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**(LL.M) COURSE (GPR 699)**

**THE LEGALITY AND FAIRNESS OF THE IMPEACHMENT OF COUNTY  
GOVERNORS IN KENYA: A SUPPRESSION OF THE SPIRIT OF  
DEVOLUTION?**

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**2020**

**DECLARATION**

I, GATHII IRUNGU, do hereby declare this research project as my original work and that it has not been previously submitted elsewhere nor is it due for submission for a degree in any other institution.

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This research project has been submitted for examination with my approval as a University Supervisor.

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**PAMELLA AGER.**

## **DEDICATION**

I dedicate this work to my Father JOHN MWANGI, an excellent educator. Despite many challenges, he did not give up on me. He today remains an inspiration. I further dedicate this work to my lovely wife JANE, lovely daughters GRACE, PAULINE and JOAN. During my studies, you were a steadfast beacon of hope. My dear mum, thank you for continuing to protect me. I also include the interesting NJORO family scattered in the four winds. You all have a special place in my heart as you contributed to my success.

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I want to express my deepest gratitude to The Almighty for it is by such grace that I have managed to do and complete this study.

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I thank my family, especially my wife, JANE, lovely daughters GRACE, PAULINE, JOAN, parents JOHN & WANJIRU, the NJORO family and the infrastructure team for encouragement and support in this tough journey.

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## TABLE OF CONTENTS

DECLARATION.....	i
REG NO.: G62/75313/2014 .....	i
DEDICATION.....	ii
ACKNOWLEDGMENT .....	iii
LIST OF ACRONYMS .....	vii
LIST OF STATUTES .....	viii
LIST OF CASES .....	ix
ABSTRACT.....	x
1.1 Introduction.....	1
1.2 Background of the Study .....	1
1.3 Statement of the Problem.....	2
1.4 Justification of the Study .....	<b>Error! Bookmark not defined.</b>
1.5 Research Objectives.....	3
1.6 Research Questions.....	4
1.7 Research Hypotheses .....	4
1.8 Theoretical Framework.....	5
1.9 Literature Review .....	7

1.10 Research Methodology .....	11
1.11 Scope and Possible Limitations of the Study.....	11
1.12 Chapter Breakdown .....	12
2.1 Introduction.....	15
2.2 County Governments: Governors and Members of the County Assemblies.....	16
2.3 Removal of a Governor.....	18
2.4 Removal of the President.....	20
2.5 Removal of a Member of Parliament.....	20
2.7 Conclusion .....	26
3.1 Introduction.....	28
3.2 Alternative Dispute Resolution and other Punitive Measures besides Impeachment .....	29
3.3 Reprimand and Censure.....	29
3.4 Fine or Monetary Retribution .....	30
3.5 Suspension and Dissolution.....	30
3.6 The Predicament of a Person Facing Impeachment Motion.....	32
3.7 The Justifiability of the County Assemblies’ Bid to Play A Quasi-Judicial Role and the Fairness Of Its Role as a Tribunal.....	33
3.8 Role of Courts in Impeachment Process in Kenya .....	35
3.9 Conclusion .....	36

4.1 Introduction.....	38
4.2 Impeachment in USA.....	<b>Error! Bookmark not defined.</b>
4.3 The Case of South Africa.....	38
4.4 The Case of Nigeria .....	42
4.4.1 The Impeachment of Governors in Nigeria .....	45
5.1 Introduction.....	50
5.2 Conclusion .....	50
5.3 Recommendations.....	54
BIBLIOGRAPHY .....	<b>Error! Bookmark not defined.</b>

## LIST OF ACRONYMS

BoR	Bill of Rights
CIC	Commission for the Implementation of the Constitution
FGDs	Focus Group Discussion(s)
MCA	Member of County Assembly
US/USA	United States of America



## **LIST OF STATUTES**

*The Constitution of Kenya, 2010*

*The Constitution of South Africa, 1996*

*The Constitution of the Federal Republic of Nigeria 1999*

*The Constitution of the United States*

*The County Government Act, 2012*

*The Elections Act, 2011*

*The Judicature Act, No. 16 of 1967*

## **LIST OF CASES**

*Advisory Opinion Reference 2 of 2013, between Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR.*

*Hastings v U.S. Senate, Impeachment Trial Committee, D.D.C. 1989,716 F Supp 38.*

*Martin Nyaga Wambora & Others v. County Assembly of Embu & Others, Petition Nos. 7 & 8 of 2014*

*Matter of Impeachment of Moriarty [1994] 902 S.W.2d 273.*

## **ABSTRACT**

Article 181 of the Constitution of Kenya 2010 provides for several grounds under which a county governor can be removed from office. This includes; a gross violation of the Constitution, where there are serious reasons to believe that the governor has committed a crime; abuse of office or gross misconduct; physical or mental incapacity to perform the functions of the office of county Governors. The process can emanate from the national assembly within the confines of legislation by parliament which stipulates the procedure of removal. This study appraises the framework for the impeachment process initiated by the Members of the County Assemblies (MCA's, in particular, the legality and fairness of their actions. Using constitutional theories, theories of justice and rule of law principles, the research hopes to identify the immediate challenges and future barriers in operationalizing this provision. In light of the foregoing, this study takes the view that, as Kenya proceeds down the devolution path, it may be well worth reflecting on other countries' experiences with this form of government. Given South Africa's experience over the past 20 years, Kenya may want to consider some of the hard lessons that South Africa has learnt, and also train its system along with the South African one, albeit with moderation. This, together with the experience of the US and Nigeria, can solve the going subjective impeachments in Kenya.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Introduction

Devolution is the most talked about concept in Kenya today. However, there exist a lot of misconceptions about devolution as opposed to what was envisaged in chapter 11 of the Constitution of Kenya, 2010. In the recent past, Kenyans have witnessed a rift between the senators and the Governors as well as the Senate and the National Assembly.<sup>1</sup> Further, the Members of County Assemblies (MCAs) have threatened the Governors to abide by their angry demands or else face impeachment or make it hard for them to carry out the duties. The leaders have generally been sensitised to be vigilant and hold themselves with integrity, lest they be recalled for failing to meet the “integrity test.”

### 1.2 Background of the Study

Whenever there is any slight veering off by a person holding a public office from the Constitutional provisions, a majority of the citizenry is keen to seek the remedies provided by the Constitution to ensure that the leader or public official is held accountable for his misconduct or any violation of the Constitution.<sup>3</sup> The key provisions to note are those provisions on recalling and the impeachment of public officials that are suspected to be acting contrary to the principles and purpose of the Constitution. More specifically, the Constitution expressly provides for the conduct of state officers; that a state officer is to behave in a manner which avoids: demeaning the office that they hold, compromising any public or official interest in favour of personal

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<sup>1</sup>Ochieng David Ayuo, “The Legal Framework for Devolution in Kenya” (April 2014) LL.B Dissertation, School of Law, Moi University (hereinafter “Ochieng”), p. Vii. *ibid* Chapter 6. The Constitution of Kenya 2010, Article 75

interest as well as a manner that avoids any conflict of interest.<sup>2</sup>As a result, any public officer could be recalled for any misconduct, the nature of the same notwithstanding.<sup>3</sup>In the recent past, the media has been awash with news of impeachment of Governors, not only on print media but also, on social media.<sup>4</sup>For instance, the Standards Group had a little running on the threats to impeach Governors.<sup>5</sup>

In light of these series of threats of impeachment, a deduction can be made that, in the near futuresoon, any officer of the state could be sent home for mistakes not entirely their fault, seeing that he or she does not work alone in conducting the business of the relevant county. It is thus relevant to enquire into the motive behind the impeachment of state officers, particularly the Governors and this is the basis of this study since in most cases it is assumed that impeachment is not done in good faith, but is based on the nature of the office held by Governors being a political one and that the process is based on spurious grounds, driven by a desire to settle scores.

### **1.3 Statement of the Problem**

Like in any jurisdictions having decentralised systems of governance such as South Africa, Uganda and Ethiopia, devolution in Kenya play a valuable role. Not only is it created to ensure public participation in governance but also to bring services to the door-step of each citizen in the respective counties.

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<sup>2</sup>Article 75 (1), The Constitution of Kenya.

<sup>3</sup>The Constitution of Kenya 2010, Article 80.

<sup>4</sup>‘Kenya: Court Reinstates Impeached Embu Governor Martin Wambora’, the *Star* (20 February 2014). Sacked Embu Governor Martin Wambora will be back in office after a court stopped his impeachment until the case he has filed is determined, retrieved from <http://allafrica.com/view/group/main/id/0029061.html> accessed on October 6, 2014.

<sup>5</sup>Concerns raised over MCAs threats to impeach Governors’, <http://www.standardmedia.co.ke/?articleID=200110753> accessed on October 6, 2014.

Admittedly, Article 181 of the Kenyan Constitution provides for the grounds for removal of a governor, such as gross violation of Constitution or any other law, commission of a crime under national or international law, abuse of office or gross misconduct, or physical or mental incapacity to perform. The procedural aspects of the process are well reflected under the County Government Act, 2012. However, whereas the Act has explicitly magnified the substance and procedure of removal, the same has been a myth in practice. Politically motivated MCAs have shown no iota of regard for the law and from the outset, have seemed subjective rather than objective.

Thus, *sans* any holistic and pragmatic approach embodied in a legal framework to contain the impeachment processes, the system of devolution in Kenya is likely to fail. MCAs, in their bid to show power over the Governors. The MCAs will, on a simple mistake that would otherwise not amount to misconduct or abuse of office, continue initiating impeachment of Governors without any good faith, unless the whole process is tamed.

To this end, this paper will focus on impeachment challenges in Kenya. It will analyse the legality and fairness of the impeachment process initiated by the MCAs and, in particular, the impact of the process on the spirit of devolution in Kenya.

#### **1.4 Research Objectives**

The overall objective of this study was to analyse whether the impeachment process by members of the county assemblies can be legally challenged as being in bad faith and contrary to the spirit and purpose of the constitution.

### **1.4.1 Specific Objectives**

The study has the following specific objectives

- i. To Establish the reasonableness and legality of the impeachment threats or processes;
- ii. To Establish whether impeachment by the same members of the county assemblies, acting as a quasi-judicial body, is an absurdity in the first place; and
- iii. To set up a case for an inclusive regulatory regime to regulate the wave on impeachment of Governors and to highlight the roles to be played by each body provided for by the Constitution on the right to recall and impeach state holding public officers.

### **1.5 Research Questions**

In order to meet the objectives stated above, this research seeks to answer the following research questions:

- i. What is the reasonableness of impeachment of Governors in Kenya and can this process be challenged for being unfair, unreasonable and hence in violation of the principles of natural justice?
- ii. What appropriate and effective measures should be taken to promote the creation of a devolution friendly means of solving county issues to enhance the accountability of the Governors?
- iii. What are the best practices and lessons Kenya can borrow for her devolved governance system?
- iv. Are there any proposed interventions and recommendations that can be used to strengthen the impeachment processes?

### **1.6 Research Hypotheses**

The following hypotheses will be tested in this study:

- i. That the impeachment of county Governors in Kenya is politically motivated, not at all reasonable and is without any good-will for the country's call for devolution as per the Constitution.
- ii. That having a legal framework that espouses impeachment procedure and remedies is the most suitable mechanism to strengthen impeachment processes in Kenya.
- iii. That the on-going impeachment of county Governors in Kenya by the same members of the county assembly is absurd and against the principles of procedural fairness and thus the need to enhance accountability in the process.

### **1.7 Justification of the Study**

The study is justified by the need to address the need to strengthen the legal framework on impeachment of governors. The current process has a number of loopholes which result in an impeachment process that is highly political and not as per the grounds laid out in the Constitution of Kenya, 2010. The process lacks procedural fairness where members of the county assembly instigate impeachment proceedings that are not in accordance with the law. The study is justified on the need to have a stronger legal framework at the county assembly.

### **1.8 Theoretical Framework**

As aforementioned, the contention informing the recent impeachment processes initiated by MCAs is a new matter in the Kenyan political and legal spheres. The theoretical pronouncements on the question of impeachment, and reasonableness and legality, therefore,



have not been explicitly laid out and the theories I am relying on for this study will assist in addressing this.

### **1.8.1 Political Liberalism**

This study will favour Rawls' theory of *Political Liberalism*, as a modification of his former theory of justice as fairness.

This theory of political liberalism emerged as a result of critics of Rawls' previous theory of justice<sup>6</sup> as fairness, in which he had argued that all moral convictions are personal and should be respected. He had also held that all should embrace the same principles of justice. In his new framework, Rawls hoped to form a consensus that justice as fairness theory (theory of justice) was a fair standard upon which to organise government and regulate society. According to him, if everyone could be convinced to do this, then adjudications, laws and the Constitution itself could be understood in light of the principles of justice as fairness. This consensus was to provide judges, lawmakers, and citizens generally with a common point of reference.

Reasonableness, for Rawls, becomes the new standard of judgment. Thus, anything that does not meet the Rawls standard is to be considered not false or wrong, but "unreasonable." Thus, any public action consistent with these tenets of justice is understood as legitimate. In the public arena, then, all are expected to defend their ideas in terms that everyone can understand and embrace, which is to say that all are expected to use public reason and therefore this theory goes hand in hand with answering the research questions outlined above.

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<sup>6</sup> J. Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1971); see also D.J. Galligan, *Due Process and Fair Procedures: A study of Administrative Procedures* (1996), 469-70

Rawls argues that to give acceptable reasons for a policy or a decision, one simply has to pretend that they are shrouded in the veil of ignorance. If one's argument relies on special knowledge or one's own personal moral convictions, then it is outside the bounds of public reason, is unreasonable, and thus illegitimate. Thus the importance of this theory to this study is the fact that reasonableness of the impeachment of Governors in Kenya, often shrouded by political scores, can be well exposed in light of Rawls' arguments, as explained.

### **1.8.2 Theory of General Will**

This theory was posited by Rousseau whereby he speaks of the general will and private will. The private will is about private interests while the general will speaks on the interests. He propounds that in many occasions people prefer their personal interest over the interest of the citizens. Governors are elected to promote the interest of the citizen. They hold the office as a social contract to govern. The members of county assembly out of private interest may instigate impeachment process which is political and not on the interest of the electorate. This is a derogation from the Constitution of Kenya, 2010 which only expects impeachment where there are factual grounds of misconduct and abuse of office. The process has to be strengthened to ensure that impeachment is always based on the general will and not on the private will.

### **1.9 Literature Review**

“Impeachment” is a new concept in Kenya's governance system under the new Constitution. Debate on the legality of the process only cropped up recently with the initiation of the impeachment of Embu Governor Martin Nyaga Wambora and his deputy Dorothy Nditi.

Moses Chelanga<sup>7</sup> discusses what the law stipulates on impeachment. According to him, the impeachment procedure set under section 33 of the County Governments Act is a copy proper of Article 145 of the Constitution on the impeachment of the President. He believes that impeachment is both a legal and political process with no prescribed strict legal standard of proof. The Committee of Senate that investigates the allegations against the governor should be guided accordingly on the standard of proof required before making a report to the whole house. Section 33(a) of the Act makes reference to “charge against governor”; meaning that the proceedings are criminal, hence the standard of proof is beyond reasonable doubt. His writing, however, only provides a critique of the impeachment process.

Ochieng Ayuo<sup>8</sup> delves into the concept of devolution. Being a unique feature in the 2010 constitution, he posits that understanding devolution is important for the implementation of the new Constitution. He explores the historical background of the quest for devolution in Kenya and gives an analysis of the legal framework in Kenya. Whereas Ochieng welcomes the significance of devolution as per the Constitution, he however believes that the system should be treated with caution. To justify this, he makes reference to the recent war between the Senators and Governors, including the impeachment threats fuelled by the MCAs against the Governors.

Ochieng goes further to draw best practices on decentralization of power from South Africa and Uganda. He recommends that Kenya should adopt the South African example because of its long-

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<sup>7</sup>Chelanga Moses, “Law and Politics of Impeaching County Governors” (February 12, 2014) ilawkenya, blawg Devolution, Available at <ilawkenya.com/devolution> accessed 21<sup>st</sup> November 2014.

<sup>8</sup>Ochieng, ( *note 1*)

lived devolved system of governance. Although his study will be of great importance in the instant research, his work is devoid of the question of impeachment that has shaken the Kenyan devolution process. He only makes a preliminary mention of the removal process under the County Government Act, 2012. This study therefore augments his writing by pointing out the umbra of the impeachment process and its fairness in Kenya.

Daniel Muia<sup>9</sup> writes on the decentralization of power to districts in Kenya. His work is principally based on the previous constitutional regime that entrenched the provincial and district administration systems. Whereas his writing may not be relevant to this study because of it being written at a time Kenya had not undergone the test of devolution typified by the present constitution, this study takes note of his definition of the term “decentralisation.” A consideration of his article will therefore limit any further construction of the term. In a nutshell, Muia asserts that decentralisation is one way through which people’s right to participate in governance is attainable. He highlights further two central definitions of decentralization to emphasize the importance of the transfer of decision making power and management of affairs to a subordinate entity. First, according to him, decentralization refers to the transfer of public authority and resources including personnel from the national to sub-national jurisdiction. Second, he states that decentralization is the transfer or delegation of legal or political authority to plan, make decisions and manage public functions from central subordinate units of government, semi-autonomous public corporations, regional development or functional authorities and local governments and non-governmental organizations.<sup>10</sup> It is the observation of the researcher herein that, once power has been decentralized into a particular

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<sup>9</sup>Muia M Daniel, ‘Decentralization of Governance to Districts in Kenya: A case Study’. (2008). In: Kibua T N and Mwabu G, (ed), *Decentralization and Decentralization in Kenya: New Approaches*. (University of Nairobi Press, 2008) page.

<sup>10</sup> Ibid

body, taking it at a tender stage of its exercise by way of impeachment, or before the expected fruits yield, is tantamount to a frustration to the giver of the power, being the people of Kenya.

Gerhardt<sup>11</sup> identifies several problems with the federal impeachment process in the US. These include, inter alia, the uncertain precedential value of impeachment proceedings; the increasing influence of the executive branch in initiating or displacing impeachments; the Congress' tendencies in defining impeachable offences; and the propriety of reimbursing the defence costs of impeached officials acquitted by the Senate. He believes that the precedential effect of impeachment in the US is at its strongest if a question of constitutional interpretation is involved. In such cases, the Congress seems to be sensitive to the permanent effect of its decisions on the Constitution and its relationship with the other federal branches. The Congress also has a desire to provide the parties in an impeachment, consistent, predictable, and stable guideline, and to avoid any practice that might undermine the confidence of the participants in the fairness of the impeachment process. His arguments are very informative in this study and it is the view of the researcher herein that the Kenyan situation has to adopt Gerhardt's principles. His study, however, fails to cover the need of documenting impeachment processes cum the requirements of natural justice. While drawing his arguments, this study makes important strides, albeit with a limitation to the Kenyan problem.

The literature review above is important to this study as it analyses and captures the concept of devolution and what the law stipulates on impeachment. However, not many authors have delved on legality and fairness of impeachment processes. Very few have actually provided commentaries on the controversial impeachment provisions and this study will assist bridge

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<sup>11</sup> Gerhardt J. Michael, *The Federal Impeachment Process: A The Constitutional and Historical analysis* (University of Chicago Press), Chapter 5.

this current gap in literature review. This study will further lay down a framework for fair impeachment.

### **1.10 Research Methodology**

The study adopts a descriptive research design that finds out: the what, where and how of a fact. This is based on a qualitative approach of methodology involving the use of secondary sources of data. The secondary-source study shall be library and internet-based. This shall entail the use of case law, journal articles and scholarly publications, and reports. Online sources shall provide information on the possible impacts of the threats of and impeachment of Governors on the devolution process in Kenya. The websites of most of the Kenyan media houses that highlighted the wave of the impeachment threats shall also be consulted. Information obtained there-from shall be verified by the various commentaries made through newspapers inter alia, the Daily Nation and the Standard. Additionally, reference to specific books on constitutionalism shall be made to get information on the impact of devolution and the possible outcomes of the law of impeachment. The Constitution and statutes such as the County Government Act shall provide a legal framework in this study.

Considering chapter four is a comparative study, the researcher also relied on a comparative method of legal analysis of other countries internationally and regionally to capture more information on impeachment processes respectively.

### **1.11 Scope and Possible Limitations of the Study**

The scope of this study is two-pronged. Firstly, it mirrors the current impeachment controversies in Kenya, the fairness and impact of the process, and the need to have a regulatory framework in order to protect the spirit of devolution as espoused under the

Kenyan Constitution. Secondly, in order to inform its findings and recommendations, the study extends the scope to best practices from countries that have devolved governments. The intention here is to get more information of procedural aspects of impeachment, particularly with regard to county governments.

Noteworthy, the study shall not be concerned with a closely related topic of impeachment of the head of state by the two houses. The research to be conducted should not be distinguished from an advocacy for impeachment of state officials whenever they abuse offices, but rather the impacts of the impeachment process on devolution.

Given this scope, and like in any research that involves secondary sources, this study may face a number of challenges, timescale being the main challenge.

### **1.12 Chapter Breakdown**

The study is divided into five chapters as follows.

#### *I. Chapter One: Introduction*

This acts as a precursor to the study. It provides the background of the subject matter of research, the intended objectives, the statement of the problem, justification of the study, and the theoretical postulates intended to be proved. The Chapter also explored the methodological approach of the study.

## *II. Chapter Two: The Reasonableness of Impeachment*

This chapter shall explore the question of misconduct or abuse of office *cum* the integrity issues on state officers. The basis shall be to establish as to whether the impeachment threats or processes are reasonable insofar as the spirit of devolution is concerned. The chapter shall also show the impact of the impeachment on the dignity of the office, and question the justifiability of the entire process as a matter of law. Of interest shall be how the abuse occurred, if at all it was the governor's mistake in bad faith; the discretion of the governor over some matters, if any; and whether there is any alternative remedy other than impeachment.

## *III. Chapter Three: Towards Protection or Creation of a Devolution-friendly Means of Solving County Issues to Enhance Accountability.*

The chapter shall examine the predicament of a person facing impeachment motion, a process that can be initiated and progressed by the county assembly and senate. This will be a precursor to an examination as to whether such a person has any other remedy prior to the initiation of the impeachment motion or simply advocate for a regulatory framework to regulate the process as a way of protecting the interest, spirit and purpose of the Constitution. The chapter shall then compare the justifiability of the county assemblies' bid to play a quasi-judicial role and the fairness of its role as a tribunal in a matter it is interested or it initiated.



*IV. Chapter Four: Best Practices, a Synergy to Devolution in Kenya*

This chapter shall draw best practices on impeachment and devolution from Nigeria and South Africa in order to inform the recommendations of this study. The procedural aspects of impeachment shall be explored together with the need to have a regulatory framework.

*IV. Chapter 5: Recommendations and Conclusion*

This chapter shall delve on the recommendations and conclusion of this study.

## CHAPTER TWO THE REASONABLENESS OF IMPEACHMENT

### 2.1 Introduction

This chapter seeks to establish whether the impeachment threats or processes in Kenya are reasonable insofar as the spirit of devolution is concerned. The chapter shall also show the impact of impeachment on the dignity of the office, and question the justifiability of the entire process as a matter of law. It compares the legal provisions on removal of the president, Members of Parliament and Governors with a view to establishing how reasonable or otherwise impeachment is as applied against Governors. It also seeks to analyse whether there are other alternative punitive measures or remedies that should be applied other than impeachment.

Among the expected benefits of the Constitution of Kenya, 2010 was the realisation of human rights, the entrenchment of the rule of law and the realisation of good governance. The rule of law, which is among the national values and principles of governance, requires that every person, office, or state organ, respects the constitution and the mandate of the institutions therein established.<sup>12</sup> Article 174 of the Constitution which introduced a devolved system of governance in Kenya provides that the underlying objectives of the devolved system are, *inter alia*, to promote accountable exercise of power and recognize the right of the people to manage their own affairs and decision making.<sup>13</sup>

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<sup>12</sup> CIC Statement on the impeachment process in respect of the Governor for Embu and the Rule of Law, at <http://www.cickenya.org/index.php/newsroom/press-releases/item/369-cic-statement-on-the-impeachment-process-inhttp://www.cickenya.org/index.php/newsroom/press-releases/item/369-cic-statement-on-the-impeachmentprocess-in-respect-of-the-governor-for-embu-and-the-rule-of-lawrespect-of-the-governor-for-embu-and-the-rule-oflaw> (accessed 11/8/2015).

<sup>13</sup>The Constitution of Kenya, Article 174.

Besides the Constitution, there exist numerous other laws that provide for the framework and an enabling environment to breathe life into devolution. These include the County Governments Act<sup>14</sup>, the Intergovernmental Relations Act and the County Governments Public Finance Management Transition Act 2013.

## **2.2 County Governments: Governors and Members of the County Assemblies**

County governments are obliged by the law to uphold the objects of devolution besides conforming to the constitutional and statutory provisions on leadership and integrity. The authority assigned to a State officer/Public officer is a public trust, to be demonstrated by respect for the people, honour to the nation, dignity to the office and public confidence in the integrity of the office;<sup>15</sup> State/Public officers have a responsibility to serve the people, rather than themselves. Indeed, a transparent and accountable exercise of devolved power is a key tenet of devolution under the Constitution of Kenya 2010.<sup>16</sup>

All the county actors ought to complement each other's role and work towards the implementation of devolution. The executive arm at the County level is made up of different actors; namely; the

Governor, the County Executive Committee, Members of County Assembly (MCA), County Public Service Boards, County Assembly Service Boards. They are in charge of implementation of projects at the county level. The Governor is the chief executive officer of the county and is obliged to diligently and competently discharge executive functions as

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<sup>14</sup> Act No. 17 of 2012.

<sup>15</sup> The Constitution of Kenya 2010, Article 73.

<sup>16</sup> Keith Changalwa (2014) "Invoking impeachment through the law," Kenya National Commission on Human Rights, at <http://www.knchr.org/Keith-Changalwa-Invoking-impeachment-through-the-law.aspx> (accessed 11/8/2015). <sup>16</sup> The County Governments Act No.17 of 2012, s8.

stipulated under Section 30 of the County Government Act, the Constitution and other relevant laws.

On the other hand, the county legislature i.e. the County Assembly is to formulate laws and provide oversight on the operations of the county governments.<sup>16</sup> Their roles and functions are defined in the Constitution as well as the County Government Act. The role of the Members of the County Assembly is threefold:<sup>17</sup> First, to provide oversight over the functioning of the executive arm; second, to legislate on respective county laws and third, to represent the electorate and air their views and plight in the county assembly.

MCAAs are also expected to consult the people and maintain close contact with the electorate.

Section 9 (1) of the County Government Act provides that “a member of a county assembly shall maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly.”<sup>18</sup>

This underlines the key principle entrenched in the Constitution that the public should be involved in critical decisions on governance and processes.<sup>19</sup> It is therefore mandatory for the MCAAs to involve the public and present their views, opinions and proposals to the assembly. In the ensuing sections under the study on the reasonableness of impeachment, this study shall interrogate the question whether there was public participation in the impeachment motions against the Embu and Kericho Governors.

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<sup>17</sup>Ibid.

<sup>18</sup>The County Governments Act No.17 of 2012, s9 (1).

<sup>19</sup>The Constitution of Kenya 2010, Article 201 (a); 196 (1) (b).

The gist of providing oversight by the MCAs is to ensure transparency and accountability in the exercise of power and discharge of functions by county governments.<sup>20</sup> However, majority of the MCAs in several counties have been driven by greed and personal interests in making crucial decisions like resolving to impeach a governor.

Most MCAs have reportedly abused their oversight role by fronting their personal interests and compelling their respective Governors to endorse them, failure to which they initiate impeachment proceedings.<sup>21</sup>

### **2.3 Removal of a Governor**

Article 181 (1) of the Constitution provides that a county governor may be removed from office on any of the following grounds: gross violation of this Constitution or any other law; where there are serious reasons for believing that the county governor has committed a crime under national or international law; abuse of office or gross misconduct; or physical or mental incapacity to perform the functions of office of county governor.<sup>22</sup>

Article 181 (2) obliges Parliament to enact legislation to stipulate the procedure of removal.<sup>53</sup>

In this regard, the County Government Act was enacted. The procedure is provided for under Section 33 of the Act which states that a member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution, and if such a motion is supported by at least two-thirds of all the members of the County Assembly, the Speaker of the County Assembly

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<sup>20</sup>Ibid.

<sup>21</sup>Cf the case of Embu Governor and Kericho Governor.

<sup>22</sup>The Constitution of Kenya 2010, Article 181 (1).

shall inform the Speaker of the Senate of that resolution within two days; and the Governor shall continue to perform the functions of the office pending the outcome of the proceedings.<sup>23</sup>

Within seven days after receiving notice of a resolution from the Speaker of the County Assembly, the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the Governor; and the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter. Such a special committee shall investigate the matter and report to the Senate within ten days on whether it finds the particulars of the allegations against the Governor to have been substantiated.<sup>24</sup>

Section 33 (5) further provides that the Governor shall have the right to appear and be represented before the special committee during its investigations and if the special committee reports that the particulars of any allegation against the Governor have not been substantiated, further proceedings shall not be taken in respect of that allegation. On the other hand, if the special committee reports that the particulars of any allegation against the Governor have been substantiated, the Senate shall, after according the Governor an opportunity to be heard, vote on the impeachment charges.<sup>25</sup>

If a majority of all the members of the Senate vote to uphold any impeachment charge, the Governor shall cease to hold office, but if a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the Speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the

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<sup>23</sup>The Constitution of Kenya 2010, Article 181 (2).

<sup>24</sup>Ibid s 33.

<sup>25</sup>Ibid s 33 (5).

same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.<sup>26</sup>

## **2.4 Removal of the President**

Article 145 of the Constitution provides for the removal of a president from office through impeachment. The threshold is that a Member of National Assembly (MNA) can bring motion which must be supported by at least two-thirds majority vote in the National Assembly.<sup>27</sup> Thereafter, the Speaker of National Assembly has to notify the speaker of Senate of the resolution who in turn, convenes a meeting to hear the allegations levelled against the president. This is further subjected to voting. For the impeachment motion to succeed there has to be a further two- thirds majority decision at the senate.<sup>28</sup>

## **2.5 Removal of a Member of Parliament**

Article 104 of the Constitution provides for the removal of a Member of Parliament. Parliament enacted the Elections Act 2011 to provide for removal of an MP by recall. The Act specifies the grounds on which a recall of a member of parliament may be initiated as where the member: is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution on leadership and integrity; is found, after due process of the law, to have mismanaged public resources; and where the member is convicted of an offence under the Act.<sup>29</sup>

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<sup>26</sup>Ibid , s 33 (8).

<sup>27</sup>The Constitution of Kenya 2010, Article 145.

<sup>28</sup>The Constitution of Kenya 2010, Article 145.

<sup>29</sup> The Elections Act No.24 of 2011, s45.

Section 45 (3) of the Act requires that a recall of a Member of Parliament shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified above.<sup>30</sup>

Legal analysts have argued that this provision of the law may need to be re-evaluated in light of the practical redundancies that it presents.<sup>31</sup> It is for instance, difficult to understand whether the drafters of the Act intended that even where an MP has been found guilty of an offence by a magistrate court, a person wishing to institute a recall process must again apply to the High Court in order to proceed.

Under Elections Act also, a petitioner must get 30 per cent of registered voters in a constituency plus 15 per cent in all wards in the constituency. Such petition can only be initiated after at least two years in office and 1 year before the next election and it can only be once during the MP's term.<sup>32</sup> This effectively means that voters have only a one to two years window (the third and part of the fourth years of the five year term) within which to effect the recall of the relevant elected official. Further, the recall petition cannot be filed against an MP more than once during their term and that a person who unsuccessfully contested an election under the Act is not eligible, directly or indirectly, to initiate a recall petition.<sup>33</sup>

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<sup>30</sup>The Elections Act No.24 of 2011, s45 (3).

<sup>31</sup> Elisha Ongoya (2013) "The Role of Institutions in the Resolution of Election Disputes in Kenya ," Judiciary WorkinPaper, at

[http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/reports/Handbook%20on%20Election%20Disputes%20in%20Kenya%20-1.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/Handbook%20on%20Election%20Disputes%20in%20Kenya%20-1.pdf)(accessed 15/8/2015).

<sup>32</sup> Elections Act No.24 of 2011, s46.

<sup>33</sup> Section 45 (4), (5) and (6) of the Elections Act.



If the ground for recall, for instance, was that the member is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution, or, is found, after due process of the law, to have mismanaged public resources, how can such member stand in the by-election in light of the provisions of Article 99 of the Constitution that expressly disqualifies such person from being elected as a member of parliament?” asks Elisha Ongoya.

## **2.6 Is impeachment of Governors reasonable?**

It is clear that among all the elective seats in Kenya, it is way much easier to remove a Governor than it is for other elected State Officers. The removal from office of a governor is largely mirrored along provisions for the removal of the president. However, when it comes to the threshold and frequency, it is different. Section 33 (7) of the County Government Act only requires a one-third vote in the county assembly and a simple majority vote in Senate for the impeachment motion to succeed. This is opposed to the two-thirds majority requirement both in the National Assembly and Senate for the presidency.

Notably, Section 33 (8) of the County Government Act is not clear on the number of times a governor can be impeached. The law permits the re-introduction of the same charges or allegations against the same governor in the Senate albeit with a proviso that it must be 3 months from the initial date. This provision is a recipe of instability.<sup>31</sup> It leaves a question as to why Members of Parliament would make it so easy to remove a Governor and on the other hand so difficult to remove one of them.

The procedure for the removal of an MCA is almost similar to that for the removal of a Member of Parliament. Section 27 of the County Government Act provides that an MCA may be recalled before end of the term on the grounds of: violation of the provisions of Chapter Six of the Constitution; Mismanagement of public resources or Conviction for an electoral offence as stipulated under the Elections Act. Just like in the recall of MPs, a recall of a Member of the County Assembly shall only be initiated upon a judgment by the High Court confirming the grounds or allegations against the MCA. This can also only arise 2 years after the election and not later than 1 year before the next general election and it can only be done once during the term of that MCA.

There is therefore a striking similarity in the grounds for removal from office and a clear disparity in the process for removal between that of the Governors and that of the MPs and MCAs.

An MCA who represents a ward (a relative small unit within a county) is subject to a high threshold when it comes to the recall process. Similarly, a Member of Parliament who represents a Constituency (a sub-county) is subject to a difficult removal procedure as compared to the simpler impeachment process applicable to Governors. This is despite the fact that all of them are elected by the citizens through the same process.

There are three major reasons why the legal provisions on the Governors' impeachment process are unreasonable and should therefore be relooked: First, there is no bar on the number of times an impeachment motion can be instigated against a Governor. Second, it only requires a simple majority vote in the Senate to impeach a Governor. Third, Section 33(3) (a) of the County Governments Act makes reference to "charges against the governor" meaning

that the proceedings are criminal in nature and therefore the standard of proof is beyond reasonable doubt. However, section 33(6) of the Act implies that the standard is “substantiated allegations”<sup>32</sup>

Chapter Six of the Constitution of Kenya, as well as the Leadership and Integrity Act 2012 should be applied to all state officers. The recent impeachment motions against some Governors in Kenya have proved to be subject of abuse by both the respective MCAs and Senators. Observers have noted that this has been reduced to witch hunt and hounding out of office. While MCAs have wanted to settle scores with Governors who refuse to endorse deals meant to benefit them as individuals at the county level, the Senators at the national level have failed to rise above partisan and parochial interests to offer proper leadership and safeguard devolution.<sup>39</sup> A case study is that of Kericho and Embu counties. Kericho County Governor Paul Kiprono Chepkwony was removed over alleged abuse of office and flouting of procurement rules as contained in both the Public Procurement and Disposal Act and the Public Finance Management Act.<sup>33</sup> However, there were concerns by the members of public in Kericho County that they were not consulted prior to the impeachment motion against Governor Chepkwony.<sup>34</sup> It is believed that the MCAs were motivated by personal interests in moving the motion against the Governor. For instance, (some) residents in Kericho county moved to court to challenge the impeachment of Governor Chepkwony.<sup>42</sup> Nevertheless, On June 3, 2014, the Senate absolved Governor Chepkwony of impeachment charges on account that they did not meet the impeachment threshold.

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<sup>32</sup> Moses Chelanga (2014) “Law and Politics of Impeaching County Governors,” *ilawKenya*, at <http://ilawkenya.com/devolution/law-and-politics-of-impeaching-county-Governors/> (accessed 11/8/2011). <sup>39</sup>

Moses Chelanga, *Ibid*.

<sup>33</sup> Moses Chelanga, *Ibid*.

<sup>34</sup> Keith Chagalwa, *ibid*.

Embu Governor Martin Nyaga Wambora became the first impeached Governor under the Constitution of Kenya 2010. He was accused of corruption involving 33 million Kenyan shillings after he refused to suspend Embu county secretary Lorna Kariuki over the handling of the tenders for renovation of Moi Stadium and procurement of seeds for distribution to farmers. This amounted to contravention of the Constitution and gross violation of public finance and procurement laws, hence he got impeached. He successfully challenged this first impeachment in the High Court.

Later, at the Court Appeal again, the impeachment was quashed. The County Assembly instituted an impeachment process again for the second time on the same grounds. Governor Wambora unsuccessfully challenged this second impeachment at the High Court.<sup>35</sup>

The High Court's decision to uphold the second impeachment has been a subject of sharp criticism from legal analysts. Moses Chelanga in his short article<sup>36</sup> has raised four issues that arise from this decision: First, the threshold of impeachment; second, personal responsibility vs. vicarious liability; third, bias of the special senate committee; fourth, public participation. He contends that the standard of proof on impeachment petitions is above balance of convenience and not necessarily beyond reasonable doubt but faults the court for failing to apply this when determining whether the impeachment in question met this threshold or whether the alleged facts and evidence supported the impeachment charge.<sup>37</sup>

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<sup>35</sup> *Martin Nyaga Wambora & Others v. County Assembly of Embu & Others*, Petition Nos. 7 & 8 of 2014 Moses Chelanga (2014) "The High Court Flaws in Governor Wambora's Second Impeachment," at <http://ilawkenya.com/devolution/the-high-court-flaws-in-governor-wamboras-second-impeachment/> (accessed 20/8/2015).

<sup>36</sup> Ibid

<sup>37</sup> Ibid

On the question of personal responsibility and vicarious liability, Chelanga is of the view that a Governor should not be vicariously liable for the errors done by officials under him unless it is proven that there is a nexus between the violation of the law and the conduct of the Governor.<sup>46</sup> Under Section 30(3) (f) of the County Government Act, the governor is accountable for the management and use of county resources. The court in *Wambora* case, correctly found that in the case of impeachment charge, there must be a nexus between the alleged gross violation and the conduct of the governor. However, it did not properly interrogate the facts before it to see the connection or nexus between the alleged violations of the law and the conduct of the Governor.

The Senate in *Wambora* case was also faulted for being biased and partisan. It has been accused of failing to rise above partisan and parochial interests to offer proper leadership and safeguard devolution.

On matters of public participation as was raised in the *Wambora* case, there was insufficient involvement of the members of the public in *Wambora*' impeachment process. Chelanga aptly puts; "While public participation is not cast in stone with no hard and fast rules on how to conduct, the extent of public participation conducted by the Embu County Assembly was insufficient."<sup>38</sup>

## **2.7 Conclusion**

It is evident that though legally sound, impeachment motions have adversely affected county operations. Impeachments against Governors are turning out to be a stumbling block on the devolution process.

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<sup>38</sup> Ibid

Some have proposed, rightly so, that with the recent developments, time is prudent to amend the County Government Act to provide for aggravated options for the removal from office depending on the nature and extent of allegations. This study contends that there is need to introduce alternative punitive measures besides impeachment. These include reprimanding and suspension. More importantly, impeachment should be exercised with caution and restraint. The threshold may alternatively be tightened in a way that safeguards and gives security of tenure to the office bearers to enable them discharge their mandate effectively having to worry about being impeached.

These and other proposals shall be discussed extensively in chapter three of this study.

## CHAPTER THREE:

### TOWARDS PROTECTION OR CREATION OF A DEVOLUTION-FRIENDLY MEANS OF SOLVING COUNTY ISSUES TO ENHANCE ACCOUNTABILITY

#### 3.1 Introduction

This chapter examines the predicament of a person facing an impeachment motion, a process that can be initiated and progressed by the county assembly and the senate. This is a precursor to an examination as to whether such a person has any other remedy prior to the initiation of the impeachment motion and the advocacy for a regulatory framework to regulate the process as a way of protecting the interest, spirit and purpose of the Constitution. The chapter then compares the justifiability of the county assemblies' bid to play a quasi-judicial role and the fairness of its role as a tribunal in a matter it is interested or it initiated.

In Kenya, the devolution agenda was largely borne out of the long history of marginalization and non-inclusion of the citizens in governance matters by the former regimes.<sup>39</sup> The promulgation of the Constitution of Kenya, 2010 played an important role in setting the pace for the decentralisation of power in Kenya. The Law sets the underlying objectives of the devolved system as inter alia to promote accountable exercise of power and further, recognizing the right of the people to manage their own affairs and decision making.<sup>40</sup> Some scholars have argued that the exercise of such extensive powers without clear procedural and substantive guidelines may lead to abuse of the same. This study seeks to answer the question whether Kenya is on the right path towards enjoyment of full self-governance rights.

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<sup>39</sup> Advisory Opinion Reference 2 of 2013, between *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR.

<sup>40</sup> The Constitution of Kenya (2010), article 174.

### **3.2 Alternative Dispute Resolution and other Punitive Measures besides Impeachment**

The fact that impeachment is anchored in law is not in contention. However, as has been observed in the preceding chapters, its ramifications are far and wide. It is evident that though legally sound, impeachment motions have adversely affected county operations. It is mutating to be a big enemy to the devolution concept which is still at its infancy. A single act of abuse of office or of corruption by the governor can constitute a valid ground to initiate impeachment proceedings but as things stand, it has been reduced merely to witch hunt and hounding out of office.<sup>41</sup> It defies all logic and makes no sense to fight corruption and illegality with illegality.

The County Assemblies may check and punish the members of the County Executive without necessarily moving a motion for their removal through impeachment but including the Senate. This can be done through reprimand or censure, fine or monetary restitution and finally under exceptional circumstances suspension<sup>42</sup> and ultimate dissolution of the whole county government.

### **3.3 Reprimand and Censure**

A “censure” or a “reprimand” is a procedure where the Assembly by majority vote on a simple resolution, expresses a formal disapproval of the conduct of a member or the party concerned.<sup>43</sup> In case of violation of minor rules for instance concerning procurement, the Assembly can express disapproval of the Governor’s actions simply by means Censure rather than initiating

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<sup>41</sup> Keith Chagalwa, “ Invoking impeachment through the law” available at <<http://www.knchr.org/Keith-Chagalwa-Invoking-impeachment-through-the-law.aspx>>(accessed 3/9/2015)

<sup>42</sup> The Constitution of Kenya (2010), article 192(1)(b)

<sup>43</sup> Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* CRS Report for Congress (Order Code RL31382 2005), 11.



impeachment motions after each disagreement. Likewise, the County Assembly Committee concerned with such particular sector may also issue a “letter of reproof”<sup>44</sup> to the Governor.

### **3.4 Fine or Monetary Retribution**

In cases where for instance the Governor has been accused for expenditure beyond what was legally budget by the Assembly, a resolution can be made that reimbursement be effected either with or without fine. Mismanagement of public funds, corruption and flouting of procurement laws all falling under abuse of office has been the predominant charge cutting across all the impeachment motions that have been filed against Governors. Difference should however be noted where the charge is minor and curable by way of fine and retribution and serious violations attracting ouster of the Governor.

### **3.5 Suspension and Dissolution**

Transparency in governance holds that the decisions and actions of those in government are open to public scrutiny and that the public has a right to access such information. Suffice it to say that accountability and transparency are essential ingredients towards attaining democratic good governance.<sup>45</sup> A democracy devoid of accountability and transparency is likely to become arbitrary and self-serving. Accountability also encompasses the principle of separation of powers, which is the principle that no branch of government may dominate another, and that each branch has the power to check fundamental excesses of the other branches. Impeachment is, therefore, an essential democratic mechanism for ensuring accountability and transparency in governance. However, when impeachment is abused democracy is doomed because the strategic value of

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<sup>44</sup>An official act or expression of criticism and censure issued by an administrative body.

<sup>45</sup>The Constitution of Kenya 2010, Article 10.

impeachment is abandoned. Similarly, impeachment is abused when it becomes a handy tool in the hands of desperate and self-serving politicians for political blackmail aimed at seeking political loyalty at the expense of good and accountable governance.

A case in point is the one concerning Makueni County Government. More than 50,000 residents from the County filed a petition<sup>46</sup> to the president praying for the dissolution of the County Government over being dysfunctional and no longer serving their interests. This was prompted by unending wrangles between Governor Kivutha Kibwana and the MCAs. The president appointed a task force chaired by Mr. Mohammed Nyaoga to probe for the suspension of the Makueni County Government.

The task force after completing their probe submitted a report to the president on September 3<sup>rd</sup>, 2015 recommending that the County Government should be suspended citing “exceptional circumstances”. The then Governor, Prof Kibwana, welcomed the commission’s decision noting that it was the wish of the people of Makueni County and should be granted. If the Senate adopts such a report then the President is required by law to send the Governor, his Deputy, Assembly and Executive home. An Interim County Management Board is then set to oversee the affairs of the devolved unit for 90 days after which the county is dissolved to pave way for elections or the jinxed leaders are tentatively reinstated.<sup>47</sup>

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<sup>46</sup> Petition for suspension of the Government of Makueni County, available at <http://Kenyalaw.org/kenyalawblog/petition-for-suspension-of-the-government-of-makueni/> (accessed 5/9/2015)

<sup>47</sup> It’s suspension for Makueni County, available at [www.nation.co.ke/news/politics/Makueni-County-Commission-Report/-/1064/2857702/-/6mkhtz/-/index.html](http://www.nation.co.ke/news/politics/Makueni-County-Commission-Report/-/1064/2857702/-/6mkhtz/-/index.html) (accessed 5/9/2015)

### 3.6 The Predicament of a Person Facing Impeachment Motion

The grounds for impeachment of a Governor are provided for under Article 181(1) of the Constitution of Kenya. They are; gross violation of the law, where there are reasons to believe that he has committed crimes, abuse of office or gross misconduct and physical or mental incapacity to perform the functions of the office. Article 181 (2) obliges parliament to enact legislation to stipulate the procedure of removal. In this regard, the County Government Act was enacted. The Act takes cue from the constitution and provides at Section 33 that: An MCA may move a motion for the removal of a governor and such motion must be supported by at least a third of all members. Thereafter, the county speaker shall notify the Senate speaker who in turn will convene a special committee of 11 members to investigate the allegations and determine the matter. Upon substantiation of the allegations, the Senate is required to vote. Impeachment is deemed successful if a simple majority votes in its favor.<sup>48</sup>

For a governor who's County Assembly has once initiated an impeachment motion, neither does the success nor the failure of such an attempt leaves the governor without subsequent problems. If the Senate approves the impeachment of a governor, then he loses his seat and the deputy governor assumes office as county governor for the remainder of the term of the county governor.<sup>49</sup>

For a determined County Assembly whose motion has been shot down by the Senate, the law permits, under section 33 (8) of the County Government Act, the re-introduction of the same charges or allegations against the same governor in the Senate albeit with a proviso that it must

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<sup>48</sup>The County Governments Act No.17 Of 2012, s33.

<sup>49</sup>The Constitution of Kenya (2010), article 182 (2)

be 3 months from the initial date.<sup>50</sup>This provision is a recipe of instability. Thus far, it has already been invoked in the Embu county circus with monstrous effects on the operations of the Embu county government.

It is also clear that the Constitution and the County Government Act do not clearly indicate the procedure to be followed in impeaching a deputy governor. At one time the lawmakers were grappling with how to proceed with the impeachment of Mr. Bernard Kiala due to the gap in the law on the matter.<sup>51</sup>The law only provides on how the deputy governor assumes powers of the governor in case of a vacancy but does not provide on how his removal should be conducted. This is another nightmare that the governor has to live with once he faces an impeachment motion. The law, however, is very clear on matters regarding the removal of the deputy governor through the courts in matters regarding chapter six of the Constitution on issues integrity.

### **3.7 The Justifiability of the County Assemblies' Bid to Play A Quasi-Judicial Role and the Fairness Of Its Role as a Tribunal**

A County Assembly is composed of both Elected and Nominated Members. The process for the election and nomination, including how the stakeholders participate are set in the Constitution of Kenya and statutes.<sup>52</sup> The Assembly exercises and executes the mandate, role and function by the sovereign power to participate in governance, delegated to them under Article 1 (2), (3) and (4) of the Constitution of Kenya 2010. Generally, on the basis of the current philosophies and practices of governance from the Constitution and relevant statutes, the two major roles and

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<sup>50</sup>The County Governments Act No.17 Of 2012, s33 (8).

<sup>51</sup> Jeremiah Kiplang'at, Bid to impeach Machakos deputy governor Bernard Kiala hits snag, available at <https://mobile.nation.co.ke/news/Machakos-Deputy-Governor-Bernard-Kiala-Impeachment/-/1950946/2402340/-/format/xhtml/-/t13u4rz/-/index.html> (accessed 5/9/2015)

<sup>52</sup> The County Governments Act 2012, Political Parties Act 2010 and Independent Electoral and Boundaries Act 2011.

functions of the County Assemblies in Kenya are: That they are the home of and executor of the legislative authority of a County by making and unmaking rules (Legislative role); that they exercise oversight over all issues and matters of governance, especially the operation of the County Executive Committee and all organs of the County Executive.

When exercising the oversight, the County Assembly focuses on the following areas: implementation of laws, application of laws, application of budgets, strict observance of laws of the Assembly and the Constitution and effective management of government departments. By overseeing the actions of the County Government, the County Assembly is able to ensure that service delivery takes place, so that all citizens can live a better quality life. Apparently, the County Representatives are supposed to be watchdogs for the county governments.

When it comes to fulfilling its mandate, a county assembly is called upon to wear several hats. In determining whether a governor should be removed, the assembly must bring a motion on the floor of the assembly to impeach the governor. The County Representatives discuss the grounds for such impeachment.<sup>53</sup> This is comparable to proceedings against an alleged wrongdoer (perform a prosecutorial role). Ultimately, the Assembly votes<sup>54</sup> and if a third of the members support the motion, then the Speaker of the County Assembly informs Speaker of Senate of such resolution within two days (act as judge plus jury).

Within seven days of receiving the notice, Senate hears the charges against the governor and forms a committee to investigate the charges. If it finds out that the accusations against the governor are unsubstantiated, there shall be no further proceedings and the governor shall remain in office.

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<sup>53</sup> The Constitution of Kenya (2010), article 181

<sup>54</sup> The County Governments Act, section 33

However if the senate committee finds out that the charges are substantiated, the whole senate vote on impeachment and if majority of all senators vote to impeach the governor, the governor shall cease to hold office.<sup>55</sup>

From the foregoing, it can be deduced that for a body that acts both as prosecutor and jury, chances of achieving fairness are minimal. How justifiable is it for the county assembly to initiate and vote on a motion of impeachment against the governor whereas it is known that they have interests in the matters concerning the county and office of the governor? Where do they draw the line concerning what is justifiable oversight and mere malice, ill-motivated and self-centred interests?

### **3.8 Role of Courts in Impeachment Process in Kenya**

To capture clearly the role of courts in the impeachment processes in Kenya, it is prudent to state that the process of removal of a Governor from office is a constitutional and political process which is quasi-judicial. (This has been captured earlier in this chapter) The High Court has four distinct constitutional jurisdictional mandates relevant to the question of removal of a Governor from office.<sup>56</sup> These are:

- a. *Article 165 (6) of the Constitution which vest upon the High Court supervisory jurisdiction over anybody or authority exercising judicial or quasi-judicial functions.*
- b. *Article 165 (3) (d) (ii) which vest upon the High Court jurisdiction to hear any question whether anything said to be done under the authority of Constitution or any law is inconsistent with or in contravention with the Constitution.*

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<sup>55</sup> Ibid

<sup>56</sup>*In the Matter of the Interim Independent Electoral Commission (Applicant) - The Constitutional Application No. 2 of 2011, (Eklr)*

c. *Article 165 (3) (d) (iii) that vest upon the High Court jurisdiction to hear and determine any matter relating to constitutional powers of State Organs in respect of county governments.*

*(Article 260 of the Constitution defines a state organ to include anybody established by the Constitution. It is our considered view that both the Senate and the County Assembly are state organs and are subject to the jurisdiction of the High Court as provided for in Article 165 (3) (d) (ii) and (iii).)*

d. *Article 165 (3) (d) vests upon the High Court the jurisdiction to interpret the Constitution and in the instant case, the issue relates to interpretation of gross violation in Article 181 of the Constitution.*

It is hence clear that our courts indeed play a crucial law in the impeachment processes and this should be considered intensely before a state official is removed from office.

### **3.9 Conclusion**

For Kenya to achieve its devolution goals and by extension vision 2030, the conduct of county governments must be tamed and be in adherence with the letter and spirit of the constitution and other relevant statutes. Time is nigh for parliament to pass laws or amend the already existent County Governments Act to provide for the alternative dispute resolution mechanisms discussed here above. It is also recommendable that the Senate steps up in its oversight mandate and ensure that the county development agenda is achieved rather than focusing its energy on supremacy battle between the Governors and on the other side with the national assembly.

Laws are there to guide and ensure fairness to all. Abuse of both substantive and procedural legal provisions, as well as utter disregard for court orders amounts to legislative absurdity. Manifestation of this legislative absurdity, motivated and amplified by vested interests, is an uninspiring approach to politics and governance, especially at a period when the country is grappling with implementation of a very young Constitution and sprouting devolution. If the

absurdity and propensity are not checked, the strategic value of impeachment would be reduced to mere political ladder for attainment of personal political ambitions.



## **CHAPTER 4: BEST PRACTICES, A SYNERGY TO DEVOLUTION IN KENYA**

### **4.1 Introduction**

This Chapter focuses on impeachment and devolution as practiced in Nigeria and South Africa which will cover the regional scope as well as impeachment in the US, as an international study while outlining the procedural aspects of the same, what Kenya can draw and learn from the three countries as well as what does not work. It is only by adopting better practices and leaving out the unfair practices can devolution be a success as was envisioned by the Constitution of Kenya 2010. In Africa, Nigeria and South Africa have similar legal systems to Kenya and it is due to this reason that the two are part of the comparative study. Both countries have the three arms of government, similar to Kenya and though there are differences here and there, the three countries economic, social developments and political culture is similar thus best suit for a comparative study as well as lessons that Kenya can borrow from the same.

### **4.3 The Case of South Africa**

Section 195 of the South African Constitution provides that Public administration must be governed by the democratic values and principles enshrined in the Constitution, including: high standards of professional ethics; Efficient, economic and effective use of resources; Public administration must be development-oriented; Services must be provided impartially, fairly, equitably and without bias; People's needs must be responded to, and the public must be encouraged to participate in policy-making; Public administration must be accountable; Transparency must be fostered by providing the public with timely, accessible and accurate

information; Good human-resource management and career-development practices, to maximize human potential, must be cultivated; and finally, Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.<sup>57</sup>

Section 195(2) then adds that these principles apply to among others, administration in every sphere of government.<sup>58</sup>This therefore implies that any public officer who fails to abide by the provisions of this section can then be liable for impeachment. The South African Constitution provides for both impeachment and motions of no confidence as ways of removing the president, cabinet, ministers and members of parliament from office.

Impeachment in South Africa was introduced under the 1961 Constitution, where the State President, performing a ceremonial function as head of state, could be removed by vote of the House of Assembly and the Senate for reasons of "misconduct and inability to perform efficiently the duties of his office".<sup>59</sup>With the 1983 Constitution, came a change in the nature of the presidency entailing a political role, but the wording of the "impeachment" provision still remain the same. It has since been suggested that misconduct be assessed in terms of the presidential oath; to include anything which would harm the country and, in this case, removal was to be by simple majority of all the houses of Parliament.

The impeachment process prior to the interim Constitution was as follows: "Impeachment" was the only method of removal; and it could be done on two grounds: misconduct and inability to

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<sup>57</sup>The Constitution of the Republic of South Africa 1997, s195 (1).

<sup>58</sup>The Constitution of the Republic of South Africa 1997, s195 (2).

<sup>59</sup>The Constitution of the Republic of South Africa 1961, s10.

perform functions efficiently. It was done by a majority vote of Parliament; and consequences other than removal were not contemplated.<sup>60</sup>

Under the interim Constitution of 1993, the position changed with regard to both the grounds and the procedure. The President and the Deputy Presidents could be removed on "the ground of serious violation of the Constitution or the other laws of the Republic, or of misconduct or inability rendering him or her unfit to exercise and perform his or her functions". A two-thirds majority in a joint sitting of both the National Assembly and Senate was required.<sup>61</sup> The two-thirds majority was presumably 5, inserted to distinguish the removal by impeachment which would involve an element of censure, from a removal by a motion of no confidence which required a simple majority and which reflected a political decision involving no disgrace.<sup>62</sup>

With the interim Constitution, there were three possible votes of no confidence: If the vote of no confidence was in the Cabinet (President and Ministers), the President was to resign or dissolve the National Assembly and call a new election; If the vote of no confidence was in the President alone, the President was to resign; If the vote of no confidence was in the Cabinet excluding the President, the President was to either resign, reconstitute the Cabinet, or dissolve Parliament and call a new election.<sup>63</sup>

The current Constitution of the Republic of South Africa adopted the interim Constitution's three motions, with one modification to the last one: If the National Assembly passes a vote of no confidence in the Cabinet (President and Ministers), the President shall resign or dissolve the

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<sup>60</sup> Reports on impeachment and Motions of no confidence <http://www.justice.gov.za/legislation/TheConstitution/history/REPORTS/tc2TNAEXEC.PDF> accessed on August 13, 2017.

<sup>61</sup> The Constitution of the Republic of South Africa 1993, s87.

<sup>62</sup> The Constitution of the Republic of South Africa 1993.

<sup>63</sup> Interim The Constitution of the Republic of South Africa 1994, s93. The Constitution of the Republic of South Africa 1997.

National Assembly and call a new election; If the National Assembly passes a vote of no confidence in the President, the President shall resign; If the National Assembly passes a vote of no confidence in the Cabinet excluding the President, the President may resign or reconstitute the Cabinet.<sup>64</sup>This motion is a form of parliamentary ratification veto procedure of the appointment of Ministers so that where the National Assembly is not satisfied with particular cabinet appointments, it could pass motions of no confidence in the Ministers until it is satisfied with all the ministers (or until the President resigns).<sup>65</sup>

With South Africa, there are no Governors as such, Premiers head the different provinces equivalent to how Governors head different counties in Kenya. Hence the removal or impeachment of a premier could be compared to the impeachment of a governor in Kenya.

A Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected Premier assumes office.<sup>66</sup>No person is to hold office as Premier for more than two terms, but when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier is not regarded as a term.<sup>67</sup>

Subsection 3 further provides that the legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the Premier from office only on the grounds of a serious violation of the Constitution or the law; serious misconduct; or

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<sup>64</sup> Report on impeachment and Motions of no

<sup>65</sup>The Constitution of the Republic of South Africa 1997, s130 (1).

<sup>66</sup>The Constitution of the Republic of South Africa 1997, s130 (2).

<sup>67</sup>The Constitution of the Republic of South Africa 1997, s130 (3).

inability to perform the functions of office.<sup>68</sup> Anyone who has been removed from the office of Premier in terms of subsection (3) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

There is a danger though to borrowing from South Africa. As stated in above paragraphs, South Africa does not have Governors. Therefore, as much as the premier could be compared to a governor, their functions and jurisdictions are different hence we could end up borrowing different problems or different procedures and our own may be ignored or not be addressed to the maximum.

#### **4.4 The Case of Nigeria**

The impeachment process has become a topic of interest in Nigeria's Constitutional development.<sup>69</sup> Overtime, impeachment and the relevant processes involved have created political wars between the three arms of government in Nigeria, and almost tampered with Nigeria's burgeoning democracy between 2005 and 2014, a time when the process of impeachment was grossly abused.<sup>70</sup>

The Nigerian Constitution clearly ensures that separation of powers is an underlining principle of the Nigerian governmental system; that while sections 4 and 5 deal with the legislative and executive powers respectively, section 6 is concerned with the judicial powers.<sup>71</sup> Hence no arm of government is to exceed its mandate or perform the functions of the other.

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<sup>68</sup>The Constitution of the Republic of South Africa 1997, s130 (4).

<sup>69</sup> <https://iproject.com.ng/law/final-year-project-topics/the-role-of-legislature-in-impeachment-proceeding-under-the-1999-constitution-of-nigeria/project-topics> accessed on August 13, 2018.

<sup>70</sup> Journal of Policy and Development Studies, 'Politics of impeachment in Nigeria; a discourse on causes and implications for democratic consolidation' Vol. 10, No. 1, (2016) <[www.arabianjbm.com/JPDS\\_index.php](http://www.arabianjbm.com/JPDS_index.php)> accessed on August 13, 2018.

<sup>71</sup>The Constitution of the Federal Republic of Nigeria, 1999. The Constitution of Nigeria 1999, s 188(2).

Section 188 (1) of the Constitution of Nigeria provides for the removal of a Governor or Deputy Governor from office. The six steps required by the House of Assembly of any state to remove a governor from office as provided in the constitution are as follows:

There is to be a notice of allegation which must be in writing and which has to be signed by not less than one-third of the members of the House, stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office.<sup>72</sup>Gross misconduct according to the Nigerian Constitution means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct.<sup>73</sup>

The speaker then notifies members of the House about the proposal to impeach the governor after which also the members of the House must be informed about his reply concerning the move to remove him from office.<sup>74</sup>Within 2 weeks of the presentation of the notice to the speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation is to be investigated.<sup>75</sup>

In the event that the motion is adopted, the speaker is to within one week request the chief judge to set up a panel to investigate the allegations, after which the panel is to report back to the House within three months of inauguration.<sup>76</sup>If the panel exonerates the governor, the matter

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<sup>72</sup>The Constitution of Nigeria 1999, s188 (11).

<sup>73</sup>Ibid 188(2) (b).

<sup>74</sup>Ibid, s 188(3).

<sup>75</sup>Ibid, s188 (5).

<sup>76</sup>Ibid , s188 (8).

must be dropped.<sup>77</sup> Should the panel's report implicate the governor, the House is to within 14 days of the receipt of the signed allegation consider the claim and if it is adopted by two-third of the House, the governor shall be removed from office.<sup>78</sup>

Whereas the powers of impeachment provided under the Nigerian constitution were meant to provide a means of checking the excesses of certain executive officers who enjoy the privilege of constitutional immunity against civil or criminal proceedings while they remain in office, instead of being invoked in appropriate circumstances, however, overtime, these powers have been abused and constitutional provisions flagrantly breached. The continued abuses are a symptom of imbalance of power between the executive and the legislature as well as evidence of the limits of constitutionalism in the face of politics. Omololu Fogbadeba made very intriguing observations in this regard. The author notes that the legislature should be an instrument of societal accountability, not a tool for political expediency.<sup>79</sup> The rationale that the author offers for the abuse of the political process of impeachment arises from entrenched impunity in the political tradition of a country. The devolved governance mechanisms in both South Africa and Nigeria have turned the Leviathan on its head. By that, it is meant that the exercise of political power ceases to be a metaexercise, crystallizing into duties and obligations in law.

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<sup>77</sup>Ibid, s188 (9.)

<sup>78</sup> MammanLawan, 'The Journal of Modern African Studies', (2010) Vol. 48, No. 2, 311-338 <[https://www.jstor.org/stable/40864719?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/40864719?seq=1#page_scan_tab_contents)> accessed on August 19, 2018. MammanLawan, 'The Journal of Modern African Studies', (2010) Vol. 48, No. 2, 311-338.

<sup>79</sup> OmololuFagbadebo and Fayth Ruffin, *Perspectives on the Legislature and the Prospects of Accountability in Nigeria and South Africa* (1st edn, Springer International 2018).

#### **4.4.1 The Impeachment of Governors in Nigeria**

Nigeria has a long chequered history, both politically and legally. Since the first peaceful transfer of power in the country in 2006, there have been six impeachments of Governors in the country. The list includes: Ayo Fayose from Ekiti State in 2006, Peter Obi from Anambra State in 2006, Joshus Dariye of Plateau State in 2006, Rashidi Ladoja Adewolu of Oyo State in 2006, Diepreye Alamieyeseigha from Bayelsa State in 2005; and most recently Murtala Nyako of Adamawa State in 2014. Even though there have been various criticisms of the process, it remains to be seen that the charges on which the impeachments subsisted and even failed showed that the rule of law is the foundation of any impeachment motion. Nigeria has the distinction of having very many impeachments overturned by the courts of law. That proves that the benches are faithful custodians of the rule of law in the process of impeachment. Furthermore, it quantifies the role of natural justice in ensuring that Governors and assemblies alike can take refuge in the law to get consistently justiciable outcomes every time an impeachment occurs.

This study has pointed out the fact that the dignity of the office of the governor (and deputy) is that of the sovereign. And sovereign power belongs to the people, *per* the first Article of the Kenyan Constitution, which vests all power in the Kenyan citizenry. What that means is that the sanctity, and security of tenure of a governor; must be well protected. The reason that a case study of Nigeria is important is because it offers a measure of the seriousness of the process. As has already been laid out, the process of impeachment has a political ethnography. But then what makes the proceedings quasi-judicial is the fact that it is subject to the supervision and correction of the courts. That creates a balance between the political and legal objectives of the process. Due to the fact that there are very many examples of impeachments in Nigeria, the paper will focus on the latest. The impeachment of the Governor of Adamawa state- Murtala Nyako, and the



overturning of that vote by the Court of Appeal shows that the standard of impeachment is that of 'beyond reasonable doubt'.

On closer study of the Nyako impeachment annulment, and indeed all the other overturned impeachment attempts in Nigeria, one notices that procedural fairness is a core element. That is because the courts overturned the impeachments on the grounds of procedural ineptitude during the process of impeachment. The crux of the judgment's rationale was that the process of impeaching the Adamawa Governor was improper since it did not follow due process. The appellant, it was held, did not get a fair hearing. The Yola-based court noted that the Governor did not get his right of reply during the proceedings that led to the vote of no confidence. That was a violation of his rights *per* Article 36 (6) of the Constitution. That ground alone is enough to draw parallels to the Kenyan context, noting how the present Constitution protects the right to a fair hearing in its BoR. The most sustainable way of protecting the sanctity of the impeachment process is to ensure that procedural fairness is the pivot of the entire exercise.<sup>80</sup> The Adamawa state Assembly conducted a process in which the accused persons did not participate, and went on to deliver recommendations to impeach the sitting Governor without offering the individual an opportunity to respond to the charges of financial impropriety. These violations of the process occasioned an administrative injustice to the Governor.

The impeachment process of Governor Nyako showed the underbelly of the impeachment process.

It identifies the fact that impeachment is a political process, albeit with the underwriting of the law. Since the impeachment of a governor is the consequence of a successful accusation of an

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<sup>80</sup> Tom Garba, 'Nyako's Impeachment: Court Strikes Out Case For Abuse Of Court Process' (*Nigerian Voice*, 2015) <<https://www.thenigerianvoice.com/news/180022/nyakos-impeachment-court-strikes-out-case-for-abuse-of-court-process.html>> accessed 22 November 2019.

individual, the right to administrative justice and a fair hearing all accrue to the Governor. These article 47 and 50 rights accrue by dint of the state officer (governor) being a Kenya. In addition to that, Governors are also entitled to fair procedural allowances since their position in Kenyan society is eminent. As senior state officers, the office of Governor carries with it immense responsibility to measure up to the standards set out in the Constitution's sixth chapter. The impeachment of the Nyako state governor rode on the fact that the accused did not manage the finances of the state in good faith. In Kenya, that would amount to a violation of Article 76, which charges state officers to maintain the duty of *uberrime fidei* to the public purse. The governor deserved to respond to the charges, according to the individual administrative justice.

#### ***4.4.2 The differences in the legal system and political culture in Kenya vis a vis South Africa and Nigeria***

The reversal of an impeachment voids the collective will of the voters that the censuring MCAs exercised in the process. The fact that Governor Wambora survived multiple attempts at impeachment shows that the Senate and courts observed illegalities and misapplications of the law in the process. The main parameters of a naturally justifiable impeachment exercise are conformity with the law. That conformity cascades from the Constitution. Firstly, it emanates from the acknowledgement of the place of Kenyan citizens as the bearers of all authority vested in the government in its first Article. Subsequently, the principles of natural justice crystalize into the ethos of national governance as set out in the tenth Article. These proclamations set the stage for a more detailed exposition of the rights that should accrue to every Kenyan, as set out in Articles

47 and 50 of the BoR. It is important to point out the chapter on leadership's integrity offers unique specificity that offers grounds for dismissal through impeachment.

Above all, it is important to point out the fact that the public trust is the most essential element of the entire impeachment process. It is imperative that the overriding objective of an impeachment conform to the failures of the individual to discharge the gubernatorial duties. Natural justice espouses common sense, and above all, fidelity to the procedural and administrative rights set out in the Constitution.

From the foregoing, Kenya whose constitution is at its infancy should learn from what has worked in these two countries and what has not. The only way impeachment can foster devolution is if the impeachment is practicable and fair as devolution aims to promote democratic and accountable exercise of power as well as foster national unity<sup>81</sup> as opposed to disarray. County governments and members of the County Assemblies in exercise of their constitutionally vested powers inclusive of impeachment are to abide by democratic principles as opposed to subjective interests so as to guarantee a justice that resonates with fairness.

A danger though that may arise from borrowing from Nigeria's procedure is the fact that there are executive officers who enjoy the privilege of constitutional immunity against civil or criminal proceedings while they remain in office, instead of being invoked. If this was to be exercised by Governors who are candidates for impeachment due to abuse of office, then the end result would be unconstitutional and the people in that particular county would end up suffering. It would reflect to the society that wrong doing does not have to be punished and thus the mentality of such an argument would rot the society, slowly by slowly.

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<sup>81</sup>The Constitution of Kenya 2010, Article 174.

A positive lesson on the other hand is the fact that Nigeria has the distinction of having very many impeachments overturned by the courts of law. This practise should indeed be borrowed by our judiciary where our learned judges will uphold the rule of law despite the decision of the lawmakers, which has been discussed in chapter one that some decisions to impeach a governor are fuelled by malice as opposed to rightful legal issues and concerns.

## **CHAPTER FIVE CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter seeks to make a comprehensive summary of the findings from the topic discussed in this document, as well as to make recommendations and working solutions to the prevalent issues.

Following the discussions in preceding four chapters and given the issues of legality and fairness of the impeachment of Governors in Kenya, it is clear that if at all the spirit of devolution is to be a success, then all the citizens of Kenya including the members initiating impeachment of certain persons must abide by the wording of the Constitution of Kenya 2010, without fear or favour. Also, there is need for a specific regulatory framework defining the grounds of, procedures and remedies of, impeachment of Governors and other state officers.

### **5.2 Conclusion**

From the foregoing, the following conclusions can be drawn from impeachment-

That impeachment is aimed at the removal of state officials who are guilty of abuse of power. It is thus not limited to the Head of the State, but includes, other state officers (Governors). The conduct need not necessarily be criminal, a violation of the Constitution or breach of trust would suffice; The removal of persons who are unable to perform their duties due to some physical or

mental incapacity is not necessarily linked to impeachment; Finally, that The legislature, or a part thereof, acts as a court to convict such a person.<sup>82</sup>

The Constitution of Kenya has clearly enunciated that any disciplinary procedure for a person holding a state office, whether dismissal or removal from office can only be taken where the state officer has acted in a manner that demeans the office they hold, where there has been any conflicts of interest with performance of official duties or where the person has compromised any public or official interest in favour of a personal interest.<sup>83</sup> Article 181 as discussed earlier specifically gives the grounds for removal of any acting County governor. The County Governments Act further provides that the procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.<sup>84</sup> Therefore, other personal vendettas and grudges as a drive or motive to institute any such impeachments can then be said to be baseless, without merit and unconstitutional.

Any unfair and unreasonable impeachments can also be said to be going against the principles of Natural Justice, which imply fairness, reasonableness, and equality and which advocate for the rule against Bias, as well as the rule of Fair hearing. And as a result of the recent moves to impeach various Governors of various counties, this research concludes that there is need for a more responsive and applicable legislation that deals with the issues of absurdity and legality of impeachment of public officials as provided by Article 80 of the Constitution which allows parliament to enact legislation establishing procedures and mechanisms for effective

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<sup>82</sup> Reports on impeachment and Motions of no confidence <http://www.justice.gov.za/legislation/TheConstitution/history/REPORTS/tc2TNAEXEC.PDF> accessed on August 13, 2017.

<sup>83</sup>The Constitution of Kenya 2010, Article 75.

<sup>84</sup>The County Governments Act No.17 of 2012, Section 33 (9).

administration, prescribing penalties in addition to those provided for and with the necessary modifications to public officers.<sup>85</sup>The failed impeachment against the Governor of Adamawa State in 2014 shows that natural justice encompasses the right to a fair hearing, replete with all the administrative justices due to an individual in that position.

It is also important to point out the fact that the sociology of law is also a critical component to the impeachment process. It is obvious that impeachment is a political process. However, that is no license to settle political scores, which often do not meet the high threshold that impeachment warrants. An article by Arinze, Christopher, and Oliver reveals the contextual problems which Nigeria faces with regards to the process of impeachment; and which, more importantly, reflect the Kenyan challenges to the same.<sup>86</sup>The authors note that politics (of which impeachment is a facet); is used as a tool of financial empowerment, rather than a means of facilitating good governance. That is unnatural since the objective of exercising political power is to be a custodian of the collective trust that the people place in their political leadership through election processes. Vitiating the collective will of a people through impeaching a democratically elected governor should therefore follow the letter of the law.<sup>87</sup>The net effect of the final position of the Court of Appeal in Yola validates the moral authority of the impeachment process. It was essential that

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<sup>85</sup>The Constitution of Kenya 2010, Article 80.

<sup>86</sup> The authors argue that impeachment in Nigeria, since civil rule in 1999, was characterized by all kind of illegality and abuse. The authors reiterate that politicians see politics as a means to achieve economic empowerment which should be achieved by any means humanly possible. Consequently, the result has been subversion of the democratic process and political instability in the country. Offor Macaulay Arinze, Eze O Christopher and Oliver Nwaeze, 'Politics Of Impeachment In Nigeria; A Discourse On Causes And Implications For Democratic Consolidation' (2019) 10 Journal of Policy and Development Studies

[https://www.arabianjbm.com/pdfs/JPDS\\_VOL\\_10\\_1/5.pdf](https://www.arabianjbm.com/pdfs/JPDS_VOL_10_1/5.pdf)>accessed 18<sup>th</sup> September 2019.

<sup>87</sup> John Rawls, *A Theory Of Justice* (The Belknap Press of Harvard University Press 2005).p45

natural justice prevails as a means of ensuring that administrative justice and procedural fairness are the foundations of the impeachment process.

The study has also shown that the impeachment process is prone to abuse in young democracies, as was the case in Nigeria. That is why the judiciary must be careful to ensure that the sociology of political processes does not usurp the naturally justiciable outcomes of the impeachment process. Laman notes that the impeachment process of Nigeria suffers misuse due to the over-politicization of public responsibility. That constantly leads to the process following an unnatural tangent due to the fact that natural justice does not serve subjective political 'goods'.<sup>88</sup> Various scholarly works point to impeachment as a particularly handy tool of settling political scores, particularly in the Obasanjo administration. That was in the first and second terms of President Obasanjo's tenure. It is highly reflective of the case in Kenya, where we are still in the second cycle of a devolved system of government split between the 47 counties and a unitary national government. It leads to the single most important recommendation of this study, that the process of impeachment include multiple sectors of the political landscape of the jurisdiction. In this case, one can see that the jurisdiction in question is the county.

The incursion into the Nigerian impeachment process is highly reflective of what exists in Kenya. That is because the failed impeachments of both Governors Murtala Nyako and Ken Wambora occurred due to administrative injustices stemming from violations of the BoR. In both instances, the Governors did not have the right to respond conclusively to the charges that their respective assemblies laid on them. In effect, that obfuscated the flow of natural justice by

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<sup>88</sup>MammanLawan, 'Abuse Of Powers of Impeachment in Nigeria' (2010) 48 *The Journal of Modern African Studies*.



denying individuals the opportunity to defend the trust that entire populations conferred on them through democratic elections.

Impeachment is often a last resort, hence the rarity of the proceedings in South Africa and the USA.

Nigeria offers the closest comparative example of the strengths and weaknesses of impeachment processes to Kenya. The sheer number of times the process has been instigated, the relative youth of Nigeria's democracy, and the vehemence of the courts' protection of natural justice outcomes is crucial to Kenya's comprehension of the same. The study has shown that impeachment is an innately political process. In the same breath, it has gone on to quantify the fact that it must be above-board. The measure of the legal standing of these proceedings is natural justice. And while natural justice is amorphous, it inspires the specificity of the Constitution and all other attendant sources of law as set out in the Kenyan Judicature Act.<sup>89</sup>

### **5.3 Recommendations**

This study makes several recommendations to address the issue of legality of impeachment of Governors in Kenya. The recommendations act as possible intervention measures to facilitate fair and reasonable impeachments trying to get rid of the current absurdity in impeachment proceedings based on personal or political interests and can be classified into short term, mid-term and long term recommendations.

#### **Short-term recommendations**

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<sup>89</sup> The Judicature Act, 16 of 1967, sets out the sources of law in Kenya, in what has come to be accepted as a hierarchy. In section 3, the Act points out the fact that the hierarchy of laws cascades down from the The Constitution, Acts of Parliament, case law, statutes of general application in force in England before 12<sup>th</sup> August 1897, and principles of equity that are contextually applicable to Kenya.

- i. There is need for a specific regulatory framework defining the grounds of, procedures and remedies of, impeachment of Governors and other state officers. To start with, Kenya needs to enact the Impeachment procedure Bill that was proposed in 2016.

The proposed law gives the speaker mandate to determine if an impeachment motion meets the standards set in law, allowing him room to approve or reject it and also includes the process of conducting public participation in the impeachment process. The parliament/senate is recommended to carry out this recommendation.

- ii. There is a need to differentiate between personal responsibility and vicarious liability or social responsibility. A governor should not in all instances go down for the actions of other public officials who have done a wrongful act unless there is a nexus between the alleged violation of the law and the conduct of the governor. This is a lawyer's assignment.

#### Mid-term recommendations

- i. There should be a bar as to the number of times an impeachment motion can be instigated against a governor as opposed to the provision of section 33(8) of the County Governments Act. This has been confirmed to be a recipe for instability as seen in the Wambora case files.

The parliament/senate is recommended to carry out this recommendation.

- ii. There is need to follow the rules of evidence used in civil court cases as opposed to criminal ones since civil cases require a lower standard of proof for verdicts. The judiciary should be assigned this task. For instance, in a 1994 case, the Missouri Supreme Court established "clear and convincing evidence" as the standard for a

conviction in an impeachment trial, as opposed to “beyond a reasonable doubt” as used in criminal cases.<sup>90</sup>

#### Long-term recommendations

- i. There is need to standardize the impeachment process to be similar for all elected public officials since they are elected by citizens through a similar process. For instance, raise the bar for impeachment of Governors from a simple majority vote to two-thirds votes by the national assembly and senate equivalent to that of impeachment of the president. This is a parliament/senate function.
- ii. There is also need to include other alternative measures to impeachment to deal with wrongful actions by Governors. For instance, suspension, censures, fines or monetary restitutions and reprimands. Legislators should be consulted on this. The process of impeachment should include the legal fraternity from the onset to its conclusion. That has the added benefit of ensuring that the politics of impeachment does not overrule the overarching role of natural justice in administrative justice. This recommendation need not only the judiciary at hand, but the entire legal fraternity which includes lawyers and also parliament should be involved.

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<sup>90</sup> Matter of Impeachment of Moriarty [1994] 902 S.W.2d 273.

## BIBLIOGRAPHY

Arinze O, E Christopher O Nwaeze, 'Politics Of Impeachment In Nigeria; A Discourse On Causes And Implications For Democratic Consolidation' (2019) 10 Journal of Policy and Development Studies <[https://www.arabianjbmr.com/pdfs/JPDS\\_VOL\\_10\\_1/5.pdf](https://www.arabianjbmr.com/pdfs/JPDS_VOL_10_1/5.pdf)>accessed 22 November 2019.

Charles W. Johnson (III), John V. Sullivan and Thomas J. Wickham, House Practice: A Guide to the Rules, precedents, and Procedures of the House, (115th Congress, 1st session 2017) 619.

Chelanga Moses, "Law and Politics of Impeaching County Governors" (February 12, 2014)iLAWKENYA, BLAWG Devolution, Available at <[ilawkenya.com/devolution](http://ilawkenya.com/devolution)> Accessed 21<sup>st</sup> November 2014.

CIC Statement on the impeachment process in respect of the Governor for Embu and the Rule of Law, at <http://www.cickenya.org/index.php/newsroom/press-releases/item/369-cic-statementon-the-impeachment-process-in-respect-of-the-governor-for-embu-and-the-rule-of-law> accessed 11/8/2015.

Committee on the Judiciary, Impeachment, Selected Materials, (H. Doc. No. 93–7 Oct. 1973) p 691.

Concerns raised over MCAs threats to impeach Governors', read more at <http://www.standardmedia.co.ke/?articleID=200110753>.

<http://www.standardmedia.co.ke/article/2000121857/senate-to-sit-over-kericho-governor-paul-chepkwony-s-ouster> (accessed 20/8/2015).

Elisha Ongoya (2013) "The Role of Institutions in the Resolution of Election Disputes in Kenya," Judiciary Working Paper, at [http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/reports/Handbook%20on%20Election%20Disputes%20in%20Kenya%20-1.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/Handbook%20on%20Election%20Disputes%20in%20Kenya%20-1.pdf) (accessed 15/8/2015).

<https://iproject.com.ng/law/final-year-project-topics/the-role-of-legislature-in-impeachment-proceeding-under-the-1999-constitution-of-nigeria/project-topics> accessed on August 13, 2018.

Fagbadebo OF Ruffin, *Perspectives On The Legislature And The Prospects Of Accountability In Nigeria And South Africa* (1st edn, Springer International 2018)

Galligan, *Due Process and Fair Procedures: A study of Administrative Procedures* (1996), 469-70.

Gerhardt J. Michael, *The Federal Impeachment Process: A Constitutional and Historical analysis* (University of Chicago Press), Chapter 5.

Garba T, 'Nyako's Impeachment: Court Strikes Out Case For Abuse Of Court Process' (Nigerian Voice, 2015) <<https://www.thenigerianvoice.com/news/180022/nyakos-impeachment-courtstrikes-out-case-for-abuse-of-court-process.html>> accessed 22 November 2019

It's suspension for Makueni County, available at [www.nation.co.ke/news/politics/Makueni-County-Commission-Report/-/1064/2857702/-/6mkhtz/-/index.html](http://www.nation.co.ke/news/politics/Makueni-County-Commission-Report/-/1064/2857702/-/6mkhtz/-/index.html) (accessed 5/9/2015)

J. Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, 1971); see also D.J.

Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* CRS Report for Congress (Order Code RL31382 2005), 11.

Journal of Policy and Development Studies, 'Politics of impeachment in Nigeria; a discourse on causes and implications for democratic consolidation' Vol. 10, No. 1, (2016) [www.arabianjbm.com/JPDS\\_index.php](http://www.arabianjbm.com/JPDS_index.php) accessed on August 13, 2018.

Jackline Moraa, "Review impeachment clause, urges CIC boss" *Daily Nation* (Sunday, June 1, 2014).

Jeremiah Kiplang'at, Bid to impeach Machakos deputy governor Bernard Kiala hits snag, available at <https://mobile.nation.co.ke/news/Machakos-Deputy-Governor-Bernard-Kiala-Impeachment/-/1950946/2402340/-/format/xhtml/-/tl3u4rz/-/index.html> (accessed 5/9/2015)

Keith Changalwa (2014) “Invoking impeachment through the law,” Kenya National Commission on Human Rights, at <http://www.knchr.org/Keith-Changalwa-Invoking-impeachment-through-the-law.aspx> accessed 11/8/2015.

Kenya: Court Reinstates Impeached Embu Governor Martin Wambora’, *the Star* (20 February 2014). Sacked Embu Governor Martin Wambora will be back in office after a court stopped his impeachment until the case he has filed is determined, retrieved from <http://allafrica.com/view/group/main/id/0029061.html> accessed on October 6, 2014.

Lawan M, 'Abuse Of Powers Of Impeachment In Nigeria' (2010) 48 *The Journal of Modern African Studies*.

Mamman Lawan, ‘The Journal of Modern African Studies’, (2010) Vol. 48, No. 2, 311-338 <[https://www.jstor.org/stable/40864719?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/40864719?seq=1#page_scan_tab_contents)> accessed on August 19, 2018.

Muia M Daniel, ‘Decentralization of Governance to Districts in Kenya: A case Study’. (2008). in: Kibua T N and Mwabu G, (ed), *Decentralization and Decentralization in Kenya: New Approaches*. Nairobi: University of Nairobi Press, (2008) Chapter 4

Ochieng David Ayuo, “The Legal Framework for Devolution in Kenya” (April 2014) LL.B Dissertation, School of Law, Moi University.

Petition for suspension of the Government of Makueni County, available at <http://Kenyalaw.org/kenyalawblog/petition-for-suspension-of-the-government-of-makueni/> (accessed 5/9/2015).

Rawls J, *A Theory of Justice* (The Belknap Press of Harvard University Press 2005)

Reports on impeachment and Motions of no confidence <http://www.justice.gov.za/legislation/constitution/history/REPORTS/tc2TNAEXEC.PDF> accessed on August 13, 2017.

SouthAfrica.info, 'Provincial Government,' available at <http://www.southafrica.info/about/government/govprov.htm#.Ut-MhOUr-Z8> accessed on 20th November 2014.