be kept separate and no individual must be allowed to hold a membership in more than one
(e) if the prescription is maintained, each branch will operate as check on the others, and no single group will be able to control the machinery of the state.

According to this doctrine, the executive is the branch of government charged with implementing or executing the law and managing the affairs of the state. The executive body is entrusted with administrative function of government. The *de facto* head of executive is

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33 *Supra, Note 22* p. 12
referred as the head of government. The executive may be referred to as the administration in presidential system or simply as the government in parliamentary systems. The executive authority within a presidential system is exercised by a president who is the head of the state. In a parliamentary system of government, the executive branch is comprised of a prime minister and a cabinet, who must directly or indirectly secure the support of the legislature. It is usually the role of the executive to:

(i) enforce the law by administering the prisons, police force, prosecutes criminals in the name of the state.
(ii) conduct foreign relations of the State.
(iii) command the armed forces
(iv) appoint state officials, including judges and diplomats
(v) administer government departments and public services
(vi) issue executive orders or secondary legislation

The legislature is a governmental deliberative assembly with the power to make, repeal or amend the laws. In parliamentary system of government, the legislature is formally supreme and appoints the executive. In the presidential system of government, the legislature is considered a power branch which is equal to and independent of the executive. In addition to enacting laws, legislature has the exclusive authority to raise taxes.

The judiciary is another branch of the government which is responsible for the administration of justice in the country. Its main function consists of the interpretation of the law and its application by rules or discretion to facts of a particular case.

One of the leading legal scholars Professor Vile explained that it is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments; legislature, the executive and the judiciary.\footnote{Supra, Note 31}
To each of these three branches there is corresponding identifiable function of government, namely legislation, execution and adjudication. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach on the function of the other branches. Finally, the persons who compose these agencies of government must be kept separate and distinct to the extend that no individual is allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the other and no single group of people will be able to control the machinery of the state.

The doctrine is founded on the need to preserve and maintain the liberty of the individual. The mechanism it adopts is to divide and distribute the powers of government to prevent tyranny and arbitrary rule\(^{35}\). The essence of the doctrine is therefore one of the constitutionalism or limited government. The basic control is to vest legislative, executive and judicial powers in three separate and independent institutions, namely legislature, executive and courts with the personnel each being different and independent of each other. This is to ensure complete separation as regards powers, institutions and personnel.

However, it should be noted that there is no current constitutional system which adopts this complete separation of powers. The doctrine of the separation of powers mainly operates as system of checks and balances as follows:-

The executive checks the parliament as follows:-
(i) through veto powers

The executive checks on judiciary as follows:-
(i) appoints the members of judiciary

The legislature checks the executive as follows:-
(i) vote of no confidence
(ii) impeachment
(iii) authority to collect taxes
(iv) call to account for actions of executive

\(^{35}\) Supra, Note 22 p.12
(v) confirm some appointments
(vi) vetoed bills may be passed by two-thirds majority

The legislature checks on judiciary as follows:-
(i) pass the laws
(ii) create appropriate structures
(iii) regulate salary and terms of appointment
(iv) impeachment

The judiciary checks on the executive as follows:-
(i) judicial review of its actions

The judiciary checks the parliament as follows:-
(i) striking the statutes as unconstitutional

In a constitutional democratic society, the laws and institutions so established should meet the requirement of having clear goals and protecting the public interest. Hence, the importance of a constitution in establishing institutions and empowering them to perform their respective responsibilities. For effective operation of these institutions, there is need for sound constitutional basis and sufficient statutory provisions to regulate them. Failure to observe this will result to weak institutions which are unable to control and regulate the arbitrary and discretionary powers of the executive. Governments are organized around institutions that engage in the delivery of goods and services. Institutional effectiveness and accountability is central to good governance and the rule of law. Without effective and responsive institutions that are undergirded by sustained constitutional structures and behavioral norms that guide the actions of decision-makers, political representation and all its attributes will not be sustainable. As observed in some jurisdictions, weak and unaccountable public institutions have arguably been largely responsible for the failure of governance.  

Constitutionally, the other main purpose for creation of the office of Attorney General is to maintain and facilitate the rule of law. The rule of law is the basis of an ordered and organized society. It is also the basis for socio-economic and political development.

\[6 \text{ Supra, Note 19 p1} \]
At the dawn of twenty-first century, nations of virtually every region in the world recognized the role of the rule of law in their own political and legal system as a critical factor in the nation-building and good governance. The rule of law has become a central focus of domestic and international efforts to promote good governance. This is because the rule of law protects inalienable rights and liberties which government should not violate. Predominant among such rights are property rights, the right to free expression, freedom of association, equality before the law and protection against discrimination.

Generally, the rule of law may be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of governmental power.

The rule of law as a legal principle was propounded by A.V. Dicey, English jurist and Professor of Law. It essentially means that those in the authority must exercise their powers according to the law and not arbitrarily. Dicey set out three principles to summarize the rule of law:

(i) supremacy of the regular as opposed to arbitrary power;
(ii) equality before the law; and
(iii) derivation of the law from individual rights and not vice versa. Hence, there is no need for Bill of Rights because the general principles of the constitution are the results of judicial decisions determining the rights of private persons.

37 Ibid p.1
38 Helen Yu and Alison Guerney ‘World Bank, Rule of Law as a Goal of Development Policy’, paper prepared by the University of Iowa Center for International Finance and Development < http://www.uiowa.edu/ifdebook/fag/Rule_of_Law.shyml > (accessed on 2 April 2007)
An American legal scholar Lon L. Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law:

(i) laws must exist and those laws should be obeyed by all, including government officials
(ii) laws must be published
(iii) laws must be prospective in nature so that the effect of the law may only take place after the law has been passed.
(iv) Laws should be written with reasonable clarity to avoid unfair enforcement
(v) laws must avoid contradictions
(vi) law must not command the impossible
(vii) law must stay constant through time to allow formation of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed
(viii) official action should be consistent with the declared rule

Fuller’s criteria are helpful in understanding the rule of law because they outline the types of rules or formal constraints that societies should develop in order to approach legal problems in a way that minimizes the abuse of legal process and political power. The rule of law, however, extends beyond mere regulations and is also shaped by institutional constraint like independent judiciary.

Basically, the essential characteristics of the rule of law are:

(i) the supremacy of the law, which means that all people (individuals and government) are subject to the law
(ii) concept of justice which emphasizes interpersonal adjudication, law based on standards and the importance of procedures
(iii) restrictions on the exercise of discretionary power
(iv) the doctrine of judicial precedent
(v) the common law methodology
(vi) legislation should be prospective and not retrospective

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The rule of law places both ruler and the ruled under one law. It means absence of arbitrary powers; confining the exercise of discretionary powers within reasonable limits; subservience to the ordinary laws by everyone irrespective of social status; safeguarding of fundamental civil rights of individuals; and independence of the judiciary which is impartial.

The essence of the rule of law lies in its juxtaposition to “the rule of man”. This aphorism is not meant to express the utter absurdity that laws are capable of governing the society without the help of man. Rather, it seeks to state the following principles; that all state powers ought to be exercised under the authority of the law and that policies and law are executed in away that ensure rationality and fairness in the decision-making process. The state of affairs is, thus, contrasted with a regime of caprice or arbitrariness in which acts or omissions are traceable to the whims of the particular person in power at a given time. It connotes the use of state power through rules of law for the establishment of the economic and social system agreed by the people via constitutionally sanctioned institutions or other acceptable surrogates.

The rule of law implies the assurance of predictability in the conduct of the state officials by prior existence of basic law covering the subject-matter that falls within their fields of operation. It demands the precise definition of roles and status of such public officials by law. It commends the creation of control devices to ensure that public officials abide by these norms, and if they do not, then their actions are invalid. It embraces procedural guarantees necessary to assure fairness in adjudication of disputes and application of sanctions without hamstringsing the administration of justice or frustrating the imposition of basic order in the community. It demands
equality in the treatment before the law. It means that the government is, in its actions, bound by the rules fixed and announced before hand which make it possible to foresee with certainty how authority will use its coercive powers and allows an individuals to plan his or her affairs on the basis of this knowledge. It aims to limit, thereby checking the arbitrary, oppressive, and despotic tendencies of power and to ensure equal treatment and protection of citizens irrespective of race, class, status, religion, place of origin or political persuasion. It implies a legal framework that is fair and that legitimizes state actions. Authority is legitimate, if there is an established legal and institutional framework and if decisions are taken in accordance with the accepted institutional criteria, processes and procedures.\textsuperscript{42}

Generally, in constitutional democracy, the doctrine of the separation of powers and the rule of law are enshrined in the constitution. Constitution may be defined as a formal document having the force of law by which a society organizes a government for itself, defines and limits its powers and further prescribes the relations of its various organs inter se and with the citizens\textsuperscript{43}. It is the constitution which creates the organs of the government, clothes them with powers and in so doing delimits the scope within which they are to operate. The constitution is, thus, the basic law of the land which guides the officials and the citizens. Constitutionalism recognizes the need of the government but insists on a limitation placed on its powers.

According to this view, there can not be a constitutional government unless there are mechanisms within the constitution for the supervision of the government functions. These mechanisms should include separation of powers and the principles of limited government both of which must conform to the theory that the government itself ought to adhere to the rule of law\textsuperscript{44}.

1.4 OBJECTIVES

The following are the main objectives of the study: -

\textsuperscript{42} Ibid p.2
\textsuperscript{43} Ibid p. 2
\textsuperscript{44} Supra, Note 15 p. 229
(i) To identify constitutional restraints on the Attorney General’s autonomy in the current Constitution.

(ii) To find out legal weaknesses in the operation of the Attorney General’s Office

(iii) To determine appropriate legal reforms to the Attorney General’s Office with a view to enhance its independence

1.5 THE RESEARCH HYPOTHESIS

The hypothesis for the purpose of this study is that lack of statute has weakened constitutional independence of the Attorney General.

1.6 RESEARCH QUESTIONS

The research questions to be answered for the purpose of this study are: -

(i) What are the constitutional factors hindering to the role of the Attorney General in Kenya?

(ii) How can the constitutional autonomy of the Attorney General be enhanced?

(iii) What statutory and constitutional reforms are necessary to the office of Attorney General?

1.7 METHODOLOGY

The research will be mainly desk based. The study will be a research based on comparative analysis of other legal jurisdictions. Reliance will also be placed on research papers and textbooks by both local and international authors in constitutional context.

1.8 LITERATURE REVIEW

It is an acknowledged principle of good governance in most Commonwealth countries that the Attorney-General in exercising most discretionary prerogative powers should be independent from executive. The independence of the Attorney-General arises

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from the fact that the Attorney-General must exercise the various powers and
powers and
powers and
discretions in the public interest. As quasi-judicial powers they are not to be exercised
discretions in the public interest. As quasi-judicial powers they are not to be exercised
according to the political wishes of the executive. To proceed otherwise would lead to
according to the political wishes of the executive. To proceed otherwise would lead to
unsatisfactory performance by the Attorneys General.

Many scholars have contributed this unsatisfactory performance to different reasons.
unsatisfactory performance to different reasons. According to Professor Ojwang, poor performance of the Attorney General’s office in
According to Professor Ojwang, poor performance of the Attorney General’s office in
Kenya is attributed to encroachment of the executive and legal dilemma the
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Constitution places on the Attorney General. The Constitution of Kenya has
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maintained this office as a public service even though it is known to perform many
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political functions. However, in some countries like United Kingdom and Australia
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the office of the Attorney General is ministerial and political office. As the primary
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agency of policy implementation, the civil service is based on uncompromised degree
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of loyalty and acceptance of government. Hence, the institutional difficulty of the
Attorney General to be independent from the executive. This situation is worsened by
Attorney General to be independent from the executive. This situation is worsened by
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the fact that civil service has been politicized and is unlikely to remain politically
neutral in a context of divergent streams of political beliefs and programmes. The
neutral in a context of divergent streams of political beliefs and programmes. The
initial constitutional amendments involved the process of constitutional control by the
initial constitutional amendments involved the process of constitutional control by the
president. These constitutional amendments were intended to recentralize the
president. These constitutional amendments were intended to recentralize the
executive powers.

Professor Ojwang argues whether the Attorney General should be a public officer
Professor Ojwang argues whether the Attorney General should be a public officer
holding a constitutional office or should he or she be elected member of parliament?
holding a constitutional office or should he or she be elected member of parliament?
He explains that although Kenya’s Attorney General is accorded constitutional tenure
He explains that although Kenya’s Attorney General is accorded constitutional tenure
and is ex-officio member of parliament, and chief legal adviser for Government at
and is ex-officio member of parliament, and chief legal adviser for Government at

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46 Supra, Note 5
<www.kenyaconstitution.org/docs/07do11.htm> (accessed on 29 May 2006)
cabinet level, he or she is not a candidate for election. The position is attained purely by appointment. This means that the Attorney General sits astride political stall and professional public service stall. Experience has shown that this duplicity is not readily understood by most people, apart from standing potential risks of compromising the constitutional public service mandate or the political expectations.

Consequently, Professor Ojwang is of the view that the office of the Attorney General should be made a purely political office to be occupied by a minister similar to current British tradition where the Attorney General and Solicitor General are members of parliament and are assigned these responsibilities on the basis of their known competence and potential resourcefulness within the government-ruling party team. This approach doesn’t politicize the office of the Attorney General. However, the approach by Professor Ojwang doesn’t consider means of achieving depolitization within the current constitutional framework.

Attiya Waris, a Kenyan legal scholar, observes that the Attorney General has many roles and constitutionally conflicting positions.\(^{51}\) He or she is both a civil servant and holder of a seat in the executive. He or she has many diverse duties both as a representative of the people and government and thus there is an obvious conflict. Waris explains that the office of the Attorney General is and has always been an area of controversy. The contentiousness of this position is usually related to the Attorney General’s entwined duties of representing the people’s interests’ vis-à-vis advising the government. Waris examined the office of the Attorney General with reference to criminal prosecution powers and recommends the depolitisation as the solution to the constitutional conflicts. She also recommends alternative solutions:

(i) The Attorney General could be adopted as a fully-fledged member of the executive of arm of government without prosecution powers, which could be vested in the office of the Director of Public Prosecution

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The Attorney General could be removed from the executive and concentrate on prosecution as chief public prosecutor.

However, Attiya Waris does not outline how depoliticisation can be achieved. Neither does she consider operationalisation of the autonomy of the Attorney General by a statute. There is need for a statute which will provide for the structure of the office, criminalize interfering with its operation, outline immunities to legal officers, ratification of the appointment by parliament and make him or her accountable to the parliament.

Leigh Andrew attributes the unsatisfactory performance of the Attorneys-General to difficulties inherent in the separation of powers doctrine in a parliamentary democracy. In some jurisdictions, for instance Australia and Kenya, the Attorney-General is member of executive, judiciary and parliament. This places constraints in performing the functions of the office effectively. He argues that success in the ministerial office depends on both doing “a good job” in the relevant policy area, and on satisfying one’s political colleagues. In Nigeria, the office of the Attorney General and Minister of Justice are fused. This inevitably gives rise to an apparent conflict of interest with respect to the Attorney-General’s roles as legal advisor with the other as a cabinet minister bound by ministerial collective responsibility. This fusion of roles strangely combines the obligation to act on some matters independently and free of political consideration with the political partisanship that is associated with other ministerial offices. The fundamental responsibility when acting as Attorney-General is to act in the public interest.

An American legal academic Nancy Baker analyses the character of the Attorneys-General and is of the view that the effectiveness of the office of Attorney-General

52 Supra, Note 1
53 Supra, Note 45
54 Uchena, LM ‘Nigeria: How Impartial is the Attorney General’s Office?’ All Africa. 13 August 2007 < allAfrica.com /stories/2007081400383.html > (accessed on 18 August 2007)
depends on the integrity and loyalty of the holder of the office. She categorizes Attorneys-General into two archetypes; the advocate Attorney-General and neutral Attorney-General. Advocate Attorneys-General are principally interested in the political concerns of the administration. An advocate Attorney-General is, in the words of L. Huston 'the president’s lawyer'.

On the other hand, neutral Attorneys-General are individuals who would at least in theory fulfill their duties with almost judicial discretion and independence. There are some examples under this bracket.

However, it would be hasty to conclude that a neutral Attorney General is always preferable. As Baker, has pointed out, by being more removed from the political decision-making process, a neutral Attorney-General risks being bypassed. In contrast, an advocate Attorney-General is likely to be consulted more frequently, and to be more willing to provide intellectual honest advice. An advocate Attorney General is also more likely to be aware of how decisions will be appear to the public ,and (in those countries where the Attorney General is a member of parliament) to his or her constituents- whereas a neutral may be dangerously oblivious to such matters. In most cases, advocate Attorneys- General are prone to abuse their office. However, it is important to have a balance.

Excluding the Attorney General from the cabinet or selecting someone who is “outside politics” are unlikely to solve the dilemma. After all, the role of the Attorney General

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56 Examples of advocate Attorneys- General are John Mitchell, United States President Richard Nixon’s first Attorney General, who played a role in the Watergate affairs and was jailed for 19 months for perjury and obstruction of justice; United States President Ronald Reagan’s Attorneys- General William French Smith and Edwin Meese III. William French Smith began his memoirs by referring to the “Revolutionary zeal” with which he and his colleagues arrived in Washington.

57 'Referee Reno', *The Economist*, Vol.343, No. 8013. 19 April 1997, p.60

58 Edward Levi, United States President Gerald Ford’s Attorney General. He was non-partisan academic, appointed in an effort to restore credibility to the administration in the wake of Watergate’s affairs; United States Attorney General, Janet Reno was criticized by both supporters and opponents of Bill Clinton for handling of Whitewater fundraising and Monica Lewinsky scandals

59 Supra, Note 55 pp.172-173
has been shaped by the constitutional struggle which arose in England in the seventeenth century. Those struggles established that Attorneys General no longer served at the monarch’s pleasure (as did Coke and Baron) but were advisers to the government. In broad terms, the shape of the Attorney-General’s role has changed little since that time.

Most of the scholars have given varying solutions to the problems hindering the role of the Attorney General. They appear to agree on either to depoliticise or politicize the Office of the Attorney General as a way of enhancing its effectiveness and performance. None of these of these legal scholars have attempted to consider institutional, adjudicative and administrative independence of the Attorney General or legislatively-structured model as a means to enhance constitutional independence of the Attorney General from executive encroachment. As Professor Mwanzia observes that the vast majority of systems of government in the world today seem to be inherently unstable. This instability seems to be due to defects that emanates from their constitutional –making process and insufficient legislation. To construct a table system of government, these defects should be avoided. These defects stem from failure to give weight to normative and structural aspects of society which in turn affects the process of constitutional-making.

The office of the Attorney General is critical in good governance. Many scholars have concentrated their effort on constitutional independence and depoliticization of the office of Attorney General. However, it is high time to emphasize legislative-structured approach as way to supplement the constitutional independence of the Attorney General.

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1.9 LIMITATIONS AND BENEFITS

This study has been constrained by the following factors:

(a) Due to political violence after General Election 2007 in Kenya, the society became too polarized and politicized for objective research by questionnaire.

(b) Due to political sensitivity and security issues it was difficult to get some files dealing with corruption cases.

(c) Research is limited to Attorney General in Kenya.

(d) Inadequate funding.

The study is beneficial to the State Law Office and the public as it analyzes the constitutional problems being encountered by the Attorney General and solutions to unsatisfactory performance. It provides the roadmap for reforms to the State Law Office.

1.10 CHAPTERS BREAKDOWN

Chapter one is the introduction to the study. It will consider the background, and identify the problem that prompted the study. It will also outline justification, objectives, theoretical framework, research hypothesis, research questions, methodology, and literature review.

Chapter two will consider the general role and functions of the Attorney General. It will also outline the organizational structure of the State Law Office in Kenya. It will trace the genesis of the office of the Attorney General both in United Kingdom and Kenya. Kenya was a British colony and hence most of the legal and administrative systems were inherited from United Kingdom. Major doctrines of Attorney General in various legal traditions will also be analyzed.

Chapter three will consider the role of the Attorney General within the Kenyan constitutional context. It will outline constitutional development of imperial presidency in Kenya with wide discretionary powers. It will also analyze the
constitutional conflicting functions of the Attorney General, problems and weaknesses of the Attorney General's Office.

Chapter four will highlight constitutional reform experiences in the role of the Attorney General in some countries with similar jurisdictions.

Chapter five will contain the conclusion, findings and recommendations.
CHAPTER TWO

THE ROLE OF THE ATTORNEY GENERAL

2.0 INTRODUCTION

The office of Attorney General plays a key role in the administration of justice and rule of law. The office evolved with time responding to societal dynamics in governance. Good governance is a public good which every civil and ordered society must strive to realize for its socio-economic development. The ultimate aim is for the society to have efficient, accountable, responsive and effective institutions. It is the primary duty of the government of any country to establish and safeguard institutions that promote, maintain and facilitate justice and rule of law. The goal is a society where citizens celebrate life abundance, and live in peace ensuring that human dignity and public interest is protected.

This chapter will deal evolution of the office of Attorney General. It will also consider its role in the society and main principles which have governed it in the administration of justice and rule of law.

2.1 THE GENESIS OF THE OFFICE OF ATTORNEY GENERAL

The office of the Attorney General is a very old and dynamic institution. The importance of this office and need to keep it under constant reforms for purposes of making it relevant to the society can be appreciated when its historical evolution in United Kingdom is analyzed. It should be noted that Kenya inherited this institution from British Government, hence the need to have a clear historical background of its evolution to assist in having better understanding of its operation, structure and role in the society. It is an office which can easily be misused and abused by the executive. It is interesting to observe that while British Government is reforming its Office of the Attorney General for greater accountability, transparency and making it more relevant to the society, the Kenyan one has not been subjected to legal reforms since

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independence in 1963. It should be appreciated that government institutions are established to serve specific needs and are also affected by the societal dynamics.

The details of the historical development of the office are obscure with some disagreement among legal historians as to the exact details of the office history.

A comprehensive and authoritative study of the history of the office of Attorney General is given by Professor John Edward.

The origin of the office of the Attorney General can be traced back to England in the thirteenth century and the early beginnings of the legal profession itself. The sovereign was unable to appear in person in the courts to plead in cases affecting his or her interests. It became the responsibility of the King’s Attorney to maintain the interests of the sovereign before the royal courts. The first written record of a professional attorney appearing on behalf of the sovereign is of Lawrence del Brok in 1243 that was noted as recovering an “annual fee of 20 pounds for suing the King’s affaire of his pleas before him.”

Lawrence del Brok held office as the King’s Attorney for 14 years and was later made a judge. The sort of work that Lawrence del Brok was engaged in can be determined from the court rolls at the time and included initiating actions to ‘recover rents and lands, proceeding against those who pronounced a sentence of excommunication against

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64 Press Release on Reforms to Historic Role of Attorney General Announced on 25th March 2008 by Attorney General ‘s Office in United Kingdom
< http://www.attorneygeneral.gov.uk/sub_news_press.htm > (accessed on March 2008);
Green Paper on Governance of Britain: A Consultation on the Role of the Attorney General presented to the Parliament by Command of Her Majesty


a royal servant guarding the King’s right to present to churches" and “investigating homicides, to hear and determine what pertained to the crown.” Professor J. Edwards argues that, “it would seem not unreasonable to recognize Lawrence del Brok’s strong claims to have been the first King’s Attorney and the progenitor of the modern Attorney General.” Notably, the political duties currently attached to the office of Attorney General were not present in this early period of the office’s history. However, “as the functions of sovereign became more complex and extensive and acquired a more public character, it was natural that the functions of the King’s Attorney should become wider”.

In 1461, the first record of the title ‘Attorney General’ appears when the King’s Attorney, John Herbert was described as the “Attorney General of England” on the patent of his appointment. In the same year, Herbert was summoned along with the judges to the House of Lords to advise on legal matters. The writ of attendance issued to the Attorney General and to Justices of the King’s Bench and Common Pleas stated that they were to attend the House of Lords and commanded simply to give advice. The Attorney General’s position in the House of Lords as an advisor and attendant may be seen as a reflection of the original conception of the office as that of the legal adviser to the sovereign.

By the beginning of the sixteenth century, it was the Attorney General who was generally consulted by the government regarding points of law and who had the conduct of important state trials. The responsibility of the Attorney General had steadily expanded to involve “… the representation of the sovereign in his rights and interests

70 Supra, Note 67 p. 16
71 Ibid
72 Ibid
73 Supra, Note 69
74 Supra, Note 68 p. 27
75 Supra, Note 67 p. 156
76 Supra, Note 68 p. 33
whenever that was necessary and discharge of the sovereign's responsibilities for the prosecution of crime." 78

The Attorney General also began to assume a significant position in the House of Lords and by the sixteenth century as the "the principal link between the two Houses of parliament, carrying bills and messages from the Lords to the Commons and drafting or amending parliamentary measures." 79

This increasing involvement in the work of parliament was the most noteworthy aspect of the Attorney General's expanding role. 80 Although originally called upon by the House of Lords for legal advice, the Attorney General ultimately took a place in parliament in the House of Commons. 81 Towards the end of the sixteenth century the House of Commons began to assume an important position in the state. It also became desirable for the Attorney General to be available to explain to the House of Commons legal implications of the government measures that came before it. However, the Attorney General was attached to the House of Lords. The question of whether the Attorney General could become a member of the House of Commons was a reflection of the constitutional struggle at that time. This issue caused a controversy in 1614 when the House of Commons objected to Sir Francis Bacon remaining in the House of Commons after his appointment as Attorney General to serve in the Lower House in future. 82 This incident provides one of the earliest illustrations of the inherent conflict in the office of the Attorney General between politics and law. It appears that the ruling of the House of Commons was adhered to for sometime. For instance in 1620, 1625 and 1640 new merits for election were issued when members of the House of Commons were appointed to the office of the Attorney General. 83

78 Supra, Note 67 p. 156
79 Supra, Note 69 p. 34
80 Supra, Note 67 p. 156
81 Supra, Note 68. p. 16
82 Ibid p. 37
83 Ibid
The House of Commons viewed the Attorney General with suspicion as a tool of the Crown and the Lords.\(^84\) However, as noted, it was important for the House of Commons to have the legal advice of the Attorney General. Consequently, in 1661, the House of Lords granted leave for the Attorney General, Sir Geoffrey Paluser, to attend the House of Commons after the Lower House sought his advice regarding business with which the Crown was concerned.\(^85\)

However, it was not until 1670 that the problem was finally resolved when Sir Heneage Finch was permitted to retain his seat in the House of Commons after his appointment as Attorney General’s participation in the Lower House was restricted to drafting bills and advising on legal matters.\(^86\) The Attorney General rarely spoke in the House of Commons.\(^87\) Through membership of the House of Commons, the Attorney General gradually assumed political responsibilities.\(^88\)

Ultimately the responsibilities and duties attached to the office of Attorney General took on a more public and political character.\(^89\) In 1890s, the right of the Attorney General to undertake private practice was restricted.\(^90\) And in 1893, the Law Officers Department was created in London.\(^91\) By the early 1900s the energies of the Attorney General focused exclusively on government business in the courts and parliament.\(^92\) Thus, the role of the Attorney General in the United Kingdom developed from being the legal representative of the sovereign to being an important figure in government, chief crown prosecutor and member of parliament with substantial political responsibilities.\(^93\)

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84 Supra, Note 67 p. 37
85 Supra, Note 68 p.37
87 Ibid
88 Ibid
89 Supra, Note 67
90 Supra, Note 68 p. 145
91 Ibid
92 Ibid
93 Supra, Note 67
Since 1814, the Attorney General of England has also been recognized as the head of the English Bar. The history of the office of the Attorney General illustrates how the office has developed into a very political position. Although the Attorney General is a politician, he or she is also primarily a lawyer. His or her role in the government is confined to providing legal advice to the government, representing the government in court, exercising control over major prosecutions and discharging the legal functions of the state. Although, usually a member of the House of Commons, he or she is included in the cabinet. However, he or she does not have ministerial responsibilities for a government department. Ministerial responsibilities for the administration of justice rest with the Lord Chancellor and to a certain extent, the Home Secretary who are both members of the cabinet.

The Attorney General also has a number of common law powers including initiating and terminating criminal prosecutions, power to grant immunity from prosecution, advising on the grant of pardons, issuing fiats in relator actions, instituting contempt of court proceedings, appearing as amicus curiae in matters of public interest, applying for judicial review, representing the crown in legal proceedings and providing legal advice to parliament, the executive and cabinet.

2.2 THE MODERN ROLE OF THE ATTORNEY GENERAL

The role of the Attorney General is a very important one in the society. It has evolved considerably since its genesis as society and government have become more complex. The role continues to develop in a time of great change. Currently, Attorneys General perform varied and wide range of functions derived from:

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94 Supra, Note 68 p.3
96 Shawn, WD 'History of the Illinois Attorney-General'. <http://www.ag.state.il.us/about/history.html> (accessed on 29 May 2007);
(i) Constitutional powers
(ii) Statutory powers
(iii) Common law powers

It may be stated that in most cases, the duties and powers of the Attorney-General emanate from English common law. However, modern practice is that most of these Attorney-General’s functions under common law have been enacted by parliament thereby giving the Attorney-General constitutional or statutory powers. Consequently, they have been enacted into statutes or provided in the constitutions for purposes of greater protection.

Generally, in common law jurisdictions, the Attorney General is the chief legal adviser to the government and in some jurisdictions for instance in Australia and Kenya may in addition have executive responsibility for public prosecutions.97

The Attorney General as chief law officer has a special responsibility as the guardian of the rule of law which protects individuals and society as a whole from state arbitrary measures and safeguards personal liberties. He or she also has a special role to play in advising cabinet to ensure that the rule of law is maintained and the cabinet actions are legally and constitutionally valid. In providing such advice, it is important to keep in mind the distinction between the Attorney General’s policy advice and preference, and the legal advice being presented to cabinet. The Attorney General’s legal advice or constitutional advice should not be lightly disregarded. The Attorney General’s policy advice has the same weight as that of other ministers.

One of the most publicly scrutinized aspects of the Attorney General’s role is the responsibility for criminal prosecutions. The Attorney General’s responsibility for

97 Wikipedia, Attorney General
<en.wikipedia.org/wiki/Attorney_General> (accessed on 1 May 2006);
The _Role of an_Attorney_General> (accessed on 1 May 2006)
individual criminal prosecutions must be undertaken and seen to be undertaken on strictly objective and legal criteria and independent of any political consideration. Whether to initiate or stay criminal proceedings is not an issue of government policy. This is not to suggest that decisions regarding criminal prosecutions are made in a complete vacuum. A wide range of policy considerations may be weighed in executing this responsibility and the Attorney General may choose to consult the cabinet on some of these considerations. However, any individual prosecution must be that of the Attorney General alone and independent of the traditional cabinet decision-making process.98

An important part of the Attorney General’s responsibility in conducting criminal prosecutions and civil matters is associated with the responsibility to protect public interest, which includes not only the community as a whole and the victim but also the accused. The responsibility is to present the case fairly and not necessarily to convict. This is a fundamental concept of criminal law, even if it is not a particularly well-understood concept among the general public.

Ultimately, the Attorney General is accountable to the people through the legislature for decisions relating to criminal prosecutions. Such accountability can only occur once the prosecution is complete or when a final decision has been made not to prosecute. The sub-judice rule bars any comment on a matter before the courts that is likely to influence the case. The sub- judice rule strictly prohibits the Attorney General from commenting on prosecutions that are before the courts given the stature of the Attorney General’s position. Any public comment coming from the office would be seen as an attempt to influence the case.

The Attorney General has also broad responsibilities associated with government legislation. These responsibilities have been described as two-fold; one is to oversee that all legislative enactments are made in accordance with the principle of natural justice

98 AL Smith LJ in R v. Comptroller of Patents; Exparte Tomlinson (1899) 1 QB 909 at p.913
and civil rights; and the second aspect of this is to advise on the constitutionality and legality of legislation.

The Attorney General has also specific responsibility of conducting civil litigation on behalf of the state. The authority to conduct litigation in cases directly affecting the government or its agencies, involves powers to protect public interests represented. The representation of the state is translated to representation of the people thus serving the public interest is a paramount obligation of the Attorney General. The powers outline the core jurisdiction to be exercised by the Attorney General. While these powers may be expanded, nothing in this basic core can be transferred or exercised by any other officer unless provided by the statute or constitution.

In some commonwealth jurisdictions, for instance Kenya, the powers of the Attorney General are outlined in statutes or constitution modifying the common law powers. In which case, the constitution provides the Attorney General shall be the principal legal officer of the government. Essentially, the role of the Attorney General includes the prerogative of conducting legal affairs for the state. This role is not limited to serving or representing the particular interests of state agencies but embraces serving or representing the broad interests of the state.

Due to its peculiar role, the Attorney General litigates cases where there is a clear matter of public interest or public right at stake. This has been characterized as a constitutional responsibility to ensure that the public interest is well and independently represented. It may involve intervening in private litigation.

Generally, in Anglo-American and Commonwealth countries the common law powers of the Attorney General have been summarized by legal experts as follows:

(i) To initiate, prosecute and terminate criminal proceedings
(ii) To advise on the grant of a pardon
(iii) To issue a fiat in relator actions
(iv) To grant immunities from the prosecutions
(v) To appear as amicus curiae or contradictor
(vi) Initiate proceedings for contempt of court
(vii) Represent the state in any legal proceedings
(viii) Intervene in any proceedings
(ix) Provide legal advice to the parliament, cabinet and executive

While many of these powers now have a statutory and constitutional basis, the Attorney General, stands out as a lawyer in a position different from most other lawyers. His or her clients are ultimately the people. While the Attorney General may represent officers and agencies that are parties to litigation within his or her purview, the Attorney General’s relationship to those “clients” differs from a customary attorney - client relationship. When the Attorney General undertakes representation in his or her constitutional role, it is the Attorney General and not the officer or agency that controls the course of the representation. The Attorney General is fully empowered to control the state’s litigation in the public interests. Hence, he or she has the power to make all decisions on the state’s behalf in litigation he or she is handling including the strategy, the course of the litigation and to make determination on settlement and appeal.

Serving and representing the broader interests of the state takes the Attorney General into a wider range of areas, some of which were unknown at the time the common law powers were developed. The state’s legal business has been expanded in western countries like United Kingdom to include functions relating to the protection of environment (developing from the common law power to prevent public nuisance), combating of consumer fraud, the protection of the citizens interests in public utilities services matter and most recently in health care.
While the Attorney General has prosecutorial powers under the common law, he or she generally lacks the power to take exclusive charge of the prosecution of cases. Examples of such commonwealth jurisdictions are the United Kingdom and Australia, where there is a Director of Public Prosecutions or Solicitor General who is statutorily empowered to handle those cases. In the United Kingdom, the Prosecution of Offences Act (1985) establishes the office of the Director of Public Prosecutions, while in Australia there is the Director of Public Prosecutions Act (1983). In such cases, the Attorney-General retains residual powers and may assist when in his or her judgment the interest of the people requires it. Thus he or she retains the prerogative to appear for and represent the people of the state in cases in which the state or the people are interested. The fact that the common law places the Attorney General in a position of being an advocate for the broad interests of the state as attorney for the people as a whole, postures him or her to look beyond what can sometimes be the parochial interests of state agencies and government units to what is greater good and the more significant interests.

As the government’s legal adviser, the Attorney General must give wholly independent advice. To do so, he or she must be free from conflicts of interest and be insulated as much as possible from pressure from the government. It is therefore necessary that the Attorney General should not be concerned about the impact his or her advice might have on his or her future ministerial career or constituency.

However, in practice, the Attorney General is primarily an officer of the state and in that sense an officer of the public. In the United Kingdom, in his or her absence or incapacity, the duties devolve upon Solicitor General.100

During the evolution of the office of the Attorney, there has been a steady expansion of the responsibilities of the Attorney General involving the courts and work in the parliament. The office, thus, came to assume the political responsibilities, which are so important in the role of the modern Attorney General. He or she has come to be not only

the instrument by which the state discharges its legal functions and responsibilities, but also the chief prosecutor, member of parliament and a minister of the state with important political responsibility. These functions over time tend to overlap and influence each other thereby giving rise to great difficulties for Attorneys General in discharging their various functions with integrity and leading to controversies in which their reputation has suffered often unjustly.

In some commonwealth countries, there has been inherent tension between the legal duties and political responsibilities of the Attorney General. The tension in the office arises out of the duties the office holder has to the law and the courts, the executive, parliament, constituents and political party loyalty. It is a role which covers a portfolio of quasi-judicial, professional, parliamentary and political duties of considerable breadth. The history of the office of the Attorney General in the United Kingdom illustrates that it has developed into a very political position. Although the United Kingdom Attorney General is a politician, he or she is also primarily a lawyer. His or her role in government is confined to providing legal advice to the government, representing the government in court, exercising control over major prosecutions and discharging the legal functions of the state. Although the Attorney-General is a member of the House of Commons, he or she is not included in cabinet. Neither, does he or she have ministerial responsibility for a government department. Ministerial responsibility for the administration of justice rests with the Lord Chancellor and to a certain extent, the Home Secretary who are both members of cabinet. The Australian Attorney General, on the other hand, is primarily a politician and not necessarily a lawyer. He is a member of parliament and may be included in cabinet and, further, administers a large government department like other ministers in the cabinet.

In the United States, the Attorney General is appointed by the president and is a member of cabinet and therefore forms part of the executive government. This arrangement has resulted in a similar debate in United Kingdom as to the appropriate degree of

\[\text{101 United Kingdom and Australia} \]
\[\text{102 Supra, Note 86 p. 211} \]

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involvement of the Attorney General in political affairs and decision-making. The extent of the independence of the Attorney General has been a matter of special attention since the United State’s Watergate scandal in 1972 where five burglars were caught inside the Democratic Party offices in the Watergate complex, Washington stealing documents and taped conversations for President Nixon. It forced President Nixon to resign. The responsibility of the Attorney General for the appointment of special counsel to deal with allegations against the president obviously requires a considerable degree of detachment from and independent of executive government. Nevertheless, the Attorney General of the United States is responsible for the Department of Justice, a huge department of executive government with a wide range of functions.

2.3 SOLICITOR GENERAL

When it comes to organizational structure of the Attorney General’s office, the Solicitor General places a key role in administration. In Kenya both the Attorney General and Solicitor General are appointed by the President. Though the position of the Attorney General is provided by the Constitution, the Solicitor General’s is not. The Solicitor General’s functions are more of administrative in nature as he is the accounting and authorized officer of the State Law Office. However, this is an office which needs to be defined by the Constitution or statute to avoid being a source of administrative conflict especially in a polarized environment and politicized civil service. In the United Kingdom, the Law Officers Act makes the Solicitor General the deputy of the Attorney General. In Australia, the Solicitor General is the second law officer after the Attorney General. Unlike the Attorney General, the Australian Solicitor General is a not a minister or a member of the government. Until 1964, he or she was the secretary to the Attorney General. Currently, the principal function of the Australian Commonwealth Solicitor General is to act for the Attorney General as senior counsel appearing for the Commonwealth’s interests particularly in the High Court.

103 Learn History-A Divided Union 1914-80
2.4 THE DOCTRINE OF INDEPENDENT ALOOFNESS

Due to the difficulty of reconciling the impartiality and even-handedness required for the proper discharge of the Attorney General’s legal and quasi-judicial functions on one hand and with the demands of partisanship on the other hand, there has developed a notion described as ‘independent aloofness’\(^{104}\). The notion is that the Attorney General should neither be involved in questions of government policy nor too closely be active in policy debates within the government. He or she should not engage in robust political debate except in relation to his or her own portfolio; and generally be reticent and non-confrontational with the respect to party politics. This concept came into prominence following criticisms of the part played by the Attorney General (Sir Patrick Hastings QC) in the first British Labor Government in 1924, involving the withdrawal of a prosecution against a communist by the name of Campbell. Prosecuting Campbell presented serious political implications for the Labor Government. The prosecution was discontinued following a cabinet meeting which the Attorney General attended. The Conservative opposition accused the Prime Minister of putting political pressure on the Attorney General to influence his decision\(^{105}\).

Since then, the doctrine of independent aloofness has had a wide and growing influence in many countries whose legal system is derived from United Kingdom. Consequently, the Attorney General has been made a public official independent of politics in India, Kenya, Singapore, Sri Lanka, Malta, Botswana, the Bahamas and the Seychelles. However, in Australia the Attorney General is also a Minister of State and a member of parliament with the duties and responsibilities attached to those positions. This gives a somewhat hybrid character to the office of the modern Attorney General. The incumbent may easily be placed in a situation of conflict between the demands of the office of Attorney General as chief law officer and as a minister.

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In Australia, from colonial times the Attorney General has always been an important political as well as legal figure. He or she has been a member of the cabinet and frequently held other portfolios. Since federation, the Australian Attorneys General have often been senior ministers combining the portfolio of Attorney General with other senior and highly political portfolios\textsuperscript{106}. They were all politicians influential in framing government policy and at the same time engaged in robust political controversies. In considering the role of the modern Attorney General in relation to politics and the judiciary, it is important to keep in mind the political path, which the office of Attorney General has followed, in each society.

2.5 GUARDIAN OF THE PUBLIC INTEREST

One of the legal duties of the Attorney General is to act as "guardian of the public interest." The original source of this designation of the Attorney as the guardian of the public interest is obscure. The earliest reference to it is found in the relatively recent texts of Professor Edwards.\textsuperscript{107}

The two functions listed are: -

(i) The enforcement of public legal rights, usually by relator actions; and

(ii) Representation of the public interest before tribunals.

The other powers are: -

(i) Initiation of proceedings for contempt of court;

(ii) The ability to appear as amicus curiae; and

\textsuperscript{106} William Morris Hughes (1915-1923) was both Attorney General and Prime Minister; Robert Gordon Menzies (1934-1939) was both Attorney General and Deputy Prime Minister; Herbert Vere Evatt and Garfield Barwick combined Attorney General and External Affairs portfolios.

Fact Sheet 73, National Archives of Australia, Australian Government < http://www.naa.gov.au/publications/fact-sheet/FS73.html > (accessed on 20 August 2007 );

\textsuperscript{107} Supra, Note 68
In the administration of justice is, of course, an important aspect of protecting the public interest as it reflects the extent to which the Attorney-General does protect that interest. This was recognized by Lord Diplock in *Attorney-General v Times Newspaper* describing the Attorney-General as “the appropriate public officer to represent the public interest in the administration of justice.” However, that responsibility is shared by all who are vested directly or indirectly with the sovereign power of the people; parliament, the executive and the judiciary. Generally, the guardianship role of the Attorneys General is the sum of their legal duties and responsibilities.

The Attorneys General have various rights to intervene in litigation. At common law, the Attorney General has a right to intervene in cases that might affect the prerogatives of the Crown. He or she can also seek leave from the court to intervene in other cases. As an intervener, the Attorney General becomes a party to the case, is liable for costs and bound by the decision of the court. The Attorney General may also seek leave to intervene as an *amicus curiae* or friend of the court. An *amicus* only assists the court in making its decision.

Normally, the Attorney General has a responsibility to protect the public interest as the representative of the state government. This role is generally considered in the context of the Attorney lending his or her assistance to a person to bring legal proceedings in the name of the Attorney General by the grant of a fiat. In exercise of his discretion, the Attorney General must weigh up countervailing public interests and consider all the relevant facts.

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108 *Attorney General v. Times Newspaper Ltd.* (Thalidomide Case, 1974) *AC* 273 at p.311 per Lord Diplock and at pg. 326 per Lord Cross
109 (1974) *AC* 273 at p. 311
110 Supra, Note 45
111 Gouriet v. Union of Postal Workers (1978) *A.C.* 435
Traditionally, the Attorney General’s responsibilities have included the protection of charities. He or she represented the Crown as *parens patriae* and was the protector of all property subject to charitable trusts. The Attorney General was therefore, subject to statute, the proper person to take proceedings on behalf of and to protect charities.

### 2.6 INDEPENDENCE OF THE ATTORNEY GENERAL

Institutional efficacy demands functional independence. Functional independence for an institution implies achieving the desired degree of autonomy and maintaining an arm’s length relationship from interest groups. The line between independence and autonomy is a thin one but clearly recognizable. Independence, in the main, comprises automatic funding of the institution in question, without having to depend on the whims of ministers and their civil servants. It also means that the head of the institution, once appointed, has fixed tenure and can be removed only for incompetence and moral turpitude. Taken together, these two elements confer an unparalleled freedom of action on the institution. Nevertheless, the perceived benefits of allowing some institutions to discharge their mandate with functional freedom are an attractive enough incentive to justify such move. These benefits include improvement in effectiveness, efficiency, transparency and accountability in the system.

Autonomy, in contrast, usually has at least one of these elements, but automatic funding is absent. Thus, while seeking to establish whether an institution is truly independent or merely autonomous, these are the first characteristics one should look at.

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[112] Halsbury’s Laws of England, 4th Ed. Vol.5 para 870 and the leading case of Moggridge vs. Thackwell 7 Ves Jun 64, in which the Crown as *parens patriae* is described as having ‘the superintending power’ and ‘paternal care’ and protection over all charities.


[115] Ibid
When considering the autonomy of the Attorney General the following dimensions of independence should be analyzed:—

(i) Institutional independence
(ii) Adjudicative independence
(iii) Administrative independence
(iv) Policy directives

Institutional independence looks at the security of tenure of the office holder and financial security of the office holder and the organization. Security of tenure refers to, tenure whether until an age of retirement, fixed term or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner. Critical to the security of tenure is the mode of removal and whether there is a right of appeal. The essence of financial security is that security of salary or remuneration should be established by the law and not subject to arbitrary interference of the executive. While adjudicative independence, on the other hand, considers personal independence in terms of decision-making. It refers to the individual protections in the form of constitutional and legislative provisions protecting the officer-holder from executive interference. The provisions will relate to the aspects:—

(a) appointment
(b) promotion
(c) remuneration
(d) duration of terms of office
(e) irremovability and the exercise of disciplinary powers
(f) oaths of office

Adjudicative independence does not just happen. It requires institutional and individual protection in the forms of constitutional mandates and administrative structures.

16 'Institutional Independence in India' by CUTS International Law and Policy Vol.30 No. 2 April 2008
17 Ibid
Administrative independence looks at the operational autonomy as the office relates to other functions and departments of government. An institution’s independence will also depend to a great extend it is not controlled by other government departments in terms of finances and resource supplies. However, some administrative control is necessary for maintenance of public accountability.

Independence could also be considered to the extent the executive does not exercise control of the office through policy directives. There is need for institutions to be involved in the formulation of the policy that provides strategic direction for the organization.

However, institutional independence has an inverse relationship with external influences over the authorities. The lesser the influence, the greater will be the scope for functional autonomy. There could be a host of possible external influences, including those wielded by interest groups. The government can always discover ways and means to conveniently distort the nature and extent of functional autonomy of such institutions. Therefore, in practice, the extent of the vulnerability to government influence actually determines the degree of independence for such institution. The paradox is that, while some institutions are given independence in democratic societies, when they seek to exercise their independence, they usually come into direct conflict with executive. Effective constitutional and statutory independence of the office minimizes application of “telephone law” or “telephone justice” through orders from “above.”

The office of Attorney General in Kenya is one of the inherited institutions from the British Government which the Constitution grants autonomy in its operation. Hence, its reform perspective can better be analyzed and understood against the background of the British legal system. This approach is appropriate for comparative and also reform purposes.
The independence of the Attorney General is more critical in criminal justice, where there is need for prosecutorial independence. In United Kingdom, under common law jurisdiction, the role of the Attorney General in the prosecution of crime is derived from the Royal Prerogative. Chief Justice Wilmot of the Court of Commons explained the constitutional basis for the role of the Attorney General thus:

"By our Constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of the society...As indictments and informations, granted by the King's Bench, are the King's suits, and under his control; informations, filled by his Attorney General are most emphatically his suits, because they are the immediate emanations of his will and pleasure."\(^{18}\)

However, in Kenya, the role of the Attorney General in criminal prosecutions is a constitutional function provided under section 26(3) of the Constitution which provides:

"The Attorney General shall have power in any case in which he considers it desirable so to do-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by any person;

(b) to take over and continue any such criminal proceedings that have been instituted by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

The Constitution also empowers the Attorney General to direct the Commissioner of Police to investigate any matter which in his or her opinion, relates to any offence or alleged offence or suspected offence and Commissioner shall comply and report.\(^{19}\)

\(^{18}\) R.v. Wilkes(1768), 4 Burr 2527

\(^{19}\) Section 26(4) of Constitution of the Republic of Kenya
In deciding whether or not to mount a prosecution the attorney General is not subject to any person or authority.\textsuperscript{120} Although Parliament is supreme in the Kenya system of government, it cannot, in law, order the Attorney General to prosecute. This independence is illustrated in the reply to Parliament by the Attorney General, Mr. Joseph Kamere, when Parliament sought to have one Stanley Munga Githunguri prosecuted on charges of contravening the provisions of the Exchange Act. In his reply the Attorney General said:

"Prosecution is not persecution-what this House has been subjected to is to challenge the decision of the Attorney General who has decided not to proceed against Mr. Githunguri on the evidence contained in the inquiry file. This House makes laws but does not execute them. The law is left to persons of integrity, those with patience in their deliberations, to consider whether to prosecute or not to prosecute. The question as to whether to prosecute or not to prosecute is entirely left to the discretion of the Attorney General."	extsuperscript{121}

Whereas the role of the Attorney General in facilitating and promoting the rule of law and administration of justice is recognized, it has also been realized that it is an office which is vulnerable for misuse and abuse by the executive. In order for office to maintain objectivity and protect public interests, there is need for it to be autonomous. Hence, during its development it has embraced one basic legal principle which governs its operation; namely, independence from executive.

In order to perform his or her role effectively the Attorney General needs to be protected from encroachment of the executive. Consequently, there has evolved a convention that the Attorney General in exercising the prerogative discretion should not act merely as a member influenced by government policy or party-political considerations and compliant with cabinet decisions, but should make the decisions as an independent judge. But the application of the convention to concrete situations has had a chequered history and the proper relationship of the Attorney General to cabinet in relation to

\textsuperscript{9} Section 26(6) of Constitution of the Republic of Kenya

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decisions as to the exercise of the prerogative discretion is by no means easy to define in a way which produces consistently satisfying outcomes.

The issue has generally arisen in relation to the decisions whether or not to prosecute. It has a long history in England. As long as 1792, the Attorney General, Sir John Scott (later Lord Eldon) asserted the complete independence of the Attorney General in deciding whether or not to prosecute. His successor, Sir Charles Denman (later Lord Denman), however, expressly acknowledged the right of the government to give instructions to prosecute. Thus began a controversy which continued intermittently as the issue arose in particular cases. In 1873, Prime Minister Gladstone denied government responsibility for the Attorney General’s decision to institute proceedings for contempt of court and asserted that the office of Attorney General “was entirely distinct from action of the government.” 122 Major conflicting views are expressed in a House of Lords debate in 1896 in Jameson Raid case where Lord Herschell asserted that the government could not entirely detach itself from a decision to demand a trial at bar “and say that the whole matter is for the determination absolutely of the Attorney General.” 123

The landmark case of Campbell in 1924 brought a new dimension in the United Kingdom’s legal system. The Campbell case, partly of highly charged political atmosphere surrounding the existence of the first Labor Government in United Kingdom (it resulted in the downfall of the Government) and partly because of the extraordinary venom displayed towards Hastings, its Attorney General, who seemed to have been regarded by Conservative Party figures at the bar as little short of a traitor for making his services available to the Labour Government, had a profound, perhaps disproportionate effect on subsequent thinking on the subject both in United Kingdom and elsewhere. The senior opposition figures adopted principle of the independence of the Attorney General of cabinet in his prosecutorial decision. The

123 Ibid
Prime Minister, Stanley Balderin in the Conservative Government, which succeeded
the defeated Labor Government, proclaimed that a cabinet instruction to the Attorney
General to withdraw a prosecution was “un-constitutional, subversive of the
administration of justice and derogatory to the office of Attorney General.”124

Thus a doubtful and hitherto controversial principle was elevated to the level of
binding constitutional convention. It was not thereafter questioned in Britain. The
post-war Labor Government led by Clement Atlee, no doubt aware of the fate of the
first Labor Government, accepted the principle unreservedly and its Attorney General,
Sir Hartley Shawcross, went to great pains to expound it to the parliament and the
legal profession.

The Shawcross speech to the House of Commons in 1951 contains what Professor J.
Edwards describes as “modern exposition of the constitutional position of the
Attorney General.”125 It, therefore, deserves extensive quotation. Shawcross quoted
the views expressed by Sir John Simon (later Lord Simon) in 1925:

“...there is no greater nonsense talked about the Attorney
General’s duty than the suggestion that in all cases the Attorney
General ought to decide to prosecute merely because he thinks
that there is what the lawyers call ‘a case.’ It is not true and no
one who has held that office supposes that it is.”126

Shawcross continued to expound the principle that the Attorney General should only
direct a prosecution when it is in the public interest. In making the decision, he said:

“There is only one consideration which is altogether excluded and
that is the repercussion of a given decision upon my personal or
my party or the government’s political fortune that is a
consideration which never enters into account.”127

124 Ibid
125 Supra, Note 68 p. 223
126 Supra, Note 112
127 Ibid
Dealing particularly with prosecutions, which may concern questions of public policy or national interest, he explained:

"I think the true doctrine is that it is the duty of an Attorney General in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order to inform himself, he may, although I do not think he is obliged, to consult with any of his colleagues in the government and indeed as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision and does not consist and must not consist, in telling him what the decision ought to be. The responsibility for the eventual decision rests upon the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision to the shoulders of his colleagues. If political considerations in the broad sense that I have indicated affect government and the abstract arises, it is the Attorney General, applying his judicial mind who has to be the sole judge of those considerations."\(128\)

The Communique of the Commonwealth Law Ministers who met in Winnipeg, Canada in 1978 seems to indicate that the law ministers adopted these principles. It reads:

"In recent years both outside and within the Commonwealth, public attention has frequently focused on the function of law enforcement. Ministers endorsed the principles already observed

\(128\) Ibid
in their jurisdictions but the discretion in these matters should always be exercised in accordance with wide considerations of the public interest and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of office whatever the precise constitutional arrangements in the state concerned.  

2.8 INDEPENDENCE PRINCIPLE

This principle has been accepted in some Commonwealth countries. For instance the Attorney General of Australia, Mr. Ellicott, QC certainly relied upon those principles in 1977, when he resigned from the Fraser’s government upon the ground that “there has been an attempt to direct or control” him in the exercise of a prosecutorial discretion.  

The question was whether the Attorney General should exercise his power to take over and discontinue a private prosecution against the Prime Minister in the previous government; Mr. E. G. Whitlan, and other ministers in the government. The cabinet had decided to refuse the Attorney General access to cabinet papers relating to the previous government’s involvement in a controversial attempt to raise overseas loans and had conveyed to him the considered opinion of the entire cabinet that the Attorney General should take over the private prosecution and discontinue the proceedings. The Prime Minister, Mr. Malcolm Fraser, although denying that what was done was tantamount to an attempt to direct or control the Attorney General in the exercise of his discretion, accepted the Shawcross principles. He explained:

“It is the traditional role of the Attorney General, as first law officer, to institute and where appropriate, to take over prosecutions for offence. The government recognizes that this is his role. It is not questioned that the Attorney General has a full discretion in relation to these matters. It is nevertheless, proper

129 Ibid
130 Supra, Note 1
for the Attorney General in such matters to consult with and to have regard to the views of his colleagues even though the responsibility for the eventual decision to prosecute or not rests with the Attorney General and with the Attorney General alone. This practice of consultation is a long-standing practice."\(^{131}\)

However, the decisions to prosecute, stay proceedings or launch an appeal must be made in accordance with legal criteria. Two important principles flow from this proposition: firstly, prosecution decisions may take into account the public interest, but must not include any consideration of the political implications of the decision; and secondly, no investigative agency, department of government or minister of the Crown may instruct pursuing or discontinuing a particular prosecution or undertaking a specific appeal. These decisions rest solely with the Attorney General and must for these purposes be regarded as an independent officer, exercising responsibilities in a manner similar to that of a judge.\(^ {132}\)

The absolute independence of the Attorney General in deciding whether or not to prosecute and in making prosecution policy is an important constitutional principle in England and Canada. As the Supreme Court in Canada stated:

"It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions."\(^ {133}\)

Generally, the law is that the Attorney General cannot be directed in carrying out his or her duties by colleagues in the government or parliament.

Colin Turpin, a legal scholar, remarked:

"The Attorney General has certain discretionary powers to authorize, institute or stop criminal proceedings. While he may properly consult his colleagues before taking action of these kinds..."\(^ {131}\)

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\(^{131}\) Ibid


\(^{133}\) Law Society of Alberta vs. Krieger (2002) SCC 65

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in cases raising political issues, he is required by convention to exercise an independent judgement, un-influenced by consideration of party advantage.”

Similarly, Marshall G, another legal academic observed:

“All recent law officers have argued that it is proper and prudent for the Attorney General to consult his political colleagues where prosecutions raise question of public policy or issue of national or international importance, but that the final decision must be his.”

In the United Kingdom, the independence of the Attorney General as principal public prosecutor is legally insecure but conventionally safe. The Attorney General is answerable as a member of the government to the House of Commons for all prosecution decisions conferred on him by statute and in some sense or other he or she is answerable for the Director of Public Prosecutions. However, in performing the duties the Attorney General is allowed to consult. Hartley T. C. and Griffith J. A. G expounded this principle:

“The Attorney General is the chief legal adviser to the government and he appears in courts on behalf of the Government. In exercising his powers, the Attorney General is entitled to consult with any political colleague but the final decision is his alone, and he is expected to exclude all party – political considerations from his mind.”

The critical issue is that he or she should not receive orders to direct the decision. Geoffrey Wilson observed on Campbell case:

“Commenting on the communist conspiracy trial in 1925, Sir John Simon said ‘I understand the duty of the Attorney General to be this. He should absolutely decline to receive order from the Prime Minister or Cabinet or anybody else that he shall prosecute’. His

135 Marshall, G (1986) Constitutional Conventions Oxford: Clarendom Press p. 113
136 Ibid p. 111
first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney General as the head of the Bar, is satisfied that a case for prosecution lies against him. He should receive orders from nobody.”.138

It is now established principle in most Commonwealth countries e.g. the United Kingdom and Canada that the Attorney General in exercising discretionary prerogative powers should not be subject to the direction of the cabinet.139 This independence of the Attorney General arises from the fact that the Attorney must exercise the various powers and discretions in the public interest. As quasi-judicial powers, they are not to be exercised according to the political wishes of the cabinet or the party although their views are entitled to be taken into account in appropriate cases. As L. Smith LJ noted:

“The Attorney General has had from the earliest times to perform judicial functions which are left to his discretion to decide.”140

However, the political acceptance of this independence appears to be relatively recent in the United Kingdom following criticism of the Campbell affairs in 1924 when the Attorney General was directed by cabinet to withdraw a criminal prosecution against Campbell, an editor of the communist newspaper called Workers Weekly. More recently, Lord Morris of Borth-y-Gest observed that the Attorney General in deciding whether to institute proceedings for contempt of court in the United Kingdom would with complete impartiality solely consider the public interest of maintaining the due administration of justice in all its integrity.141

In Australia, the resignation of the Attorney General, Mr. Robert Ellicott QC, in 1977 over pressure from cabinet for him to intervene to terminate a private prosecution against former Prime Minister Gough Whitlam and others, raised the importance of the independence of the Attorney General at least in criminal matters.142 However, the

140 Supra, Note 98
141 Supra, Note 108
function has in practice been transferred to the Director of Prosecutions with the Attorney General retaining least a power not often used to issue direction.\textsuperscript{143} The Director of Prosecutions and the Solicitor General are equally entitled to some degree of independence under their respective statutes.\textsuperscript{144} In Queensland, after Fitzgerald Report\textsuperscript{145} emphasizing the importance of the Attorney General’s independence, the Electoral and Administrative Review Commission (EARC) recommended an Attorney General Act to provide for the powers, functions and responsibilities of the Attorney General.\textsuperscript{146} It also recommended that all directions given by the Attorney General to the Solicitor General and the Director of Prosecutions should be in writing.

In Kenya, the independence of the Attorney General is recognized by the Constitution. Section 26(8) of the Constitution gives the Attorney General its autonomy:

\begin{quote}
"In the exercise of its functions vested in him by subsections (3) and (4) of this section and by sections 44 and 55, the Attorney General shall not be subjected to the direction or control of any other person or authority."
\end{quote}

The independence of the Attorney General was more pronounced in the Kenya Independence Constitution Act 1963, where he or she enjoyed great security of tenure\textsuperscript{147}.

The Attorney General was considered as having a key responsibility for upholding the rule of law. This was reflected in the provisions of the Independence Constitution relating to his or her functions, appointment and dismissal. He was to be appointed by the Governor General acting in accordance with the advice of the Public Service Commission (which in turn had to consult the Prime Minister before presenting their...
nomination). He or she could not be removed from the office except for inability to exercise the functions of the office (whether arising from infirmity of body or mind or any other cause) or misbehavior. The question of his or her removal could be raised by the Prime Minister, Chairman of the Public Service Commission, or a Region President (which points to the need for the Attorney General to be even-handed between the Centre and Region), and if raised, it had to be referred to an independence tribunal consisting of senior Commonwealth judges, whose decision was binding on the Governor General. This position did not last for long for the subsequent constitutional amendment gave the President absolute discretion as to the appointment.  

Section 109(1) of the Constitution now gives the President absolute discretion to appoint the Attorney General without any consultation. Section 26(1) of the Constitution provides that the Attorney General is principal legal advisor to the government at Cabinet level making him or her bound by the ministerial collective responsibility. Section 24 of the Constitution gives the president power to establish the organizational structure of the government ministries including the Attorney General. For instance by Presidential Circular No. 1 of 2003 on the Organization of Government Ministries, the Attorney General’s Office was renamed State Law Office and placed under the Ministry of Justice and Constitutional Affairs. However, this organizational arrangement was later rectified by Presidential Circular No. 2 of 2003, which delinked the State Law Office from the Ministry of Justice and Constitutional Affairs.

The legal consequence of these discretionary appointive and dismissal powers of the president is that the independence of the Attorney General has been diluted to the extent that the Attorney General is inclined to act as president’s advocate rather than people’s advocate.

2.9 UNIQUE ROLE OF THE ATTORNEY GENERAL

The Attorney General should be an independent constitutional officer who has the duty to represent and protect the rights of the public. This is because the clients of the

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148 Ibid

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Attorney General are the people of the state. The Attorney General’s ethical obligation is therefore to the public and not to any one state official. The duty of the Attorney General is to uphold the law and constitution put in place by the people and not to represent the personal desires or wishes of individual office holders. In a dispute between the state and any other party, the Attorney General must be able to give his or her loyalty to the constitution and law and not to an individual executive or group of executives.

This places the Attorney General of a state is a unique position. He or she is indeed *sui generis*. As a member of the bar, he or she is of cause held to a high standard of professional ethical conduct. As a constitutional executive officer with broad duties of chief civil law officer, he or she is required to fulfill the duty as a lawyer to protect the interest of his or her clients, the people of the state. This special status of the Attorney General where the people of the state are the clients cannot be disregarded even though the main role of the Attorney General encompasses advising and representing the state and its agencies in all proceedings. However, his or her ultimate duty is to serve the people. In addition, although an attorney-client relationship exists between a state agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a state agency is precisely akin to the traditional role of the private counsel apropos of a client. The Attorney General’s responsibility is not limited to serving or representing the particular interests of state agencies, but embraces serving or representing the broad interest of the state. Clearly, the relationship between the Attorney General and the state agencies is quite different from that between private counsel and a client who retains him or her.

The unique character of the office is in terms of the legal role of the Attorney General. It includes the authority to chart a course of legal action which is opposed to the administrative officers he or she represents. The Attorney General’s relationship to the heads of state agencies is not the ordinary Attorney-client relationship. The relationship of agency officials to government counsel is not of a client and attorney in any ordinary sense. It is the law and not the whims of person momentarily in the
employment of the executive branch, which embodies the interests and desires of the clients, he or she is retained to represent. The legal position is that the Attorney General is not a counsel giving advice to the government as his clients but as a public officer acting judicially under all the solemn responsibilities of conscience and of legal obligation. The fact that the Attorney General is not in a traditional client relationship with the state agencies and officials is virtually self evident when one considers the role of the Attorney General:-

(i) First, the Attorney General may sue the same state officials to whom he or she provides legal services. The Attorney General represents the public interests and as an incident to the office, he or her has the power to proceed against public officers to require them perform the duties that they owe to the public in general, set aside such action as shall be determined to be in excess of their authority and have them compelled to execute their authority in accordance with the law.

(ii) Secondly, legal opinions issued by the Attorney General to state officials are public records. In a traditional attorney – client relationship such opinions would be confidential.

(iii) Ordinarily, the Attorney General under the common law and statutes is empowered to make any disposition of the state litigation, which he deems for its best interest. The power to control litigation involves the power to discontinue if and when he or she is of the opinion that this should be done. Generally, therefore, the Attorney General has authority to direct the dismissal of proceedings or institute on behalf of the state. This discretion is based on the premise that the Attorney General should act on behalf of the public interests or as the ‘people’s attorney’. Thus unlike the usual situation where the attorney is bound to conduct litigation according to the wishes of the clients, the Attorney General has charge and control of the state’s litigation. All the state legal affairs are under the charge, control and supervision of the Attorney General.

(iv) Fourthly, the Attorney General may be requested to pursue litigation by state officials, who are of potentially divergent interests. The Attorney General may be requested to prosecute and defend actions at the request of the state or legislature.
Finally, the separation of powers under the constitution makes an ordinary client relationship impossible for the Attorney General with respect to the elected or appointed state officials. The constitution usually provides for the separation of government powers into the three branches or divisions. The separation of powers principle exists to prevent tyranny and abuse of powers. This principle underlies the unique position of the Attorney General with respect to other state officials or agencies to which he or she provides legal services. An ordinary private sector is not consistent with the principle in the context of the Attorney General’s representation of other state officers or agencies.

Thus, when an agency head recommends a course of action, the Attorney General must consider the ramification of that action on the interest of the state, and the public generally, as well as on the officials, himself and his or her clients, the people. To fail to do so would be an abdication of his or her role.

Traditionally, the Attorney General is authorized by common law to make those decisions relating to action for and on behalf of his or her clients, the people of the state. Therefore, as the authorized decision-maker for his or her clients, the Attorney General is authorized to consent to the disclosure by this office of such information is to the best interests of the people.

Similarly, the Attorney General’s professional employment requires that the Attorney General to keep the clients, the people, informed concerning the legal matters in which they have an interest. The Attorney General should be authorized preferably through a statute to disclose such information to the public in order to carry out his duties as their lawyer. The statute should provide that the business of state should be generally conducted publicly. There should be a statutory commitment to openness in government.149

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The position in Kenya is that since it inherited British legal system, common law still plays great role in governing the operation of the Attorney General. Unlike, countries which have legislated the common law into statutes, Attorney General still relies on common law powers to facilitate his or her functions.

However, in practice the Attorney General is seen in a traditional attorney-client relationship with the state official and agencies. Hence, the office treating the issues with confidentiality. The result is lack of accountability and transparency in the activities of the Attorney General. The obligation to protect confidence and secrets obviously doesn’t preclude a lawyer from revealing information when his client consents after full disclosure and where it is necessary to perform his or her professional employment or when required by law. Consequently, the Attorney General is considered as president or executive’s advocate rather than people’s advocate.

2.10 CONCLUSION

The office of Attorney General is dynamic institution which has evolved with unique features depending on the socio-political nature of the society. However, there is one factor which has shaped its development, namely independence principle. It is an office which is vulnerable for abuse by the executive. Hence, the need to ensure its independence is safeguarded by constitution and other statutes.

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CHAPTER THREE
THE ATTORNEY GENERAL IN KENYAN
CONSTITUTIONAL CONTEXT

3.0 INTRODUCTION
Kenya achieved independence in 1963 with Westminster- model of administration. The office of Attorney General is one of the government institutions which was inherited from the British Rule. The Kenya Independence Constitution safeguarded the independence of this office. However, the office which has been vulnerable to abuse and misuse by the executive. Hence, it has undergone constitutional changes which have eroded its institutional, adjudicative, and administrative independence.

This chapter will outline organizational structure, role and development of the office of Attorney General in post-independence era. It will also analyze constitutional security of tenure and relationship with executive. The performance of the office will be considered in light of the independence principle in the Constitution.

3.1 CONSTITUTIONAL MANDATE
The office of the Attorney General in Kenya is a constitutional office established within the civil service. The Constitution provides that:

"There shall be an Attorney General whose office shall be an office in the public service."\(^{151}\)

The office plays a vital role in upholding the rule of law and facilitating conducive legal system which is essential for sustainable socio-economic and political development in the country. In its endeavor to fulfill and discharge its policy mandates it is guided by its vision:

"To be the best law firm in Kenya."\(^{152}\)

The mission statement for the Office is:

\(^{151}\) Supra, Note 2
\(^{152}\) Supra, Note 4
"To provide efficient and professional legal services to the
government and the public for the purposes of facilitating,
promoting and monitoring the rule of law, protection of human
rights and democracy."\textsuperscript{153}

Constitutionally, the Attorney General is the principal legal advisor to the Government of Kenya and its agencies.\textsuperscript{154} The Office ensures that the legal system effectively offers opportunities for the activities of the public and private sectors are carried out within the ambit of law. To facilitate this role, the Constitution also gives him or her, the following responsibilities: -

(i) In-charge of all public prosecutions.\textsuperscript{155}

(ii) Power to require investigations by the police on any matters relating to any offence or alleged offence.\textsuperscript{156}

(iii) Member of the Advisory Committee on the Prerogative of Mercy.\textsuperscript{157}

(iv) Ex-officio member of parliament under section the Constitution\textsuperscript{158}

(v) Member of the Judicial Service Commission under the Constitution\textsuperscript{159}

The Parliament has also over the years conferred additional functions to the Office of the Attorney General in its capacity as the principal legal advisor of the government by way of statutes. These include: -

(i) Secretariat at the Advocates’ Complaints Commission under section 54(2) of the Advocates Act

\textsuperscript{153} Ibid
\textsuperscript{154} Supra, Note 3
\textsuperscript{155} Section 26 (3) of the Constitution of the Republic of Kenya
\textsuperscript{156} Section 26 (4) of the Constitution of the Republic of Kenya
\textsuperscript{157} Section 28 of the Constitution of the Republic of Kenya
\textsuperscript{158} Section 36 of the Constitution of the Republic of Kenya
\textsuperscript{159} Section 68 (1) (b) of the Constitution of the Republic of Kenya
3.2 POLICY MANDATES OF THE ATTORNEY GENERAL IN KENYA

The Attorney General is a high-ranking lawyer at cabinet level and a member of the executive branch of government. His main role is to uphold the rule of law and protect the public interest. The main functions of the Office of the Attorney General are usually set out in Presidential Circulars on Organization of Government Ministries and outlined in other official documents as follows:

(i) Undertaking public prosecutions and representing the state in criminal prosecutions, appeals and revisions.

(ii) Undertaking civil litigation directly or through appropriate agencies.

(iii) Negotiating, drafting and vetting of local and international instruments, treaties and agreements involving the government and its institutions.

(iv) Adjudicating complaints made against practising advocates, firms of advocates, a member or employee thereof and ensuring disciplinary action is taken.

(v) Undertaking reviews of laws, drafting of bills, subsidiary legislations, notices of appointment to state corporations, constitutional offices and public offices.

(vi) Reviewing and overseeing legal matters pertaining to registration of companies, business names, societies, trade unions, adoptions, marriages and so on.

(vii) Reviewing and overseeing legal matters pertaining to Public Trustee in administration of estates and trusts.

(viii) Reviewing, updating and consolidating development and codification of laws for promotion of democratic gains and development.

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*Schedule of Duties. March 1995.* Office of Attorney-General;  
*Strategic Plan 2004/5-2006/7.* Office of Attorney-General  
*State Law Office Booklet.* Office of Attorney-General  
*Report on Ministerial Rationalization and Staff Rightsizing, March 2000.* Office of Attorney-General
3.3 ORGANIZATIONAL STRUCTURE

The current organizational structure of the Attorney General’s Office is outlined in the Strategic Plan 2004/5-2007/8. The Office is headed by the Attorney General who is a lawyer. He or she is assisted by the Solicitor General and two Deputy Solicitors General. The Office is organized into eight departments each headed by a departmental head. The eight departments are: Department of Public Prosecutions, Administrator General’s Department, Registrar General’s Department, Civil Litigation, Legislative Drafting, Treaties and Agreements, Advocates’ Complaints Commission and Finance and Administration. All the seven technical departments are professionally answerable to the Attorney General though financially and administratively they are accountable to the Solicitor General.161

The Office is organized into eight departments to enable it perform its policy mandates and functions. These are outlined in Strategic Plan 2004/5-2006/7 as follows:-

(i) **Department of Public Prosecutions**

This is the department that is responsible for undertaking criminal prosecutions, appeals and revisions. It provides services at provincial headquarters and some district offices. The function of criminal prosecution in the lower courts is delegated to the Police Department in the Office of the President.

(ii) **Civil Litigation Department**

The department provides legal services in civil matters to the government ministries and departments.

(iii) **Treaties and Agreements Department**

This is the department that is responsible for negotiating, drafting and vetting local and international instruments, treaties and agreements for and on behalf of the Government ministries and departments. It provides legal advice relating to treaties and agreements to the government. It also undertakes interpretation of

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161 Supra, Note 4
treaties and agreements on behalf of the Government of Kenya. The department is centralized at Nairobi.

(iv) **Legislative Drafting Department**
It deals with drafting bills, subsidiary legislations and notices of appointment to state corporations and constitutional offices. It is also responsible for publishing bills, Acts of parliament and subsidiary legislations in the Kenya Gazette. The department operates from Nairobi.

(v) **Advocates’ Complaints Commission**
This is the department mandated to receive and investigate complaints for purposes of handling professional misconduct against advocates, advocates’ firms, their members and employees thereof under the Advocates Act. Its role is to ensure that advocates conduct themselves professionally and with integrity.

(vi) **Registrar General’s Department**
It is responsible for provision of registration services in respect of incorporation of companies, business names and handling official receiver duties. The other functions include registration of societies, adoption and marriage.

(vii) **Administrator General’s Department**
The department deals with administration of estates and trusts.

(viii) **Finance and Administration Department**
This is the department that is responsible for providing logistical support to the technical departments. It provides administrative infrastructure for purposes of facilitating the professional departments to accomplish their goals. It comprises the Administration, Finance, Procurement, Accounts, Personnel, Information Technology, Internal Audit and the Central Planning Unit.
The responsibilities of the Attorney General are outlined in the Schedule of Duties as follows:\(^{62}:\)

(i) Government’s principal legal adviser and in-charge of public prosecutions and civil litigation.

(ii) Undertakes all duties conferred on the Attorney General by the Constitution, specific statutes and other laws in Kenya.

(iii) Undertaking such other duties and functions as may be assigned to him by government or which are conferred by tradition.

(iv) Overall in-charge of policy formulation in and central co-ordination of the functions of the Office.

The Solicitor General is both the authorized and financial officer. His or her duties are also provided in the ‘‘Schedule of Duties’’ and is responsible to the Attorney General for:\(^{63}:\)

(i) Assisting the Attorney General in the performance of his or her duties as principal legal adviser to the government

(ii) Organizing, coordinating and managing the administration and legal functions of the State Law Office.

(iii) Assisting in formation of legal policy and ensuring proper administration of Kenya legal system.

(iv) Formulating and ensuring implementation of development strategies for government legal services.

(v) Ensuring preparation of cabinet papers and memoranda and taking follow-up action on cabinet decisions

(vi) Representing government in constitutional and major litigation cases

(vii) Undertaking duties of alternate Chairman of Advocates’ Disciplinary Committee

(viii) Dealing with complaints touching on professional ethics and practice of advocates

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\(^{62}\) Schedule of Duties of March 1995 prepared by the Office of Attorney-General; Attorney-General’s Booklet (undated) prepared by the Hon. S. Amos Wako, Attorney-General

\(^{63}\) Ibid
Undertaking duties of alternative Chairman of College of Arms

Undertaking duties as a member of the Council of Legal Education and attending meeting of the Committee for Legal Education in East Africa

Arranging attachment of candidates for pupilage in the State Law Office

Evaluating and advising on application to conduct legal research in Kenya

Undertaking contractual obligations on behalf of the State Law Office

Undertaking other duties as may be conferred by specific statutes or otherwise assigned to him or her by the Attorney General.

3.4 ESTABLISHMENT OF OFFICE OF THE ATTORNEY GENERAL IN KENYA

Kenya was a British colony until it achieved independence on 12th December, 1963. At the time of its independence the formal political structure of the new state established in terms of the Kenya Independence Act 1963, adhered to the familiar constitutional pattern existing in most ex-British colonies. It thus inherited the British legal system with parliamentary form of government based on British Westminster constitutional model.164

Upon colonization, the English law was applied to Kenya. It included the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12 August 1897, together with procedure and practice observed in the courts of justice in England at that date.165 The English law that was applied to Kenya could only be applied so far as the circumstances of Kenya and its inhabitants permitted.

The Office of the Attorney General is one of the colonial institutional legacies that Kenya inherited from the British rule. The initial proposal for the post of the Attorney General was outlined by the Letters Patent of 11th September 1920 from Colonial Office of which Part IV provided:

“There shall be an Executive Council in and for Colony and the Executive Council shall consist of such persons as we shall direct

165 Section 3(1) of Judicature Act (Chapter 8 Laws of Kenya)
The post was finally established by the Royal Instruction of 20th September 1920 when Kenya became a British Colony from the protectorate status. The Royal Instruction established the Executive Council with the Attorney General as ex-officio member and legal advisor thereof. This position was re-enforced by the Royal Instruction of 29th March 1934. Part IV thereof provided:

"The Executive Council of the colony shall consist of the persons for the time being lawfully discharging the functions of Chief Secretary, of Attorney General, of Financial Secretary and the Chief Native Commissioner who shall be styled ex-officio members of Executive Council."

In 1954, the Colonial Office introduced the Lyttelton Constitution, which established ministerial system of government with the Attorney General becoming the Minister for Legal Affairs.

The Kenya Independence Constitution Act 1963 provided for the Attorney General as a civil servant and the principal legal advisor to the government. On the 12th December 1964, the Ministry of Legal Affairs was abolished and the powers thereof transferred to the Attorney General.

The basis of good governance in a constitutional democratic government is the constitution. The national constitution articulates the vision of the country, defines the fundamental principles by which the country is governed, distributes powers within it and plays a critical role of the national-building and consolidating the national state.

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George R.I, Title III - Instructions No. 21 of 1920 p. 77
167 Government Notice No. 256 of 1934 Nairobi Government Printer
168 Section 26 (1) and (2) of the Constitution of Kenya
169 Supra, Note 19 p.1
The idea of a constitutional democratic government or constitutionalism connotes a government defined, regulated and limited by a constitution. Thus, constitutional democracy is founded on the principle of checks and balances, namely that different institutions - the executive, legislature and the judiciary while operating independently of one another and act to check each other's powers. In essence all the institutions are duty bound to uphold the rule of law. This necessitates the precise definition of the role of each institution and that of the public officials. In the absence of role definitions, decisions are taken by persons without the authority to do so, or by the top leadership of the state apparatus. In a constitutional democracy, it is not enough to ensure predictability, control devices to curb bureaucratic excesses are also necessary on at least two grounds; first in the absence of such controls, bureaucrats will use their powers arbitrarily to sabotage the program of administration through corruption and abuse of office; and secondly such powers may be used either in outright violation of the rights of citizens or in more indirect way of bureaucratic insecurity.

Thus, the constitution is something antecedent to government and connotes a system of fundamental principles according to which a nation is governed. In this sense, a constitution embraces not only the frame of the government, but also the relations of the government to the individuals that compose the nation or state. A government operating under written constitution has no more power than is granted to it by the constitution either expressly or by necessary implication.

Essentially, constitution is the basic or fundamental law of the land that serves 'constitutive' functions both internally by establishing the structure for the exercise of government power and externally by establishing a convincing sovereign presence to other nations. It is the law that literally constitutes a country and enables it to run as an entity. It also consists of those core legal values and principles upon which a country and its institutions are founded and establishes how they are run and organized. It stands at the head of a country's hierarchy of law. If any other type of law e.g. Act of parliament, subsidiary legislation, common law, equity and customary law

170 Supra, Note 15 p.222
is inconsistent with it, then that law is null and void, that is, in-operative to the extent of its inconsistency.\footnote{Supra, Note, 21 pp. 37-38}

It is the constitution that creates the organs of government, clothes them with their powers, and in so doing delimits the scope within which they operate.\footnote{Supra, Note 22 p. 5} A government operating under a written constitution must act in accordance with it and any exercise of power outside it is invalid. It operates as a supreme authority.\footnote{Ibid}

It is important to note therefore that effectiveness of a government institution depends to a great extent on its constitutional basis and how it relates to other government institutions. This is because the constitution provides the relevant powers. Hence, effectiveness of Attorney General’s office depends on powers given to it in relation to executive and parliament by the constitution. Where the executive has sole discretionary appointive and dismissal powers over the Attorney General, there is bound to be encroachment on the functions and role of the Attorney General leading to bad governance. Since independence, Kenya has witnessed a systematic and deliberate trend of enhancing the presidential powers which have paralyzed the effectiveness of the Attorney General to discharge his or her constitutional mandates competently and independently. Several amendments to the Constitution have been made which have resulted to executive president with enormous discretionary powers in the civil service. This trend has tremendously affected the limited constitutional protection given to the Attorney General.

Kenya Independence Constitution Act 1963 provided great security to the Attorney General and hence better constitutional environment to discharge his or her mandates. After independence deliberate efforts were made by the government to enhance the executive powers, yet nothing was done to protect the office of the Attorney General against this development. The result has been weak Attorneys General who were not
able to discharge their constitutional responsibilities competently and independently. Wanza Kioko, a legal scholar commented:

“For years Public Investment Committee (PIC) and Public Accounts Committee (PAC) have generated volumes of reports detailing corrupt activities and recommendations against individuals named in those reports. Nothing happens. The Controller and Auditor General has his own volumes detailing governmental corruption. The Attorney General doesn’t persecute.”

3.5 THE INDEPENDENCE CONSTITUTION

Kenya achieved independence under Kenya Independence Constitution Act 1963 which provided a vital step in the country evolution as an independent state. It indeed provided the crucial institutions that set the country afoot in independent statehood and on this account has become a historical heritage and a reference point in any current and future reform initiatives.

Kenya’s current Constitution dates back to independence in 1963 except that it has been repeatedly amended over the years. Its essential character today is quite different from what it was in 1963.

Kenya set off at independence with the Constitution that provided “dual executive”; the Queen was represented by the Governor General as the Head of State and the Commander-in-Chief of the Armed Forces while the Prime Minister was the head of the government and leader of the largest political party in the National Assembly. Sections 31 of Kenya Independence Constitution Act created the position of the Governor-General who was appointed by the Her Majesty Queen, while section 71(1) thereof established the position of the Prime Minister who was appointed by the Governor-General. The Independence Constitution 1963 contained several checks and

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175 Supra, Note 50
balances as the Head of State held a ceremonial position while the head of government held executive powers. The instruments of constitutional action were in the custody of the Head of State. Therefore the Prime Minister, the real power holder had to work in consultation with the constitutional head who was the Head of State. There was also semi-federal (or Majimbo) system which took the form of seven regions each with a Regional Assembly and a separate public service. Attendant upon this federalist element was a bi-cameral legislature at the national level. Provision was also made for several commissions for different aspects of the public service.

The Kenya Independence Constitution Act 1963, therefore, provided a legal basis for keeping a governmental power in check safeguarding minority rights and interests. This was one of the key devices instituted for the purposes of balancing the central exercise of public power through the civil service machinery. Its unframed discretionary powers were removed and placed under the control of the Public Service Commission, an independent supervisory body. It was the duty of the Public Service Commission to appoint persons to hold or act in the offices in the public service and to remove such persons from office. In the highest public offices such as the Attorney General, the Controller and Auditor General and Permanent Secretaries, the Governor General was mandated to make the appointments with the advice of the Public Service Commission.¹⁷⁶

The civil service was visualized as a neutral tool of appointment. This entailed a rather extreme approach to the separation of powers concept. A neat demarcation was drawn between the legislature and executive functions of government where the civil service was considered as a special department within the framework of the executive organs completely apart from the ordinary political process. Professor Yash Pal Ghai explained that the Independence Constitution conformed to this pattern, establishing the supremacy of the Constitution and neutrality of the public service.¹⁷⁷

¹⁷⁶ Supra, Note 49 p.430
The Independent Constitution 1963 placed the Attorney General in public service as the chief legal advisor to the government. He or she was considered at independence as having a key responsibility for upholding the rule of law. This view was reflected in the provisions relating to his or her functions, appointment and dismissal. The holder of the office was (and is) a public servant. He or she was appointed by the Governor General acting in accordance with the advice of the Public Service Commission (which in turn had to consult the Prime Minister before presenting the nomination). The Attorney General enjoyed great security of tenure. He or she could not be removed from the office except for inability to exercise the functions of the office (whether arising from infirmity of the body or mind or any cause) or for misbehavior. The question of his or her removal could be raised by the Prime Minister, Chairman of the Public Service Commission, or a Regional President (which points to the need for the Attorney General to be even-handed between the Centre and Regions), and if raised, it had to be referred to an independent tribunal consisting of senior Commonwealth judges whose decision was binding on the Governor General. This position did not last long for the very first constitutional amendment gave the President absolute discretion as to his or her appointment.

An analysis of most of the constitutional amendments and especially those of the 1960s shows that they had a purely governmental-cum-ruling party origin and sought in the first place to consolidate the authority of the executive, almost at the expense of the other organs of the government. Rather than promote checks and balances, the amendments tended to relegate both the legislature and the judiciary to the position of subordination compared to the meteorically ascendant executive. This culminated to one reality in terms of governmental power, namely pluralistic checks and balances.
system of the Kenya Independence Constitution Act 1963 model was debunked and replaced with a monolithic state in the person of an executive president with the fullest control over parliamentary and public service in addition to constitutional authority over the make up of the judiciary. The result was centralized imperial presidential powers which were unchecked and uncontrolled.181

Professor Okoth Ogendo, referred to this development as the emergence and predominance of a form of imperial presidentialism.182 With such immense governmental powers, the independence of the Attorney General would prove of no consequence. The reality would appear as remarked by legal scholar Dr Gibson Kamau Kuria when analyzing the case of Stephen Mwangi Muriithi183 that in post independence Kenya as in colonial Kenya, all public servants including judges held their offices during the President’s pleasure.184

However, the post-independence period witnessed the rejection of Westminster government and its replacement with executive presidential government. This development should be considered against cardinal principle that whereas the Attorney General may be part of the executive, while performing the office’s role, he or she is required to be independence from encroachment of the executive. Indeed, in a number of Commonwealth countries, the Attorneys General are public officials. They are governments’ chief legal advisers heading the ultimate prosecuting authority. They are also the guardians of public interest.

It is against this background that it is necessary to consider the rise of an imperial presidency in Kenya which is a potential threat to the independent exercise of the Attorney General’s powers.185

82 Supra, Note 15
85 Supra, Note 15
With time, stage was set for reconstruction of the state and emergence of a form of imperial presidentialism characterized with pre-eminence of discretion as the basis of constitutional power. According to Professor Okoth Ogendo four devices were used to recentralize power:\(^{186}\):

(i) extension of appointive and dismissal authority of the chief executive to key offices in the public service, civil, military and constitutional offices such as the judges and Attorney General.

(ii) subjection of political recruitment at all levels, local, municipal and parliamentary to strict party sponsorship.

(iii) expansion of the coercive powers of the state by allowing extensive derogation from bill of rights whenever it was justifiable. This expansion was usually accomplished by the removal (or weakening) of parliamentary supervision of emergency powers.

(iv) ensure that the constitutional order conformed to the inherited colonial legal order.

The result was the fusion of executive power in the chief executive and the supremacy of the Office of the President over all organs of government. The semblance of separation of powers that remained was, at its best, of administrative significance only. The second index to this development was the immunity of the president from the legal process, civil and criminal, as long as he remains in the office.\(^{187}\)

For practical purposes, the Independence Constitution was a document which proved unworkable for presidential system of government seeking massive discretionary powers.\(^{188}\) The political elites lost faith in it. It was unfortunate that the protagonists did not have much faith in it.\(^{189}\) This constitutional development in Kenya was similar to other countries like Tanzania. The result was the rejection of the independence

\(^{186}\) Supra, Note 15

\(^{187}\) Ibid

\(^{188}\) Agweli, PLO Constitution-Making in Kenya Nairobi: Pakasawa Printer p.169

\(^{189}\) Githu, M 'Amending the Constitution.' paper presented to the Constitution of Kenya Review Commission <www.kenyaconstitution.org/does/03d001.htm> (accessed on 6 June 2006)
constitutions as evidenced in the post-colonial independence era in many African states. This general trend in Africa is summarized by the remarks of late President Nyerere of Tanzania:

"We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a straitjacket of constitutional devices – even of our own making..."\(^{190}\)

Kenya witnessed the first democratic wave in 1960s culminating to the Independence Constitution with a neutral civil service managed by the independent Public Service Commission. However, the independence was immediately followed by blowing of the reverse wave of democratic breakdown, which had drastic negative impact on the Independence Constitution, and the role of the Public Service. Professor Okoth Ogendo\(^ {191}\) attributes this to the rise of imperial presidency in the reconstituted states. It involved the emergence and predominance of a form of imperial presidentialism. The consequence was the supremacy of the Office of the President over all organs of government.\(^ {192}\) This was justified by the need for a strong government to steer the development and modernization of the economy, which were the main reasons for the independence struggle.

This rise of imperial presidency had great influence on the public service. This is because public service is the principal instrument of the state to implement its policies. Its effectiveness is based on merit and expertise, while its neutrality and impartiality is ensured through an independent method of recruitment and promotion as well as by fidelity to the law. This position changed with the emergence of political patrimonialism. This was a form of personalized rule, which did not tolerate opposition. In such situation, the administration is based on the total power and discretion of the ruler. The bureaucracy becomes an extension of his or her household with delegated power. Officials owe their appointment to his or her trust and

\(^{190}\) Supra, Note 15
\(^{191}\) Ibid
\(^{192}\) Ibid
goodwill. There is no clear separation between the private and public sphere of the ruler. He or she is above the law, so are the officials who dispense justice and petition for his or her clemency and generosity. The ideological superstructure of such domination is the good generosity and concern of the ruler for his or her people. He is regarded as the “father of his people,” or the “father of his nation.”

As a result of this development, post-independence era witnessed several constitutional amendments which enhanced the presidential powers in the civil service.

Most of the post-independence constitutional amendments were aimed at recentralizing political power and establishing imperial presidency with immense executive powers. The process destroyed the checks and balances system against the executive. Unfortunately, with this development nothing was done to protect or safeguard the office of the Attorney General, which was left at the mercy of imperial presidency. Over Kenya’s first 25 years, the Constitution was amended more than thirty times and nearly every amendment further concentrated power in the person of the president of which it is argued that the Attorney General was not able to advise. This is evidenced in the passing of Constitutional of Kenya (Amendment) Act No. 14 of 1986 and Constitutional of Kenya (Amendment) Act No. 4 of 1988 in which the security of tenure for the Attorney General, judges of High Court and Court of Appeal, and members of the Public Service Commission was removed.

3.6 CONSTITUTIONAL AMENDMENTS

The Kenya Independence Constitution Act 1963 established a liberal democratic form of government providing legal environment where the Attorney General could give independent legal advice to the government. It provided sufficient autonomy for safeguarding of Attorney General. In that setting, the Attorney General could give advice to the government based on law, and not politics or other external factors. The
government is of course under no obligation to accept the advice. However, in principle, the government should not instruct or coerce the Attorney General to give the advice that suits it. Twisting the law to make an executive decision appear constitutional or legal when it is not, is outside the role of an Attorney General in a liberal democracy.

It is one of the legal principles to safeguard and maintain the autonomy of the Attorney General that whereas he or she may be part of the executive, while performing his or her role, he or she should be independent from the interference of the executive. L. Smith L.J explained

“The Attorney General has had from the earliest times to perform judicial functions which are left to his discretion to decide.”

However, with the rise of imperial presidency in Kenya, the independence of the Attorney General was gradually diluted with several constitutional amendments which increased the executive powers of the president to tyrannical ruler. These constitutional amendments had a direct bearing on the role of the Attorney General. Surprisingly, no corresponding constitutional and statutory safeguards were provided to the office of the Attorney General to protect its autonomy. The result was an executive president with enormous discretionary powers which could not be controlled, while the Attorney General was relegated to position of president’s advocate rather than people’s advocate. An analysis of those constitutional amendments confirms this trend.


This Act eliminated the positions of Governor General and Prime Minister and concentrated power in one chief executive who became Head of State, Head of government and Commander - in – Chief of the Armed Forces. It established a republic with an executive president. The first President would be the person holding

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195 In principle the government should not instruct or coerce the Attorney General to give the advice that suits it. Twisting the law to make an executive decision appear constitutional or legal when it is not, is outside the role of an Attorney General in a liberal democracy.

196 Supra, Note 98 p. 913

197 Constitutional of Kenya (Amendment Act, 1964 (No.28 of 1964)
office of Prime Minister immediately prior to the establishment of the republic. A candidate for the presidency had to be a candidate for the House of Representatives and his or her nomination had to be supported by a thousand registered voters. It required all candidates for the House of Representatives to indicate their support for a presidential candidate. Under Constitution of Kenya (Amendment) Act, 1964 the presidential candidate who won his or her constituency seat and also received a majority of votes of the number of members of the parliament was declared elected.

The provisions relating to the office of the Attorney General were also changed. The amendment altered sections 189-191 of Constitution of Kenya giving the President complete appointive discretion over the Attorney General interfering with the Attorney General’s constitutional independence and autonomy.

The amendment vested in the President wide powers in relation to the civil service. Whereas the members of the Public Service Commission were previously required to be appointed by the Governor General acting on advice of the Judicial Service Commission, they were now to be appointed by the President acting in his or her own discretion. The provisions relating to the office of the Attorney General were also changed. The President enjoyed complete appointive discretion in relation to these officers.

2. Constitutional of Kenya (Amendment) Act, 1965

The First Schedule Part 1 (ii) (a) of this Act altered the parliamentary majority required for approval of a declaration of a state of emergency from three-quarters of all members to a majority. It also extended the period to seek a parliamentary resolution to twenty-one days. Significantly, it decreased the parliamentary majority required for a constitutional amendment to three-quarters in both Houses. Section 7(1) (f) of this Act abolished the special entrenchment of certain sections of the Regional Assemblies, renamed them as Provincial Councils giving the Parliament the power to

198 Amendments of sections 189-191 of Kenya Independence Constitution Act 1963
199 Constitutional of Kenya (Amendment) Act, 1965 (No. 14 of 1965)
confer functions upon them. Finally, it extended the validity of declaration of emergency from two to three months.


This Act eroded parliamentary independence and ended the independence of the civil service. All civil servants including parliamentary staff had to serve at the pleasure of the president who was given the power to appoint and dismiss from civil service. Section 87 of that Constitution of Kenya (Amendment) Act vested in the President the power of constituting and abolishing offices in the Republic and of making and terminating appointments to any such office. Section 87A thereof provided that every person held office at the pleasure of the President. The apparent effect of these constitutional changes was to relegate the Public Service Commission to a nominal auxiliary role. The tenure of civil servants no longer depended on the observance of the Code of Regulations but more relevantly on presidential pleasure. And as the President could abolish offices in his own discretion, it followed that protecting offices by vesting their control in independent bodies was no longer valid. The President became in theory the employer of all civil servants whom he could discontinue their services at will. The normative bulwark designed to insulate public officers from the vagaries of political was constitutionally removed; the underlying policy consideration had changed in favour of the political will. Section 42(1A) of the constitutional amendment required that a member of parliament who was sentenced to a prison term of six months or more should vacate his or her seat. Further a member of parliament who failed to attend eight consecutive parliamentary meetings without permission of the speaker should loose his or her seat, although it allowed the President to waive the rule. The President’s power to rule by decree in North Eastern Region was extended to Marsabit, Isiolo, Tana River and Lamu Districts.

200 Constitutional of Kenya (Amendment) Act 1966 (No. 16 of 1966)
4. Constitution of Kenya (Amendment) Act 1969\textsuperscript{202}

This Act published on 18\textsuperscript{th} April 1969, consolidated all the above amendments in a revised Constitution. These amendments of the Constitution had a number of major consequences effectively creating a new Constitution. They made Kenya a unitary state, concentrated power in the President and reduced the powers of the parliament. The Constitution now provided for a strong centralized authority. Part of the initial amendments therefore involved an attempt albeit misguided to harmonize the operations of a democratic constitution with an undemocratic and authoritarian administrative structure. Kenya had eventually become a de facto one-party state.

5. Constitution of Kenya (Amendment) Act, 1982\textsuperscript{203}

This Act was to go down the history as the most far-reaching and controversial amendment to the Constitution. It introduced the infamous section 2 A of the Constitution making Kenya a \textit{de jure} one-party state, further reducing parliament’s role. The amendment outlawed all opposition whatsoever and gave the ruling party Kenya African National Union (KANU) the monopoly of political power in the country.

This constitutional amendment also formalized the position of the Chief Secretary in Public Service. The Chief Secretary was to exercise supervision over the Office of the President, general supervision and co-ordination of all other departments of government including the Attorney General’s office. This post was later abolished.

6. Constitution of Kenya (Amendment) Act, 1986\textsuperscript{204}

This Act was far-reaching. In many ways it was the genesis of extensive ill-advised amendments. The amendment was a clear case of a situation where government was no longer receiving legal advice and the Attorney General had lost his autonomy and independence to the extent of bending over backwards to accommodate every political whim. The amendment removed the security of tenure of the Attorney

\textsuperscript{202} Constitutional of Kenya (Amendment) Act, 1969 (No. 5 of 1969)
\textsuperscript{203} Constitutional of Kenya (Amendment) Act 1982 (No.7 of 1982)
\textsuperscript{204} Constitutional of Kenya (Amendment) Act, 1986 (No. 14 of 1986)
General and the Controller and Auditor General. These were very key offices which the Kenya Independence Constitution Act had insulated from the vulgarization of political life, being watchdogs of the public interest. The bill caused an outcry from the public, inter alia, the Law Society of Kenya, the National Christian Council of Churches of Kenya, and the Catholic Bishops. This very unpopular bill with the public was nonetheless passed in record time and got opposition from only two members of parliament. The debates in parliament justified the amendments as necessary in order to centralize power in the President and avoid the growth of alternative center of power as had occurred during Mr. Charles Njonjo’s tenure as Attorney General. The amendment also abolished the Office of the Chief Secretary which was argued had been set up at the behest of Mr. Charles Njonjo. Through this amendment, the Vice-President or any other minister charged with responsibility for a department of the government would exercise some directions and control over that department.205 This explains the presidential directive placing the Attorney General’s Office under the Ministry of Justice and Constitution Affairs in 2003.206


This amendment was one of those rare but significant instances where the legislature overrules the judiciary. This amendment made all offences which are punishable by death namely treason, murder, robbery with violence and attempted robbery with violence non-bailable. In a significant way this was an interference with the discretion of the judiciary to award or refuse to award bail depending on the circumstances of each case. Bail is a fundamental human right because criminal jurisprudence and the Constitution presume all accused persons are innocent until proven guilty after due law process. Indeed, in practice, the courts had always declined to release persons charged with capital offences on bail due to the possibility that they would abscond and fail to appear during their trials.

205 Supra, Note 188 p.187
206 Presidential Circular No.3 of 2003 on Organization of Government Ministries Office of the President Nairobi: Government Printer

Section 6 of this Act expanded the presidential powers by removing the right to security of tenure from the judges of the High Court and Court of Appeal as well as the members of the Public Service Commission. It eroded the separation of powers, which entails in part the independence and impartiality of judiciary and the political neutrality and impartiality of the civil service. This amendment went against the entire philosophical and jurisprudential basis of the Constitution. It reflects lack of autonomy and independence of the Attorney General as guardian of public interest.

In effect, the amendment gave the executive, powers to interfere with the judiciary and civil service with impunity. Whereas this amendment was a logical extension of the process of concentrating immense powers in the executive and reducing its accountability to any other organ except itself, it was outright unconstitutional. There can be no interpretation of the constitution that read into the amending power, a power to render one fundamental arm of government into a subservient puppet of the other. It was against constitutional theory, judicial precedent and the reality of a democratic system of government. The amendment reveals undemocratic and authoritarian government that was not receiving or listening to sound legal, constitutional and political advice. It also manifests the extent the Attorney General was impotent despite the constitutional autonomy and independence. This Act was later repealed in 1990.

Whereas the Constitution provides that the Attorney General is to act completely independent in the exercise of the functions of his or her office and that parliament is the supreme law making body in the land, the Attorney General nonetheless did receive “a directive” in November of 1990 to draft a bill effecting the changes.

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207 Constitution of Kenya (Amendment) Act 1988 (No. 4 of 1988)
209 Supra, Note 50
The bill brought out the very unprincipled and reckless way in which previous amendments were made. The amendment further removed the rights of suspects and accused persons by empowering the police to hold suspects with capital offences for 14 days and other offences for 24 hours.

It is evident that these constitutional amendments resulted in a significant increase of presidential absolutism. Professor Mohammed Hyder in his treatise ‘Kenya 2001: Afresh Synthesis of Kenya’ quotes the constitutionalist, P.L.O.Lumumba who summarized the question of executive supremacy as follows:

“\textit{The Independent Constitution which emerged following the numerous amendments between 1964 and 1969 gave birth to an executive arm that was vested with massive powers. The words of then the attorney General, Charles Njonjo(1971) underlined the philosophical essence of the new approach. He said ‘Our most cherished institution is the presidency, and our most beloved citizen is the first holder of the office, Mzee Jomo Kenyatta. No one is more important to the peace and prosperity of our country than our President’}”

The lesson learnt from these constitutional amendments is that despite the constitutional autonomy and independence guaranteed to the Attorney General, the office became more vulnerable to the immense presidential powers and hence, the need for additional safeguards empowering it to protect the public interest.

3.7 ATTORNEY GENERAL’S SECURITY OF TENURE IN KENYA

Kenya has had five Attorneys General since independence in 1963.

Questions have been raised about the Attorney General’s powers to prosecute and whether those powers have been exercised independently or under the influence of the government of the day. What this points to is the contradiction that plagues the office of the Attorney General. Apart from the President and Finance Minister, the Attorney

\textsuperscript{210} Supra, Note 188 p.187
\textsuperscript{211} Ibid p. 133
General is the only cabinet member whose limited executive powers are defined by the Constitution of Kenya.

Section 26 (8) of the Constitution provides the autonomy of the office of the Attorney General:

"In the exercise of the functions vested in him by subsections 3 and 4 of this section and by sections 44 and 55 the Attorney General shall not be subject to the direction or control of any other person or authority."

Section 109 (5) and (6) of the Constitution guarantees the security of tenure to the Attorney General. In particular, section 109 (5) of the Constitution provides:

"The Attorney General may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be removed except in accordance with this section."

This security of tenure was revoked in August 1988 and restored in 1990\textsuperscript{213}.

In cases where it may be necessary to remove the Attorney General from the office, there must be presidential tribunal’s recommendation to that effect. Section 109 (6) of the Constitution states:

"The Attorney General shall be removed from office by the president if the question of his removal from office has been referred to a tribunal appointed under sub-section (7) and the tribunal has recommended to the president that he ought to be removed for inability as aforesaid or for misbehavior."

The tribunal so appointed shall consist of the chairman and four other members selected by the President from among the following persons:

(i) who hold or have held office as judge of the High Court or judge of appeal or,

\textsuperscript{213} Supra, Note 208 p.226
(ii) who are qualified to be appointed as judges of the High Court under Section 61 (13) or,

(iii) upon whom the rank of senior counsel has been conferred by the president under section 17 of the Advocates Act.

Once the question of removing the Attorney General has been referred to a tribunal, the president may suspend the Attorney General from the exercise of the functions of his or her office and any such suspension may at any time be revoked by the president and shall cease to have the effect if the tribunal does not recommend his or her removal.\textsuperscript{214}

However, despite this security of tenure (which was repealed between 1986 and 1990),\textsuperscript{215} many post-independence Attorneys General in Kenya are perceived to have worked under the influence of the President and other powerful members of the government. In a situation where they have exercised independent judgement, their tenure has been short-lived and they have had to resign.\textsuperscript{216} This was the case with Kenya’s shortest serving Attorney General, James Karugu (1980-1981). He took over after Charles Njonjo (1963-1980) who resigned to contest a by-election. Soon after Charles Njonjo was elected to parliament, and made the Constitutional and Home Affairs Minister, he began encroaching on the Attorney’s General functions. This encroachment and Njonjo’s attempt to influence the prosecution of his cousin Andrew Muthamba, who was charged with treason reportedly, pressured Mr. James Karugu to resign.\textsuperscript{217}

It is against this background that recommendations were made in 1990 for the Office of the Attorney General to be split into two. These recommendations were made to

\textsuperscript{214}Section 109 (8) of the Constitution of Kenya

\textsuperscript{215}The security of tenure for the Attorney General was removed by the Constitution of Kenya (Amendment) Act No. 14 of 1986 and re-instated by the Constitution of Kenya (Amendment) Act 17 of 1990.


\textsuperscript{217}Ibid
the 19-person KANU Review Committee when it went round the country between July and August 1990 seeking people’s views on reforms to the then only political party, the Kenya African National Union (KANU). Many of the people who made their submissions to the Committee chaired by the then Vice-President George Saitoti, did not want to be confined to suggesting ways to improving the political party and hence included governance issues within the public service. Therefore, when the Committee submitted its report to the President in October 1990, it included among others, in Chapter 10, a recommendation that the Office of the Attorney General be reformed. The political section of the office be separated from the non-political section. This implied the appointment of either a Minister of Justice or the establishment of the Office of the Director of Public Prosecutions to exercise the powers conferred on the Attorney General by Section 26 of the Constitution of Kenya. This would leave the Attorney General to exercise his or her other role as a member of parliament and cabinet minister.218

Although no immediate changes were made to the Office of Attorney General, in April 1991, the then Attorney General, Justice Guy Muli gazetted the appointment of a five-man Committee to examine the proposals, suggestions and submit its findings and appropriate recommendations within two months. The Committee was chaired by Justice Emmanuel O’ Kubasu. The other members include Dr. Bonaya Godana, a lawyer and at the same time as Assistant Minister, Professor Jackson Ojwang of the University of Nairobi, Nairobi lawyer Lee Muthoga and William Asiko as secretary to the Committee. However, the five-man Committee’s appointment was revoked by the Attorney General a week after its gazettement. Eventually, the Office of the Director of Public Prosecution was established under the Attorney General and not as a separate institution.219

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218 Ibid
219 Ibid
THE ATTORNEY GENERAL AS A CIVIL SERVANT

In Kenya the Attorney General is a civil servant. The Constitution establishes the office of the Attorney General within the public service. It provides that there shall be an Attorney General whose office shall be in the public service. He or she is appointed by the President. The Independence Constitution had instituted the public service machinery as a device for purposes of balancing the central exercise of public power. It placed public service under the control of the Public Service Commission. The civil service was visualized as a neutral tool of implementation. The civil service inherited from the Colonial Rule was to be regarded as a separate estate from the political order, a profession whose fundamental principle was neutrality and whose tools were in the nature of data and other politically silent values. The purpose was to practically implement decision whose policy underpinnings had been laid by elected persons in control of the government of the day.

While performing his or her duties, a civil servant is always in a situation of dilemma when dealing with the fundamental questions on what to do, how to act in complex situations, involving contrasted values or decisions whose premises could imply hard choices. This scenario is usually complicated by politics in which a civil servant finds himself or herself. The distinction between politics and administration forms one of the most classic doctrines of modern political science and public administration which connotes not only their division of function and their structural separation, but also the subordination of the latter to the former. Thus the primacy of politics in the politico-administrative nexus explains the ultimate political or rather governmental control of the administrative machinery of the state in a democracy. The loyalty of the bureaucracy to its political masters is grounded on the obligation of ministers in parliamentary democracies to be answerable and responsible to the legislature (ministerial responsibility to parliament). It is only by that means that the

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220 Supra, Note 2
221 Section 109(1) of the Constitution of Kenya
representation of the nation may hold the bureaucracy accountable to the will of the people and the general interests.

Since it is the ministers who are accountable to the parliament and, not civil servants, it follows that the latter are obligated to execute the orders of the former even if they disagree with their content provided that they originate from a legitimate source of authority and that authority insists on their execution despite the remonstrance put forward by officials.\textsuperscript{222} However, this excludes criminal activities.

Subordination of civil servants to elected representatives who act as law-makers and policy-setters forms a sine quo non precondition of democratic politics. It is argued that unless subordinated to political control, the bureaucracy and administration would be usurping powers, which do not belong to it. If that happens, then bureaucracy (civil or military) enters the political arena, undermining representative democracy and subjugates politics and government to its own interests and commands.

It is thus a fundamental ethical duty of civil servants in pluralist parliamentary democracy to subordinate themselves to political authority. Hence, they owe a duty of loyalty and faithfulness to the duly elected or appointed political masters, however, transient they may be. In the same vein they would have to show a spirit of neutrality and discretion in their capacity as members of the administrative infrastructure of the state vis-à-vis partisan politics and keep at bay their own personal preferences in the performance of their duties and responsibilities.\textsuperscript{223}

Accordingly, the first duty of a civil servant is to give his individual allegiance to the state at all times and in all occasions when the state has a claim upon his service.\textsuperscript{224} It

\textsuperscript{223} Ibid
\textsuperscript{224} Supra, Note 137 p.117
follows that there are spheres of activity legitimately open to the ordinary citizen, in which the civil servant can play no part or only a limited part. He is not to indulge in political or party controversy lest by so doing he should appear no longer the disinterested adviser of ministers or able impartially to execute their policy.225

In Kenya as a civil servant, one holds office in the civil service at the pleasure of the president.226 This means that the tenure of civil servants no longer depends on observance of the code of regulations as such but more important on the presidential pleasure. The President can abolish offices at his own discretion and hence the idea of protecting offices by resting their control in independent bodies is no longer valid.227 The result is that the President has become in practice the employer of all civil servants whom he or her can also discontinue their services at will. The normative bulwark designed to insulate public officers from the vagaries of political will has been constitutionally removed. In such a politicized civil service, it is unlikely to remain politically neutral in a context of divergent streams of political beliefs and programmes.228

As the primary agency of policy implementation, the civil service is based on uncompromised degree of loyalty and acceptance of government.229 Hence, the challenge and dilemma of the Attorney General to be independent from the executive on one hand and on the other hand dependency on president who has the constitutional powers to reorganize the government and assign the functions to the ministers. This is because the Constitution provides that there shall be such offices of ministers of the government of Kenya as may be established by parliament or subject to any other provisions made by parliament, by the President.230

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225 Ibid
226 Section 25 of the Constitution of the Republic of Kenya
227 Section 24 of the Constitution of the Republic of Kenya
228 Supra, Note 49
229 Supra, Note 5
230 Section 16 (1) of the Constitution of the Republic of Kenya
The responsibility for any business of government including the administration of any of the government department is assigned to the Vice-President and other ministers in accordance with the direction given by the President in writing. It follows that the security for organization of the State Law Office is at the mercy and will of the executive. Though the Attorney General is given an autonomy and security of tenure, this does not extend to the organization of his or her office which can be reorganized and restructured by the executive at any time for the better or worse.

As a civil servant, the Attorney General is the principal legal officer to the government. As the government legal adviser, he or she must give wholly independent advice. To do so, he is required to be free from conflicts of interests and insulated as much as possible from the executive pressure in the government. It is therefore desirable that the Attorney General should not be concerned about the impact of his advice on his future ministerial career or political-party policy.

Being a civil servant, the Attorney General needs sufficient protection to perform his duties impartially and independently. This calls for his or her appointment to be protected from political patronage. This is necessary to secure political neutrality of his or her service. The Report of the Royal Commission on the Civil Service (1953-1955) in United Kingdom observed:

"We think it will be generally accepted that the community must suffer if the present tradition is impaired whereby a non-political civil service carries out impartially the tasks required of it by government of different political complexions. A corollary of this is that in the matter of recruitment and dismissal there must be no question of patronage or manipulation of appointment and that no improper influence should be exercised by tampering with the salaries of particular posts or individuals. The state as employer must therefore limit its freedom of action, in a way

231 Section 18 of the Constitution of the republic of Kenya
that a private employer needs not to secure, particularly in the higher civil service immunity from political and personal pressure. This requires that recruitment procedures leading to admission to the civil service should be more formal than those outside and should not be changed at short notice, and there should be a greater degree for security of tenure than is necessarily found outside."232

However, the current Constitution allows the president to appoint the Attorney General without any consultation or recommendation from an independent body. The result is that the appointment is usually political. This makes the Attorney General vulnerable to political influence or patronage hindering the independent exercise of his or her powers. The question has always been asked whether the Attorney General should be a public officer holding a constitutional office or should be an elected member of parliament. The Constitution considers the Attorney General as a civil servant rather than treating the office as a purely political to be occupied by a minister appointed by the president from the government party-team that wins General Election. In United Kingdom, both the Attorney General and the Solicitor General are members of parliament and are assigned these responsibilities on the basis of their potential resourcefulness within the government -ruling party team.

In Kenya, although the Attorney General is accorded constitutional tenure and is a member of parliament and chief legal adviser for the government at cabinet level, he or she is not a candidate for election. The position is attained purely by appointment. This means that he or she sits astride the political stall. Experience has shown that this duplicity is not readily understood by most people apart from standing potential risks of compromising either the constitutional public service mandate or the political expectations.233

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232 Supra, Note 137 p.87
233 Ibid
THE ATTORNEY GENERAL AS A CABINET MINISTER

The Attorney General besides being a civil servant is also a minister responsible for several government departments like other ministers. These include the Registrar General, Administrator General, Treaties and Agreements, Advocates’ Complaints Commission and Drafting Department. He or she sits at cabinet level to determine government policies. In this capacity he or she is bound by the collective responsibility of the executive.

Consequently, the Attorney General has two distinct and often conflicting functions. He or she is appointed by the President (who is fundamentally a politician and head of a political party). As a government minister who sits in the front government bench of parliament makes him or her bound by the ministerial collective responsibility to support government policies even if he or she cannot be sacked. He or she also advises the government on the law, draft legislation and contentious issues strongly opposed by the opposition. His or her appointment is also closely connected with the Judiciary where he or she has tremendous de facto power regarding judges’ appointment, transfers, working, leave, and so on. He or she is also a civil servant in charge of prosecution with the very important task of deciding whether or not to prosecute any person for an offence. This involves making subjective decisions of which his or her status in cabinet has tremendous effect.

It has been argued that to minimize the conflicting of interests, the office of the Attorney General should be split into two. There could be Minister for Law or Legal Affairs who would be appointed in the usual manner from his or her party and would presumably be a lawyer. In this capacity, he or she would be the legal adviser of government. The ministry would supervise drafting of new legislations, amending old legislation and liaise with the judiciary and the Attorney General. This would leave the Attorney General completely independent of the government and be non-partisan. In this case, the Attorney General would be a non-partisan civil servant and the

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< www.kenyaconstitution.org > (accessed on 6 June 2006)
Director of Public Prosecution. He or she would not be a member of parliament or a minister. In this situation, he or she would be able to make decisions independently without being influenced by political colleagues.

Currently, the concept of ministerial collective responsibility provided in section 17 (3) of the Constitution is a hindrance to effective role of the Attorney General. He is bound by the decision of the cabinet or executive which places him or her in a conflicting position when exercising quasi-judicial discretion especially in cases where the cabinet could have made its decision. This binding formula interferes with the Attorney General's role as chief legal officer exercising quasi-judicial discretion. According to the survey carried out by the Kenya Section of the International Commission of Jurists indicated that many of the people interviewed were of the view that with the creation of the Ministry of Justice and Constitution Affairs, the Attorney General should neither serve as a member of parliament nor remain a member of the cabinet because the doctrine of collective responsibility impairs his or her functions of advising the government as the chief legal adviser.  

3.10 THE ATTORNEY GENERAL AS AN EX-OFFICIO MEMBER OF PARLIAMENT

Kenya has unicameral National Assembly composed of 224 seats; 210 members elected by popular vote to serve five-year term; 12 nominated members who are appointed by the President but selected by the political parties in proportion to their parliamentary vote total, and 2 ex-officio members. The Attorney General is one of the ex-officio members of parliament. Although the Attorney-General cannot vote, he or she advises the parliament on legal matters. However, this is bound to bring conflict. The Attorney-General is public servant appointed by the President without consultation and is part of the executive. As a member of the executive and cabinet he or she is bound by the principle of collective responsibility as provided by section 17 (3) of the Constitution. It therefore imperative that he or she may not be impartial

Kenya Section of the International Commission of Jurists Nairobi: Willart Production Ltd at p.50

236 Supra ,Note 2

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in Parliament especially in matters which have been agreed in the cabinet and which are opposed by the Opposition. It is therefore argued that the he or she may not be competent to advise the government and parliament on the same contentious issue because that would be an obvious and unacceptable conflict of interests.\textsuperscript{237}

3.11 THE ATTORNEY GENERAL AS PROSECUTOR

The Attorney General in Kenya is also the principal state prosecutor in administration of criminal justice. The power of controlling prosecutions is vested in the Attorney General under section 26(3) of the Constitution which provides:

"The Attorney General shall have power in any case in which he considers it desirable so to do:

(a) to institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by himself or another person or authority and

(c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or any other person or authority

The State through the Attorney General is bestowed with the power of controlling criminal prosecutions. This was the position of the Court of Appeal of Kenya in the case of Jopley Constantine Oyieng’ v Republic where the court observed:

"...in the instant case, the appellant was pursuing a right to file private prosecution. Only the Attorney General has the right under section 26(3) of the Constitution to institute criminal proceedings. No similar right is extended to private individual and it is obvious that section 88(1) of the Criminal Procedure Code does not override section 26 of the Constitution..."\textsuperscript{238}

\textsuperscript{237} Ibid
\textsuperscript{238} Jopley Constantine Oyieng’ v Republic Criminal Appeal No. 45 of 1988 in Nairobi
The state is therefore the prosecutor in all criminal proceedings.\textsuperscript{239} That of the state to control all criminal proceedings subsists whether the proceedings have been initiated by a complaint and the prosecution conducted by a private under the provision of section 89 of the Criminal Procedure Code.

The issue of who has the right to prosecute is even more pronounced in the respects of appeals. However, section 384 (a) of the Criminal Procedure Code provides that:

"when an accused person has been acquitted on a trial held by a subordinate court or where an of refusing to admit a complaint or formal, charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney General may appeal to the High Court from the acquittal or order on a matter of law."

This provision seems to oust the scope of a private prosecutor conduct of criminal appeal, and to rest on the Attorney General monopoly right of prosecuting criminal appeals a position which was upheld in Riddlesbarger v Brian John Robson\textsuperscript{240}

However, State's constitutional and legal rights over criminal prosecutions are not exclusive. A private individual other the Attorney General may also institute criminal proceedings if he or she has reason and probable cause to believe that an offence has been committed. This right is recognized under section 26(3) of the Constitution which further empowers the Attorney General to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority.

Section 89 of the Criminal Procedure Code confers the right to institute criminal proceedings on any person by means of complaints to a magistrate and section 88 confers the right to any person to conduct the prosecution subject to the permission of any magistrate trying the case. The right to private prosecution has been said to be "a useful constitutional safeguard against capricious, corrupt or biased failure of the

\textsuperscript{239} Riddlesbarger v Brian John Robson (1959) E.A 84
\textsuperscript{240} Supra, Note 21
police forces and the office of the Director of Public Prosecution to prosecute offenders against the criminal law".\textsuperscript{241}

On the whole, the cumulative effect of section 26 of the Constitution and section 384(a) of the Criminal Code is that it is the Attorney General that it is the Attorney General who has the ultimate undisputed control over all prosecutions.\textsuperscript{242} The major methods of control are the instruments of \textit{nolle prosequi} and withdrawal. The former entitles the Attorney General to take over and continue any proceedings and the latter empowers him or her to withdraw proceedings at any stage before the judgment is delivered.\textsuperscript{243} These are the areas the Attorney General's performance has been criticized and constitutional independence eroded by the executive.

A \textit{nolle prosequi} is a statement that the state intends to discontinue the proceedings and is entered by the Attorney General. In the case of Crispus Njogu v The Attorney General a \textit{nolle prosequi} was defined to mean:

"A \textit{nolle prosequi} is a procedural device which has its origins in English common law. Under English Constitutional system the monarch is the constitutional head of the courts. The power to commence and terminate proceedings lies with the monarch. A \textit{nolle prosequi} becomes merely a procedural device through which the monarch can exercise her prerogative powers to end criminal proceedings and because the monarch is the constitutional head of the courts, a \textit{nolle prosequi} entered by the Attorney General personally as the monarch's minister cannot be challenged in any English courts."\textsuperscript{244}

In handling criminal proceedings, the Attorney General is required by the law to reach a decision as to whether a prosecution is necessary on his or her own after considering the public interest.

The need for statutory safeguards on the constitutional independence of the Attorney General can be identified from some cases handled by the Attorney General. In the

\textsuperscript{241} Supra, Note 111
\textsuperscript{244} Crispus Njogu v The Attorney General High Court of Kenya Criminal Application No. 39 of 2000
case of Clifford Derrick Otieno v Lucy Kibaki,\textsuperscript{245} where Clifford a television cameraman filed a suit against the Lucy Kibaki (Kenya’s current First Lady) alleging assault and malicious damage to property at the Nation Media Group’s newsroom. However even before the matter was entered in the court’s record, the Director of Public Prosecutions entered a \textit{nolle prosequi} under the direction of the Attorney General. Similarly, in the case of Seanoi Parsimei ole Sisina and others v Attorney General\textsuperscript{246}, where Thomas Cholmondeley was charged with murder of a Kenyan service warden at his Soysambu Ranch. However, before the case could proceed to trial the Attorney General withdrew the murder charge citing insufficient evidence to support and sustain the charge. Other cases in this category would include of Kamlesh Mansukhlal Patini v Republic.\textsuperscript{247}

These cases highlight that the Attorney General does not conform to the United Nations Guidelines on the Role of Prosecutors.\textsuperscript{248} Guideline four provides that States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper or unjustified exposure to civil, penal or other liability. These are issues which interfere with constitutional independence of the Attorney General.

\textsuperscript{245} Clifford Derrick Otieno v Lucy Kibaki Miscellaneous Application No. 5 of 2005 (UR) at the Magistrate’s Court in Nairobi

\textsuperscript{246} Seanoi Parsimei ole Sisina and others v Attorney General Criminal Case No. 345 of 2005 at the High Court in Nakuru

\textsuperscript{247} Kamlesh Mansukhlal Patini v Republic Criminal Appeal No. 88 of 1995 in Nairobi


Some of these guidelines include:

(i) Guideline No. 13 –In performance of their duties, prosecutors shall : (a) carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discriminations (b) protect public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect

(ii) Guideline No.14 –Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows to be unfounded.

(iii) Guideline No. 15- Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly, corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offices.
3.12 CHALLENGES AND NECESSITY FOR STATUTORY REFORMS IN THE ATTORNEY GENERAL’S OFFICE

The National Rainbow Coalition (NARC) Government came into power in 2002 on a platform of fighting corruption. The 2002 General Election in Kenya saw a resounding rejection of Kenya African National Union (KANU) with a legacy of endemic corruption and mismanagement. The departure of former President Daniel arap Moi from Kenya’s political scene and the ascension to power of the National Rainbow Coalition (NARC) generated hope that Kenya political system which had become almost synonymous with corruption would undergo fundamental redemption. As the first electoral change of government in independent Kenya, it aroused hope of the possibility of reform and renewal. Among President Kibaki’s first actions was the creation of a new Ministry of Justice and Constitutional Affairs (MOJCA), mandated to co-ordinate the anti-corruption campaign and spear-head the enactment of laws to facilitate it.

The Ministry has now been renamed as Ministry of Justice, National Cohesion and Constitutional Affairs by Presidential Circular. The Ministry has been delinked from the office of the Attorney General and it deals mainly with constitutional matters and legal policy issues in the administration of justice and rule of law which were previously within the policy mandates of the Attorney General. However, it has to liaise with the office of the Attorney General for legal advice. The Attorney General still remains the principal legal advisor to the government and all its agencies.

By May 2003, two primary statutes had been enacted towards strengthening the watchdog institutions in the fight against corruption. The Anti-Corruption and Economic Crimes Act 2003 (No. 3 of 2003) (ACECA) which created the Kenya Anti-Corruption Commission (KACC) with responsibility to investigate corruption and

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< http://www.worldpress.org/Africa/1499.cfm > (accessed on 18 August 2007 )

250 Gladwell Otieno ‘The NARC’s Anti-Corruption Drive in Kenya’  

251 Presidential Circular No. 1 of 2008 on Organization of Government Ministries Nairobi: Government Printer
economic crimes and conduct public education on corruption; and the Public Officer 
Ethics Act 2003 (No. 4 of 2003) (POEA) which provides for Codes of Conduct for all 
public officers and further compels all officers to declare their wealth including that of 
their spouses and dependent children were enacted.\textsuperscript{252}

However, no corresponding reforms have been made at the Attorney General’s office 
to enhance its legal capacity to handle the cases of corruption. It is evident that the 
Attorney General was not capable to prosecute the perpetrators of the Goldenberg 
scandal and ethnic clashes during the KANU regime. A diligent consideration of this 
failure should have necessitated urgent reforms in the Office of the Attorney General 
to meet these challenges in handling corruption cases.

After the 2002 General Election, Kenya hoped to uncover, punish and avert repetitions 
of the abuse of the past. The NARC Government chose to investigate and ultimately 
redress these abuses through a series of established commissions of inquiry. The most 
prominent was the Commission of Inquiry into the Goldenberg scandal, established to 
look into non-existent export of gold and diamond from Kenya between 1990-1993, 
which ultimately cost the country an estimated US $ 600 million.\textsuperscript{253}

The other commission is the Commission of Inquiry into Irregular and Illegal 
Allocation of Public Lands, known as the Ndung’u Land Commission, which looked 
into the expropriation of public lands to the politically connected.\textsuperscript{254} It was appointed 
by the Government in 2003.\textsuperscript{255}

There was also the task force on Truth, Reconciliation and Justice appointed in March 
2003 to enquire into the possibility of establishing a commission to deal with past

\textsuperscript{252} Nation Reporter ‘Attorney General: Accused of taking too Long to Act on PIC Report’, Daily Nation 
Newspapers, 28 June 2006

\textsuperscript{253} Gazette Notices No. 1237 and 1238 of 24\textsuperscript{th} February 2003 on Judicial Commission of Inquiry into 
Goldenberg Affairs.

\textsuperscript{254} The misappropriation of public lands was increasingly adopted by under KANU regime as a means of 
accessing resources and dispensing patronage when other avenues for corruption were increasingly closed 
by advancing economic liberation

\textsuperscript{255} The task force consulted and recommended the establishment of a commission on the South African model to 
deal with abuses by the state and its agencies. It also recommended the commission to deal with economic 
crimes. However, so far the government has not yet established such a commission.
human rights abuses as the case in other countries undergoing transition from authoritarianism to democracy had done.

In 2004, the scandal of Anglo-Leasing and Finance Company emerged involving high-ranking government officials. The contracts were awarded to a shadowy company known as Anglo-Leasing and Finance Company for procurement of passport issuing equipment by the Department of Immigration and for construction of a forensic laboratory to the Criminal Investigation Department (CID) in the Office of the President.\textsuperscript{256}

The investigation by the Public Accounts Committee into the scandal resulted in the resignation of three ministers namely, Minister of Finance, Minister of Education and Minister of Justice and Constitutional Affairs.

All these cases point to challenges the Attorney General is facing. To handle these cases effectively, it will require statutory reforms in the Office of the Attorney General. The commentary in Daily Nation Newspaper concurred with this view:

"One of the greatest impediments to economic recovery in this country is corruption. Systematic corruption distorts incentives, undermines institutions and redistributes wealth and power to the undeserving. In the long run, what will count is the gradual reform and strengthening of what is referred to in modern parlance as the national integrity system; we must reform and strengthen the office of the Attorney General."\textsuperscript{257}

\textsuperscript{256} The project began during KANU regime. The immigration procurement originally projected to cost Ksh 622,039,944/= was expanded under NARC Government in 2003 to Kshs. 2,67billion. Anglo-Leasing and Finance Company submitted a purported unsolicited but detailed technical proposal for supply of an Immigration Security and Document Control System. Authority was sought for direct procurement or single sourcing which the Ministry of Finance granted. On conclusion of the agreement between the government and Anglo-leasing and Finance Company in 2003, a sum of Kshs. 91, 678,169/= or 3% of the credit sum was paid to the financing firm in February 2004. There was also forensic laboratory project for the Criminal Investigation department involved about US$ 5 million paid foe services not rendered.

\textsuperscript{257} Gladwel, O’ The NARC’s Anti-Corruption Drive in Kenya’ Security Review Vol. 14 No. 4 2005
3.13 EXECUTIVE CONSTITUTIONAL POWERS IN KENYA

The current Constitution creates an executive with massive discretionary powers which has usurped the role of the other arms of the government. The principle of separation of powers is no longer adhered to though it is alluded to in the Constitution. This means that there are very few checks and balances. Enormous powers are still vested in the presidency at the expense of other arms of government paralyzing any meaningful actions on the reports of the Controller and Auditor General which have been taken for granted and described as those of a dog barking at the moon.\textsuperscript{258}

The excessive discretionary powers have resulted to political patronage allowing too much political interference in both decision-making and employment of public servants.\textsuperscript{259}

From a textual standpoint, the excessive powers of the President are traceable to several provisions of the current Constitution. First, section 4 of the Constitution makes the President the Head of State and Commander-in-Chief of the Armed Forces of the Republic of Kenya. Second, section 14 of the Constitution secures the President from civil and criminal liability during his or her tenure in office. Third, section 16 of the Constitution empowers the President to appoint ministers and their assistants without consulting anyone else. Fourth, section 23 of the Constitution vests executive authority of the government in the President. Fifth, section 24 of the Constitution gives the President untrammeled powers of constituting and abolishing offices in the Republic of Kenya including making appointments to any such office and terminating such appointments. Sixth, section 27 of the Constitution empowers the President with the prerogative of mercy. Seventh, section 30 of the Constitution vests legislative power of the Republic in the parliament of Kenya, which consists of the President, and the National Assembly. Eighth, section 59 of the Constitution empowers the President


\textsuperscript{259} Ibid
to prorogue and dissolve parliament at any time. Ninth, section 83 of the Constitution entrenches the President’s broad powers to declare a state of emergency. Finally, sections 108, 109 and 110 of the Constitution empower the President to appoint the Commissioner of Police, Attorney General and Controller and Auditor General without consulting.

Cumulatively, these powers confer upon the president vast legal and political powers, which are vulnerable for abuse. Under section 14 of the Constitution, he or she cannot be charged in criminal proceedings, or be sued in a civil court until he or she has left the presidency. According to the standing orders of the National Assembly, his or her conduct cannot be raised in parliament. He or she cannot be summoned to attend parliament to answer question under section 52 of the Constitution. Under section 59(3) of the Constitution, no vote of confidence can be passed against him or her. Such a vote can only be passed against the government. Even if such a vote is passed, the President does not have to resign. He can choose to stay on and dissolve parliament instead under section 59 (3) of the Constitution in which case he or she can stand again in the resulting General Election. He or she cannot be impeached, as there is no such provision in the Constitution. He or she cannot be freely criticized outside parliament in public. In such cases, his or her critics may be charged with causing a breach of peace.

It is against this background of immense executive constitutional powers that the weaknesses of the Attorney General’s Office stem from as Nathan Mnjama remarked:

"Very often cases of alleged corrupt practices have been brought to the attention of Kenya’s Attorney General but many of such cases have not been pursued due to lack of evidence. For instance in 1996, the Attorney General was accused by the opposition political parties for failure to prosecute individuals and organizations alleged to have swindled the public of billions of shillings in shady deals involving a number of state-owned enterprises. The Attorney
General's reply was that he could only pursue the cases which there were no sufficient evidence to support each case."\(^{260}\)

The Auditor and Controller General is mandated under section 105(4) of the Constitution to submit reports to the Minister of Finance for purposes of laying the same to the National Assembly. The same reports are considered by the Public Investment Committee (PIC) and Public Accounts Committee (PAC) of the parliament, which have been making recommendations for prosecution of the perpetrators of corrupt practices. However, in most cases no action is taken as Wanza Kioko observed:

"For years Public Investment Committee (PIC) and Public Accounts Committee (PAC) have generated volumes of reports detailing corrupt activities and recommendations against individuals named in those reports. Nothing happens. The Controller and Auditor General has his own volumes detailing governmental corruption. The Attorney General doesn't persecute."\(^{261}\)

Similar comments by Public Investment Committee illustrate the situation:

"A parliamentary watchdog has accused the Attorney General of failing to implement its recommendations aimed at curbing the misuse of funds by state corporations. The Public Investments Committee says the Attorney General's Office has been slow to act on its recommendations particularly when it suggests the investigation and possible prosecution of officials involved in misappropriation of funds. In its latest report tabled in parliament yesterday, Public Investment Committee seeks to know what has been causing the delay. Public Investments Committee chaired by Siakago M.P., Justin Muturi also


\(^{51}\)Supra, Note 174
accused the National Hospital Insurance Fund of paying allowances to its Board of rates higher than those set by the government. Tax issue was raised by the Controller and Auditor General in his 2002/2003 report. PIC then recommended that the excess amount be recovered immediately but the Attorney General is yet to act on the report. Another case involved the loss of Kshs.500 million at the Kenya National Trading Corporation in 1993. Mr. David Tirop, the then Managing Director was charged in court with abuse of office but the case was dismissed. The Attorney General’s Office promised to file an appeal but it’s yet to happen. The PIC recommends in the report that the Attorney General speed up all cases referred to it and take the appropriate action.

The Kenya Anti-Corruption Commission has also been blaming the Attorney General for the delay to prosecute:

“The Director of Public Prosecutions (DPP), Keriako Tobiko has warned against giving the Kenya Anti-Corruption Commission (KACC) powers to prosecute saying the Commission was open to political manipulation. The Commission has been blaming the delay in prosecution of graft cases on the incompetence of the Attorney General’s office.”

The situation is attributed to the Attorney General having unbalanced and partisan view of his role in the government.

The danger of executive encroachment is highlighted by the International Commission of Jurists in All African News:

“The ICJ also opposed subordination of the judiciary and the Office of the Attorney General to the Minister of Justice and Constitutional Affairs. The Commission notes that it is extremely important that there is clear separation of powers...

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264 Supra, Note 262
The Commission said as long as the section 26(6) of the Constitution is not amended, the Attorney General is not subordinate to the Minister. The said section vests powers there under on him alone to the exclusion of any person or authority. 265

3.14 TO WHOM SHOULD THE ATTORNEY GENERAL BE ACCOUNTABLE?

The Attorney General occupies a unique position in the government. He or she represents the public generally and not just a particular agency or official. He or she is the officer of the people. Although the Attorney General provides legal services to the various agencies and the officials of the government, he or she is the public or people’s lawyer. Hence, he or she must simultaneously represent the legal interest of the people and the government as a whole. The role of the Attorney General as the public lawyer has long been established. 266

In this era of accountability and transparency, the Attorney General like other institutions of government is coming under increasing pressure to provide information that will enable the public assess its effectiveness and use of public resources.

The Attorney General represents the public and may bring all proper suits to protect the public. The real clients of the Attorney General are the people of the state to whom under common law he or she has a duty to represent their public interest. He or she is authorized by the common law to make decisions relating to his or her actions for and on behalf of clients, the people. Therefore, as the authorized decision-maker for his or her clients, the Attorney General is authorized to consent to the disclosure such information which he or she considers in the best interests of the people. Also, the

Attorney General’s professional employment requires that he or her keeps the clients, the people of Kenya well informed concerning the legal matters in which they have an interest. The obligation to protect confidence and secret obviously does not preclude a lawyer from revealing information with the client’s consents after full disclosure and when necessary for performance of professional employment or when required by law. The Attorney General should be authorized to disclose information to the public in order to carry out his or her duties as their lawyer. This may require a statute that provides that the business of the government be generally conducted publicly. Essentially, it requires a statutory commitment to openness in government.\textsuperscript{267}

For a long time, the State Law Office in Kenya has been impenetrable and information on this important institution is difficult to come by making its accountability to the public minimal if any at all. There is lack of information in the public domain on the State Law Office that would facilitate objective assessment of its performance.

Of particular interest in criminal justice are public prosecutions which may concern questions of public policy or national interest. It is the duty of the Attorney General to decide whether or not to authorize the prosecution. However, in so doing, it is necessary that he or she be acquainted with all the relevant facts including the effects of the prosecution, successful or unsuccessful, upon public morale and order and any other consideration affecting public policy. For this purposes consultation with colleagues in the government may be necessary. The assistance is confined to particular considerations which might affect his or her own decision, but does not consist and must not consist of telling him or her decision ought to be. However, he or she should not be put under pressure by the colleagues. Nor can the Attorney General shift the responsibility for the making of the decision to colleagues. If political considerations in the broad sense affect government and the abstract arises, it is the Attorney General applying his or her juridical mind, who is the sole judge of those considerations.

\textsuperscript{7} Supra, Note 21
However, the discretion in these matters should always be exercised in accordance with wide consideration of the public interest and without regard to party political considerations. This means that the Attorney General should be free from any direction or control whatsoever. Bearing in mind this immense power and discretion it is only reasonable that in this age of accountability that the Attorney General should be accountable to the people through the parliament. He or she should be able to submit reports of his or her actions, otherwise unchecked power may lead to arbitrary and misuse of this trust power bestowed upon him by the people.

It may be mentioned that, the maintenance of this principle depends ultimately upon the unimpeachable integrity of the office-holder whatever the precise constitutional arrangements in the state concerned. It is upon this principle that the Attorney General of Australia, Mr. Ellicott certainly relied on in 1977 when he resigned from the Fraser government on the ground that there was an attempt to direct or control him in the exercise of a prosecutorial discretion. The question was whether the Attorney General should exercise his power to take over and discontinue a private prosecution against the Prime Minister in the previous government; Mr. Eli Whitlam and other ministers in that government for breach of the Financial Agreement Act and Loan Council provisions. The cabinet had decided to refuse the Attorney General access to cabinet papers relating to the previous government’s involvement in a controversial attempt to raise overseas loans. Consequently, the cabinet conveyed to him the considered opinion of the entire cabinet that the Attorney General should take over the private prosecution and discontinue the proceedings.\textsuperscript{268}

The accountability of the Attorney General involves an important issue of democratic principle. The Attorney General or the Director of Public Prosecutions for whose acts the Attorney General is responsible prosecutes in the name of the state. The Attorney General’s authority is derived from his or her role as the state’s attorney. It is argued that the Attorney General prosecutes for the government which has been elected by the people. The government is the trustee for the people. Accordingly, it is the executive

\textsuperscript{268} Supra, Note 67
which should be accountable to the people through parliament for prosecutorial decisions. In modern constitutional practice, the government exercises the executive powers on behalf of the people.

The key point to make is that the state must have a law officer who is accountable and can be brought to parliament to answer for his or her decisions. Accountability is a key requirement of good governance in modern society. The governmental institutions must be accountable to the public and to their institutional stakeholders. In general, an organization or an institution is accountable to those who will be affected by its decisions or actions. Accountability cannot be enforced without transparency and the rule of law. In Canada, there is Federal Accountability Act to facilitate the public officers being answerable for their actions.

Generally, there is a strong case for going further and arguing that the Attorney General should not be a member of parliament or indeed a governmental minister but should hold an independent office appointed by the president. This is the position in several countries, which have the English legal system for instance, India, Ireland and Israel.

The other argument is that the Attorney General should not be accountable to parliament. So far as the role of the Attorney General as legal adviser to the government is concerned, that advice is given to the government as the executive and not to parliament. The Attorney General cannot advise both the government and the parliament on the same contentious issue because that would be an obvious and unacceptable conflict of interest. The issue of accountability lies with the government which is accountable for its decision whether or not and how far it acts on the Attorney General’s advice. Hence, it is not appropriate for the Attorney General to be

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269 'What is Good Governance?'<www.unescap.org/hnset/gg/governance.htm> (accessed on 13 June 2006)
270 Supra, Note 21
271 Ibid
accountable to parliament for that advice. After all, it is given as advice and not as a decision.

There is a stronger case for the Attorney General to be accountable to parliament for decisions made on prosecution matters. But even here there are arguments that it should not be so. These decisions are different from those taken by other ministries because the Attorney General must act independently from the government and is plainly not accountable to the president for those decisions. If the Attorney General is not accountable to the president, then there is some doubt whether his or her accountability should properly lie to parliament. The question, therefore, arises whether it is not at least equally appropriate and perhaps more effective that any checks on improper prosecution decision taken by the Attorney General or decision where it is alleged he has acted improperly, should be exercised by judicial review of decisions rather than by parliament.

However, it is generally accepted that since the Attorney General represents the people, he should be accountable to the people through the parliament.

3.15 THE KENYAN EXPERIENCE: SUBORDINATION OF THE ATTORNEY GENERAL

In Kenya, the Office of the Attorney General is an anomaly. It is the only office that cuts across the three-way separation of powers established by the Constitution. The Attorney General is a legislator entitled to sit and contribute, though not allowed to vote in parliament; he or she is a part of the executive and in that capacity sits in the cabinet and drives the government’s legislative programme, not just as the principal legal adviser but also as the initiator of a government legislation in parliament; he or she is the state public prosecutor and is in that capacity an officer of the court like every other member of the Bar; and as a member of the Judicial Services Commission, is squarely a part of the judiciary and is in a powerful position to influence the appointment and removal of judicial officers. These roles frequently clash and contradict each other often leading to weak institution of the Attorney General.
Although section 26 (8) of the Constitution of Kenya provides that the Attorney General shall not be subject to the direction or control of any other person or authority, the Constitution cannot be judged by terminology alone. The sections of the Constitution must be weighed against each other to understand how they operate in reality. Some provisions of the Constitution regarding the powers of the executive in fact directly contradict the some provisions of the same Constitution on independence of the Attorney General. Since, the current Constitution favors executive presidency with enormous discretionary powers, the idea of independent Attorney General is not feasible as envisaged in a liberal democratic model. Once, a liberal democratic government is replaced with authoritarian regime the objectivity and detachment of the Attorney General becomes mirage to be realized. In such environment, the Attorneys General would serve as apologists for the executive rather than legal advisors.272

The current Constitution does not provide any strategic national goals or direction to the office of the Attorney General. It does not conceive the institution of the Attorney General as a national institution to protect the public interest or larger interest of the state. The office is placed in the public service and hence subordinate to the executive.273

Consequently, the security of tenure given by the Constitution is not for the protection of the office to safeguard public interest as such but rather to safeguard and protect the “right man” of the executive.274 It should be noted that the Attorney General is appointed by the President without any consultation or recommendation from anybody. No vetting is done as to the suitability or integrity. Once appointed, it is only logical that he or she should be protected not for the public good but to serve the appointive agency.

273 Supra, Note 2
274 Section 109 (6) of the Constitution of the Republic of Kenya
The genesis of this constitutional misconception can be traced from the colonial regime where the main role of the government was to serve the colonial interest and not the people. Regrettably, the Kenya Independence Constitution Act 1963 maintained the status quo. Unfortunately, nothing has been done in the post-independence era to reconsider the objective of the institution of the Attorney General to protect the public good.

It was against this background that in 2003 the National Rainbow Coalition government issued the Presidential Circular No.1 of 2003 on 14th January 2003 placing the Attorney General under the Ministry of Justice and Constitutional Affairs. This led the International Commission of Jurists (Kenya Section) to object the arrangement. Mohammed Nyaoga, Chairman of ICJ said:

"The ICJ opposes subordination of the judiciary and the office of the Attorney General to the Minister of Justice and Constitutional Affairs. The Commission notes that it is extremely important that there is a clear separation of powers as long as section 26 (6) of the Constitution is not amended the Attorney General is not subordinate to the Minister. The section vests powers thereunder on him alone, to the exclusion of any person or authority."

The Presidential Circular No.1 of 2003 on Organization of Government Ministries was later replaced by Presidential Circular No. 3 of 2003 on Organization of Government Ministries which delinked the Office of the Attorney General from the Ministry of Justice and Constitutional Affairs. However, this has not changed the practical reality of subordination of the Attorney General to the executive as provided in the Constitution. This has been manifested in the way the Attorney General handles major cases of public interest especially grand corruption cases in Goldenberg International Limited and Anglo Leasing and Finance Company scandals, corruption

275 Supra, Note 265
276 Supra, Note 2

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cases in the reports of Controller and Auditor General together with recommendations of the Public Accounts Committee and Public Investment Committee. The Goldenberg International Limited scandal was a financial scandal where the Ministry of Finance irregularly paid to Goldenberg international Ltd 35% export compensation for non-existence gold and diamond jewelry alleged to have been exported. Commenting on the situation, the Center for Law and Research International observed:

"But even before the 1990s when corruption assumed monstrous proportions and has been consuming the Kenyan societies, the Attorney General's Office had not only been lethargic but unwilling to prefer corruption related charges against government officials. By far, the most dismal failure by the Attorney General to use his enormous constitutional powers and the due process of law to fight corruption is illustrated by the Goldenberg scandal involving a complex network of government ministries, departments and officials. After the Attorney General failed to initiate proceedings, in December 1994, the Law Society of Kenya filed a complaint in court seeking to be allowed to privately prosecute six individuals involved in the scandal. The LSK argued that the Attorney General had abdicated his constitutional responsibility of accounting to the public what step he had taken to investigate or prosecute those involved in the Goldenberg case."  

After being allowed to participate in the case as amicus curiae (friend of the court) the Attorney General proceeded to object to granting the Law Society of Kenya leave to prosecute the case. He cited several alternative grounds for objection to the prosecution:

(i) That the Law Society of Kenya had no *locus standi* under its constituent statute, the Law Society of Kenya Act (Cap.18 Laws of Kenya) and under the

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Constitution to apply for and be granted the right to institute private prosecutions

(ii) That the Law Society of Kenya had not “personally” suffered or established any material damage to it, sufficient to give it an interest to institute the proceedings.

(iii) The Law Society of Kenya Act did not empower it to bring such an application. It being the private prosecution the Attorney General argued it had acted *ultra vires*.

(iv) That under section 26 (3) of the Constitution, only the Attorney General had the power to prosecute in the interests of the public. Hence, the Attorney General was the most suitable person to determine what is not in the public interest.

(v) That the charges were defective.

The court upheld these objections and dismissed the Law Society of Kenya’s private prosecution case.280 Global Policy Forum commented:

“In what looks like a protection racket for Moi, his vice-president and other service officials implicated in scandals, the Attorney General has stopped private prosecutions of culpable public officials by the Law Society of Kenya.”281

These are cases where the Attorney General appeared to have lost his capacity to protect the public interest. A comment in Sunday Standard Newspapers on this wise is worthy noting:

“When the Law Society of Kenya took Charles Mbindyo, Kamlesh Pattni and Job Kilach to court over Goldenberg Scandal, it made a mistake of

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280 Ibid
<www.globalpolicy.org/nations/corrupt/kenya.htm> (accessed on 12 July 2006.)
leaving the Attorney General out. The Attorney General in turn took over the case and quashed it.  

When it comes to taking legal action against such people like former or serving heads of parastatals, cabinet ministers or other high public office holders, the Attorney General always hesitantly calculates the likely political consequences of such action. The Public Accounts Committee and the Public Investment Committee have for a long time now investigated government and public sector expenditure and unveiled and documented massive corruption. The acts of corruption in the public sector as revealed in the reports of the two bodies are myriad. The two Committees have tabled their reports before the parliament on an annual basis. The reports contain many recommendations which are directed at accounting officers, chief executives and the Attorney General for appropriate action to be taken. But hardly any action is taken by the Attorney-General to prosecute the culprits.

This has led to Public Investment Committee accusing the Attorney General of failing to implement its recommendations aimed at curbing the misuse of funds by state corporations. In these cases, that the Attorney General’s Office has been slow to act on its recommendations particularly where it suggested the investigations and possible prosecutions of officials involved in misappropriation of funds.

The weakness of the Attorney General’s Office to protect public interest stems from the Constitution. Besides, establishing the Office of the Attorney General, the Constitution does not provide the strategic direction on the purpose of the office. Without these national goals, the Attorney General has been reluctant to effectively protect public interests in Goldenberg International Limited and Anglo-Leasing and Finance Company scandals. The Attorney General’s role appears sketchy if not confusing.

282 Dennis Onyango ‘VP and Attorney General to be Charged with Graft.’ Sunday Standard Newspaper s. 27 February 2005
284 Supra, Note 278
285 Supra, Note 174
These cases reflect the need for reforms in the Attorney General’s Office. In Kenya, there is no specific statute that defines the functions, goals, duties and responsibilities of the Attorney General. The policy mandates are usually outlined in the Presidential Circulars on Organization of the Government Ministries. Due to this weakness, the Office of the Attorney General has no clearly defined national goals with regard to protection of public interest. This has been worsened by subordination of the Attorney General’s office to the executive. Hence, there is need for constitutional and statutory reforms to strengthen the Attorney General’s Office to deal with these cases effectively.

3.16 CONCLUSION
In Kenya, the Constitution places the Attorney General in the public service. The Constitution also makes the Attorney General to be a member of the executive, parliament and judiciary. This has made the Attorney General vulnerable to the executive encroachment. Consequently, the constitutional independence has been eroded and the Attorney General is considered subordinate to the executive. To strengthen the constitutional independence of the Attorney General, there is need for a statute to enhance public accountability and buttress the office’s autonomy.
CHAPTER FOUR
REFORM AGENDA IN OTHER JURISDICTIONS

4.0 INTRODUCTION
Since the evolution of office of Attorney General in thirteen century in England, its role has continued to change and adopt depending on socio-economic and political dynamics. The dynamics causing this transformation differ from country to country. It may be observed that most of the late twentieth and twenty-first centuries government-driven legal reforms have generally, aimed at good governance, accountability and decentralization of power to the people for purposes of socio-political and economic development. Most of these reforms have been geared towards re-engineering the government institutions to facilitate and promote good governance. One of these critical institutions is the Attorney General’s office. The current thrust of reforms on the role of the Attorney General is towards enhancing adjudicative and institutional independence, administrative autonomy and independent policy-making. The aim is to strengthen the constitutional independence and autonomy of the Attorney General especially in criminal justice. The reason for reforms is to minimize executive control on the Attorney General. Appropriate legal instruments to achieve these reforms are the constitution and legislation besides the common law and informal administrative arrangement which include code of conduct.

This chapter will consider legal reforms on the role of the Attorney General in United Kingdom, Australia and South Africa with view to learn and how Kenya can also reform its office of Attorney General. The reason for this is because the institution of the Attorney-General evolved from United Kingdom and was transplanted in various British colonies in Africa including Kenya. These are countries with similar legal system and shared same anglo- common law jurisprudence. Legal reforms on the role of the Attorney General in these countries reflect the need for reforms in Kenya.

Kenya inherited the office of Attorney General in 1963 from British rule. Incidentally, while United Kingdom is reforming the office Attorney General, Kenya is yet to embark on this matter despite its unsatisfactory performance.

4.1 REFORMS IN UNITED KINGDOM

In the United Kingdom tremendous effort has been made to depoliticize criminal justice system and enhance public accountability of the Attorney General. In the United Kingdom, the Attorney General’s various functions fall into four broad categories:

(i) Legal adviser to the government
(ii) Superintending minister
(iii) Guardian of the public interest
(iv) Functions relating to parliament and legal profession

The Attorney General and Solicitor General are referred as the law officers. They are also government ministers appointed by the Prime Minister. Their general responsibilities include:

(i) Principal legal advisers to the Crown and ministers
(ii) Superintendence of the Directors of Public Prosecutions in England and Wales and Northern Ireland, the Director of Serious Fraud Office.
(iii) Have a general oversight of all prosecutions in England and Wales.
(iv) Are ministers within the criminal justice system together with the Minister of the Home Office and Department for Constitutional Affairs.

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In order to maintaining principles of fairness, independence and accountability within criminal justice system, the legislature enacted the Prosecution of Offences Act (1985) creating the office of the Director of Public Prosecutions. The statute provides structures, powers, functions, system of intervention of the Crown Prosecution Office. The statute establishes the autonomy of the Crown Prosecution Office in relation to other government institutions. The Crown Prosecution Office’s autonomy is distinguished by its links to criteria of legality and objectivity because the prosecutors are exclusively under the directives, orders and instructions stated by the law. The subjection of the public prosecutors to criteria of legality is a proper principle in a state abiding by the rule of law. The autonomy of the Crown Prosecution Service is observed by the fact that it is able to operate and organize on itself.

The Director of Public Prosecutions is responsible for the conduct of criminal proceedings instituted on behalf of police force, instituting proceeding, advising the police on matters relating to criminal offences and a variety of related functions. The Act provides the statutory framework for the duties and powers of the Director of Public Prosecutions and the Crown Prosecution Service. The main features of the system established by the Act include:-

(i) National prosecutions system for England and Wales
(ii) Conduct of prosecutions independent of the police
(iii) Public accountability
(iv) Consistent national criteria for the prosecution of offences
(v) Local decision- making based on national established principles
(vi) The ability of any Crown prosecutor to exercise the power and duties of the Director of Public Prosecutions

The Director of Public Prosecutions is appointed by the Attorney General and is accountable to the Attorney General for the exercise of his or her functions. The

289 ‘The Independence and Accountability of the Public Prosecutors in Search of a Difficult Equilibrium: The Cases of England, France and Italy’ paper prepared by Professor Giuseppe Di Federico on 15th November
Attorney General in turn is appointed by the Queen on the Prime Minister's proposal. He or she is a member of the Parliament. He or she can take part in the cabinet meetings and act as the main expert advising the government on legal matters and is accountable to parliament for the decision making and other acts of the Crown Prosecution Service. Section 10 of the Prosecution of Offences Act requires the Director to publish a code for Crown prosecutors giving guidance on the general principles to be applied by the Crown Prosecution Service in deciding whether proceedings for an offence should be started or terminated. The code is a public statement of the principles, which guides legal officers in making decisions in every case. Parliament and the public have entrusted the Crown Prosecution Service with a wide discretion in its decision-making and all its members must exercise that discretion responsibly.

Legally, the work of the Crown Prosecution Service is regulated by the directives of criminal policy which are binding for Crown Prosecutors and which govern their discretionary powers as far as penal actions are concerned. These directives are formulated by the Director of Public Prosecution in collaboration the Attorney General. They are contained in the two different documents:-

(i) the Code for Crown Prosecutors;

(ii) the Manuals which contain very detailed instructions of a confidential nature.

Applying the principles in the code ensures that the right factors are taken into account in all cases, and that Crown Prosecution Service adopts a consistent approach to the decision-making. However, the code does not prevent one from taking the special features of an individual case into account where they are relevant to a decision. It avoids taking arbitrary actions. Arbitrary differences in approach lead to unfairness and injustice. The key principles are independence, fairness, openness and accountability.

2001 at the Universidad National de Cordoba. He is also Law Professor at the University of Bologna; Director of the Research Institute on Judicial Systems of the Italy National Research council; Member of the Italian Superior Council of the Magistracy(2002-2006) <http://www.isig.cm.itltesti/pub_onlinelindp_account.> (accessed on 29 June 2008)

Ibid
The Prosecution of Offences Act (1985) further imposes both statutory duties and confers discretionary powers upon the Director of Public Prosecutions as head of the Crown Prosecution Service. The main statutory duties under the Prosecution of Offences Act (1985) include the duty to:-

(i) to take over the conduct of all criminal proceedings instituted on behalf of police force (except specific offences).  
(ii) to institute and conduct criminal proceedings in appropriate cases.  
(iii) to take over the conduct of all binding-over proceedings instituted on behalf of police force.  
(iv) to take over the conduct of all forfeiture proceedings commenced under section 3 of the Obscene Publication Act 1959.  
(v) to give advice to police force to the extent the Director thinks appropriate regarding criminal offences.  
(vi) to appear for the prosecution on appeals in criminal cases when directed.  
(vii) to issues a code for guidance in crown prosecutions.  
(viii) to make an annual report to the Attorney General. The Director of Public Prosecutions has a duty under section 9 of the Prosecution of Offences Act to make an annual report to the Attorney General, which is published and presented to parliament each year. The report sets out the key achievements and developments of the previous twelve months. The annual report is an expression of the Director’s accountability to the Attorney General and to the wider public through parliament.

The Prosecution of Offences Act 1985 also gives statutory powers to Director of Public Prosecutions including:-
(i) the power to assign the conduct of criminal proceedings under section 5.

(ii) section 6 (2) confers ability to take over any criminal proceedings.

(iii) section 7 gives the power to receive demands from the magistrate’s court.

(iv) power to designate persons employed by the Crown Prosecution Service who are not crown prosecutors to conduct bail application under section 7(a).

(v) section 23 confers the power to discontinue criminal cases in the magistrate court.

The Director of Public Prosecutions is independent of the state and the Attorney General in performance of his or her duties. The prosecutions are conducted or supervised by the Director of Public Prosecutions, who, statutorily, acts under the “superintendence” of the Attorney General. The Director is politically independent, but answerable to Parliament for the decisions of the Crown Prosecution Service through the Attorney General. Sir Michael Havers (later, Lord Havers) put a finer point on this relationship when, in 1979, he said the following in the House of Commons in his capacity as the Attorney General of England:

“My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have the regard to the overall prosecution policy which he pursues. My relationship is such that I require to be told in advance of the major difficult and from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate powers.”

There is also the Law Officers Act 1997, which empowers the Solicitor General to deputize the Attorney General.

As a matter of public accountability the Attorney General submits Annual Departmental Reports for the Law Officers Departments to the parliament. The reports highlight the strategies and the work of the departments for purposes of accountability. The reports also outline criminal policy issues, specific initiatives, casework, parliamentary questions, advice to government, civil and international litigation.

However, currently in Britain, the role of the Attorney General is no longer constitutionally sustainable due tensions between various functions he or she performs within parliamentary political system. Consultation reforms are underway to rebalance powers between the parliament and the executive and give the parliament greater ability to hold the government to account. There is already Constitutional Renewal Draft Bill 2007 which seeks to address powers between the executive, parliament and the people for purposes of reforming the historic office of the Attorney General. The Governance of Britain Green Paper sets out this reform to strengthen confidence in the administration of justice system and in the rule of law through reforms of this historic office of the Attorney General. The current nature of the Attorney General’s role has given rise to a debate that has focused on two areas:

(i) tension between the various functions of the Attorney General - being a minister and a member of the government, and being an independent guardian of the public interests and performing superintendence functions (e.g. on decisions relating to sensitive prosecutions).

(ii) tension between a party politician and a member of the government, and the giving of independent and impartial legal advice.

These conflicts have led to call for changes to the office. In announcing the 2007 Green Paper *The Governance of Britain*, the Prime Minster said that the Attorney

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General's role needs to change along with greater constitutional framework. The British Government is committed to reforming the role of the Attorney General. It is a complex role which has evolved over centuries and comprises a broad and varied range of functions which are fundamental in the upholding the rule of law and promoting the administration of justice, in particular in their oversight of the prosecuting authorities. The areas which require reforms include where there is potential for conflicts of his or her functions in the administration of justice, maintenance of the rule of law and the protection of the public interests.

The Attorney General carries out a number of roles which have the potential to create tension and conflicts. The Attorney General is a politician and a member of the government, but also acts an independent legal adviser and guardian of the public interest. The test for any proposal for change is whether it enhances effective administration of justice, maintenance of the rule of law, protection of public interests and enhances public confidence.

The Constitutional Affairs Select Committee of the House of Commons has also issued a report on the constitutional role of the Attorney General for consideration by the government. The consultation document, The Role of the Attorney General sets out a number of strengths in the current arrangements including:

(i) the Law Officers 's direct accountability to Parliament
(ii) a Cabinet-level Minister with specific responsibility for prosecutorial policy able to champion the interest of prosecutors
(iii) mechanisms for ensuring the government can be properly consulted though the Attorney General on the public interest considerations, especially national security, in sensitive cases

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301 This is Government paper issued on 3rd July 2007 which embarked on the wide process of consulting on the proposals for constitutional change;
“The Governance of Britain Green Paper” by Ministry of Justice

< http://officio.documents.gov.uk/documents/cm7 > (accessed on 3 April 2008)
The Paper also describes a range of possible measures for addressing concerns expressed about the 'political nature' of the Attorney Generals Office, for providing greater transparency and for change to the role's public interest, criminal justice policy, and superintendence of prosecuting authorities' functions. Specific options for potential reform of the role listed in the consultation document include:

(i) making a clear separation between the Attorney General’s ministerial responsibility for the operational delivery of prosecutions, from the power to make decisions in individual prosecutions - so that the Attorney General could not give a direction as to whether a particular prosecution should or should not be brought.

(ii) the current practice whereby the Attorney General attends meetings of Cabinet could be modified. Provision would need to be made to enable the Attorney General to attend where necessary as chief legal adviser to the government.

(iii) a clear commitment could be given that a full explanation of the legal basis for decision to use the armed force would be given to the parliament.

(iv) accountability to parliament could be enhanced by the creation of a select committee especially to scrutinize the exercise of the Attorney General’s functions;

(v) a commitment could be given that the Attorney General will exercise his or her public interest functions in a way that is clearly institutionally separate from the government, namely, that there will be no involvement by the government in the taking of any public interest decision, including and criminal case. Provisions could be made for those exceptional cases where there are needs for consultation for example over national security;

(vi) level policy (including prosecuting policy) for the prosecuting authorities
(vii) conferring specific and limited powers on the Attorney General to set high
requirement for the Attorney General’s consent to the bringing of certain
criminal prosecutions could be removed entirely, or transferred to the
Director of Public Prosecutions.

Consequently, the government has introduced Constitutional Renewal Draft Bill
2007/8 with the following key reforms on the role of the Attorney General:

(i) **Power of direction:**
The relationship between the Attorney General and the prosecuting authorities
will be recalibrated in a significantly and substantial manner. In particular the
Attorney General will cease to have any power to take decisions to the
authorities which he or she superintends (the Crown Prosecution Services, the
Serious Fraud office and Revenue and Customs Prosecutions Office) in an
individual case, except in certain exceptional cases.

(ii) **National security cases:**
The Attorney General will have a very limited power of direction to individual
cases, exercisable only in certain exceptional cases where it is necessary to
give direction to guard national security. He or she will have to report to the
parliament every time this power is used.

(iii) **Accountability to Parliament:**
The ability of the Parliament to hold the Attorney General to account will be
enhanced by the requirement on the Attorney General to prepare and lay before
parliament an annual report on his or her functions. In addition, the protocol as
to the relationship between the Attorney General and the prosecuting
authorities will be laid before the parliament which will bring greater clarity
and make it clearer who is responsible for each decision. This will aid
parliament in holding the Attorney General and the prosecuting authorities to
account.

(iv) **Emphasizing the role of public guard:**
The Attorney General’s oath of office will be amended to require him or her to “respect the rule of law”. The change to the oath will re-emphasize the basis on which the Attorney General gives legal advice and exercises his or her functions in the public interest rather than on the political convenience or party loyalty.

(v) **Attendance to the cabinet:**
The Attorney General will continue to attend the cabinet.

(vi) **Consents:**
The Attorney General will give up the power of consenting to prosecutions in most of the cases. Where the requirement to obtain consent to prosecute is unnecessary, the requirement will be abolished. For instance consents under the Agricultural Credits Act 1928 and the Water industry Act 1991. In most cases, the function of consenting to a prosecution will be transferred to the Director of Public Prosecutions or, in relation to offences which fall within the Director of the Serious Fraud Office, or Director of the Revenue and customs Prosecution Office.

Although the situation in the United Kingdom is different from Kenya, the principles of public accountability, fairness and justice in the administration of justice and rule of law apply equally to Kenya. The performance of the Attorney General in Kenya has not been satisfactory. Hence, there are reform issues which Kenya can benefit from the United Kingdom experience. Kenya has no statute to insulate the public prosecution from executive and politics. There is need to enact a statute similar to Prosecution of Offences Act establishing the Office of Director of Public Prosecutions. It will also enhance the independence and autonomy of that office. Alternatively, there should be Attorney-General Act which enables the Attorney-General concentrate on prosecutions and delink him or her from cabinet matters.

Currently, Kenya Attorney General is not accountable the public or executive for his or her actions. There is need for statutory obligation on the Attorney General to account to the people through the Parliament for his or her actions. The statute should
also ensure that the Attorney-General reports to the Parliament to enhance transparency and accountability.

The Attorney General in Kenya has no deputy. In his absence, some functions cannot be done. There is need for a statute to provide the Solicitor-General as a deputy to the Attorney-General. In the United Kingdom, the Solicitor General deputizes the Attorney General in his or her absence.

4.2 REFORMS IN AUSTRALIA

Australia is one of the Commonwealth countries which inherited its legal system from United Kingdom and still a member of Dominion with Queen as her ceremonial head. It was a British colony and shares with Kenya the same British legal tradition. Like the United Kingdom, Australia has also made some reforms on the role of the Attorney General.

The Australian Government passed the Solicitor General Act 1985 and the Director of Public Prosecution Act 1983 to give the Solicitor General and Director of Public Prosecutions some independence from the executive. Unlike the Attorney General, they are not appointed during the pleasure of the Crown.\(^{303}\)

The independent discretion exercised by the Attorney General in supervising criminal proceedings has been almost totally supplanted by the Director of Public Prosecutions who exercises the same on independent statutory role.\(^{304}\)

The office of the Director of Public Prosecution operates independently although the ultimate authority for authorizing prosecution lies with the Attorney General. The Attorney General may (but very rarely does and can even then at the risk of great political command) overrule the decisions of the Director of Public prosecutions.

\(^{303}\) Supra, Note 45

\(^{304}\) Section 8 of the Director of Public Prosecutions Act (1983)
The effect of the Solicitor General Act 1985 and Director of Public Prosecution Act 1983 has insulated criminal justice from politics which has been left in the domain of the Attorney General. In Australia, the Attorney General is the chief law officer of the Crown and a member of the Federal Cabinet\textsuperscript{305}. The Australian Attorney performs a wide range of functions and is unique as minister in that some of the functions are statutory, some arise from common law prerogative while others arise from the Attorney General's role as a minister appointed under section 64 of the Constitution\textsuperscript{306}. He or she is appointed by the Governor-General on the advice of the Prime Minister and serves at the Governor-General's pleasure. In practice the Attorney-General is a party politician and his or her tenure is determined by political factors. The Attorney General is the minister responsible for legal affairs, public security and the Australian security intelligence organization. As a minister the Attorney General oversees a government department of Commonwealth legal policy and expenditure of public funds on the court system, though in practice Australian federal courts are responsible for their own administration.

Each Australian state has an Attorney General who is a state minister with similar responsibilities to the federal minister with respect to state law. The Attorney General is a politician, heads a government department and is vested with statutory powers. They are not necessarily lawyers. The Attorney General has three distinct but related types of responsibilities\textsuperscript{307}:-

(i) The first is ministerial responsibility. Like all the other ministers, the Attorney General has a responsibility for administration of specific legislations and the development of policy in specific areas. This responsibility is not different from that of other ministers in relation to their portfolios.

\textsuperscript{305} 'Attorney-General of Australia' Wikipedia. 

\textsuperscript{306} 'The Role of the Commonwealth Attorney General in Appointing Judges to the High Court of Australia' paper prepared by Paul Donegan 

\textsuperscript{307} Supra, Note 97
(ii) Secondly, as first law officer, the Attorney General has a general legal policy responsibility for all laws. He or she is the legal adviser and counsel to the Australian Commonwealth Executive Council.

(iii) The Attorney General acts to protect the public interests. In general, this responsibility has arisen in relation to the processes associated with litigation and prosecution.

However, for purposes of streamlining the operations of office of the Attorney General, the Electoral and Administrative Review Commission (EARC) of Australia, recommended the enactment of Attorney General Act to provide for its powers, functions and responsibilities. It also recommended that all directions given by the Attorney General to the Solicitor General and Director of Public Prosecutions be in writing and reported to the parliament. The Attorney General also submits Department Annual Report to the parliament in accordance with the law. This is to enhance accountability and transparency of the Attorney General’s operation.

The issue of independence and autonomy of the Director of Public Prosecutions from should be emulated in Kenya. The enactment of Director of Public Prosecutions Act (1983) has ensured that prosecution is independent from politics in Australia. The Attorney -General is compelled by the statute to submit annual reports to parliament which promotes transparency and accountability. The Australian Government has also established the Electoral and Administrative Review Commission which has recommended enactment of the Attorney-General Act to comprehensively reconsider of the role of Attorney-General.

These are reforms which Kenya can borrow and come up with comprehensive reform programme on role of the Attorney General. Of special concern is insulating prosecutorial function from politics by enacting a statute creating the post of Director

\[^308\] Supra, Note 146
\[^309\] Section 63 (2) of the Public Service Act 1944 and Freedom of Information Act 1982.
of Public Prosecutions while the Attorney General would be retained as Minister and politician.

4.3 REFORMS IN SOUTH AFRICA

The Republic of South Africa is one of former British Colonies in Africa. It inherited some of its legal system from Britain. It is also one African country which has embraced constitutional reforms since independence in 1994. Currently, Kenya also in the process of constitutional-making and has a lot to learn from Republic of South Africa.

The Constitution of the Republic of South Africa Act 1996 (No. 108 of 1996) was approved by the Constitutional Court on 4th December 1996 and came into effect on 4th February 1997. It one of the most progressive constitution in the world and enjoys high acclaim internationally.\(^{10}\) The Constitution of the Republic of South Africa has provided a comprehensive reform on the role of the Attorney General. To enhance theeffectiveness of the autonomy and independence of the office of the Attorney General, the Constitution of the Republic South Africa Act No. 108 of 1996 enshrines the office of the Attorney General and further authorizes the Parliament to enact legislation to operationalise and establish the said office. Section 179 of the Constitution of South Africa provides:

\((1)\) the authority to institute criminal prosecution on behalf of the state shall rest with the Attorney General of the Republic.

\((2)\) the area of jurisdiction, powers and functions of an Attorney General shall be as prescribed by or under law.

\((3)\) no person shall be appointed Attorney General unless he or she is appropriately qualified in terms of a law regulating the appointment of Attorneys General in the republic.

Consequently, Parliament passed the National Prosecuting Authority Act 1998 to give effect to the constitutional provision dealing with the prosecuting authority and

\(^{10}\) South African Government Information
outlining the details of a new prosecutorial system for the country. With the promulgation of the Act, South Africa’s first centralized national prosecuting authority headed by National Director of Public Prosecutions with powers to direct prosecutions throughout the country came into existence.

The National Prosecuting Authority consists of the office of the National Director of Public Prosecutions and the offices of the Prosecuting Authority at the high courts. The National Director of Public Prosecutions is assisted by an executive staff component comprising an advisor, a public relations officer and administrative assistants. The office of the National Director is served by four Deputy National Directors of Public Prosecutions. As head of the prosecution authority, the National Director has the final authority in the exercise of all powers and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, the National Prosecuting Authority or any other law.

The National Director of Public Prosecutions holds office for a non-renewable period of ten years or until attaining the age of 65 years. The Deputy National Directors and Directors serve unrestricted terms until the age of 65 years. The National Directors may be suspended or removed by the President subject to ratification by parliament. However, the President is obliged to remove the National Director, deputies or a director from the office if requested to do so in an address by Parliament. This enhances the public accountability on the Attorney General because he or she can be called to account for his or her action. While guaranteeing the autonomy, impartiality and non-interference, the National Prosecuting Authority Act 1998 provides that members shall serve impartially and exercise, carry out or perform their powers, duties and functions in good faith and without fear, favor or prejudices and subject only to the Constitution and the law.\(^{311}\)

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\(^{311}\) Section 32 (1) (a) of National Prosecuting Authority Act 1996
Section 32 (1) (b) of this Act further stipulates that subject to the Constitution and the Act, no organ of the state and no member or employee of an organ of state or any other person shall improperly interfere with, hinder or obstruct the Prosecuting Authority or any member thereof in the exercise, carrying out or performance of his or her powers, duties and functions. Any person who contravenes this pension is guilty of an offence.\textsuperscript{312}

In contrast, Kenya has no similar statute to safeguard the independence of the Attorney General neither does the Constitution of Kenya make it an offence to interfere with the Attorney General’s function. In addition, there is need for taking of oath or making an affirmation that the Director of Public Prosecutions will “uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and enforce the law of the republic without fear, favor or prejudice and as the circumstances of any political case may require in accordance with the Constitution and the law.”\textsuperscript{313}

In South Africa, there is Minister of Justice who is a member of the cabinet and responsible for the Ministry of Justice and Attorney General. There is also National Director of National Prosecuting Authority appointed under National Prosecuting Authority Act 2998 who is in-charge of public prosecutions. The National Director of Public Prosecutions is appointed by the President but ratified by Parliament. He or she is acts independently from the Attorney General. The statute insulates the public prosecutions from politics. This enhances the independence and autonomy of the Attorney-General. In Kenya, the Attorney-General is appointed by the President alone. This encourages allegiance to the President rather to the nation.

\textbf{4 SHORTCOMINGS OF STATUTORY REFORMS}

It should be observed that anyone possessing any measure of power ought to hold the same in trust for the public. And so it is with the Attorney General, and his or her agents. Decisions which are critical to functioning of a criminal justice such as what

\textsuperscript{2} Section 32 (1) (b) of National Prosecuting Authority Act 1996
\textsuperscript{3} Section 32 (2) (a) of National Prosecuting Authority Act 1996
criminal charges should be or not, how the case is to be proved and whether they should be brought, are to be exercised on a principled basis with public interest as the focal point. Just how that responsibility is to be discharged in a manner that ensures public confidence and eliminates the intrusion of partisan political consideration becomes an important objective for all prosecution services.

Some countries like United Kingdom, Australia and South Africa have opted to rely on statutorily-based structures to ensure independence and instill public confidence. The issue of the Attorney-General’s autonomy should also be balanced with public accountability. Too much autonomy may be abused or it may lead to tyrannical Attorney-General. However, this may be reduced by ensuring that the Attorney-General is answerable to the parliament and further subject his or her decisions to judicial review. However, statutory-based structure is one of the main approaches to enhance independence of the Attorney General. Once stable legislatively-based structures are established, other non-legal measures could be applied to support the system. These would include code of conduct and is issues of personal integrity of the office holder.

4.5 CONCLUSION

The office of Attorney General is dynamic institution which should to be nurtured and reformed in accordance with the needs of the society. The office is vulnerable to abuse and misuse by the executive and should be independence from the executive interference and politics. One of the main approaches used to achieve this is to adopt legislatively-based model. This model is being used in United Kingdom, Australia and South Africa. Similarly, there is need to enact a statute to separate public prosecutions from the other functions of the Attorney General in Kenya. This will enhance fairness, independence and accountability in the administration of justice and rule of law.
CHAPTER FIVE

CONCLUSION

5.0 INTRODUCTION

This chapter deals with findings of the study and make appropriate recommendations to strengthen the constitutional independence of the Attorney General in Kenya. Kenya inherited the office of the Attorney General from United Kingdom in 1963. The purpose of colonial rule was to exploit the Kenyan recourses for the benefits of the colonial masters. The colonial administration established government institutions which were oppressive to the majority of the Kenyans. It is not surprising to note that the issues of independent Attorney General were not their concern. The issue of institutional, administrative and adjudicative independence of the Attorney General was not the objective of the colonial administration. When Kenya achieved its independence in 1963 no effort was made to re-engineer the objective of government institutions to serve the interest of the Africans. Hence, the need for legal reforms on role of the Attorney General to make it accountable and responsive to the needs of the Kenyans.

5.1 THE PURPOSE OF STUDY

The purpose of this study was to identify and determine constitutional and statutory factors that negate the independence and autonomy of the Attorney General and consequently hinder effective role of the office in good governance for purposes of introducing reforms to the State Law Office. Consequently, the constitutional, statutory and common law roles and operations of the Attorney General in Kenya have been critically analyzed within the doctrine of separation of powers and rule of law to identify constitutional and statutory weaknesses. A comparative study of the office of Attorney General with other countries within the Commonwealth region has also been carried out to identify gaps for reforms. To achieve the purpose of this study, the following three critical questions have been considered to confirm whether or not lack of statutory operationalization of the Attorney General’s autonomy has hindered the office’s role in good governance in Kenya:
(i) What are the constitutional factors hindering the role of the Attorney General in Kenya?
(ii) How can the constitutional autonomy of the Attorney General be enhanced?
(iii) What constitutional and statutory reforms are necessary to this office the
When answering these questions, the focus has been on analyzing, assessing and
evaluating the extend the current Constitution provides for the following dimensions
of the independence of the Attorney General:
(a) Institutional independence
(b) Adjudicative independence
(c) Administrative independence
(d) Autonomy in policy directives

In considering these issues, attention has been drawn not only to the current
Constitution but also the “operational reality” of the Attorney General’s office. It is
important to assess whether the Constitution provides appropriate working
environment that gives rise to apprehension of real independence. In this regard, the
study considered the extent the Attorney General is legally empowered to exercise the
constitutional independence. However, administrative control has not been the ground
on which a reasonable apprehension of a lack of independence usually rests or
succeeds. Executive supervision over the government institutions is common and
expected. It fulfils the goal of public accountability.

The office of the Attorney-General plays a critical role in good governance in any
country. It evolved for purposes of serving the society. The sustenance of good
governance in any country will depend to a great extend on how effective, accountable
and responsive the office of the Attorney-General is operating. This is because the
office of the Attorney-General deals with laws which act as “nuts and bolts” to
organize the complex behaviors involved in self-organization and development. In
many developed and commonwealth countries, for instance United Kingdom, Australia

314 Supra, Note 8
315 Supra, Note 22 p.12
and Republic of South Africa have introduced many legal reforms to make the office of the Attorney-General more accountable, relevant and responsive to good governance. Consequently, many constitutional and other statutory reforms have been introduced in their legal systems\textsuperscript{316}. These countries have adopted a legislatively-based structural model to safeguard the institutional and adjudicative independence of the prosecutorial independence of the Attorney General.\textsuperscript{317}

5.2 CONSTITUTIONAL AND STATUTORY WEAKNESSES OF THE ATTORNEY-GENERAL IN KENYA

Having analyzed the role, genesis, development and operation of Attorney General in Kenyan context and compared it with other similar jurisdictions, the study shows several constitutional and statutory gaps in the institutional, administrative and adjudicative independence of the Attorney General in Kenya. Compared to developed countries, Kenya has made no constitutional or statutory reforms to make the office of the Attorney-General more responsive to good governance. Hence, the institution is considered as an instrument of oppression in the hands of the executive instead of being viewed as tool to facilitate realization of the public good. This study and analysis of the office of the Attorney-Generals operation has identified the following gaps and weaknesses:-

(a) **Constitutional gaps in security of tenure:**

Whereas the Constitution of Kenya provides for independence and security of tenure for the Attorney General, the effectiveness of these provisions has been eroded by lack

\textsuperscript{316} (i) United Kingdom-Prosecution of Offences Act 1985; Law Officers Act 1997
(ii) Australia-Director of Public Prosecutions Act 1983
(iii) British Columbia- Attorney General Act (RSBC) (Cap.22)
(iv) Northern Ireland- Justice (Northern Ireland) Act 2002
(v) Papua New Guinea – Attorney General Act 1975
(vi) Canada- Attorney General Act 1990
(vii) Angola- Article 136(2) of the Constitution provides that the government ‘s shall have its own statute to enjoy its autonomy in accordance with law
(viii) U.S.A.- Justice Act 1789 creates the Office of the Attorney General and defines his duties
(ix) Malta- Attorney General ’s Ordinance(Cap. 90)

\textsuperscript{317} Sunlight and Disinfectants: Prosecutorial Independence and Accountability Through Public Transparency paper by Bruce A. Macfarne Q.C Deputy Attorney General for Province of Manitoba <http://www.canadaicriminal.com/article> (accessed on 29 May 2008);

(2000) 45 Criminal Law Quarterly 272
of statutory safeguards to withstand the misuse or abuse of excessive powers of the President under sections 24, 25 and 26 (1) of the Constitution. Section 109 (4) of the Constitution authorizes that the Parliament to legislate on the age of retirement for the Attorney General. However, this provision has not been operationalised by a statute. This means that Attorney General may stay in the office as long as he or she has the goodwill of the appointive agency. The Constitution does not specify the kind of oath the Attorney General should take. Currently the Attorney General takes the oath of office with allegiance to the President instead of the nation and the law of the land as the case in the Republic of South Africa. These constitutional gaps interfere with the adjudicative independence of the Attorney General. There is need for a statute to specify the age of retirement or the terms of service to secure adjudicative independence of the Attorney General. The second Kenya Attorney General, James Karugu (1980-1981) was forced to resign.

Since 2002, the President has established new of Ministry of Justice, National Cohesion and Constitutional Affairs which has taken some of the mandates of the Attorney General. The State Law Office and the new Ministry of Justice, National Cohesion and Constitutional Affairs deal with constitutional and other legal issues at cabinet level\(^\text{318}\). It is important that the Constitution clarifies their roles to avoid conflicts in the policy mandates of the two offices.

(b) **Lack of sound constitutional basis:**

The weakness of the Attorney General’s Office to protect the public interest is traceable to lack of sound constitutional basis for its role in the society. The current Constitution does not provide national goals or directions to the office of the Attorney General. It does not conceive the institution of the Attorney General as national institution to protect the public good or larger interest of the state. It is limited and strictly designed to serve the interest of the executive. This can be traced from colonial era where its primary objective was to serve and preserve the colonial regime and not

\(^{318}\) Presidential Circular No.1 of 2008 on Organization of Government Ministries of the Republic of Kenya issued by the Office of the President Nairobi :Government Printer
to protect the interest of the Africans. Regrettably, this status quo has been maintained by the subsequent governments to the prejudice of public good. No wonder the office finds it very hard to prosecute the senior members of the executive. There is need for a legislation to define the role of the Attorney General as protector of public interest.

(c) **Ministerial collective responsibility:**
As a member of the cabinet, the principle of ministerial collective responsibility provided in section 17 of the Constitution limits the independence of the Attorney General enshrined in section 26 (8) of the Constitution. While this may have served colonial regime, it has failed to protect public interest.

(d) **Imperial presidency:**
The current Constitution vests excessive powers in the President which makes it hard for the Attorney General to advise the executive appropriately and effectively. For instance under section 25 of the Constitution every civil servant serves during the pleasure of the President; section 24 of the Constitution gives the President appointive and dismissal powers over civil servants; section 109 (1) of the Constitution gives the President sole appointive power for Attorney General.

(e) **Subordination of the Attorney General to the executive:**
(i) Section 26(1) of the Constitution places the Attorney General in public service and hence directly subordinate to the executive. This makes the independence in section 26 (8) of the Constitution meaningless and impracticable in light of imperial presidency. This also explains lack of appropriate action by the Attorney General on annual reports of Controller and Auditor General, and recommendations of parliamentary Public Accounts Committee and Public Investment Committee.

(ii) As a civil servant, the Attorney General serves at the pleasure of the President under section 25 of the Constitution. This further weakens the independence of the Attorney General.
(iii) Under section 24 of the Constitution, the President has powers to constitute and abolish offices in the Republic of Kenya. This includes the office of the Attorney General which has been renamed by Presidential Circulars No.1 of 2003 and No.3 of 2003 on Organization of the Government Ministries as State Law Office.

(iv) The security of tenure for the Attorney General in section 109 of the Constitution is grossly inadequate in light of excessive presidential powers in sections 24, 25 and 26(1) of the Constitution. As a civil servant, the Attorney General is serving at the pleasure of the President unless he is on contract.

(f) **Statutory gaps on institutional independence:**

There is no statute which outlines the functions, powers, and responsibilities of the Attorney General. There is need for a statute to consolidate the powers of the Attorney General under common law for purposes of enhancing institutional independence of the Attorney General. Currently, the Attorney General has no deputy. In the absence of Attorney General, constitutional issues have to be held in abeyance despite appointment of Solicitor General. Both officers are appointed by the President. However, there is no clear distinction on their functions bearing in mind that both are lawyers appointed by the President. There is urgent need to legislate on their responsibilities as done in other jurisdictions. In Tasmania, there is the Solicitor General Act; in United Kingdom there is Law Officers Act; in Australia there is Solicitor General Act etc.

(g) **Lack of appropriate neutral body for vetting the appointment:**

The appointment of the Attorney General is vulnerable to political patronage. While appointment made by the executive government will often be castigated as “political appointments”, the meaning of this is often unclear, especially, since all such appointments are political in the sense that they are made by a largely unconstrained executive elected through political process. However, appointment of Attorney General may be political if it is made as a reward, out of political patronage or in
response to a guarantee that specific decisions will be made by the appointee once in office. In Kenya the appointment process has not been impeccably credentialled and meritorious hence, the risk of bringing it into disrepute and affects public confidence. There is need to establish an independent prosecution authority from the Attorney General’s office to depoliticize it and protect it from political patronage. Further, the Attorney General should be appointed by the President but ratified by the Parliament. The government ‘s appointment ought to be defensible as not excessively partisan .It should be able to be characterized as balanced in terms of the appointment of people from different political perspectives or from none.

(h) **Lack public accountability mechanism:**

Currently, the Attorney General is neither accountable to the public nor the Parliament. He or she is answerable the appointive authority. Hence, it lacks public accountability. There is need to institute legal mechanism where he or she could account to the public through the parliament for his or her performance and actions. This will include submission of annual reports to the parliament for assessment.

5.3 **RECOMMENDATIONS**

The study identified strategic areas in the constitution which need to be addressed to enhance the constitutional independence of the Attorney General. They are the areas which require legal reforms:-

(a) **Appointment:**

The current Constitution empowers the President to appoint the Attorney General without any consultation. Section 109 (1) of the Constitution provides:

“The Attorney General shall be appointed by the president.

The independence Constitution of 1963 had provided that the Attorney General was to be appointed by the Head of State (Governor General) with the advice of the Public Service Commission.$^{319}$

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$^{319}$ Supra, Note 49
Currently, the President enjoys complete appointive discretion.\textsuperscript{320} The President is a politician and usually in charge of a political party. In Kenya, most of senior appointments in the public service have been politicized, hence the difficulty of the Attorney General to remain politically neutral in a context of many political beliefs and programmes.\textsuperscript{321} A politicized civil service is usually one sensitized and regards itself as under imperative duty to take account of the process of political competition outside the scope of official obligations stricto sensu and serves a particular political course. Such a public service usually has an intimate role in the formulation of political policy as its security rests on its unconditional identification with the prevailing political influence.\textsuperscript{322} To minimize the dependency of the Attorney General on the executive, the Constitution should provide that the Attorney General be appointed by the President subject to approval by parliament. This will reduce the influence of the President and secure neutrality of the office. The Attorney General may serve for two terms of five years each or retire at the age of 60 years. This is a similar situation to Director of National Prosecuting Authority in the Republic of South Africa. The main purpose of this provision is to ensure that the loyalty and allegiance of the Attorney General is to the nation and the law of the land and not an individual or executive. His or her dismissal should be subject to a recommendation of a tribunal and approval by the Parliament.

(b) National purpose and goal:

The Constitution should expressly specify the purpose and goals of the office of the Attorney General in promoting, protecting and upholding the rule of law and defending the public interest.\textsuperscript{323} The current Constitution does not give any direction as to the general purpose of the office. This lacuna makes the office vulnerable to the executive influence. Sound constitutional basis will also minimize the danger of

\textsuperscript{320} Ibid
\textsuperscript{321} Ibid
\textsuperscript{322} Ibid
\textsuperscript{323} Section 170 (7) of Proposed New Constitution of Kenya \textit{Gazette Supplementary No. 63 of 2005. 22 August 2005} which was rejected in November 2005 Referendum;
Section 108 of the Constitution of Republic of South Africa
the Attorney General being prone to serving the purpose and goal of appointive agency or political aspiration of the ruling party or clique.

(c) **Comprehensive independence:**
The Constitution should provide for operationalisation of the autonomy and independence of the office of the Attorney General by a statute namely the Attorney General Act, making it a criminal offence to interfere with role of Attorney General. In particular, the statute should outline adjudicative and institutional independence, administrative autonomy and independent policy-making. The current Constitution does not provide institutional independence, administrative autonomy, and independent policy-making.

(d) **The general functions of the Attorney General:**
General functions of the Attorney General should be outlined in the Constitution. The areas of jurisdiction and powers of the Attorney General should be as prescribed by or under the law. The same should apply to the post of the Solicitor General as the deputy of the Attorney General. The general functions of the Attorney General should also be distinguished from the of the Minister of Justice .

(e) **Organization and structure:**
The parliament should be authorized to enact legislation to operationalise and protect the office of the Attorney General within the constitutional parameters. These should be incorporated in the Attorney General Act. This will ensure the permanency of the institution and minimize the powers of the executive in re-organizing the government. The organizational structure and functioning of the Attorney General’s Office should be regulated by its own statute as done in other countries, which have updated the institution of the Attorney General by statute.³²⁴

³²⁴ (i) Law Officers Act 1966, Swaziland;
(ii) Attorney General Act 1999, Queensland (Australia);
(iii) Attorney General Act(RSBC) Chapter 22,British Colombia
(iv) Law Officers Act 1964, Australia
Public accountability of the Attorney General:

To ensure that the Attorney General acts with integrity and in accordance with the law, he or she should be made accountable to the people through the parliament. Besides defending the office’s actions and decisions in the parliament, the Attorney General should be able to submit annual reports to the Parliament on the activities and programmes for assessment. This should be outlined in the statute establishing the office of the Attorney General in accordance with Constitution.

(v) Public Prosecutions Act 1983, Australia
(vi) Prosecution of Offences Act 1985, United Kingdom
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