

**HOW FAR IS TOO FAR? THE SEPARATION OF POWERS DOCTRINE AND  
JUDICIAL REVIEW OF LEGISLATIVE ACTION IN KENYA**

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**G80/97972/2015**

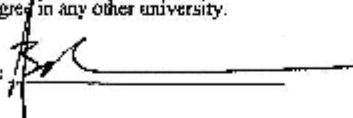
**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE  
AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW IN THE  
FACULTY OF LAW IN THE UNIVERSITY OF NAIROBI**

**NOVEMBER 2021**

## DECLARATION

#### DECLARATION

I Buluma Bwire declare that this is my original work and has not been submitted for the award of a degree in any other university.

Signed:  Date: 19<sup>th</sup> NOVEMBER 2021


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#### APPROVAL

This thesis, 'How far is too far? The Separation of Powers Doctrine and Judicial Review of Legislative Action in Kenya' has been done under our supervision and has been submitted to the University of Nairobi, School of Law for examination with our approval as the candidate's supervisors.

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## DEDICATION

*Ad Majorem Dei Gloriam*

This thesis is dedicated foremost to the memory and honor of my beloved father, the Late Arthur Hardidge Wanyama Buluma (M.B.S), (1953 – 1994). He set the pace and established the gold standard towards which I aspire with his achievements which I now quote in the fashion of General Maximus as portrayed by Russell Crowe in the movie Gladiator:

*“His name is Arthur Hardidge Wanyama Buluma, Moran of the Burning Spear, LL. B (Nairobi), Advocate of the High Court of Kenya, Certified Legislative Draftsman, Chief Parliamentary Counsel in the State Law Office of Kenya (1976 – 1994), African Representative in the Council of the Commonwealth Association of Legislative Counsel (1987 – 1994), and loyal servant to the Republic of Kenya. Husband to a loving wife, Melissa, and Father to five loving children: Linda, Andrew, Edward, William, and Arthur.”*

And to my loving mother, Melissa Buluma, who is a living tribute to the power of the human spirit and the steady rock upon which we all rely as we grow through life. To you both I say, “It is the highest honor and privilege to be your son.

## ACKNOWLEDGEMENTS

*“Do you not know that those who run in a race all run, but only one receives the prize? Run in such a way that you may win.” – 1 Corinthians 9:24.*

The six-year journey travelled in undertaking this study was a roller coaster ride and, in the end, just like Sir Winston Churchill, “I have nothing to offer but blood, toil, tears, and sweat.” I would like to thank those who supported me in this journey.

First, I am intellectually indebted to my supervisors, Prof. Migai Akech and Dr. Agnes Meroka, for their guidance, support, and patience over the past six years. They shaped my research from the first initial musings and raw drafts to the comprehensive work it is now. I am grateful for their support and advice in exploring in depth and breadth this fascinating aspect of constitutional law, separation of powers and judicial review of legislative action, and contributing towards its jurisprudential development.

Second, I would like to thank my family and friends for being my greatest cheerleaders and taking an interest in my research, and for always believing in me and providing a loving and supportive network that enabled me to complete the journey. In particular, I want to thank my wife, Shiko. Your contribution to this thesis and the roller coaster journey towards its finalization is immeasurable. Also, a big thank you to my cousin, Fanon. We are now *“Daktaris”*, *“Use your kidneys!”*

*Finally, a toast to this person called Bwaya, you stuck in there and hung on for dear life to the very end. You deserve a toast – let’s have another drink!*

## **ABSTRACT**

While it is generally held that the Kenyan Constitution facilitates the judiciary's independent exercise of its power of judicial review of legislative action as a check and balance on the legislature, the problem is that unfettered exercise of this power results in unwarranted judicial interference in legislative processes. Therefore, I will demonstrate that the absence of defined parameters within which Kenyan courts undertake judicial review of legislative action creates room for a court's unwarranted interference with policy choices democratic majorities should be allowed to make; and the abstraction of courts operating in isolation from political reality resulting in issuance of unenforceable orders. By drawing on the judiciary's historical development and contemporary characteristics in the evolution and exercise of its power of judicial review of legislative action I portray their effectiveness and shortcomings in wielding it whilst balancing between the prevailing political and legal constraints. Utilizing my conceptual framework I assess how courts, in general, exercise this power in a way that enables them to adhere to the requirements of the separation of powers doctrine, while considering the political and legal constraints under which they operate. Analyzing trends in charting of Kenyan courts within the conceptual framework I show that effective exercise of a court's judicial review power is only possible if the prevailing political structure is one whereby the three arms of government are co-equal, and each is therefore able to independently exercise its mandate while allowing for checks and balances by the others. On this basis I contend that the best safeguard for such independence is expressly providing for it in the constitution and ensuring that the judiciary effectively exercises its judicial review power to protect the constitution from encroachment by the political arms of government (executive and legislature). Moreover, through critical case analysis during the tenure of the first parliament elected under the 2010 Constitution I show that the judiciary is consistently exercising

its power of judicial review of legislative action to effectively invalidate unconstitutional legislative action, and through *Advisory Opinion Reference No. 2 of 2013* it establishes five parameters to determine when and how to intervene in legislative affairs. I consequently argue for adoption of these parameters to avoid unwarranted interference with legislative processes except in the clearest of cases. Going forwards this conceptual framework allows for evaluation of which amongst the five parameters is most suitable to prompt a court's intervention in legislative processes, and to determine fluctuations over time in reaction to changes in the politico-legal context.

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Stephen S. Pareno v. The Judicial Service Commission of Kenya [2014] eKLR.

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## ABBREVIATIONS

<b>AG</b>	Attorney General
<b>AfriCOG</b>	Africa Centre for Open Governance
<b>CDF</b>	Constituency Development Fund
<b>CIPEV</b>	Commission of Inquiry into Post-Election Violence
<b>CJ</b>	Chief Justice
<b>CKRC</b>	Constitution of Kenya Review Commission
<b>CORD</b>	Coalition for Reforms and Democracy
<b>DPP</b>	Director of Public Prosecutions
<b>ECK</b>	Electoral Commission of Kenya
<b>HFCK</b>	Housing Finance Company of Kenya
<b>ICJ-K</b>	International Commission of Jurists, Kenya Chapter
<b>ICPC</b>	International Centre for Policy and Conflict
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>IPOA</b>	Independent Policing Oversight Authority
<b>IPPG</b>	Inter-Parliamentary Parties Group
<b>JMVB</b>	Judges and Magistrates Vetting Board
<b>JSC</b>	Judicial Service Commission

<b>KADU</b>	Kenya African Democratic Union
<b>KANU</b>	Kenya African National Union
<b>KES</b>	Kenya Shilling
<b>KHRC</b>	Kenya Human Rights Commission
<b>KNCHR</b>	Kenya National Commission on Human Rights
<b>KPU</b>	Kenya People’s Union
<b>LSK</b>	Law Society of Kenya
<b>MP</b>	Member of Parliament
<b>NARC</b>	National Alliance of Rainbow Coalition
<b>NIC</b>	Newly Industrialized Country
<b>ODM</b>	Orange Democratic Movement
<b>PAC</b>	Public Accounts Committee
<b>PEV</b>	Post-Election Violence
<b>PNU</b>	Party of National Unity
<b>SC</b>	Senior Counsel
<b>SCOTUS</b>	Supreme Court of the United States
<b>TNA</b>	National Alliance Party

**USD** United States Dollar

**URP** United Republican Party

## CHAPTER ONE

### INTRODUCTION

#### 1.1. BACKGROUND

The separation of powers doctrine holds that for the establishment and maintenance of political liberty, where all citizens are equally governed by the same laws<sup>1</sup>, the government should be divided into three branches: executive, legislative, and judicial. Moreover, each branch must be restricted to the exercise of its own functions and should not be allowed to encroach upon those of the others.<sup>2</sup> There exists neither a universal model of separation of powers nor separation that is absolute, consequently different jurisdictions have progressively developed distinctive models that fit into their systems of government.

Kenya is a constitutional democracy<sup>3</sup> founded on the principles of the doctrine of separation of powers. Its Constitution vests legislative authority in parliament under Article 94,

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<sup>1</sup> According to Montesquieu, political liberty is a tranquility of mind arising from the opinion each person has of his safety. Within the context of the citizenry he argued that, 'It involves living under laws that protect us from harm while leaving us free to do as much as possible, and that enable us to feel the greatest possible confidence that if we obey those laws, the power of the state will not be directed against us.' Based on the foregoing I therefore propose the conclusion that this is only possible where all citizens are equally governed by the same laws. See also: Hilary Bok, 'Baron de Montesquieu, Charles – Louis de Secondat', *The Stanford Encyclopedia of Philosophy* (summer 2014 Edn), Edward N Zalta (Ed) <<http://plato.stanford.edu/archives/sum2014/entries/montesquieu/>> accessed 20 August 2015.

<sup>2</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 13.

<sup>3</sup> Kenya is a nascent democracy still undergoing evolution. It should be affirmed that democracy is a process aimed at creating a self-determined society of free and equal individuals with equal rights and obligations. See: John Haberson,

executive authority in the national executive under Article 129 and judicial authority in the courts under Article 159. However, this authority is derived from the Kenyan people who collectively exercise their sovereign power to delegate it to these state organs as provided for under Article 1 (3).<sup>4</sup>

Judicial review is the power of courts to evaluate the actions and decisions of the executive and legislature, and to invalidate those it finds to be unconstitutional. Over time, it has proven to hold the most effective methods of ensuring that state organs are accountable for the power they exercise.<sup>5</sup> It places limitations on the exercise of these powers in the form of constitutional checks and balances, which help fasten the state to the rule of law.<sup>6</sup> However, this power should always be exercised in awareness of its political consequences and not in a manner that would hinder either the executive or legislature from fulfilling its mandate in accordance with the law. This is necessary because such judgements have a direct impact on a government's ability to implement its desired policies and programs.

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'Reflections on a visit: Democratic pluses and minuses' *The Nairobi Law Monthly* (Vol 6, Issue No.12, December 2015) 6.

<sup>4</sup> Constitution of Kenya, 2010.

<sup>5</sup> Jenny Cassie and Dean Knight, 'The Scope of Judicial Review: Who and What May be Reviewed' <[http://www.vuw.ac.nz/staff/dean\\_knight/Cassie\\_Knight\\_Scope.pdf](http://www.vuw.ac.nz/staff/dean_knight/Cassie_Knight_Scope.pdf)> accessed 27 March 2014.

<sup>6</sup> Jackton B Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press 2013) 19. In his foreword to this book, the Kenyan Chief Justice Hon. Dr. Willy Mutunga further argued that the observance of the rule of law in Africa has been a constant challenge in spite of: innovative jurisprudence, constitutions drawn, legal structures created, and international organs established; all of which have had minimal effect upon the reality. He credits these challenges to deficient political will of what seems to be an inadequately cultivated political class that constantly challenges the rule of law.

Article 165 (3) (d)<sup>7</sup> gives the high court the power of constitutional interpretation, and to uphold constitutional supremacy by declaring void any law that is inconsistent with the Constitution or invalid any act or omission contravening it.<sup>8</sup> Within the current Kenyan context judicial review of legislative action has become the norm. The courts are constantly drawn into the realm of legislative matters as the different levels of government established under the Constitution wage supremacy battles against each other. Parliament also serves as a theater for politics and politics is a game of one-upmanship, especially in a First Past the Post (FPTP)<sup>9</sup> electoral system such as the Kenyan one, it is therefore common for parliamentarians defeated on the floor of the house to cunningly turn to the courts as an alternative forum for competition. If the court is not keen it can be used in this manner, this threat was observed in *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others*<sup>10</sup> where the court held that:

“Whereas under Article 165 (3) (d) of the Constitution as read with Articles 22(1) and 23 (1), the High Court has wide interpretative powers donated by the Constitution, it must be hesitant to interfere with the legislative process except in the clearest of cases ... the High Court should

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<sup>7</sup> Constitution of Kenya, 2010.

<sup>8</sup> Herman Omiti, ‘Who guards the guard? The Supreme Court’s battered integrity’ *The Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015) 32.

<sup>9</sup> A First Past the Post (FPTP) electoral system is the simplest form of plurality/majority electoral system whereby the winning candidate is the one who gains more votes than any other candidate, even if this is not an absolute majority (over 50%) of the valid votes. For the Kenyan context see: Buluma Bwire, ‘Constitutional Quotas and Women’s Political Representation: A Way Out of the Kenyan Dilemma’ (LL.M Thesis, University of Nairobi, 2012).

<sup>10</sup> (2015) eKLR.

not be turned into an alternative forum where losers in Parliamentary debates rush to assert revenge on their adversaries.”<sup>11</sup>

However, even when the court exercises its power of constitutional interpretation there is an increasing tendency for the political elite to ignore court orders. For instance, in *Speaker of Senate & Another v A.G. & 4 Others*<sup>12</sup> despite the advisory opinion of the Supreme Court going further to define ‘What a Bill that concerns Counties’ means in order to avoid future conflict between the Senate and National Assembly when dealing with such legislation, the National Assembly continued to debate and enact similar legislation without the Senate’s input.<sup>13</sup>

Nevertheless, Kenyan courts must avoid adopting ‘strong-form judicial review’<sup>14</sup> whose inherent danger is that it provides an avenue for unwarranted interference by a reckless court with policy choices that parliament should be allowed to make. The term unwarranted is used here to emphasize the fact that courts must refrain from interfering with legislative processes except in the clearest of circumstances. ‘Strong-form judicial review’ denotes exercising sweeping powers of

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<sup>11</sup> (2015) eKLR.

<sup>12</sup> Advisory Opinion Ref. No.2 of 2013, (2013) eKLR. The advisory opinion was occasioned by the act of the Speaker of the National Assembly reversing his action of referring a legislative matter to the Senate and having the National Assembly solely conclude deliberations on the Division of Revenue Bill (2013) which was then forwarded to the President for assent and thereafter enacted into law.

<sup>13</sup> The National Assembly continued to debate and enact laws which clearly concern County Governments without recourse to the Senate. Specific examples are the Livestock and Fisheries Act and the Public Finance and Management Act.

<sup>14</sup> Mark V Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries’ (2003) 38 Wake Forest L. Rev. 813.

judicial review to invalidate legislative action on the ground of perceived threats<sup>15</sup> of violation of rights.<sup>16</sup> Exercise of such sweeping powers, as pointed out by the Speaker of the National Assembly<sup>17</sup>, can create a scenario whereby courts issue orders that are not executed thereby acting in vain. It should always be remembered that the primary aim of judicial review is to determine whether the law violates the constitution, and not whether it leads to good or bad results.<sup>18</sup>

## 1.2. PROBLEM STATEMENT

Within the current Kenyan politico-legal context judicial review of legislative action is increasingly the norm because Article 165 (3) (d) of the Constitution bestows wide interpretative powers on the high court, and Article 258 endows every citizen with the right to institute court proceedings claiming either contravention or threat of contravention of the Constitution. Consequently, courts are constantly drawn into the realm of legislative matters when petitioned to

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<sup>15</sup> Article 258 (1) of the Constitution provides that, ‘Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.’ The Constitution therefore allows specifically for the exercise of strong-form judicial review in Kenya. Article 258 further allows for a claim to be filed by a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of a group or class of persons; or a person acting in the public interest; or an association acting in the interest of one or more of its members.

<sup>16</sup> Mark V. Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries’ (2004) 38 Wake Forest L. Rev. 813.

<sup>17</sup> The speaker blamed the judiciary for interfering with debate on Division of Revenue Bill 2013 and took issue with the court’s ruling to retain Embu Governor Martin Wambora despite having been impeached twice by the Senate. See: Supreme Court Advisory Opinion Ref. No.2 of 2013; *Speaker of Senate & Another v A.G. & 4 Others* (2013) eKLR; Constitutional Petition 7 of 2014; *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others* (2014) eKLR; and Petition 518 of 2013; *Judicial Service Commission v Speaker of the National Assembly & 8 Others* (2014) eKLR in which a court ruling overruled parliament’s censure of the judicial service commission on grounds that the parliamentarians violated an order stopping the debate. The speaker said the house would not obey such orders.

<sup>18</sup> Ali Abdi, ‘Auditing Mutunga’ *The Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015) 38.



exercise this power of judicial review of legislative action. However, unfettered exercise of this power results in unwarranted judicial interference in legislative processes resulting in hindrances to policy choices democratic majorities should be allowed to make; and the abstraction of courts operating in isolation from political reality issuing unenforceable orders. The absence of defined parameters within which courts can exercise this power is a key deficiency in its effective exercise considering the potential impact on social, political, and economic development policies, and the potential threat of political actors undermining the courts as a political consequence of their judgements.

### **1.3. THESIS STATEMENT**

While it is generally held that the Kenyan Constitution facilitates the judiciary's independent exercise of its power of judicial review of legislative action as a check and balance on the legislature, the problem is that unfettered exercise of this power results in unwarranted judicial interference in legislative processes. Therefore, I will demonstrate that the absence of defined parameters within which Kenyan courts undertake judicial review of legislative action creates room for a court's unwarranted interference with policy choices democratic majorities should be allowed to make; and the abstraction of courts operating in isolation from political reality resulting in issuance of unenforceable orders. By drawing on the judiciary's historical development and contemporary characteristics in the evolution and exercise of its power of judicial review of legislative action I portray their effectiveness and shortcomings in wielding it whilst balancing between the prevailing political and legal constraints. Utilizing my conceptual framework I assess how courts, in general, exercise this power in a way that enables them to adhere to the requirements of the separation of powers doctrine, while considering the political and legal constraints under which they operate.

#### **1.4. THESIS OBJECTIVES**

1. Identify whether, how and when Kenyan courts exercise their judicial review power to check and balance parliament's exercise of legislative power.
2. Critically evaluate their operation as effective checks against the abuse of legislative power by parliament.
3. Suggest appropriate strategies that would help clarify, extend, or modify these judicial checks and balances to better achieve the aims for which they have been developed over time.

#### **1.5. RESEARCH QUESTIONS**

- a) How have Kenyan courts exercised their power of judicial review as a check and balance on parliament's exercise of legislative power?
- b) Are Kenyan courts effectively using their judicial review power to check against the abuse of legislative power by parliament?
- c) How can this power of judicial review of legislative action be clarified, extended or modified to better achieve the objective of serving as a check and balance on parliament?

#### **1.6. SCOPE OF THE STUDY**

The study is limited to evaluation of judicial checks and balances on the exercise of legislative power developed under the Kenyan Constitution.<sup>19</sup> It interrogates the conflict between these two governmental arms within the framework of the doctrine of separation of powers. Its objective is to establish the strengths and limitations of existing procedures and policy governing judicial intervention in legislative affairs in Kenya. This analysis is subsequently used as the basis

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<sup>19</sup> Constitution of Kenya, 2010.

to define a middle ground that would safeguard the independence of both institutions while maintaining the harness afforded by each having the power to check the other which best reflects the realities of the Kenyan political context.

### **1.7. SIGNIFICANCE OF THE STUDY**

Although Kenya is implementing a new political structure within the context of a new democratic governance system and a new Constitution since 2010, most politico-legal actors still view it within Montesquieu's lens when advocating for separation of powers.<sup>20</sup> Increasingly, the courts are petitioned under Article 165 (3) (d) of the Constitution to exercise their power of judicial review of legislative action resulting in strained relations between the two arms of government.<sup>21</sup> Given the significance of case law in bestowing legal effect to constitutional provisions and in clarifying when and how they are invoked, an updated and comprehensive legal analysis is essential to provide current information as to the Kenyan courts exercise of their power of judicial review of legislative action. This information is relevant not only for the politico-legal actors but also in relation to policy and research discourses on Kenyan constitutional law and practice.

Previous studies, while acknowledging the importance of the doctrine of separation of powers in the Kenyan political structure<sup>22</sup>, have not specifically analyzed the performance of Kenyan courts undertaking judicial review of legislative action in relation to how they balance between the prevailing legal and political constraints. Such analysis will result in better

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<sup>20</sup> Yash Ghai, 'Dilemmas for the Judiciary' *Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015).

<sup>21</sup> Wachira Maina, 'How drafters of 2010 Constitution ensured MPs won't abuse it for political expediency' *Saturday Nation* (Nairobi 28 March 2015) 8.

<sup>22</sup> Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press 1970).

understanding of when and how these courts should intervene in legislative processes within the Kenyan politico-legal context. Consequently, this study seeks to fill this void by developing and utilizing a conceptual framework to assess how courts, in general, exercise this power in a way that enables them to adhere to the requirements of the separation of powers doctrine, while considering the political and legal constraints under which they operate. Moreover, through critical case analysis the study evaluates the exercise of this judicial review power by Kenyan courts over the first parliament elected to office under the 2010 Constitution.

This study contributes to our understanding of the inter-dependence between political structure design and judicial independence, and how it affects the courts exercise of their power of judicial review of legislative action. Whereas within the Kenyan politico-legal context this power is exercised under the constitutional ambit of Article 165 (3) (d), court cases interpreting the court's exercise of this power determine to a significant extent when and how they do it. One of the main contributions of this study, based on critical analysis of the case law, is the contention that Kenyan courts should adopt the five parameters established in *Advisory Opinion Reference No. 2 of 2013* to determine when and how to intervene in legislative affairs.

This study also builds on the work of Theunis Roux<sup>23</sup> to develop a conceptual framework for assessing the performance of Kenyan courts in exercising their power of judicial review of legislative action in relation to the prevailing legal and political constraints. Subsequently, the study reveals four possible types of courts based on how the court balances between legal and political constraints when undertaking judicial review of legislative action. This analysis provides

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<sup>23</sup> Theunis Roux developed the model to assess the achievements of the First South African Constitutional Court. See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

a useful analytical lens within which to understand how courts can effectively use their power of judicial review of legislative action to contribute towards democratic consolidation and social transformation.<sup>24</sup>

## **1.8. THEORETICAL FRAMEWORK**

This thesis is grounded in Montesquieu's theory on the doctrine of separation of powers and James Madison's further exposition on Montesquieu's concept of partial separation<sup>25</sup> modified by a system of checks and balances. However, these theories only form the foundation upon which a variation more relevant to the Kenyan constitutional and political context is proposed. In this regard the thesis is guided by the words of Yash Ghai who said that:

“We have travelled a long way from the systems for which Montesquieu or even the American John Madison, whom the more erudite Kenyan MPs quote as authority for the separation of powers, developed their theories. It is time we turned our attention away from these venerable philosophers to the people-driven and people-owned constitution, but mindful of their advocacy for checks and balances.”<sup>26</sup>

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<sup>24</sup> Siri Gloppen, 'How to Assess the Political Role of the Zambian Courts' (Chr. Michelsen Institute 2004) 1.

<sup>25</sup> John Locke had advocated for a physical and total separation of powers, also known as the pure doctrine of separation of powers, which emphasized on total separation of agencies, functions, and persons of the three arms of government. See: Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

<sup>26</sup> Yash Ghai, 'Dilemmas for the Judiciary' *Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015).

Montesquieu first came up with his theory on the doctrine of separation of powers when he wrote his treatise *De l'Esprit des Lois*.<sup>27</sup> He emphasized the importance of placing judicial and executive power in different hands and of the mutual balancing and restraining of the legislative and executive power.<sup>28</sup> Montesquieu modified the pure doctrine of separation of powers, which emphasized total separation of agencies, functions, and persons, and promoted a partial separation of powers modified by a system of checks and balances. He is also credited with formulating the tripartite division of government functions in a recognizably modern form<sup>29</sup> and establishing the idea of the three branches of government – executive, legislature, and judiciary. The division of labour amongst the three was described as follows, “to legislate is to make law, to execute is to put it into effect and the judicial power is the announcing of what the law is by settlement of disputes.”<sup>30</sup>

Vile<sup>31</sup> postulates that Montesquieu in his preface intends to show the way in which laws of each state are related to the nature and principles of its form of government, to the climate, soil and economy of the country, and to its manners and customs. However, Marshall<sup>32</sup> notes that neither Montesquieu nor many other theorists down to present day seem clear as to whether

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<sup>27</sup> (1748).

<[https://books.google.co.ke/books/about/The\\_Spirit\\_of\\_Laws.html?id=5zZJAAAAMAAJ&printsec=frontcover&source=kp\\_read\\_button&redir\\_esc=y#v=onepage&q&f=false](https://books.google.co.ke/books/about/The_Spirit_of_Laws.html?id=5zZJAAAAMAAJ&printsec=frontcover&source=kp_read_button&redir_esc=y#v=onepage&q&f=false)> accessed 4 September 2019.

<sup>28</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

<sup>29</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 63.

<sup>30</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 64.

<sup>31</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 55.

<sup>32</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

checking of one branch by another is a participation in the other's function hence a partial violation of the separation of powers doctrine, or whether it carries out the very purpose of separating and balancing off against each other of the three arms of government.

James Madison built upon Montesquieu's concept of 'partial' separation and came up with the American mixture of ideas about isolating, checking, balancing, and interacting between the three arms of government. Madison theorized that checks could only be exercised by one arm's partial agency or participation in the other's functions.<sup>33</sup> For instance, when the executive has powers to veto legislation this partial interference in legislative functions does not constitute a breach of the separation of powers doctrine since one branch is simply checking and balancing the other through such interference.<sup>34</sup> However, Marshall notes that when it comes to judicial review of legislative action the question occurs in its most acute form as to whether this is itself participation in the legislative function or merely part of the judicial function. This thesis seeks to answer this question within the Kenyan context.

Montesquieu's separation of powers doctrine together with Madison's exposition of Montesquieu's concept of 'partial separation' modified by a system of checks and balances are selected for the theoretical framework because: Firstly, this thesis advances the argument that although judicial review power acts as a potent check on legislative action there is need to clarify how and when courts may exercise it in such a manner; Secondly, it acknowledges that checks can only be exercised through one arm's partial agency or participation in the other's functions.

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<sup>33</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 103.

<sup>34</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 103.

## **1.9. METHODOLOGY**

Chapter two of the study develops and utilizes a conceptual framework to assess the performance of Kenyan courts in exercising their power of judicial review of legislative action in relation to the prevailing legal and political constraints. Chapters three and four then utilize this conceptual framework to undertake critical case law analysis focusing predominantly on cases providing the foundation for interrogating rules and developing normative claims to guide the courts in the exercise of this judicial review power, with a corresponding analysis of the relevant constitutional provisions. The case selection is further guided by the first and second research questions while zeroing in on cases in which the petitioners are directly contesting legislative action and categorized according to whether they occurred under either the post-independence or 2010 Constitution. This analysis is necessary to provide a comparative legal analysis of the status of the exercise of this judicial review power under the 2010 Constitution vis-à-vis the status under the post-independence Constitution. The Kenya Law Reports electronic database provides the primary research tool for locating the court cases.

Chapters three and four also encompass a legal analysis of secondary data in tracing the historical evolution and contemporary characteristics of the Kenyan judiciary's exercise of its power of judicial review of legislative action. The collection, analysis and interpretation of secondary data is determined by the first and second research questions. The sources of the secondary data are drawn from archival internet and library research for material on the historical evolution, and Hansard/newspaper reports for contemporary developments.

Chapter five concludes by undertaking a comparative analysis of the exercise of this judicial review power in the jurisdictions of South Africa and the United States. South Africa is selected because its judiciary operates within the context of a recently adopted transformative Constitution



which also forms the basis for some of the provisions in Kenya's 2010 Constitution.<sup>35</sup> On the other hand, America is selected because it exercises a democratic governance system that is over two centuries<sup>36</sup> old hence its courts have centuries of experience in navigating the tensions between legal and political constraints in their exercise of judicial power. This comparative analysis is necessary to establish whether, how, and why South Africa and America create a political environment that respects judicial independence hence allowing for effective exercise of this power of judicial review of legislative action. The objective is to draw out lessons for Kenya.

### **1.10. LITERATURE REVIEW**

Since the eighteenth-century scholarship on the separation of powers doctrine is largely shadowed by Montesquieu's seminal treatise, *De l'Esprit des Lois*.<sup>37</sup> However, Montesquieu was only building on the work of John Locke who first theorized on total separation of powers in his treatise, 'Second Treatise of Government.'<sup>38</sup> Montesquieu's relevance to the current Kenyan legal and political context is one of the key questions that shall inform this thesis. However, Ghai notes,

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<sup>35</sup> The term 'transformative constitution' has come into popular usage to describe the aspirations of a constitution as a tool to bring about positive change in society. It was first used to describe the South African Constitution by former South African Chief Justice Chaskalson (2001 – 2005) in the case of *Soobramoney v. Minister of Health, Kwa Zulu-Natal* 1998 1 SA 765 (CC). He described it as a constitution which would transform society into one in which there would be human dignity, freedom and equality, lying at the heart of the new constitutional order.

<sup>36</sup> Joseph Stromberg, 'The Real Birth of American Democracy' (Smithsonian.com, 20 September 2011) <<https://www.smithsonianmag.com/smithsonian-institution/the-real-birth-of-american-democracy-83232825/>> accessed 17 August 2018.

<sup>37</sup> (1748).

<sup>38</sup> (1689). <<https://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>> accessed 5 September 2019.

“He [Montesquieu] was writing at a time when there was no modern conception of democracy, the role of the state was quite limited, and there were few limitations to the powers of the executive.”<sup>39</sup>

This is not the situation prevailing in the world today, more specifically Kenya is currently implementing a new democratic system of governance under a new Constitution.<sup>40</sup> This thesis therefore aims to capture the political economy of democratization within the current Kenyan politico-legal context.<sup>41</sup> It critically analyzes the Constitution to determine the constitutional basis of the relationship between parliament and the judiciary under this new system of governance based on the separation of powers doctrine.<sup>42</sup> Below is a review of some of the scholarship that has emerged in this area in the twentieth and twenty first centuries within the context of constitutional democracies, and specifically dwelling on the power of judicial review of legislative action.

All scholars reviewed in this section have contributed greatly towards a better understanding of the nature of the separation of powers doctrine and its application within modern constitutional democracies. However, the applicability of their various arguments within the Kenyan context under the current Constitution is yet to be determined. Moreover, the time is ripe for evaluation of the doctrine and the exercise of judicial review powers by Kenyan courts’ under

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<sup>39</sup> Yash Ghai, ‘Dilemmas for the Judiciary’ *Nairobi Law Monthly* (Vol.6, Issue No. 6 December 2015) 49.

<sup>40</sup> Constitution of Kenya, 2010.

<sup>41</sup> John Haberson, ‘Reflections on a visit: Democratic pluses and minuses’ *The Nairobi Law Monthly* (Vol 6, Issue No.12, December 2015) 6.

<sup>42</sup> Ali Abdi, ‘Auditing Mutunga’ *Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015).

the first parliament to be elected under this Constitution in 2013 which brought into effect a bicameral parliament.

### **1.10.1. THEME A: THE DOCTRINE OF SEPARATION OF POWERS**

The phrase ‘separation of powers’ has earned its place as one of the most confusing in the vocabulary of political and constitutional thought, and even where commentators agree on its existence in a given constitution it is commonplace for them to draw different conclusions as to what particular implications of law or policy follow therefrom.<sup>43</sup> Even though Montesquieu’s treatise still forms the conceptual basis for the separation of powers doctrine today, the specific content of the writings in earlier centuries is quite inappropriate to the problems of the twentieth century.<sup>44</sup> Within the Kenyan context, Ghai notes that we should question the relevance of Montesquieu to our times and that it makes greater sense and is a greater recognition of Kenya’s sovereignty for us to turn to our Constitution, approved by an overwhelming majority, in order to consider the relationship between parliament and the judiciary.<sup>45</sup> This is what this thesis seeks to do.

#### **1.10.1.1. IS IT TOTAL OR PARTIAL SEPARATION OF POWERS?**

Scholars who argue for total separation of powers are building on Locke’s ‘pure doctrine.’<sup>46</sup> Vile calls Locke’s theory the ‘pure doctrine’ but notes that it has rarely been held in this extreme form, and even more rarely been put into practice. Vile uses this form of the doctrine as a

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<sup>43</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 97.

<sup>44</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 6.

<sup>45</sup> Yash Ghai, ‘Dilemmas for the Judiciary’ *Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015).

<sup>46</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 14.

benchmark within which to describe the changing development of the historical doctrine.<sup>47</sup> From Vile we therefore learn that the concept of total separation of powers is best suited for theorizing with little practicability in terms of application within modern governments. This thesis seeks to clarify the most practical extent to which Kenyan courts can exercise their judicial review power over the legislature without being in breach of the doctrine of separation of powers.

Hans Kelsen while advocating for such total separation of powers within the context of judicial review of legislative action argues that, “[T]he judicial review of legislation is an obvious encroachment upon the principle of separation of powers.”<sup>48</sup> Kelsen states that amendment by another organ of a law issued by the legislature amounts to a remarkable restriction of its powers which creates a negative legislature alongside the positive one. Consequently, such an annulling organ forms an authority above the legislator.<sup>49</sup> However, this Kelsenian context does not consider that upon judicial review the courts can only issue orders declaring the legislation in question invalid if found to be unconstitutional. This does not amount to amendment of any given law, which can only be done by the legislature.<sup>50</sup> This thesis is premised on the grounds that interpretation of the doctrine should be done in accordance with the legal and political realities

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<sup>47</sup> Maurice J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 14.

<sup>48</sup> Hans Kelsen, *General Theory of Law and State* (A. Wedberg tr, 1961) 269.

<sup>49</sup> Hans Kelsen, *General Theory of Law and State* (A. Wedberg tr, 1961) 268.

<sup>50</sup> Similar conclusions have been made by Professor JB Ojwang who stated that once the judiciary has pronounced itself on a matter declaring it a nullity or unconstitutional then the issue rests there. The only recourse available to the legislature is to change the law so that what was previously unconstitutional is validated and constitutional. See: Jackton B Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press 2013) 131.

within which it exists and is sought to be applied. It therefore seeks to put forward an interpretation of the doctrine that best reflects the Kenya legal and political context.

According to Nicholas Barber<sup>51</sup> the separation of powers doctrine curtails the exercise of political power in order to prevent its abuse. As a result, the principle of checks and balances allows each of the three branches of government a measure of intrusion into another branch's functions. Sang<sup>52</sup> notes that the legislature checks the executive through the power to impeach a president, whereas the executive checks the legislature through presidential assent to make a bill law whereas the judiciary checks the executive and legislature through its judicial review power. In turn, the executive and legislature check the judiciary through determining the appointment or removal of judicial officers. Sang examines which branch exercises greater power over the others and concludes that the judiciary has the upper hand because the only way the other branches can censure it is through the rather tedious process of removing judges from office. He ultimately cautions that abuse of their judicial review power could lead to courts' usurping the functions of the other branches of government<sup>53</sup>. However, Sang does not proceed to clarify the extent to which this judicial review power could be exercised without amounting to usurpation. This thesis seeks

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<sup>51</sup> Nicholas W. Barber, 'Prelude to Separation of Powers' (2001) 60 Cambridge Law Journal 9.

<sup>52</sup> Oscar Sang, 'The Separation of Powers and New Judicial Power: How the South African Constitutional Court Plotted its Course' (2013) III Elsa Malta Law Review 98  
<[http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce\\_uploads/09b.pdf](http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce_uploads/09b.pdf)> accessed 31 March 2014.

<sup>53</sup> Oscar Sang, 'The Separation of Powers and New Judicial Power: How the South African Constitutional Court Plotted its Course' (2013) III Elsa Malta Law Review 99  
<[http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce\\_uploads/09b.pdf](http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce_uploads/09b.pdf)> accessed 31 March 2014.

to clarify the extent to which the Kenyan courts can exercise their judicial review power as a check on the legislature.

#### **1.10.1.2. SEPARATION OF POWERS AND JUDICIAL REVIEW**

Marshall<sup>54</sup> holds that the existence of a judicial review power grants courts the right to invalidate legislation, which violates the principle that each arm has an independent sphere of action and the right to make its own decisions on matters of constitutionality. However, Marshall also believes that where constitutional law places restrictions on legislative power, a duty to declare the law implies a duty to declare when such restrictions have been violated whether by the legislature or anyone else.<sup>55</sup> Consequently, based on the findings in the American case of *Marbury v Madison*<sup>56</sup> he concludes that no legislative act contrary to the constitution could be valid and to deny this would be to propose that the representatives of the people are superior to the people themselves<sup>57</sup>. Although the court's decision in *Marbury* has greatly influenced the development of judicial review within the world's constitutional history, there is still a need to probe its application within the context of specific constitutions. This thesis critically examines the Kenyan courts' exercise of their judicial review power over legislative action under the current Constitution.<sup>58</sup>

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<sup>54</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 104.

<sup>55</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 104.

<sup>56</sup> 1 Cranch 137 (1803).

<sup>57</sup> Article 1 (1) of the Kenyan Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Article 1(2) states that the people may exercise their sovereign power either directly or through their democratically elected representatives.

<sup>58</sup> Constitution of Kenya, 2010.

Mbote and Akech<sup>59</sup> note that, “Although it can be argued that the power of judicial review is an inherent power in a constitutional democracy, the Constitution does not expressly give the courts the power to censure governmental action.”<sup>60</sup> Having thus highlighted the issue, they make the case that Kenyan courts’ struck down laws for being inconsistent with the Constitution thus deriving their legitimacy from the constitutional provision that any law that is inconsistent with the Constitution is void to the extent of the inconsistency as provided for under Article 2 (4).<sup>61</sup> Within this context it can be posited that courts should only step in once parliament has enacted specific legislation to determine its constitutional validity, and that they should not interfere with the actual law making process which is the preserve of parliament. Similarly, Ojwang<sup>62</sup> observes that the liberty of the citizen rests upon the impartial determination of laws governing the claims and activities of both the executive and legislature. This can be interpreted to mean that the judiciary should only intervene when the decisions and activities of either the executive or the legislature have violated existing laws and not prior to that. This thesis argues that although this judicial review power is an effective check on the legislature, it is necessary to clarify how and when it is to be used in the Kenyan context.

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<sup>59</sup> Patricia Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 60.

<sup>60</sup> Patricia Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 60.

<sup>61</sup> Constitution of Kenya, 2010.

<sup>62</sup> Jackton B Ojwang, *Constitutional Development in Kenya: institutional adaptation and social change* (Acts Press, African Centre for Technology Studies 1990) 151.

### 1.10.1.3. SEPARATION OF POWERS AND POLITICAL QUESTIONS

A balance should always be struck between the social, political, and economic issues that form the basis of judicial review of legislative action. Justice Sawant in the Indian case of *Mandal Commission*<sup>63</sup> framed these issues as political questions which are often emotionally hyper charged and raise a storm of controversy in society, some of which have portentous consequences for generations to come. When it comes to these political questions the debate has always centered on whether they should be the subject of judicial review, or whether they are best left for resolution in the political arena which is the domain of the executive and legislature. Dworkin<sup>64</sup> states that, “The capital question now is not what power the court has but how its vast power should be exercised. Should it undertake to enforce the whole constitution including those provisions that require almost pure political judgement to interpret?”

Marshall notes that the exclusion of the judiciary from these political questions is defended on separation of powers grounds.<sup>65</sup> He cites the majority ruling in the American case of *Colegrove v Green*<sup>66</sup> which held that, “It was hostile to a democratic system to involve the judiciary in the politics of the people. Courts ought not to enter this ‘political thicket.’” Conversely, in another American case *Baker v Carr*<sup>67</sup> the majority held that, “the mere fact that the suit seeks protection of a political right does not mean that it presents a political question.” Marshall therefore concludes

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<sup>63</sup> (1992) Supp (3) SCC 501.

<sup>64</sup> Ronald Dworkin, *Law's Empire* (Fontana Press, 1986) 357.

<sup>65</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 110.

<sup>66</sup> 328 U.S. 549 (1946).

<sup>67</sup> 369 U.S. 186 (1962).



that the boundary between entering the political thicket and dutifully applying constitutional guarantees of citizen's rights to equality and freedom is a misty one.<sup>68</sup> However, he does not interrogate further where this boundary could be drawn and instead concludes that the separation of powers doctrine offers no clear guidance here than it did historically in establishing the propriety or otherwise of judicial review itself.<sup>69</sup> This thesis critically examines cases in which the Kenyan courts' have exercised their judicial review power over legislative action in regard to political questions. It analyzes whether doing so is in violation of the doctrine within the Kenyan context.

Judicial intervention in parliamentary affairs undoubtedly breeds grounds for conflict between these two arms of government. In Kenya, as the judiciary entertains an increasingly greater number of claims against parliament through judicial review, it results in strained relations between the two. Commenting on this Maina<sup>70</sup> notes the following about Kenyan parliamentarians:

“Flailing around for enemies many of them now see the Constitution and judges who interpret it as their enemies. They seem to have a point though: the judiciary has recently outlawed important portions of the new security laws; ordered the National Assembly to work with the Senate on the annual division of revenue bill and even condemned the famous Constituency Development Fund (CDF) as unconstitutional.”

However, Maina also argues that they are wrong to blame the courts or the Constitution whereas the problem is that Kenyan politics has become judicialized. This is a direct result of the increasing

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<sup>68</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 111.

<sup>69</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 111.

<sup>70</sup> Wachira Maina, 'How drafters of 2010 Constitution ensured MPs won't abuse it for political expediency' *Saturday Nation* (Nairobi 28 March 2015) 8.

cases of politicians turning to the courts for interpretation and determination even on purely political matters. This should not be the case since the courts should only be used to resolve legal questions. Ojwang<sup>71</sup> notes that, “There may also be questions that are purely political and which therefore call for political solutions rather than legal sanctions.”<sup>72</sup> Maina<sup>73</sup> further argues that by making constitutional amendment harder and access to courts cheaper, and therefore more financially accessible to citizens, the Constitution substituted parliament as the preferred site for political change. This thesis explores the dangerous possibility within such an environment for reckless courts’ to unjustifiably interfere with policy choices parliament should be allowed to make.

One of the arguments raised against courts’ resolution of political questions is that there might be difficulty in enforcing a judgement on a reluctant executive or legislature<sup>74</sup>. The general trend in the recent past has been for the Kenyan parliament to ignore any decisions emanating from

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<sup>71</sup> Jackton B Ojwang, *Constitutional Development in Kenya: institutional adaptation and social change* (Acts Press, African Centre for Technology Studies 1990) 159.

<sup>72</sup> See also the Indian case of *Mandal Commission* (1992) Supp (3) SCC p.501 where Justice Sawant held that: ‘In a legal system where courts are vested with the power of judicial review, on occasions issues with social, political and economic overtones come up for consideration. They are commonly known as political questions. Some of them are of transient importance while others have portentous consequences for generations to come. Often such issues are emotionally hyper charged and raise a storm of controversy in society ... The courts have, however, as part of their obligatory duty to decide them. While dealing with them, the courts must raise issues above contemporary dust and din, and examine them dispassionately, keeping in view, the long-term interests of the society as a whole’.

<sup>73</sup> Wachira Maina, ‘How drafters of 2010 Constitution ensured MPs won’t abuse it for political expediency’ *Saturday Nation* (Nairobi 28 March 2015) 8.

<sup>74</sup> Wachira Maina, ‘How drafters of 2010 Constitution ensured MPs won’t abuse it for political expediency’ *Saturday Nation* (Nairobi 28 March 2015) 8.

the court that are against the house.<sup>75</sup> Mbote and Akech<sup>76</sup> canvass this issue based on their observation that parliament persists to enact legislation that violates the separation of powers doctrine and undermines the democratic process but does not take steps to amend laws that the courts have ruled to be unconstitutional. This raises the question of the courts' powers to enforce their decisions since their role is limited to interpretation only. Kegoro<sup>77</sup> in his commentary on the court ruling in the case of *Judicial Service Commission v The Speaker of the National Assembly & 8 others*<sup>78</sup> notes that with such judgements the judiciary has placed on its own shoulders the burden of ensuring that its orders in relation to other state organs are viewed as just, and reasonably capable of obedience. This thesis interrogates this question with the aim of establishing the strengths and limitations of the existing procedures and policy governing judicial intervention in legislative affairs in Kenya.

However, it is noteworthy that whereas courts may not have the power to compel the legislature in the manner described above, both derive their power from the Kenyan people as

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<sup>75</sup> The Speaker of the National Assembly has been quoted lamenting of court orders that, 'we want to respect court orders, and we have respected very many of them. But I do not understand how we are to obey every order, however idiotic or unconstitutional.' See: Moses Njagih, 'Parliament will not honour 'idiotic and unreasonable' court orders says Speaker Justin Muturi' *Standard Digital* (Nairobi 3 March 2014) <[https://www.standardmedia.co.ke/?articleID=2000105985&story\\_title=muturi-parliament-will-not-honour-idiotic-and-unreasonable-court-orders/](https://www.standardmedia.co.ke/?articleID=2000105985&story_title=muturi-parliament-will-not-honour-idiotic-and-unreasonable-court-orders/)> accessed 31 March 2014.

<sup>76</sup> Patricia Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 69.

<sup>77</sup> George Kegoro, 'Judiciary must continue asserting its authority' *Sunday Nation* (Nairobi 20 April 2014) 30.

<sup>78</sup> (2014) eKLR; Petition 518 of 2013.

provided for under Article 1 of the Constitution. Under Article 104<sup>79</sup> the people have the right to recall parliamentarians, therefore theoretically the people can invoke this constitutional right if parliamentarians fail to comply. Nevertheless, within the current Kenyan political context the practicality of such a move is doubtful at best.

### **1.10.2. THEME B: THE RELATIONSHIP BETWEEN JUDICIAL REVIEW AND DEMOCRACY**

Gloppen<sup>80</sup> notes that in many countries going through democratic reform processes, there is reason to believe that a stronger ideological emphasis on constitutional democracy, combined with international aid towards legal and judicial reform have strengthened the courts. The underlying rationale in strengthening the courts is to enable them to play a key role in ensuring political accountability, which is crucial to democratic consolidation in new democracies. However, there is little systematic knowledge about the role the courts have played in the political developments of these countries.<sup>81</sup> Haberson<sup>82</sup> with specific regard to emerging African democracies says, “And, as I have confessed before, I am also not sure that academics like myself have quite captured the political economy of democratization in current African circumstances as well as we might.” This work aims to capture the political economy of democratization within the current Kenyan politico-legal context with specific focus on the exercise of judicial review power over legislative action.

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<sup>79</sup> Constitution of Kenya, 2010.

<sup>80</sup> Siri Gloppen, ‘How to Assess the Political Role of the Zambian Courts’ (Chr. Michelsen Institute 2004).

<sup>81</sup> Siri Gloppen, ‘*How to Assess the Political Role of the Zambian Courts*’ (Chr. Michelsen Institute 2004).

<sup>82</sup> John Haberson, ‘*Reflections on a visit: Democratic pluses and minuses*’ (Vol.6, Issue No.12 December 2015).

## **1.10.2.1. THE ROLE OF JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY**

### **1.10.2.1.1. THE ROLE IN AN ESTABLISHED DEMOCRACY**

Even in established constitutional democracies, such as the United States, the legitimacy of judicial review is called into question when the courts invalidate federal legislation. Prakash and Yoo<sup>83</sup> evaluate criticisms of judicial review in America following the Supreme Court's decisions declaring federal statutes unconstitutional.<sup>84</sup> They posit that the Supreme Court's effort to police the boundaries of national power is both unwise and unwarranted and observe that it has even led to calls for a constitutional amendment that would allow Congress to override judicial decisions, if not the elimination of judicial review.<sup>85</sup> However, Prakash and Yoo are also of the view that the recent attack on judicial review is really an effort to undermine judicial supremacy and that judicial review finds its origins in the Constitution's text and structure, as understood by those who drafted and ratified it.<sup>86</sup> This thesis shall evaluate Kenyan courts' exercise of their

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<sup>83</sup> Saikrishna B. Prakash and John C. Yoo, *'The Origins of Judicial Review'* (2003) 70 U.Chi.L. Rev. 887 <<http://scholarship.law.berkeley.edu/facpubs/1407>> accessed 7 April 2014.

<sup>84</sup> The Court had declared unconstitutional federal statutes that had gone beyond the limits of the Commerce Clause; Section 5 of the Fourteenth Amendment, or that invaded the sovereignty of the states as guaranteed by the Tenth and Eleventh Amendments.

<sup>85</sup> Saikrishna B. Prakash and John C. Yoo, *'The Origins of Judicial Review'* (2003) 70 U.Chi.L. Rev. 887 <<http://scholarship.law.berkeley.edu/facpubs/1407>> accessed 7 April 2014.

<sup>86</sup> Saikrishna B. Prakash and John C. Yoo, *'The Origins of Judicial Review'* (2003) U.Chi.L. Rev. 887 ,<<http://scholarship.law.berkeley.edu/facpubs/1407>> accessed 7 April 2014.

judicial review power over legislative action in light of recent criticisms following court orders invalidating several pieces of legislation and decisions made by the current parliament.<sup>87</sup>

Prakash and Yoo further argue that each branch must interpret the Constitution for itself in the course of performing its own constitutional duties.<sup>88</sup> The courts must determine the constitutionality of the federal statutes they interpret and apply in cases brought before them; the president must determine the constitutionality of these statutes prior to taking care that they are faithfully executed; and both the president and congress must determine the constitutionality of the bills that they consider before making them law. This interpretation means that each branch of government should have its own check and balance in terms of constitutional interpretation that would be independent of the other branches. They theorize that the separation of powers doctrine creates three branches of government that bear independent obligations to interpret and enforce the constitution within their respective spheres.<sup>89</sup> However, it is generally accepted that the judiciary has the ultimate role in terms of constitutional interpretation. The only question that should be asked is whether the other arms of government are bound to accept the judiciary's

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<sup>87</sup> The speaker blamed the judiciary for interfering with debate on Division of Revenue Bill 2013 and also took issue with the court's ruling to retain Embu Governor Martin Wambora despite having been impeached twice by the Senate. See: Supreme Court Advisory Opinion Ref. No.2 of 2013; *Speaker of Senate & Another v A.G. & 4 Others* (2013) eKLR; Constitutional Petition 7 of 2014; *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others* (2014) eKLR; and Petition 518 of 2013; *Judicial Service Commission v Speaker of the National Assembly & 8 Others* (2014) eKLR in which a court ruling overruled parliament's censure of the judicial service commission on grounds that the parliamentarians violated an order stopping the debate. The speaker said the house would not obey such orders.

<sup>88</sup> Saikrishna B. Prakash and John C. Yoo, 'The Origins of Judicial Review' (2003) 70 U.Chi.L. Rev. 887 <<http://scholarship.law.berkeley.edu/facpubs/1407>> accessed 7 April 2014.

<sup>89</sup> Saikrishna B. Prakash and John C. Yoo, 'The Origins of Judicial Review' (2003) 70 U.Chi. L. Rev. 887 <http://scholarship.law.berkeley.edu/facpubs/1407> accessed 7 April 2014.

interpretation. This question shall be addressed in this thesis within the context of the Kenyan courts' exercise of its judicial review power over parliament under the current Constitution.

#### **1.10.2.1.2. THE ROLE IN A NASCENT DEMOCRACY**

Gloppen observes that the more central role for the courts and an increase in the scope for judicial activism has in some cases led to increased politicization of the courts, sometimes to the point of open conflict between political powerholders and the judiciary.<sup>90</sup> He specifically mentions Zimbabwe, Malawi, Uganda, Namibia and Zambia as examples where this has happened. In Kenya, such scenario has led to open defiance of court orders.<sup>91</sup> This is but one of the many battles that have been fought between the two arms and one parliamentarian actually cautioned that parliament was setting a bad precedent by inviting and encouraging anarchy through such open defiance of court orders.<sup>92</sup> On the other hand the Kenyan courts are always quick to cite the Constitution as the basis of their actions, “We have legalized everything happening and we’ve already put it in the Constitution. We have to live by what we decided.”<sup>93</sup>

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<sup>90</sup> Siri Gloppen, *How to Assess the Political Role of the Zambian Courts* (Chr. Michelsen Institute 2004) 3.

<sup>91</sup> Siri Gloppen, *How to Assess the Political Role of the Zambian Courts* (Chr. Michelsen Institute 2004) 5.

<sup>92</sup> Beatrice Elachi, ‘Rule of law on trial in supremacy clash’ *Daily Nation* (October 31, 2015). Senator Elachi wrote the article following the National Assembly’s defiance of a court order to halt impeachment proceedings against the Cabinet Secretary for Devolution and Planning, Ms. Anne Waiguru.

<sup>93</sup> Kennedy Marathi, ‘MPs tell judges to respect the legislature’ *Saturday Nation* (October 31 2015) Justice Majanja was speaking in response to accusations by the Senate and the National Assembly that the Judiciary had chosen to be on a warpath with the Legislature. The remarks were made at the Africa Colloquium of Legal Counsel to Parliament held in Mombasa, Kenya on October 31, 2015.

The judges in their role as guardians of the democratic process must strike a delicate balance between protecting the newly established democratic principles and freedoms vis-à-vis respecting the boundaries between the branches of power. Gloppen proposes that:

“On the other hand, it is important that judges know when they should remain silent or ‘passive’ (for example when a properly elected group or representatives, sanctions norms that the judges find unfortunate, but which are not self-serving or do not affect the procedural foundations of the democratic system). The questions of when and how to engage in judicial activism and when to exercise restraint, are particularly important to address for judiciaries in young democracies.”<sup>94</sup>

This thesis analyzes the exercise of the judicial review power by the Kenyan courts within the context of a country which introduced multi-party democracy within the last two decades<sup>95</sup> and only recently began to implement a new constitution that has brought with it a total change in the structures of government.<sup>96</sup>

Judicial reform is a key pillar in the establishment of democratic reform processes in Africa. It is therefore prudent to increase the capacity of the courts to contribute in the processes of democratic consolidation and social transformation.<sup>97</sup> Judicial review is often cited as the bedrock of democracy without which, not only the lives and liberty of the people would be in

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<sup>94</sup> Siri Gloppen, *How to Assess the Political Role of the Zambian Courts* (Chr. Michelsen Institute 2004) 5.

<sup>95</sup> The first multi-party elections in Kenya were held in 1992.

<sup>96</sup> The new Kenyan Constitution was promulgated in 2010 and the first elections under the new Constitution were held in 2013.

<sup>97</sup> Siri Gloppen, *How to Assess the Political Role of the Zambian Courts* (Chr. Michelsen Institute 2004) 1.



jeopardy, but also the democratic rights and competencies of one branch of government may be, with recklessness, put in jeopardy or rendered ineffectual by another branch.<sup>98</sup> Ginsburg<sup>99</sup> observes that we are in the midst of a global expansion of judicial power, and the most visible and important power of judges is that of judicial review. However, despite this fundamental shift in democratic practice and scholarship there exists little inquiry into questions about the expansion of judicial review, and more specifically the conditions leading to its establishment and the successful exercise of judicial power. This thesis examines where judicial review power of the Kenyan courts comes from, how it has developed, and what political conditions support its expansion and development.

## **1.11. CHAPTER BREAKDOWN**

### **1.11.1. CHAPTER ONE: INTRODUCTION**

It outlines the thesis background and defines the problem addressed as well as the chosen methodology. Moreover, it delineates the theoretical foundations underpinning the thesis as well as the rationale alongside evidence and parameters of the current context. This is done to emphasize the urgency of studying the problem to contribute towards its solution. The chapter further provides the historical background of the problem and the context within which it is studied.

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<sup>98</sup> Ajepe Taiwo Shehu and Mohammed Mustapha Akanbi, 'Modeling Separation for Constitutionalism: The Nigerian Approach' (2012) vol.3 Journal of Law, Policy, and Globalization 22.

<sup>99</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 10.

### **1.11.2. CHAPTER TWO: THEORETICAL FOUNDATIONS OF THE SEPARATION OF POWERS DOCTRINE AND IMPLICATIONS FOR JUDICIAL REVIEW OF LEGISLATIVE ACTION**

This chapter develops a conceptual framework for how courts, in general, should go about exercising their power of judicial review of legislative action in a way that enables them to adhere to the requirements of the separation of powers doctrine, while taking into account the legal and political constraints under which they must operate. It is based on the reasoning that although disputes between the political branches should ideally be resolved through the political process, judicial intervention remains necessary especially when the political process breaks down and is no longer self-correcting.<sup>100</sup> This is so even though intervention by courts may expose them to retaliation by the more powerful branches therefore making such intervention counterproductive.

### **1.11.3. CHAPTER THREE: THE EXERCISE OF JUDICIAL POWER UNDER THE INDEPENDENCE CONSTITUTION**

This chapter responds to the thesis's first research question: how have Kenyan courts exercised their power of judicial review as a check and balance on parliament's exercise of legislative power? It traces and examines the evolution of politicization of Kenyan courts in the post-independence era and how this affected their exercise of judicial review power as a restraint on the political arms of government<sup>101</sup> within the context of the separation of powers doctrine. This analysis provides the basis to determine the position of the post-independence Kenyan

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<sup>100</sup> Suzanne Prieur Clair, 'Separation of Powers: A New Look at the Functionalist Approach' (1989) 40 Case Western Law Review 331, 340.

<sup>101</sup> The executive and legislature are considered political in this context because they are composed of politicians who are elected into office by the citizens.

judiciary within the quadrant model developed<sup>102</sup> to assess how courts exercise their judicial power in relation to their prevailing legal and political constraints.

#### **1.11.4. CHAPTER FOUR: THE EXERCISE OF JUDICIAL POWER UNDER THE 2010 CONSTITUTION**

This chapter interrogates how the Kenyan courts have specifically exercised their power of judicial review of legislative action during the term of the first parliament under the 2010 Constitution (2013 – 2017). It responds to the second research question: ‘Are Kenyan courts effectively using their judicial review power to check against the abuse of legislative power by parliament?’ Using the conceptual framework developed in chapter two it assesses how individual courts balanced the prevailing legal and political constraints with a view to locating the Kenyan judiciary’s position within the four quadrants of the framework.

#### **1.11.5. CHAPTER FIVE: A COMPARATIVE ANALYSIS OF THE EXERCISE OF JUDICIAL POWER IN THE UNITED STATES AND SOUTH AFRICA VIS-À-VIS THE KENYAN CONTEXT**

This chapter examines whether, why and how the United States and South Africa have created a political environment that respects judicial independence, thus achieving the status of the Normatively Preferred Model Court (Court A). It does so in response to the third research question: How can this power of judicial review of legislative action be clarified, extended or modified to better achieve the objective of serving as a check and balance on parliament? Part A of the chapter is a conceptual framework and identifies the factors that determine the strength or weakness of the legal and political constraints under which a court operates. Part B examines the place of the

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<sup>102</sup> See discussions in Chapter Two of this thesis.

American and South African judiciaries in the constitutions, politics and practice of the two countries. It seeks to establish whether, how, and why they created a political environment that respects judicial independence hence enabling their courts to achieve the status of Court A. Both countries are examined with the objective of drawing out lessons for Kenya in terms of what can be done to enable Kenyan courts achieve the status of Court A: The Normatively Preferred Model Court. Part C concludes.

#### **1.11.6. CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS**

This chapter discusses the major findings as related to the exercise of judicial power under the Independence and 2010 Constitutions, as well as the United States and South Africa vis-à-vis the Kenyan context. The chapter also discusses how the study relates and contributes to existing theories on judicial review of legislative action within the context of the separation of powers doctrine. It concludes by interrogating the study limitations and research possibilities to help answer the research questions.

## CHAPTER TWO

### THEORETICAL FOUNDATIONS OF THE SEPARATION OF POWERS DOCTRINE AND IMPLICATIONS FOR JUDICIAL REVIEW OF LEGISLATIVE ACTION

#### 2. INTRODUCTION

The proper functioning of government depends upon the protection of the constitutional balance of power amongst the three arms of government, this is at the core of the doctrine of separation of powers. However, as discussed in chapter one, there exists neither a universal model of separation of powers nor separation that is absolute. Different states have developed distinctive models suitable to their systems of government and political contexts, but they are all built around Montesquieu's tripartite division of government functions.<sup>103</sup> Importantly, these three branches are independent and co-equal meaning that none can encroach on the functions of the other and that they are all of same rank. Moreover, in keeping with Montesquieu's concept of partial separation deliberated upon in the previous chapter, each branch's exercise of its powers is modified by a system of checks and balances.<sup>104</sup>

Restraint of the legislative power is exercised by the courts through their power of judicial review by which they can evaluate legislative actions and invalidate those they find to be

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<sup>103</sup> Montesquieu is credited with the establishment of the idea of the three branches of government and formulation of the tripartite division of government functions. See: Maurice J. Vile, *Constitutionalism and the Separation of Powers* (2<sup>nd</sup> Edition, Liberty Fund 1998) 63.

<sup>104</sup> The concept of partial separation emphasizes the importance of placing judicial and executive power in different hands while at the same time exercising the mutual balancing and restraining of the legislative and executive power. See: Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

unconstitutional.<sup>105</sup> The extent and manner of exercise of the power of judicial review by the courts in any given context is provided for under the respective laws and institutionalized legal rules, norms, and practices. If a court ignores and/or deviates from such laws, norms and practices this may prompt a loss in its legitimacy and they therefore serve as legal constraints on the courts.<sup>106</sup>

On the other hand, judicial review of legislative action has a direct impact on the implementation of a government's policies and programs for the benefit of its citizens and consequently entails deliberation on social, political, and economic issues. The resultant outcome can be labelled as the political consequences of judicial review which if ignored make the court vulnerable to political attack that may negatively impact its institutional security. Such political attack can be launched through the legislature using its various powers of restraint over the judicial arm of government such as: power of approval of appointment to or removal from office of judges; approval of budgets and rules affecting the courts' financial independence; and changes to laws on: security of tenure, remuneration, or courts' jurisdiction and powers. These political outcomes therefore serve as political constraints on the courts.<sup>107</sup>

As chapter one strives to demonstrate, the power of judicial review when exercised without taking into account its political consequences creates two problems: (a) the dangerous possibility

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<sup>105</sup> Over time, it has proven to hold the most effective methods of holding state organs to account for the power they exercise. See: Jenny Cassie and Dean Knight, 'The Scope of Judicial Review: Who and What May be Reviewed' <[http://www.vuw.ac.nz/staff/dean\\_knight/Cassie\\_Knight\\_Scope.pdf](http://www.vuw.ac.nz/staff/dean_knight/Cassie_Knight_Scope.pdf)> accessed 23 January 2017.

<sup>106</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>107</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

for a reckless court to interfere with policy choices parliament should be allowed to make; and (b) defeating the ends of justice by creating a scenario where courts issue orders against parliament that are not executed thereby acting in vain.

The political and legal constraints of judicial review of legislative action require that a court must be able to respond to each constraint without compromising its ability to respond to the other.<sup>108</sup> On the one hand the court must consider a wide range of contextual factors in foresight of the political consequences; and on the other it must consider the nature and permissible scope of judicial review. This requires an interdisciplinary approach that draws from both political and legal theory.<sup>109</sup> In this regard legal theorists have been challenged to ground normative theorizations of judicial review in descriptively accurate accounts of the political contexts in which constitutional courts operate.<sup>110</sup>

Considering the above, in this chapter I develop a conceptual framework for how courts, in general, should go about exercising their power of judicial review of legislative action in a way that enables them to adhere to the requirements of the separation of powers doctrine, while taking into account the legal and political constraints under which they must operate. This is based on the reasoning that although disputes between the political branches should ideally be resolved through

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<sup>108</sup> This balance has been used as a measure of performance of constitutional courts in legal and political terms. See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>109</sup> It has been noted that there has not been much interdisciplinary research in this area. See: Frank B. Cross, 'Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance' (1997) 92 *Northwestern University Law Review* 252.

<sup>110</sup> See: Barry Friedman, 'The Politics of Judicial Review' (2005) 25 *Law and Social Inquiry* 601.

the political process, judicial intervention remains necessary especially when the political process breaks down and is no longer self-correcting.<sup>111</sup> This is so even though intervention by courts may expose them to retaliation by the more powerful branches therefore making such intervention counterproductive. In this chapter, those legal and political constraints are viewed as being conceptually distinct but inter-related. What follows is an attempt to address the question of their interaction in relation to a court's capacity to simultaneously respond to both when exercising its power of judicial review of legislative action. The objective is to develop a conceptual framework to determine the extent to which a court can do so, within the confines of the doctrine of separation of powers.

In developing the conceptual framework, I build on the Roux model for assessing the performance of constitutional courts in legal and political terms.<sup>112</sup> It seeks a balance between: (a) the legal constraints emanating from institutionalized, legal rules, norms and practices deviation from which may trigger a loss in legal legitimacy; and (b) the political constraints deriving from the capacity of political actors to attack and undermine the courts' institutional independence. In this conceptualization, I adopt and utilize the Roux model's quadrant-based depiction of the legal and political constraints impacting on courts, modified specifically for courts exercising the power of judicial review of legislative action. Drawing from the theoretical foundations of the doctrine

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<sup>111</sup> Suzanne Prieur Clair, 'Separation of Powers: A New Look at the Functionalist Approach' (1989) 40 Case Western Law Review 331, 340.

<sup>112</sup> Theunis Roux developed the model to assess the achievements of the First South African Constitutional Court. See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).



of separation of powers and the functionalist approach to its interpretation by courts’, I present four types of courts corresponding to the four sectors of the quadrant and show how a court can balance the legal and political constraints to remain within, or move towards, the normatively preferred model court of judicial review of legislative action.

## **2.1. MAPPING OF THE LEGAL AND POLITICAL CONSTRAINTS IN JUDICIAL REVIEW OF LEGISLATIVE ACTION**

As discussed in chapter one, Montesquieu’s conceptualization of the doctrine of separation of powers emphasizes the importance of placing judicial and executive power in different hands and of the mutual balancing and restraining of the legislative and executive powers.<sup>113</sup> From this elementary model there have been many variants of the doctrine, but no standard separation of powers template has ever existed. Three considerations are noted to suggest the lack of a standard template<sup>114</sup>: firstly, no single canonical version that could have served as the standard template has been revealed in its intellectual history; secondly, pre-existing English models from which the doctrine evolved reveal that within a very broad range, a diverse arrangement would have been consistent with the doctrine; and thirdly, debates on all the diverse institutional arrangements pivoted on political considerations as opposed to overall compliance with some generally agreed upon formulation of the doctrine. It is within this context that all the leading scholars of the founding era of the doctrine developed different formulations of the doctrine and therefore supplied no single formula for the details of a properly composed government.<sup>115</sup>

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<sup>113</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

<sup>114</sup> John F. Manning, ‘Separation of Powers as Ordinary Interpretation’ (2011) 124 *Harvard Law Review* 1941, 1993.

<sup>115</sup> John F. Manning, ‘Separation of Powers as Ordinary Interpretation’ (2011) 124 *Harvard Law Review* 1941, 1994.

Although the different models of the doctrine which have emerged are all built around Montesquieu's tripartite division of government functions, they have significant divergence about how to characterize and classify the powers to be divided. This divergence has been brought about by variations in focus on at least five distinct, and at times conflicting, purposes associated with different strands of the doctrine:

“... (a) to create greater governmental efficiency; (b) to assure that statutory law is made in the common interest; (c) to assure that law is impartially administered and that all administrators are under the law; (d) to allow the people's representatives to call executive officials to account for the abuse of power; and (e) to establish a balance of governmental powers.”<sup>116</sup>

Judicial review of legislative action falls under all five purposes and over time it has proven to hold the most effective method of ensuring that state organs are accountable for the power they exercise.<sup>117</sup>

### **2.1.1. POLITICAL CONSTRAINTS OF JUDICIAL REVIEW OF LEGISLATIVE ACTION**

The exercise of the power of judicial review within the context of the doctrine of separation of powers is influenced by the political system in which the doctrine is being applied. Even though Montesquieu's treatise still forms the conceptual basis for the doctrine today, it was written when

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<sup>116</sup> W.B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to Adoption in the United States Constitution* (Tulane University Press 1965) 127,128.

<sup>117</sup> Jenny Cassie and Dean Knight, 'The Scope of Judicial Review: Who and What may be Reviewed' <[http://www.vuw.ac.nz/staff/dean\\_knight/Cassie\\_Knight\\_Scope.pdf](http://www.vuw.ac.nz/staff/dean_knight/Cassie_Knight_Scope.pdf)> accessed 31 February 2017.

there was no modern conception of democracy, the role of the state was quite limited, and there were few limitations on the powers of the executive.<sup>118</sup> The political context has significantly evolved with the emergence and dominance of the democratic system of governance.

However, the political economy of democratization varies among states and these political factors influence the application of the doctrine with specific regard to judicial review. Specifically, judicial review of legislative action has a direct impact on a government's ability to implement its envisioned social, political, and economic policies and programs. There is therefore a need for its exercise to be grounded in descriptively accurate accounts of the political contexts in which it's applied.<sup>119</sup> Failure to do so makes the courts vulnerable to attack by political actors in ways that would undermine their institutional independence. If a court chooses to ignore the political consequences of judicial review of legislative action, then the political arms of government can use the following constitutionally valid measures to attack it: instituting processes for removal of judges; reviewing downwards budget approvals; revising rules affecting the courts' financial independence; or amending laws on: security of tenure for judges, remuneration of judges, or courts' jurisdiction and powers. These political factors therefore serve as political constraints on the courts exercise of their power of judicial review of legislative action.

### **2.1.2. LEGAL CONSTRAINTS OF JUDICIAL REVIEW OF LEGISLATIVE ACTION**

Legally, judicial review of legislative action is based on the principle that where constitutional law places restrictions on legislative power, a duty to declare the law implies a duty

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<sup>118</sup> Yash Ghai, 'Dilemmas for the Judiciary' *Nairobi Law Monthly* (Vol.6, Issue No.6 December 2015) 49.

<sup>119</sup> Barry Friedman, 'The Politics of Judicial Review' (2005) 84 *Texas Law Review* 257.

to declare when such restrictions have been violated whether by the legislature or anyone else.<sup>120</sup> Courts are therefore obligated to evaluate the decisions of parliament and to invalidate those actions and decisions they find to be unconstitutional. As shown in the preceding chapter's analysis of the seminal case of *Marbury v. Madison*<sup>121</sup>, no legislative act contrary to the constitution can be valid and to deny that is to propose that the representatives of the people are superior to the people they represent.

However, the courts' exercise of their power of judicial review of legislative action must be subject to rules guiding when a court can step in to determine the constitutional validity of legislative action to avoid a court being guilty of usurping the law-making role reserved for parliament under the doctrine of separation of powers. There may be questions that are purely political in nature and therefore require political answers as opposed to legal sanctions.<sup>122</sup> Therefore, in any jurisdiction there are institutionalized legal rules, norms, and practices that govern the manner and extent to which courts can exercise their power of judicial review. These legal rules, norms and practices serve as the legal constraints on the courts' exercise of their power of judicial review of legislative action. Failure to observe them can occasion a loss in the legitimacy of a court's decision.

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<sup>120</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 104.

<sup>121</sup> 1 Cranch 137 (1803).

<sup>122</sup> J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press 1990) 159.

### 2.1.3. MAPPING THE LEGAL CONSTRAINTS

The concept of law as a constraint on adjudication has its origins in the command theory of law, also known as legal positivism, which views laws as the commands of the state sovereign. Legal positivism views every law or rule as a command by the state sovereign to a person in a state of subjection to the sovereign who is therefore obligated to follow that command or face a punishment.<sup>123</sup> The legal positivist tradition of judgement according to law presumes the need for judicial discretion to be constrained by either formal legal rules or principles; or constraints flowing from the nature of the judicial function.<sup>124</sup> Judges are therefore bound by these constraints in so far as they restrict the forms of reasoning they can legitimately use in their arguments while deciding a case. Failure to observe such legal constraints would result in a loss of legitimacy of their judgements.

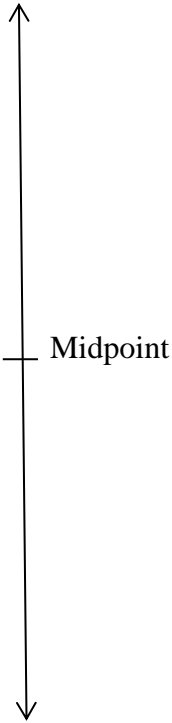
For purposes of the development of my conceptual framework, all courts having the power of judicial review of legislative action can be thought of as occupying a point on the following vertical axis; vis-à-vis the legal constraints influencing them:

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<sup>123</sup> J.W. Harris, *Legal Philosophies* (Oxford University Press, 2<sup>nd</sup> Edition, 2004) 28.

<sup>124</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

**LEGALLY CONSTRAINED**



**LEGALLY UNCONSTRAINED**

The axis represents the theoretical range of courts in respect of the legal constraints under which they operate. However, it must be emphasized that the position of a court along the axis is a relative position determined by considering the circumstances of the courts in relation to the circumstances of other courts.

The relative strength or weakness of legal constraints varies between jurisdictions. This is primarily due to variations in legal cultures within different states. A legal culture is defined as, "... a specific way in which values, practices, and concepts are integrated into the operation of

legal institutions and the interpretation of legal texts.”<sup>125</sup> Within the context of this chapter, it is viewed as the extent to which the rules and concepts of law have been integrated within the society in which they are to be applied.

There are those societies in which these legal rules and concepts are heavily and extensively integrated and such have strong legal cultures, where the rule of law is supreme. Such societies tend to have long established and codified systems of law. Within such context a court’s main task is to maintain the existing judicial reasoning about the law, and this is achieved through strict observance of the established legal rules, norms, and practices.<sup>126</sup> These courts are thus strictly constrained by the prevailing legal rules, norms, and practices. In undertaking judicial review of legislative action such courts are guided by a formal judicial reasoning. Judges are expected to rely solely on the authority of a settled rule to arrive at their decision on a matter even where there are strong moral, economic, political, institutional, or other social considerations pointing to a different outcome.<sup>127</sup> Such a formalistic court invokes the separation of powers doctrine relying on a background norm of strict separation of powers which is grounded upon the belief that each branch of government operates with and maintains maximum independence.<sup>128</sup> Such a court

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<sup>125</sup> John Bell, ‘English Law and French Law- Not so Different?’ (1995) 48 (Part 2) *Curr Leg Probl* 63 <[https://doi.org/10.1093/clp/48.Part\\_2.63](https://doi.org/10.1093/clp/48.Part_2.63) > accessed 15 March 2017.

<sup>126</sup> Martin Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237.

<sup>127</sup> P.S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987) 1.

<sup>128</sup> Suzanne Prieur Clair, ‘Separation of Powers: A New Look at the Functionalist Approach’ (1989) 40 *Case Western Law Review* 331.

therefore favors unyielding enforcement of a strict norm of separation of powers even where this may yield inefficiencies and ignores the reality of political relationships.<sup>129</sup>

On the other hand, there are those societies which do not have a strong rule of law tradition; where the legal rules, norms and practices are not strongly institutionalized and therefore do not constrain judicial decision making to a significant degree. Such societies have a weak legal culture. They mostly fall into the category of fragile or transitional democracies where there is no tradition of respect for judicial independence.<sup>130</sup> The fact that they are in a state of transition from dictatorships to civil democratic governments means that they are still vulnerable to destabilizing levels of violence which has a claw back effect on the gains made towards successful transition. Such countries usually receive relatively good ratings for electoral processes, political pluralism, and freedom of association, but achieve very low scores in rule of law and civil liberties.<sup>131</sup>

In such context the tension between law and politics when it comes to judicial determination does not arise and the overriding expectation from the political arms of government is that the courts will decide politically sensitive and/or controversial cases in line with the desires

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<sup>129</sup> It has also been noted that such strict rules have the shortcoming of inflexibility for each branch of government when it must deal with changing political realities and in-fact that the formalist approach often ignores the reality of political relationships. See: Suzanne Prieur Clair, 'Separation of Powers: A New Look at the Functionalist Approach' (1989) 40 Case Western Law Review 331.

<sup>130</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>131</sup> 'Breaking the Cycle of Violence: The Role of Democracy, Rule of Law and Human Rights' <[http://freedomhouse.org/sites/default/files/inline\\_images/Taft\\_World\\_%20Bank\\_Apr09.pdf](http://freedomhouse.org/sites/default/files/inline_images/Taft_World_%20Bank_Apr09.pdf)> accessed 16 March 2017.



of the dominant political group.<sup>132</sup> These courts are therefore legally unconstrained and are actually free to participate as blatant political actors, adjusting their decisions to the desired political outcome. Overall, this only serves to further entrench a weak legal culture since (ironically so) a court's political calibration of its decisions towards the policy preferences of the political arms of government does not help build a political culture of respect for judicial independence; neither does it help build a legal culture in which legal rules and concepts exert any meaningful constraints on the exercise of judicial discretion.<sup>133</sup>

The problem to be addressed in any system of government is how a court can strike a balance between the political and legal constraints while maintaining some fidelity to the doctrine of separation of powers. However, formulating a precise definition of executive, legislative, and judicial functions has been a perennial problem for modern governments. Even where this is specifically provided for in the text of a constitution, there is still the hurdle of surmounting the logical difficulties of defining the power of each arm of government and the practical and political consequences of an inflexible application of their delimitation.<sup>134</sup> As earlier discussed and emphasized, the complexities characterizing modern governments make a rigid conception of the doctrine a hindrance that would make modern government impossible.<sup>135</sup> Vile asserted that the

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<sup>132</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>133</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>134</sup> Per Dixon, J. in: *Victorian Stevedoring and General Contracting Co. Pty. Ltd. & Meakes V. Dignan* (1931) 46 CLR 73, 91.

<sup>135</sup> Felix Frankfurter, *The Public and its Government* (Yale University Press 1930).

more successful varieties of the doctrine have endured because they were grafted with the theory of balanced government, or one of its derivatives such as mixed government, and the concept of checks and balances so as to produce a multi-functional political structure.<sup>136</sup>

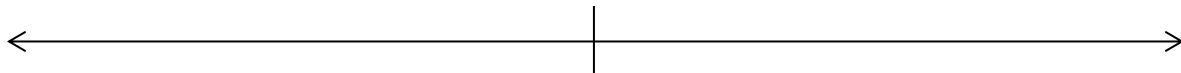
#### **2.1.4. MAPPING THE POLITICAL CONSTRAINTS**

Judicial review of legislative action essentially requires a court to consider social, political and economic issues; they form the basis of such review. As seen in the discussion of the Indian case of *Mandal Commission*<sup>137</sup> in chapter one, these issues are often emotionally charged and may have consequences for future generations. A court's disregard of such political consequences of its judgement can trigger its attack by political actors in the other arms of government who are affected by these consequences. It is this insulation from, or susceptibility to, such political attack that determines the relative weakness or strength of the political constraints under which it must operate.

Using the same approach used to map legal constraints on a vertical axis, the political constraints can be represented on a horizontal axis as follows:

**POLITICALLY  
UNCONSTRAINED**

**POLITICALLY  
CONSTRAINED**



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<sup>136</sup> M.J.C. Vile, *Constitutionalism and Separation of Powers* (Liberty Fund, 2<sup>nd</sup> Edition 1998) 291.

<sup>137</sup> (1992) Supp (3) SCC 501.

The strength or weakness of the political constraints is relative to the court's insulation from, or susceptibility to political attack. In this context political attack refers to constitutionally valid actions that can be undertaken by political actors to undermine the independence of the court and subject it to political control. For example, the executive and the legislature may utilize their powers under the doctrine of separation of powers to: (a) remove from office the concerned judges; (b) reduce the budget allocation granted to the judiciary; and (c) pass constitutional amendments that would remove judges' security of tenure or change the courts' jurisdiction and powers. All these actions serve to undermine the court's independence from political control and condense its capacity to act as a check on the abuse of political power by either the executive or the legislature.<sup>138</sup>

The degree of a court's independence is directly related to the degree of its insulation from political attack. Where a court is vulnerable to political attack, such as those courts in weak legal cultures discussed above, its institutional security is low and constantly threatened by the political arms of government. This makes it overly dependent on the other arms of government for its very survival; such a court is therefore politically constrained. Conversely, where a court operates within the context of a strong legal culture with a long tradition of respect for judicial independence, such a court has a high degree of institutional security and can withstand political attacks by the other arms of government. This type of court is therefore politically unconstrained.

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<sup>138</sup> See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

Therefore, a court that has strong institutional independence and is able to assert its judicial role while withstanding political attack is strongly insulated<sup>139</sup> and thus politically unconstrained; whereas a court with weak institutional independence and therefore non-assertive to its external political environment is susceptible to political attack and thus politically constrained. It should be noted that a court's relative degree of insulation from political attack consists not in its ability to avoid such attacks but rather in its ability to withstand such attacks when they do happen.

Under the Bangalore Principles of Judicial Conduct<sup>140</sup> a judge is required to be free from inappropriate connections with, and influence by, the executive and legislative branches of government. Therefore, a court that is politically constrained is a court which does not meet the threshold for judicial independence in both its individual and institutional aspects since it is subject to undue political control. This may further lead to a loss in not only its institutional independence but also a corresponding loss in its legitimacy.

## **2.2. APPLICATION OF THE ROUX QUADRANT MODEL IN MAPPING THE LEGAL AND POLITICAL CONSTRAINTS IN JUDICIAL REVIEW OF LEGISLATIVE ACTION**

Theunis Roux in his seminal publication, 'The Politics of Principle: The First South African Constitutional Court, 1995 – 2005'<sup>141</sup> introduced a quadrant-based depiction of the legal

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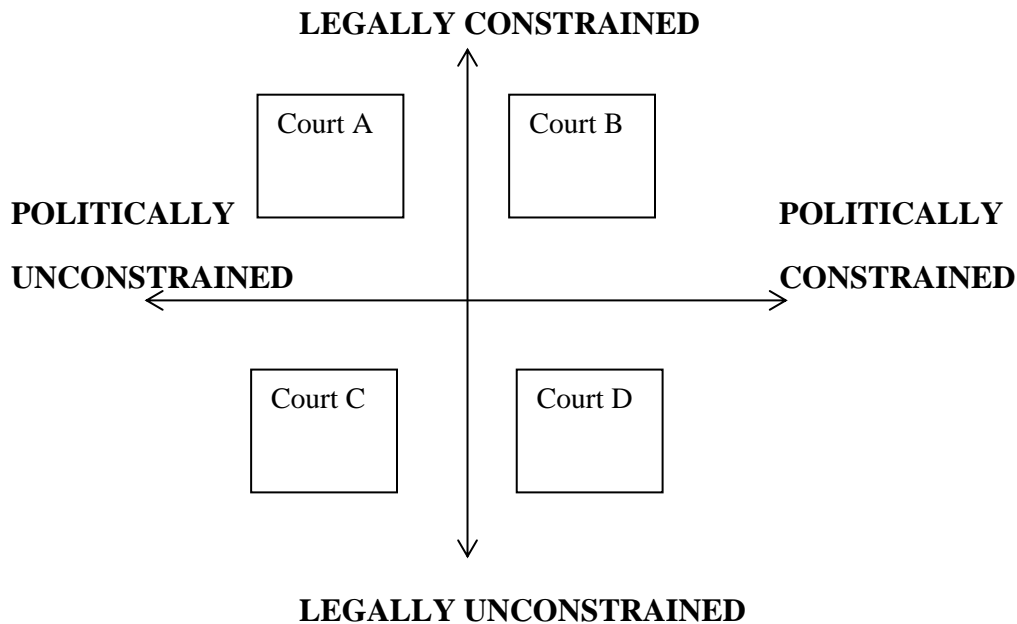
<sup>139</sup> This means that the court successfully take on whatever political repercussions its decisions might trigger; it can deal with politically controversial cases and still remain independent. See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>140</sup> The Bangalore Principles of Judicial Conduct (2002)  
<[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)> accessed 7 February 2017.

<sup>141</sup> (Cambridge University Press 2013).

and political constraints impacting on constitutional courts and set out the factors according to which a court's position on the quadrant may be mapped. The objective of Roux's work was to measure the achievements of the South African constitutional court under Chief Justice Arthur Chaskalson. I utilize a similar approach to map the legal and political constraints impacting on courts with powers of judicial review of legislative action. Having placed the legal constraints on the vertical axis and the political constraints on the horizontal axis in the preceding discussions, I shall now derive a quadrant adapted to determination of how courts exercise their power of judicial review of legislative action in relation to their prevailing legal and political constraints.

When the legal and political constraints are plotted on a graph, all courts with a power of judicial review of legislative action can be thought of as occupying a point on the quadrant below:



### **2.2.1. COURT A: THE NORMATIVELY PREFERRED MODEL COURT**

Court A represents a court which is legally constrained but politically unconstrained. This means that the court is insulated from political attack and therefore has the independence it requires

to carry out its constitutional mandate within the framework of the doctrine of the separation of powers. At the same time, being legally constrained, such a court operates within the constraints of legal rules, norms, and practices which when adhered to ensure that its judgements have legitimacy. I thus propose it as the model and normatively preferred court in judicial review of legislative action.

Such a court exists in mature constitutional democracies where the legal rules, norms, and practices constrain the exercise of judicial discretion to a significant level whereas all the political actors understand and respect the need for judicial independence.<sup>142</sup> The tension between law and politics in such a system of government recedes into the background only surfacing in isolated cases when an emotionally hyper charged and controversial case brings it to the fore. However, even in such instances the courts are often able to justify their decisions in a manner acceptable to both the legal fraternity, thereby retaining legal legitimacy; and, to the political actors therefore avoiding political attack which would otherwise undermine its institutional independence. It follows that, even though Court A is politically unconstrained this does not mean that it should ignore the political consequences of its judgement. Insulation from political attack does not warrant its determining a case in isolation of the political realities since this would result in the earlier highlighted problem of issuance of politically illegitimate and unenforceable orders or the abstract creation of ‘paper rights’ as discussed in chapter one.

Insulation from political attack is an indicator of a relatively strong and independent judiciary in keeping with the doctrine of separation of powers. In such cases even when the

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<sup>142</sup> W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press 2007) 5.

decision of the court eventually suffers from a loss in legitimacy this rarely translates into a loss of judicial independence because the respect of its independence by the political arms of government is such as to make it strong enough to withstand any attempted political attack as a result of a loss of legitimacy.<sup>143</sup> Courts operating within such a system of government similarly place emphasis on the functionality<sup>144</sup> of the coordinate branches of government when exercising their power of judicial review of legislative action.<sup>145</sup> Functionalism tends to validate actions by other arms of government as long as they preserve an appropriate balance between the coordinate arms, even if this entails rejection of detailed procedural requirements of a specified rule, norm, or practice. It emphasizes flexibility and balancing of powers by examining the entire framework of relationships between branches with a focus on balance and not separation of their powers. Therefore, Court A adopts such functionalist approach in its determination of such a case within the context of the doctrine of separation of powers.

A functionalist court as described above in its determination be guided by the fact that a constitution is a 'living' document and should be read as a broad statement of principle rather than as a detailed code. It is on this basis that it is argued that even if one wished to read into it an unwritten separation of powers principle, it would be difficult, if not impossible, to identify a

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<sup>143</sup> See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>144</sup> Suzanne Prieur Clair, 'Separation of Powers: A New Look at the Functionalist Approach' (1989) 40 *Case Western Law Review* 331, 332

<sup>145</sup> John F. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 *Harvard Law Review* 1941, 1942, 1943.

universally agreed upon external template for the appropriate mix of separation and blending of powers amongst the three branches of government. This is the basis upon which it is emphasized that the separation of powers to be respected is that which is established by the constitution rather than try to impose some grand theory upon the document.

Functionalism places emphasis on standards and primarily examines the constitutional purposes as derived from the constitutional text and original understanding of the constitution makers. It thus validates actions by other arms of government as long as they preserve an appropriate balance between the three coordinate arms. Moreover, in determining whether the core function of a branch has been impermissibly interfered with, the functionalist test emphasizes flexibility and balancing by examining the entire framework of relationships between branches.<sup>146</sup> This is because functionalists view the constitution as emphasizing balance and not separation of powers, thus placing overvaluation on general constitutional purposes.<sup>147</sup> Where the constitution is silent on the manner of exercise of a power by an arm of government, functionalists argue that the law allows the legislature to determine how best the powers in question shall be exercised.<sup>148</sup> Court A would therefore task itself with ensuring that the legislature has respected a broad background purpose to establish and maintain a rough balance or creative tension amongst the three branches.

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<sup>146</sup> Suzanne Prieur Clair, 'Separation of Powers: A New Look at the Functionalist Approach' (1989) 40 Case Western Law Review 331, 332

<sup>147</sup> John F. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 Harvard Law Review 1941, 1951.

<sup>148</sup> John F. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 Harvard Law Review 1941, 1951.



Under the functionalist approach it is not sufficient to merely demonstrate that a statute regulates or structures the exercise of another branch's power. It must be shown that the challenged branch's action affects those powers in a manner or to a degree that the constitution otherwise prohibits.<sup>149</sup> In its judicial review of legislative action Court A's functionalist analysis would therefore begin by examination of whether the act in question has impermissibly prevented one branch from accomplishing its constitutionally assigned functions. This requires a determination of what functions of each branch are involved with the disputed act and how they are realistically affected.<sup>150</sup> Where the action does not contradict or effectively reallocates power from its specified branch then the court should not invalidate such action by reading abstract notions of separation of powers into otherwise open-ended clauses.

As earlier emphasized, it must also be noted that such determination is always done within a political context and the courts must respect the political realities of the day and not make their determination in isolation of this fact nor subscribe to abstract legal philosophies that would lead them to judgements that may be academically valid but are realistically unenforceable or politically illegitimate. Muigai notes that<sup>151</sup>,

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<sup>149</sup> John F. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 Harvard Law Review 1941, 1942, 1943.

<sup>150</sup> Suzanne Prieur Clair, 'Separation of Powers: A New Look at the Functionalist Approach' (1989) 40 Case Western Law Review 331, 332

<sup>151</sup> Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kivutha Kibwana, (ed.), *Law and the Administration of Justice in Kenya* (ICJ Kenya 1992) 93.

“To begin with the courts in constitutional cases face issues that are inescapably ‘political’ in that they involve a choice between competing values and desires, a choice reflected in the legislative or executive action in question which the court must either condemn or condone.”

The doctrine of separation of powers, as discussed in chapter one, reflects many decisions about how to allocate and condition the exercise of sovereign power and it is the role of the courts to determine where, how, or to what degree these powers are in fact separated. Functionalism is thus proposed for the normatively preferred court, Court A, because it has this inherent uncertainty of outcome which encourages problem-solving negotiations between political actors which in turn helps ensure that political disputes are resolved in the political process, leaving the courts as a last resort measure for times when political processes break down.<sup>152</sup>

When undertaking this role, the courts must exercise their discretion in the knowledge that a constitution is a political compromise and while some articles may speak in specific terms about the locus of a given power and the way it is to be exercised, other provisions are more open ended and indeterminate. No ‘one size fits all’ theory can do them justice and it is argued that any approach that tries to elevate a general separation of powers doctrine above the many specifics of the constitution’s power-allocating provisions is a contradiction of the background purposes and compromises inherent in a constitution.<sup>153</sup>

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<sup>152</sup> Suzanne Prieur Clair, ‘Separation of Powers: A New Look at the Functionalist Approach’ (1989) 40 Case Western Law Review 331, 332.

<sup>153</sup> John F. Manning, ‘Separation of Powers as Ordinary Interpretation’ (2011) 124 Harvard Law Review 1941, 1945.

### 2.2.2. COURT B: THE HYPOTHETICAL ZERO-SUM COURT

Court B represents a court that is both legally and politically constrained. This creates a relationship in which a gain for one side entails a corresponding loss for the other side; a zero-sum game.<sup>154</sup> The opposite pull of the legal and political constraints influencing a court makes it very difficult for a court to arrive at a judgement that does not result in a loss in either political or legal terms. Therefore, a decision which complies with the political constraints results in a loss of legal legitimacy whereas a decision that complies with the legal constraints results in political attack undermining the judiciary's institutional independence.<sup>155</sup>

Based on the foregoing I propose that the existence of such a court would be theoretical at best since the relationship between the legal and political factors impacting on a court is one of constant interaction and the push and pull between the two factors cannot be indeterminate. The nature of their interaction is such that at any given point in time the legal factors impacting on a court are specified in relation to the political ones and vice-versa; meaning one set of constraints will always be weaker or stronger in relation to the other. As Roux concluded, “[l]aw and politics cannot be in a permanent state of contradiction.”<sup>156</sup>

Moreover, the nature of politics is one of aligned interests and therefore when a case of judicial review of legislative action is being determined there can be instances when the desired

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<sup>154</sup> Definition of Zero-Sum, <<https://www.merriam-webster.com/dictionary/zero%E2%80%93sum>> accessed 13 February 2017.

<sup>155</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>156</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

political outcome is justifiable even within a strong legal culture. It is not necessarily the case that a judgement that has the desired political outcome results in a loss of the court's legal legitimacy. Conversely it cannot also be the case that a judgement that strictly adheres to set legal rules, norms, and practices to the exclusion of political factors would automatically result in an attack on the court by political actors. Alternatively, it is also possible for the court to avoid politically controversial cases to allow the matter to be settled through the political process, without losing its legal legitimacy.<sup>157</sup> Furthermore, the interaction between the legal and political constraints is both context and case specific. The political context in relation to the legal constraints of any given case can always be distinguished. It cannot be that in all cases the legal and political constraints are in a state of constant contradiction.

I therefore submit that the existence of Court B is purely hypothetical and best suited for theorizing on how courts in general should exercise their power of judicial review of legislative action within the confines of the doctrine of separation of powers. Court B has little or no practicability in terms of its application within modern democratic systems of government.

### **2.2.3. COURT C: THE DANGEROUS POSSIBILITY**

Court C represents a court that is both legally and politically unconstrained. Such a court exists in the context of a system of government that has a weak legal culture where legal rules, norms and practices are not institutionalized and/or guaranteed. Judges sitting in such a court are therefore not constrained by legal factors in their determination of a case of judicial review of legislative action and are free to make their judgement according to their own policy preferences.

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<sup>157</sup> H.W. Perry Jr. *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press 1991).

It is in such a court that the problem highlighted in chapter one, "...the dangerous possibility for a court's unwarranted interference with policy choices democratic majorities should be allowed to make..."<sup>158</sup> is most likely to be encountered.

Moreover, Court C is insulated from political attack and is therefore politically unconstrained. In such a context the court can proceed to arrive at a decision based solely on the judge's personal policy preferences without the looming threat or consequences of political attack by the legislature. In this case the judge is supreme and is unshackled from legal constraints on the one hand, and from political constraints on the other. The political outcome as well as the legal legitimacy of a judgement from Court C is therefore entirely dependent on the judge's policy preferences. Such a judgement is viewed as a rebuke against the sitting government and is often labelled as judicial activism.

Judicial activism is a term used in public debate about court decisions that have been seen to encroach on the jurisdiction of the other two arms of government. However, there is no single definition that has been arrived at that was acceptable to all in legal scholarship mainly because of its multi-dimensional nature. Canon<sup>159</sup> identified and described six dimensions of judicial activism.<sup>160</sup> For the present argument the dimensions that are important are: (a) the degree to which

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<sup>158</sup> Refer to the problem statement of this thesis.

<sup>159</sup> Bradley C. Canon, 'Defining the Dimensions of Judicial Activism' (1983) 66 *Judicature* 236,239.

<sup>160</sup> The six dimensions are: (a) The degree to which policies adopted through democratic processes are judicially invalidated; (b) The degree to which earlier court decisions, doctrines or interpretations are altered; (c) The degree to which constitutional provisions are interpreted contrary to clear language and original intent; (d) The degree to which judicial decisions make substantive policy rather than preserve democratic processes; (e) The degree to which the judiciary eliminates discretion of other governmental actors and makes policy itself; and (f) The degree to which judicial decisions preclude serious consideration of governmental problems by other political actors.

policies adopted through democratic processes are judicially invalidated; (b) the degree to which judicial decisions make substantive policy rather than preserve democratic processes; (c) the degree to which the judiciary eliminates discretion of other governmental actors and makes policy itself; and (d) the degree to which judicial decisions preclude serious consideration of governmental problems by other political actors. In each of these instances it is evident that such a court is interfering with policy choices that democratic majorities should be allowed to make. Doing so is an active breach of the doctrine of separation of powers and encroachment on the law and policy making function of parliament.

When judges in Court C take any of the above-mentioned four courses of action they are in essence exercising their discretion to elevate their determination on a given issue above that of either: (i) the people – where democratic processes are judicially invalidated; (ii) other government actors – where the judiciary goes ahead to make policy itself; or (iii) other political actors – where the judiciary precludes serious consideration of governmental problems by other political actors such as the opposition parties who don't have a majority in parliament, or are even not represented in the sitting parliament.<sup>161</sup> Court C is therefore the least preferred court in regards to judicial review of legislative action.

However, it must also be noted that within the context of a democratic system of government the courts play a central role in shaping the processes of legal and political reform to establish a civil, constitutional, and democratic government with the courts as the main guardians of the constitution and the rule of law.<sup>162</sup> The more central role of the courts increases the scope

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<sup>161</sup> Bradley C. Canon, 'Defining the Dimensions of Judicial Activism' (1983) 66 *Judicature* 236,239.

<sup>162</sup> Siri Gloppen, *How to Assess the Political Role of the Zambian Courts* (Chr. Michelsen Institute 2004) 3, 5.

for judicial activism which in some cases leads to increased politicization of the courts to the point of open conflict between political power holders and the judiciary. When this happens, it erodes the insulation from political attack that is otherwise enjoyed by Court C. In order to avoid this and to retain their insulation such courts may therefore seek to consolidate their position through judicial self-limitation.<sup>163</sup> This is also not desirable since it opens up the court to the possibility of its not being free of both individual or institutional connections with, and influence by, political actors in the other arms of government. Such a scenario greatly undermines judicial independence<sup>164</sup> and hinders the judiciary's effective exercise of its oversight role to guard against the abuse of power by the other arms of government under the doctrine of separation of powers.

#### **2.2.4. COURT D: THE WORST DEVIATION FROM THE DOCTRINE**

Court D represents a court that is politically constrained but legally unconstrained. In such a court, whereas the legal rules, norms, and practices exert relatively little constraint on judges; they are very vulnerable to political attack. Such a court exists in the context of a newly established judiciary in a fragile or transitional democracy with no tradition of respect for judicial independence.<sup>165</sup> This means that any decision by Court D can be rejected by political actors who have both the capacity and the will to attack the court in a manner that results in the deflation of its individual and institutional independence. This is primarily because the political actors have

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<sup>163</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>164</sup> The Bangalore Principles of Judicial Conduct (2002)

<sup>165</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

the simple option of removing recalcitrant judges and replacing them with amenable judges. Court D is the court most vulnerable to political attack and eventual capture by political actors.

Generally, such courts tend to operate within a political atmosphere that expects the court to decide on politically controversial cases in line with the desired political outcome of the dominant political group.<sup>166</sup> Such a court may therefore be conspicuously dependent on the political arms of government which greatly hinders its exercise of its oversight role over parliament through judicial review of legislative action. Court D is therefore the worst deviation from the tenets of the doctrine of separation of powers.

Moreover, a judge in Court D cannot be free from inappropriate connection with, and influence by, the executive and legislative branches of government; without facing the imminent threat of political sanctions. As discussed above, the political actors have the option of appointing agreeable judges to the bench to guarantee judgements that are favorable to and supportive of the dominant political regime of the day. Politically controversial cases do not pose a problem for Court D since its determination is guided by the desired political outcome irrespective of the corresponding legal legitimacy, or lack thereof. Such a court evidently does not meet Montesquieu's basic principle of placing judicial and executive power in different hands and of the mutual balancing and restraining of the legislative and executive power.<sup>167</sup>

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<sup>166</sup> Gretchen Helmke, *Courts under Constraints: Judges, Generals and Presidents in Argentina* (Cambridge University Press 2005).

<sup>167</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.



### 2.3. IMPLICATIONS FOR JUDICIAL REVIEW OF LEGISLATIVE ACTION

Judicial review of legislative action should not be viewed purely in terms of a contest between the judiciary and the legislature whereby the only available outcome is either the constitutional validation or invalidation of those actions. It should be noted that the courts also have the role of complementing the law making function of parliament by interpreting the laws to ensure they implement their purpose rather than the letter of the law where the two diverge.<sup>168</sup> This is because legislatures enact laws to fulfil a specific purpose within the context of a limited time span<sup>169</sup> and therefore at times they do not have the time to deliberate or foresee how those laws shall be applied over time. The laws thus passed will never perfectly capture the purposes that inspired their enactment within the specific statutes hence the need for judicial interpretation.

Judicial review of legislative action is a necessary check and balance provided for within the framework of the doctrine of separation of powers as applied in modern democratic systems of government. However, for it to be effective there is a need for procedural mechanisms that define how the courts can exercise it. This is best achieved when such mechanisms are defined within the constitutional order that grants executive, legislative, and judicial actors their powers and the manner in which they should be exercised.<sup>170</sup> It is such mechanisms that help a court negotiate the

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<sup>168</sup> John F. Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 Harvard Law Review 1941, 1972.

<sup>169</sup> The lifetime of the sitting parliament before the next general elections; this is usually a five year period in most modern democracies.

<sup>170</sup> Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the new Constitution Enhance Government Accountability?' (2011) 18 Indiana Journal of Global Legal Studies 341.

legal and political constraints impacting on it so as to remain within, or move towards, being within the realm of the normatively preferred model court (Court A) as described above.

When there is no framework within which judicial review of legislative action is done then the issue of legitimacy arises and parliament can contest the exercise of this judicial power since, when viewed in contrast to the exercise of legislative power, it is exercised by judicial officers who are not elected by, and therefore not accountable to, the citizens.<sup>171</sup> It provides a means of enhancing government accountability within the framework of the doctrine of separation of powers. The doctrine simply advocates for the prevention of tyranny through the allocation of excessive power on any one person or body, and the check on one power by another.<sup>172</sup>

However, it must always be borne in mind that complete separation of powers with no overlaps or coordination between the branches is not conducive to the proper function of government. The emphasis should always be on cooperation rather than separation in constant interchange of give and take between the three branches to ensure optimum functionality of the government as a whole. Courts operating within the realm of the normatively preferred model court (Court A) should always strive to maintain a balance between stability and flexibility since the law must be stable and yet it cannot be still.<sup>173</sup>

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<sup>171</sup> Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the new Constitution Enhance Government Accountability?' (2011) 18 *Indiana Journal of Global Legal Studies* 341.

<sup>172</sup> Yash Vyas, 'The Independence of the Judiciary: A Third World Perspective' (1992) 11 *Third World Legal Studies* 127.

<sup>173</sup> Roscoe Pound, *Law Finding through Experience and Reason* (University of Georgia Press 1960) 13.

Above all, it is here reiterated that the extent to which a court may intervene in the functions of other branches of government must be clearly delineated and the limits of such judicial power acknowledged.<sup>174</sup> This is especially due to the absence of direct proper accountability and safeguarding of the judiciary from political processes and the question always remains: how far is too far? How would judges react if the legislature passed a resolution dictating how the court should construe a piece of legislation, or if the executive directed the way a case must be decided? These are questions that judges should have at the back of their minds when laying down the dos and don'ts for future action regarding judicial review of legislative action.<sup>175</sup> This helps in demarcating the point at which the court's intervention moves from judicial oversight and becomes usurpation of power in breach of the doctrine of separation of powers.

Also, it is not possible or indeed desirable for a court to ignore political and social realities, especially when it comes to judicial review of legislative action. To do so is self-delusion.<sup>176</sup> The courts must always have regard to the results achieved socially as part of the process of arriving at the justice of the individual case. Judicial review is a measure of last resort and courts should be reluctant to go against something that is the express wish of the legislature, especially where such wish is subjected to the rules governing the proceedings in parliament.<sup>177</sup>

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<sup>174</sup> Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?' (2015) 35 *Journal of Law, Policy and Globalization* 95, 107.

<sup>175</sup> V.R. Krishna Iyer, *Law and the People* (Peoples Publishing House 1972) 45.

<sup>176</sup> Wolfgang Friedman, 'Judges, Politics and Law' (1951) 8 *Can. Bar. Rev.* 811,837.

<sup>177</sup> Terence Daintith and Allan Page, *The Executive in the Coalition: Structure, Anatomy and Internal Control* (Oxford University Press 1999) 248.

The questions around the framework within which the question as to how and when the courts may intervene in legislative action do not have ready answers and appropriate answers can only emerge in the course of time, through the lesson of experience by way of actual cases.<sup>178</sup> In the next chapter, I use my conceptual framework to assess the exercise of the power of judicial review of legislative action by Kenyan courts in specific cases within different political regimes with a view to establishing how they handle the law and politics tensions influencing them and whether they fit within the realm of the normatively preferred model court (Court A) as described above, or any of the other three courts in the quadrant.

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<sup>178</sup> J.B. Ojwang, 'Separation of Powers under Kenya's Constitution: Emerging Relationship between the Legislature and the Judiciary' (Annual Judges Colloquium, Mombasa, August 2016) 8.

## CHAPTER THREE

### THE EXERCISE OF JUDICIAL POWER UNDER THE INDEPENDENCE CONSTITUTION

#### 3. INTRODUCTION

The judiciary ideally acts as a neutral arbiter of competing political interests among the executive and legislature.<sup>179</sup> Akech and Mbote hold that the Kenyan judiciary's performance in the post-independence period exhibited a failure to duly exercise this mandate owing primarily to a lack of institutionalization that predisposed judicial officers to manipulation by the executive.<sup>180</sup> As discussed in chapter two, such manipulation is achieved when the political arms of government abuse their powers of oversight over the judiciary<sup>181</sup> to harass and intimidate courts to guarantee desired political outcomes. These outcomes serve as political constraints on the courts in their exercise of judicial power.<sup>182</sup>

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<sup>179</sup> Migai Akech and Patricia Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State' (2012) 18 East African Journal of Peace and Human Rights 357.

<sup>180</sup> Migai Akech and Patricia Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State' (2012) 18 East African Journal of Peace and Human Rights 357.

<sup>181</sup> These include power of approval of appointment to or removal from office of judges; approval of budgets and rules affecting the courts' financial independence; and changes to laws on: security of tenure, remuneration, or courts' jurisdiction and powers.

<sup>182</sup> This refers to the authority, both constitutional and legal, given to the courts and its judges to: (1) preside over and render judgement on cases; (2) to enforce or void statutes and laws when their scope or constitutionality is questioned; and (3) to interpret statutes and laws when disputes arise. <<http://thelawdictionary.org/judicial-power/>> accessed 28 June 2017.

Within the context of my conceptual framework, the strength or weakness of such political constraints depends on a court's insulation from political attack by either the executive or legislature. Although the Independence Constitution<sup>183</sup> contained provisions conducive to formation of an independent judiciary, well insulated from political attack, they were subsequently removed by successive parliaments through a series of amendments that destroyed the independence of both parliament and the judiciary while creating an imperial presidency.<sup>184</sup> In this political reality executive power is absolute and the executive drives the other arms of government into subservience.<sup>185</sup>

The primary objective of the constitutional amendments was to remove institutional checks on the executive to strengthen it and centralize politics while nullifying human rights.<sup>186</sup> This resulted in a fundamental absence of proper checks and balances between the three governmental arms since they were never co-equal in the sense advocated under the separation of powers doctrine. The judiciary gradually lost its institutional autonomy and became acquiescent to the executive. Moreover, judges also lost their individual independence since the chief justice wielded

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<sup>183</sup> The Kenya Independence Order in Council 1963 is the one that established the Constitution of Kenya upon independence. It was made on 4<sup>th</sup> December 1963 and was to come into operation immediately before 12<sup>th</sup> December 1963 (Independence Day).

<sup>184</sup> A term used to describe a presidency that is uncontrollable and has exceeded its constitutional limits. Arthur M. Schlesinger Jr., *The Imperial Presidency* (Houghton Mifflin Harcourt, 1973).

<sup>185</sup> Hastings W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Paradox' in Issa Shivji (Ed.), *State and Constitutionalism: An African Debate on Democracy* (SAPES Trust 1991).

<sup>186</sup> Hastings W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Paradox' in Issa Shivji (Ed.), *State and Constitutionalism: An African Debate on Democracy* (SAPES Trust 1991).

immense powers which were often exercised to undermine their decisional independence.<sup>187</sup> The judiciary therefore became a tool for facilitating and rationalizing executive control to a point whereby the doctrine of separation of powers in Kenya was replaced by the doctrine of concentration of powers.<sup>188</sup>

Based on the foregoing, this chapter responds to the thesis's first research question: how have Kenyan courts exercised their power of judicial review as a check and balance on parliament's exercise of legislative power? In this chapter I trace and examine the evolution of politicization of Kenyan courts in the post-independence era and how this affected their exercise of judicial review power as a restraint on the political arms of government<sup>189</sup> within the context of the separation of powers doctrine. In doing this I undertake a legal analysis of secondary data to trace the historical evolution and contemporary characteristics of the Kenyan judiciary's exercise of its power of judicial review of legislative action. The sources of the secondary data are drawn from archival internet and library research for material on the historical evolution, and Hansard/newspaper reports for contemporary developments.

I also utilize my conceptual framework to undertake critical case law analysis focusing predominantly on cases providing the foundation for interrogating rules and developing normative

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<sup>187</sup> Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' (2011) *Indiana Journal of Global Legal Studies* 378.

<sup>188</sup> Kiraitu Murungi, 'Relationship between the Three Branches of Government' in *Report of the Pan-African Forum of the Commonwealth Latimer House Principles on the Accountability and the Relationship between the Three Arms of Government* (Commonwealth Secretariat 2005) 9.

<sup>189</sup> The executive and legislature are considered political in this context because they are composed of politicians who are elected into office by the citizens.

claims to guide the courts in the exercise of this judicial review power, with a corresponding analysis of the relevant constitutional provisions. This analysis subsequently provides the basis for determining the position of the post-independence Kenyan judiciary under the Kenyatta, Moi and Kibaki regimes within my conceptual framework, and to assess how they exercised their judicial power in relation to the prevailing legal and political constraints.

### **3.1 THE EFFECTS OF POLITICAL CONSTRAINTS ON THE JUDICIARY AFTER INDEPENDENCE**

A key requirement of the separation of powers doctrine is that judicial and executive power should be placed in different hands, with the judiciary subsequently exercising the mutual balancing and restraining of executive and legislative powers.<sup>190</sup> This is only achievable if there is an independent and impartial judiciary to facilitate impartial decision making and preserve the integrity of the judiciary as a separate arm of government.<sup>191</sup> The judiciary as an institution and judges as individuals must be insulated from external influences that may corrupt their integrity or impartiality. Failure to do so makes them vulnerable to political attack and under constant threat by the political arms of government. This eventually leads to judicial determination of cases being greatly influenced by political constraints. Subsequently, it creates an environment where there is little respect for judicial independence and the judiciary is overly dependent on the other arms for its survival.

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<sup>190</sup> Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

<sup>191</sup> Migai Akech, Patricia Kameri-Mbote, Collins Odote, and Gabriel Mwangi, 'Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution' (Law and Development Initiatives, 2011) 12.



### **3.1.1 THE JUDICIARY’S POSITION WITHIN THE CONCEPTUAL FRAMEWORK AS AT 12<sup>TH</sup> DECEMBER 1963**

Chapter ten of the Independence Constitution<sup>192</sup> established the foundation for an independent and accountable judiciary. The chief justice was to be appointed through a comprehensively consultative process that even involved the presidents of the regional assemblies whereas the appointment of puisne judges was to be done in accordance with the advice of the Judicial Service Commission (JSC).<sup>193</sup> Their tenure of office<sup>194</sup> as well as procedure for removal were specifically provided for and guaranteed, with the grounds for removal being restricted to: (a) inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause); or (b) misbehavior.<sup>195</sup> The removal could only be concluded based on the findings of a tribunal formed to investigate the matter.

Within the context of my conceptual framework these provisions possess the power to insulate judicial officers from political attack through the guarantee of the judges’ security of tenure. The consultative appointment process and objective criteria ensures that appointees are the best equipped individuals in terms of technical qualifications, independence, and moral

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<sup>192</sup> The Kenya Independence Order in Council 1963, which was made on 4<sup>th</sup> December 1963 and was to come into operation immediately before 12<sup>th</sup> December 1963 (Independence Day).

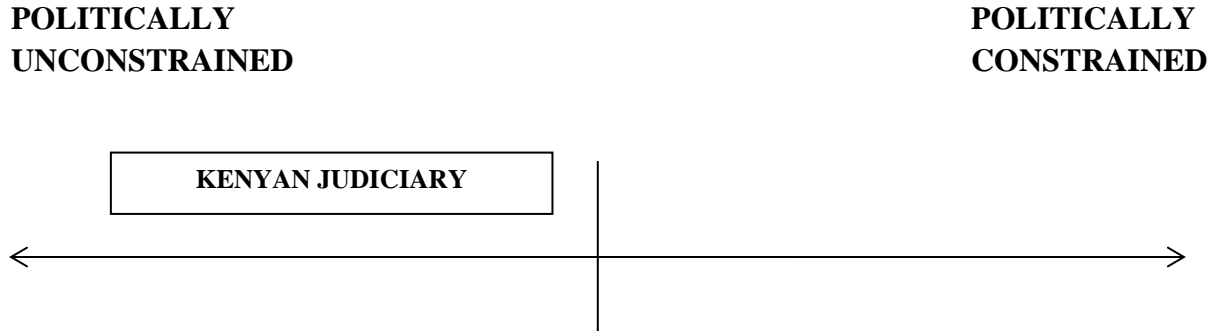
<sup>193</sup> Section 172.

<sup>194</sup> Section 173 (1) provided that a person holding the office of a judge of the Supreme Court shall vacate that office when he attains such age as may be prescribed by Parliament.

<sup>195</sup> Section 173 (3).

suitability.<sup>196</sup> Such conditions greatly aid in safeguarding the judiciary’s independence from political control and enhance its capacity to act as a check on abuse of either executive or legislative power.<sup>197</sup> These constitutional provisions therefore provided a relatively high degree of institutional security that would have enabled the Kenyan judiciary to withstand political attacks while asserting its executive and legislative oversight role as provided for under the separation of powers doctrine.

Moreover, at independence the bench was comprised of strong and intractable personalities carried over from the colonial era who were averse to giving way to external pressure. On the other hand, the executive and legislature under President Kenyatta (at that time) appeared to be indifferent to the work of the judiciary.<sup>198</sup> Based on the above, I place the judiciary’s position on the horizontal axis of the quadrant model at independence in the second quadrant:



<sup>196</sup> Migai Akech and Patricia Mbote, ‘Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State’ (2012) 18 East African Journal of Peace and Human Rights 357.

<sup>197</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>198</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 60.

### **3.1.2 THE CONSEQUENCES OF POLITICALLY MOTIVATED CHANGES TO THE JOMO KENYATTA ERA JUDICIARY: 12<sup>TH</sup> DECEMBER 1963 – 22<sup>ND</sup> AUGUST 1978**

#### **3.1.2.1 THE USE OF CONSTITUTIONAL AMENDMENTS**

Ghai and McAuslan<sup>199</sup> chronicle the gradual concentration of powers in the executive, more specifically the presidency, as beginning immediately after independence in 1964 with the first constitutional amendment law<sup>200</sup> which declared Kenya a republic. It also combined the powers and functions of the head of state with those of the head of government, vesting both in the presidency.<sup>201</sup>The second and third amendments<sup>202</sup> removed all powers and functions from the regional assemblies thereby eliminating the legislative arm of regional governments and transferring those powers to parliament. They further repealed the provisions relating to regional taxation thereby starving the regional assemblies of local sources of revenue. This marked the end of the regional assemblies and the centralization of power around the executive.<sup>203</sup> The use of constitutional amendments to dilute the Independence Constitution continued to a point whereby

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<sup>199</sup> Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press 1970).

<sup>200</sup> The Constitution of Kenya (Amendment) Act No. 28 of 1964

<sup>201</sup> Dan Juma, ‘The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present and Future’ in Curtis Njue Murungi (Ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (ICJ Kenya, 2010) 220.

<sup>202</sup> The Constitution of Kenya (Amendment) (No.2) Act, No.38 of 1964, and the Constitution of Kenya (Amendment) Act No. 14 of 1965.

<sup>203</sup> Dan Juma, ‘The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present and Future’ in Curtis Njue Murungi (Ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (ICJ Kenya 2010) 220.

it morphed from being a document for democratic governance and became an instrument of highly concentrated and authoritarian executive power.<sup>204</sup>

Subsequently, through a series of constitutional amendments meant to entrench power in the presidency, Kenya regressed from a multi-party devolved system of government in 1963 to a *de facto* single party state by 1978 when President Kenyatta died.<sup>205</sup> The President's party, Kenya African National Union (KANU), rose to dominance as the sole political party after the government sanctioned disbandment of the Kenya African Democratic Union (KADU) and the Kenya People's Union (KPU) shortly after independence.<sup>206</sup> Thereafter, the courts' were used to silence dissenting political voices through enforcement of two restrictive colonial era laws: the

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<sup>204</sup> Peter Anyang Nyong'o, 'State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism 1963-78' (1989) 88 *African Affairs* 229.

<sup>205</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>206</sup> S.D. Mueller, 'Government and Opposition in Kenya: 1966 – 1969' (1984) 22 *Journal of Modern African Studies* 399.

Public Order Act<sup>207</sup>, and the Preservation of Public Security Act.<sup>208</sup> This set the stage for the politics of exclusion and impunity<sup>209</sup> that would form the template used by successive regimes.

As the executive assumed absolute power through constitutional amendments parliament failed in its role to ensure executive accountability and the judiciary failed to remedy these deficits through exercise of its powers of judicial review and constitutional interpretation. The judiciary's neglect of duty occurred even where such amendments sought to curtail judicial power and independence. For example, in 1975 an amendment to the Constitution granted the president the power of prerogative reprieve for election offences which he duly used to pardon political allies whom the courts had found guilty therefore assuming a purely judicial function in contravention of the separation of powers doctrine.<sup>210</sup>

The constitutional amendments centralization of power in the executive created a political structure that was dominated by the executive to the detriment of the legislature and the judiciary. Subsequently, the President was able to exert undue control and influence over the other arms of government in direct contravention of the doctrine of separation of powers. The legislature and the

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<sup>207</sup> Chapter 56 of the Laws of Kenya; its commencement date was 13<sup>th</sup> June 1950 and the government used it to prohibit public meetings and processions of a political nature as well as issue curfew orders.

<sup>208</sup> Chapter 57 of the Laws of Kenya; its commencement date was 11<sup>th</sup> January 1960 and the government used it for, "the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the Government or the Constitution" (this is the one of the definitions of 'the preservation of public security' as provided for under Section 2(d) of the Act.

<sup>209</sup> E.S Atieno Odhiambo, 'Democracy and the Ideology of Order in Kenya' in M.G. Shatzberg (Ed.) *The Political Economy of Kenya* (Praeger 1987) 177.

<sup>210</sup> Constitution of Kenya (Amendment) (No.2) Act No. 14 of 1975.

judiciary were therefore not independent in the exercise of their respective mandates but were instead dependent the executive.

### **3.1.2.2 POLITICAL CONTROL OF JUDICIAL APPOINTEES**

The executive sought to control the judiciary by appointing ‘regime friendly’ lawyers to the bench<sup>211</sup> and then placing them in strategic positions.<sup>212</sup> These appointees were carefully screened and selected by the then powerful Attorney-General, Charles Njonjo, who also represented the judiciary in parliament. This peculiar arrangement meant that the Attorney-General outranked the Chief Justice despite the Chief Justice being the head of one arm of government.<sup>213</sup> Njonjo preferred English judges and thus they dominated the superior courts whereas Kenyan Asians and Africans were appointed to the magistrates’ courts.<sup>214</sup>

However, in keeping with parliament’s Africanization policy Justice Kitili Mwenda was appointed Chief Justice in July 1968. Unfortunately, Mwenda’s reign was unremarkable and ended in disgrace in July 1971 when he was forced to resign after being implicated in the 1971 coup attempt against President Kenyatta.<sup>215</sup> Thereafter, the Office of the Chief Justice was occupied by Englishmen for close to three decades. The third Kenyan Chief Justice, Abdul Majid Cockar,

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<sup>211</sup> This was in line with the Kenyan government’s policy to replace the departing colonial English officers in public service with qualified Kenyans.

<sup>212</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 76.

<sup>213</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 80.

<sup>214</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 81.

<sup>215</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 74.

attributed this to Njonjo's firm belief that "An African was not yet ready to handle such a responsibility."<sup>216</sup> These Englishmen were beholden to the Attorney-General for their contractual appointments and were thus content to run the judiciary in a manner that did not contradict his wishes. This factor resulted in the tenure of the first English Chief Justice appointed under the Kenyatta regime<sup>217</sup> being criticized for its subservience in the following terms, "Never before, and never after the long term of CJ Wicks had the Judiciary become so submissive to the wishes of one man in Kenya: AG Mr. Njonjo."<sup>218</sup>

### **3.1.2.3 RESULTANT CHANGES IN THE JOMO KENYATTA ERA JUDICIARY'S POSITION WITHIN THE CONCEPTUAL FRAMEWORK**

The judiciary was bound to the executive and therefore unable to effectively undertake its role of checking and balancing the other arms of government. Prempeh<sup>219</sup> observes that such a judiciary subscribes to the jurisprudence of executive supremacy and views its institutional role to be primarily maintenance of law and order, and not to protect freedom or restrain government. The judiciary was essentially under executive capture and judicial officers serving in it had strong incentives<sup>220</sup> to protect the executive at the expense of judicial independence. The executive could

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<sup>216</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 77.

<sup>217</sup> Hon. Chief Justice Sir James Wicks: July 1971 – December 1982.

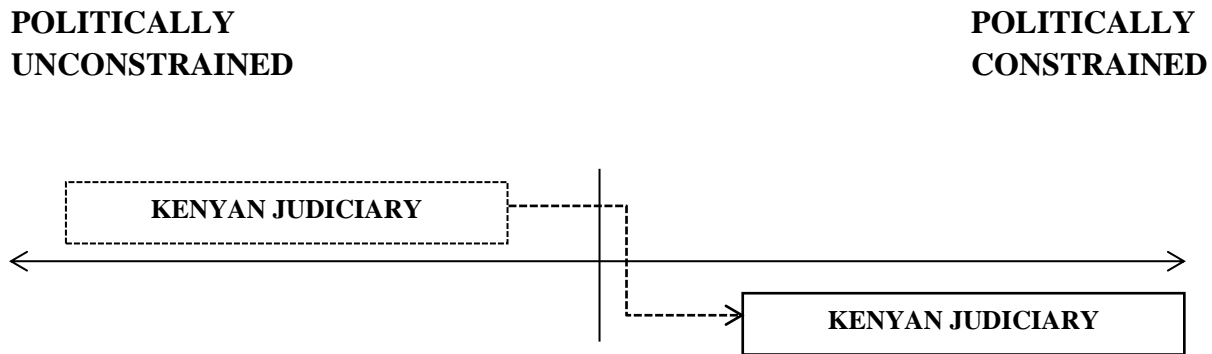
<sup>218</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 78.

<sup>219</sup> H. Kwasi Prempeh, 'A New Jurisprudence for Africa' (1999) 10 J. Democracy 136.

<sup>220</sup> The incentives referred to are the perks, prestige and powers of judicial office. See: Migai Akech and Patricia Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State' (2012) 18 East African Journal of Peace and Human Rights 357.

thus operate outside constitutional limits without reproach.<sup>221</sup> Ultimately, the judiciary deviated from its mandate of enforcing the Constitution even when it is politically unpopular to do so.<sup>222</sup>

The judiciary under Kenyatta therefore ceased to have strong institutional independence and was not able to assert its judicial role as a separate arm of government or withstand political attacks. It was hence politically constrained since both its individual and institutional independence was subject to undue political control. Based on this the position of the Jomo Kenyatta era judiciary on the horizontal axis of the quadrant model moves from the second to the fourth quadrant as follows:



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<sup>221</sup> Jackton B. Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press, 2013) 44.

<sup>222</sup> Stephen Breyer, *America's Supreme Court: Making Democracy Work* (Oxford University Press, 2010) 79.



### **3.1.3 THE CONSEQUENCES OF POLITICALLY MOTIVATED CHANGES TO THE DANIEL ARAP MOI ERA JUDICIARY: 22<sup>ND</sup> AUGUST 1978 – 30<sup>TH</sup> DECEMBER 2002**

#### **3.1.3.1 CONTROL OF THE JUDICIARY THROUGH THE OFFICE OF THE ATTORNEY-GENERAL**

Moi ascended to the presidency after Kenyatta's death in 1978 and continued with the established trend of judicial influence and interference. However, following the exit of Charles Njonjo as Attorney-General when he joined elective politics<sup>223</sup> Moi was subsequently forced to endure a succession of weak Attorney-Generals. As a result, his foremost consideration for appointments of Chief Justices was a person who would be able to perform his judicial function and, when necessary, apply tactful pressure on judicial officers to give rulings that would achieve his desired political outcomes.<sup>224</sup> The first of such appointees was Chief Justice Wicks who set a trend for his successors in terms of favoring the presidency. This tradition continued even after the end of Njonjo's tenure as Attorney-General.<sup>225</sup> Chief Justice Cockar<sup>226</sup> later attributed this culture of non-confrontation with the establishment on the part of English judges to their desire to safeguard their employment contracts.<sup>227</sup>

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<sup>223</sup> He vied for, and won, the Kikuyu constituency seat in the 1980 general elections.

<sup>224</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 129.

<sup>225</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 80.

<sup>226</sup> The third Kenyan Chief Justice: December 1994 – December 1997

<sup>227</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 84.

Executive interference, through the Attorney-General's office, in the exercise of judicial power was particularly evident in criminal cases against opponents of the Moi regime. The complicity of judicial officers was at times very brazen, for instance one magistrate upon taking charge of the criminal subordinate courts reportedly made it known to Njonjo that he would get convictions and sentences of the type the Attorney-General desired against political agitators.<sup>228</sup> However, unabashed use of the Attorney-General's office to achieve Moi's desired political objectives was most pronounced in the case against Gitobu Imanyara.<sup>229</sup> He first came to the attention of the State in the case of *Paul Ekai v. R*<sup>230</sup>. During the trial, accusations were made by Ekai's family that the judge hearing the case, Justice Mathew Guy Muli, had been compromised by 'some white men'. Mr. Imanyara subsequently raised the issue in court and was directed by Justice Muli to appear in chambers. However, when Imanyara showed up in chambers he was arrested on unspecified charges but later released upon intervention of the state prosecutor Mr. Evans Gicheru.<sup>231</sup>

Subsequently, Mr. Imanyara represented soldiers charged with treason or mutiny after the failed 1982 coup against the advice of his father, a soldier holding the senior rank of lieutenant

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<sup>228</sup> In his book, the former Chief Justice Hon. Justice Cockar criticized Hon. Justice Sachdeva for manning the criminal courts on behalf and at the behest of the Attorney-General Hon. Mr. Charles Njonjo. See: Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 78.

<sup>229</sup> He was a lawyer and a political activist against the Moi regime.

<sup>230</sup> (1981) CAR 115. Mr. Imanyara represented Mr. Ekai who had been tried and convicted of the murder of the world-famous wildlife conservationist Ms. Joy Adamson

<sup>231</sup> Gicheru would later join the bench and ascend to the position of Chief Justice thereafter becoming Kenya's longest serving Chief Justice: February 2003 – February 2011. See: Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 84.

colonel, who was reportedly sent by President Moi to advise him against it. The consequences of his refusal, and subsequent use of the judiciary to destroy him, would be disclosed years later when he filed a constitutional petition against the State under the 2010 Constitution: *Gitobu Imanyara & 2 Others v Attorney General*.<sup>232</sup> In this petition it was disclosed that when he refused his father was appointed the presiding officer of the soldiers' court martial and Imanyara was subsequently asked to recuse himself owing to the evident conflict of interest. He refused to do so, the matter was then adjourned, and his father was forced to retire from the armed forces.

Thereafter the then Attorney-General, Justice Muli,<sup>233</sup> ordered the Law Society of Kenya (LSK) to investigate whether Imanyara had any complaints made against him. When it was established that he had a pending complaint on an unpaid cheque it was ordered that he be arrested and charged with the offence of stealing by agent.<sup>234</sup> Furthermore, Muli gave the opening address in the case and expressed strongly the need for the court to pass a severe and deterrent sentence.<sup>235</sup> He then personally supervised the prosecution and trial of Imanyara through intimidation of the trial magistrate, Mary Angawa<sup>236</sup> (as she then was), and through phone calls made to the state prosecutor during the evidentiary hearing. This achieved the desired result in conviction and sentencing of Imanyara to five years imprisonment. Moreover, the Attorney-General ordered that Imanyara be struck off the roll of advocates while a government owned mortgage company,

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<sup>232</sup> (2013) eKLR.

<sup>233</sup> They had earlier crossed paths in the *Ekai* case when Muli was still on the bench prior to his appointment as AG.

<sup>234</sup> *Gitobu Imanyara & 2 Others v Attorney General* (2013) eKLR.

<sup>235</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) 78

<sup>236</sup> Hon. Angawa later rose through the ranks to become a high court judge.

Housing Finance Company of Kenya (HFCK), moved to evict his family from their house and promptly sold it without advertisement or notice as required by law.<sup>237</sup>

This illustrates absoluteness of executive capture of the judiciary under the Moi regime, and its subsequent use in maintaining his autocracy. Judicial independence cannot thrive in such an environment and the Kenyan judiciary at that time seldom wielded its power of judicial review to check the excess of the Moi administration in keeping with the doctrine of separation of powers.

### **3.1.3.2 THE USE OF CONSTITUTIONAL AMENDMENTS**

Numerous amendments to the Independence Constitution resulted in the president exercising sole power to appoint the chief justice without consulting anyone.<sup>238</sup> Moreover, whereas the president was required to consult the Judicial Service Commission (JSC) in appointing judges<sup>239</sup>, little if any consultation occurred in practice. Akech and Mbote observe that such judicial appointments were not always informed by any objective criteria.<sup>240</sup>

In 1988 parliament passed amendments to Sections 61, 62, 69, 72, and 106 of the Constitution within a matter of hours which vested the power of firing judges in the president

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<sup>237</sup> *Gitobu Imanyara & 2 Others v Attorney General* (2013) eKLR

<sup>238</sup> Section 61 (1) of the Constitution of Kenya.

<sup>239</sup> Section 61 (2) of the Constitution of Kenya.

<sup>240</sup> Migai Akech and Patricia Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State' (2012) 18 East African Journal of Peace and Human Rights 357.

without recourse to any institutional inquiry.<sup>241</sup> This removal of the judges security of tenure was implemented alongside, “an opaque system of appointments of judges that engendered loyalty, and began a pattern of intimidating judges who displayed any streak of independence.”<sup>242</sup> This seriously undermined the judiciary’s institutional independence as well as the judges decisional independence.<sup>243</sup> As a result, the Moi era judiciary was criticized for only feebly and often reluctantly exercising its constitutional interpretation and judicial review powers to assert its duty to defend the integrity of the Constitution, and even where it did critics assert that it exercised a weak form of judicial review to check the executive and legislature.<sup>244</sup> The judiciary thus abdicated its key role as the governmental arm with the final word in constitutional interpretation and protection within the context of the separation of powers doctrine.<sup>245</sup>

This abdication of duty occurred even though the Independence Constitution had originally vested judicial review and constitutional interpretation powers in the judiciary. The Moi era judiciary therefore failed in its obligation to uphold the Constitution and protect it from

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<sup>241</sup> Shadrack B.O. Gutto, ‘Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa’ (1987) 5 Z.L. REV. 142.

<sup>242</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>243</sup> Constitution of Kenya (Amendment Act) Act No.4 of 1988.

<sup>244</sup> Dan Juma, ‘The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present and Future’ in Curtis Njue Murungi (Ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (ICJ Kenya, 2010) 224.

<sup>245</sup> In the seminal American case of *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803) it was stated that, “It is emphatically the province and duty of the judicial department to say what the law is.”

encroachment by legislative enactment and the unwarranted extension of executive authority.<sup>246</sup> The promise of the Independence Constitution, to transform the colonial structures into systems better suited to a modern sovereign state,<sup>247</sup> was therefore not realized due to the judiciary's deference to national politics which resulted in cases raising politico-legal issues being thrown out on frivolous grounds.<sup>248</sup> Moreover, even in those cases where the courts invalidated governmental action Muigai<sup>249</sup> notes that, "There was no unequivocal judicial philosophy, compelling jurisprudence, or interpretative practice that emerged which would induce restraint or democratic boundaries of governmental action."

Shadrack Gutto<sup>250</sup> notes that these unwarranted constitutional amendments were the result of undue pressure exerted on parliament by the ruling party (KANU) and were greatly opposed by the legal fraternity, scholars, journalists, and even churches.<sup>251</sup> Parliament was simply being used by the presidency to rein in the judiciary. Kenya was subsequently transformed into a *de jure* one

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<sup>246</sup> Steven Pfeiffer, 'The Role of the Judiciary in the Constitutional Systems of East Africa' (1978) 16 *The Journal of Modern African States* 33.

<sup>247</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics 2012) VII.

<sup>248</sup> Dan Juma, 'The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present and Future' in Curtis Njue Murungi (Ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (ICJ Kenya, 2010) 224.

<sup>249</sup> Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kivutha Kibwana, (ed.), *Law and the Administration of Justice in Kenya* (ICJ Kenya 1992) 110.

<sup>250</sup> Kenyan law lecturer and academic political activist who went into exile during the Moi era.

<sup>251</sup> Shadrack B.O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 *Z.L. REV.* 142.

party state through the Constitution of Kenya (Amendment) Act No.7 of 1982 and President Moi thereafter used KANU to control the judiciary, sidestep parliament, and spread fear, despondency and exclusion through an unquestioningly loyal network of provincial administrators and KANU party agents.<sup>252</sup> Ngugi wa Thiongo laments this regression of the national party, “KANU had changed from a mass nationalist party to a moribund bureaucratic machine catering, where necessary, for the alliance of a few home and foreign financiers ... only the name remained, a hollow echo of its patriotic origins.”<sup>253</sup>

As a result, the Chief Justice became a political appointee inclined to implement the wishes of the appointing authority – the President. Then in 1989 the judiciary was given pseudo independence when it was freed from being a mere department in the office of the Attorney-General<sup>254</sup>, and therefore delinked from the public service and placed under the Chief Justice. Akech and Mbote<sup>255</sup> note that this resulted in the head of the judiciary possessing broadly enhanced but unregulated powers which included, amongst others: (a) the power to determine which judges heard which cases; (b) where and how litigants could file their cases; (c) supervising and disciplining judges; (d) transferring judges; and (d) disciplining and initiating the process of

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<sup>252</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>253</sup> Ngugi wa Thiong’o, *Detained: A Writer’s Prison Diary* (East African Educational Publishers Ltd. 1981) 56.

<sup>254</sup> Abdul Majid Cockar, *Doings, Non-Doings and Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics, 2012) 182.

<sup>255</sup> Migai Akech and Patricia Mbote, ‘Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State’ (2012) 18 *East African Journal of Peace and Human Rights* 357.

removal of judges'. These powers were often abused to the detriment of judicial independence and accountability.<sup>256</sup>

Interestingly, executive capture of the Office of the Chief Justice and, through his office, the judiciary was a common occurrence in post-independence Africa.<sup>257</sup> Cockar<sup>258</sup> notes that “The common charges levelled against a CJ of a third world country are generally based on his meek responses to the pressures from the executive, charges of corruption and legal and administrative inefficiency.” Post-independence Africa witnessed, severally, the promulgation and subsequent mutilation of constitutions by power hungry political elites. Murunga *et al*<sup>259</sup> view this as the greatest impediment to the entrenchment of a culture of constitutionalism in Africa, resulting in what Okoth-Ogendo referred to as ‘constitutions without constitutionalism’<sup>260</sup>.

### **3.1.3.3 THE JUDICIARY’S ROLE IN MAINTAINING THE MOI REGIME**

Murunga *et al* observe that, “By 1992, all key institutions – the judiciary, public services, security forces, provincial administration and parliament – had been reduced to instruments of

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<sup>256</sup> Migai Akech and Patricia Mbote, ‘Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State’ (2012) 18 East African Journal of Peace and Human Rights 357.

<sup>257</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 59.

<sup>258</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 59.

<sup>259</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>260</sup> Hastings W.O. Okoth-Ogendo, ‘Constitutions without Constitutionalism: Reflections on an African Paradox’ in Issa Shivji (Ed.), *State and Constitutionalism: An African Debate on Democracy* (SAPES Trust 1991).



authoritarian domination”.<sup>261</sup> With the advent of multi-party politics in Kenya in the 1990s culminating in the elections of 1992, the judiciary played a pivotal role in ensuring the continued domination of the KANU regime and President Moi’s rule. It all began with a constitutional amendment, The Constitution of Kenya (Amendment) Act No.12 of 1991, repealing Section 2A of the Constitution which had legalized one-party rule. Section 2A had been introduced in 1982 through The Constitution of Kenya (Amendment) Act No.7 of 1982 and it changed Kenya from a *de facto* to a *de jure* one party state thereby outlawing the formation and operation of more political parties in Kenya and making KANU the one and only political party.<sup>262</sup> It also deleted the definition of a political party and amended the method of nominations for general elections making them the sole preserve of KANU.

Moi won the 1992 multi-party elections with 1,927,645 (36.7%) of the votes while his closest challenger, Kenneth Matiba, had 1,352,856 (26%) of the votes.<sup>263</sup> Matiba subsequently challenged the results in court through a presidential petition: *Kenneth Stanley Njindo Matiba v. Daniel Toroitich arap Moi*.<sup>264</sup> A total of six presidential petitions were filed but five got thrown out

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<sup>261</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>262</sup> Wild about Africa, ‘Kenyan constitution amendments through time’  
<<https://wildaboutafrica.wordpress.com/2010/07/13/kenyan-constitution-amendments-thru-time/>> accessed 24 August 2017.

<sup>263</sup> Africa Democracy Encyclopedia Project, ‘Kenya: 1992 Presidential election results’  
<<https://www.eisa.org.za/wep/ken1992results.htm>> accessed 24 August 2017.

<sup>264</sup> (1994) eKLR.

by the courts on procedural grounds.<sup>265</sup> At the time Matiba was recovering from a stroke which had paralyzed his right hand and impaired his vision and ability to read. This stroke was suffered while in detention without trial for his role in agitating for multi-party politics in the early 1990s.<sup>266</sup> His wife, whom he had given a power of attorney, therefore signed the petition. However, the law at the time made it mandatory for the petition to be personally signed by the petitioner and therefore Moi's advocate, Mr. Inamdar, made an application to strike out the petition on the basis that it was not personally signed by the petitioner as required by law.<sup>267</sup> The high court hearing the election petition found that since the petition was signed by the lawfully appointed holder of the power of attorney then it met the legal requirement of being signed by the petitioner and was therefore valid.

Section 44(5) of the Constitution provided that an election petition court's decision as final, therefore not subject to appeal, and this applied to all decisions whether interlocutory or final. The objective of this amendment was to prevent the possibility of an election petition remaining unheard or undetermined over an entire parliamentary term of five years thereby rendering the petition obsolete. Nevertheless, Inamdar filed a notice of appeal against the ruling, and this was countered with the respondent's application to have the notice of appeal struck out. The appellate

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<sup>265</sup> John Kamau, 'The grim history of presidential petitions in Kenya' Daily Nation (Nairobi 11 August 2017) <<http://mobile.nation.co.ke/news/politics/The-grim-history-of-presidential--petitions-in-Kenya-3126390-4053238-13ccaq0z/index.html>> accessed 24 August 2017.

<sup>266</sup> John Kamau, 'The grim history of presidential petitions in Kenya' Daily Nation (Nairobi 11 August 2017) <<http://mobile.nation.co.ke/news/politics/The-grim-history-of-presidential--petitions-in-Kenya-3126390-4053238-13ccaq0z/index.html>> accessed 24 August 2017.

<sup>267</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 200.

bench composed of Justices Cockar (as he then was), Muli (former AG)<sup>268</sup> and Omolo, went out of their way to apply unusual legal reasoning to allow the appeal. They held that the issue whether the election petition was properly signed by the petitioner had nothing to do with the election itself and as a result the election petition court had no jurisdiction to adjudicate on this issue, but that this did not deprive it of its jurisdiction as a high court. They therefore held that in determining the issue the election petition court had been doing so in its capacity as a high court and its ruling was therefore appealable.<sup>269</sup>

The application to strike out the notice of appeal was subsequently dismissed, whereas the appellant's other application for extension of time to file the appeal was granted on the grounds that it involved an important point of law and was a matter of national interest.<sup>270</sup> The election petition was ultimately unanimously struck out by this bench which held that it was not a properly, legally filed document. The appellate bench's separation of the question of the legality of the signature on an election petition from the election petition itself is still highly debatable many years later.

Striking out the presidential petition literally saved President Moi from the ignominy of being summoned to give evidence and be subjected to cross-examination. Moreover, the election petition court had the power to find the President guilty of an election offence and consequently

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<sup>268</sup> Justice Muli went back to the bench after his tenure as AG which lasted from 1983 to 1991.

<sup>269</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 202.

<sup>270</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 203.

could not only nullify his win but also bar him from contesting elections for a given period.<sup>271</sup> Most importantly, President Moi would not have had the option of appealing the court's decision owing to the provisions of Section 44(5) of the Constitution which made such decision final and non-appealable. Many years later, Justice Cockar revealed that at the time the news of his impending appointment as Chief Justice reached him, he mused that this decision could have been one of the reasons for his appointment.<sup>272</sup> Conversely, this case would later come to haunt Justice Omolo when it constituted one of the reasons the Judges and Magistrates Vetting Board formed under the 2010 Constitution found him unfit for office on the grounds, amongst others, that he had been politically biased in his judgements.<sup>273</sup>

The same scenario of the courts being used to enhance President Moi's reign would be replicated after the 1997 elections where Moi had 2,445,801 (40.13%) of the votes against his closest challenger Mwai Kibaki who had 1,895,527 (31.09%) of the votes.<sup>274</sup> Kibaki challenged the results through a presidential petition: *Kibaki v. Moi & 2 others (No.2)*<sup>275</sup> which was struck out on the grounds, amongst others, that the petition had not been personally served on President Moi. The court held that this was the only mode of service that was envisioned under Rule 14(1) of the Election Petition Rules which required service of the petition on the respondent within ten days of

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<sup>271</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 203.

<sup>272</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 212.

<sup>273</sup> JMV B Report No.2 of 2012 <<http://kenyalaw.org/caselaw/cases/view/85878/>> accessed 24 August 2017.

<sup>274</sup> Africa Democracy Encyclopedia Project, 'Kenya: 1997 Presidential election results' <<https://www.eisa.org.za/wep/ken1997results.htm>> accessed 24 August 2017.

<sup>275</sup> (2008) KLR (EP) 308.

its presentation, despite the existence of other modes of service under the civil procedure rules. Consequently, an elected president could never be served with an election petition because of the simple fact that the president's security detail could ably prevent the servers getting anywhere near him. On appeal, *Kibaki v. Moi (No.3)*<sup>276</sup>, the bench comprised of the fifth Kenyan Chief Justice, Hon. Benard Chunga, and appellate judges Omolo (who was part of the bench in the *Matiba*<sup>277</sup> petition), Shah, Lakha, and Owuor. The court dismissed the appeal on the grounds, amongst others, that, "Election petitions are of such importance to the parties concerned and to the general public that unless parliament specifically dispensed with the need for personal service, then the courts must insist on such service."<sup>278</sup>

#### **3.1.3.4 A STILL BORN ATTEMPT AT JUDICIAL REFORMS**

In 1998 the fourth Kenyan Chief Justice, Zacchaeus Chesoni, appointed a committee led by Justice Richard Kwach<sup>279</sup>, to review the administration of justice in Kenya. The 'Kwach Committee' in its report identified the problems bedeviling the judiciary to be corruption, incompetence, neglect of duty, theft, drunkenness, lateness, sexual harassment, and racketeering. It recommended, amongst other measures: (a) removal of incompetent judges, (b) development of a code of conduct for judicial personnel, (c) formation of an inspectorate unit to implement the code of conduct, (d) improve employment terms and conditions, (e) split the high court into four divisions: family, commercial, civil and criminal, and (f) overhaul of the judicial service

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<sup>276</sup> (2008) 2 KLR (EP) 351.

<sup>277</sup> (1994) eKLR.

<sup>278</sup> *Kibaki v. Moi (No.3)* (2008) 2 KLR (EP) 351.

<sup>279</sup> A Judge of the Court of Appeal.

commission.<sup>280</sup> Chief Justice Chesoni then formed another committee to develop mechanisms to implement the recommendations of the Kwach Committee, but he died shortly afterwards and his successor, Justice Bernard Chunga, chose not to implement the report findings.

### **3.1.3.5 THE MOI ERA JUDICIARY'S POSITION WITHIN THE CONCEPTUAL FRAMEWORK**

Gutto<sup>281</sup> criticizes Kenyan courts of the time for their significant contribution to the erosion of democratic constitutional rights as they systematically designed or manipulated substantive and procedural laws to ensure expedient conviction of Kenyans who were viewed as a threat by the KANU political regime. Mutua<sup>282</sup> also observes that this judicial subservience was intertwined with judicial authoritarianism, “with judges taking openly partisan positions that undermined democratic struggle and often referring to the Constitution to back up their claims” Moreover, the lack of any objective appointment standards and the need to have regime friendly judges meant that appointments were made on parochial and ethnically jaundiced criteria<sup>283</sup> which brought through people who became willing and able participants in the political machinations of the executive as they assumed the role of guardians of the KANU political regime.

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<sup>280</sup> The Report the Committee on the Administration of Justice, 1998  
<<https://www.coursehero.com/file/p74ejra/The-Report-of-the-Committee-on-the-Administration-of-Justice-1998-The-Kwach/>> accessed 25 August 2017.

<sup>281</sup> Shadrack B.O. Gutto, ‘Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa’ (1987) 5 Z.L. REV. 142.

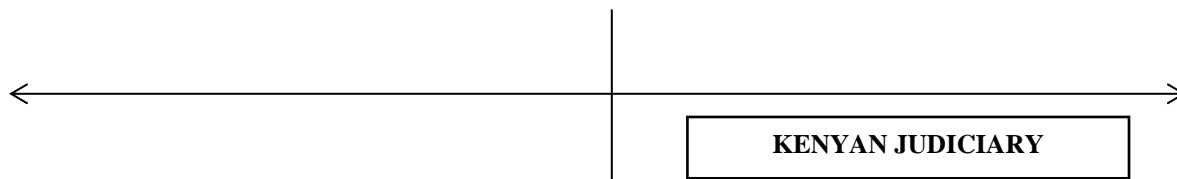
<sup>282</sup> Makau W. Mutua, ‘Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya’ (2001) 23 Human Rights Quarterly 96.

<sup>283</sup> Migai Akech and Patricia Mbote, ‘Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State’ (2012) 18 East African Journal of Peace and Human Rights 357.

Ultimately, the Moi era judiciary was like the Kenyatta era one. It lacked strong institutional independence and was not able to assert its judicial oversight role of the executive and legislature since it was overwhelmingly politically constrained and therefore subject to undue political influence and interference. Hence the position of the Moi era judiciary on the horizontal axis of the quadrant model is on the fourth quadrant as portrayed below:

**POLITICALLY  
UNCONSTRAINED**

**POLITICALLY  
CONSTRAINED**



### **3.1.4 CONSTITUTIONAL AND JUDICIAL REFORMS DURING THE MWAI KIBAKI ERA: 30<sup>TH</sup> DECEMBER 2002 – 9<sup>TH</sup> APRIL 2013**

President Kibaki strode into power on the promise of democratization and constitutional reforms.<sup>284</sup> His party, the National Alliance of Rainbow Coalition (NARC), promised Kenyans a new constitution within its first one hundred days in power but this was not the case as the NARC dream disintegrated amidst wrangles amongst the coalition partners on how to share power. The promise of constitutional reforms therefore remained elusive for almost another decade under

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<sup>284</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 1.

Kibaki.<sup>285</sup> Kenya continued to be governed under the Independence Constitution which, as discussed above, concentrated power in the presidency. Interestingly, it was Kibaki as M.P who, during the Moi regime, proposed the constitutional amendment that transformed Kenya into a *de jure* one party state in 1982.<sup>286</sup>

The executive under Kibaki proceeded to reconstitute political power and privilege within a select circle of powerful politicians commonly known as ‘the Mount Kenya Mafia’ who rejected the notion of de-concentration of powers from the presidency.<sup>287</sup> Moreover, the African Peer Review Mechanism Report on Kenya at the time stated that, “The subordination of Parliament to the Executive in law making and parliamentary oversight functions; the failure of the Executive to heed parliamentary recommendations; Executive interference in appointments to the Judiciary do not conform to the accepted norms of democracy and are a source of disquiet in certain segments of Kenyan society”.<sup>288</sup>

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<sup>285</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 1.

<sup>286</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>287</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>288</sup> . M.K. Mbondenyei, ‘Introduction’ in M.K. Mbondenyei P.L.O Lumumba, and Steve O. Odero (Eds.), *The Constitution of Kenya: Contemporary Readings* (Law Africa 2011) 3.



As for the judiciary, the trends discussed above in regard to the executive's control of the judiciary continued to thrive well into the 2000s with the sole distinction being that in addition to being under executive capture the Kenyan judiciary was also bound to the vice of corruption amongst judicial officers.<sup>289</sup> The depths to which the judiciary had sunk were revealed to the public on 27<sup>th</sup> January 2003 (the same month the NARC government was sworn in) when a long serving high court judge, Justice Samuel Oguk<sup>290</sup>, was charged with the offence of obtaining money by false pretenses. The particulars of the offence were that the judge had obtained a cheque worth KES 520,000 from a former receiver-manager of the Grand Regency Hotel with intent to defraud, and failure to honor police summons.<sup>291</sup> Notably, the Grand Regency Hotel was one of the assets obtained by the mastermind of the Goldenberg mega corruption scandal of the 1990s, Kamlesh Pattni. The scandal cost the Kenyan economy an estimated USD 600 million which was the equivalent of more than 10% of the country's annual GDP.<sup>292</sup>

Justice Oguk pleaded not guilty and went ahead to challenge the constitutionality of the criminal charge on the basis that it took away his security of tenure as a sitting judge and therefore

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<sup>289</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 61.

<sup>290</sup> Justice Oguk had served in the judiciary for 27 years: 12 as a magistrate and 15 as a high court judge. See: 'State drops graft charges against Oguk' <<http://www.network54.com/Forum/204096/thread/1048059549/Lessons+from+Botswana+on+graft+war>> accessed 23 October 2017.

<sup>291</sup> 'State drops graft charges against Oguk' <<http://www.network54.com/Forum/204096/thread/1048059549/Lessons+from+Botswana+on+graft+war>> accessed 23 October 2017.

<sup>292</sup> 'Q&A: Kenya's Goldenberg affair' <<http://news.bbc.co.uk/2/hi/business/4808618.stm>> accessed 23 October 2017.

violated the doctrine of judicial immunity.<sup>293</sup> He also called a press conference during which he vowed he would “not go down alone” and would expose senior government officials involved in the Goldenberg scandal.<sup>294</sup> However, in a sudden about-turn two weeks later Justice Oguk tendered his resignation to President Kibaki who promptly accepted his resignation. Thereafter the then Attorney-General, Amos Wako, terminated the criminal case against the judge became the first judge in the history of the Kenyan judiciary to have criminal charges brought against him.

Additionally, the Kibaki era judiciary was unapologetically self-serving and continuously used the law to protect the individual interests of judges from being eroded through constitutional reform. Any criticism was met with severe hostility as was seen in the public response of the then Chief Justice, Bernard Chunga (who was also suspended on misconduct allegations and resigned in the second month of the NARC regime), to the Report of the Advisory Panel of Eminent Commonwealth Judicial Experts<sup>295</sup>, which outlined allegations of nepotism, favoritism, political interference, corruption, and inefficiency within the Kenyan judiciary. The Chief Justice called a press conference and blasted the panel, “They are experts for what, on what and about what? ... A

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<sup>293</sup> ‘Justice Oguk pleads ‘not guilty’ to fraud charge’ < <http://www.nation.co.ke/news/1056-296930-lpqcklz/index.html> > accessed 23 October 2017.

<sup>294</sup> ‘State drops graft charges against Oguk’ < <http://www.network54.com/Forum/204096/thread/1048059549/Lessons+from+Botswana+on+graft+war> > accessed 23 October 2017.

<sup>295</sup> The CKRC had invited a panel of distinguished commonwealth judges to study and make recommendations for judicial reform in the Kenya judiciary. The panel was made up of: Hon. Justice Dr. George Kanyehimba (Supreme Court of Uganda), Hon. Mr. Justice Damian Lubuva (Court of Appeal, Tanzania), Hon. Justice Yvonne Mokgoro (Constitutional Court of South Africa), Hon. Justice Robert Sharpe (Court of Appeal for Ontario, Canada), and Professor Ed Ratushny Q.C (President of ICJ-Canada). In May 2002 the panel presented their report which outlined allegations of nepotism, favoritism, political interference, corruption, and inefficiency within the Kenya judiciary.

visitor cannot come here, stay at a lavish five-star hotel and tell me that my judicial system is at crossroads after only two days of entertainment.”<sup>296</sup> The Panel stated in its report that public confidence in the independence and impartiality of the judiciary had virtually collapsed.

#### **3.1.4.1 THE 2003 JUDICIARY INTEGRITY AND ANTI-CORRUPTION COMMITTEE (RINGERA) REPORT**

The Report of the Advisory Panel of Eminent Commonwealth Judicial Experts prompted the formation of a committee led by a former appellate judge, Justice Aaron Ringera, to investigate and report on the magnitude of corruption in the judiciary. The committee found substantial evidence implicating five appellate judges (56% of the appellate court), eighteen high court judges (50% of the high court), and eighty-two magistrates (32% of the magistracy) in judicial corruption, misbehavior, or want of ethics.<sup>297</sup> Some of those implicated voluntarily resigned while others faced appropriate disciplinary action either through constitutional tribunals for the judges or administrative action for the magistrates, which recommended either reinstatement or dismissal. The sorry state of the Kenyan judiciary at that time was captured in the following words by Justice Ringera, “The capacity of the judiciary to be an independent and impartial arbiter of legal disputes

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<sup>296</sup> Peter Mwaura, ‘The strange disease that afflicts judges’ Daily Nation (Nairobi 26 December 2014) <<http://mobile.nation.co.ke/blogs/The-strange-disease-that-afflicts-judges/1949942-2570054-format-xhtml-dc5wc7z/index.html>> accessed 19 April 2017.

<sup>297</sup> Hon. Justice (Rtd.) Aaron G. Ringera, ‘Corruption in the Judiciary’ (Paper presented at the World Bank, Washington D.C. 25 April 2007) <[http://eacc.go.ke/archives/Speeches/Justice\\_Ringera\\_Presentation200407.pdf](http://eacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf)> accessed 25 August 2017.

was compromised. The judiciary could not champion and safeguard human rights and the rule of law.”<sup>298</sup>

However, some of the judicial officers implicated in the Ringera Report challenged the recommendations in court on the basis that it had contravened their fundamental rights and freedoms in the way the investigations were done, and final recommendations given, including not being given a chance to respond to the allegations raised. Some were successful in getting reinstated such as Justice Msagha, who challenged his dismissal through an application to the high court: *Re Hon. Justice Amraphael Mbogholi Msagha*.<sup>299</sup> The court ruled that the allegations forming the basis of his dismissal were not specifically those represented by the Chief Justice to the President as the basis for the President to set up the tribunal for removal of a judge. The allegations were drawn up by an assisting counsel to the tribunal under the order of the tribunal members while the tribunal had already been constituted and this was in violation of Section 65 (2) of the Constitution.

In other cases, the then Chief Justice, Justice Evans Gicheru, by passed the JSC in making recommendations to President Kibaki. For example, in the case of *Republic v. Chief Justice of Kenya and 6 others; Ex parte Ole Keiwua*<sup>300</sup>, which was an appeal against the decision of Gicheru who circumvented the JSC and made a recommendation to Kibaki for the removal of a judge. The court held that no other institution, person, or even either parliament or the executive could initiate

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<sup>298</sup> Hon. Justice (Rtd.) Aaron G. Ringera, ‘Corruption in the Judiciary’ (Paper presented at the World Bank, Washington D.C. 25 April 2007) <[http://eacc.go.ke/archives/Speeches/Justice\\_Ringera\\_Presentation200407.pdf](http://eacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf)> accessed 25 August 2017.

<sup>299</sup> High Court Miscellaneous Application No. 1062 of 2004.

<sup>300</sup> (2010) eKLR.

this removal process, even the Chief Justice acting in his capacity as the head of the judiciary could not instigate the removal process without the JSC.

Similarly, in the case of *Stephen S. Pareno v. The Judicial Service Commission of Kenya*<sup>301</sup> the appellant contended that his dismissal from service in the magistracy was unprocedural and in breach of the principles of natural justice since he was never given an opportunity to defend himself against the allegations made against him. The court found, *inter alia*, that the Chief Justice had not given the appellant an opportunity to either exculpate or exonerate himself from the charges levelled against him before forwarding the matter to the JSC for determination and was therefore in clear breach of the rules of natural justice. The court went ahead to issue orders of certiorari quashing his dismissal from service.

A clear pattern therefore emerges where the then Chief Justice, Evans Gicheru, aided in the unprocedural dismissal or retirement from service of judicial officers implicated in the Ringera Report. This nonchalant behavior began when he unilaterally publicized the Report through the mass media in October 2003<sup>302</sup>, and it served to compromise the legitimacy of subsequent dismissal of judges and magistrates who were implicated in the Report. Moreover, the rapid nature with which the so-called ‘radical surgery’ of the judiciary was undertaken, with dismissals following immediately thereafter, gave rise to the credible inference that the move was meant to facilitate

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<sup>301</sup> [2014] eKLR.

<sup>302</sup> Charles A. Khamala, ‘Evaluating the Judicial Review of 2003 “Radical Surgery” Purging Corruption from Kenyan Courts’ (ICCLCPS 2015: 17<sup>th</sup> International Conference on Criminal Law, Criminology and Police Science, Paris, 25 – 26 June 2015).

the appointment of judicial officers who would be friendly to the new NARC regime.<sup>303</sup> Additionally, aside from retirement or dismissal without due process, there was an inherent legal challenge in having a single tribunal investigate multiple judges thereby violating their individual security of tenure.<sup>304</sup> The Ringera Committee’s legitimacy was therefore tainted by such findings, which only came to the fore long after the affected judicial officers had already been persecuted in the court of public opinion.

### **3.1.4.2 THE ROLE OF THE JUDICIARY IN THE CONSTITUTIONAL REFORM PROCESS**

Kenyans agitated for comprehensive constitutional reforms based on their abhorrence of the abuse of executive powers by the Kenyatta and Moi regimes. Constitutional reforms were seen as the only way to ensure separation of powers and curb abuse of executive powers.<sup>305</sup> The agitation for constitutional reforms began in the 1990s with the advent of multi-party politics following the repeal of Section 2A of the Independence Constitution, as discussed above, and was the Kenyan

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<sup>303</sup> Charles A. Khamala, ‘Evaluating the Judicial Review of 2003 “Radical Surgery” Purging Corruption from Kenyan Courts’ (ICCLCPS 2015: 17<sup>th</sup> International Conference on Criminal Law, Criminology and Police Science, Paris, 25 – 26 June 2015).

<sup>304</sup> Charles A. Khamala, ‘Evaluating the Judicial Review of 2003 “Radical Surgery” Purging Corruption from Kenyan Courts’ (ICCLCPS 2015: 17<sup>th</sup> International Conference on Criminal Law, Criminology and Police Science, Paris, 25 – 26 June 2015).

<sup>305</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 5.

citizenry's volatile reaction to constitutional amendments which severely limited both individual and group rights while enhancing executive powers at the expense of parliament.<sup>306</sup>

Some progress was made in the Moi era following the Inter-Parliamentary Parties Groups (IPPG) reforms before the 1997 general elections which produced the Constitution of Kenya Review Act of 1997, enabling a comprehensive constitutional review after the elections.<sup>307</sup> Consequently, the Constitution of Kenya Review Commission (CKRC) was established in November 2000 under the leadership of the world famous Kenyan constitutional scholar Professor Yash Pal Ghai. However, incessant wrangling between the government and the opposition bogged down the CKRC and Kenya went into the 2002 general elections without the much-desired comprehensive constitutional reforms.<sup>308</sup>

At the start of this constitutional reform process the judiciary was perceived to be an obstacle when in 2002 a group of judges moved to the high court to stop the Constitution of Kenya Review Commission (CKRC) from adopting proposals relating to the judiciary in the draft constitution. This was in the case of *In the Matter of Professor Yash Pal Ghai, Chairman Constitution of Kenya Review Commission, the Constitution of Kenya Review Commission, and the National Constitutional Conference, Ex-parte Mr. Justice Moiwo Ole Keiwua and Mr. Justice*

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<sup>306</sup> S. Ndegwa, 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya' (1998) 45 Africa Today 193.

<sup>307</sup> P.L.O Lumumba, 'A Journey Through Time in Search of A New Constitution' in M.K. Mbondenyi, P.L.O Lumumba, and Steve O. Odero (Eds.), *The Constitution of Kenya: Contemporary Readings* (Law Africa 2011) 41.

<sup>308</sup> P.L.O Lumumba, 'A Journey Through Time in Search of A New Constitution' in M.K. Mbondenyi, P.L.O Lumumba, and Steve O. Odero (Eds.), *The Constitution of Kenya: Contemporary Readings* (Law Africa 2011) 41.

*Joseph Vitalis Odera Juma*<sup>309</sup> where the judges argued that the proposals would adversely affect them. The proposals were, amongst others, the creation of a supreme court, more stringent qualifications for the appointment of judges, reduction of retirement age of judges from 74 to 65 years and voluntary early retirement for sitting judges with benefits or scrutiny for those wishing to continue in service. On the face of it, these proposals had the capacity to create an empowered judiciary composed of highly qualified judges, contrary to the judges' claims of adverse effect. The petitioners proceeded to obtain leave from another high court judge to apply for judicial review and it was held that the grant of leave would operate as stay of discussion of the proposals touching on the judiciary.<sup>310</sup>

The judges' true intentions were revealed when they ultimately amended their application to challenge the entire constitutional review process. This was notwithstanding the fact that: (a) the judges had already made their submissions to the CKRC through a memorandum; (b) the CKRC statute prohibited suits against the Commission; and (c) most importantly, since the application was all about the terms and conditions of service of all judges, the judiciary was essentially being a judge in its own cause which was against the rules of natural justice. This conduct overshadowed any positive contribution of the judiciary to the constitutional reform process and was strongly condemned by members of the public, parliament, professional bodies,

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<sup>309</sup> High Court Miscellaneous Application Case No.1110 of 2002.

<sup>310</sup> This was the second case filed on this matter. It was preceded by: High Court Miscellaneous Application No.994 of 2002; *Tom O. K'Opere, John M. Njongoro v. Professor Yash Pal Ghai and the Constitution of Kenya Review Commission* filed by two advocates of the high court seeking to quash proposals for reform of the judiciary by the CKRC, on the basis that practicing advocates, their clients and themselves would be adversely affected by the proposals touching on judges. The real applicant was believed to be the judiciary.



international communities, and religious organizations.<sup>311</sup> Some critics went further to castigate the judiciary for having performed badly in the enforcement of the bill of rights, lacking in legal philosophy, and even in the incidence of cases that had judgements upholding constitutional supremacy there was unprincipled manipulation of the law.<sup>312</sup>

Nevertheless, despite having an emboldened, albeit selfish, judiciary during the constitutional reform process, there was a strong legal culture in the country as exhibited in the fact that all challenges to the constitutional reform process were made through the courts. A society with a strong legal culture has well integrated within it the rules and concepts of law to an extent whereby the rule of law is supreme, and its members seek recourse and justice through the courts. Between 2003- 2005, several constitutional references were filed in the high court by private individuals, political parties, civil society organizations, advocates, and even judges, seeking to stop the constitutional reform process.<sup>313</sup>

Moreover, the judiciary can be credited with giving all Kenyans the opportunity to participate in the country getting a new constitution by way of a referendum through the ruling given in the case of *Njoya & 6 others v Attorney-General & another*.<sup>314</sup> This was an application filed to seek orders, amongst others, that: (a) certain sections of the Constitution of Kenya Review

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<sup>311</sup> ICJ Kenya, 'The Judiciary in Review (2000-2002)' <[http://pdf.usaid.gov/pdf\\_docs/Pnacw012.pdf](http://pdf.usaid.gov/pdf_docs/Pnacw012.pdf)> accessed 18 April 2017.

<sup>312</sup> ICJ Kenya, 'The Judiciary in Review (2000-2002)' <[http://pdf.usaid.gov/pdf\\_docs/Pnacw012.pdf](http://pdf.usaid.gov/pdf_docs/Pnacw012.pdf)> accessed 18 April 2017.

<sup>313</sup> Jill Cotrell and Yash Pal Ghai, 'Constitution Making and Democratization in Kenya (2000-2005)', (2007) 14 Democratization 1.

<sup>314</sup> (2004) 1 KLR.

Act abrogated the constituent power of the Kenyan people or were otherwise unconstitutional and should be struck down, (b) that the Act was unconstitutional to the extent that it permitted a National Constitutional Conference to discuss and adopt a draft bill to alter the Constitution, and (c) that the draft bill did not reflect the views of Kenyans.

The primary contention of the applicants was that parliament had usurped the Kenyan peoples' power to make a new constitution through amendments to the Constitution of Kenya Review Act. Moreover, the National Constitutional Conference was not representative of all Kenyans given that every district was represented by three delegates irrespective of differences in population and size.<sup>315</sup> The court went on to hold, *inter alia*, that: (i) Subsections (5), (6), and (7) of Section 27 of the Act were unconstitutional to the extent that they usurped the applicants' right to have a referendum to review the Constitution to the extent that such right was dependent on the absolute discretion of the Conference delegates, (ii) constituent power belonged to all Kenyan people, and (c) that in exercise of that power, the applicants, together with all Kenyans were entitled to a referendum on any proposed new Constitution.

#### **3.1.4.3 THE POLITICS OF ADOPTING A NEW CONSTITUTION**

After the NARC government came into power it reconvened the National Constitutional Conference under the Constitution of Kenya Review Act<sup>316</sup> with a view to continuing the constitution making process that was disrupted by President Moi when he dissolved parliament on 27<sup>th</sup> October 2002, a day before the 'Ghai Draft' Constitution was to be presented to delegates at

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<sup>315</sup> Patricia Mbote and Migai Akech, *Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 37.

<sup>316</sup> Cap 3A of the Laws of Kenya.

the Bomas of Kenya on 28<sup>th</sup> October 2002. CKRC subsequently developed the ‘Bomas Draft’ but this was opposed by the Kibaki regime because it proposed the decentralization of the powers of the presidency through the creation of the office of Prime Minister to share executive power with the President.<sup>317</sup> The Bomas Draft was then amended by parliament which came up with the altered Wako/Kilifi Draft which sought to retain the President’s powers and it was subjected to a referendum in 2005.

The Kenyan public, by an overwhelming majority, rejected the Wako Draft in the 2005 referendum and the constitutional reform process subsequently got a three year break before being revived in 2008 through the establishment of a Committee of Experts under the Constitution of Kenya Review Act<sup>318</sup> which worked on the contentious issues in the previous drafts and presented the harmonized draft that was voted for by the Kenyan people in the 2010 referendum.<sup>319</sup> It was the culmination of a decade long process of constitutional reforms which began in 2000 and was adopted in a constitutional referendum by 68.85% of the valid votes cast prior to its promulgation in August 2010.<sup>320</sup>

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<sup>317</sup> M.K. Mbondenyei, ‘Introduction’ in M.K. Mbondenyei P.L.O Lumumba, and Steve O. Odero (Eds.), *The Constitution of Kenya: Contemporary Readings* (Law Africa 2011) 3.

<sup>318</sup> No.9 of 2008.

<sup>319</sup> Mbage Njuguna Nganga, ‘Law Reform and Constitutional Implementation: Experiences and Challenges: The Case of Kenya’ (A presentation to the Australian Law Reform Agencies Conference, Melbourne, Australia 2<sup>nd</sup> – 4<sup>th</sup> March 2016).

<sup>320</sup> Mbage Njuguna Nganga, ‘Law Reform and Constitutional Implementation: Experiences and Challenges: The Case of Kenya’ (A presentation to the Australian Law Reform Agencies Conference, Melbourne, Australia 2<sup>nd</sup> – 4<sup>th</sup> March 2016).

### **3.1.4.4 THE USE OF THE JUDICIARY TO VALIDATE PRESIDENT KIBAKI'S CONTESTED WIN IN THE 2007 ELECTIONS**

The NARC regime's promise was one of delivery of the nation from the repressive practices of the KANU regime, and they hence opened up the political atmosphere with the hard won freedoms of speech, press and association.<sup>321</sup> Moreover, under President Kibaki the Kenyan economy underwent a revitalization that saw it achieve an annual growth rate of over 6% by the end of his first term in 2007.<sup>322</sup> Kenya was consequently being touted as being on its way towards achieving the status of a Newly Industrialized Country (NIC). However, the Kibaki regime had a two-faced existence manifested in "a duality of both positive transformation and imminent decay"<sup>323</sup>, because alongside the positive developments lurked the evils of corruption, bad governance, political instability, and ethnic tensions. Despite the economic progress made by 2007 Kenya scored poorly on the World Bank governance indicators, placing below the average score for sub-Saharan Africa in the critical areas of: (a) government effectiveness (28%); (b) political stability (35.6%); (c) control of corruption (30%); and (d) the rule of law (28.8%).<sup>324</sup>

Moreover, the Kibaki regime gave Kenyans the Anglo Leasing mega corruption scandal in which members of his cabinet were implicated, temporarily dismissed and subsequently

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<sup>321</sup> Susanne D. Mueller, 'The Political Economy of Kenya's Crisis' (2008) 2 *Journal of East African Studies* 185.

<sup>322</sup> Susanne D. Mueller, 'The Political Economy of Kenya's Crisis' (2008) 2 *Journal of East African Studies* 185.

<sup>323</sup> Susanne D. Mueller, 'The Political Economy of Kenya's Crisis' (2008) 2 *Journal of East African Studies* 185; 186.

<sup>324</sup> World Bank, 'Governance Indicators' <[http://info.worldbank.org/governance/wgi2007/sc\\_country.asp](http://info.worldbank.org/governance/wgi2007/sc_country.asp)> accessed 23 October 2017.

reinstated.<sup>325</sup> The scandal revolved around eighteen exceptionally overpriced state security contracts worth USD 770 million made with several foreign and domestic companies.<sup>326</sup> The irony is that thirteen contracts had been initiated in the late 1990s under the Moi regime while five more were made during the Kibaki presidency,<sup>327</sup> so the NARC regime had simply ‘inherited’ a corruption scam hatched under the KANU regime. This was a big embarrassment for a government which had come to power on an anti-corruption platform.

The Kibaki presidency eventually became hostage to ‘the Mt. Kenya Mafia’ who sought to roll-back the hard-won constitutional reforms by reverting to concentration of powers in the presidency. In pursuit of their objective, they consistently endeavored to weaken institutions to a point whereby these institutions were severely constrained in their exercise of institutional autonomy.<sup>328</sup> As a result, at the dawn of the 2007 general elections those institutions which would have vetted a contested election, the Electoral Commission of Kenya (ECK) and the judiciary, were not viewed as being sufficiently neutral to undertake the task.<sup>329</sup>

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<sup>325</sup> Susanne D. Mueller, ‘The Political Economy of Kenya’s Crisis’ (2008) 2 *Journal of East African Studies* 185; 186; 198.

<sup>326</sup> Katrina Manson ‘Kenya targets architects of Anglo Leasing corruption scandal’ (Financial Times, 15 March 2015) <<https://www.ft.com/content/bf75a7ee-c7f9-11e4-8210-00144feab7de>> accessed 24 October 2017.

<sup>327</sup> Katrina Manson ‘Kenya targets architects of Anglo Leasing corruption scandal’ (Financial Times, 15 March 2015) <<https://www.ft.com/content/bf75a7ee-c7f9-11e4-8210-00144feab7de>> accessed 24 October 2017.

<sup>328</sup> Susanne D. Mueller, ‘The Political Economy of Kenya’s Crisis’ (2008) 2 *Journal of East African Studies* 185; 186.

<sup>329</sup> Susanne D. Mueller, ‘The Political Economy of Kenya’s Crisis’ (2008) 2 *Journal of East African Studies* 185; 186.

The Kibaki regime went full circle to frustrating “the autonomy of independent branches of government in favor of a highly personalized presidency”<sup>330</sup> This power grab became blatant closer to the elections when two months prior to the election date President Kibaki unilaterally replaced all ECK commissioners and appointed his former personal lawyer as vice-chairman in direct breach of the IPPG reforms of 1997 which laid down the informal rule that such appointments were to be made by consensus between all political parties.<sup>331</sup>The President also appointed three new judges to the high court that would hear contested election appeals and parliament sponsored a bill that proposed the creation of fifty seven judicial vacancies in the high court and seventeen in the appellate court in an open attempt to stuff the judiciary with regime friendly judges in anticipation of a hotly contested election.<sup>332</sup>

Consequently, in the run-up to the 2007 elections both the ECK and the judiciary were viewed in the public domain, especially by the opposition led by the Orange Democratic Movement (ODM) and its supporters, “as partisan rather than impartial and as tied to the executive rather than independent from it”.<sup>333</sup>Hence when the election results were disputed on the basis of rigging allegations, the Raila Odinga led ODM refused to challenge the results in court as taunted by Kibaki’s Party of National Unity (PNU) and ODM supporters took to the streets where they

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<sup>330</sup> Susanne D. Mueller, ‘The Political Economy of Kenya’s Crisis’ (2008) 2 Journal of East African Studies 185; 186.

<sup>331</sup> J. Swan, and United States State Department, ‘The Political Crisis in Kenya: A Call for Justice and Peaceful Resolution’ (Statement before the House Africa and Global Health Sub-Committee Hearing, Washington D.C., February 6, 2008).

<sup>332</sup> Africa Confidential 48 (No. 25, 14 December 2007) <<https://www.africa-confidential.com/browse-by-country/id/25/page/2>> accessed 23 October 2017.

<sup>333</sup> Susanne D. Mueller, ‘The Political Economy of Kenya’s Crisis’ (2008) 2 Journal of East African Studies 185; 186; 195.

were confronted by PNU supporters thus precipitating the 2007/08 post-election violence. ECK on its part insisted that electoral disputes could only be resolved in the courts, but ODM refused and countered this assertion by emphasizing that, “the courts were controlled by Kibaki, who had nominated six judges, two to the appellate court and four to the high court, a few days to the election.”<sup>334</sup>

However, it must be noted that the repeated attempts at weakening the judiciary by the Kibaki regime which resulted in its loss of public trust was enabled largely in part due to the aloofness of the then Chief Justice Evans Gicheru. As earlier mentioned, at the beginning of the NARC regime he abetted the unprocedural retirement or dismissal of half of his magistrates and a third of his judges<sup>335</sup> under the ‘radical surgery’ that followed his unilateral publication of the Ringera Report, prior to affording the implicated judicial officers an opportunity to defend themselves against the allegations levelled against them. Justice Gicheru subjected himself to further ignominy when he oversaw the swearing in of President Kibaki and half his cabinet under the cover of dusk within the grounds of State House amidst the break-out of post-election violence nationwide. The Law Society of Kenya (LSK) subsequently issued a statement in January 2008

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<sup>334</sup> S. Ndegwa, ‘Kenya: Raila calls for vote recount’ (East African Standard, Nairobi, 30 December 2007).

<sup>335</sup> Stephen Makabila, ‘Next six months to count most for Gicheru tenure’ (Standard Digital, 28 August 2010) <<https://www.standardmedia.co.ke/article/2000017012/next-six-months-to-count-most-for-gicheru-tenure>> accessed 23 October 2017,.

lamenting that part of the problem which led to the political impasse not being taken to court at the time was that “the public was not confident that the Chief Justice was impartial”.<sup>336</sup>

### **3.1.4.5 ATTEMPTS AT JUDICIAL REFORM AND FINDINGS OF THE OUKO TASKFORCE**

One of the outcomes of the Kofi Annan led mediation process in reaction to the 2007 post-election violence were proposals for judicial reforms to restore public trust and its image as a neutral arbiter of disputes. This resulted in the appointment by the coalition government of a Task Force on Judicial Reforms chaired by Justice William Ouko in 2009 with the mandate, amongst others, to consider and advise on ways of dealing with corruption or perceived corruption in the judiciary. The Ouko Report found that there was serious abuse of judicial office by judges and magistrates through, *inter alia*: (a) undue influence or pressure by or between judicial officers on specific cases; (b) withdrawal of or pre-direction of files to specific judicial officers; (c) drawing of pleadings by judicial officers and staff at a fee; (d) rendering legal advice on actual or intended litigation; (e) manipulation or doctoring of the record of evidence and proceedings; and (f) acquiring an interest in the subject matter of litigation.<sup>337</sup>

The Kibaki era judiciary went rogue and engaged in the business of public extortion with judicial officers working in partnership with felonious agents in the court corridors as noted in the Ouko Report, “There are busy bodies in the court corridors who, apart from masquerading as agents of judicial officers, are also involved in other illegal practices such as disappearance of files

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<sup>336</sup> Stephen Makabila, ‘Next six months to count most for Gicheru tenure’ (Standard Digital, 28 August 2010) <<https://www.standardmedia.co.ke/article/2000017012/next-six-months-to-count-most-for-gicheru-tenure>> accessed 23 October 2017,.

<sup>337</sup> Final Report of the Task Force on Judicial Reforms (Government Printer 2010) 76.



or presentation of forged bail documents.”<sup>338</sup> However, the Ouko Report suffered the same fate as its predecessor, the Kwach Committee Report, since its findings and recommendations were never acted upon or implemented.

#### **3.1.4.6 THE KIBAKI ERA JUDICIARY’S POSITION WITHIN THE CONCEPTUAL FRAMEWORK**

From the foregoing it is evident that the Kibaki era judiciary became a law unto itself with judicial officers presiding over their courts unbridled. They did not tolerate any fetter on their powers and came out with guns blazing anytime perceived ‘outsiders’ questioned their independence or integrity. Furthermore, they challenged (in their own courts) proposals in the draft constitution to make changes in the judiciary. Typically, such judges and magistrates are not unduly constrained by political factors since the overriding considerations are self-interest and self-preservation. Consequently, the Kibaki administration made repeated attempts to create vacancies in the judiciary which would ostensibly be filled by regime friendly judges, however they enjoyed limited success since the affected judicial officers subsequently vigorously challenged their removal in the courts.

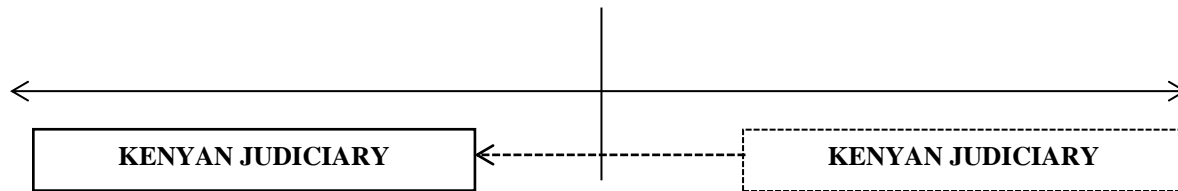
The Kibaki era judiciary continuously asserted itself whenever challenged by either the public or the other arms of government to successfully preserve their self-interests. This judiciary was impervious to either public or private opinion and/or influence even when serious allegations of corruption were levelled against its members. Therefore, its position moves from the fourth to the third quadrant as shown below:

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<sup>338</sup> Final Report of the Task Force on Judicial Reforms (Government Printer 2010) 77.

**POLITICALLY  
UNCONSTRAINED**

**POLITICALLY  
CONSTRAINED**



### **3.2 THE EFFECTS OF LEGAL CONSTRAINTS ON THE KENYAN JUDICIARY AFTER INDEPENDENCE**

### **3.3 THE ORIGINAL PROVISIONS OF THE INDEPENDENCE CONSTITUTION: A LOST OPPORTUNITY**

As seen in chapter two, the extent and manner of exercise of judicial power by the courts in any given context is provided for under the respective laws, institutionalized legal rules, norms and practices. These are the legal constraints under which the courts operate and any deviation from them may prompt a loss in the legal legitimacy of their judgements.<sup>339</sup> In societies where the rule of law is supreme such constraints are heavily and extensively integrated and a court's main task is to exercise its judicial reasoning through strict observance of the legal constraints under which it functions.<sup>340</sup> Judges within such societies are expected to solely rely on the authority of a

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<sup>339</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>340</sup> Martin Kryger, 'Law as a Tradition' (1986) 5 *Law and Philosophy* 237.

settled rule in their determination, even when there are strong moral, economic, political, or other social considerations pointing to a different outcome.<sup>341</sup>

The Independence Constitution<sup>342</sup> conferred upon the Supreme Court the jurisdiction to hear any question in respect of its interpretation.<sup>343</sup> This power of constitutional interpretation also inherently empowers a court to exercise its power of judicial review over the exercise of either executive or legislative power to ensure their conformity with the constitution, as provided for under the separation of powers doctrine. Overall, the entire judiciary was meant to exercise its judicial power within the constraints of, “any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.”<sup>344</sup> These provisions provided a foundation on which it would have been possible to construct a strong rule of law tradition from independence, and further allowed for the institutionalization of legal rules, norms, and practices that would have served to positively constrain judicial decision making. When combined with the constitutional provisions ensuring judicial independence, earlier discussed, the ground was thus ripe for the growth of an independent and accountable judiciary from the very beginning.

The envisaged institutionalization of legal rules, norms, and practices would have insulated judicial officers from political and other non-legal influences and enabled them to make legal decisions that were not influenced by the desired political outcomes of either the executive or

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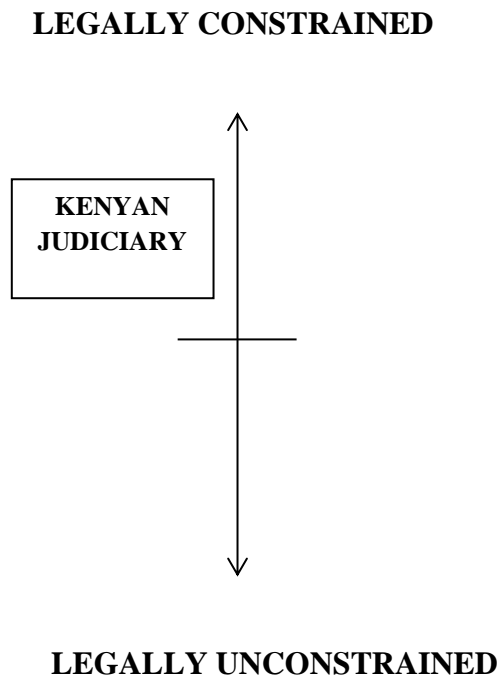
<sup>341</sup> P.S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987) 1.

<sup>342</sup> The Kenya Independence Order in Council 1963, which was made on 4<sup>th</sup> December 1963 and was to come into operation immediately before 12<sup>th</sup> December 1963 (Independence Day).

<sup>343</sup> Section 175.

<sup>344</sup> Section 171.

legislature or even the political predispositions of individual judges.<sup>345</sup> The judges' judicial discretion would have been constrained to be in accordance with the prevailing legal rules, norms and practices failure of which would have resulted in a loss of legitimacy of their judgements. These factors allow for the position of the Kenyan judiciary on the vertical axis of my conceptual framework as at 12<sup>th</sup> December 1963 to be in the second quadrant as follows:



### **3.3.1 THE IMPACT OF CHANGES TO LEGAL CONSTRAINTS ON THE KENYAN JUDICIARY AFTER INDEPENDENCE**

### **3.3.2 THE JOMO KENYATTA ERA: 12<sup>TH</sup> DECEMBER 1963 – 22<sup>ND</sup> AUGUST 1978**

The changes in the legal constraints occurred mainly at two levels: (a) actual formal changes to the constitution, as seen in the constitutional amendments discussed above; and (b)

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<sup>345</sup> Migai Akech and Patricia Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State' (2012) 18 East African Journal of Peace and Human Rights 357.

changes in judicial practice that were seen in judicial decisions and judicial behavior.<sup>346</sup> This opened the path for judges in Kenya's post-independence judiciary to deviate from their role as neutral arbiters and take up the role of defending and collaborating in the unconstitutional acts of the executive.<sup>347</sup> The courts through individual judges and magistrates contributed significantly to the erosion of constitutional democratic rights under the Kenyatta regime.<sup>348</sup> This was aided by the President's appointment of judicial officers who were inclined to protect his interests as well as through the design or manipulation of both substantive and procedural laws to enable the attainment of desired political outcomes in cases which came before the courts. The Kenyatta era judiciary was literally 'Kenyatta's judiciary' and was thus able to ignore or deviate from the constraints of legal rules, norms, and practices encouraged by a favorable political climate. They thus became agents of 'political justice' that entails the use of judicial devices in general and court proceedings to bolster, consolidate, or create new power positions.<sup>349</sup> The executive used the judiciary to consolidate power, ensure its ideological legitimacy to succession and keep political opposition in check.<sup>350</sup>

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<sup>346</sup> Shadrack B. O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 Z.L.REV 142.

<sup>347</sup> W.E. Condlin, 'The Role of Third World Courts During Alleged Emergencies' in M.L. Marasinghe and W.E. Condlin, *Essays on Third World Perspectives in Jurisprudence* (Malayan Law Journal Ltd. 1984) 137.

<sup>348</sup> Shadrack B. O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 Z.L.REV 142.

<sup>349</sup> C. Kirchheimer, *Political Justice* (Princeton University Press 1961).

<sup>350</sup> Oki Ooko-Ombaka, 'Political Justice in Kenya: Prolegomena to an Inquiry into the Use of Legal Procedures for Political Purposes in the Post Kenyatta Era' (1982) 15 Law and Politics in Africa, Asia and Latin America 393.

Also, courts could no longer rely on established legal rules drawn from past judicial decisions under the doctrine of precedent. This was because of the fact that since the collapse of the East African Community in 1975, law reports were no longer published and there was no circulation of the decisions of the higher courts.<sup>351</sup> Therefore, the preciseness in interpretation of the law became highly dependent on individual judges' memory and knowledge, or lack thereof. In the absence of authoritative judicial records, the collective judicial memory became even more pliant to manipulation by political actors in collusion with willing judicial officers when deciding on the constitutional validity of the exercise of either executive or legislative powers.

Moreover, the entire legislative process became an exercise controlled by the executive from the law-making process itself to the subsequent interpretation by the courts. Gutto observes that, "Laws made by political parliaments composed of members chosen by political parties and enforced by judges chosen by political leaders (the executive) could be anything but political!"<sup>352</sup> The political reality of the time was that the executive branch controlled the entire governmental structure.<sup>353</sup>

The Kenyatta era judiciary neglected its institutional responsibility as a separate branch of government and was not responsive to the needs of the public. This marked the breakdown of the ideological framework of the state as defined in the separation of powers doctrine as the ruling

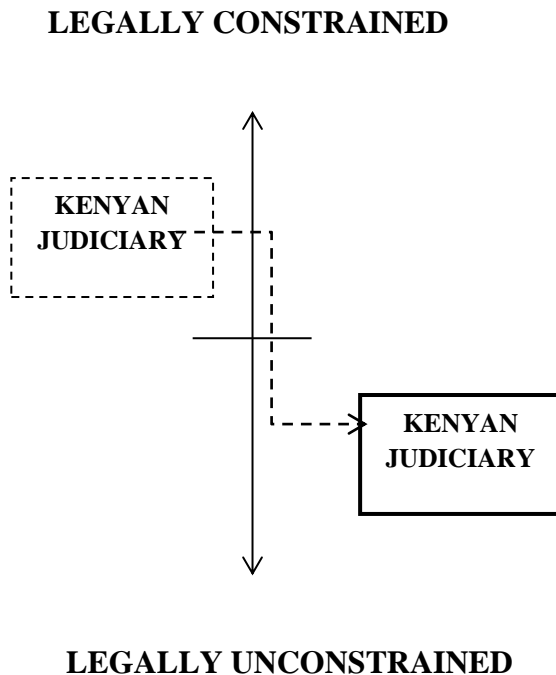
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<sup>351</sup> Shadrack B. O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 Z.L.REV 142.

<sup>352</sup> Shadrack B. O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 Z.L.REV 142.

<sup>353</sup> Jackton B. Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press, 2013) 47.

class increasingly used administrative and judicial procedures to ensure political survival.<sup>354</sup> The lack of fidelity to legal constraints and subservience to the political class moved the position of the Kenyatta era judiciary on the vertical axis from the second to the fourth quadrant as shown below:



### **3.3.3 THE DANIEL ARAP MOI ERA: 22<sup>ND</sup> AUGUST 1978 – 30<sup>TH</sup> DECEMBER 2002**

The total capture of the state by the executive under President Moi was formally pronounced in 1987 when KANU asserted, contrary to the country’s constitutional structure, that

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<sup>354</sup> Oki Ooko-Ombaka, ‘Political Justice in Kenya: Prolegomena to an Inquiry into the Use of Legal Procedures for Political Purposes in the Post Kenyatta Era’ (1982) 15 Law and Politics in Africa, Asia and Latin America 393.

it was 'above' parliament and government.<sup>355</sup> This marked the total dismantling of the tripartite system of government formulated under the separation of powers doctrine as the executive which had suffocated parliamentary and judicial freedom in the 1970s finally strangled parliamentary and judicial independence in the 1980s.<sup>356</sup> By the 1990s, the judiciary had become a discredited institution that commanded little respect from the public and was noted to have become "more executive minded than the executive, ineffectual in its work and much reviled by the public."<sup>357</sup> Judges and the judiciary were perceived to be increasingly compliant, corrupt and incompetent.

Instead of operating as a separate arm of government the Moi era judiciary was treated as a branch of the public service, a department of the office of the Attorney General.<sup>358</sup> The head of the public service kept a stranglehold on the judiciary thus allowing it to function at the command of the executive.<sup>359</sup> This allowed for unbridled interference in the exercise of judicial power by the Attorney-General and even when the judiciary was placed under the Office of the Chief Justice in 1989 this emasculation continued through the continued underfunding and understaffing of the

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<sup>355</sup> Shadrack B. O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 Z.L.REV 142.

<sup>356</sup> R. Martin, 'Legislatures and Economic Development in Commonwealth Africa' (1977) Public Law 148.

<sup>357</sup> Wachira Maina, *Strengthening the Fragile Bastion: Blue Print for Judicial Reform in Kenya* (ICJ Kenya 2006).

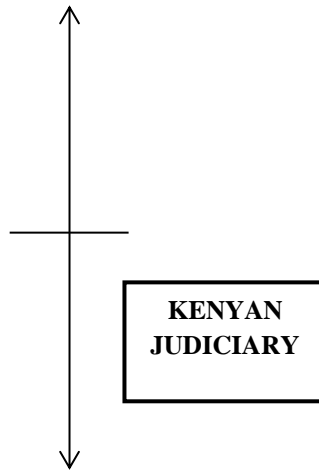
<sup>358</sup> Paul Mwangi, *The Black Bar: Corruption and Intrigue within Kenya's Legal Fraternity* (Oakland Media Services, 2001).

<sup>359</sup> Abdul Majid Cockar, *Doings, Non-Doings and Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics, 2012) 182.



judiciary.<sup>360</sup> As a result the position of the Moi era courts' on the conceptual framework's vertical axis remains in the fourth quadrant as shown below:

**LEGALLY CONSTRAINED**



**LEGALLY UNCONSTRAINED**

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<sup>360</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 5.

### 3.3.4 THE MWAI KIBAKI ERA: 30<sup>TH</sup> DECEMBER 2002 – 9<sup>TH</sup> APRIL 2013

Kenyan courts were now grappling with the scourge of corruption among judges and magistrates. The state of the judiciary at this point was aptly captured by the then retired Chief Justice Cockar as follows, “Today when I am writing this journal (year 2000 onwards), talk is rife among all and sundry about corruption among judicial officers and exertion of executive pressure on them to distort the course of justice”.<sup>361</sup> All external assessors in their reports<sup>362</sup> censured the Kenyan judiciary for corruption. This corruption not only undermined the rule of law and impartial dispensation of justice but also exposed the public to extortion.<sup>363</sup>

As earlier noted, the Kibaki era judiciary was a law unto itself, and the judicial officers were only concerned with safeguarding their own interests. In such a context, a judicial officer can proceed to arrive at a decision based solely on his/her personal and policy preferences as they operate in an environment where the judge or magistrate is supreme and unshackled from legal or political constraints. Consequently, the legal legitimacy of a judgement becomes entirely dependent on a particular judicial officer’s personal and policy preferences. Therefore, the position of the Kibaki era judiciary on the conceptual framework’s vertical axis moves from the fourth to the third quadrant as shown below:

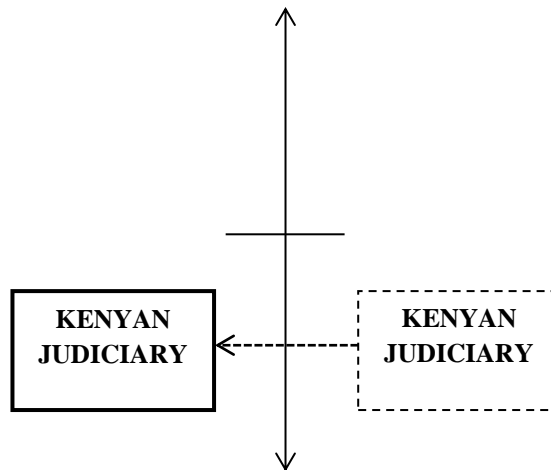
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<sup>361</sup> Abdul Majid Cockar, *Doings, Non-Doings and Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics, 2012) 61.

<sup>362</sup> The Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, The Ringera Report and the Ouko Report

<sup>363</sup> Final Report of the Task Force on Judicial Reforms (Government Printer 2010) 77.

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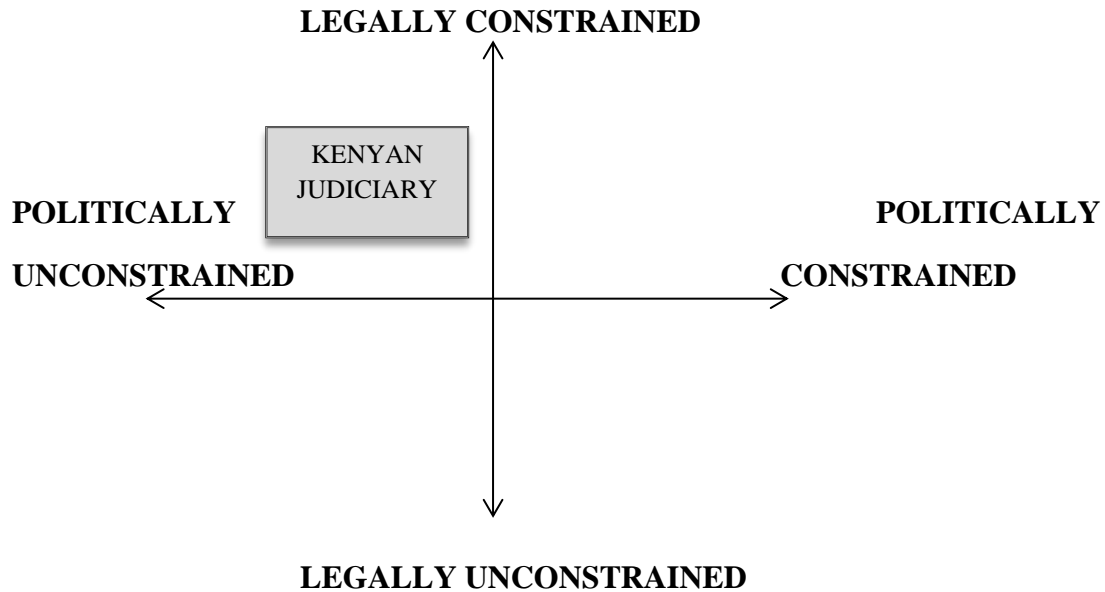


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### **3.4 FULL CONCEPTUAL FRAMEWORK MODEL POSITIONING OF THE KENYAN JUDICIARY DURING AND AFTER INDEPENDENCE**

#### **3.4.1 AS AT INDEPENDENCE ON 12<sup>TH</sup> DECEMBER 1963**

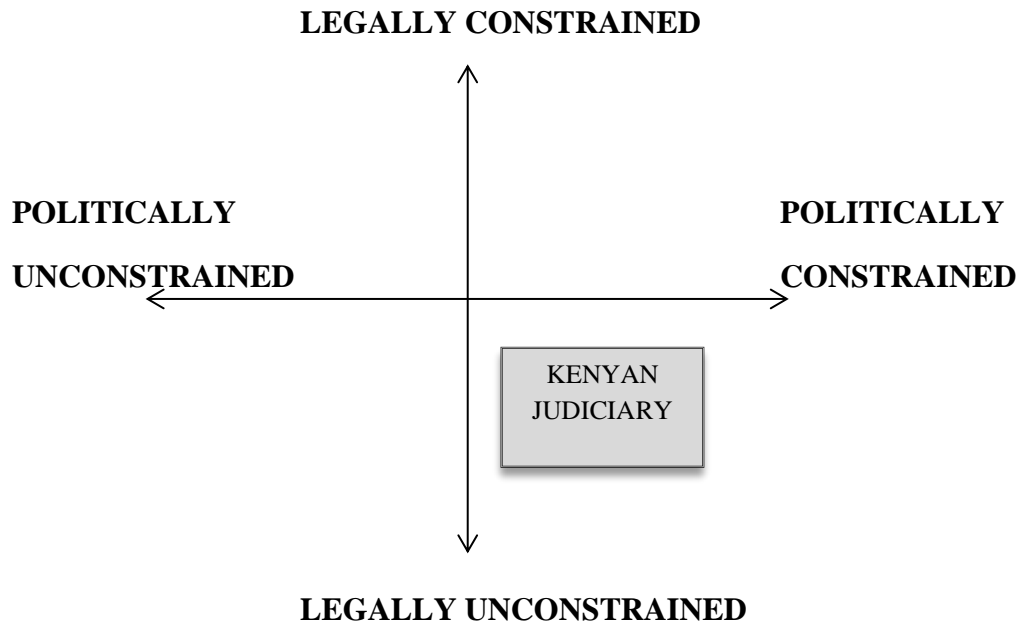
Based on the discussion above and utilization of the findings to track the position and subsequent movement of the Kenyan judiciary on the horizontal and vertical axis of my conceptual framework; a full representation of the position of the Kenyan judiciary during and after independence is shown below:



It therefore emerges that at independence the position of the Kenyan judiciary was within the second quadrant whereby it was legally constrained but politically unconstrained. Under my conceptual framework this would be Court A: The normatively preferred model court. The operational environment of the Kenyan judiciary as proposed under the independence constitution would have insulated it from political attack and therefore have the independence required for it to carry out its constitutional mandate within the ideological framework of the separation of powers doctrine. Moreover, the legal constraints under which it would have operated would have ensured that their judgements had legal legitimacy.

### 3.4.2 AFTER INDEPENDENCE

### 3.4.3 THE KENYATTA AND MOI ERAS



Owing largely to executive capture in the Kenyatta and Moi eras, the Kenyan judiciary moves from the second to the fourth quadrant. This corresponds to Court D: the worst deviation from the doctrine of separation of powers. The Kenyan judiciary under Kenya's first two Presidents was politically constrained but legally unconstrained. The existing legal rules, norms and practices exerted relatively little constraint on the judges, and they were both individually and institutionally vulnerable to political attack.

This development is not surprising since such a judiciary is likely to be found within the context of a newly established, fragile or transitional democracy with no respect for judicial

independence.<sup>364</sup> The Kenyan nation was born with weak political institutions and an equally weak political culture that was a carry-over from the colonial era where political organization was strictly prohibited and the rule of the crown was absolute and could not be challenged.<sup>365</sup> Subsequently the evolving Kenyan judiciary inherited the colonial practice of protecting executive interests through a sympathetic judiciary.<sup>366</sup> This caused it to be deeply compromised and ignore the model beacons of independence, impartiality, and professionalism.<sup>367</sup>

Kenya hence exhibited more of continuity than change from the colonial era, especially in political and constitutional theory and practice.<sup>368</sup> This created the political climate after independence within which any decision of the court could be rejected by political actors who had both the capacity and the will to attack the courts in a manner that impacted on their individual and institutional independence. In such an environment a court's determination would be guided by the desired political outcome irrespective of the corresponding illegitimacy of the judgement.<sup>369</sup>

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<sup>364</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>365</sup> Oki Ooko-Ombaka, 'Political Justice in Kenya: Prolegomena to an Inquiry into the Use of Legal Procedures for Political Purposes in the Post Kenyatta Era' (1982) 15 *Law and Politics in Africa, Asia and Latin America* 393.

<sup>366</sup> Abdul Majid Cockar, *Doings, Non-Doings and Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics, 2012) 23.

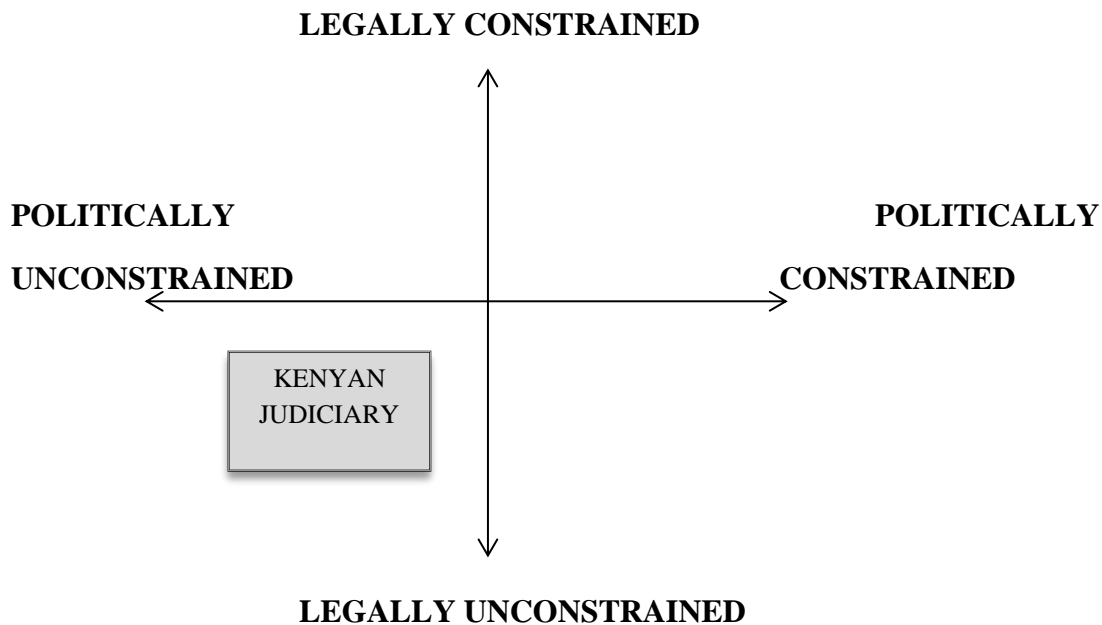
<sup>367</sup> Jackton B. Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press, 2013) 47.

<sup>368</sup> Shadrack B. O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 *Z.L.REV* 142.

<sup>369</sup> Gretchen Helmke, *Courts under Constraints: Judges, Generals and Presidents in Argentina* (Cambridge University Press 2005).

### 3.4.4 THE KIBAKI ERA

The Kibaki era judiciary existed at a time when the country was going through a constitutional reform process that also encompassed judicial reforms. However, it was steeped in allegations and perceptions of corruption which allowed judicial officers serving at the time to place their own interests above those of the public. As earlier discussed, the Kibaki era judiciary was both legally and politically unconstrained which provided an avenue for judges and magistrates, who were willing to do so, to make their decisions according to their own personal and policy preferences. It is in such a court that the problem highlighted in chapter one, “The dangerous possibility for a court’s unwarranted interference with policy choices democratic majorities should be allowed to make.”<sup>370</sup>, is most likely to be encountered. Based on the foregoing the position of the Kibaki era judiciary on the quadrant model emerges to be as depicted below:



<sup>370</sup> Refer to the problem statement of this thesis.

This corresponds to Court C: the dangerous possibility. Such a court exists in a system of government where legal rules, norms and practices are not institutionalized or guaranteed, and judges are therefore not constrained by legal factors in their determination of cases and can make their judgements based on their own personal or policy preferences. However, it should be noted that the freedom of the Kibaki era courts was mainly because of the impunity borne out of corruption and unjust economic enrichment and cannot be equated to judicial independence. This is because, as noted in the Ouko Report, “Ethics and integrity are fundamental pillars of an independent, efficient and accountable judicial system.”<sup>371</sup>

### **3.5 CONCLUSION**

As demonstrated in this chapter, the Kenyan post-independence judiciary gradually ceased to be perceived as a neutral arbiter and public confidence in its independence and impartiality virtually collapsed. This was because it became a tool of the autocratic Kenyatta and Moi regimes which concentrated powers in the executive, hence creating an imperial presidency. I find that such a political environment does not allow for the effective exercise of a court’s judicial review power since in this context separation of powers does not exist and the executive branch exercises full authority without allowing for proper checks and balances by either the legislature or the judiciary. Under the Kenyatta and Moi administrations the courts were hence deployed by the executive to play a significant role in protecting the interests of an imperial presidency in a skewed and severely compromised manner that greatly undermined public faith in their independence and impartiality. Consequently, the judiciary in these two eras corresponded to Court D of the conceptual framework – the worst deviation from the separation of powers doctrine.

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<sup>371</sup> Final Report of the Task Force on Judicial Reforms (Government Printer 2010) 73.



However, in interrogating the Kibaki presidency the chapter also reveals that even where the political structure aligns with the tripartite form of government advocated for under the doctrine of separation of powers, the personal and policy preferences of the judges can determine the effectiveness of the courts exercise of judicial power. The Kibaki era judges exhibited a strong streak of selfishness and did not shy away from using the law to protect their own interests and were also bogged down by pervasive corruption at all levels of the Kenyan judiciary. As a result, the Kibaki era judiciary paralleled Court C – the dangerous possibility that allows the threat of a court’s unwarranted interference with policy choices democratic majorities should be allowed to make. Based on this finding, I hold that effective exercise of the courts power of judicial review of legislative action is not only dependent on judicial independence but also on the integrity and rectitude of individual judges.

Ultimately, the chapter shows that post-independence courts were under political pressure or influence on judicial officers to decide cases other than in accordance with the law and evidence. Judges also frequently changed their views on the law therefore delivering inconsistent judgements to an extent that even decisions of senior judges had little value as precedent.<sup>372</sup> As seen in the case of Attorney-General Charles Njonjo, senior members of the political class established special ties with particular judges and magistrates for their own political and self-serving ends and some would even seek an opinion from crucial political actors before rendering their judgements.<sup>373</sup> On this basis I contend that the Kenyan post-independence judiciary malfunctioned to the extent that it

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<sup>372</sup> Migai Akech, Patricia Kameri-Mbote, Collins Odote and Gabriel Mwangi, *Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution* (Law and Development Initiatives 2011).

<sup>373</sup> Abdul Majid Cockar, *Doings, Non-Doings and Mis-Doings by Kenya Chief Justices 1963 – 1998* (Zand Graphics, 2012) 22.

was crippled in its role as an independent and impartial agent of democratic governance, and it became a mere department of the executive branch with dedicated service to the then prevailing political objectives.<sup>374</sup>

There was therefore a glaring need for reform of the judiciary, and this was one of the key aspects in the constitutional reforms initiatives that were taken up in earnest at the beginning of the second millennium. This need for reform was drawn from the accepted premise that a country without a credible judiciary cannot respect the rule of law.<sup>375</sup> With specific regard to its independence as espoused under the separation of powers doctrine, the Kenyan judiciary had the task of resetting its relationship with the other arms of government in order to reposition itself as a strong, effective, equal, and independent arm of government; premised on the principle of robust independence and constructive interdependence.<sup>376</sup> This is to be viewed from the perspective that it was emerging from a past where it was treated as a government department and not as an equal and independent arm of government.<sup>377</sup>

It was therefore necessary to re-establish the legitimacy of the legal order by creating checks and balances to ensure accountability of the government to the Kenyan people in whom

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<sup>374</sup>Jackton B. Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press, 2013) 52.

<sup>375</sup> Migai Akech, Patricia Kameri-Mbote, Collins Odote and Gabriel Mwangi, *Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution* (Law and Development Initiatives 2011).

<sup>376</sup> Kenya Judiciary, *Judiciary Transformation Framework, 2012-2016* (Kenya Judiciary 2012) 2.

<sup>377</sup> Kenya Judiciary, *Judiciary Transformation Framework, 2012-2016* (Kenya Judiciary 2012) 9.

the sovereign power<sup>378</sup> resided.<sup>379</sup> It was also essential for the country to have clear distinctions between the three arms of government, and especially between the judiciary and the other two arms.<sup>380</sup> Only under such conditions would the Kenyan state be able to bring forth an independent judiciary which would be able to serve the function of being the principal defence against undue exercise of power by the executive or a legislature operating outside its legal, constitutional mandate.<sup>381</sup>

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<sup>378</sup> Article 1 (1) of the 2010 Constitution provides that, “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”. Article 1(3) then delegates this sovereign power to the three state organs: parliament, executive, and judiciary.

<sup>379</sup> Eric Ngeno ‘Has ‘shambolic’ become our collective destiny?’ Sunday Nation (Nairobi 27 January 2013).

<sup>380</sup> Steve Nguru, ‘Constitutions of Kenya’ <<http://www.ustawi.info.ke/index.php/judiciary/judiciary-under-the-new-constitution?showall=&start=6>> accessed 11 April 2017.

<sup>381</sup> Bard A. Andreassen and Tiberius Barasa, ‘Political Transition, Governance and Human Rights in Kenya: Political Context Study’ in Bard A. Andreassen and Gordon Crawford (Eds.) *Human Rights, Power and Civic Action: Comparative Analyses of Struggles for Rights in Developing Societies* (Routledge 2012) 12.

## CHAPTER FOUR

### THE EXERCISE OF JUDICIAL POWER UNDER THE 2010 CONSTITUTION

#### 4.1 INTRODUCTION

As discussed in chapter three, the Kenyan judiciary can exercise its judicial review power as a check on the exercise of executive and legislative power within the context of the separation of powers doctrine. However, the extent to which it can exercise this power is limited by the political and legal constraints within which it operates. Chapter three's examination of the post-independence judiciary revealed that it was held hostage by an executive that gradually centralized governmental power through three successive political regimes under the Independence Constitution.<sup>382</sup> This was one of the core issues tackled by the constitutional reform process that began in 1998<sup>383</sup> and culminated in the promulgation of the 2010 Constitution.

The 2010 Constitution addressed shortcomings of the severely amended Independence Constitution that undermined judicial independence in Kenya, specifically the need to steer the judiciary clear of any form of manipulation from either the executive or legislature, and the need to appoint judges purely based on competence and rectitude.<sup>384</sup> The judiciary was hence better

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<sup>382</sup> (a) President Jomo Kenyatta's Era: 12<sup>th</sup> December 1963 – 22<sup>nd</sup> August 1978; (b) President Daniel arap Moi's Era: 22<sup>nd</sup> August 1978 – 30<sup>th</sup> December 2002; and (c) President Mwai Kibaki's Era: 30<sup>th</sup> December 2002 – 9<sup>th</sup> April 2013.

<sup>383</sup> With the formation of the Constitution of Kenya Review Commission (CKRC) under the Constitution of Kenya Review Act, 1998.

<sup>384</sup> Geoffrey Imende, 'Chapter Ten of the New Constitution of Kenya: A Commentary' in Curtis Njue Murungi (Ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (ICJ Kenya, 2010) 267.

placed to undertake its central role as the guardian of the Constitution from encroachment by other arms of government. However, promulgation of a robust constitution is not in itself a guarantee of judicial independence and of consequence is the composition of the bench and how they preside over the courts in determining cases which come before them.<sup>385</sup>

Although Article 165 (3) (d) of the Constitution<sup>386</sup> confers this judicial review power over the executive and legislature in the high court<sup>387</sup> in its role as constitutional interpreter, there are no specific limitations on how and when judges can exercise it. This creates the untenable situation of the scope and exercise of this judicial power being open to interpretation and control by individual judges, “leaving them power over their own role in enforcing the Constitution”.<sup>388</sup> Therefore, for the proper functioning of the three arms of government and avoidance of possible usurpation of powers, it is necessary to clarify the scope and the way in which courts can exercise their judicial review power. This is best achieved through practice and application over time.

This chapter therefore seeks to interrogate how the Kenyan courts have specifically exercised their power of judicial review of legislative action during the term of the first parliament under the 2010 Constitution (2013 – 2017). It responds to the second research question: ‘Are Kenyan courts effectively using their judicial review power to check against the abuse of

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<sup>385</sup> Morris Kiwinda Mbondenyi, ‘The Place of the Judiciary in Democratic Transitions in Africa: A Comparison of Post-Apartheid South Africa and Post-Authoritarian Kenya’ in Curtis Njue Murungi (Ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya* (ICJ Kenya, 2010) 267.

<sup>386</sup> Constitution of Kenya, 2010.

<sup>387</sup> See discussion of the problem statement in chapter one of this thesis.

<sup>388</sup> Philip Hamburger, *Law and Judicial Duty* (Harvard University Press 2008) 9.

legislative power by parliament?’ Using my conceptual framework, I assess how individual courts balanced the prevailing legal and political constraints with a view to locating the Kenyan judiciary’s position within the four quadrants of the framework. This entails critical case analysis with the case selection guided by the second research question while zeroing in on cases in which the petitioners are directly contesting legislative action at both the national and devolved levels in the first parliament elected under the 2010 Constitution. The Kenya Law Reports electronic database provides the primary research tool for locating the court cases.

## **4.2 THE STRAIN OF POLITICAL CONSTRAINTS ON THE KENYAN JUDICIARY UNDER THE 2010 CONSTITUTION**

### **4.2.1 PLACING THE JUDICIARY ENVISIONED UNDER THE 2010 CONSTITUTION WITHIN THE CONCEPTUAL FRAMEWORK**

In chapter two it was revealed that, where judicial review of legislative action results in a negative impact on the government’s policies and programs, courts become vulnerable to political attack in ways that serve to undermine their institutional independence. The extent of the courts’ vulnerability to such political attack is what determines the strength or weakness of the political constraints under which they operate. As seen in chapter three, the judiciary was emerging from a past where its institutional independence had been severely undermined by the executive whose control of the judicial system made courts’ susceptible to being used as a tool of political oppression.<sup>389</sup>

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<sup>389</sup> Wafula Okumu, ‘Good African Leaders: Who are they and How do We Get Them?’ in *The Perspective* (2002) <<http://www.theperspective.org>> accessed 28 April 2017.

The Constitution was promulgated on 27<sup>th</sup> August 2010 after a referendum that saw it endorsed by 68.85% of Kenyans.<sup>390</sup> Article 160 (1) of the Constitution expressly provides for judicial independence in stating that, “In the exercise of judicial authority, the judiciary, as constituted under Article 161, shall be subject only to this Constitution and the law and shall not be subject to control or direction of any person or authority.” It consequently recognizes the judiciary as a separate and independent arm of government which has the exclusive mandate to exercise judicial power. It must, however, be reiterated that the judiciary, just like the other two arms of government, exercises this power on behalf of the Kenyan people in whom all sovereign power resides.<sup>391</sup>

This constitutional entrenchment of judicial independence should provide a measure of guarantee and security against its usurpation by the other arms of government since it cannot be revoked without enacting a constitutional amendment of Article 160, which would require a referendum as provided for under Article 255 (1) (g).<sup>392</sup> A referendum would require that at least 20% of the registered voters in each or at least half of the forty seven counties vote in the referendum, and that the amendment/s are supported by a simple majority of the citizens voting in the referendum.<sup>393</sup> This requirement ensures that the wielders of sovereign power, the Kenyan

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<sup>390</sup> Mbage Njuguna Nganga, ‘Law Reform and Constitutional Implementation: Experiences and Challenges: The Case of Kenya’ (A presentation to the Australian Law Reform Agencies Conference, Melbourne, Australia 2<sup>nd</sup> – 4<sup>th</sup> March 2016).

<sup>391</sup> Article 1.

<sup>392</sup> Constitution of Kenya, 2010.

<sup>393</sup> Article 255 (1) (g) and Article 255 (2).

people, are invited to vote on any amendment that would curtail judicial independence thereby avoiding arbitrary restriction on the same by the political arms of government.<sup>394</sup>

The establishment of institutional independence of the judiciary within the Constitution serves to insulate it from inappropriate or unwarranted interference with either its judicial processes or decisions and is a measure of the seriousness with which the principle of separation of powers is taken.<sup>395</sup> The Kenyan judiciary is hence free to exercise its judicial power restrained only by the Constitution and the law. In theory, this constitutional protection of its institutional independence serves to insulate it from political attack and/or interference with its processes or decisions.

The 2010 Constitution can therefore be said to provide a foundation for the Kenyan judiciary to be politically unconstrained since it insulates it from political attack through constitutional safeguards of its institutional independence. These safeguards provide Kenyan courts with the security and ability to withstand political attack by either parliament or the executive. Moreover, the high threshold required for constitutional amendments relating to the independence of the judiciary guard against arbitrary erosion of these constitutional safeguards by a rogue executive as was the case with the Independence Constitution.

Furthermore, Article 160 (1) provides that the judiciary is subject only to the Constitution and the law which are hence the legal constraints within which they must operate. Therefore, in considering matters brought before them for determination Kenyan courts are obligated to abide

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<sup>394</sup> The executive and legislature which are comprised of members elected to office by the Kenyan people.

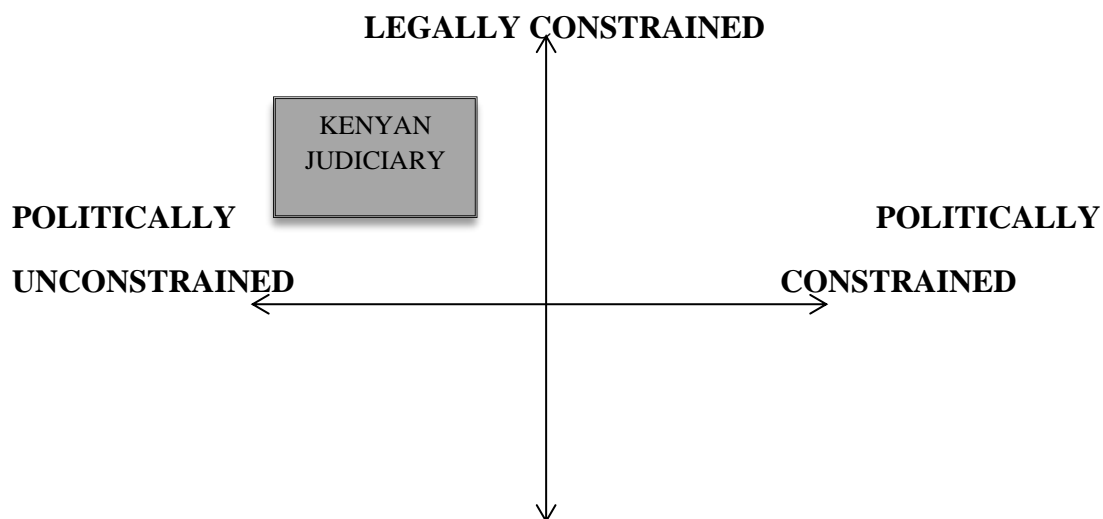
<sup>395</sup> Peter Russell and David O'Brien (Eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia 2001) 22.



by the Constitution and the law in arriving at their decisions. Article 259 further requires the judiciary to interpret the Constitution in a manner that: (a) promotes its purposes, values, and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.

Given these express constitutional requirements for constitutional interpretation, the Kenyan judiciary is therefore legally constrained within the context of my conceptual framework. Kenyan judges are consequently obligated to abide by Articles 160 and 259 when exercising their power of judicial review of legislative action to determine constitutional validity of such action even where they may have strong moral, economic, political, institutional, or other social considerations pointing to a different outcome.<sup>396</sup>

Based on the foregoing, I locate the position of the Kenyan judiciary at the time of promulgation of the 2010 Constitution in the second quadrant of my conceptual framework as represented below:



<sup>396</sup> P.S Atiyah and R.S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987).

## LEGALLY UNCONSTRAINED

The 2010 Constitution thus establishes a framework<sup>397</sup> that allows for an independent judiciary in the mould of Court A of my conceptual framework, which is the normatively preferred model court that is legally constrained but politically unconstrained.

### 4.2.2 THE POLITICAL BATTLES OF THE JUDICIARY IN THE CONSTITUTIONAL TRANSITION PERIOD: 27<sup>TH</sup> AUGUST 2010 – 9<sup>TH</sup> APRIL 2013

The 2010 Constitution is hailed for its strong bill of rights and checks on power in favor of the people as opposed to the ruling political class.<sup>398</sup> The Kenyan people fought hard for these outstanding traits, and it is essential that they be safeguarded from being hijacked by conservative and retrogressive forces as happened with: (a) the Independence Constitution in 1963; (b) the transition to multi-party politics in 1991; and (c) the toppling of the KANU regime in 2002.<sup>399</sup> Murunga *et al*<sup>400</sup> hold that this is only possible through constant vigilance on the part of

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<sup>397</sup> Chapter 10. Constitution of Kenya, 2010.

<sup>398</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 6.

<sup>399</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 7.

<sup>400</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 7.

democratic political forces in partnership with a strong civil society, working together to prevent constitutional subversion and giving life to the Constitution. Similarly, in its role as constitutional custodian and interpreter the Kenyan judiciary also has an important role to play in so far as breathing life into the Constitution for it to live up to its promise.

As discussed in chapter three, the African norm has been that in the wake of ‘second liberations’ new constitutions are launched with much pomp and circumstance only to be later mutilated following unrelenting political attack from the ruling class.<sup>401</sup> This is done with the sole objective of sabotaging the practice of constitutionalism and rule of law which ultimately leads to regression to authoritarian rule. Murunga *et al* lament that, “This has turned several potentially innovative, people-centered constitutional dispensations into moments of utter frustration and despair.”<sup>402</sup> Similarly, since its promulgation the 2010 Constitution has battled sustained political attacks meant to frustrate its successful implementation, as the following examples demonstrate.

### **4.2.3 THE BATTLE OF THE HAGUE: KENYA VS. THE INTERNATIONAL CRIMINAL COURT (ICC)**

#### **4.2.3.1 THE 2007 POST-ELECTION VIOLENCE**

The Kibaki administration spent its two terms frustrating “the autonomy of independent branches of government in favor of a highly personalized presidency”<sup>403</sup>, and even sought to

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<sup>401</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Preface’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) VIII.

<sup>402</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Preface’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) VIII.

<sup>403</sup> Susanne D. Mueller, ‘The Political Economy of Kenya’s Crisis’ (2008) 2 *Journal of East African Studies* 185; 186.

manipulate judicial appointments.<sup>404</sup> President Kibaki's win of a second term in the 2007 general elections was highly disputed by Raila Odinga's ODM party which refused to go to court because it had no confidence in the judiciary. Its sentiments were later validated by the Law Society of Kenya in a statement issued following the outbreak of post-election violence after Kibaki was hurriedly sworn into office at dusk, in which it noted that "the public was not confident that the Chief Justice was impartial".<sup>405</sup> At this point, the judiciary was suffering from a serious lack of public confidence after four decades of being an extension of the executive who used it to oppress political dissidents. It still bore the weight of vilification for "its failure to play its pivotal role in the democratic governance of this country."<sup>406</sup>

As a result of the unresolved 2007 presidential election dispute, Kenya degenerated into an orgy of violent protests across the country, which soon escalated to targeted ethnic violence. The 2007 post-election violence only ended when the African Union Panel of Eminent African Personalities<sup>407</sup> led by former Secretary General of the United Nations Kofi Annan negotiated a power sharing agreement signed on 28<sup>th</sup> February 2008 under which Kibaki retained the presidency

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<sup>404</sup> Africa Confidential 48; No. 25 (14 December 2007) <<https://www.africa-confidential.com/browse-by-country/id/25/page/2>> accessed 23 October 2017.

<sup>405</sup> Stephen Makabila, 'Next six months to count most for Gicheru tenure' *Standard Digital* (Nairobi, 28 August 2010) <<https://www.standardmedia.co.ke/article/2000017012/next-six-months-to-count-most-for-gicheru-tenure>> accessed 23 October 2017.

<sup>406</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

<sup>407</sup> The AU Panel of Eminent African Personalities was chaired by Kofi Annan with the other members being former Tanzanian President Benjamin Mkapa and Mrs. Graca Machel of Mozambique. It was formed by the AU in January 2008 to mediate in the crisis following the 2007 post-election violence. <[http://peaceoperationsreview.org/wp-content/uploads/2015/06/2010\\_au\\_panel\\_important\\_african\\_box.pdf](http://peaceoperationsreview.org/wp-content/uploads/2015/06/2010_au_panel_important_african_box.pdf)> accessed 07 February 2018.

and Odinga became a prime minister.<sup>408</sup> Thereafter on 22<sup>nd</sup> May 2008 President Kibaki gazetted the Commission of Inquiry into the Post-Election Violence (CIPEV)<sup>409</sup> “to inquire into the post-election violence experienced in Kenya after the General Elections held on 27<sup>th</sup> December 2007.” CIPEV had the mandate to investigate: (a) the facts and circumstances related to acts of violence following the 2007 presidential elections; (b) the actions or omissions of state security agencies during the violence; and (c) sets of recommendations concerning measures to be taken to prevent, control and eradicate similar violence in the future.<sup>410</sup>

CIPEV investigations revealed that 1,133 people were killed with most of the deaths being concentrated in the provinces of: Rift Valley (744), Nyanza (134), and Nairobi (125). Moreover, 3,561 people were injured and 117, 216 private properties were destroyed along with 491 government owned properties.<sup>411</sup> 35.7% of the total deaths were from gunshot wounds and there was no evidence to suggest that they were from a source other than the police therefore validating the public perception that the police were responsible for a large number of the deaths.<sup>412</sup> Also of

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<sup>408</sup> ‘Kenya since 2007-2008 post-election violence’ Daily Nation (Nairobi, 6 August 2017)

<https://www.nation.co.ke/news/politics/Kenya-since-post-election-violence-/1064-4046876-12j38pyz/index.html>  
accessed 06 February 2018.

<sup>409</sup> Gazette Notice No. 4473, in exercise of the powers conferred by Section 3 of the Commissions of Inquiry Act (Cap. 102). Funding was provided by the government and the multi-donor trust fund for national dialogue and reconciliation managed by UNDP.

<sup>410</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 21 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> accessed 06 February 2018.

<sup>411</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 345, 346 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

<sup>412</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 346 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

great concern was the finding that the perpetrators of sexual violence during this period were not only, “citizens, neighbors, and gang members, but also significant numbers of security forces.”<sup>413</sup> Ultimately, 350,000 people were displaced from their places of residence and/or business with 1, 916 Kenyans seeking refuge in Uganda.<sup>414</sup>

The CIPEV report concluded with an indictment of the Kibaki regime to the effect that the 2007 post-election violence was “in part, a consequence of the failure of President Kibaki and his government to exert political control over the country or to maintain sufficient legitimacy as would have allowed a civilized contest with him at the polls to be possible.” The Report went on to hold that, “Kibaki’s regime failed to unite the country, and allowed feelings of marginalization to fester into what became the post-election violence.”<sup>415</sup>

#### **4.2.3.2 POLITICAL DISMISSAL OF THE SPECIAL TRIBUNAL TO INVESTIGATE CRIMES AGAINST HUMANITY IN THE 2007 POST-ELECTION VIOLENCE**

In exercise of its mandate to recommend measures to eradicate impunity as well as other legal and administrative measures for state security agencies to prevent a recurrence, CIPEV recommended that a special tribunal be established as a court sitting in Kenya to hear and determine crimes against humanity committed during the 2007 post-election violence. This

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<sup>413</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 349 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

<sup>414</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 349 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

<sup>415</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 345 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

tribunal was to have the sole mandate of investigation, prosecution, and adjudication of such crimes under Kenyan law as well as the International Crimes Bill once enacted.<sup>416</sup>

CIPEV further recommended that an agreement for the establishment of the tribunal be signed by all parties to the power sharing agreement within sixty days of presentation of the CIPEV Report to the Panel of Eminent African Personalities<sup>417</sup> who had negotiated the power sharing deal. Thereafter a statute for the special tribunal was to be passed by parliament and come into force within forty-five days of signing the tribunal establishment agreement. The date when the tribunal was to start operations was “to be determined by the President in consultation with the Prime Minister, the Chief Justice, the Minister for Justice, National Cohesion and Constitutional Affairs, and the Attorney General, within thirty days after the giving of presidential assent to the Bill enacting the Statute.”<sup>418</sup>

In anticipation of lack of political good will to set up the special tribunal or political frustration of its operations once established, CIPEV included a fail-safe measure that should this be the case then, “A list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed special tribunal shall be forwarded to the special prosecutor of the International Criminal Court (ICC).”<sup>419</sup> The

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<sup>416</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 472 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

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<sup>418</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 473 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

<sup>419</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 473 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

special prosecutor was to be requested to analyze the information with the intent of proceeding with an investigation and prosecuting the suspected persons.<sup>420</sup> CIPEV placed the list of names in a sealed envelope which was then handed over to the Panel of Eminent African Personalities Chairperson, Kofi Annan. It was to remain in his custody pending the establishment of the special tribunal, failure to which he was to hand over the envelope to the ICC special prosecutor to investigate and prosecute the persons named in the list.<sup>421</sup>

Support for the establishment of the special tribunal began to wane with an increase in speculation as to the identity of the persons named in what came to be known as “The Waki List”. The speculation gave way to apprehension when the Kenya National Commission on Human Rights (KNCHR) published its report on investigations on the human rights violations that occurred during the 2007 post-election violence in August 2008<sup>422</sup>, which named 219 people as organizers or perpetrators in the violence. This apprehension was on both sides of the political divide since amongst those named were Deputy Prime Minister Uhuru Kenyatta who was allied to President Kibaki’s PNU and Agriculture Minister William Ruto who was a key leader in Prime Minister Odinga’s ODM.<sup>423</sup>

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<sup>420</sup> Republic of Kenya, The Commission of Inquiry into Post-Election Violence (CIPEV) Report (Nairobi 16 October 2008) 473 <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> 06 February 2018.

<sup>421</sup> The ICC can only exercise its jurisdiction in the event of a member state being unable or unwilling to prosecute crimes against humanity committed in its jurisdiction.

<sup>422</sup> Kenya National Commission on Human Rights, ‘On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence’ (Nairobi, August 2008).

<sup>423</sup> Serena Sharma, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya* (Routledge, 2015) 87.



On 16<sup>th</sup> December 2008 both President Kibaki and Prime Minister Odinga in their capacity as the leaders of the coalition government signed an agreement for the implementation of the CIPEV recommendations<sup>424</sup>, whilst parliament officially adopted the CIPEV Report on 27<sup>th</sup> January 2009. Thereafter, efforts to pass the law to set up the special tribunal failed thrice. The first attempt was by the then Minister for Justice, National Cohesion and Constitutional Affairs, Hon. Martha Karua<sup>425</sup>, but was rejected by parliament on 12<sup>th</sup> February 2009.<sup>426</sup> Upon her resignation in April 2009 her successor, Hon. Mutula Kilonzo, revised the rejected draft and tabled it in parliament, but this was also rejected by MPs in July 2009.<sup>427</sup> The final attempt was through a private member's bill presented by renowned political activist, Hon. Gitobu Imanyara who was then MP for Imenti Central. His bill was defeated through a consistent lack of quorum to debate it in July and November 2009.<sup>428</sup>

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<sup>424</sup> Kenya National Dialogue and Reconciliation, 'Agreement for the Implementation of the Recommendations of the Commission of Inquiry into Post-Election Violence' (Nairobi, 16 December 2008). <<https://www.legal-tools.org/doc/f6930d/pdf/>> accessed 08 February 2018.

<sup>425</sup> Hon. Martha Karua resigned on 6 April 2009 citing rejection of her advice on judicial reforms by President Kibaki when five judges were sworn into office without her knowledge since she had been opposed to judicial appointments before reforms on the grounds that such appointments were not based on competence and merit. <<https://www.nation.co.ke/news/1056-557874-k5xmb9z/index.html>> accessed 13 February 2018.

<sup>426</sup> Serena Sharma, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya* (Routledge, 2015) 87.

<sup>427</sup> Serena Sharma, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya* (Routledge, 2015) 87.

<sup>428</sup> Serena Sharma, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya* (Routledge, 2015) 87.

The MPs rallied themselves behind the slogan “Don’t be vague, go to the Hague” coined by Hon. Isaac Ruto who had been elected MP for Chepalungu constituency on an ODM ticket.<sup>429</sup> The MPs were united in their opposition of a special tribunal but for different reasons. Those who wanted to avoid prosecution based their hopes in the ICC on the false premise that ICC prosecution would be bureaucratically and procedurally delayed for years during which time they would have won the presidency and the immunity that comes with incumbency.<sup>430</sup> Conversely, those who supported prosecution of perpetrators of crimes against humanity in the post-election violence opposed the special tribunal on the grounds that it would be susceptible to political manipulation as compared to the ICC.<sup>431</sup> This latter view was given credence when Hon. John Michuki, a cabinet minister and Kibaki confidant, stated on the floor of the house that “It is being argued that in the proposed tribunal we shall have some foreigners. Of course, they will be there. They will be our employees and we shall control them! We cannot control The Hague!”<sup>432</sup>

Following parliament’s failure to establish the special tribunal, Kofi Annan handed over the sealed envelope to ICC special prosecutor, Louis Moreno Ocampo,<sup>433</sup> and the ICC commenced investigations in March 2010 into “alleged crimes against humanity committed in the context of

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<sup>429</sup> Jared Odera, ‘Uhuruto Took Themselves to The Hague’ <<https://kenyastockholm.com/2013/09/12/uhuruto-took-themselves-to-the-hague/>> accessed 08 February 2018.

<sup>430</sup> Jared Odera, ‘Uhuruto Took Themselves to The Hague’ <<https://kenyastockholm.com/2013/09/12/uhuruto-took-themselves-to-the-hague/>> accessed 08 February 2018.

<sup>431</sup> Serena Sharma, *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya* (Routledge, 2015) 88.

<sup>432</sup> Hansard, Kenya National Assembly, Official Report (Nairobi, 04 February 2009).

<sup>433</sup> Trevor Keck, ‘Mediating Ethnic Conflict: Kofi Annan in Kenya’ (22 September 2011) <[file:///C:/Users/buluma/Downloads/fulltext\\_stamped.pdf](file:///C:/Users/buluma/Downloads/fulltext_stamped.pdf)> accessed 09 November 2017.

post-election violence in Kenya in 2007/2008.”<sup>434</sup> On 15<sup>th</sup> December 2010 Ocampo revealed the six names of the people perceived to bear the greatest responsibility for the crimes against humanity committed during the 2007 post-election violence.

#### **4.2.3.3 ATTEMPTS AT A RETURN TO POLITICAL CONTROL OF JUDICIAL APPOINTMENTS**

Ocampo subsequently brought charges against six prominent Kenyans some of whom were serving as cabinet ministers in the coalition government that had Kibaki as President and Raila as Prime Minister. The six, popularly known as the ‘Ocampo Six’, were: (a) William Ruto – Minister for Higher Education; (b) Uhuru Kenyatta – Minister of Finance; (c) Henry Kosgey – Minister for Industrialization; (d) Francis Muthaura – Head of Civil Service and Secretary to the Cabinet; (e) Major General Mohammed Hussein Ali – Commissioner of Police; and (f) Joshua Sang – Head of Operations at Kass FM.<sup>435</sup> The politicians amongst the suspects were evenly balanced with Kenyatta and Muthaura being senior PNU affiliates whereas Ruto and Kosgey were senior members of ODM.

After the ICC indictments the coalition government quickly came together in an effort to have the cases tried locally in Kenyan courts, all in a bid to save the indicted officials who came from both sides of the political divide. The government’s efforts to terminate the cases at the ICC and have them transferred back to Kenya were led by the then Minister for Justice, National

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<sup>434</sup> Kenya: Situation in the Republic of Kenya, ICC – 01/09 <<https://www.icc-cpi.int/kenya>> accessed 09 November 2011.

<sup>435</sup> Lisa Bryant, ‘6 Prominent Kenyans Accused of Crimes against Humanity’ (VOA Africa, 14 December 2010) <<https://www.voanews.com/a/six-prominent-kenyans-accused-of-crimes-against-humanity--111924229/132303.html>> accessed 09 November 2017.

Cohesion and Constitutional Affairs, Mutula Kilonzo.<sup>436</sup> Kilonzo proposed that President Kibaki immediately do three things, “quickly appoint a new chief justice, commit to rule of law reforms and convince the ICC that the suspects should be tried locally.”<sup>437</sup>

Kilonzo’s strategy was meant to convince the ICC that Kenya had the capacity to locally try cases of crimes committed during the post-election violence and he was quoted as saying, “As soon as we have a new Chief Justice and an Attorney-General, we can move ahead and have a three judge bench to handle post-election cases.”<sup>438</sup> However, the tone and manner in which the Kibaki government was going about this process portended the very real threat of the judiciary being under the direct influence and control of the executive through the Justice Minister in much the same way the Kenyatta and Moi regimes had controlled the judiciary through the Attorney-General, as seen in the previous chapter.

President Kibaki and Prime Minister Odinga consequently entered into consultations over suitable candidates but could not agree on whom to appoint Chief Justice. This prompted Kibaki to unilaterally appoint Justice Alnashir Visram as Chief Justice and Prof. Githu Muigai as Attorney-General.<sup>439</sup> The entire process as instituted by the coalition government was flawed and

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<sup>436</sup> Kilonzo would later, after the 2013 elections, receive death threats which he attributed to his outspoken contrarian stand that Kenya should cooperate with the ICC at a time when the President Kenyatta and Deputy President Ruto’s cases were still on-going <<https://www.nation.co.ke/news/politics/Mutula-links-death-threats-to-ICC/1064-1441196-1wwrbcz/index.html>> accessed 13 February 2018.

<sup>437</sup> Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 222.

<sup>438</sup> Mugumo Munene, ‘Last ditch effort to shield Ocampo six’ *Daily Nation* (Nairobi, 18 December 2010).

<sup>439</sup> Other appointments made were: Kioko Kilokumi as the Director of Public Prosecutions, and William Kirwa as Controller of Budget. See: Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 222.

in direct contravention of the 2010 Constitution *ab initio*. In the first instance Justice Visram was not vetted as required under Section 23 of the Sixth Schedule to the Constitution which provided for the vetting of all judges and magistrates in office on the date of promulgation, in order to determine their suitability to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

Moreover, in making unilateral appointments President Kibaki ignored the provisions of Article 24 (2) of the Sixth Schedule which provided that, “A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.” Additionally, the President conveniently side stepped the Judicial Service Commission and the National Assembly in clear contravention of the provisions of Article 166 (1) which holds that, “The President shall appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly.” Also, of interest was the fact that the appointee for the Office of the Director of Public Prosecutions (DPP), Kioko Kilokumi, was already acting for some of the Ocampo six whom he would then be required to prosecute once the cases were transferred back to Kenya in his role as DPP.<sup>440</sup>

These appointments were resisted both within and outside the coalition government. The JSC in a statement expressed “grave concern and misgivings about the nomination for the Chief Justice”<sup>441</sup> and asked for withdrawal of the nominations and a fresh start, insisting that the JSC was imbued with powers under Articles 171 (1) and (2) read together with Article 166 (1) of the

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<sup>440</sup> Kenya Human Rights Commission, *Lest we Forget: The Faces of Impunity in Kenya* (KHRC 2011) 12.

<sup>441</sup> National Assembly Hansard 1 February 2011; Press Statement by the Judicial Service Commission on 31.01.2011.

Constitution to play an integral role in the process. The nominations were also challenged in court by civil society organizations. These organizations filed constitutional petitions in the high court which has the jurisdiction to hear and determine any question on whether anything said to be done under the authority of this Constitution is inconsistent with, or in contravention of this Constitution.<sup>442</sup>

In Muslims for Human Rights (MUHURI) & 2 others v. Attorney General & 2 others<sup>443</sup> the petitioners sought orders, *inter alia*, “A declaration that the President and Prime Minister must consult on state appointments established by the Constitution and that in the event there was no concurrence in the consultations, a written memorandum be presented to Parliament with details on convergence and divergence.” This was an interlocutory application seeking mostly conservatory orders filed simultaneously with a petition alleging contravention of fundamental rights and freedoms enshrined and protected under the Constitution.

On the question of appointment of Justice Visram as Chief Justice, Justice Mohamed Ibrahim, as he then was, took judicial notice of the fact that no judge, including Justice Visram, had been vetted in accordance with the Constitution since by the time the appointment was made the legislation for the vetting of judges in office to continue to serve had not been passed, or enacted or legislated by parliament. He went on to hold that:

“Upon careful consideration of the facts, circumstances, and the law, I do find it quite certain and obvious that if the order of conservation with regard to the appointment of the three

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<sup>442</sup> Article 165 (3) (d) (ii).

<sup>443</sup> Petition No. 7 of 2011; [2011] eKLR.

offices is not granted, the Petition herein and the Constitutional claims will be rendered nugatory, useless or academic. If the names are presented to the National Assembly for approval, there will be nothing left for the Constitutional Court to revisit at the trial. This court would have no control or supervisory authority over the National Assembly due to the principles and tenets of the Separation of Powers. The court would in effect have abdicated its Constitutional mandate and jurisdiction under Articles 165 (3) (b) and (d).”<sup>444</sup>

The court in this instance was cognizant of the limits of its exercise of its judicial powers over the legislature in line with the doctrine of separation of powers. This is in keeping with the argument espoused in my problem statement to the effect that a court that oversteps its mandate in exercising its powers of judicial review of legislative action runs the risk of issuing unenforceable orders which shall thus be rendered, “nugatory, useless, or academic.” <sup>445</sup>Justice Ibrahim thereby issued a conservatory order against, “the publication of the names of Mr. Justice Alnashir Visram, as a person nominated for consideration as the Chief Justice of the Republic of Kenya pending the hearing and determination of the Constitutional Petition herein or until further orders of the Constitutional Court.”<sup>446</sup>

Similarly, in *Centre for Rights Education and Awareness (CREAW) & 7 others v. Attorney General*<sup>447</sup> the petitioners had sought orders, *inter alia*, that Article 27 (3) of the Constitution was violated since no woman was considered for nomination. Article 27 (3) provides for equal

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<sup>444</sup> Petition No. 7 of 2011; [2011] eKLR

<sup>445</sup> Justice Mohammed Ibrahim in: Petition No.7 of 2011; [2011] eKLR.

<sup>446</sup> Petition No. 7 of 2011; [2011] eKLR

<sup>447</sup> Petition No.16 of 2011; [2011] eKLR.

treatment of men and women and therefore anyone can challenge in court any appointment on the basis that Article 27 (3) has not been fulfilled in appointments to public positions.<sup>448</sup> It is interesting to note that in this case the Attorney-General conceded that the President should have received recommendations from the JSC before making the nominations. The Attorney-General is a member of the JSC as provided for under Article 171 (2) (e) as well as being the government's principal legal advisor in line with the provisions of Article 156 (4) (a)<sup>449</sup>, therefore in making the appointments President Kibaki had impliedly done so without bothering with the counsel of his Attorney-General. Justice Musinga consequently held that based on this concession "It must be accepted that the said nominations did not comply with the Constitutional requirements of Article 166 (1) (a) as read together with Section 24 (2) of Schedule Six of the Constitution."<sup>450</sup>

ICJ-Kenya on its part criticized the appointments as being "the antithesis to international best practices that require the appointment process to be transparent, competitive and based on merit."<sup>451</sup> The appointments were hence rejected by both the courts and parliament and President Kibaki was forced to withdraw his candidates and have the process started afresh in line with the constitutional requirements.

This was a clear case of the executive seeking to wield political influence and control over appointment of the head of the judiciary as well as the subsequent prosecution and adjudication of

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<sup>448</sup> Duncan Okoth-Okombo (Ed.), *Challenging the Rulers: A Leadership Model for Good Governance* (African Books Collective 2011).

<sup>449</sup> Constitution of Kenya, 2010.

<sup>450</sup> Petition No.16 of 2011; [2011] eKLR.

<sup>451</sup> ICJ – Kenya, 'ICJ-Kenya Position Paper on the Appointment of the next Chief Justice' (ICJ-Kenya 2011)



the ICC cases in local courts. Arguably, the threat of international prosecution of six senior government officials had pushed the Kibaki government to make appointments in open violation of the 2010 Constitution as well as international best practices. Nichols<sup>452</sup> observes that, “In many ways, this marked a temporary return to the executive controlled nepotism which had been a feature of Kenyan politics for decades.”

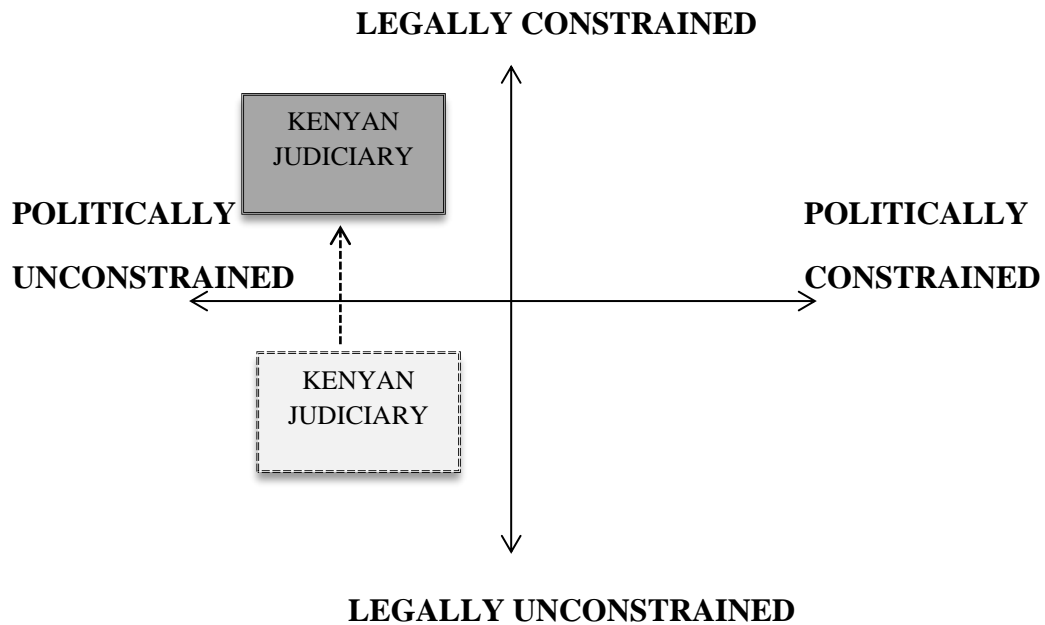
#### **4.2.4 THE POSITION OF THE KENYAN JUDICIARY DURING THE CONSTITUTIONAL TRANSITION PERIOD: 27<sup>TH</sup> AUGUST 2010 – 9<sup>TH</sup> APRIL 2013**

Through the above judgements I advance the argument that this judiciary strongly resisted political attacks whilst discharging its constitutional mandate within the constraints of the legal rules, norms, and practices espoused by the 2010 Constitution. It was therefore politically unconstrained owing to insulation from political attack, mainly because its independence was guaranteed under Article 160 (1).<sup>453</sup> Consequently, I move the judiciary from the third quadrant, where it was during the Kibaki regime, to the second quadrant after the promulgation of the 2010 Constitution as represented below:

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<sup>452</sup> Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 223.

<sup>453</sup> Constitution of Kenya, 2010.



Therefore, the judiciary at the beginning of implementation of the 2010 Constitution equates to Court A in my conceptual framework: The Normatively Preferred Model Court. Such a court was best placed to guide Kenya towards becoming a mature constitutional democracy in line with the aspirations of the transformative 2010 Constitution. It created a ripe environment for the rule of law to positively constrain the exercise of judicial discretion whilst safeguarding judicial independence, which would hopefully be understood and respected by all political actors.<sup>454</sup> Moreover, as seen in the cases discussed above, the judges determined their cases while well aware of their role within the prism of the doctrine of separation of powers and the prevailing political realities hence avoiding the problem of courts giving unenforceable orders or usurping the powers of parliament.

## **4.2.5 JUDICIAL INTERVENTIONS IN THE FIRST ELECTIONS HELD UNDER THE 2010 CONSTITUTION**

### **4.2.5.1 DETERMINING THE LEGITIMACY OF THE KENYATTA-RUTO CANDIDATURE**

The first elections under the 2010 Constitution were held against the backdrop of the 2007/08 post-election violence which broke out following the vehemently disputed declaration of Mwai Kibaki as winner of the presidential ballot. Kenyans did not want to regress to the violence of 2007/08 and through this new Constitution they sought to move away from past electoral evils such as: (a) politicians' use of violence to gain power; (b) concentration of power around the presidency; and (d) perceptions of historical marginalization and exclusion from power by certain ethnic communities.<sup>455</sup> These elections therefore had the benefit of, "a new institutional structure for the conduct of elections, new judicial safeguards to ensure integrity, and a new regulatory framework for political parties."<sup>456</sup> Two of the Ocampo Six facing charges before the ICC, Uhuru Kenyatta and William Ruto, declared their candidature for the positions of President and Deputy President respectively thereby making the ICC indictments the centerpiece of the political campaigns. The judiciary therefore had the onerous task to "fortify democracy and temper zero-sum competition for the presidency by checking executive power."<sup>457</sup>

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<sup>455</sup> As noted by the high court judges: M. Msagha, L. Kimaru, H.A. Omondi, P. Nyamweya, and G.K. Kimondo in Petition No. 552 of 2012; *International Centre for Policy and Conflict & 5 others v. The Hon. Attorney General & 4 others* (2013) eKLR.

<sup>456</sup> Nic Cheeseman, Gabrielle Lynch & Justin Willis, 'Democracy and its Discontents: Understanding Kenya's 2013 Elections' (2014) 8 (1) *Journal of Eastern African Studies* 4.

<sup>457</sup> International Crisis Group, 'Kenya's 2013 Elections' *Africa Report No. 197* (Brussels, 17 January 2013).

After the repeat selection, vetting, and nomination of candidates for the position of Chief Justice (President Kibaki having withdrawn his earlier disputed nomination of Justice Visram), Dr. Willy Mutunga was appointed the first Chief Justice under the 2010 Constitution. Dr. Mutunga was a Moi era political detainee who played a prominent role in the struggle for multi-party democracy and a new constitutional dispensation. His appointment contributed to public confidence<sup>458</sup> that the judiciary would, under his leadership, provide a more effective response to cases of electoral fraud and disputes which may arise from the 2013 elections. The judiciary thus went into the 2013 elections riding on a wave of increased public confidence with its independence guaranteed under Article 160 of the Constitution. This was further buttressed by the vetting of judges and magistrates to determine their suitability to continue to serve under the new Constitution, with subsequent dismissals of those found to be corrupt, partial, or incompetent.

However, incessant politicization of the ICC cases in the campaign rallies by all sides of the political divide constantly stoked ethnic tensions and influenced political alliances. The institutions charged with oversight and adjudication of the electoral process, the IEBC, and the judiciary, hence had their work cut out for them. These circumstances led to the International Crisis Group cautioning that, “However, huge expectations have been placed on the judiciary, and especially the Chief Justice, to backstop all other institutions. The danger is that if these expectations are not managed carefully, they could easily lead to disenchantment.”<sup>459</sup>

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<sup>458</sup> An opinion poll by Infotrak Harris found that 84% of Kenyans had confidence in the administration of justice by the judiciary. ‘Infotrak Poll: Kenyans happy with the Judiciary’ Citizen News (3 October 2012).

<sup>459</sup> International Crisis Group, ‘Kenya’s 2013 Elections’ *Africa Report No. 197* (Brussels, 17 January 2013).

The Kenyatta-Ruto duo was on the presidential ticket, despite having on-going criminal cases at the ICC. Sections of civil society, politicians, and the public viewed their candidature as a serious threat to the implementation of chapter six of the Constitution, which had strict requirements in regard to leadership and integrity of those who aspired to hold public office. Consequently, three civil society organizations: International Centre for Policy and Conflict (ICPC), Kenya Human Rights Commission (KHRC), and The International Commission of Jurists – Kenya Chapter (ICJ, Kenya) filed constitutional petitions against the Kenyatta-Ruto candidature. These petitions were later consolidated into one, namely *International Centre for Policy and Conflict & 5 others v. The Hon. Attorney General & 4 others*.<sup>460</sup> The petitions were filed following the ruling by the ICC pre-trial chamber that the ICC did not have the jurisdiction to, “bar any suspect committed to trial from holding public or state office in the Republic of Kenya.”<sup>461</sup> Moreover, the Rome Statute that established the ICC had no such prohibitory provisions and therefore the chamber concluded that this was a matter to be determined by Kenyan courts in accordance with Kenyan laws.

The first petitioner (ICPC) went to court on the grounds, amongst others, that: (a) “A person committed to trial at the ICC would not be able to properly discharge his or her duties as a public or state officer since they would be required to attend the hearings at the ICC on a full time basis”; and (b) “The honor, integrity, and confidence bestowed on public office under chapter six of the Constitution would be seriously eroded”<sup>462</sup>. ICPC further contended that, “The process of trial may

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<sup>460</sup> (2013) eKLR.

<sup>461</sup> Petition 552 of 2012, Paragraph 14; (2013) eKLR.

<sup>462</sup> Petition 552 of 2012, Paragraph 15; (2013) eKLR.

lead to the issuance of warrants of arrest of a sitting public officer, thus undermining the country's sovereignty"<sup>463</sup> This reflected the argument of all petitioners to the effect that a Kenyatta-Ruto ticket contravened the tenure, ideals, and spirit of chapter six of the Constitution. KHRC and ICJ -Kenya further argued that "One of the mechanisms of giving effect to chapter six of the Constitution is to ensure that leaders (including presidential candidates) who do not comply with chapter six of the Constitution be barred from holding public office"<sup>464</sup>

Ultimately, the high court held that it had no jurisdiction to deal with any question relating to the election of the president as this was the constitutional preserve of the Supreme Court. The court stated that "Any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court."<sup>465</sup> The court further held that the petitioners had not exhausted all available mechanisms to challenge the candidature as established under the Leadership and Integrity Act of 2012 before filing the constitutional petitions and yet the court had no right to hear the matter in first instance as decided in Michael Wachira Nderitu & others v. Mary Wambui Munene & others.<sup>466</sup> Additionally, the court stated that both Kenyatta and Ruto were yet to be found guilty of a criminal offence by any court of competent jurisdiction and therefore they enjoyed the presumption of innocence provided to every Kenyan citizen under Article 50 (2) (a) of the Constitution hence barring them from contesting in the elections would be a violation of

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<sup>463</sup> Petition 552 of 2012, Paragraph 16; (2013) eKLR.

<sup>464</sup> Petition 552 of 2012, Paragraph 40; (2013) eKLR.

<sup>465</sup> Petition 552 of 2012, Paragraph 89; (2013) eKLR.

<sup>466</sup> (2013) eKLR.

their political rights under Article 38.<sup>467</sup> They had not been convicted of any crime to merit their disqualification in line with the provisions of Article 99 (3) of the Constitution.

The court's rationale was that the Supreme Court's exclusive original jurisdiction to hear and determine disputes relating to the elections of the Office of the President under Article 163 (3) (a) as read with Article 140, "includes the question whether one is qualified or disqualified to contest the position of the President under the Constitution or any other law."<sup>468</sup> This was based on the Supreme Court's own advisory opinion, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*<sup>469</sup> in which the court held that, "it is clear to us, in unanimity, that there are potential disputes from presidential elections other than those expressly mentioned in Article 140 of the Constitution."

The court ruling came fifteen days<sup>470</sup> to the elections which were due to be held on 4<sup>th</sup> March 2013, marking the end of any dispute over the Kenyatta-Ruto candidature. They were hence free to contest for the positions of President and Deputy President respectively. The two merged their respective political parties<sup>471</sup> in December 2012 to form 'The Jubilee Alliance'. This choice of name was strategic to a fault since it was "a name that ingeniously combined multiple themes

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<sup>467</sup> Constitution of Kenya, 2010.

<sup>468</sup> Petition 552 of 2012, Paragraph 86; (2013) eKLR.

<sup>469</sup> Advisory Opinion Application No.2 of 2012; (2012) eKLR.

<sup>470</sup> It was delivered on 15 February 2013.

<sup>471</sup> Kenyatta's National Alliance Party (TNA) and Ruto's United Republican Party (URP)

of Christian evangelism, redemption, and celebration of Kenya's independence."<sup>472</sup> This fed into their campaign's nationalistic rhetoric against the ICC and helped in mass political mobilization and unification of their two ethnic communities (Kikuyu and Kalenjin) which had been bitter enemies in the 2007/08 post-election violence.

The court's strict interpretation of constitutional provisions in respect to jurisdiction<sup>473</sup> and the right of all accused persons to be presumed innocent<sup>474</sup> shows that it was able to ignore the prevailing political pressures and rely on strict interpretation of the Constitution in hearing and determining the petition. Therefore, the Kenyan judiciary was now well insulated from political attack while being legally constrained, and it hence remains in the second quadrant (Court A: The Normatively Preferred Model Court) where I moved it to after the promulgation of the 2010 Constitution, as earlier discussed:

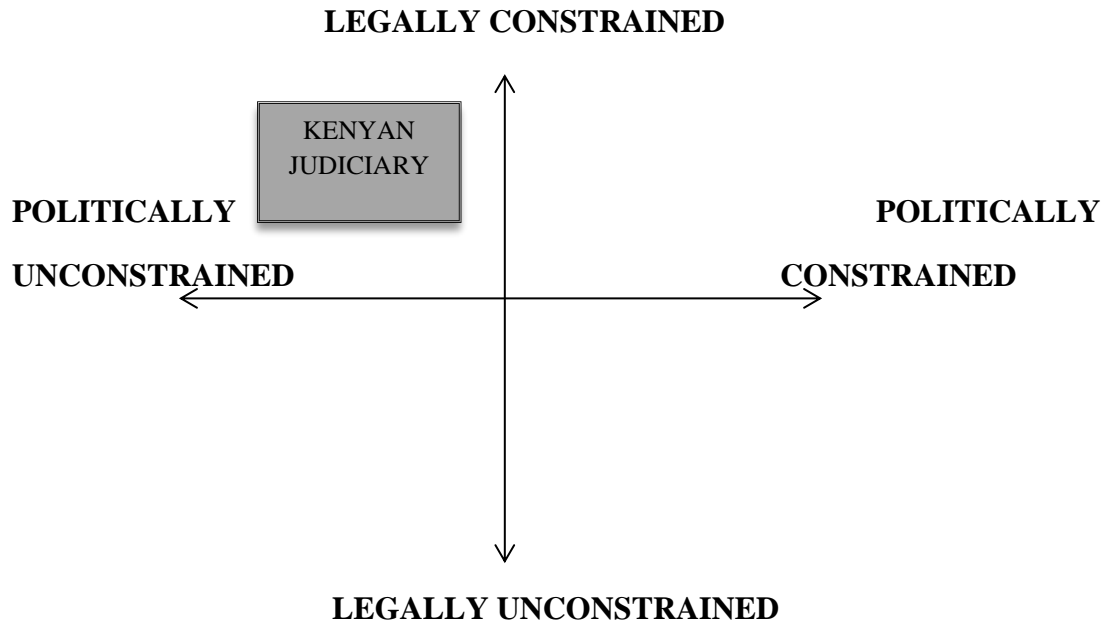
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<sup>472</sup> Nic Cheeseman, Gabrielle Lynch & Justin Willis, 'Democracy and its Discontents: Understanding Kenya's 2013 Elections' (2014) 8 (1) *Journal of Eastern African Studies* 2.

<sup>473</sup> Articles 163 (3) (a) and 165 (5).

<sup>474</sup> Article 50 (2) (a).





#### 4.2.5.2 THE 2013 PRESIDENTIAL ELECTION PETITION

Despite the ethnic tensions stoked over the ICC by the two front runners in the 2013 elections, Kenyatta’s Jubilee Alliance and Odinga’s Coalition for Reforms and Democracy (CORD), the elections were generally peaceful. Cheeseman *et al*<sup>475</sup> argue that Kenya avoided regression to violence because of four inter-connected processes: (a) political realignment that brought former rivals together thereby diffusing ethnic tensions; (b) a pervasive ‘peace narrative’ that delegitimized any political activity that would cause instability; (c) partial democratic reforms that legitimized the electoral and political system; and (d) a new constitution that introduced

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<sup>475</sup> Nic Cheeseman, Gabrielle Lynch & Justin Willis, ‘Democracy and its Discontents: Understanding Kenya’s 2013 Elections’ (2014) 8 (1) *Journal of Eastern African Studies* 3.

devolution which would allow many voters who lost nationally in the presidential election win in local contests.

Kenyatta went on to achieve a disputed win of the presidency beating Odinga with a 0.07% margin of 8,148 votes.<sup>476</sup> The Jubilee Alliance also won 58% of the seats in the National Assembly and 57% in the Senate against CORD's 39% and 43% respectively.<sup>477</sup> Odinga's CORD party subsequently rejected the presidential results and challenged Kenyatta's win in the Supreme Court as provided for under Article 140 of the Constitution. Odinga's resort to the Supreme Court, unlike 2007, reflected the overall increased confidence in the reformed and reconstituted judiciary.<sup>478</sup> Likewise Odinga himself stated that, "Let the Supreme Court determine whether the result announced by the IEBC is a lawful one. We are confident the court will restore the faith of Kenyans in the democratic rule of law."<sup>479</sup> Odinga's decision to challenge Kenyatta's win in the Supreme Court is credited with preventing a repeat of the 2007/08 post-election violence.<sup>480</sup>

Three petitions were filed challenging different aspects of the presidential elections. The petitions filed by CORD and the Africa Centre for Open Governance (AfriCOG) wanted the results

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<sup>476</sup> Nic Cheeseman, Gabrielle Lynch & Justin Willis, 'Democracy and its Discontents: Understanding Kenya's 2013 Elections' (2014) 8 (1) *Journal of Eastern African Studies* 10. Kenyatta received 6,173,433 (50.7%) of all votes cast against Odinga's 5,340,546 (43.31%).

<sup>477</sup> International Crisis Group, 'Kenya after the Elections' *Africa Report No. 197* (Brussels, 15 May 2013).

<sup>478</sup> Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, 'Kenya's 2013 General Election: A Review of Preparedness' (February 2013).

<sup>479</sup> James Brownsell, 'Odinga: From the Polls to the Courts' *Al Jazeera* (10 March 2013).

<sup>480</sup> John Harrington and Ambreena Manji, 'Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013' (2015) 9(2) *Journal of Eastern African Studies* 175.

of the presidential elections invalidated on the grounds that they were not free and fair as required under Article 81 (e) of the Constitution. They based their case on the inexplicable variations in the number of registered voters as recorded in the voter registry published on 24<sup>th</sup> February 2013 vis-à-vis the numbers used on election day. They also faulted the complete failure of all the electronic verification and transmission systems, and the differences in the results reported at the polling stations on forms 34 as compared to the results aggregated at the constituency level on forms 36.<sup>481</sup> The third petition was filed by Kenyatta’s supporters: Moses Kiarie, Denis Itumbi, and Florence Sergon who sought to have the court overturn IEBC’s decision to count rejected votes in the tabulation of results. The three petitions were consolidated into one: *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*<sup>482</sup> in which the petitioner averred that, “The electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful.”<sup>483</sup>

CORD’s attempt to file an affidavit containing new evidence after the case begun was struck out on the ground that it was filed late and without the court’s permission. Similarly the court also rejected AfriCOG’s request to conduct an audit of all the manual voter registers used on 4<sup>th</sup> March 2013.<sup>484</sup> The Supreme Court’s decision to refuse to admit this significant evidence was based on the rationale that Article 159 (2) (d) of the Constitution which provides that “justice shall

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<sup>481</sup> Marie Wolfrom, ‘The Election Commission and the Supreme Court: Two new institutions put to the test by elections’ (2013) 3 *Afrique Contemporaine* 53.

<sup>482</sup> Petition No.5 of 2013; (2013) eKLR.

<sup>483</sup> Petition No.5 of 2013, Paragraph 15; (2013) eKLR.

<sup>484</sup> Marie Wolfrom, ‘The Election Commission and the Supreme Court: Two new institutions put to the test by elections’ (2013) 3 *Afrique Contemporaine* 53.

be administered without undue regard to procedural technicalities” must give way to the more specific rule concerning fixed deadlines under Article 140.<sup>485</sup> Harrington and Manji conclude that the court’s strict application of technical rules only served to insulate IEBC from scrutiny and ultimately the court inhibited its own constitutional role as the “ultimate instance for scrutiny of executive action and for upholding the supremacy of the Constitution.”<sup>486</sup>

Stripped of additional avenues of obtaining evidence the petitioners were further hampered with the legal burden of proving that there were substantial irregularities and that these subsequently influenced the presidential results. In arriving at its determination on the burden of proof required in presidential petitions the court went by the precedent set in the Nigerian case of *Buhari v. Obasanjo*<sup>487</sup> where the Nigerian court held that, “The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result ... there must be clear evidence of non-compliance, then, that non-compliance has substantially affected the election.”

The Supreme Court’s take on the burden of proof required from the petitioners faced much criticism after the judgement came out. Harrington and Manji note that the court’s decision had set upon petitioners in presidential election cases with “almost insurmountable obstacles of proof”, and its effect was to insulate both the IEBC and the president-elect from effective challenge in the

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<sup>485</sup> Petition No.5 of 2013, Paragraph 218; (2013) eKLR.

<sup>486</sup> John Harrington and Ambreena Manji, ‘Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013’ (2015) 9(2) Journal of Eastern African Studies 175.

<sup>487</sup> (2005) CLR 7K.

Supreme Court.<sup>488</sup> This burden was defined as being in-between the standard required in a civil case (balance of probability) and that required in a criminal case (beyond reasonable doubt). Maina<sup>489</sup> concludes that this had the effect of drastically inhibiting the number of petitions that could be brought against the president-elect and hence served to protect him/her from being subjected to an election petition. In terms of shielding a president-elect from legal challenge, similarities can be drawn to the *Kibaki v. Moi & 2 others (No.2)*<sup>490</sup> petition (discussed in chapter three) which was struck out on the grounds, amongst others, that the petition had not been personally served on President Moi, an almost impossible feat given the security surrounding a president-elect which consequently meant that an s/he could never be served with an election petition.

On 30<sup>th</sup> March 2013 the Supreme Court tersely and inexplicably announced that it had arrived at a unanimous decision upholding Kenyatta's election victory and that a detailed judgement would be released on a later date in two weeks' time.<sup>491</sup> This decision sparked wild public speculation and criticism of the court as to whether it was real unanimity or that the court had made a political decision to maintain the country's cohesion.<sup>492</sup> The actual judgment was

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<sup>488</sup> John Harrington and Ambreena Manji, 'Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013' (2015) 9(2) *Journal of Eastern African Studies* 175.

<sup>489</sup> Wachira Maina, 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' *The East African* (Nairobi, 20 April 2013).

<sup>490</sup> (2008) KLR (EP) 308.

<sup>491</sup> Marie Wolfrom, 'The Election Commission and the Supreme Court: Two new institutions put to the test by elections' (2013) 3 *Afrique Contemporaine* 53.

<sup>492</sup> Marie Wolfrom, 'The Election Commission and the Supreme Court: Two new institutions put to the test by elections' (2013) 3 *Afrique Contemporaine* 53.

delivered on 16<sup>th</sup> April 2013 and was met with much criticism primarily for the court's reliance on debunked Nigerian jurisprudence and rejection of the petitioner's additional evidence. The court acknowledged that the election was not conducted perfectly and there were irregularities but went on to hold that the petitioners did not show that these irregularities drastically affected the election results.

On his part, Raila Odinga announced that he would respect the judgment although he disagreed with it saying that, "Although we may not agree with some of its findings, and despite all the anomalies we have pointed out, our belief in constitutionalism remains supreme ... casting doubt on the judgement of the court could lead to higher political and economic uncertainty, and make it more difficult for our country to move forward."<sup>493</sup> Wolfrom<sup>494</sup> notes that the court's determination of the 2013 presidential election petition left many Kenyans feeling keenly disappointed by both the IEBC and the Supreme Court, "feeling that both had betrayed their hopes for solid and reliable institutions."

#### **4.2.5.2.1 TOO MUCH TOO SOON? AN ANALYSIS OF THE KENYAN JUDICIARY'S REACTION TO SEVERE POLITICAL STRAIN IN THE 2013 PETITION**

The Supreme Court's resort to strict adherence to technicalities despite the clear provisions of Article 159 (2) (d) was a regression not in keeping with the spirit of the 2010 Constitution. It is possible that the court arrived at its determination in favour of political concerns for national

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<sup>493</sup> Olive Burrows, 'Raila accepts court's decision' Capital News (Nairobi 30 March 2013) <<https://www.capitalfm.co.ke/news/2013/03/raila-accepts-courts-decision/>> accessed 28 November 2017.

<sup>494</sup> Marie Wolfrom, 'The Election Commission and the Supreme Court: Two new institutions put to the test by elections' (2013) 3 *Afrique Contemporaine* 53.

cohesion following a disputed election against the backdrop of the 2007/08 post-election violence. Wanyoike<sup>495</sup> observes that “the Supreme Court disposed of many of the key issues in the case without reflecting in any serious manner on the deep and difficult conflicts of principle which they raised.” Wolfrom<sup>496</sup> further argues that the Supreme Court’s ruling seemed to favour political concerns over legal ones and that led to the judgment being highly criticized for lacking depth or a solid legal argument. Moreover, counsel for the respondents repeatedly asked the court in their submissions to exercise judicial restraint so as to ‘preserve political capital’, ‘promote national unity’, and ‘win public confidence’ at a time when Kenya was at a sensitive stage of establishing the institutions of democracy and constitutionalism.<sup>497</sup>

The specter of the 2007/08 post-election violence when juxtaposed against the backdrop of the resultant ICC cases and their use as a tool for political propaganda by both CORD and Jubilee politicians contributed towards the whole country being polarized along political and ethnic lines. Hence when the Supreme Court was called upon to adjudicate Kenyatta’s narrow win over Odinga in the 2013 presidential elections it was operating within a politically highly charged environment. This volatile political context had an impact on the Supreme Court’s application of the law in the election petition for, as Roux<sup>498</sup> notes, “The micro-politics of each case, and the applicable legal

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<sup>495</sup> Waikwa Wanyoike, ‘Judgement on Raila’s Petition Lacks Constitutional Clarity’ The Star (Nairobi, 28 April 2013).

<sup>496</sup> Marie Wolfrom, ‘The Election Commission and the Supreme Court: Two new institutions put to the test by elections’ (2013) 3 *Afrique Contemporaine* 53.

<sup>497</sup> Petition No.5 of 2013, Paragraph 221, 224; (2013) eKLR.

<sup>498</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013) 13.

norms and practices, will determine the precise nature of the law/politics tension in any particular case.”

The Supreme Court judges therefore bore the entire weight of responsibility for using the first presidential election petition under the 2010 Constitution to help establish the Court’s supremacy and the reformed judiciary’s institutional legitimacy under the new constitutional order. This was expected of them despite the prevailing political pressure. However, at the time the petition was heard the Supreme Court chose to remain silent as to whether there was any covert or overt political pressure being exerted upon it. It was only five years later, after he left office, that the former Chief Justice Dr. Willy Mutunga lashed out at the political class for the pressure they exerted on the court thus, “We have had two presidential elections in 2013 and 2017 with petitions filed challenging the victors in the two respective elections. The elite factions have used *Mahakama ya Juu* (the Supreme Court) as their political punching bag. Justice according to factions is when the apex court decides in their favor.”<sup>499</sup> Mutunga further notes that this in turn had the effect of aggravating the already shaky public confidence in the Supreme Court.<sup>500</sup>

The path of silence on the maneuvers of the political class was not necessarily the best approach in such cases. Roux<sup>501</sup> cautions that, “The tension between law and politics is an

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<sup>499</sup> ‘Mutunga opens up on Supreme Court rulings in 2013 and 2017’ *The Star* (Nairobi, 13 February 2018) <[https://www.the-star.co.ke/news/2017/09/15/mutunga-opens-up-on-supreme-court-rulings-in-2013-and-2017\\_c1636257](https://www.the-star.co.ke/news/2017/09/15/mutunga-opens-up-on-supreme-court-rulings-in-2013-and-2017_c1636257)> accessed 14 February 2018.

<sup>500</sup> ‘Mutunga opens up on Supreme Court rulings in 2013 and 2017’ *The Star* (Nairobi, 13 February 2018) <[https://www.the-star.co.ke/news/2017/09/15/mutunga-opens-up-on-supreme-court-rulings-in-2013-and-2017\\_c1636257](https://www.the-star.co.ke/news/2017/09/15/mutunga-opens-up-on-supreme-court-rulings-in-2013-and-2017_c1636257)> accessed 14 February 2018.

<sup>501</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013) 32.

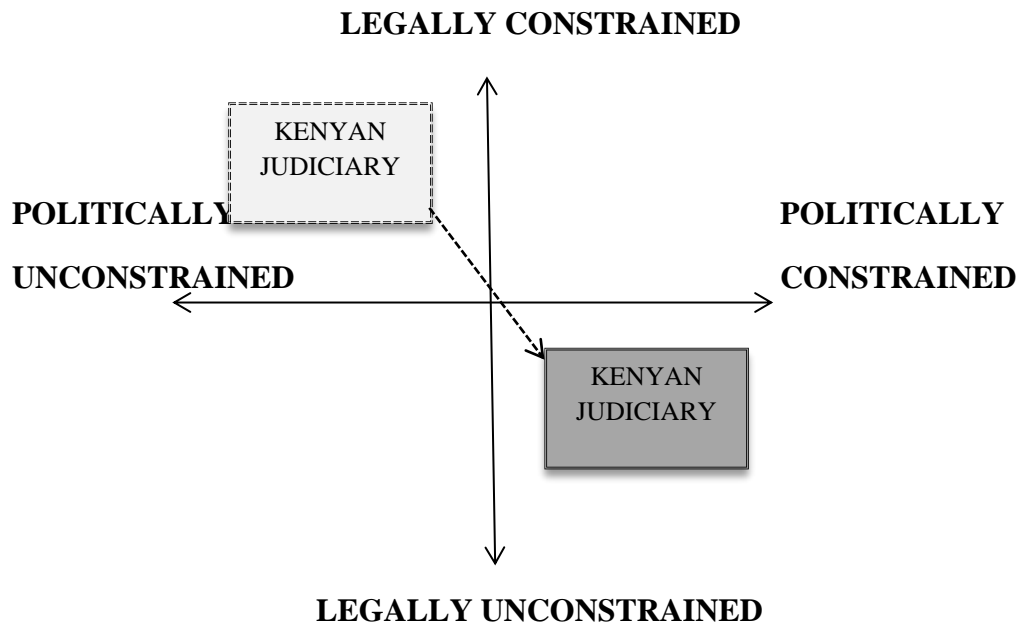


inevitable and ineradicable side effect of adjudication under a rights-based constitution, the role of judges is not so much to reduce the law and politics tension as to be honest and open about it.” From the former Chief Justice Mutunga’s article published five years later it can be inferred that the Supreme Court judges were alive to and affected by the political pressure exerted upon them when they heard the 2013 presidential election petition. It can therefore be surmised that the Supreme Court leaned towards political expediency owing to the prevailing ‘peace narrative’, earlier discussed, that had been emphasized as a barrier to a return to violence following political dispute over the presidential elections. Consequently, when its judgement was finally published, it was subjected to severe and sustained criticism from all spheres: public, private, political, and academic both within and outside Kenya. This had an immediate adverse impact on its institutional security and damaged public confidence in the apex court.

The Supreme Court responded submissively to the prevailing political constraints and its subsequent choice to stress strict adherence to procedural technicalities showed a brazen departure from the provisions of Article 159 (2) (d)<sup>502</sup> of the Constitution. This implies that the Court chose to loosely adhere to the constitutional legal constraints and therefore the prevailing legal rules, norms, and practices exerted relatively little constraint on the judges. Subsequent changes in the judiciary’s position in my conceptual framework during this period are therefore attributable to the judges. Whether by accident or design judges have the capacity to alter a court’s position on the quadrants depending on their individual responses to the prevailing legal and political constraints. The Court therefore moves from its earlier position in the second quadrant to the fourth one which represents Court D: The Worst Deviation from the Doctrine, as represented below:

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<sup>502</sup> It holds that justice shall be administered without undue regard to procedural technicalities.



The quick movement from Court A to Court D within a span of three years (2010 – 2013) is attributed to the fact that the Supreme Court was a newly established constitutional court emerging from decades of authoritarian rule where the judiciary was subservient to the executive. Whereas a court in a mature democracy can draw on a long-established political culture of respect for judicial independence to help its judges navigate the law and politics tension in such ‘high voltage’ cases, a court that exists in the context of a newly established judiciary in a fragile or transitional democracy<sup>503</sup>, which was exactly the case within this Kenyan context, cannot.

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<sup>503</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013) 22.

Moreover, during a period of constitutional and democratic transition the law and politics tension is in a constant state of flux making it harder to predict or describe with precision. Roux<sup>504</sup> notes that, “The court would be most vulnerable at this stage of its life, as its early decisions – however appropriate to the new constitutional arrangements – would inevitably be seen as inappropriately political in the eyes of the existing legal culture.” Additionally, such a court may be restrictively dependent on the political arms of government which would greatly hinder its ability to exercise its oversight role of both the executive and the legislature.

#### **4.3 JUDICIAL REVIEW OF LEGISLATIVE ACTION UNDER THE ELEVENTH PARLIAMENT: 28<sup>TH</sup> MARCH 2013 – 7<sup>TH</sup> AUGUST 2017**

The high court has the jurisdiction under Article 165 (3) (d) of the Constitution to declare void any law that is inconsistent with this Constitution and to invalidate any act or omission in contravention of it.<sup>505</sup> Therefore the high court’s power of judicial review of legislative action is drawn from this constitutional provision and the court can use this power to “either check the government or legitimize its actions”.<sup>506</sup> Akech<sup>507</sup> notes that judicial review is also a tool for democratic governance since it provides an avenue for minorities to participate in a government dominated by the elected majority. The court enables this by invalidating legislative action which

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<sup>504</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013) 22.

<sup>505</sup> Herman Omiti, ‘Who guards the guard? The Supreme Court’s battered integrity’ *The Nairobi Law Monthly* (Vol.6, Issue No.12, December 2015) 32.

<sup>506</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 411.

<sup>507</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 411.

it finds to be unconstitutional thereby protecting the rights of minorities whenever adversely affected by such action.<sup>508</sup>

However, the courts must always ensure that in exercising their power of judicial review of legislative action they do not go too far and as postulated in my problem statement, have unwarranted interference with policy choices democratic majorities should be allowed to make. As was held *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others*<sup>509</sup>, the court must be hesitant to interfere with the legislative process except in the clearest of cases. In keeping with the caution above, Akech<sup>510</sup> states that, “courts must develop principles and mechanisms that will enable them to exercise the power of judicial review in a manner that preserves their legitimacy, while allowing other branches of government to perform their functions without undue hindrances.” This is also in line with my thesis statement which argues that although judicial power can potentially operate as a powerful check on the legislature, it is necessary to clarify the extent to which courts may operate in such a manner.

Judicial review of legislative action is best exercised where the independence of the judiciary is sacrosanct. The 2010 Constitution specifically provides for judicial independence under Article 160 which holds that the judiciary shall be subject only to this Constitution and the law. Therefore, no person or authority can purport to control or direct the judiciary in the discharge of its judicial functions. An independent judicial officer is less likely to be motivated to determine

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<sup>508</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 411.

<sup>509</sup> (2015) eKLR.

<sup>510</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 412.

a matter based on political expediency whilst an independent judiciary is the government institution best placed and capable of articulating and interpreting the Constitution thereby guiding the other branches of government and the entire society.<sup>511</sup>

Under Article 258<sup>512</sup> of the 2010 Constitution any person has the right to institute proceedings claiming that this Constitution has been contravened or is threatened with contravention. Therefore, any Kenyan can petition the high court for judicial review of legislative action in exercise of its jurisdiction under Article 165 (3) (d). Akech observes that this is in line with the trend in the commonwealth to “encourage public-spirited individuals to challenge unlawful governmental action, even though it does not affect them directly.”<sup>513</sup> He further argues that this is because every citizen has the right to challenge the legality of the government’s actions.

The Jubilee Alliance dominated the eleventh parliament commanding 58% of the seats in the National Assembly and 57% in the Senate<sup>514</sup> in what Kenyan political analyst Mutahi Ngunyi infamously christened ‘The Tyranny of Numbers’.<sup>515</sup> The Alliance subsequently used its numbers to force a majority vote on issues and laws that it wanted passed. Murunga *et al*<sup>516</sup> observe that

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<sup>511</sup> L. Brilmayer, ‘Judicial Review, Justiciability and the Limits of the Common-Law Method’ (1977) 57 Boston Law Review 815.

<sup>512</sup> Constitution of Kenya, 2010.

<sup>513</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 417.

<sup>514</sup> International Crisis Group, ‘Kenya after the Elections’ *Africa Report No. 197* (Brussels, 15 May 2013).

<sup>515</sup> Wachira Maina, ‘What Tyranny of Numbers? Inside Mutahi Ngunyi’s Numerology’ (AfriCOG 2013) <[http://africog.org/new/wp-content/uploads/Tyranny%20of%20Numbers\\_final.pdf](http://africog.org/new/wp-content/uploads/Tyranny%20of%20Numbers_final.pdf)> accessed 30 November 2017.

<sup>516</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Preface’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) x.

Jubilee aligned parliamentarians often threatened to use the power of their numbers to attack the independence of the judiciary through reduction of its budget when it came to parliament for approval or summoning the JSC on issues where parliament had no mandate. They further note that, “since assuming power, the Jubilee Alliance, with its majority in the National Assembly, has continued with attempts to sidestep, mutilate or ignore certain provisions of the Constitution.”<sup>517</sup> Similarly, Ghai, a constitutional scholar who was also the chair of the CKRC which oversaw the creation the Constitution, recently lamented that:

“Neither the executive nor the legislature respects the Constitution, both ever ready to amend it at the slightest inconvenience. Many have not read it or do not care. The ethos of the old regime continues to dominate policies and practices, and there are few effective ways to challenge the illegalities of the state.”<sup>518</sup>

#### **4.3.1 ADVISORY OPINION REFERENCE NO. 2 OF 2013<sup>519</sup>**

The Supreme Court’s advisory opinion of 1<sup>st</sup> November 2013 set the precedent for judicial review of legislative action in Kenya. The matter was occasioned by the act of the Speaker of the National Assembly reversing his action of referring the Division of Revenue Bill to the Senate for deliberation before its being transmitted to the President for assent to become enacted law. The Bill provided for the sharing of finances between the national and county governments and the

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<sup>517</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Preface’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) ix.

<sup>518</sup> Yash Pal Ghai, ‘Constitutions and Constitutionalism: The Fate of the 2010 Constitution’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 141.

<sup>519</sup> *Speaker of the Senate & Another v. Attorney General & 4 others* (2013) eKLR.

argument was whether it was an ordinary Bill therefore the exclusive legislative responsibility of the National Assembly or, because it involved financing of county governments, whether it could be enacted without the Senate’s legislative contribution.<sup>520</sup> The latter argument was prompted by the fact that under Article 96 (1) of the Constitution it is the Senate which represents the counties and therefore serves to protect the interests of the counties and their governments.

The interested parties contested the court’s jurisdiction in rendering an advisory opinion in this matter as well as whether the court had jurisdiction to render an advisory opinion in regard to a constitutional process attending the enactment of the Division of Revenue Act.<sup>521</sup> It was the position of the interested parties that the relevant issues fell within the domain of litigated causes rather than that of the advisory opinion.<sup>522</sup> The court stated that what was required from it was constitutional guidance on “the main issue of the Senate’s role in the legislative process for every Bill concerning county government – regardless of the chamber of origin.”<sup>523</sup> The court stated further that its opinion would “not only resolve procedural uncertainties in the deliberation upon and passing of Bills, but [would] also chart out the proper constitutional path, and establish lines of legality.”<sup>524</sup> It therefore concluded that this was not a proper matter for litigation in the high court.

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<sup>520</sup> Advisory Opinion Reference No. 2 of 2013, Paragraph 1.

<sup>521</sup> Act No. 31 of 2013.

<sup>522</sup> Advisory Opinion Reference No. 2 of 2013. Paragraph 17.

<sup>523</sup> Advisory Opinion Reference No. 2 of 2013. Paragraph 41.

<sup>524</sup> Advisory Opinion Reference No. 2 of 2013. Paragraph 42.

In terms of whether courts can interfere with the legislative process it was the court's considered opinion that the context and terms of the 2010 Constitution vested in it the mandate, when called upon, to consider and pronounce itself upon the "legality and propriety of all constitutional processes and functions of state organs."<sup>525</sup> Moreover, in specific regard to parliamentary standing orders, the court held that its mandate to interpret the Constitution itself extended to determining the constitutionality of such standing orders despite the fact that standing orders are an element in the internal procedures of parliament. "We would state, as a legal and constitutional principle, that courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation."<sup>526</sup>

As to the extent to which courts can intervene in legislative processes within the Kenyan context the court was of the opinion that the scope for the court's intervention "should be left to the discretion of the court exercised on the basis of the exigency of each case."<sup>527</sup> It then laid out the following factors which may be considered in arriving at a decision as to the scope for intervention: (a) the likelihood of the resulting statute being valid or invalid; (b) the harm that may be occasioned by an invalid statute; (c) the prospects of securing remedy, where invalidity is the outcome; (d) the risk that may attend a possible violation of the Constitution. Through its advisory opinion the court therefore developed parameters which courts can use to guide them as to the scope within which they can intervene in legislative processes at both the county and national

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<sup>525</sup> Advisory Opinion Reference No. 2 of 2013. Paragraph 54.

<sup>526</sup> Advisory Opinion Reference No. 2 of 2013. Paragraph 55.

<sup>527</sup> Advisory Opinion Reference No. 2 of 2013. Paragraph 60.



government levels. This can hence be used as a guide as to the scope open to Kenyan courts to exercise their power of judicial review of legislative action.

#### **4.3.2 COALITION FOR REFORM AND DEMOCRACY (CORD) & 2 OTHERS V. REPUBLIC OF KENYA & 10 OTHERS (2015) eKLR<sup>528</sup>**

In response to a series of terrorist attacks against Kenyan citizens in 2014<sup>529</sup>, the Administration and National Security Committee of the National Assembly drafted the Security Laws (Amendment) Bill of 2014 that sought to amend twenty one pieces of security related legislation.<sup>530</sup> However, some of the proposed amendments were severely criticized by sections of parliament, civil society, Kenyan citizens, and international human rights organizations for limiting the rights of arrested and accused people as well as restricting freedoms of expression and

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<sup>528</sup> Petition No. 628 of 2014.

<sup>529</sup> There were two attacks on civilians in Mandera County by the Islamist Somali based terrorist group, Al-Shabaab. On 21<sup>st</sup> November 2014 terrorists stopped a Nairobi bound bus and killed 28 passengers who could not recite an Islamic creed. On 1 December 2014 Al-Shabaab terrorists raided a quarry in Mandera and killed 36 people.

<sup>530</sup> The Public Order Act (Cap. 56), The Penal Code (Cap. 63), The Extradition (Contiguous and Foreign Countries) Act (Cap. 76), The Criminal Procedure Code (Cap. 75), The Registration of Persons Act (Cap. 107), The Evidence Act (Cap. 80), The Prisons Act (Cap. 90), The Firearms Act (Cap. 114), The Radiation Protection Act (Cap. 243), The Rent Restriction Act (Cap. 296), The Kenya Airports Authority Act (Cap. 395), The Traffic Act (Cap. 403), The Investment Protection Act (Cap. 485B), The Labour Institutions Act of 2007, The National Transport Safety Authority Act, The Refugee Act, No. 13 of 2006, The National Intelligence Service Act, No. 28 of 2012, The Prevention of Terrorism Act, No. 30 of 2012, The Kenya Citizenship and Immigration Act (Cap. 172), The National Police Service Act (Cap. 84), and The Civil Aviation Act, No. 21 of 2013.

assembly.<sup>531</sup> Muthoni Wanyeki, then Regional Director of Amnesty International<sup>532</sup>, cautioned that, “The cumulative effect of the amendments could return Kenya to the police state of the 1980s and 90s and nullify recent progress on protecting human rights.”<sup>533</sup> Nevertheless the executive was determined to have the laws in place and President Kenyatta in his *Jamhuri* Day address on 12<sup>th</sup> December 2014 urged the Members of Parliament (MPs) to pass the Bill as it was the only way to deal with the rising cases of insecurity in the country.<sup>534</sup>

The Bill’s passage into law was fast-tracked: it was published on 11<sup>th</sup> December 2014, debated on the 18<sup>th</sup>, and passed thereafter received presidential assent on the 19<sup>th</sup> and came into force on 22<sup>nd</sup> December 2014. This happened despite strong opposition to the proposed amendments that saw the evening session in which the Bill was passed in parliament degenerate into chaos as opposition allied parliamentarians engaged their Jubilee Alliance colleagues in shouting matches and fisticuffs.<sup>535</sup> The Speaker of the National Assembly, Hon. Justin Muturi was forced to call out each amendment surrounded by parliamentary orderlies and Jubilee MPs who

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<sup>531</sup> ‘Kenya: Security Bill Tramples Basic Rights: Lawmakers Should Reject Amendments’ *Human Rights Watch* (13 December 2014) <<https://www.hrw.org/news/2014/12/13/kenya-security-bill-tramples-basic-rights>> accessed 1 December 2017.

<sup>532</sup> East Africa, the Horn, and the Great Lakes.

<sup>533</sup> ‘Kenya: Security Bill Tramples Basic Rights: Lawmakers Should Reject Amendments’ *Human Rights Watch* (13 December 2014) <<https://www.hrw.org/news/2014/12/13/kenya-security-bill-tramples-basic-rights>> accessed 1 December 2017.

<sup>534</sup> ‘Chaos as Kenyan MPs Pass Contested Security Laws’ *Business Daily* (19 December 2014) <<http://www.businessdailyafrica.com/Chaos-as-MPs-pass-contested-security-laws/-/539546/2561728/-/2nintxz/-/index.html>> accessed 1 December 2017.

<sup>535</sup> Siobhan Hagan, ‘Kenyan Parliament Approves Restrictive Security Bill’ International Press Institute (19 December 2014) <<https://ipi.media/kenyan-parliament-approves-restrictive-security-bill/>> accessed 1 December 2017.

were trying to protect him from opposition MPs.<sup>536</sup> President Uhuru Kenyatta shortly after signing the Bill released a statement criticizing parliamentarians who opposed the law as being “oblivious to the threat that is upon our country.”<sup>537</sup>

Human rights organizations, opposition party legislators and the Independent Policing Oversight Authority (IPOA) objected to the hasty way the Bill was introduced and fast-tracked into law without sufficient public participation.<sup>538</sup> Three petitions against this law were subsequently filed by CORD, KNCHR, and Kenyan lawyer Samuel Ng’ang’a. The three were later consolidated into one: *Petition No. 628 of 2014*.<sup>539</sup> The petitioners sought, *inter alia*, a declaration that: (a) the Security Laws (Amendment) Bill of 2014 was not procedurally debated and passed by the National Assembly in accordance with the Constitution of Kenya, is unconstitutional and therefore a nullity; and (b) a declaration that the provisions of the Security Laws (Amendment) Act (SLAA), as subsequently passed into law, were inconsistent with the Constitution of Kenya and therefore null and void to the extent of the inconsistency.<sup>540</sup>

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<sup>536</sup> ‘Chaos as Kenyan MPs Pass Contested Security Laws’ *Business Daily* (19 December 2014)

<<http://www.businessdailyafrica.com/Chaos-as-MPs-pass-contested-security-laws/-/539546/2561728/-/2nintxz/-/index.html>> accessed 1 December 2017.

<sup>537</sup> ‘Kenya: Security Laws (Amendment) Bill Enacted’ *Global Legal Monitor* (30 December 2014) <<http://www.loc.gov/law/foreign-news/article/kenya-security-laws-amendment-bill-enacted/>> accessed 1 December 2017.

<sup>538</sup> ‘Kenya: Security Bill Tramples Basic Rights: Lawmakers Should Reject Amendments’ *Human Rights Watch* (13 December 2014) <<https://www.hrw.org/news/2014/12/13/kenya-security-bill-tramples-basic-rights>> accessed 1 December 2017.

<sup>539</sup> *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others* (2015) eKLR.

<sup>540</sup> *Petition 628 of 2014*, Paragraph 35; (2015) eKLR.

In his submissions Dr. John Khaminwa who was counsel for the third interested party, *Kituo Cha Sheria*, cautioned that while they agreed with the petitioners that the Act was unconstitutional, “it is not for this court to go through each of the impugned sections of SLAA to determine which one was constitutional or not, as to do so would be to engage in a legislative process.”<sup>541</sup> This caution was echoed by Nzamba Gitonga SC acting for the first *amicus curiae*, LSK, who stated that “the court should also avoid being used as the forum for a losing side to gain the upper hand by challenging parliamentary vote in court.”<sup>542</sup> The fourth interested party, Katiba Institute, on its part contended that since Standing Orders No. 71, 83, 104, 108, and 114 were not adhered to in enacting the statute then the court had the jurisdiction to find the legislation subsequently enacted unconstitutional as was held in the Ugandan case of *Oloka-Onyango v. Attorney-General*.<sup>543</sup>

On the other hand counsel for the Jubilee Alliance, Mr. James Singh, who opposed the petition as the second interested party asserted that this amounted to an assault on the doctrine of separation of powers since the SLAA was enacted in accordance with the process of legislation as enshrined in the Constitution and Parliamentary Standing Orders.<sup>544</sup> Similarly the seventh interested party, Terror Victims Support Initiative, through their counsel Mr. Tom Macharia opposed the petition on the grounds that countries with anti-terrorism legislation which limit fundamental freedoms have succeeded in combating terrorism. They cited the English case of

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<sup>541</sup> Petition 628 of 2014, Paragraph 50; (2015) eKLR.

<sup>542</sup> Petition 628 of 2014, Paragraph 84; (2015) eKLR.

<sup>543</sup> (2014) UGCC 14; Petition No. 8 of 2014.

<sup>544</sup> Petition 628 of 2014, Paragraph 80; (2015) eKLR.

*Kennedy v. UK*<sup>545</sup> to support their contention that the global trend was to place restrictions on fundamental human rights where strictly necessary in the interest of countervailing public interests such as national security.<sup>546</sup>

The court in arriving at its determination stated that it was guided by the principle articulated in the case of *Ndyanabo v. Attorney General*<sup>547</sup> that there is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.<sup>548</sup> The court however further held that in line with the provisions of Article 24 of the 2010 Constitution there can be no presumption of constitutionality in respect of legislation which limits fundamental rights. Moreover, Article 19 (3) (a) provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Additionally, it is the duty of the State and all its organs to “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights”, as provided for under Article 21 (1). The court however cautioned that “whereas under Article 165 (3) (d) of the Constitution as read with Articles 22 (1) and 23 (1) the high court has wide interpretative powers donated by the Constitution, it must be hesitant to interfere with the legislative process except in the clearest of cases.”<sup>549</sup>

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<sup>545</sup> ECHR Application No.26839 of 2005.

<sup>546</sup> Petition 628 of 2014, Paragraph 82; (2015) eKLR.

<sup>547</sup> (2001) EA 495.

<sup>548</sup> Petition 628 of 2014, Paragraph 95; (2015) eKLR.

<sup>549</sup> Petition 628 of 2014, Paragraph 456; (2015) eKLR.

The court ultimately declared that the following sections the SLAA unconstitutional: (a) Sections 12 and 64 which violated the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution; (b) Section 34 in so far as it included “telescopes” in Section 2 of the Firearms Act; (c) Section 16 which violated the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50 (2) (j) of the Constitution; (d) Section 20 for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49 (1) (h) of the Constitution; (e) Section 26 which violated the right of an accused person to remain silent during proceedings as guaranteed under Article 50 (2) (i) of the Constitution; (f) Section 48 which violated the principle of non-refoulment as recognized under the 1951 UN Convention on the Status of Refugees and Kenyan law under Article 2 (5) and (6) of the Constitution; and (g) Section 95 which violated Article 246 (3) of the Constitution.

This is a good example of how the majority can use their superior numbers in parliament to the exclusion and disadvantage of the minority in a democratically elected government, and the role the courts can play in checking such abuse through exercising their power of judicial review of legislative action. The court stepped in to safeguard Kenyan citizens against violation of their fundamental rights and freedoms as enshrined in the Bill of Rights under the 2010 Constitution which they had fought long and hard for. Moreover, the court properly exercised its oversight role over the both the executive and legislature as required under the doctrine of separation of powers to invalidate legislation that had been passed by parliament and assented to by the executive even though some of its provisions were clearly unconstitutional.

### 4.3.3 RESETTING THE KENYAN JUDICIARY TO THE MODEL COURT A

In this case the court withstood the prevailing political pressure from the ruling majority, the Jubilee Alliance, whose MPs were hell bent on passing the Bill under instructions and pressure from the Kenyatta presidency. This was counterbalanced with pressure from the CORD coalition alongside civil society actors who went to the courts seeing only one possible outcome which they were intent on obtaining from the courts. The court was thus faced with the navigation of the law and politics tension within a politically charged environment and, as earlier discussed, ultimately it is the response of the judges in this case that determines which sector of the quadrant the court finds itself in.

In arriving at its judgement despite the political constraints this court successfully carried out its mandate under Article 165 (3) (d) of the Constitution and nullified those sections of the Act which were unconstitutional. Unlike during the hearing of the 2013 presidential election petition when the reformed judiciary was still in its infancy and undergoing both institutional and human resource reorganization, by this time the judiciary was in a stronger position in terms of both institutional and individual judicial independence. This enabled the judges to pursue the ideal of adjudication in accordance with the law and to disregard the political constraints impacting on their decisions.<sup>550</sup>

Moreover, at this point in time the judiciary had already successfully resisted political attack from the legislature and was hence more assured of its institutional security. This occurred in October 2013 when the JSC suspended the Chief Registrar, Gladys Shollei on allegations of

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<sup>550</sup> Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013) 15.

financial impropriety.<sup>551</sup> Subsequently parliament summoned Chief Justice Mutunga to appear before the Public Accounts Committee (PAC) to answer questions in regard to the improprieties; however Mutunga refused to honor the summons citing independence of the judiciary.<sup>552</sup> Chief Justice Mutunga, in declining the summons, was later reported to have taken into account a number of judicial decisions against parliament that were severely criticized and at times ignored on the grounds that they undermined its internal operations. Furthermore, it was established that various members of the legislature were unhappy with the JSC removal of the Chief Registrar.<sup>553</sup>

Chief Justice Mutunga's action was interpreted as being in defence of the judiciary's autonomy in the exercise of its judicial functions and resistance to undue influence by the legislature.<sup>554</sup> Consequently parliamentarians launched a media war against Mutunga's leadership in particular and the judiciary as a whole, citing that the judiciary was 'headless' and without leadership as well as being packed with 'activist judges' whom they vowed to punish by introducing substantive motions to discuss the conduct of individual judges with a view towards

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<sup>551</sup> In October 2013 the JSC sacked the Chief Registrar of the Judiciary, Hon. Gladys Shollei, over allegations that she misused Kshs. 2.207 billion. The JSC decision was made at the end of a two months standoff and trading of accusations and counter -accusations between Mutunga and Shollei. John Ngirachu and Ouma Wanzala, 'JSC sends Gladys Shollei packing of Sh 2 billion scandal' *Daily Nation* (Nairobi, 18 October 2013) <<https://mobile.nation.co.ke/news/JSC-sends-Gladys-Shollei-packing/1950946-2038778-format-xhtml-bsvl6r/index.html>> accessed 15 February 2018.

<sup>552</sup> Isaac Ongiri, 'Showdown looms as JSC ignores House summons' *Daily Nation* (Nairobi, 26 August 2013) <<https://www.nation.co.ke/news/Judiciary-chiefs-reject-summons-by-House/1056-1969154-format-xhtml-eu9p6r/index.html>> accessed 15 February 2018.

<sup>553</sup> Paul Ogemba, 'Mutunga accuses Parliament of issuing misleading reports' *Daily Nation* (30 October 2015) <<https://www.nation.co.ke/news/Mutunga-accuses-Parliament-of-issuing-misleading-reports/1056-2935216-format-xhtml-qbpk1/index.html>> accessed 15 February 2018.

<sup>554</sup> James Thuo Gathii, 'The Kenyan Judiciary's Accountability to Parliament and to Independent Commissions: 2010 – 2016' in Jill Cotrell Ghai (Ed.) *Judicial Accountability in the New Constitutional Order* (ICJ Kenya, 2016) 145.



their removal. Both houses of parliament also threatened to pass legislative amendments to facilitate a fresh vetting process for judges to weed out the bad elements in the judiciary.<sup>555</sup>

JSC subsequently went to court arguing that as an independent commission it was not subject to the ‘oversight’ mandate, direction or control of parliament and its committees when discharging its mandate lawfully.<sup>556</sup> This was in the case of *Judicial Service Commission v. Speaker of the National Assembly*<sup>557</sup> and the court held that the constitutional provisions for parliamentary oversight of constitutional commissions and independent offices anticipate a purposeful, lawful, objective and carefully structured oversight. It cautioned that parliament’s constitutional oversight powers did not give it the right to subjugate, micromanage, control, or direct the JSC.

Furthermore, with specific regard to judicial review of legislative action the Supreme Court had already determined the parameters to guide the courts in identifying the extent to which they could do so through the earlier discussed *Advisory Opinion Reference No. 2 of 2013*. This provided the space and freedom required for courts to establish themselves both institutionally and individually and thereby be better able to navigate the law and politics tension when faced with politically volatile cases. The courts were hence less vulnerable to political attack and in a better

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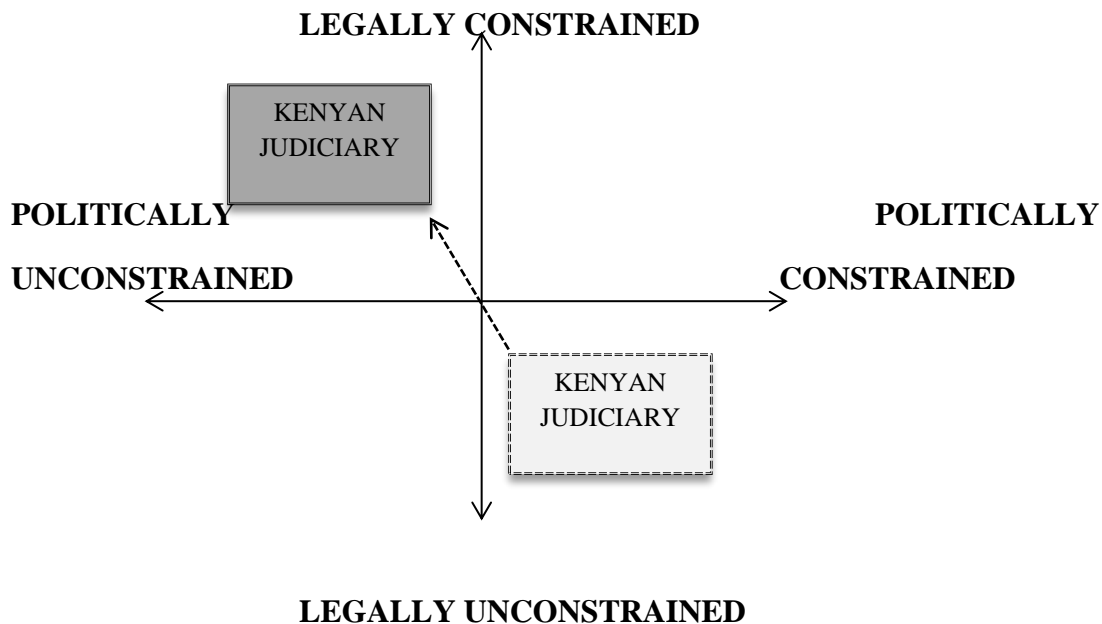
<sup>555</sup> Roselyn Obala and Moses Njagih, ‘MPs, Senators now vow to punish ‘activist’ judges’ *The Standard* (Nairobi, 21 February 2014) <<https://www.standardmedia.co.ke/article/2000105136/mps-senators-now-vow-to-punish-activist-judges>> accessed 15 February 2018.

<sup>556</sup> Anita Nyanjong and Ochiel J. Dudley, ‘Rethinking Judicial Independence and Accountability under a Transformative Constitution: Kenya Post – 2010’ in Jill Cotrell Ghai (Ed.) *Judicial Accountability in the New Constitutional Order* (ICJ Kenya, 2016) 16.

<sup>557</sup> [2014] eKLR.

position to assert themselves in relation to pressure from either the executive or legislative arms of government in adjudicating such cases.

The judiciary therefore exhibited that it was politically unconstrained while being legally constrained and consequently moves back to the second quadrant of my conceptual framework representing Court A: The Normatively Preferred Model Court. This is a marked improvement from the judiciary's position during the hearing and determination of the 2013 presidential election petition when I placed it within the fourth quadrant which represents Court D: The Worst Deviation from the Doctrine, as represented below:



#### **4.3.4 MARTIN NYAGA WAMBORA V. COUNTY ASSEMBLY OF EMBU & 37 OTHERS (2015) eKLR<sup>558</sup>**

This was an appeal from a judgment and decree of a three-judge bench<sup>559</sup> regarding two consolidated constitutional petitions in relation to the removal from office of the Governor of Embu County, Martin Nyaga Wambora. The Embu County Assembly<sup>560</sup> passed a motion for his removal on the grounds that he refused to act on their recommendations and that this amounted to gross violation of the Constitution and abuse of office. This stemmed from Governor Wambora's refusal to suspend the Embu County Secretary who failed to appear before the County Assembly to respond to queries regarding the procurement of poor-quality maize which had failed to germinate and surpassing the budget set aside for renovation of a stadium.<sup>561</sup>

The Governor went to court and obtained conservatory orders restraining the County Assembly from holding any impeachment proceedings before serving him and his deputy with the notice of motion. However, the County Assembly contravened the orders and passed the motion of impeachment and subsequently forwarded a resolution for the Governor's removal to the Speaker of the Senate as required under Section 33 of the County Governments Act.<sup>562</sup> Governor Wambora promptly went back to court seeking orders restraining the Speaker of the Senate from proceeding with a planned special sitting to hear the charges preferred against him on the grounds

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<sup>558</sup> Civil Appeal No. 194 of 2015; Petition Nos. 7 & 8 of 2014 (Consolidated).

<sup>559</sup> Justices Mwongo, Korir, and Odunga.

<sup>560</sup> Under Article 176 (1) of the Constitution a county government consists of a county assembly and a county executive.

<sup>561</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 468.

<sup>562</sup> No. 17 of 2012.

that the resolution was made in contravention of a court order and the petitioners' rights to fair administrative action.<sup>563</sup>

The Senate proceeded undeterred and after considering the report of a special committee mandated to investigate the allegations, unanimously voted that the appellant be removed from office for violating the Public Procurement and Asset Disposal Act<sup>564</sup>, the Public Finance Management Act<sup>565</sup>, and the Constitution. This decision was published through Gazette Notice No. 1052 of 17<sup>th</sup> February 2014. The high court then ruled that the proceedings were null and void *ab initio* having been made in contravention of a court order.<sup>566</sup>

In brazen defiance of the court ruling, on the same day the judgement was made, the Embu County Assembly again started removal proceedings and passed another resolution for removal dated 29<sup>th</sup> April 2014 which was forwarded to the Senate. On its part the Senate called on the same special committee that had reviewed the first motion and once more, on 13<sup>th</sup> May 2014, passed a resolution to remove Governor Wambora from office. This time round the County Assembly served the Governor with the notice of motion requiring him to appear before it and defend himself, but the Governor did not attend and was impeached *in absentia*.

This was a unique situation where both the Embu County Assembly and the Senate were exercising their legislative powers under Article 181 of the Constitution and Section 33 of the

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<sup>563</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 468.

<sup>564</sup> No. 33 of 2015.

<sup>565</sup> No. 18 of 2012.

<sup>566</sup> Civil Appeal No. 194 of 2015, Paragraph 2; Petition Nos. 7 & 8 of 2014 (Consolidated).

County Governments Act to enact the removal of the Embu County Governor. It was the constitutionality of their exercise of these legislative powers which formed the core of the issues at hand. The consolidated petitions in the high court challenging the Governor's removal had the following prayers: (a) interpretation of constitutional and statutory provisions concerning removal of a Governor; (b) declaratory orders regarding the removal and impeachment of the Embu County Governor; and (c) orders of *certiorari* quashing the impeachment of Governor Wambora.<sup>567</sup> The court however dismissed the petition ruling, *inter alia*, that the petition was incompetent.

On appeal the appellant's grounds were collapsed into four categories: (a) the principle of *stare decisis*<sup>568</sup>; (b) the threshold for removal of a Governor under Article 181 of the Constitution; (c) public participation in the impeachment process; and (d) lack of fair hearing and bias in the Senate proceedings.<sup>569</sup> Interestingly the high court, in dismissing the petition, was accused of ignoring the precedent set in the case of *Martin Wambora & 3 others v. Speaker of the Senate & 6 others*<sup>570</sup> where the appellate court sitting on appeal from the first impeachment motion<sup>571</sup> found that the high court erred in failing to exercise its constitutional mandate under Article 165 (3) (d) of the Constitution, to determine the constitutionality of the removal of the appellant as Governor of Embu County.

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<sup>567</sup> Civil Appeal No. 194 of 2015, Paragraph 4; Petition Nos. 7 & 8 of 2014 (Consolidated).

<sup>568</sup> The doctrine of precedent.

<sup>569</sup> Civil Appeal No. 194 of 2015, Paragraph 8; Petition Nos. 7 & 8 of 2014 (Consolidated).

<sup>570</sup> Nyeri Civil Appeal No. 21 of 2014.

<sup>571</sup> This was an appeal against part of the judgment of the Kerugoya high court in regard to the first removal process against the appellant.

The courts were thus being called in after both the Embu County Assembly and the Senate had exercised their legislative powers to remove Governor Wambora from office. One could argue that the impeachment of a governor was the preserve of the Senate and the County Assembly and any interference by the courts would be in contravention of the doctrine of separation of powers.<sup>572</sup> However, as the court rightly noted “although the Constitution had granted the power to impeach a governor to the County Assembly and the Senate, the impeachment had to be conducted in accordance with the Constitution and the law.”<sup>573</sup> The critical question here was how far the courts should go in regard to processes which are clearly within the mandate of the legislative arms of government at both the county and national levels.

On this issue Justice Okwengu held that, “In my view ... the process of removal lies entirely with the County Assembly wherein it is initiated, and the Senate wherein it is concluded. The court may only come in where necessary to confirm that the process has been properly followed as laid down in the Constitution and the Statute.”<sup>574</sup> The court then went on to fault the Embu County Assembly for failure to ensure public participation and involvement in the Governor’s removal process as required under Article 196 (1) (b) of the Constitution, and the high court for failing to determine whether the steps taken provided adequate facilitation of public involvement in the impeachment process.<sup>575</sup>

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<sup>572</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 469.

<sup>573</sup> Martin Nyaga Wambora v. Speaker of the Senate & 6 others (2014) eKLR, Paragraph 207.

<sup>574</sup> Civil Appeal No. 194 of 2015, Paragraph 8; Petition Nos. 7 & 8 of 2014 (Consolidated).

<sup>575</sup> Civil Appeal No. 194 of 2015, Paragraph 43; Petition Nos. 7 & 8 of 2014 (Consolidated).

The high court was further faulted for ignoring the precedent set in the case of Martin Wambora & 3 others v. Speaker of the Senate & 6 others<sup>576</sup> and failing to go beyond its supervisory mandate and invoke its constitutional mandate under Article 165 (3) (d) of the Constitution to determine the constitutionality of the removal process. In essence the high court had avoided exercising its power of judicial review of legislative action to the extent bestowed upon it by the provisions of Article 165 (3) (d). It should be noted and distinguished that the power of judicial review of legislative action at the county level is specifically drawn from Article 165 (3) (d) (iii) which gives the high court jurisdiction in matters relating to constitutional powers or state organs in respect of county governments.

The appellate court consequently held that, “The learned judges not only misdirected themselves in regard to the burden of proof, but also failed to discharge its constitutional mandate of determining whether nexus between the appellant’s governance function and the impugned procurement process was established such as to meet the threshold of Article 181 of the Constitution.”<sup>577</sup> In this matter, therefore, the appellate court was calling out the high court for failure to live up to its constitutional mandate under Article 165 (3) (d) and in so doing chose not to exercise its power of judicial review of legislative action to probe the constitutionality of the process used to remove Governor Wambora from office. The appeal was consequently allowed, and the appellate court granted the orders of *certiorari* quashing the impeachment of Hon. Martin Wambora as the Governor of Embu County.

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<sup>576</sup> Nyeri Civil Appeal No. 21 of 2014.

<sup>577</sup> Civil Appeal No. 194 of 2015, Paragraph 43; Petition Nos. 7 & 8 of 2014 (Consolidated).

This case is a good example of how Kenyan courts can interrogate the constitutionality of legislative processes and procedures independent of whether or not they result in the passing of new laws as was seen in the earlier case of *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others*<sup>578</sup>. The court has the constitutional mandate to determine whether anything said to be done under the authority of the 2010 Constitution or of any law is inconsistent with, or in contravention of, this Constitution.<sup>579</sup> The appellate court commendably rectified the error of the lower court in not seizing itself of the matter of determination of the constitutionality of the impeachment of Governor Wambora. In so doing the court also protected the rights of the Embu County electorate by censuring the County Assembly for failure to ensure public participation and involvement in the Governor’s removal process as required under Article 196 (1) (b) of the Constitution. As noted by Akech, “giving meaning to the desires of the Constitution for participatory governance therefore means giving the electorate appropriate information and reasonable opportunities to participate directly in the process of removing governors.”<sup>580</sup>

The court’s adherence to the Constitution to determine a matter that had seen both the Embu County Assembly and the Senate proceed in defiance of court orders shows that the judiciary at this point remained politically unconstrained while being legally constrained. It therefore

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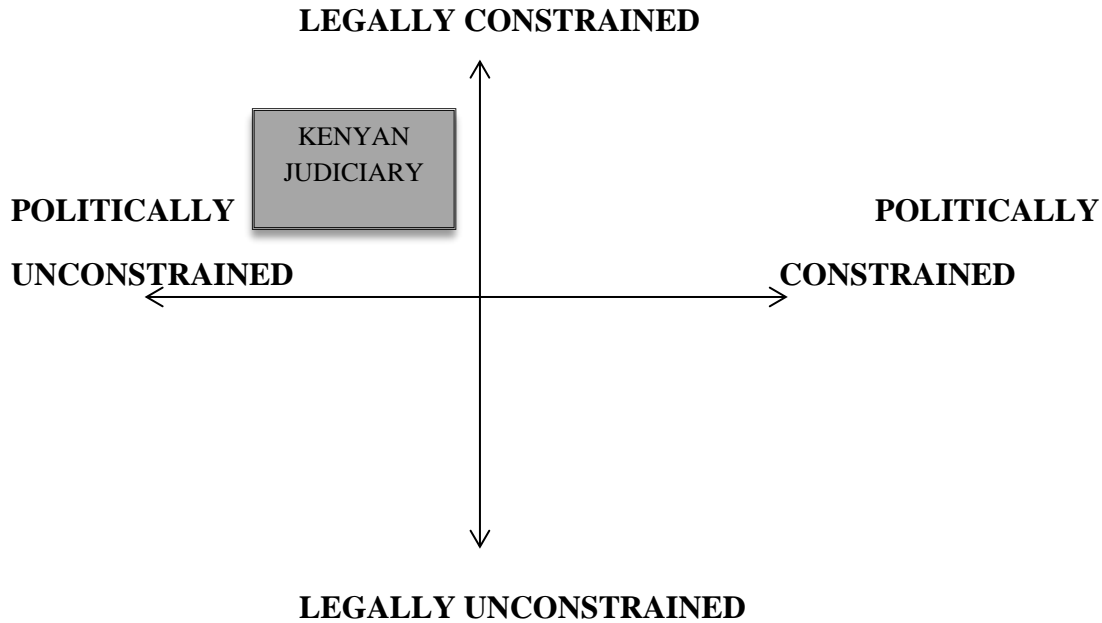
<sup>578</sup> (2015) eKLR.

<sup>579</sup> Article 165 (3) (d) (ii).

<sup>580</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 474.



remains within the second quadrant of the conceptual framework representing Court A: The Normatively Preferred Model Court as seen below:



#### **4.3.5 PETITION No.71 OF 2013 THE INSTITTUE OF SOCIAL ACCOUNTABILITY & ANOTHER V. THE NATIONAL ASSEMBLY & 4 OTHERS<sup>581</sup>**

The petitioners sought a declaration that the Constituencies Development Fund (CDF) Act of 2013<sup>582</sup> violated the Constitution from the process leading to its enactment to the substance of the legislation including the nature, administration and management of the Fund.<sup>583</sup> They further claimed that the Act contravened the constitutional principles of: rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national

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<sup>581</sup> Unreported.

<sup>582</sup> No. 30 of 2013.

<sup>583</sup> Petition No. 71 of 2013, Paragraph 2.

and county governments. The Act had been passed to replace the repealed Constituencies Development Fund Act of 2003 and it set aside a specific portion of the annual government budget for financing of grassroots development within the constituencies.

Initially two petitions had been filed, one in Nairobi (Petition No.71 of 2013) on 3<sup>rd</sup> February 2013 and another in Nakuru (Petition No.16 of 2013) on 10<sup>th</sup> May 2013. The Nakuru petition was later transferred to Nairobi and consolidated with Petition No.71 of 2013 on 22<sup>nd</sup> May 2013 with consent of both parties.<sup>584</sup> After the petitions were filed and consolidated parliament on its own motion passed an amendment to the Act through the Constituencies Development Fund (Amendment) Act<sup>585</sup> on 6<sup>th</sup> August 2013.

The petitioners then filed an amended petition in response to the amendment in which they sought orders ,amongst others, that a declaration be issued: (a) under Articles 1, 2, 6(2), 10(1)(a), 186, 189(1)(a), and Schedule 4 of the Constitution that the Act was unconstitutional because it offended the principles of public finance, division and separation of powers; (b) that failure to involve the Senate in consideration and deliberation of the Act was unconstitutional; (c) that failure by the National Assembly to facilitate public participation in the passage of the CDF (Amendment) Act was unconstitutional and therefore rendered the Act invalid.<sup>586</sup>

The petitioners argued that Article 202 of the Constitution already established a detailed formula for the equitable sharing of revenue between the national and county governments and

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<sup>584</sup> Petition No. 71 of 2013, Paragraph 6.

<sup>585</sup> No.36 of 2013.

<sup>586</sup> Petition No. 71 of 2013, Paragraph 7.

that the CDF Act introduced new criteria different from that provided for under the 2010 Constitution.<sup>587</sup> They further contended that the requirement that the fund created under the Act be administered by MPs rather than either than the national or county governments would make the MPs both executors as well as overseers of the fund in violation of the principle of separation of powers. Additionally, the National Assembly had failed to ensure meaningful public participation in the enactment of the law as required under Article 10 of the Constitution.

The court held that it was only the national government that could provide grants to the county governments but it was only the county governments that have the constitutional power to execute development within the counties except for projects reserved for the national government as provided for the Fourth Schedule of the Constitution.<sup>588</sup> Moreover, the court stated that the CDF appeared to be a third entity grafted from the national government that operates within the county governments but outside their structures. The court therefore concluded that the involvement of MPs in implementation and administration of the CDF infringed the Constitution since it threatened to violate the division of functions between the national and county governments by introducing competing governance structures.<sup>589</sup>

The court also held that the legislation concerned the county governments and therefore failure to subject it to the Senate for participation in its enactment in accordance with Article 96 (1) rendered it unconstitutional. It went on to find that the CDF Act was defective in many respects, from the manner which it was enacted, its objective, design and implementation. Since the

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<sup>587</sup> Petition No. 71 of 2013, Paragraph 16.

<sup>588</sup> Petition No. 71 of 2013, Paragraph 109.

<sup>589</sup> Petition No. 71 of 2013, Paragraph 120.

defective parts could not be severed from the rest of the Act the court rendered the CDF Act of 2013 invalid in its entirety.<sup>590</sup>

However, in line with the parameters established in *Advisory Opinion Reference No. 2 of 2013*, the court considered the impact of its orders invalidating the entire Act given that the CDF was a system that had been in place for a decade and the funds allocated to it for the 2014/15 financial year had already been disbursed and the budgetary process for the next financial year was already in progress.<sup>591</sup> The court consequently held that, “We must accord leverage to public interest and good order while conscious of our country’s political realities. We are of the view that a temporary suspension of the invalidity of the Act is the appropriate relief in the circumstances.”<sup>592</sup> The court went on to suspend the invalidity of the Act for a period of twelve months from the date of the judgment during which parliament was entitled to remedy the defects either in the form of new legislation or other constitutional means.

This case is a good example of how a court when exercising judicial review of legislative action should be alive to the prevailing political realities of the day and the effect of its decision since, as discussed in chapter one, the court’s judgments have a direct impact on the government’s ability to implement policies and programs for the benefit of Kenyans. To neglect to do so would create the problem of courts operating in isolation from political reality and making unenforceable orders or indulging in nugatory creation of ‘paper rights’ as noted in my problem statement. This

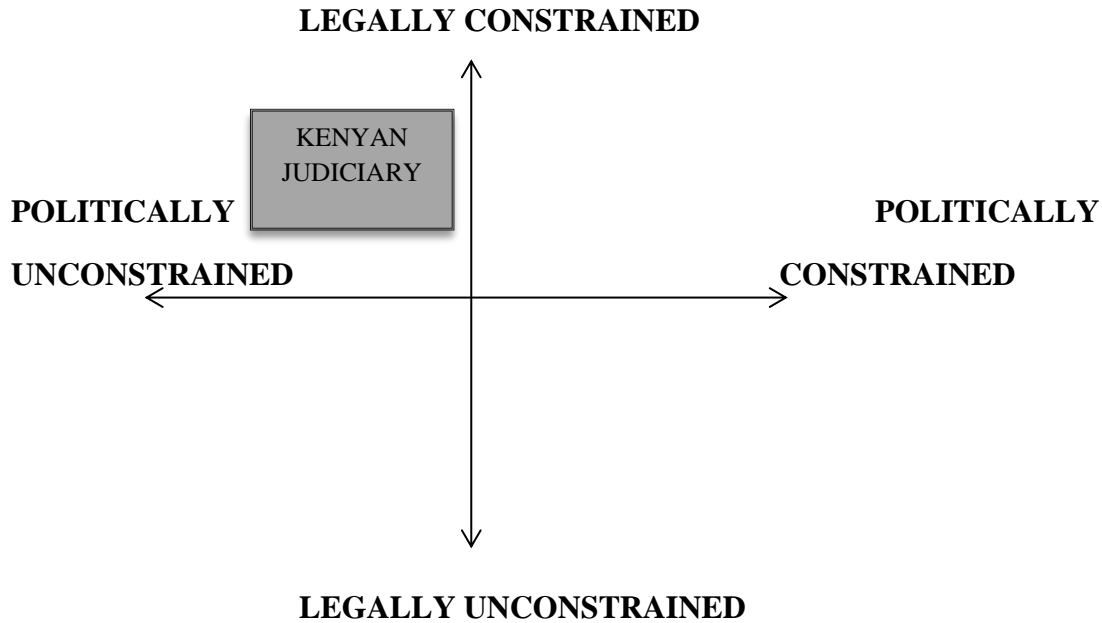
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<sup>590</sup> Petition No. 71 of 2013, Paragraph 150.

<sup>591</sup> Petition No. 71 of 2013, Paragraph 152.

<sup>592</sup> Petition No. 71 of 2013, Paragraph 152.

court exhibited legal constraint while being politically unconstrained and therefore remains within the second quadrant which represents: Court A: the Normatively Preferred Model Court as seen below:



#### 4.4 CONCLUSION

The 2010 Constitution provides the foundation for judicial reforms that reset the Kenyan judiciary's relationship with the other arms of government to reposition itself as a strong, effective, equal, and independent arm of government. As this chapter shows, aside from the constitutional safeguards for judicial independence under Articles 160 (1) and 255 (1) (g), it also provides the legal constraints for constitutional interpretation under Article 259. On this basis I make the key finding that the 2010 Constitution puts in place the requisite safeguards for both institutional and individual independence of the Kenya judiciary that enable it to effectively exercise its power of judicial review of legislative action as specifically provided for under Article 165 (3) (d).

Also, in its examination of how the judiciary responded to political pressure during the constitutional transition period, the chapter reveals that the reformed judiciary enjoyed the confidence of political actors and citizens who were now willing to submit to it as a neutral arbiter of political disputes. Moreover, enabled by the right of every person to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention as provided for under Article 258 (1), Kenyans increasingly petitioned the high court to exercise its judicial review power to invalidate unconstitutional exercise of either executive or legislative power. I find that this prompted the judiciary to evolve in defining when and how to undertake such intervention in legislative affairs, as well as be able to assert itself and resist attempts by political actors to influence or interfere with its exercise of its power of judicial review of legislative action. Consequently, the Kenyan judiciary overall attains the status of Court A in my conceptual framework: The Normatively Preferred Model Court.

Ultimately, this chapter reveals that through persistent and effective exercise of the power of judicial review of legislative action the Kenya judiciary was able to define the parameters of when and how to intervene in legislative affairs through *Advisory Opinion Reference No. 2 of 2013*. The five parameters to be used to determine when and how to intervene are: (a) the likelihood of the resulting statute being valid or invalid; (b) the harm that may be occasioned by an invalid statute; (c) the prospects of securing remedy, where invalidity is the outcome; and (d) the risk that may attend a possible violation of the Constitution. I therefore contend that Kenyan courts should adopt these five parameters in determining the scope for judicial review of legislative action within the Kenyan context.

Overall, I conclude that Kenyan courts are effectively using their power of judicial review to check against the abuse of legislative power by parliament. With the sole exception of the 2013

presidential election petition, the Kenyan courts have exhibited consistency in exercising their power of judicial review of legislative action under the 2010 Constitution within the boundaries of being legally constrained and politically unconstrained therefore placing the position of the Kenyan judiciary overall in the second quadrant: Court A – The Normatively Preferred Model Court. This is quite commendable since such a court is the mainstay of mature constitutional democracies where the legal rules, norms, and practices significantly constrain the exercise of judicial discretion, and all the political actors understand and respect the need for judicial independence.<sup>593</sup>

The Kenyan judiciary is thus playing its role in enhancing democratization as guided by the text and spirit of the 2010 Constitution, especially in its interpretative role under Article 165 (3) (d) and as seen in the cases discussed above. More significantly through *Advisory Opinion Reference No. 2 of 2013* the Supreme Court set out the parameters within which Kenyan courts can exercise their power of judicial review of legislative action at both the national and county levels of government. While leaving each court free to exercise its own discretion based on the prevailing constraints of each case that comes before it.<sup>594</sup>

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<sup>593</sup> W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press 2007).

<sup>594</sup> *Advisory Opinion Reference No. 2 of 2013*. Paragraph 60.

## CHAPTER FIVE

### A COMPARATIVE ANALYSIS OF THE EXERCISE OF JUDICIAL POWER IN THE UNITED STATES AND SOUTH AFRICA VIS-À-VIS THE KENYAN CONTEXT

#### 5. INTRODUCTION

This chapter examines how courts in the United States and South Africa exercise their judicial review powers. Court A thrives in mature constitutional democracies where legal constraints restrict the exercise of judicial discretion within defined limits and all political actors respect judicial independence. It is on this basis that the United States is selected for comparison since American democracy is now two hundred and fifteen years old<sup>595</sup>; hence American courts' have centuries of experience in navigating the tensions between legal and political constraints in their exercise of judicial power.

On the other hand, similar to Kenyan courts, South African courts operate within the context of a recently adopted transformative constitution<sup>596</sup> that emphasizes the protection of fundamental

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<sup>595</sup> Joseph Stromberg, 'The Real Birth of American Democracy' (Smithsonian.com, 20 September 2011) <<https://www.smithsonianmag.com/smithsonian-institution/the-real-birth-of-american-democracy-83232825/>> accessed 17 August 2018.

<sup>596</sup> The term 'transformative constitution' has come into popular usage to describe the aspirations of a constitution as a tool to bring about positive change in society. It was first used to describe the South African Constitution by former South African Chief Justice Chaskalson (2001 – 2005) in the case of *Soobramoney v. Minister of Health, Kwa Zulu-Natal* 1998 1 SA 765 (CC). He described it as a constitution which would transform society into one in which there would be human dignity, freedom and equality, lying at the heart of the new constitutional order.



human rights and the rule of law.<sup>597</sup> Moreover, their suitability for comparison is also based on the facts that: the legal systems of both countries are firmly rooted in the British common law, both Kenya and South Africa can be labelled as developing countries, and their populations consist of diversified ethnic and racial groups.<sup>598</sup>

Based on the foregoing, this chapter examines whether, why and how the United States and South Africa have created a political environment that respects judicial independence, thus achieving the status of the Normatively Preferred Model Court (Court A). It does so in response to the third research question: How can this power of judicial review of legislative action be clarified, extended, or modified to better achieve the objective of serving as a check and balance on parliament? In this chapter I argue that a court which operates in an environment that respects judicial independence has a high degree of institutional security and is hence able to withstand political attacks. This enables the court to overcome political constraints in its exercise of judicial power thereby allowing it to only operate within legal constraints, which when adhered to ensure the legitimacy of its judgements. Consequently, in this chapter I also interrogate how America and South Africa have handled the politics of the exercise of judicial power to draw out lessons for the Kenyan context.

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<sup>597</sup> Migai Akech, *Institutional Reform in the New Kenya Constitution* (International Centre for Transitional Justice, 2010) 12.

<sup>598</sup> Dane Ally, 'A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa' (2016) 2 (3) *Athens Journal of Law* 137; 141.

Part A of the chapter is a conceptual framework and identifies the factors that determine the strength or weakness of the legal and political constraints under which a court operates. Part B examines the place of the American and South African judiciaries in the constitutions, politics, and practice of the two countries. It seeks to establish whether, how, and why they created a political environment that respects judicial independence hence enabling their courts to achieve the status of Court A. Both countries are examined with the objective of drawing out lessons for Kenya in terms of what can be done to enable Kenyan courts achieve the status of Court A: The Normatively Preferred Model Court. Part C concludes.

### **5.1. PART A: EVALUATING THE IMPACT OF POLITICAL SYSTEMS ON JUDICIAL INDEPENDENCE**

Courts operate within existing legal and political constraints.<sup>599</sup> However, the courts should not be overwhelmed by either legal or political constraints in arriving at any decision but should pass judgements that reflect the current political realities while retaining their legal legitimacy. Successful balancing of the two requires an interdisciplinary approach that draws from both political and legal theory. Consequently, any normative theorization on factors influencing the ability of legal constraints to restrain the exercise of judicial discretion within defined limits, vis-à-vis the effects of political constraints on judicial independence, need to be grounded in the political contexts in which the courts operate.

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<sup>599</sup> See chapter two of this thesis. Legal constraints emanate from institutionalized legal rules, norms and practices deviation from which may trigger a loss in legal legitimacy. Political constraints derive from the capacity of political actors to attack and undermine the courts' institutional independence.

Whereas different countries may have similar legal constraints, their unique political systems structure their content and use differently.<sup>600</sup> Hence, it I theorize that the nature and relative strength or weakness of legal constraints depends on the political structures that form a political system. Contextually, democracy is the political system under reference whereas political structure refers to the arrangement of political institutions within which societies generate law.<sup>601</sup> The nature and interaction of political structures determine the relative strength or weakness of legal constraints, hence influencing their ability to restrain the exercise of judicial discretion within defined limits. Subsequently, measuring their relative strength or weakness in any jurisdiction entails identifying the circumstances and ways in which political structures affect their development, style, and function.

However, political structures are endogenous to the prevailing political culture. Political culture refers to a set of attitudes, beliefs and sentiments that form the underlying assumptions and rules governing behaviour in political systems.<sup>602</sup> It is therefore a determinant of differences in political structures and helps to explain and predict the behaviour of political actors. Where the political culture is one where citizens trust government, they are likely to defer to the elite decision makers.<sup>603</sup> This kind of political culture empowers political actors and their institutions (the

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<sup>600</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env'tl. L. J. 357.

<sup>601</sup> In a democratic context parliament makes the law, the executive enforces it whereas the judiciary interprets it.

<sup>602</sup> David Schneiderman, *Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture* (University of Toronto Press 2015).

<sup>603</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env'tl. L. J. 357.

executive and the legislature) to the judiciary's detriment since their overriding expectation is that courts will decide politically sensitive or controversial cases in line with the desires of the dominant political group. This environment breeds a weak legal culture where legal rules, norms and practices are not strongly institutionalized, and the political actors have little respect for judicial independence. These shortcomings are subsequently reflected in the political structure.

Conversely, where the political culture is one where citizens do not trust government, they are likely to establish constitutional safeguards to limit executive power alongside a system of checks and balances amongst the three arms.<sup>604</sup> Such an environment breeds a strong legal culture where legal rules and concepts are comprehensively integrated into society and there is greater respect for judicial independence. These strengths facilitate the functioning of political structures within the ideal of the doctrine of separation of powers. Therefore, to fully measure the effects of political systems on judicial independence, one needs to interrogate the political culture and structures existing in any given jurisdiction. This forms the basis for my examination of the exercise of judicial power in the American and South African contexts.

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<sup>604</sup> Executive, Legislature, and Judiciary.

## 5.2. PART B: INTERROGATING THE AMERICAN AND SOUTH AFRICAN CONTEXTS

### 5.2.1. THE UNITED STATES

#### 5.2.1.1. HOW THE AMERICAN POLITICAL STRUCTURE SHAPED INCENTIVES TO DEVELOP STRICT LEGAL CONSTRAINTS

Americans vote separately for president and for congressional representatives. The executive, therefore, has a different electoral base and term than the legislative branch.<sup>605</sup> Consequently, the political incentives and policy preferences of the two are often quite different.<sup>606</sup> Even when one party dominates the presidency and Congress, it is common for legislators to assert their policy preferences while questioning the president's priorities.<sup>607</sup> Nonetheless, to accomplish any major policy decisions the President must work and negotiate with Congress for it to pass the budget to implement them. Lack of congressional budgetary approval can result in a federal government shutdown.<sup>608</sup>

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<sup>605</sup> George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press 2002)

<sup>606</sup> Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton University Press 2010).

<sup>607</sup> Jason S. Byers and Jamie L. Carson 'Trump and the Republican Congress: The Challenges of Governing' (2017) 15 (2) *The Forum* 499 <[https://spia.uga.edu/faculty\\_pages/carson/forum17.pdf](https://spia.uga.edu/faculty_pages/carson/forum17.pdf)> accessed 14 July 2017.

<sup>608</sup> 'Major parts of the federal government begin shutting down for an indefinite closure' <[https://www.washingtonpost.com/politics/trump-leans-on-mcconnell-to-pass-spending-bill-with-border-funding-in-senate/2018/12/21/31bb453a-0517-11e9-b5df-5d3874f1ac36\\_story.html?noredirect=on&utm\\_term=.d74b4b5a02f4](https://www.washingtonpost.com/politics/trump-leans-on-mcconnell-to-pass-spending-bill-with-border-funding-in-senate/2018/12/21/31bb453a-0517-11e9-b5df-5d3874f1ac36_story.html?noredirect=on&utm_term=.d74b4b5a02f4)> accessed 14 July 2019.

However, the executive has significant abilities to control other institutions within the political structure, specifically the federal administrative agencies. It does so through tools such as executive appointments and the allocation of budgets.<sup>609</sup> Consequently, these institutions will be responsive to it. In such instances Congress often turns to the courts, particularly the Supreme Court of the United States (SCOTUS) to monitor and enforce restrictions on executive power, and this in turn brings the courts into conflict with the executive. These conflicts are usually regarded as grave challenges to the American Constitution and judicial independence.<sup>610</sup>

Whittington observes that such disputes occur during times of political crisis and constitutional uncertainty, and they are a key feature of ‘reconstructive presidencies.’ He defines reconstructive presidents as those who aim to shatter and recreate the prevailing political order.<sup>611</sup> This conflict usually arises from the president’s confrontation with politicians who differ with him in their interpretations of the constitutional traditions and political systems he seeks to shatter.<sup>612</sup> When the matter finds its way to the courts the judiciary is subsequently portrayed as being highly

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<sup>609</sup> Terry M. Moe, ‘Political Institutions: The Neglected Side of the Story’ (1990) 6 *J.L. Econ & Org.* 213; Terry M. Moe and Scott A. Wilson, ‘The Institutional Foundations of Democratic Governance: A Comparison of Presidential and Parliamentary Systems’ (1994) 150 *J. Institutional & Theoretical Econ.* 171; Terry M. Moe & Scott Wilson, ‘Presidents and the Politics of Structure’ (1994) 57 *L. & Contemp. Probs.* 1.

<sup>610</sup> Keith E. Whittington, ‘Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning’ (2001) 33 *Polity* 365; 395.

<sup>611</sup> For example, President Abraham Lincoln who sought to abolish slavery, and President Franklin Roosevelt who developed the ‘New Deal’ to restore America’s economy after the Great Depression.

<sup>612</sup> Keith E. Whittington, ‘Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning’ (2001) 33 *Polity* 365; 382.

politicized thereby legitimizing the president's claim to regain control over the nation's constitutional future.<sup>613</sup>

Such an environment motivates the legislature to impose lasting and specific legal constraints on the courts because of the imminent possibility of executive interference in the judiciary in order to push through the president's preferred policies.<sup>614</sup> These constraints are formulated in ways the legislature believes will increase the courts' likelihood to achieve the desired substantive goal of checking abuse of executive power.<sup>615</sup> Huber and Shipan<sup>616</sup> found that where courts have manifest power or desire to impose a broad range of interpretations on statutes, the legislature uses more restrictive statutory language to constrain the courts. Moreover, the tendency of federal political systems to have greater potential for inter-governmental conflict

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<sup>613</sup> Keith E. Whittington, 'Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning' (2001) 33 *Polity* 365; 383.

<sup>614</sup> President Roosevelt at one point attempted to increase the number of SCOTUS justices in order to allow him 'pack the court' with friendly justices in numbers large enough to have decisions go his way for him to be able to implement his 'New Deal' policies. See: Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System since the New Deal* (Oxford University Press 1993); John Yoo, 'Franklin Roosevelt and Presidential Power' (2018) 21 *Chapman Law Review* 205.

<sup>615</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law' (2017) *Va. Env'tl. L. J.* 357.

<sup>616</sup> John D. Huber and Charles R. Shipan, *'Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy'* (Cambridge University Press 2002).

shapes the desire of legislators to enact specific and detailed legal constraints on the exercise of judicial discretion within defined limits.<sup>617</sup>

#### **5.2.1.2. COMPARING THE UNITED STATES AND KENYA**

Conversely, in Kenya the political party that controls parliament often also controls the executive.<sup>618</sup> Subsequently, any legislative action required to implement the president's policy decisions is simply taken as a party position and members are mobilized by the executive to utilize their numeric advantage in parliament to pass any laws or budgets necessary for him to implement them.<sup>619</sup> The executive thus has near total control over parliament coupled with extensive authority over administrative decision making. Therefore, within the Kenyan context the executive and legislature are *de facto* unified. Moreover, parliamentarians who choose to hold policy positions at odds with the executive are disciplined by being removed from chairing parliamentary committees and ostracized within the party.<sup>620</sup>

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<sup>617</sup> David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers (Political Economy of Institutions and Decisions)* (Cambridge University Press, 1<sup>st</sup> Edition 1999).

<sup>618</sup> The sole exception being the controversial 2007 – 2012 parliament where Raila Odinga's ODM controlled parliament while Mwai Kibaki's PNU won the presidency. See: Clark C. Gibson and James D. Long, 'The Presidential and Parliamentary Elections in Kenya, December 2007' (2009) *Electoral Studies* <<https://africog.org/reports/Gibson%20and%20Long%202009.pdf>> accessed 14 July 2019.

<sup>619</sup> See discussions in Chapter four on the Security Laws (Amendment) Bill of 2014.

<sup>620</sup> 'Duale gets his way as Keter replaced as Labour Committee chair' <<https://www.capitalfm.co.ke/news/2018/02/duale-gets-his-way-as-keter-replaced-as-labour-committee-chair/>> accessed 14 July 2017.



Such a political structure if left unchecked makes a mockery of separation of powers as the executive exercises control over the legislature. However, Kenya's history of an all-powerful executive under its first two presidents<sup>621</sup> made evident the need for a strong and independent judiciary and this was factored into the 2010 Constitution.<sup>622</sup> Ultimately, Kenya also needs strict legal constraints to ensure that courts exercise their judicial discretion within defined limits and the judiciary does not revert to being a victim of executive capture.

### **5.2.1.3. EXAMINING AMERICAN LEGAL CONSTRAINTS AND HOW THEY CAN BE ADOPTED INTO THE KENYAN CONTEXT**

Legislatures can impose legal constraints on courts in two ways: (a) directly establish substantive standards or requirements in legislation to ensure the outcomes they aim to achieve; or (b) impose procedural or other constraints on the exercise of judicial discretion in ways they believe will enhance the likelihood of the courts achieving the desired substantive goals.<sup>623</sup> Both appeal to legislatures in terms of *ex ante* control of judicial outcomes. However, for substantive constraints the legislature's control of the judicial outcome is limited to setting the relevant standard whereas under procedural constraints it is left to the court to set the standard, and there is always the risk that a court can set a standard below the legislature's desired outcome.<sup>624</sup>

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<sup>621</sup> See discussions in Chapter three.

<sup>622</sup> Articles 159 and 160 of the 2010 Constitution.

<sup>623</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env'tl. L. J. 357.

<sup>624</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env'tl. L. J. 357.

America has the Due Process Clause under the Fourteenth and Fifth Amendments of the Constitution which place limitations on the actions of state and federal government respectively.<sup>625</sup> It basically holds that no person shall be deprived of life, liberty, or property, without due process of law. Procedural due process is based upon the principle of fairness and addresses the legal procedures required to be followed in state or federal proceedings.<sup>626</sup> Substantive due process interrogates whether a law can be applied at all, regardless of the procedures followed. It thus addresses the constitutional validity of a law and can restrict or invalidate the application of state or federal law.<sup>627</sup>

A comparison with similar constitutional provisions in Kenyan law, Sections 47 and 50<sup>628</sup>, reveals that there are more systematic, well-defined and broader provisions in the United States. This is attributable to the fact that the Clause has been involved in more litigated cases than all other clauses in the American Constitution.<sup>629</sup> Moreover, the United States has more cases of judicial review of executive action and thus not only does American law provide clearer and

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<sup>625</sup> Hugh Evander Willis, 'Due Process of Law Under the United States Constitution' (1926) 74 (4) University of Pennsylvania Law Review 331.

<<https://pdfs.semanticscholar.org/4387/c718b0697eb1607076949f106497750d40b9.pdf>> accessed 18 July 2019.

<sup>626</sup> These include notice, opportunity to be heard, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. 'Due Process of Law' <<https://law.justia.com/constitution/us/amendment-14/04-due-process-of-law.html>> accessed 18 July 2019.

<sup>627</sup> 'Due Process of Law' <<https://law.justia.com/constitution/us/amendment-14/04-due-process-of-law.html>> accessed 18 July 2019.

<sup>628</sup> Section 47 provides for the right to fair administrative action whereas Section 50 provides for the right to a fair hearing. Constitution of Kenya, 2010.

<sup>629</sup> '14<sup>th</sup> Amendment' <<https://www.law.cornell.edu/constitution/amendmentxiv>> accessed 18 July 2019.

broader substantive and procedural constraints, but also American courts are more frequently called upon to enforce those standards through either ordering initiation of administrative action or reviewing it once finalized.<sup>630</sup>

Kenya can similarly breathe more life into the provisions of Sections 47 and 50<sup>631</sup> through development of the necessary benchmarks and legal tests through which courts can assess their implementation. This is only possible if proponents of due process under Kenyan law effectively challenge decisions by the executive, legislature and even judiciary. Such litigation is currently hindered by the existing political fusion of the executive and legislature coupled with strong party politics and domination of administrative decision making by the ruling Jubilee party. These path dependencies need to be destroyed and the separation of executive and legislative power restored since the existing fusion greatly limits parliament in constraining executive power. However, such change in political structure requires an underlying shift in political culture. Possible ways of how to effect such change are discussed below.

#### **5.2.1.4. HOW AMERICAN POLITICAL CULTURE HAS ENHANCED RESPECT FOR JUDICIAL INDEPENDENCE BY POLITICAL ACTORS**

A key tenet of American political culture is the belief in democratic government. Posner views democracy as, “a competitive struggle among members of a political elite for the electoral

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<sup>630</sup> Sari Graben and Eric Biber, ‘Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env’tl. L. J. 357.

<sup>631</sup> Constitution of Kenya, 2010.

support of the masses.”<sup>632</sup> The political elite are largely motivated by self-interest and mobilize the masses who, except in times of crises, are generally little interested in political matters.<sup>633</sup> American masses, despite being regarded as poorly informed and disinterested in politics, are essential to American democracy since it is dependent on their votes to bring about political change through the electoral process. To ensure balanced competition and peaceful resolution of disputes arising therefrom a neutral arbiter respected by both the masses and politicians is essential. This neutral arbiter is the judiciary which is allocated this role within the context of an environment that respects the rule of law, where both the state and its citizens are willing to submit themselves to the laws passed by parliament and interpreted by the courts.

Notably, within the American context the rule of law is functional as opposed to formalist. Upham describes a functional rule of law as that which is alive to the political context within which it operates. He distinguishes it from the formalist rule of law which is apolitical and emphasizes adherence to legal rules completely free from political influences.<sup>634</sup> Upham argues that the formalist rule of law is unsuitable for the American context since judges are routinely elected or appointed based on their ideological views.<sup>635</sup> Therefore, American courts in acknowledgment of the political context within which they operate strive to adopt a functional approach to the exercise

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<sup>632</sup> Richard A. Posner, *Law, Pragmatism and Democracy* (Universal Law Publishing Co. Pvt. Ltd., 2005) 130.

<sup>633</sup> Richard A. Posner, *Law, Pragmatism and Democracy* (Universal Law Publishing Co. Pvt. Ltd., 2005) 230.

<sup>634</sup> Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ (Carnegie Endowment for International Peace 2000) 7.

<sup>635</sup> Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ (Carnegie Endowment for International Peace 2000) 1.

of judicial power.<sup>636</sup> This has created a high degree of legal and political stability that has enabled American courts to develop properly and attain the strength required to assert their independence within the American democratic system.<sup>637</sup>

Consequently, American politicians generally exercise restraint and do not openly interfere with the courts' exercise of judicial power. Upham put this down to a question of not whether the courts play a political role but how that role is structured and managed.<sup>638</sup> In his estimation America manages this very well because of the fine and alternating balance between liberals and conservatives in judicial appointments. Since American politics is dominated by two parties, Democrats and Republicans, this balance in the composition of the bench reflecting both ideological camps make it easier for politicians to respect and uphold judicial independence.

This, as Upham notes, is because such judges serve “over relatively long-time spans”,<sup>639</sup> and seldom does their ideological stance change once on the bench. Politicians see no need to attack the judiciary when courts make decisions they disagree with because they know that eventually within the political cycle they shall have the political control required to shape the judiciary,

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<sup>636</sup> A good example is *Bush v. Gore* 531 U.S 98 (2000). Whereas legal purists have considered it “at best a questionable decision, and at worst, especially if one focuses on the best possible rationale for the decision, a very bad decision”<sup>636</sup>, the American public welcomed it since the Supreme Court’s decision averted a potential presidential succession crisis. See: Richard A. Posner, *Law, Pragmatism and Democracy* (Universal Law Publishing Co. Pvt. Ltd., 2005) 349.

<sup>637</sup> Christopher M. Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ (1996) 44 *The American Journal of Comparative Law* 620.

<sup>638</sup> Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ (Carnegie Endowment for International Peace 2000) 19.

<sup>639</sup> Either the terms of elected state judges or the political cycles of presidentially appointed federal ones. Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ (Carnegie Endowment for International Peace 2000) 15.

especially SCOTUS.<sup>640</sup> As Upham notes, “It is also true that parties rotate in power, so that the judiciary is not totally dominated by one party or one political view.”<sup>641</sup> Moreover, it is virtually impossible for politicians to alter or influence any particular judgement once passed by the courts.<sup>642</sup> They can complain about unpopular decisions, but they do so in order to preserve their electoral popularity rather than with a serious intention of altering the decision.<sup>643</sup> Often they usually have enough respect for the courts to be circumspect in their complaints.<sup>644</sup>

### **5.2.1.5. DRAWING LESSONS FOR THE KENYAN CONTEXT**

Unlike Americans, Kenyan politicians often seek to seize political power by inciting ethnically defined coalitions.<sup>645</sup> This ethnic mobilization and incitement of voters on both actual and perceived inequalities in the distribution of national resources results in violence being a recurrent electoral feature.<sup>646</sup> Whereas the American judiciary is respected as a neutral arbiter, the

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<sup>640</sup> Control of appointments to SCOTUS helps the parties to ensure that the ideologies of the appointees’ tallies with their own. Reflected in socially and politically controversial cases that pit liberals (Democrats) versus conservatives (Republicans) such as abortion, civil rights, homosexuality, gender equality and immigration.

<sup>641</sup> Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ (Carnegie Endowment for International Peace 2000) 19.

<sup>642</sup> John Ferejohn, ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1999) 72 Southern California Law Review 353, 357.

<sup>643</sup> John Ferejohn, ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1999) 72 Southern California Law Review 353, 382.

<sup>644</sup> Barbara J. Pariente and F. James Robinson Jr. ‘A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks’ (2016) 68 Florida Law Review 1529.

<sup>645</sup> Robert H. Bates, ‘Modernization, Ethnic Competition and the Rationality of Politics in Contemporary Africa’ in D. Rothchild and V. Olorunosa (eds) *State Versus Ethnic Claims: African Policy Dilemmas* (Westview Press 1983).

<sup>646</sup> Violence and displacements have been witnessed in every election since the re-introduction of multi-party politics in Kenya in the early 1990s. (1992, 1997, 2002, 2007, 2013 and 2017). See: Hanne Fjelde and Kristine Hoglund,

historical concentration of power in the executive and subsequent interference with judicial independence,<sup>647</sup> as well as charges of corruption, legal and administrative inefficiency<sup>648</sup> deprives the Kenyan judiciary of similar respect. Such an environment promotes neither rule of law nor respect for judicial independence.

There is an urgent need to change the Kenyan political context by eliminating historic ethnic inequalities while creating contemporary opportunities through facilitating access to political, social and economic resources.<sup>649</sup> A peaceful electoral process and belief in impartial judicial resolution of disputes arising therefrom would serve to enhance the rule of law thereby creating an environment that respects judicial independence. A new political culture, underpinned by (a) institutional reform<sup>650</sup> and (b) fundamental attitudinal change amongst ethnic majorities and minorities, is required to actualize this using the strategies discussed below.

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‘Ethnic Politics and Elite Competition: The Roots of Electoral Violence in Kenya’ in Mimi Soderberg Kovacs and Jesper Bjarnesen (eds) *Violence in African Elections* (Zed Books 2018) 27.

<sup>647</sup> See discussions in Chapter 3.

<sup>648</sup> Abdul Majid Cockar, *Doings, Non-Doings & Mis-Doings by Kenyan Chief Justices 1963 – 1998* (Zand Graphics 2012) 59.

<sup>649</sup> Stefan Wolff, ‘Beyond Ethnic Politics in Central and Eastern Europe’ (2002) 4 *Journal on Ethnopolitics and Minority Issues in Europe*.

<sup>650</sup> Wolff argues that only institutions capable of delivering good governance based on the principles of democracy, rule of law and respect for human rights and create an environment conducive to economic growth stand a chance of acceptance by the electorate.

First is to break the historical legacies of ethnic political mobilization.<sup>651</sup> Dismantling the elite's incentives to incite exclusionary ethnic identities to nurture political support<sup>652</sup> would mature Kenyan politics beyond ethnic rhetoric and bartering. This is possible through enhancing transparency and accountability regarding ethnic representation in government and eliminating exclusionary practices in distribution of state resources. Kenya already has in place laws serving these two objectives in Section 7(2) of the National Cohesion and Integration Act<sup>653</sup> and Article 202 (1) of the Constitution<sup>654</sup> respectively. However, there is need to review the Act to impose stiffer sanctions<sup>655</sup> against politicians who promote ethnic discrimination as a deterrent against ethnicizing politics.

Political de-ethnicization also requires gradual creation of political spaces around issues other than exclusionary ethnic identities and creating conditions for peaceful co-existence within a single political, social and economic space.<sup>656</sup> This requires long term changes in current

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<sup>651</sup> Hanne Fjelde and Kristine Hoglund, 'Ethnic Politics and Elite Competition: The Roots of Electoral Violence in Kenya' in Mimi Soderberg Kovacs and Jesper Bjarnesen (eds) *Violence in African Elections* (Zed Books 2018) 28.

<sup>652</sup> Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (W.W. Norton & Co. 2000).

<sup>653</sup> Section 7 (2) of the National Cohesion and Integration Act (No.12 of 2008) specifically provides that no public establishment shall have more than one third of its staff from the same ethnic community.

<sup>654</sup> Article 202 (1) of the Constitution specifically provides that the revenue raised nationally shall be shared equitably among the national and county governments.

<sup>655</sup> Section 65 provides that contravention of the act does not create any civil or criminal liability except to the extent specifically provided for in the Act. The stiffest penalty is under Section 62 for the offence of ethnic or racial contempt which carries a maximum fine of Kshs. 1 million, or a maximum prison term of five years. Article 202 (1) provides for the equitable sharing of national revenue among the national and county governments.

<sup>656</sup> Stefan Wolff, 'Beyond Ethnic Politics in Central and Eastern Europe' (2002) 4 *Journal on Ethnopolitics and Minority Issues in Europe*.



socialization patterns across generations and the best strategy of achieving this is through promoting inclusivity at all levels of education, based on the national values and principles of governance under Article 10 (2), to facilitate generational change. Ethnic minorities<sup>657</sup> should also be supported by the State to access political spaces through affirmative action programs<sup>658</sup> that facilitate skills training and awareness-raising on political participation.<sup>659</sup>

Second, as the American experience illustrates, stabilization of politics is essential to create an environment that respects judicial independence. The fine and alternating balance of power between the Democrats and Republicans is also reflected in judicial appointments hence making it easier for politicians to respect and uphold court decisions.<sup>660</sup> This is unlike Kenya where the politics of ‘winner-takes-all’ often subsumes the politics of power sharing across all arms and levels of government. Kenya needs to shift to the politics of power sharing to counter politicians’ exclusionary ethnicization of political, social and economic spaces which only breeds violence.<sup>661</sup>

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<sup>657</sup> Kenya’s Demographic Profile 2018: Kikuyu 22%, Luhya 14%, Luo 13%, Kalenjin 12%, Kamba 11%, Kisii 6%, Meru 6%, other African 15%, non-African (Asian, European, and Arab) 1%  
<[https://www.indexmundi.com/kenya/demographics\\_profile.html](https://www.indexmundi.com/kenya/demographics_profile.html)> accessed 13 February 2019.

<sup>658</sup> Article 27 (6) mandates the State to undertake affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

<sup>659</sup> Similar structures were utilized to successfully increase women’s political participation in Rwanda. See: Drude Dahlerup ‘Increasing Women’s Political Representation: New Trends in Gender Quotas’ in Julie Ballington and Aza Karam (eds.) *Women in Parliament: Beyond Numbers* (IDEA 2005) 156.

<sup>660</sup> The parties rotate in power hence the judiciary is not totally dominated by one part or one political view. Hence politicians see no need to attack the judiciary since eventually they shall have the power to shape it. See: Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’ (Carnegie Endowment for International Peace 2000) 19.

<sup>661</sup> Makau Mutua, *Kenya’s Quest for Democracy: Taming the Leviathan* (Lynne Reiner Publishers 2008).

This is in direct contrast to the conceptualization of democracy as a means of containing violence and stabilizing political competition.<sup>662</sup>

Kenyan politics needs a permanent mechanism for creation of an inclusive government. A possible solution lies in Arend Lijphart's<sup>663</sup> influential model of consociational democracy which holds that ethnic diversity can be managed by infusing measures that protect the interests of each community into the foundations of the political system. This would negate the potentially violent ethnic arithmetic at every election that leads to recurrent cycles of coalition formation and dissolution as each group tries to acquire political power. Lijphart identifies executive power-sharing among the representatives of all significant groups as the key pillar<sup>664</sup> of consociationalism, and it is this aspect of consociationalism that is herein proposed as a stabilizer of Kenyan politics.

Since the restoration of multi-party politics in 1992 there has always been a duality of political formations jostling for political power. Therefore, power-sharing in the Kenyan context should be centered around the precedent of there always being two main political

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<sup>662</sup> Marilyn Ossome, 'States of Violence: Structural Dynamics of Gendered, Ethnicized, and Sexualized Violence in Kenya's Democratic Transitions' (PhD Thesis, University of Witwatersrand 2015).

<sup>663</sup> Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (University of California Press 1968).

<sup>664</sup> Lijphart conceptualizes four pillars of consociationalism: (a) executive power-sharing among the representatives of all significant groups; (b) a high degree of internal autonomy for groups that wish to have it; (c) proportional representation of civil service positions and public funds; and (d) a minority veto on the most vital issues. See: Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (University of California Press 1968).

parties/coalitions<sup>665</sup>; hence executive power-sharing should be between the two. It is hereby proposed that we revert<sup>666</sup> to creation of the position of prime minister to share executive power with the president. Primarily the president would be the head of state and commander-in-chief of the armed forces whereas the prime minister would be the head of government. The president would represent the political formation which won the elections whereas the prime minister would be the leader of the formation which placed second. Such a duality of executive power can only be achieved by way of a referendum as provided for under Article 255 (1) (c) since it would entail expanding delegation of the sovereign power of the people within the national executive under Article 130 (1).

Ultimately, such reformation of the Kenyan political culture through infusing belief in the values of order, stability, and a smooth political transition- whereby both the political elite and masses are willing to respect the decision of the courts whenever disputes arise- would serve to create an environment of respect for judicial independence by political actors.

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<sup>665</sup> Similar to the American duality of Republicans and Democrats being the two main political actors.

<sup>666</sup> Initially proposed in the Bomas Draft Constitution of 2004 and introduced in the aftermath of the 2007/2008 PEV that resulted in the formation of the coalition government under the National Accord and Reconciliation Act of 2008. The coalition government model that ended the 2007/2008 PEV was such a success that the same model was replicated in a diversity of cases: Zimbabwe, Afghanistan, Honduras, Iraq and Madagascar. See: Nic Cheeseman, 'The Internal Dynamics of Power Sharing in Africa' (2011) 18:2 Democratization 336.

### 5.2.1.6. HOW CONSTITUTIONAL SAFEGUARDS HELP UPHOLD JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

The American Constitution has safeguards for judicial independence such as life tenure and prohibition against salary reductions.<sup>667</sup> These structural protections restrict political attacks to politicians' ability to garner enough support and coordination to overcome them.<sup>668</sup> Moreover, removal of judges is difficult since judicial impeachments through senatorial trial are subject to the two-thirds majority vote rule and such majorities are difficult to mobilize and sustain.<sup>669</sup> Consequently, whereas it is possible for American politicians to freely attack individual judges, it remains fairly difficult to target one for removal and impeachments are relatively rare to date.

Conversely, the Kenyan impeachment threshold is very low and lacks clear definitions of the grounds for removal, specifically breach of the judges' code of conduct and incompetence which are open to broad interpretation that could see judges removed for minor breaches.<sup>670</sup> In the absence of clear definitions and a high threshold, it is arguable that what constitutes an impeachable offence is whatever the JSC deems it to be.<sup>671</sup> This leaves the entire process open to abuse through frivolous impeachment petitions, as witnessed after the Supreme Court's

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<sup>667</sup> Article III of the Constitution of the United States.

<sup>668</sup> John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 353, 355.

<sup>669</sup> John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 353, 355.

<sup>670</sup> Migai Akech, *Administrative Law* (Strathmore University Press 2016) 440.

<sup>671</sup> Under Article 168 (4) the JSC shall consider the petition, and if it is satisfied that it discloses a ground for removal under Article 168 (1), send the petition to the president who shall then appoint a tribunal.

nullification of the 2017 presidential election.<sup>672</sup> Given the ambiguity of what constitutes an impeachable offence there is a need to ensure that due process is followed at this initial stage; however this has not been the case as witnessed in the proceedings of Supreme Court Justices Mwilu<sup>673</sup> and Ojwang<sup>674</sup>. In the former there was an attempt to circumvent the JSC in preferring criminal charges against the judge whereas in the latter the judge's right to be heard was not observed.<sup>675</sup>

When the JSC declined to give audience to Justice Ojwang's lawyers<sup>676</sup> they were going against the standard set in *Rees v. Crane*<sup>677</sup> that at this initial stage there is the right to be represented and make representations. However, this right isn't absolute, and consideration of the

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<sup>672</sup> *Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission Chairman (IEBC) & Another* (2017) eKLR. There were three petitions to remove the majority decision judges on unsubstantiated claims of gross misconduct. See: Walter Khobe Ochieng 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Elections' in James Gondi (ed.) *Reflections on the 2017 Elections in Kenya: Papers on Emerging Judicial Philosophy in Kenya* (ICJ Kenya 2018).

<sup>673</sup> 'Philomena Mwilu survives as court stops prosecution over graft' <<https://www.nation.co.ke/news/Mwilu-survives-court-blocks-prosecution/1056-5139704a92gw8z/index.html>>.

<sup>674</sup> 'Tribunal finds Supreme Court Justice Ojwang Innocent' <<https://www.the-star.co.ke/news/2019-08-04-tribunal-finds-supreme-court-justice-ojwang-innocent/>> accessed 16 September 2019.

<sup>675</sup> The high court quashed the DPPs intended prosecution of the DCJ on the grounds, *inter alia*, that the DCI had intended to use illegally obtained evidence. 'Philomena Mwilu survives as court stops prosecution over graft' <<https://www.nation.co.ke/news/Mwilu-survives-court-blocks-prosecution/1056-5139704a92gw8z/index.html>>. A tribunal absolved Ojwang of any wrongdoing <<https://www.the-star.co.ke/news/2019-08-04-tribunal-finds-supreme-court-justice-ojwang-innocent/>>.

<sup>676</sup> 'Judge Jackton Ojwang' refuses to appear before JSC' <<https://www.nation.co.ke/news/Judge-Ojwang--refuses-to-appear-before-JSC-over-bribe/1056-5031404-f1qa0ez/index.html>>.

<sup>677</sup> (1994) 1 A.E.R 833.

circumstances is crucial since it also accrues at the tribunal stage. Therefore, the JSC should always strike a balance between ensuring: (a) judicial independence and preventing victimization of judges, and (b) that the impeachment process isn't unduly cumbersome and protracted. Kenya should also set a high political bar for impeachment like the American senatorial two-thirds supermajority requirement. This requires amendment of Article 168 (7) (b) to require a majority vote by parliament in support of a tribunal's recommendation for removal. This is only possible through a referendum as provided for under Article 255 (1) (g).

This institutional protection enables judges to make judgements without worrying about potential political or personal consequences. Ultimately, this ensures judicial accountability since judges can then decide cases in fidelity to legal constraints even when there are strong moral, economic, political, institutional or other social considerations pointing to a different outcome.<sup>678</sup> Even politically controversial decisions are hence justifiable in a manner acceptable to the legal fraternity thereby retaining legal legitimacy, and also to politicians thereby avoiding political attack that would otherwise undermine the judiciary's institutional independence. Moreover, such controversial cases are heard by a panel of judges to ensure that they are determined with adequate judicial deliberation. This allows judges to share responsibility for the majority decision while allowing for dissenting opinions.

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<sup>678</sup> P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987).

## 5.2.2. SOUTH AFRICA

### 5.2.2.1. HOW THE NEW CONSTITUTIONAL DISPENSATION SHAPED A POLITICAL CULTURE THAT RESPECTS JUDICIAL INDEPENDENCE

The 1996 Constitution established South Africa as a sovereign democratic state founded on the principles of constitutional supremacy, rule of law, and a multi-party system of democratic government.<sup>679</sup> The new constitutional dispensation was based on two fundamental tenets, the Bill of Rights and justiciability of government action.<sup>680</sup> The peoples' hopes were anchored in the belief in the idea of entrenched rights and independent courts to safeguard those rights against any future government.<sup>681</sup> Consequently, South Africa adopted a political system of constitutional supremacy with an entrenched Bill of Rights and a newly constituted Constitutional Court to champion those rights.

Contextually the courts' judicial review power was given prominence to enable the courts to invalidate legislation that did not conform with the Constitution.<sup>682</sup> South Africans placed their hopes in the courts to check the exercise of executive and legislative power so that the evils of its

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<sup>679</sup> Section 1 of the Constitution of the Republic of South Africa, 1996

<<http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> accessed 7 August 2019>. See: Amy Gordon and David Bruce, 'Transformation and the Independence of the Judiciary in South Africa' in CSV, 'After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa' (CSV, 2007) 1.

<sup>680</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>681</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>682</sup> As specifically provided for under Section 2 of the Constitution.

apartheid past would never recur.<sup>683</sup> The judiciary as a whole, and the Constitutional Court in particular, was perceived with hope and respect, and judges bore the grave responsibility of developing a rights-based jurisprudence from scratch.<sup>684</sup> The judiciary therefore had to evolve into a legitimate and effective arm of government. This entailed consideration of a variety of factors, key among them: composing a demographically representative bench, promoting a culture of judicial accountability, and creating the necessary structures to foster judicial independence.<sup>685</sup>

To achieve such transformation required judges who were firmly committed to the rule of law and the concept of rights, therefore composition of the bench was crucial towards promoting independence and respect for the judiciary. Redress of social inequalities of the apartheid era was essential to achieve the constitutional goal of “laying the foundation of a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.”<sup>686</sup> The judiciary also had the mandate to protect and uphold constitutional values and it was therefore important that judicial appointees identify with and were dedicated to the new constitutional order.<sup>687</sup>

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<sup>683</sup> Max du Plessis, ‘The Legitimacy of Judicial Review in South Africa’s New Constitutional Dispensation: Insights from the Canadian Experience’ (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>684</sup> Max du Plessis, ‘The Legitimacy of Judicial Review in South Africa’s New Constitutional Dispensation: Insights from the Canadian Experience’ (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>685</sup> Amy Gordon and David Bruce, ‘Transformation and the Independence of the Judiciary in South Africa’ in CSV, ‘After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa’ (CSV, 2007) 20.

<sup>686</sup> Preamble of the 1996 Constitution of the Republic of South Africa <<https://www.gov.za/documents/constitution-republic-south-africa-1996-preamble>> accessed 3 November 2018.

<sup>687</sup> Amy Gordon and David Bruce, ‘Transformation and the Independence of the Judiciary in South Africa’ in CSV, ‘After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa’ (CSV, 2007) 20.



Consequently, to ensure accountability and impartiality of judges the Constitution mandated the establishment of structural and institutional safeguards through the enactment of legal provisions and creation of formal structures that would enable the judiciary to function independently of the other arms of government.<sup>688</sup> Judicial independence was hence specifically protected and guaranteed by Section 165 (2).<sup>689</sup> Moreover, no person or state organ may interfere with the functioning of the courts.<sup>690</sup> Ultimately, the 1996 Constitution established a new legal order with an independent judiciary with the power to review the legality of all official acts by either the executive or legislature.<sup>691</sup>

South Africans aspirations of a future based on recognition of human rights and democracy, as upheld by independent courts, also led to societal acceptance of the rule of law. Woolman observes that the rule of law doctrine and the principle of accountability cannot function solely as constitutional values but must form part of society's daily lived experiences.<sup>692</sup> Contextually, the concept of rule of law was understood to mean that "the law is elevated above politics and judges are independent and impartial arbiters protecting citizens' rights and guarding against tyranny and

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<sup>688</sup> Amy Gordon and David Bruce, 'Transformation and the Independence of the Judiciary in South Africa' in CSV, 'After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa' (CSV, 2007) 21.

<sup>689</sup> They provide that the courts are independent and subject only to the Constitution and the law, to be applied impartially without fear, favor or prejudice.

<sup>690</sup> Section 165 (3).

<sup>691</sup> Section 172 (1) (a) of the Constitution holds that a court can declare invalid any law or conduct that is inconsistent with the Constitution, to the extent of its inconsistency.

<sup>692</sup> Stu Woolman, 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President' Constitutional Court Review <<http://www.saflii.org/za/journals/CCR/2018/19.pdf>> accessed 10 June 2019.

arbitrariness in government.”<sup>693</sup> On their part, the political elite chose to abide by court decisions as provided for under Section 165 (5) of the Constitution.<sup>694</sup> The precedent was set by President Mandela when, in reaction to the court’s invalidation of his efforts at legislative amendment in order to favor ANC<sup>695</sup>, he made a televised statement affirming his respect of the Court’s power to declare his actions unconstitutional and invalid and that he would respect and obey its decision.<sup>696</sup>

Hence, the new constitutional dispensation created an environment whereby courts were insulated from political manipulation.<sup>697</sup> The South African political culture thus placed faith in independent courts to determine and uphold civil liberties and individual rights, “whilst insulated from the demands of the political majority whose interests would override the rights.”<sup>698</sup>

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<sup>693</sup> Cora Hoexter, *Administrative Law in South Africa* (Juta 2<sup>nd</sup> Edition 2012) 140.

<sup>694</sup> It provides that, “An order or decision issued by a court binds all persons to whom and organs of the state to which it applies.”

<sup>695</sup> *Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8.

<sup>696</sup> James Gibson and Gregory Caldeira, ‘Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court’ (2003) 65 (1) *The Journal of Politics* 1 – 30  
<[https://www.jstor.org/stable/10.1111/1468-2508.t01-1-00001?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/10.1111/1468-2508.t01-1-00001?seq=1#metadata_info_tab_contents)> accessed 30 January 2019.

<sup>697</sup> Max du Plessis, ‘The Legitimacy of Judicial Review in South Africa’s New Constitutional Dispensation: Insights from the Canadian Experience’ (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>698</sup> Max du Plessis, ‘The Legitimacy of Judicial Review in South Africa’s New Constitutional Dispensation: Insights from the Canadian Experience’ (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

#### **5.2.2.2. THE SUBSEQUENT PROMINENCE OF THE JUDICIARY IN THE POLITICAL STRUCTURE AND DEVELOPMENT OF LEGAL CONSTRAINTS**

The apartheid legacy is still resonant and continues to be a central concern for government and citizens.<sup>699</sup> In the post-apartheid transformation, South Africans sought to create a representative judiciary dedicated to upholding constitutional values, fostering judicial accountability and improving efficiency to ensure access to justice for all.<sup>700</sup> This is only possible within the context of an independent judiciary. Therefore, consolidation of judicial independence was a key component of the wider political transformation in the post-apartheid era. Subsequently, upon adoption of constitutional supremacy to guide it from its turbulent past, South Africans trusted the courts to lead them towards a democratically just future.<sup>701</sup> The courts, led by the Constitutional Court, were expected to develop jurisprudence that would bridge the gap between a past where the law seldom protected human rights and the future where their protection is sacrosanct.<sup>702</sup>

South Africa emerged from a history where the political structure revolved around an executive dominated by a white minority, and a system of parliamentary sovereignty whereby

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<sup>699</sup> Amy Gordon and David Bruce, 'Transformation and the Independence of the Judiciary in South Africa' in CSV, 'After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa' (CSV, 2007) 5.

<sup>700</sup> Amy Gordon and David Bruce, 'Transformation and the Independence of the Judiciary in South Africa' in CSV, 'After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa' (CSV, 2007) 5.

<sup>701</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>702</sup> Myron Zlotnick, 'The Death Penalty and Public Opinion' (Seminar No.4 of the Centre for the Study of Violence and Reconciliation, June 1995).

parliament was the supreme legal authority and the courts could not invalidate laws passed by it.<sup>703</sup> Under the new constitutional dispensation that embraced constitutional supremacy the judiciary, particularly the Constitutional Court, was given a central role in the political structure with the mandate to advance the recognition of the Bill of Rights for the benefit of all South Africans.<sup>704</sup> Whilst still maintaining fidelity to the doctrine of separation of powers, the judiciary gained prominence in this system of democratic constitutionalism<sup>705</sup> whose hallmark is the power of judicial review. Endoh<sup>706</sup> notes that the rationale for South Africa establishing democratic constitutionalism was to promote the rule of law through the Constitution and hence have a government that guarantees equality and respect for all. Du Plessis observes that this made South Africa take up a position of constitutionalism and justiciability.<sup>707</sup>

However, the constitutional supremacy clause in Section 2 and the open texture of the Constitution is noted to grant courts wide powers of judicial review.<sup>708</sup> This power ought to be exercised judiciously otherwise courts run the risk of encroaching on the executive and legislative

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<sup>703</sup> <<https://www.parliament.uk/about/how/role/sovereignty/>> accessed 29 May 2018.

<sup>704</sup> Fabrice Tambe Endoh, 'Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited' (2015) 7 (1) Africa Review 67.

<sup>705</sup> Fabrice Tambe Endoh, 'Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited' (2015) 7 (1) Africa Review 67.

<sup>706</sup> Fabrice Tambe Endoh, 'Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited' (2015) 7 (1) Africa Review 67.

<sup>707</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) The Comparative and International Law Journal of Southern Africa 227.

<sup>708</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) The Comparative and International Law Journal of Southern Africa 227.

functions.<sup>709</sup> The question is not whether the courts exercise the power of judicial review, but how they exercise it. Within the South African context, in order to ensure that such power is not wielded arbitrarily and rein in the possibility of judicial interference with government action, the Constitutional Court developed a limitation clause in *S v. Zuma and Others*.<sup>710</sup> This was with specific regard to determining the legitimacy of a government's limitation of rights. In the first stage the court determines the boundaries and content of the right in reference to the constitutional values served by its entrenchment in the Bill of Rights; and in the second stage the court measures these constitutional values against competing rights, values and ideals vis-à-vis the requirements of social policy.<sup>711</sup> This is a legal constraint core to the court's interpretation of the Bill of Rights vis-à-vis justiciability of government action which are the key tenets of the new constitutional dispensation.

### **5.2.2.3. SHORTCOMINGS AND OPPORTUNITIES IN THE KENYAN POLITICAL CULTURE AND STRUCTURE AS COMPARED TO THE SOUTH AFRICAN CONTEXT**

Kenya also has a new Constitution that recognizes “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”<sup>712</sup> However, unlike South Africa the Kenyan political culture has not changed to reflect these aspirations. It is still dominated by ethnicity in political mobilization and

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<sup>709</sup> See discussions in Chapter One.

<sup>710</sup> 1995 2 SA 642 (CC).

<sup>711</sup> *S v. Zuma and Others* 1995 2 SA 642 (CC).

<sup>712</sup> Preamble to the Constitution of Kenya, 2010.

organization centered around control of patronage resources by ethnically defined coalitions. In such environment citizens tend to defer to the elite decision makers in the political class even when their behavior and decisions undermine other democratic institutions. This does not breed a political culture with inherent respect for judicial independence, neither does it help build a legal culture in which legal rules and concepts exert any meaningful constraints on the exercise of judicial discretion.

Also, the Kenyan political structure is distorted by the overwhelming influence of the executive on the legislature under the umbrella of the ruling Jubilee party. This *de facto* unification of the executive and legislature was further exacerbated by the recent alliance between President Kenyatta and the leader of the leading opposition party, Raila Odinga.<sup>713</sup> This is a hindrance on the separation of powers between the two arms according to their function and has left the judiciary in a constant struggle to assert its independence and it is frequently in conflict with the two over its decisions against them. Unlike South Africa, the Kenyan executive and legislative arms have been lax in respecting and upholding court decisions they disagree with.<sup>714</sup>

The Kenyan political culture requires political de-ethnicization to reflect the aspirations of the 2010 Constitution; possible strategies to achieve this were elaborated upon herein above. It is only when the political culture changes to reflect societal belief in the constitutional values of

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<sup>713</sup> Eugene Okumu, 'How We Got Here: The Story of Handshake' *Standard Digital* <<https://www.standardmedia.co.ke/article/2001315921/the-story-of-handshake>> accessed 12 August 2019.

<sup>714</sup> E.g.: *Judicial Service Commission v. Speaker of the National Assembly and the Attorney-General* (2013) eKLR; *Martin Nyaga Wambora and the County Government of Embu v. Speaker, County Assembly of Embu & 4 Others* (2014) eKLR; *Speaker of Senate & Another v. A.G. & 4 Others*, Supreme Court Advisory Opinion Ref. No.2 of 2013; *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others* (2015) eKLR.

human rights, equality, freedom, democracy, social justice, and the rule of law<sup>715</sup> that Kenya can create an environment that truly has respect for judicial independence. Such change would trigger a similar positive change in the political structure respectful of the constitutional separation of powers according to functions to ensure government accountability to all Kenyans who are the wielders of sovereign power.<sup>716</sup>

A key factor for the prominence of the judiciary within the South African political structure, alongside enhanced judicial independence and the rule of law, is the precedent set by the political elite to respect court decisions even when they disagree with them.<sup>717</sup> This should be emulated within the Kenyan context since open disregard for court orders by politicians triggers a lack of belief in the courts by the people from whom courts derive their authority.<sup>718</sup> It is therefore an imminent threat to the legitimacy of the Constitution and the rule of law since undermining judicial credibility leaves people with no legal recourse hence creating room for anarchy.<sup>719</sup> Moreover, the concept of rule of law requires every person, including all organs of government, to submit themselves to the law which applies equally to everyone. Politicians cannot choose which court orders to obey and which ones to ignore since doing so would be gross neglect of their

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<sup>715</sup> Preamble to the Constitution of Kenya, 2010.

<sup>716</sup> Section 1 of the Constitution provides that all sovereign power belongs to the Kenyan people who may exercise it either directly or through their democratically elected representatives.

<sup>717</sup> *Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8.

<sup>718</sup> Article 159 (1) of the Constitution.

<sup>719</sup> Emmanuel Kibet and Kimberly Wangeci, 'A Perspective on the Doctrine of the Separation of Powers Based on the Response to Court Orders in Kenya' (2016) *Strathmore Law Review* 220.

duty to respect and uphold the law.<sup>720</sup>To their credit the Kenyan courts have been resolute in reminding the political class that respect of court orders, even when they disagree with them, is a key tenet of the rule of law.<sup>721</sup>

#### **5.2.2.4. DEFINING STRONG GROUNDS FOR IMPEACHMENT AS A MEANS OF SAFEGUARDING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: LESSONS FROM SOUTH AFRICA**

South Africa has constitutional safeguards to ensure judges operate in an environment conducive to judicial independence. These include security of tenure for Constitutional Court judges<sup>722</sup> and protection of salaries and benefits.<sup>723</sup>Importantly, a judge can only be removed on grounds of incapacity, gross incompetence or gross misconduct,<sup>724</sup>and this requires a two-thirds parliamentary majority vote. Judges can thus feel very secure once appointed and do not have to fear that decisions unfavourable to government will lead to impeachment.<sup>725</sup>

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<sup>720</sup> Emmanuel Kibet and Kimberly Wangeci, 'A Perspective on the Doctrine of the Separation of Powers Based on the Response to Court Orders in Kenya' (2016) *Strathmore Law Review* 220.

<sup>721</sup> *Judicial Service Commission v. Speaker of the National Assembly and the Attorney-General* (2013) eKLR

<sup>722</sup> Section 176 (1) provides they serve a non-renewable term of twelve years or until they attain the age of seventy, whichever comes first.

<sup>723</sup> Section 176 (3) provides that they cannot be reduced.

<sup>724</sup> Section 177.

<sup>725</sup> Amy Gordon and David Bruce, 'Transformation and the Independence of the Judiciary in South Africa' in CSV, 'After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa' (CSV, 2007) 1.



South Africa also has a judicial code of conduct,<sup>726</sup> however, breach of the code is not a ground for removal of a judge.<sup>727</sup> Any willful or grossly negligent breach of the code is not an impeachable offence but is instead subject to inquiry and remedy.<sup>728</sup> However, in Kenya breach of the code is a ground for removal,<sup>729</sup> but to date no such code has been prescribed by any law.<sup>730</sup> This is contrary to global best practice which holds that not every breach of a code should be sufficiently serious to warrant removal of a judge.<sup>731</sup> Kenya should therefore also develop a judicial code of conduct prescribing appropriate remedies instead of impeachment.<sup>732</sup> Article 168 should subsequently be amended to remove it as a ground for removal.<sup>733</sup>

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<sup>726</sup> The Judicial Service Commission Act (No. 9 of 1994) contains the South African Judicial Code of Conduct.

<sup>727</sup> Under Section 177 of the South African Constitution there are only three grounds for removal: incapacity, gross incompetence or gross misconduct.

<sup>728</sup> Section 17 (8) lists the following remedial steps: (a) apologizing to the complainant; (b) a reprimand; (c) a written warning; (d) any form of compensation; (e) appropriate counselling; (f) attendance of a specific training course; (g) any other appropriate corrective measure.

<sup>729</sup> Article 168 (1) (b) of the Kenyan Constitution

<sup>730</sup> Article 168 (1) (b) requires the code to be prescribed by an Act of Parliament. The judiciary developed one in 2016 but it was not tabled before parliament within seven days after its publication and hence lapsed in line with Section 11 of the Statutory Instruments Act.

<sup>731</sup> J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Bingham Centre for the Rule of Law, Commonwealth Secretariat 2015).

The *UN Basic Principles on the Independence of the Judiciary* as well as the *Commonwealth Latimer House Principles* both hold that judges should only be removed for reasons of incapacity or behavior that renders them unfit to discharge their duties.

<sup>732</sup> The Code can be under the Kenya Judicial Service Act the same way the South African Code is under its Judicial Service Commission Act.

<sup>733</sup> This would require a referendum as provided for under Article 255 (1) (g).

Kenya should also limit petitions under Article 168 (1) (d) to instances of gross incompetence on the part of individual judges. This insulates them from being removed for errors of competency that are beyond their control such as those caused by systemic factors such as excessive caseload or insufficient administrative support.<sup>734</sup> This requires amendment of Article 168 (1) (d) which can only be done by way of referendum as provided for under Article 255 (1) (g).

In *De Lange v. Smits*,<sup>735</sup> the court stated that the minimum criteria of judicial independence are judges' security of tenure, financial security, and institutional independence. It is therefore essential that Kenya has in place robust safeguards to protect judges from victimization and the possibility of being impeached on frivolous grounds, thereby enabling them to act as impartial and morally autonomous agents who share and protect the constitutional values. Impartiality in deciding cases and fidelity to legal values is core to ensuring judicial accountability within the separation of powers doctrine.

### **5.3. PART C: CONCLUSION**

As this chapter shows, respect for judicial independence thrives in contexts where societal belief and adherence to the rule of law exists. Examination of the American and South African contexts reveals that it subsequently leads to the crystallization of good working relationships between the three arms of government with recourse to the judiciary when disputes arise. I therefore find that effective exercise of judicial power is only possible in an environment governed

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<sup>734</sup> J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Bingham Centre for the Rule of Law, Commonwealth Secretariat 2015).

<sup>735</sup> (1998) ZACC 6.

by the rule of law, where both the state and its citizens are willing to submit to the laws passed by parliament and interpreted by the courts.

Moreover, as this chapter shows, a functional rule of law approach where courts consider the political environment in which they operate helps them make pragmatic and practical judgements thereby avoiding the pitfall identified in my problem statement, the risk of making abstract judgements that may be academically valid but are realistically unenforceable. This creates the high degree of legal and political stability required for a judiciary to evolve over time into an institution that can utilize its independence to effectively exercise judicial power to enact natural justice, regulate the legality of government behavior, and safeguard important legal and constitutional values.

The chapter also reveals that having constitutional safeguards for judicial independence in place, such as security of tenure for judges, makes individual judges feel very secure once appointed thus enabling them to determine cases without fear of political attacks should their decisions not be in line with the desired political outcomes. This institutional protection further allows the judiciary to play a key role in shaping a country's political culture grounded in societal belief in the rule of law, and the idea of entrenched rights and independent courts to safeguard those rights. I therefore hold that the institutional protection afforded by constitutional safeguards for judicial independence allow the judiciary to assume a central role in a country's political structure with the mandate to advance the rule of law through development of a rights-based jurisprudence.

The chapter also shows that the exercise of judicial power is influenced by the political system in which the court exercising it operates. Tensions between politicians and the courts are an inherent feature of democratic government, what matters is how politicians respond to the courts when they disagree with their judgements. Ultimately, Kenyan political culture needs urgent recalibration away from ethnicity towards a belief in the values of the 2010 Constitution.<sup>736</sup> Subsequently, Kenya can achieve a political structure that ensures separation of powers and correlates the use of checks and balances on the exercise of government power with high levels of specificity and oversight.<sup>737</sup> Consequently, this will create a conducive environment for respect for judicial independence and the rule of law by all Kenyans and a strong legal culture where even the courts are positively constrained in their exercise of judicial power within defined limits.

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<sup>736</sup> Human rights, equality, freedom, democracy, social justice and the rule of law.

<sup>737</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) *Va. Env'tl. L. J.* 357

## CHAPTER SIX

### CONCLUSIONS AND RECOMMENDATIONS

#### 6. INTRODUCTION

The purpose of this study was to critically examine the Kenyan judiciary's exercise of its power of judicial review as a check and balance on the exercise of legislative power under the current politico-legal context.<sup>738</sup> This chapter includes a discussion of the major findings as related to the exercise of this judicial power under the Independence and 2010 Constitutions, as well as the United States and South Africa vis-à-vis the Kenyan context. The chapter also discusses how the study relates and contributes to existing theories on judicial review of legislative action within the context of the separation of powers doctrine. It concludes by interrogating the study limitations and research possibilities to help answer the research questions:

1. How have Kenyan courts exercised their power of judicial review as a check and balance on parliament's exercise of legislative power?
2. Are Kenyan courts effectively using their judicial review power to check against the abuse of legislative power by parliament?
3. How can this power of judicial review of legislative action be clarified, extended, or modified to better achieve the objective of serving as a check and balance on parliament?

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<sup>738</sup> Guided by the Constitution of Kenya, 2010.

## **6.1. INTERPRETATION OF THE FINDINGS**

### **6.1.1. HOW HAVE KENYAN COURTS EXERCISED THEIR POWER OF JUDICIAL REVIEW AS A CHECK AND BALANCE ON PARLIAMENT'S EXERCISE OF LEGISLATIVE POWER?**

The study examined this research question based on the practice under the Independence Constitution, prior to promulgation of the 2010 Constitution. The objective was to establish the historical context and gradual development of procedures and policy governing judicial intervention in legislative affairs in Kenya. This helped in comprehension of the underlying politico-legal systems within which the Kenyan political culture evolves to shape its political structure. This analysis was done to identify strengths and limitations that contributed towards or mitigated against the creation of a conducive political environment that respects judicial independence. Ultimately, this is the only environment in which courts can exercise their judicial review power as a check and balance on the executive and legislature within the context of the separation of powers doctrine.

#### **6.1.1.1. FINDINGS**

The results of this study show that effective exercise of a court's judicial review power is only possible if the prevailing political structure is one whereby the three arms of government are co-equal, and each is therefore able to independently exercise its mandate while allowing for checks and balances by the others. This finding is consistent with Montesquieu's theory of partial separation of powers modified by a system of checks and balances.<sup>739</sup> Such tripartite division of

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<sup>739</sup> *De l'Esprit des Lois* (1748).

<[https://books.google.co.ke/books/about/The\\_Spirit\\_of\\_Laws.html?id=5zZJAAAAMAAJ&printsec=frontcover&source=hp\\_read\\_button&redir\\_esc=y#v=onepage&q&f=false](https://books.google.co.ke/books/about/The_Spirit_of_Laws.html?id=5zZJAAAAMAAJ&printsec=frontcover&source=hp_read_button&redir_esc=y#v=onepage&q&f=false)> accessed 4 September 2019.

government functions is best safeguarded if delineated in a constitution which is the main instrument of government. However, even where this is the case competition between constitutional principles and the ideologies of the political elite can result in regression towards concentration of powers in the executive. Both Ghai<sup>740</sup> and Murunga *et al*<sup>741</sup> observe that where the wielders of political power have little commitment to constitutional values then there is a lack of constitutionalism resulting in the absence of the rule of law and a separation of powers between the governmental arms.

An examination of the Kenyatta and Moi regimes revealed that the Independence Constitution was severely amended to the point of gross distortion of the tripartite division of government functions, resulting in the concentration of powers in the executive arm. This resulted in executive capture of both parliament and the judiciary eventually creating an environment where the entire government was subsumed in the executive. Ultimately, the study revealed that under the two regimes Kenya was a KANU State and this echoes Gutto's<sup>742</sup> observation, at the time, that "KANU also started asserting, contrary to the constitutional structure of the country, that it is

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<sup>740</sup> Yash Pal Ghai, 'Constitutions and Constitutionalism: The Fate of the 2010 Constitution' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 119,127.

<sup>741</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>742</sup> Shadrack B.O. Gutto, 'Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa' (1987) 5 Z.L. REV. 142.

‘above’ parliament and government.”<sup>743</sup> Therefore, under the Kenyatta and Moi regimes Kenya did not have a political structure that would allow the courts to exercise their power of judicial review as a check and balance on parliament’s exercise of legislative power.

Murunga *et al*<sup>744</sup> observe that such constitutional mutilation is the key impediment to the entrenchment of a culture of constitutionalism in Africa. Therefore, the Kenyatta and Moi administrations’ cannibalization of the Independence Constitution created a political environment devoid of constitutionalism and hence governmental power was exercised outside the confines of the rule of law and the separation of powers doctrine. The conclusion as to their lack of constitutionalism is based on De Smith’s<sup>745</sup> proposition that under constitutionalism governmental power should be exercised guided by rules prescribing the procedure according to which executive and legislative acts are to be performed.

It was further shown that where the political structure is dominated by the executive it tends to exert influence and interference in the courts to ensure that they arrive at the desired political outcome in their judgements. Under the Kenyatta and Moi administrations the courts were hence deployed by the executive to play a significant role in protecting the interests of an imperial presidency in a skewed and severely compromised manner that greatly undermined public faith in their independence and impartiality. To ensure this the executive, by way of constitutional

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<sup>743</sup> Shadrack B.O. Gutto, ‘Constitutional Law and Politics in Kenya since Independence: A Study in Class and Power in a Neo-Colonial State in Africa’ (1987) 5 Z.L. REV. 142.

<sup>744</sup> Godwin R. Murunga, Duncan Okello and Anders Sjogren, ‘Towards a New Constitutional Order in Kenya: An Introduction’ in Godwin R. Murunga, Duncan Okello and Anders Sjogren (Eds.) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 4.

<sup>745</sup> S.A De Smith, *The New Commonwealth and its Constitutions* (Stevens & Sons 1964).



amendments, seized powers of appointment and removal of judicial officers which allowed it to control the judiciary.<sup>746</sup> These courts were therefore primed to exercise the jurisprudence of executive supremacy at all costs, at the expense of protecting individual freedoms and restraining government.<sup>747</sup> Within such a context the judiciary is subject to the prevailing interests of the executive and is hindered from exercising its judicial review power to ensure that parliament's exercise of legislative power is in accordance with the constitution. Similarly, Ojwang<sup>748</sup> notes that such conditions are not suitable for the exercise of judicial power as a restraint on the executive or legislature.

However, the study also found that even where the political structure is in line with the tripartite form of government espoused under Montesquieu's separation of powers doctrine, the personal and policy preferences of the judges can determine the effectiveness of its exercise of judicial power. The study revealed that the Kibaki era judges exhibited a strong streak of selfishness and did not shy away from using the law to protect their own interests, as seen by the cases they filed to stop the CKRC from adopting proposals for judicial reform in the draft constitution. This shortcoming on their part was further worsened by the pervasive corruption which had crept into the Kenyan bench and claimed prominence at all levels of the judiciary.

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<sup>746</sup> Kuria G. Kamau and J.B. Ojwang, 'Judges and the Rule of Law in the Framework of Politics: The Kenya Case' (1979) Public Law 254.

<sup>747</sup> Migai Akech and Patricia Mbote, 'Kenyan Courts and the Politics of the Rule of Law in the Post-Authoritarian State' (2012) 18 East African Journal of Peace and Human Rights 357.

<sup>748</sup> Jackton B. Ojwang, *Ascendant Judiciary in East Africa* (Strathmore University Press, 2013) 46.

Consequently, judges and the judiciary were perceived to be increasingly compliant, corrupt and incompetent.

Therefore, the Independence Constitution had provisions that safeguarded judicial independence and allowed for the exercise of judicial review power to ensure the constitutionality of legislative action. However, it did not achieve this aspiration owing to the subsequent concentration of power in the executive through constitutional amendments under the Kenyatta and Moi regimes. Consequently, the judiciary in these two eras corresponded to Court D of the conceptual framework – the worst deviation from the separation of powers doctrine.

Although the judiciary in the Kibaki era enjoyed more independence as a result of the then on-going constitutional reform process which brought about gradual judicial reforms, it was not able to effectively exercise its judicial power owing to the judges' collective focus on protecting their own interests vis-à-vis the judicial reforms proposed by CKRC. At the same time the judges were also preoccupied with self-preservation following the judicial purge triggered by the Ringera Report. As a result, the Kibaki era judiciary paralleled Court C – the dangerous possibility that allows the threat of a court's unwarranted interference with policy choices democratic majorities should be allowed to make. This is exemplified by the judges' filing of petitions intended to stop the constitutional review process for their own self-interest.

#### **6.1.1.2. RECOMMENDATIONS**

Kenyan courts' must appreciate that they exercise a delicate power, and will only be accepted by Kenyans if their exercise of judicial power is restrained and they reach decisions that

are seen to be serving the public good.<sup>749</sup> Judges should be able to decide cases free from either external or internal influences, inducements, pressures, threats, or interference, direct or indirect, from any quarter or any reason.<sup>750</sup> It is the institutional independence of the judiciary as a separate arm of government which determines its capacity to resist encroachment from the political branches and thereby preserve the separation of powers. This institutional independence must be accompanied by personal independence of the judicial officers to decide cases without threat or intimidation that could interfere with their ability to uphold the law.<sup>751</sup>

The study therefore shows that judicial independence is best safeguarded when it is expressly provided for in a country's supreme law, the Constitution. Moreover, the Constitution must protect it from arbitrary amendment by the political arms of government (executive and legislature) by requiring a popular mandate for any such amendment by way of referendum. This would ensure that the entire electorate is invited to vote on any amendment that would restrict or destroy judicial independence. Furthermore, there is an indelible link between separation of powers, judicial independence, and the rule of law. Failure to strike an appropriate balance of power between the three arms of government has negative consequences for judicial independence and rule of law.<sup>752</sup> The establishment of institutional independence of the judiciary within the

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<sup>749</sup> Migai Akech, 'Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya' in *Governance, Institutions and the Human Condition* (Strathmore University & Law Africa 2009)

<sup>750</sup> The Bangalore Principles of Judicial Conduct (2002)  
<[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)> accessed 7 February 2017.

<sup>751</sup> Julie Ouma Oseko, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform' (PhD Thesis, University of Leicester, 2011) 18.

<sup>752</sup> Julie Ouma Oseko, 'Judicial Independence in Kenya: Constitutional Challenges and Opportunities for Reform' (PhD Thesis, University of Leicester, 2011) 9.

Constitution serves to insulate it from inappropriate or unwarranted interference with either its judicial processes or decisions and is a measure of the seriousness with which the principle of separation of powers is taken.<sup>753</sup>

This constitutional protection of the judiciary's institutional independence serves to insulate it from political attack and/or interference with its processes or decisions. However, even though these constitutional protections are a welcome move, the challenge is the extent to which systematic interpretation habits can be achieved, or if they are indeed achievable.<sup>754</sup> Moreover, it must be ensured that judicial appointments put through individuals who are competent and have integrity since these constitutional provisions alone lack the ability to constrain judges in their interpretation or ensure uniform interpretation in the entire judiciary.

### **6.1.2. ARE KENYAN COURTS EFFECTIVELY USING THEIR JUDICIAL REVIEW POWER TO CHECK AGAINST THE ABUSE OF LEGISLATIVE POWER BY PARLIAMENT?**

The study evaluated the Kenyan courts exercise of their judicial review power to check against the abuse of legislative power by the first parliament to be elected under the 2010 Constitution. This Constitution created two houses of parliament, the National Assembly<sup>755</sup> and the Senate<sup>756</sup>, to exercise legislative power vested upon parliament by the Kenyan people who are

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<sup>753</sup> Peter Russell and David O'Brien (Eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia 2001) 22.

<sup>754</sup> Freda Mugambi Githiru, 'Transformative Constitutionalism, Legal Culture and the Judiciary under the 2010 Constitution of Kenya' (LL. D Thesis, University of Pretoria, 2015).

<sup>755</sup> Under Article 95 of the Constitution.

<sup>756</sup> Under Article 96 of the Constitution.

the wielders of sovereign power<sup>757</sup>. It also specifically provides for judicial independence under Article 160 (1) which holds that in exercising its judicial authority the judiciary “shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”<sup>758</sup> Moreover, any constitutional amendment that might revoke or restrain judicial independence can only be done by way of referendum as provided for under Article 255 (1) (g).<sup>759</sup> This Constitution therefore provides constitutional safeguards for judicial independence.

#### **6.1.2.1. FINDINGS**

The study found that aside from the constitutional safeguards for judicial independence afforded under Articles 160 (1) and 255 (1) (g), the Constitution has specific parameters within which the courts can interpret it. Under Article 259 the courts are mandated to interpret it in a manner that: (a) promotes its purposes, values, and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance. These can be taken as the legal constraints governing the court’s interpretation of the Constitution. Judicial officers are therefore bound by them to the extent that they restrict the modes of reasoning they can legitimately apply in their interpretation, and failure to observe them would result in a loss of interpretative legitimacy.

An examination of the constitutional transition period<sup>760</sup> revealed that the judiciary enjoyed the confidence of the political class, and Kenyans as a whole, who were now willing to submit to

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<sup>757</sup> Article 1 (1) of the Constitution.

<sup>758</sup> Constitution of Kenya, 2010.

<sup>759</sup> Constitution of Kenya, 2010.

<sup>760</sup> 27 August 2010 – 9 April 2013.

it as a neutral arbiter of political disputes. This was heavily influenced by an overall desire of the Kenyan people to prevent a recurrence of the 2007/08 post-election violence. Under Article 258 (1) of the Constitution “every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.” The study found that during this period Kenyans directly invoked the court under Article 258(1) to exercise its judicial review power to invalidate unconstitutional exercise of executive power. For instance, when President Kibaki attempted to unilaterally appoint the first chief justice and attorney-general under the 2010 Constitution.<sup>761</sup> Consequently, the judiciary was able to assert itself and resist attempts by the political elite to influence or interfere with its exercise of judicial power.

Similarly, the judiciary was able to provide a stabilizing force in the first elections to be held under the 2010 Constitution by acting as a neutral arbiter in determining the legitimacy of the Kenyatta-Ruto candidature.<sup>762</sup> The study disclosed that in determining this case the court was faced with both overt and covert political pressure, with one side wanting their candidature confirmed whereas the other side of the political divide hoped that they would be barred from contesting in the 2013 presidential elections. Nevertheless, the court arrived at its ruling on the basis of unreservedly legally constrained interpretation of the Constitution in respect to its own jurisdiction. It held that under Article 165 (5)<sup>763</sup> it did not have jurisdiction in matters reserved for the exclusive jurisdiction of the Supreme Court which was the only one with jurisdiction to determine matters relating to the election of the president. Arguably, the high court was mindful of the need for

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<sup>761</sup> *Muslims for Human Rights (MUHURI) & 2 others v. Attorney General & 2 others* (2011) eKLR.

<sup>762</sup> *International Centre for Policy and Conflict & 5 others v. The Hon. Attorney General & 4 others.* (2013) eKLR.

<sup>763</sup> Constitution of Kenya, 2010.

stabilization of the political climate following incessant politicization of the ICC cases in campaign rallies that constantly stoked ethnic tensions and influenced political alliances. This can be inferred from the courts statement that, “The Office of President is the focal point of political leadership, and therefore, a critical constitutional office... the whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.”<sup>764</sup>

However, in its determination of the first presidential election petition under the 2010 Constitution<sup>765</sup> the Supreme Court’s strict adherence to procedural technicalities made it dismiss admission of additional evidence on the ground that it was filed late and without its permission. This was based on the rationale that Article 159 (2) (d) of the Constitution which provides that “justice shall be administered without undue regard to procedural technicalities” must give way to the more specific rule concerning fixed deadlines under Article 140.<sup>766</sup> Moreover, the Court held that the burden of proof was on the petitioners to prove that there was non-compliance with electoral rules and that such non-compliance had substantially affected the result.

The study found that Court’s stance in this case rested on undue consideration of procedural technicalities and debunked Nigerian jurisprudence<sup>767</sup> resulting in an academic judgment that was divorced from the political realities of the day. Consequently, it set a dangerous precedent in placing the burden of proof on petitioners in presidential elections since all the evidence required

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<sup>764</sup> Petition No.5 of 2013, Paragraph 298; (2013) eKLR.

<sup>765</sup> *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others* (2013) eKLR.

<sup>766</sup> Petition No.5 of 2013, Paragraph 218; (2013) eKLR.

<sup>767</sup> *Buhari v. Obasanjo* (2005) CLR 7K.

to prove non-compliance is held by the IEBC and if a petitioner cannot obtain it then the president-elect is hence shielded from effective challenge. This may deter politicians from seeking judicial resolution of electoral disputes, a situation that triggered the 2007/08 post-election violence. Similarly, Harrington and Manji<sup>768</sup> note that this places upon petitioners in presidential cases “almost insurmountable obstacles of proof”.

Nevertheless, the study found that during the tenure of the first parliament under the 2010 Constitution the judiciary consistently exercised its power of judicial review of legislative action to effectively invalidate unconstitutional legislative action. Crucially, in *Advisory Opinion Reference No. 2 of 2013*<sup>769</sup> it was held that the high court’s constitutional interpretation mandate extended to determining the constitutionality of parliamentary standing orders despite the fact that they are an element of internal parliamentary procedures. Most importantly, in this case the court pronounced itself on five parameters to be used to determine when to intervene in legislative affairs: (a) the likelihood of the resulting statute being valid or invalid; (b) the harm that may be occasioned by an invalid statute; (c) the prospects of securing remedy, where invalidity is the outcome; and, (d) the risk that may attend a possible violation of the Constitution. Therefore, the scope for judicial review of legislative action within the Kenyan context is guided by these five parameters.

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<sup>768</sup> John Harrington and Ambreena Manji, ‘Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013’ (2015) 9(2) *Journal of Eastern African Studies* 175.

<sup>769</sup> (2013) eKLR.



### 6.1.2.2. RECOMMENDATIONS

The judiciary should continue to exercise its judicial review power to check the abuse of legislative action, this is the only way it can help Kenya develop a political culture that is centered around the rule of law. As former Chief Justice Mutunga stated in Advisory Opinion Reference No. 2 of 2013<sup>770</sup>:

“The court must patrol Kenya’s constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.”<sup>771</sup>

It is through such vigilance that the judiciary can develop, shape, and maintain a political environment that respects the rule of law. Similarly, Bickel<sup>772</sup> notes that the effective exercise of the judicial review power is what can summon up the judiciary out of the constitutional vapours and be shaped and maintained.

However, even though the high court has wide interpretative powers under Article 165 (3) (d) of the Constitution it must not indulge in unwarranted interference with legislative processes except in the clearest of cases.<sup>773</sup> In doing so the court should consider the five parameters

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<sup>770</sup> (2013) eKLR.

<sup>771</sup> Paragraph 161.

<sup>772</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986) 12.

<sup>773</sup> Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others (2015) eKLR.

established in *Advisory Opinion Reference No. 2 of 2013*<sup>774</sup>; indicated above. If the court can develop a credible body of jurisprudence in this area it shall earn a well-deserved reputation for its independence and contribute towards societal acceptance and practice of the rule of law. Respect for the rule of law shall further serve to ensure that the political arms of government refrain from attacking the courts even when they disagree with their judgements. In turn, this shall enhance Kenya's observance of the principle of checks and balances under the separation of powers doctrine.

### **6.1.3. HOW CAN THIS POWER OF JUDICIAL REVIEW OF LEGISLATIVE ACTION BE CLARIFIED, EXTENDED, OR MODIFIED TO BETTER ACHIEVE THE OBJECTIVE OF SERVING AS A CHECK AND BALANCE ON PARLIAMENT?**

The study also undertook a comparative analysis of the exercise of judicial power in the United States and South Africa vis-à-vis the Kenyan context. This was done to extract lessons for Kenya regarding how to build a political culture that respects judicial independence. Moreover, it also examined how their political culture has influenced the development of political structures that adhere to the tripartite system of government, with the underlying checks and balances, envisioned under the separation of powers doctrine. The study further sought to understand how the two countries have handled the politics of the exercise of judicial power. Ultimately, the study incorporated the comparative analysis to find out how the Kenyan judiciary's exercise of its judicial review power can be clarified, extended or modified to better achieve the status of Court A: The Normatively Preferred Model Court.

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<sup>774</sup> (2013) eKLR.

### 6.1.3.1. FINDINGS

An examination of the American political structure revealed that when disputes occur between the executive and the legislature over policy preferences, the legislature often turns towards the Supreme Court to rein in executive power. This is especially so where a president tries to force through his policy preferences resulting in a deadlock with Congress. However, since the executive also has a role in the appointment of Supreme Court justices whereas the Supreme Court justices are the final arbiters, the legislature gradually imposed specific legal constraints on the courts devised in ways in which it believes shall increase their likelihood of checking executive power. These legal constraints may be either substantive or procedural, with the former limited to setting the relevant standard whereas the latter leaves it to the court to set the standard. Within the American context these legal constraints are what form the Due Process Clause in the Fifth and Fourteenth amendments to the Constitution. Ultimately, the study found that American law was able to provide clearer and broader substantive and procedural constraints because the courts are more frequently called upon to enforce them.<sup>775</sup>

The study further revealed that the respect for judicial independence and rule of law exhibited within the American political structure was only possible because its political culture is based on a belief on democracy and the rule of law. Larkins<sup>776</sup> identifies the crystallization of good relationships between the three branches of government and, in turn, how their institutions relate

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<sup>775</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env'tl. L. J. 357.

<sup>776</sup> Christopher M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 The American Journal of Comparative Law 605.

to society as a key factor in achieving good democratic governance.<sup>777</sup> This can only be done in an environment governed by the rule of law, where both the state and its citizens are willing to submit to the laws passed by parliament and interpreted by the courts.

Moreover, the study found that American courts adopt a functional rule of law approach and are hence cognizant of the political environment in which they operate. This leads them towards pragmatic and practical judgements as seen in the case of *Bush v. Gore*<sup>778</sup>, and hence helps them to avoid the pitfall identified in the thesis problem statement: “the risk of making abstract judgements that may be academically valid but are realistically unenforceable or politically illegitimate.”<sup>779</sup> This has created the high degree of legal and political stability required for the American judiciary to evolve over time into an institution that can utilize its independence to “operate forcefully – vis-à-vis other political and societal institutions – to enact neutral justice, regulate the legality of government behavior, and mandate important legal and constitutional values.”<sup>780</sup>

Both the American and South African Constitutions were found to have specific constitutional safeguards for judicial independence. The key safeguard is the high threshold set for removal of judges from office with both countries requiring a two-thirds majority vote, in the

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<sup>777</sup> Christopher M. Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ (1996) 44 *The American Journal of Comparative Law* 605.

<sup>778</sup> 531 U.S 98 (2000).

<sup>779</sup> See problem statement in Chapter One of this Thesis.

<sup>780</sup> Christopher M. Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ (1996) 44 *The American Journal of Comparative Law* 620.

Senate for America and in parliament for South Africa. Ferejohn<sup>781</sup> notes that such votes are difficult to mobilize and sustain and hence judges can only be removed on very strong grounds. As a result, they can feel very secure once appointed and determine cases without fear of political attacks should their decisions not be in line with the desired political outcomes. Atiyah and Summers<sup>782</sup> note that it is this institutional protection that allows judges to abide by legal constraints and retain legal legitimacy in their judgements, even when there are strong moral, economic, political, institutional or other social considerations pointing to a different outcome.

The study further found that the South African political culture was developed anew with the promulgation of the 1996 Constitution and was henceforth centred around the idea of entrenched rights and independent courts to safeguard those rights.<sup>783</sup> Section 167 of the Constitution established the Constitutional Court as the apex court in all constitutional matters, and Du Plessis<sup>784</sup> notes that it was the one bestowed with the burden of developing a rights-based jurisprudence from scratch. The study further found that the South African judiciary, led by the Constitutional Court, was able to help develop a political culture that respects judicial

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<sup>781</sup> John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *Southern California Law Review* 353, 355.

<sup>782</sup> P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987).

<sup>783</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

<sup>784</sup> Max du Plessis, 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 (2) *The Comparative and International Law Journal of Southern Africa* 227.

independence and the rule of law through extensive judicial reforms. Gordon and Bruce<sup>785</sup> note that this was done in consideration of the following key factors: composing a demographically representative bench, promoting a culture of judicial accountability, and creating the necessary structures to foster judicial independence.

Ultimately the study established that the performance of the Constitutional Court in developing “an extensive and internationally acknowledged body of jurisprudence”<sup>786</sup>, gradually earned it a well-deserved reputation for its independence and it was able to frequently stand up against any political attacks. In this manner the Court contributed towards societal acceptance of the rule of law which makes both politicians and citizens respect the Court and refrain from interfering with its work, even when they disagree with its decisions. Even in cases where the Court has ruled contrary to strongly held views of various political and legal elites they have refrained from direct attacks and abided by its decisions.<sup>787</sup> Consequently, the judiciary as a whole and the Constitutional Court in particular assumed a central role in the political structure with the mandate to advance the recognition of the Bill of Rights for the benefit of all South Africans.<sup>788</sup>

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<sup>785</sup> Amy Gordon and David Bruce, ‘Transformation and the Independence of the Judiciary in South Africa’ in CSVR, ‘After the Transition – Justice, the Judiciary, and Respect for the Law in South Africa’ (CSVR, 2007) 20.

<sup>786</sup> ‘Celebrating the South African Constitutional Court’, <<https://www.brandsouthafrica.com/people-culture/democracy/celebrating-the-constitutional-court>> accessed 30 January 2019.

<sup>787</sup> James Gibson and Gregory Caldeira, ‘Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court’ (2003) 65 (1) *The Journal of Politics* 1 – 30 <[https://www.jstor.org/stable/10.1111/1468-2508.t01-1-00001?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/10.1111/1468-2508.t01-1-00001?seq=1#metadata_info_tab_contents)> accessed 30 January 2019.

<sup>788</sup> Fabrice Tambe Endoh, ‘Democratic Constitutionalism in Post-apartheid South Africa: The Interim Constitution Revisited’ (2015) 7 (1) *Africa Review* 67.

### 6.1.3.2. RECOMMENDATIONS

The key impediment towards Kenya's political structure creating an environment conducive to judicial independence and the rule of law is the ethnicization of its political culture. De-ethnicization of Kenyan politics should be an area of pivotal focus for the government and the Kenyan people. This should be done to create a new political culture centered on democracy and the rule of law alongside a belief in judicial independence as a precursor towards courts entrenching such a culture. Efforts to achieve this must be underpinned by (a) institutional reform<sup>789</sup> and (b) fundamental attitudinal change amongst ethnic majorities and minorities. Consequently, the government must implement policies aimed at eliminating ethnic inequalities and providing all Kenyans with equal access to political, social and economic resources. Ultimately, the foundation for restructuring the Kenyan political culture and structure is to change the political system to incorporate inclusive government based on Arend Ljiphart's<sup>790</sup> consociational democracy model.<sup>791</sup> As discussed in Chapter Five, such restructuring and introduction of sharing of executive power is achievable by way of a referendum as provided for under Article 255 (1) (c).

In terms of clarifying, extending, or modifying the judicial review power this is best done through continued development of robust jurisprudence in this area. This is how both the American

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<sup>789</sup> Wolff argues that only institutions capable of delivering good governance based on the principles of democracy, rule of law and respect for human rights and create an environment conducive to economic growth stand a chance of acceptance by the electorate.

<sup>790</sup> Arend Ljiphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (University of California Press 1968).

<sup>791</sup> See discussions in Chapter Five.

and South African courts have been able to develop the legal constraints governing their courts' exercise of judicial review power to check the executive and legislature. Kenyans should therefore continue invoking their right to institute such proceedings under Article 258 (1) and the courts should not hinder this through strict interpretation of their jurisdiction as was the case in *International Centre for Policy and Conflict & 5 others v. The Hon. Attorney General & 4 others*.<sup>792</sup> (2013) eKLR, discussed above. Moreover, in such determinations the courts should also not have undue regard to procedural technicalities as specifically provided for under Article 159 (2) (d) of the Constitution.

Within the context of a political culture that respects the rule of law and judicial independence, it is to the benefit of all Kenyans to have a judiciary that is well insulated from political attack. It is therefore crucial to ensure that once appointed judges can enjoy their security of tenure without hindrance and that they are not targeted for removal based on trivial or frivolous grounds. The only way to achieve this is to raise the threshold for removal of judges in Kenya by better defining the grounds for removal under Article 168 (1) (b) and (d) of the Constitution and introducing a further requirement of a two-thirds parliamentary majority to confirm a tribunal's recommendation for removal under Article 168 (1) (7) (b). This would require a referendum as provided for under Article 255 (1) (g).

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<sup>792</sup> (2013) eKLR.



## 6.2. IMPLICATIONS FOR THEORY AND RESEARCH

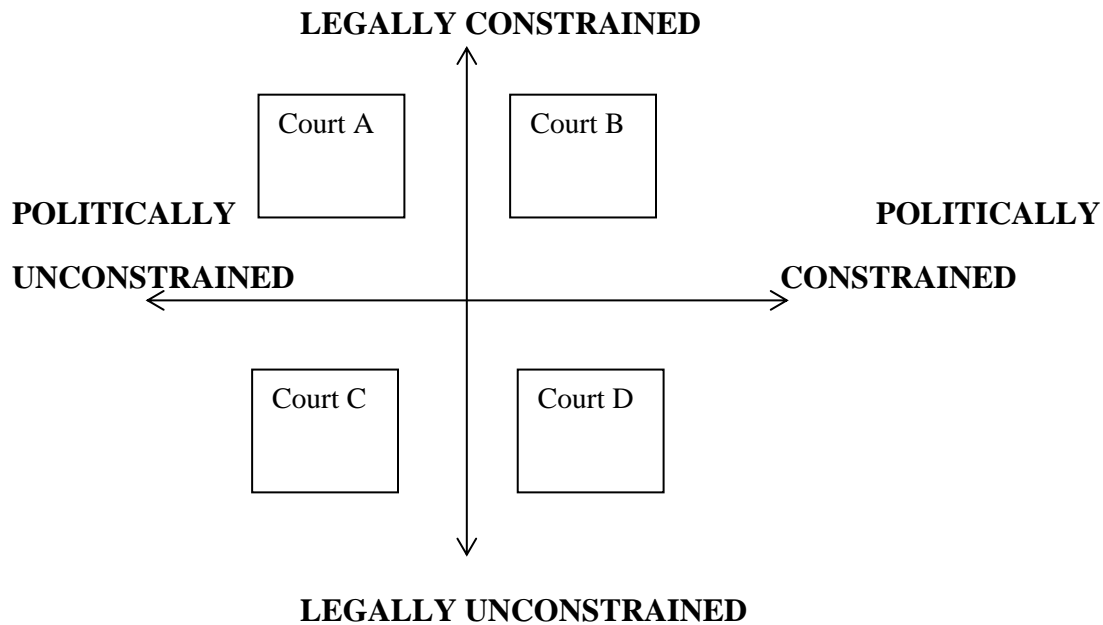
This study was grounded in Montesquieu's theory on the separation of powers doctrine and James Madison's further exposition on Montesquieu's concept of partial separation<sup>793</sup> modified by a system of checks and balances. It then considered the political and legal constraints of judicial review of legislative action,<sup>794</sup> under which the courts operate. The study found that courts must consider the political consequences of their judgements vis-à-vis the nature and permissible scope of judicial review. The study then developed a conceptual framework based on Theunis Roux's model for assessing the performance of constitutional courts in legal and political terms.<sup>795</sup> It consequently adopted and utilized Roux's model quadrant-based depiction of the legal and political constraints impacting on courts, modified specifically for courts exercising the power of judicial review of legislative action.

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<sup>793</sup> John Locke had advocated for a physical and total separation of powers, also known as the pure doctrine of separation of powers, which emphasized on total separation of agencies, functions, and persons of the three arms of government. See: Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1971) 102.

<sup>794</sup> This balance has been used as a measure of performance of constitutional courts in legal and political terms. See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>795</sup> Theunis Roux developed the model to assess the achievements of the First South African Constitutional Court. See: Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).



The study then used Court A: The Normatively Preferred Model Court as the gold standard with which to evaluate how effective courts are in exercising their judicial review power whilst achieving a balance between: (a) the legal constraints emanating from institutionalized, legal rules, norms and practices deviation from which may trigger a loss in legal legitimacy; and (b) the political constraints deriving from the capacity of political actors to attack and undermine the courts' institutional independence.

Subsequently the study was also able to further develop a conceptual framework that can be used to evaluate the impact of political systems on judicial independence. This builds on the work of Graben and Biber<sup>796</sup> and is also based on Schneiderman's<sup>797</sup> observation that it is the

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<sup>796</sup> Sari Graben and Eric Biber, 'Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law (2017) Va. Env'tl. L. J. 357.

<sup>797</sup> David Schneiderman, *Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture* (University of Toronto Press 2015). J. 357.

political culture that forms the underlying assumptions and rules governing behavior in political systems. The conceptual framework provides that measuring the relative strength or weakness of legal constraints entails identifying the circumstances and ways in which political structures affect their development, style, and function. However, since political structures are endogenous to the prevailing political culture, to fully measure the effects of political systems on judicial independence one needs to interrogate the political culture and structures existing in any given jurisdiction.

### **6.3. LIMITATIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH**

The study proposes several practical measures that can be implemented to ensure more effective exercise of the power of judicial review of legislative action in Kenya. However, it was purely a qualitative study. Greater authority could be given to this study if it integrated as a mixed method – qualitative and quantitative – study since this would allow for statistical analysis which may proffer more evidence to strengthen the findings from the qualitative data. A quantitative study could therefore be undertaken to evaluate which out of the five parameters set out in *Advisory Opinion Reference No. 2 of 2013*<sup>798</sup> is most often cited as the reason for the court’s intervention in legislative processes. This can be done over a five to ten-year period to determine if there are extreme shifts over time in the Kenyan judiciary’s motivation to exercise its judicial review power to check parliament’s exercise of legislative power.

Although, the study severally cited the effects of public confidence (or lack thereof) in the judiciary it did not include quantitative data to measure the actual levels of public perceptions of

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<sup>798</sup> (2013) eKLR.

the judiciary across different political regimes. A quantitative study that would help couple this study's qualitative findings with public perception indices of the judiciary across different political regimes would provide more insight into the development of the Kenyan judiciary's exercise of its judicial review power.

#### **6.4. CONCLUSION**

Kenya has established clear parameters a court should consider in determining when, how, and why it can exercise its power of judicial review of legislative action. These are: (a) the likelihood of the resulting statute being valid or invalid; (b) the harm that may be occasioned by an invalid statute; (c) the prospects of securing remedy, where invalidity is the outcome; and, (d) the risk that may attend a possible violation of the Constitution. Moreover, the 2010 Constitution has safeguards to ensure judicial independence as specifically provided for under Article 160 (1) and legal constraints for the high court to exercise its constitutional interpretation mandate<sup>799</sup> which are outlined in Article 259 (1). Also, any Kenyan can invoke the high court to exercise its constitutional interpretative mandate under Article 258 (1) to check the abuse of either executive or legislative power.

However, these legal constraints exist within the context of a political culture that is based on ethnicity and therefore there is always the risk that a rogue executive can manipulate the political structure to an extent whereby the political constraints outweigh these legal constraints. It is therefore essential that Kenyans undertake the measures proposed in this study in order to develop a political culture based on democracy, rule of law, and respect for judicial independence. It is only then that we can safeguard the existence of a political structure that allows the courts to

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<sup>799</sup> Provided for under Article 165 (3) (d) of the Constitution.

effectively exercise their judicial review power as a check on both the executive and the legislature. Until then, there exists the imminent threat of executive dominance of the political structure to the detriment of the legislature and the judiciary as well as all Kenyans.

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