

**SEPARATION OF POWERS UNDER THE 2010 CONSTITUTION: AN ANALYSIS OF
THE EMERGING TENSIONS BETWEEN PARLIAMENT AND THE JUDICIARY**

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Degree of Masters of Laws (LLM)**

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Declaration

I, **KABATHI ANTONY GATHITU**, declare that this Dissertation is my own, unaided work. It is submitted in fulfillment of the requirements of the degree of Master of Laws (LLM) in the Faculty of Law at the University of Nairobi. It has not been submitted before for any degree or examination in this or any other university.

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Dedication

I dedicate this study to my family and all those who supported me in my entire academic life.

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I am grateful to God for giving me the motivation, passion, intellect, resources and the ability to pursue my LLM studies. My sincere gratitude and heartfelt appreciation goes to the following people who have played a special role in helping me to complete this study:

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Abbreviations

CC	Constitutional Court
CDF	Constituency Development Fund
CoK	Constitution of Kenya
JSC	Judicial Service Commission
KJMA	Kenya Judges and Magistrates Association
NCOP	National Council of Provinces
SA	South Africa
SOP	Separation of powers
UK	United Kingdom
USA	United States of America

List of Constitutions

Constitution of Kenya 2010

Constitution of the Republic of South Africa 1996

List of Statutes**Kenya**

Division of Revenue Bill

National Assembly Powers and Privileges Act, Cap 6 of the Laws of Kenya

County Government Act, No. 17 of 2012

Constituency Development Fund Act, 2013

List of Cases

Martin Wambora v. Speaker County Assembly of Embu & 5 Others [2014] eKLR (High court).

Nixon v. USA [1993] (Supreme Court of the US)

International Legal Consultancy Group v Senate and Another [2014]eKLR.

Joseph Mbalu Mutava v Attorney General & another [2014]eKLR (High court), Petition 337.

Judicial Service Commission v Speaker of the National Assembly & 8 others [2014]eKLR (High court), Petition 518.

Njenga Mwangi & Another v Truth, Justice And Reconciliation Commission & 4 Others [2013]eKLR (High court), Petition 286.

S v Mhlungu and Others [1995] ZACC 4 CCT25/94.

United States v Butler (297) US 1 at 62-3 (1936)

Doctors for Life International v Speaker of the National Assembly,

De Lille v Speaker of the National Assembly

Soobramoney v Minister of Health (Kwazulu-Natal)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs

South Africa Association of Personal Injury Lawyers v Heath,

Executive Council Western Cape Legislature v President of Republic of South Africa

Frieda Coetzee and The Government of the Republic Of South Africa

Glenister v President of the Republic of South Africa

South African Association of Personal Injury Lawyers v Heath

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CHAPTER 1

SEPARATION OF POWERS UNDER THE 2010 CONSTITUTION: AN ANALYSIS OF THE RELATIONSHIP BETWEEN PARLIAMENT AND THE JUDICIARY

1.1 Introduction

What is special as regards the Judiciary as the bearer of the people's mandate is that it is the primary and ultimate arbiter, when the operations of the several public bodies run into conflict; it is the dominant interpreter not only of the totality of the Constitution, but also of all other laws applying in the land...¹

1.2 Background

The purpose of this research is to examine as well as to propose the way forward to the concern that courts in many new constitutional democracies are exercising increased influence beyond their traditional adjudicative role in exercising the judicial function.

As such they have been perceived to be overstepping their mandate as well as usurping the roles of other arms of government.²

In 2010, Kenya promulgated a new Constitution. The new constitution was seen by a majority of Kenyans as an expression of their wishes and they expected it to deal with the question of historical land injustice, ethnicity as well as equitable distribution of resources.³

¹Jackton B. Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Nairobi: Strathmore University Press, 2013), p. 26.

²Dennis Davis, *Democracy and Deliberation* (Juta & Co. Ltd 1999) 47.

³Patrick Lumumba, Morris Mbondenyei & Steve Odero, *The Constitution of Kenya: Contemporary Readings* (Law Africa 2011) 45.

The Constitution brought with it new reforms. The most critical salient features in the constitution are; a devolved system of governance; weakening of the presidency through the introduction of various checks on the executive, a bicameral legislature; strengthening of judicial independence; and enactment of a progressive bill of rights.⁴

Following the 2013 General election, things started falling apart for the newly formed institutions both at the county and national levels. These include; differences between the senate on one hand and the national assembly, between senate and governors, the executive against the judiciary and also between the judiciary and the legislature.

Indeed Justice David Maraga when he was being vetted for the Office of the Chief Justice job was asked by the National Assembly Justice and Legal Affairs Committee how he was going to end wrangles between Parliament, Executive and the Judiciary. Justice Maraga said he would work to ensure that there are clear checks and balances to prevent abuse and excess as well as ensure harmony among the three arms of government.⁵ This is after MPs raised the query that Judiciary encroaches on Parliament's lawmaking powers through court orders. Maraga said he would establish a quarterly round table where the President, Speaker and Chief Justice meet and deliberate issues of public interest.⁶

⁴ Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla, 'Human rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States' http://www.kas.de/wf/doc/kas_33086-1522-2-30.pdf?121213123738> accessed 23 June 2014.

⁵ James Mbaka, 'I'm a Liberal Christian and Faith won't cloud my mind – Maraga' *The Star* (2016) <http://www.the-star.co.ke/news/2016/10/14/im-a-liberal-christian-and-faith-wont-cloud-my-mind-maraga_c1437759> accessed 14 October 2016.

⁶ Ibid.

These daunting challenges and obstacles threaten the hope of a better Kenya. These impediments include lack of constitutionalism, disobeying the rule of law, ethnicity and judicial disobedience.⁷

For instance, the Division of Revenue Bill 2013 which allocates the national cake between the two levels of government was enacted by the National Assembly correctly in accordance with the Constitution, and certified the Bill as one concerning the counties and forwarded the same to the senate for its input and approval. The Senate debated the bill and proposed some amendments which increased the amount to be allocated to the county governments from 210 billion to 259 billion.

The National Assembly forwarded the original bill to the President for assent which the President did. The implication of this was that the national executive and national assembly had actually undermined the legislative power of the senate.

The Supreme Court rendered an advisory opinion on this a matter and declared that the Bill concerned County Governments and hence the Senate input was necessary.⁸ However, despite this ruling by the Supreme Court, the National Assembly has continued to debate and enact legislation which concern county governments without involving the Senate.⁹

⁷ *ibid.*

⁸ *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR

⁹ Key Note Speech delivered by Senator Amos Wako at the Law Society of Kenya annual Conference at the Leisure Lodge Beach & Golf Resort, Kwale County on August 15, 2014

It was not long before the other arms of government in this case the judiciary was dragged into the supremacy battle. Under the Independence (repealed) Constitution, the executive authority was vested in the presidency.¹⁰ The legislative authority was exercised through bills passed by the national assembly.¹¹ They had the exclusive powers to make the laws of Kenya. Parliament also had the power to alter the constitution as long as the bill was supported by more than sixty five percent of the national assembly.¹²

The judiciary did not have any such powers in the repealed constitution. Yash Pal Ghai and Patrick McAuslan argue that judges served at the pleasure of the Crown during the colonial era.¹³ Former Presidents Jomo Kenyatta and Daniel Arap Moi, treated the courts like an agency within the executive. Following an amendment in 1988 spearheaded by President Moi, Parliament removed the security of tenure for judges.¹⁴ This derailed judicial independence as well as respect for human rights. This disregard of basic constitutional principles by the executive was a clear indication of the subordinate status of the courts in Kenya pre-2010.¹⁵

Currently, both parliament and the judiciary are still not getting along. The supremacy battle between parliament and judiciary has now become an issue of national importance. The disobedience of court orders by parliament does not augur well for development. It undermines

¹⁰ Constitution of Kenya 1963, s 23(1) and s (30).

¹¹ Constitution of Kenya 1963, s 46(1).

¹² Constitution of Kenya 1963, s 47(2).

¹³ See Yash Ghai & J.W.P.B. McAuslan, Public Law and Political Change In Kenya: 1865–1970, 173 (1970).

¹⁴ See Constitution of Kenya, Amendment Act No. 4 (1988).

¹⁵ Makau Mutua, Justice under siege, 'Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya' (2001) 23 (1) [Human Rights Quarterly](https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/human_rights_quarterly/v023/23.1mutua.html) <https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/human_rights_quarterly/v023/23.1mutua.html> accessed 17 October 2015.

the rule of law. Parliament and Judiciary derive their power from the people; the Constitution obligates them to exercise this sovereign power in accordance with the laws of the land.¹⁶

Power is no longer centralized at the national/central government as was the case in the 1969 Constitution. Separation of powers, rule of law, judicial independence, democracy and participation of the people consists of one of the fundamental tenets of our constitution.¹⁷ Separation of power which is central to our discussion seeks to ensure that there is a clear demarcation of functions between arms of government. It has played a major role in the formation of the Constitution.¹⁸ However, for this to be realized, the judiciary must be free from parliamentary and executive interference.¹⁹

The study will therefore be advancing the argument that all the three arms of government have their own duties and responsibilities and there exists a legal framework to ensure that none of them have excessive powers and that each one of them does not abuse the powers given to them.

1.3 Statement of the problem

The relationship between parliament and the judiciary between 2010-2016 has been characterized by lack of constitutionalism and judicial disobedience. This bad blood between Parliament and the Judiciary has had adverse effects on the rule of law especially through disobeying of court orders. The problem therefore under consideration is the continued

¹⁶ Constitution of Kenya, 2010, Article 1.

¹⁷ Hilaire Barnett, *Constitutional & Administrative Law* (5th Edition, Cavendish 2004) 97-99.

¹⁸ *ibid.*

¹⁹ PLO Lumumba, "Judicial Innovation or Schizophrenia? A Survey of emerging Kenyan Jurisprudence," A Paper presented at the Law Society of Kenya Annual Conference at Leisure Lodge Beach & Golf Resort, Mombasa, held 14th -15th day of August 2014.

prevalence of conflict between judiciary and parliament despite the fact that separation of powers between these two arms of government has been dealt with sufficiently in the Constitution of Kenya 2010.

In addition, judicial independence in the constitution has been enhanced which in turn limits parliamentary sovereignty.

1.4 Justification of the study

This study is justified on the basis that the three arms of government: executive, judiciary and legislature are meant to work together as one in order for the country to progress. A constitution governs the relationship between these three arms of government and it is deemed to be the supreme law of the land. If there is any conflict between any of these institutions the country's development is negatively affected. All the arms of government should strictly follow the provisions of the constitution to avoid conflict. The perceptions leading to the conflicts of supremacy must be addressed and corrected for any meaningful development to be achieved.

In analysing separation of powers under CoK it provides a clear insight of the functions delegated to each arm of government. Once this has been achieved, the organs will be aware of their functions and hence avoids usurping the powers of each other. An interrogation on the current supremacy issues between parliament and judiciary will inquire into the causes of the conflict.

Once the study is done and understood then it will be easy to provide the way forward in averting the same. Kenya is a young constitutional democracy hence progressive measures must be taken to realize the gains intended under the 2010 Constitution.

1.5 Research objectives

The general objective of the study is to examine the current conflict of supremacy between the judiciary and parliament and to find out if the separation of powers as outlined in the constitution can help in ending this conflict.

The specific objectives of the research are to:

1. Identify the reasons behind the conflict between the parliament and judiciary.
2. Elaborate on the provisions dealing with the separation of powers in the Kenyan constitution.
3. Critically examine the above mentioned provisions to find out if they are clear or they have gaps which need to be sealed to end this tussle.
4. Identify whether the judiciary and parliament are usurping the powers of each other.
5. Establish a way to end the current supremacy issue between parliament and judiciary.

1.6 Research questions

This study seeks to answer the following questions:

1. What causes supremacy conflicts between parliament and the judiciary?
2. Does the Kenyan constitution deal with separation of powers?
3. Has the constitution adopted a pure separation of powers? Is parliament or judiciary encroaching into the realm of the other?
4. What are the limitations of parliamentary sovereignty and judicial independence?

1.7 Hypothesis

This study will test the following hypothesis

1. The judiciary and parliament are encroaching into the functions of each other leading to a conflict between the two arms of government.
2. No conflict ought to arise between parliament and judiciary.
3. The constitution has not adopted pure separation of powers.
4. Constitutional supremacy and sovereignty of people has limited parliamentary sovereignty.

1.8 Theoretical Framework

This study is guided by three theories. These are; Legal Positivism theory, separation of powers and constitutionalism.

Under this study, I shall focus on mainly two (2) theories. These are; separation of power and constitutionalism. However, I shall use the legal positivism as the overarching theory. Legal positivism refers to the school of thought which propounds that written rules, principles that have been enacted, adopted or recognized by a government entity such as the executive, judicial bodies or administrative organs are the only legitimate sources of law. Legal positivism also identifies written law as the primary source of legitimate law. Hans Kelsen, in his hierarchy of coercive norms ranks the Constitution (supreme law) as the highest norm.²⁰ This theory is important to this study to the extent that it identifies the Constitution as the primary legal text that all other laws derive their validity from. It is therefore my argument that if the Constitution is our supreme law and it clearly stipulates the institutional function of the different arms of

²⁰ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (OUP, Oxford 2005)

government such conflicts should not arise. And if they arise, judges should adjudicate these conflicts in accordance with the Constitution.

I shall proceed to discuss the theory of separation of powers and constitutionalism.

1.8.1 Theory of separation of powers

The doctrine of separation of powers is associated Montesquieu's writing in the 18th century. It advocates against concentration of state power i.e. the legislative, executive and judicial function in one body.²¹ The doctrine advocates for a clear demarcation in the function between the three arms of government and that none should have excessive power and there should be a mechanism in place to provide for checks and balances between the institutions.²² It was first espoused by the English philosopher John Locke.²³ In his works, John Locke distinguished legislative power from executive and federal power. He stated that separation of the powers of the different arms of government was fundamental to ensure protection of individual liberty, otherwise, these rights and freedoms are threatened.²⁴ Locke despises a situation where the same person who have the power of making laws to also execute them.²⁵ It was for this reason that he proposed a model where the distinct powers of government were separated, and the different powers placed in the hands of different institutions.²⁶

A number of years later, the concept of separation of powers was expounded further by the French philosopher Baron de Montesquieu, in his treatise on political theory.²⁷ Montesquieu

²¹ Mark Ryan, *Unlocking Constitutional & Administrative Law* (2nd edn, Hodder Education Publishers 2010) 55.

²² Hilaire Barnette, *Constitutional & Administrative Law* (3rd edn, Cavendish Publishing Limited 2000)87.

²³ *ibid.*

²⁴ John Locke, *Second Treatise of Civil Government* (Awnsham Churchill 1690) Chapter XII, Section 143.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Charles Montesquieu, *The Spirit of Laws* (Cambridge University Press 1748) 130.

based his view of separation of powers on the English constitution and stated that there exists three main classes of government function: executive power, legislative power and judicial power. He further proffered that powers of these classes of government are vested in three main organs of government, to wit, the executive, the legislature and the judiciary. According to Montesquieu, concentrating more than one class of the functions of government in any one of the organs is a threat to individual tyranny.²⁸

The doctrine of separation of powers was also discussed by William Blackstone thus;

*“In all tyrannical governments...the right of making and enforcing the law is vested in the same man or body of men and whosoever these two powers are united together, there can be no liberty.”*²⁹

The paramount purpose objective of this doctrine is to limit and check the arbitrariness inherent in the government. This doctrine also advocates for the concept of ‘independence’ of the three arms of government such that none can assume the functions of the other. The theory of separation of powers is relevant to this study to the extent that it will be used to examine how the 2010 constitution has entrenched separation of powers between the three arms of government.

1.8.2 Theory of constitutionalism

The concept of constitutionalism is often associated with the political theories of John Locke and the founders of the American republic. It is concerned with control and the ability to legally limit government powers.³⁰

²⁸ *ibid.*

²⁹ William Blackstone, *Commentaries on the Laws of England*. (Clarendon Press 1765) 14.

³⁰ Stanford encyclopedia of Philosophy ‘Constitutionalism’ (September, 2012) .
< <http://plato.stanford.edu/entries/constitutionalism/> > accessed 24 May 2014.

Various scholars and philosophers have attempted to come up with the definition of the word constitutionalism hence getting a concrete definition is not easy. Hillarie defines it as the doctrine which governs the legitimacy of government action.³¹ However, according to Professor Ojwang' constitutionalism means a government that is subject to restraint in the interest of the ordinary members of the community, a government that is not arbitrary or totalitarian.³²

According to P.L.O. Lumumba *et.al*, constitutionalism traces its roots in the 17th century struggle between monarchists support for the doctrine of the divine right of the kings and parliament, and the judiciary's assertion of the primacy of a system of authority based on law.³³

To be effective, constitutionalism requires compliance with the relevant legislative and executive statutes that specify performance, powers and limitations. This helps in reducing arbitrariness and misuse of discretionary powers.³⁴

Constitutionalism is a key theory to this study. The 2010 constitution identifies the constitution as a supreme law of the land.³⁵ This theory will therefore be relevant in analysing how different statutes have been used to limit judicial and parliamentary powers in Kenya.

1.9 Research Methodology

In order to gather information for this research, library and internet searches shall be carried out.

The library research will analyse scholarly writings on the relevant laws and books dealing with the separation of powers.

³¹ Hilaire Barnett, *Constitutional & Administrative Law* (5th Edition, Cavendish 2004)5.

³² Ojwang J.B 'Constitutional Development in Kenya: Institutional adaptation and social change'(Acts Press,1997)13.

³³ P.L.O Lumumba, M.K Mbondenyei & S.O Odero, 'The Constitution of Kenya: Contemporary Readings' (Law Africa 2011) 46.

³⁴ *Journal Of Global Affairs And Public Policy* Volume 1, Number 1, 2011 p.3.

³⁵ Constitution of Kenya, Article 2.

The internet searches will be used to get relevant material on the topic and to track the progress of the various cases that are before the Kenyan courts that deal with this issue. Articles, reports and journals dealing with the subject matter shall also be reviewed.

1.10 Literature Review

The literature review covers a wide array of books, journals, texts, newspaper articles, unpublished works and various sources from the internet that deal with various concepts that relate to the research topic. The texts reviewed deal with separation of powers, constitutionalism, judicial independence, parliamentary sovereignty all of which are important for one to comprehensively understand the supremacy war between the judiciary and parliament.

John Locke's in *The 2nd Treatise of Governments*³⁶ and **Montesquieu's** *Spirit of Laws*³⁷ are essential to this research as they help to appreciate the origins of the doctrine of separation of powers and how it was meant to apply in a democratic government. They also shed light on how the doctrine of separation of powers is expected to work and the respective functions to be performed by the various organs of government, especially the judiciary and the legislature. However pure separation of powers as expounded by them does not apply in the Kenyan situation where the supremacy of the constitution is fundamental.

Ben Nwabueze in his book *Judicialism in Commonwealth Africa*,³⁸ deals with the role of the judiciary in government. This expounds on the judiciary and how it works but of importance is the way the writer explains the role of the judiciary into detail and the powers that they have.

³⁶ John Locke, *Two Treatises of Government* (Cambridge University Press, Cambridge 1988).

³⁷ Charles Montesquieu, *The Spirit of Laws* (Cambridge University Press 1748).

³⁸ Benjamin Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (Hurst & Company, London 1977).

This literature will be relied on when discussing the role of the Kenyan judiciary and its usurpation of parliamentary legislative mandate.

Oscar Sang³⁹ in the *Elsa Malta Law Review* describes issues regarding the judiciary and the new constitutional regime. In this article he seeks to answer questions such as: what are the acceptable limits of judicial power? How should courts carry out their role as the guardians of the constitution as well as the protector of democratic values while adhering to the doctrine of separation of powers? Can judges remain above the fray of politics?⁴⁰ South Africa is used as a case study and the process of how they dealt with the above questions is outlined in a clear manner.

Suneri Katoruna,⁴¹ is also an important book as it enlightens the reader on matters dealing with the constitution. The nature of constitutional law and sovereignty of the parliament is discussed in depth and this helps one in understanding at what point the powers of parliament should stop. However he fails to address issues of supremacy battles between the arms of government.

Muthomi Thiankolu in *Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence*⁴² will be used to review the present situation in Kenya on this issue. The document gives an elaborate history of the Constitution and the cases that have been brought to court dealing with constitutional review in the recent past and the remedy to conflicts that arise due to gaps in the constitution.

³⁹ Oscar Sang, 'The separation of powers and new judicial power: How the south African constitutional court plotted its course' *Elsa Malta Law Review* <http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce_uploads/09b.pdf> (accessed 10th April 2014).

⁴⁰ *ibid.*

⁴¹ Suneri Katoruna, *Constitutional Law* (HLT 1990).

⁴² Muthomi Thiankolu, 'The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence' <http://www.kenyalaw.org/Downloads_Other/Constitutional_Review_Cases.pdf> accessed 11 June 2014.

Albert Venn Dicey,⁴³ one of the greatest proponents of parliamentary sovereignty viewed this principle as the cornerstone of a constitution. He viewed it as having both positive and negative elements. The positive element being that parliament can pass any law it chooses. The negative aspect is that no court or other body can question a statute. Dicey only identifies one limitation to the sovereignty of parliament; that it cannot bind its successors or be bound by its predecessors. Although Dicey gives a strict description of what parliamentary sovereignty is, such a description cannot apply to a modern contemporary constitution in the 21st century. This research though it will borrow heavily from Dicey's concept of parliamentary sovereignty, it will identify other limitations to it such as constitutional supremacy and people's sovereignty.

Mark Ryan in his book *Unlocking Constitutional & Administrative Law*,⁴⁴ gives a strict interpretation of what parliamentary sovereignty is in regard to the British constitution which is unwritten. However he fails to acknowledge that this does not apply to all regimes in the world. In countries where there is a written democratic constitution, supremacy of the constitution prevails. This research will therefore enrich this literature by showing that courts have a role to declare an act of parliament void where it contravenes the constitution of the land.

Hilaire Barnett,⁴⁵ insists that there can never be a pure separation of powers between institutions of states. He explains that a complete separation of powers would result into a legal and constitutional deadlock. To him the concept insists that there should be checks to ensure that no institution encroaches significantly upon the functions of the other. He however fails to provide the measures that can be adopted to ensure that where pure separation of powers does

⁴³ AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959).

⁴⁴ Mark Ryan, *Unlocking Constitutional & Administrative Law* (2nd edn, Hodder Education 2010).

⁴⁵ Hilaire Barnett, *Constitutional & Administrative Law* (3rd edn, Cavendish Publishing Limited 2000).

not exist there will be no overlap of functions. This research aims at providing the measures to be put in place where there exists partial separation of powers.

Bradley and Ewing,⁴⁶ describe the evolution of parliamentary government and rule of law in the United Kingdom. They argue that the doctrine of parliamentary sovereignty must be retained if it can only be shown that the political system provides adequate safeguards against legislation which would be contrary to fundamental constitutional principle or the individual's basic rights.⁴⁷ This literature will be greatly relied on to provide an in depth understanding of the relationship between the legislature and judiciary for the purposes of this research.

Fredrick W Jjuuko,⁴⁸ discusses the independence and accountability of the judiciary in three East African States; Kenya, Uganda and Tanzania. The book takes stock of what has occurred to judicial independence in the last 40 years, and the colonial arrangements that historically informed the post-independent era. This book is useful as it provides the experiences in judicial independence in Kenya. It provides the historical background of judicial independence in the old constitution. At the time when it was being published the new constitution had not come into force. Therefore it only provides recommendations. This research will address judicial independence parameters as encapsulated in the 2010 constitution hence enriching the literature.

Jackton B Ojwang,⁴⁹ defines the role of the judiciary as the central pillar in the entire configuration of Kenya's new constitution. The success of the constitution will therefore be

⁴⁶ Anthony Wilfred Bradley and Keith Ewing, *Constitutional and Administrative Law* (12th edn Addison Wesley Longman Limited 1997).

⁴⁷ *ibid.*

⁴⁸ Fredrick Jjuuko , *The Independence of the Judiciary and the Rule of Law* (2nd Publication, Kituo cha katiba 2005).

⁴⁹ Jackton B Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Strathmore University Press 2013).

determined by the success of judiciary. He attaches so much centrality on the judiciary and the implementation of the constitution. However he fails to provide an elaborate way in which matters that are before the courts on supremacy battles between it and parliaments can be addressed. This is the tenant upon which this research is based.

Peter Gerangelos,⁵⁰ discusses the threat that legislative interference in pending cases may cause. This is so when amendments are made to a law in order to affect the outcome of a case in court. He contends that legal disputes must be protected from political influence and factional interest. The court in exercising its judicial power its independence must be protected. This article will be relied on to give an impetus into the understanding of judicial independence when it comes to decisional independence.

Elisha Ongoya,⁵¹ examines and interrogates the extent to which the architects and designers and their consequential architecture and design of the Constitution of Kenya 2010 paid homage to the fundamental doctrine of separation of powers. He identifies the overlaps of power and the mechanisms for checks and balances under the constitution. However he does not articulate how this overlaps can be dealt with to avert supremacy wars.

Supremacy battles between parliament and judiciary is not a new phenomenon in Kenya. It has been there since the adoption of the post-independent constitution. However the new constitution has a new paradigm of functions for parliament and judiciary. Parliament sovereignty has been limited by constitutional supremacy, sovereignty of the people and judicial intervention. Judicial

⁵⁰ Peter Gerangelos, *The Separation of Powers and Legislative Interference in Pending Cases* (Sydney Law Review 2008).

⁵¹ Elisha Ongoya, Patrick Lumumba, Morris Kiwinda Mbondenye and Steve Odero *Separation of Powers in the Constitution of Kenya: Contemporary Readings* (Law Africa 2011).

independence on the other hand has been enhanced. However powers of the judiciary are only conferred by the constitution and the law of the land. The current publicity of the supremacy wars between parliament and judiciary are in the public domain due to the increased public awareness. There is therefore limited literature in Kenya on the recent supremacy wars between the arms of government. This research aims at enriching this literature by giving an in depth understanding of separation of powers in the new constitution. It will analyse the current supremacy wars and provide the way forward to avert the same.

1.11 Limitation of the Study

The research covers an ongoing issue and most of the cases concerning the issue are still pending in court making it difficult for the researcher to conclusively assess the situation in the country.

1.12 Chapter breakdown

1.12.1 Chapter One: Introduction

The research paper consists of five chapters. Chapter one is an introductory chapter which captures the introduction, background of the research, statement of the problem, research questions, hypothesis, limitation, justification to the study, conceptual framework and literature review.

1.12.2 Chapter Two: Separation of powers in the constitution of Kenya

This chapter will look at various concepts such as separation of powers, parliamentary supremacy, and independence of the judiciary and their relationship with the present situation in the country.

1.12.3 Chapter Three: Parliament-Judiciary supremacy battles

This chapter will focus on the Kenyan laws and which powers are allocated to both the parliament and judiciary. It will seek to examine the wrangles and establish which of the two arms of government is acting in an unconstitutional manner.

1.12.4 Chapter Four: Comparative Analysis.

We shall do a comparative analysis of how the research topic has been dealt with in South Africa which has a constitution that is similar to the Kenyan one. The research will endeavour to find the challenges that South Africa may have face and draw lessons that can be used to transform the Kenyan situation.

1.12.5 Chapter Five: The way forward for Kenya.

This will contain the recommendations and conclusions and the way forward for Kenya

CHAPTER 2

SEPARATION OF POWERS UNDER THE 2010 CONSTITUTION OF KENYA

2.1 Introduction

The 2010 Constitution of Kenya provides for 3 arms of government namely; legislature, judiciary and executive. Each arm of government is assigned its powers and functions to avert encroachment and overlapping. Separation of powers is an important feature of every constitutional democracy. The CoK of 2010 as compared with the Independence Constitution fundamentally altered the relationship between the different arms of government. The Constitution provides under Article 1 that power belongs to the people and shall be exercised only in accordance with the law. This power is delegated to the three main organs which includes; parliament, the executive and the judiciary. This power has also been delegated to the devolved structures at the county level.

This chapter analyses the conceptual and theoretical framework of the doctrine of separation of powers and constitutionalism. The concept of constitutionalism will be discussed so as to have a clear understanding as to why the constitution plays a huge role in solving the supremacy battles between parliament and judiciary.

The concept of separation of powers will be discussed in order to understand its meaning and objectives in the context of addressing supremacy battles between the legislature and judiciary in a constitutional democracy.

The theoretical framework analyzes the philosophical foundations of the doctrine of separation of powers. The study will discuss how the doctrine has been entrenched in the Constitution as well as examine its role in addressing the impasse between these two arms of government.

2.2 Theory of Constitutionalism⁵²

Morris Mbondenye and Osogo Ambani provides for several ways through which the Constitution can be used to limit government. This is mainly through separation of powers, establishing the rule of law, through checks and balances as well as through participatory governance based on democracy and good governance.⁵³

Mbondenye defines constitutionalism as the art of limiting government. Ben Nwabueze is in agreement with this when he talks about limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.⁵⁴

Scholars have in the past described African countries as “graves” of beautiful constitutions, which when promulgated, raise the spirits of the citizens but always disappoint the world as they fail to bring the expected reforms.⁵⁵ Most countries in Africa including Kenya continue to struggle to cultivate a constitutional culture.

⁵² Ben Sihanya (2015), *Constitutional Law Teaching Materials, Innovative Lawyering & Sihanya Mentoring*, Nairobi.

⁵³ Morris Mbondenye and Osogo Ambani, *The New Constitution Of Kenya. Principles, Government And Human Rights* (LawAfrica 2012).

⁵⁴ Ibid.

⁵⁵ Brenda Aroko, 'The Challenges of Constitutionalism In Kenya' (*Kenyaplex*, 2012) <<https://www.kenyaplex.com/resources/6523-the-challenges-of-constitutionalism-in-kenya.aspx>> accessed 26 May 2016.

Several scholars and philosophers have attempted to come up with the definition of the word constitutionalism.⁵⁶ According to Professor JB Ojwang’ constitutionalism means a government that is subject to restraint in the interest of the ordinary members of the community, a government that is not arbitrary or totalitarian.⁵⁷ He also argues that a constitution may or may not embody the principle of constitutionalism. In the case where a constitution contains clear checks and balances to the exercise of public power, it will serve as an underpinning for the principle and practice of constitutionalism.”⁵⁸

According to Vicki Jackson and Mark Tushnet, constitutionalism involves having the rule of law applied to people and government officers, as well as judicial independence and existence of basic human rights.⁵⁹

Constitutionalism therefore presupposes that governments in exercising its power shall be bound by laid down rules and procedure. This can be achieved when there is compliance with the various laws that stipulate powers and limitations of the various arms of government.⁶⁰

H.W.O Okoth-Ogendo argues that most African Constitutions were enacted and have been amended or manipulated to remove any checks on governmental power, to limit the power of the

⁵⁶ H.W. Okoth Ogendo, 'Constitutions Without Constitutionalism: An African Political Paradox', *Constitutionalism and Democracy: Transitions in the Contemporary World* (1st edn, OUP 2016).

⁵⁷ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press, 1997) 13.

⁵⁸ Jackton B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* African Centre for Technology Studies (ACTS, Nairobi 1990). See also J.B. Ojwang’, *Ascendant Judiciary in East Africa* (Strathmore University Press, Nairobi 2013).

⁵⁹ Jackson and Mark Tushnet, *Comparative Constitutional Law* (2nd edn, Foundation Press 2006).

⁶⁰ Journal Of Global Affairs And Public Policy Volume 1, Number 1, 2011 p.3

sovereign people and restrict or deny them fundamental human rights.⁶¹ All progressive constitutions like the 2010 Kenyan Constitution, have tried to limit the powers of the government, establish the rule of law, protect human and people's rights and foster democracy.⁶²

One may ask how the theory of constitutionalism plays out in the Constitution of Kenya 2010. The Kenyan Constitution indeed entrenches the concept of constitutionalism as evidenced by limits imposed upon each arm of the government. All arms of the government in Kenya derive their powers from the written Kenyan Constitution which limit them to those set out there under. As remarked by HWO Okoth-Ogendo, in his article 'Constitutions without constitutionalism: Reflections on an African political paradox,' written constitutions are conceived as condition precedents for the practice of constitutionalism. The Constitution provides for functions of each arm of the government. Chapter Eight provides for the legislature, Chapter Nine provides for the Executive and Chapter Ten provides for the Judiciary.

2.3 Separation of Powers⁶³

According to the Black's Law Dictionary, separation of powers is the division of governmental authority into three branches of government – legislature, executive, and judiciary - each with its own duties.⁶⁴

⁶¹ Issa Shivji (ed), *State and Constitutionalism: An African Debate on Democracy* (Southern Africa Political Economy Series (SAPES) Trust, Harare 1991) at 3-26.

⁶² R. Cohen, G. Hyden, and W. Nagen (eds.), *Human Rights and Governance in Africa* (University Press of Florida, Gainesville, Florida 1993).

⁶³ Ben Sihanya (2015), *Constitutional Law Teaching Materials, Innovative Lawyering & Sihanya Mentoring*, Nairobi.

⁶⁴ Braynan Carner, *Black's Law Dictionary* (9th ed, West Publishing Company 2009) 45.

Ian Loveland writing on the British system argues that, the basic point to distil from the separation of powers doctrine in the British context is that the government function has three discrete elements.⁶⁵

The first is legislation. One part of government makes the laws under which people live. In Kenya, the legislative function rests with Parliament. The second element is ‘execution’ of the laws. This is undertaken by the executive branch of government. Dicey argues that the executive arm will always try to do things that the legislature has not authorised. As such, the third element of government must offer citizens a remedy if the executive acts incompatibly with the laws the legislature has enacted.⁶⁶

The third element is the courts. In determining whether executive action falls within the limits approved by parliament, courts possess a limited law-making power through developing the common law. The threefold division within Dicey’s version of the rule of law is well illustrated in the celebrated case of *Entick v Carrington*.⁶⁷

John Locke further developed the doctrine of SOP in his *Second Treatise of Civil Government* (1690).⁶⁸

⁶⁵ Ian Loveland, *Constitutional Law, Administrative Law, And Human Rights: A Critical Introduction* (7th edn, OUP 2016).

⁶⁶ Ibid.

⁶⁷ (1765) 19 State Tr 1029.

⁶⁸ John Locke, *Two Treatises of Government* (first published in 1690, Peter Laslett Ed, Cambridge University Press, 1988) 319.

John Locke identified three elements necessary for a civil society: a common established law, a known and impartial body to give judgment and the power to support such judgments and called for a government with different branches, including a strong legislature, and an active executive who does not outstrip the lawmakers in power.⁶⁹

Locke's theory on separation of powers demonstrated the early UK model and attempted to limit the absolute monarch's powers by separating two powers (legislature and executive powers).⁷⁰ He favoured a limited government power unlike his predecessor Thomas Hobbes who was an exponent of unlimited power where the sovereign was absolute.⁷¹

Additionally, Locke emphasized the importance of a social contract.⁷² He argued that because of the danger of human bias and self-interest, the absence of impartial judges and the lack of an executive power those living in the state of nature enter into a social contract and set up a civil government.⁷³ The role of the civil government is therefore to govern and exercise power through clearly defined laws, through impartial judges and through the effective execution of laws and judgment.⁷⁴ Locke drew a distinction between three types of power: legislative, executive, and federative.⁷⁵

⁶⁹ Spark Notes, 'Two Treatises of Government' (2014)

<<http://www.sparknotes.com/philosophy/johnlocke/section2.rhtml>> accessed 20 August 2014.

⁷⁰ *ibid.*

⁷¹ Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernity* (Cavendish Publishing Limited, 1997)134.

⁷² Christopher Roederer and Darrel Moellendorf, *Jurisprudence* (Juta 2004) 78.

⁷³ John Locke, *Two Treatises of Government* (first published in 1690, Peter Laslett Ed, Cambridge University Press, 1988) 326.

⁷⁴ Christopher Roederer and Darrel Moellendorf, *Jurisprudence* (Juta 2004) 78.

⁷⁵ John Ralph Alvey, Separation of Powers in Australia: Issues for the States' (2005) <<http://www.cpahq.org/cpahq/cpadocs/The%20Separation%20of%20Powers%20in%20Australia%20Issues%20for%20the%20States.pdf>> accessed 15 July 2014.

In Locke's analysis, the legislative power was supreme and although the executive and federative powers were distinct, the one concerned with the execution of domestic law within the state and the other with a state's security and external relations.⁷⁶ He argued for the limits of governmental power and the ultimate political sovereignty of the people.⁷⁷ Article 94(1) of the constitution of Kenya echoes this by stipulating that the legislative authority of the Republic is derived from the people and at national level, is vested in and exercised by parliament.

Montesquieu a French theorist later elevated the doctrine of SOP to the rank of a grand constitutional principle in his great work *De L'Esprit des Lois* (1748) which argued for a strict separation of the legislature, the executive or administration and the judiciary in order to protect the liberty of the individual.⁷⁸ Montesquieu was influenced by the theory of the ancients and he was credited for elaborating the modern doctrine of separation of powers along with the independence of judiciary.⁷⁹ Montesquieu theory identified three forms of power (the legislature, executive and judiciary) and noted the importance of the independence of the judiciary. Montesquieu found that if the power is concentrated in a single person's hand or a group of people then it results in a tyrannical form of government.

⁷⁶ *ibid.*

⁷⁷ John Locke, *Two Treatises of Government* (first published in 1690, Peter Laslett Ed, Cambridge University Press, 1988) 319.

⁷⁸ David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law: Text with Materials* (4th edn, Oxford University Press 2007) 45.

⁷⁹ Bruce G Peabody and John D Nugent, 'Unifying Theory of Separation of Powers' [2003] 53 *American Law Review* 1-64.

Montesquieu idea eventually developed into a norm consisting of four basic principles:⁸⁰

- a. The principle of *trias politica*, which simply requires a formal distinction to be made between the legislative, executive and judiciary components of the state authority.
- b. The principle of separation of personnel. This requires that a person serving in the one organ of state authority is disqualified from serving in any of the others.
- c. The principle of the separation of functions which demands that every organ of state authority be entrusted with its appropriate functions only.
- d. The principle of checks and balance. This requires that each organ of state authority be entrusted with special powers designed to keep a check on the exercise of functions by the others.

Though Montesquieu's theory of separation of powers has been adapted, it has been criticized for its strictness because no pure separation of powers between state organs can exist.

2.3.1 The Rationale behind the Doctrine of Separation of Powers

The rationale behind the theory of separation of powers according to Montesquieu was to avoid concentration of power in one institution.⁸¹ Montesquieu expressed this point succinctly in 1748 as follows:

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and

⁸⁰ Professor Vile, *Constitutionalism and the Separation of Powers* (2nd Edn Indianapolis, Liberty Fund 1998) 13.

⁸¹ Baron Montesquieu, *The Spirit of Laws* (1748).

executive... there would be an end to everything, if the same man or the same body...were to exercise those three power.”⁸²

In order to avert oppression and tyranny, state functions had to be distributed within state institutions each having a separate role from the other. Where one body or institution made the laws, and at the same time enforce and implement the same laws, and finally adjudicate on the same laws legislated by it such a body would in effect enjoy excessive and tyrannical powers.

The Supreme Court of Kenya expressed itself on this issue of separation of power in **Re the Matter of the Interim Independent Electoral Commission** as:

“The effect of the constitution's detailed provision for the rule of law in the process of governance is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”⁸³

Separation of powers also provides a system of checks and balances between the branches of government. One institution/arm of government can provide a check on the constitutional

⁸² Montesquieu, Charles de Secondat, baron de. *The Spirit of Laws* (c.1748). Translated and edited by Anne Cohler, Basia Miller, and Harold Stone. (Cambridge University Press 1989).

⁸³ *Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR.

functions of others as provided by the law. Separation of powers between state organs safeguards the independence of the judiciary.

The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others**,⁸⁴ recognizing the principle of checks and balances stated as follows:

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a per-commitment in our constitutional edifice. However, separation of power does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.”

This doctrine has been adopted in various constitutions across the world. However, constitutional scholars have not been able to reach an agreement on how this doctrine should be construed.⁸⁵

⁸⁴ *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2012), Civil Appeal No. 290 of 2012.

⁸⁵ Donald Elliot, ‘Why our Jurisprudence is so Abysmal’ (1989). <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CCcQFjAC&url=http%3A%2F%2Fdigitalcommons.law.yale.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D3204%26context%3Dfss_papers&ei=otcSVKayM6PG7Ab52IH4CA&usg=AFQjCNHg6QEdoeWLeDNieDpoM6ROAY9SaA&bvm=bv.75097201.d.ZGU> accessed 14 August 2014.

Bruce Peabody and John Nugent,⁸⁶ propose a unified theory on separation of powers in order to address its inconsistency in the American system of government. There are different views that prevail on what constitutes the doctrine of separation of powers. The competing theories or models of the separation of powers and how it should operate diverge widely.⁸⁷

2.3.2 Separation of Powers under the 2010 Constitution

The Constitution gives the concept of separation of powers a two pronged approach.⁸⁸ State power has been separated and dispersed both vertically and horizontally. Vertically, state power has been divided, separated and dispersed to infuse the two levels of government namely the national government and the county government.⁸⁹ It is expected that the two levels of governments namely the national and the county governments which are distinct and inter-dependent ought to conduct their mutual relations on the basis of consultation and cooperation. However, the constitution has put in safeguards to resolve conflicts between the two levels of governments.⁹⁰ The Fourth Schedule of the Constitution of Kenya 2010 provides for functions assigned to the two levels of government at the national and county level.

Whereas, horizontally state power at the national government level has been divided, separated and dispersed to the three main arms of government executive, legislature and the judiciary.⁹¹

⁸⁶ Bruce G Peabody and John D Nugent, *Unifying Theory of Separation of Powers* (American Law Review 53, No 1 2003) 1-64.

⁸⁷ Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is* (83 George Town Law Journal. 1994) 217.

⁸⁸ Prof Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla, *Human Rights, Separation of Power and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States*, (Konrad Adenauer Stiftung 2012)12.

⁸⁹ Constitution of Kenya, Article 1 (4).

⁹⁰ See Chapter 11 of the Constitution of Kenya 2010.

⁹¹ Constitution of Kenya, Article 1(3) (a) (b) (c).

Each arm of government has its own distinct functions and is not allowed to encroach on the functions of the other arm of government.

It is important to note that, both the national and county government exercise executive and legislative powers.

2.4 The Structure and Function of Parliament under the 2010 Constitution

The national legislature is conceptualised and designed as a bicameral body, comprising the National Assembly and the Senate.⁹² Both the Senate and the National Assembly perform three main functions: legislation, oversight and representation.⁹³

2.4.1 The Senate

The Senate which is also referred to as the Upper House represents the counties, and serves to protect the interests of the counties and their governments. The Senate is therefore an important pillar in the devolved system of governance in Kenya.⁹⁴

Composition of the Senate

The composition of the Senate is governed by Article 98 (1) of the Constitution. There are 47 members directly elected by each county, 16 women members, two members representing the youth, two members representing persons with disabilities, and the Speaker.

⁹² Article 93 of the Constitution of Kenya 2010.

⁹³ Margaret Kobia and Obuya Bagaka, 'Separation of powers in Kenya's devolved administrative system: Opportunities and challenges' (2013) <<http://www.commonwealthgovernance.org/assets/uploads/2013/11/1-Separation-of-powers-in-Kenya.pdf>> Accessed 11 June, 2014.

⁹⁴ Article 96 of the Constitution of Kenya.

Functions of the Senate

The Senate participates in the law-making function of Parliament by considering, debating and approving bills concerning counties, as provided in Articles 109 to 113 of the Constitution of Kenya. The Senate also determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments. The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

2.4.2 The National Assembly

The National Assembly represents the people of the constituencies and special interests in the National Assembly.

Composition of the National Assembly

The National Assembly consists of two hundred and ninety members, each elected by the registered voters of single member constituencies; forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency; twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and the Speaker, who is an *ex officio* member.

Functions of the National Assembly

The National Assembly has the following functions;

- a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;⁹⁵
- b) appropriates funds for expenditure by the national government and other national State organs; and⁹⁶
- c) exercises oversight over national revenue and its expenditure;⁹⁷
- d) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and⁹⁸
- e) exercises oversight of State organs.

It is important to note that the doctrine of the rule of law and the concept of separation of powers are further buttressed by the doctrine of judicial review. Judicial review allows courts to review the exercise of executive authority as well as the decisions of parliament in the form of legislation. Judicial review of administrative action is anchored in the constitutional order.⁹⁹

The doctrine of separation of powers is a necessary element of constitutionalism. It provides for checks and balances of the three organs of the government. The executive provides political direction, administration and creates room for order and security. While, the judiciary interprets and adjudicates law and disputes respectively. The legislature is the law-making organ. All of these organs require restraints to avoid arbitrariness.

⁹⁵ Article 95(4) (a) of the Constitution.

⁹⁶ Article 95(4) (b) of the Constitution.

⁹⁷ Article 95(4) (c) of the Constitution.

⁹⁸ Article 95(5) (a) of the Constitution.

⁹⁹ Article 47 of the Constitution

2.5 Parliamentary Autonomy

According to Dicey, ‘*Parliament has under the English constitution, the right to make or unmake any law whatever; and further...no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament.*’¹⁰⁰ The basis of parliamentary supremacy is founded on the political reality that parliament has unlimited legislative competence and thus cannot be bound by the judiciary or the executive.¹⁰¹

The essence of parliamentary supremacy is encapsulated in Article 94(1) which states that the legislative authority of the republic is derived from the people and, at the national level, is vested in and exercised by parliament. Article 94(5) further states that no person or body, other than parliament, has the power to make provisions having the force of the law in Kenya except under the authority conferred by the constitution or by legislation. However, the Constitution prescribes an exception to Article 94(6) under which an act of parliament or legislation of a county may confer on any state organ, state officer or person the authority to make provisions having the force of law in Kenya. A prerequisite to this is that the act of parliament or county legislation shall expressly specify the purposes and objectives for which that authority is conferred, the limits of that authority, the nature and scope of the law that may be made, the principles and the standards applicable to that authority.

Parliamentary autonomy is also captured under parliament’s general procedures and rules; freedom of speech and debate in parliament as well as powers, privileges and immunities

¹⁰⁰ Albert Venn Dicey, *The Law of Constitution*, (Oxford Press 1915) 3-8.

¹⁰¹ Christian Roschmann, Peter Wendoh & Steve Ogolla, *Human Rights, Separation of Power and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States*, (Konrad Adenauer Stiftung 2012)5.

guaranteed to the Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members. This ensures the efficacy and orderly discharge of parliamentary business,¹⁰² each house of parliament is empowered to establish committees and make standing order for the orderly conduct of its proceedings and that of its committees.¹⁰³

The legislative authority of the Republic of Kenya is derived from the people, at the national level and is only vested in and exercised by the parliament.¹⁰⁴ The legislative power of parliament is exercised through Bills passed by the parliament and assented to by the President.¹⁰⁵ The role of the parliament is therefore to protect the constitution and promote democratic governance. Furthermore, the Constitution establishes a bicameral parliament consisting of the national assembly and the senate.¹⁰⁶ This enhances parliamentary sovereignty by ensuring that the other arms of governments do not encroach on the powers of parliament.

2.5.1 Limitation of parliamentary sovereignty

Parliamentary sovereignty though enhanced in the constitution has also been limited through various means. It is restricted not only in terms of what parliament can do as an institution, but also in terms of what an individual house of parliament can do. It has been limited through constitutional supremacy, sovereignty of the people, restriction on constitutional amendments and judicial intervention.

¹⁰² Constitution of Kenya, Article 117.

¹⁰³ Constitution of Kenya, Article 124.

¹⁰⁴ Constitution of Kenya, Article 94(1).

¹⁰⁵ Constitution of Kenya, Article 109(1).

¹⁰⁶ Constitution of Kenya, Article 93(1).

2.6 The Structure and Functions of the Judiciary under the Constitution of Kenya 2010

The Judiciary is established under Chapter 10, Article 159 of the Constitution of Kenya. Its primary role is to exercise judicial authority given to it, by the people of Kenya.¹⁰⁷

The Judiciary and its related institutions perform the following functions;

- a) Administration of justice;¹⁰⁸
- b) Formulation and implementation of judicial policies;¹⁰⁹
- c) Compilation and dissemination of case law and other legal information for the effective administration of justice.¹¹⁰

2.6.1 Hierarchy of the Courts in Kenya

Under the Constitution of Kenya 2010, the courts operate at two levels, namely; Superior and Subordinate courts. The Constitution of Kenya 2010 provides the hierarchy of the superior courts as the Supreme Court, the Court of Appeal, and the High Court respectively. Under the 1969 Constitution, there was no Supreme Court.¹¹¹

2.6.1.1 The Supreme Court

The Supreme Court of Kenya is established under Article 163 of the Constitution of Kenya. The Constitution places the Supreme Court at the apex of the judicial hierarchy system. The court

¹⁰⁷ Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

¹⁰⁸ 'About The Judiciary' (*The Judiciary*, 2014) <<http://www.judiciary.go.ke/portal/page/about-the-judiciary>> accessed 27 May 2016.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Alnashir Visram, 'Role And Responsibility Of The Courts Under The Constitution Of Kenya, 2010' (*Kenya Law*, 2011) <<http://kenyalaw.org/kl/index.php?id=1935>> accessed 27 May 2016.

comprises of seven judges: the Chief Justice, who is the president of the Court, the Deputy Chief Justice, who is the deputy to the Chief Justice and the vice-president of the Supreme Court and five other judges.¹¹²

The Supreme Court has original, appellate and advisory jurisdiction. According to the Constitution, the Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140.¹¹³

Justice Alnashir Visram argues that with the exception of the Court's original jurisdiction, the Constitution leaves broad room for Parliament and indeed the court itself to make rules relating to the exercise of its jurisdiction.¹¹⁴

2.6.1.2 Court of Appeal

The Court of Appeal is established under Article 164 of the Constitution of Kenya 2010. The Court consists of – the President of the Court; and not less than twelve judges appointed in accordance with Articles 164.¹¹⁵

The Court of Appeal has jurisdiction to hear appeals from the High Court; and any other court or tribunal as prescribed by an Act of Parliament.¹¹⁶

¹¹² Article 163 of the Constitution of Kenya.

¹¹³ See Petition No. 5 of 2013.

¹¹⁴ Alnashir Visram, 'Role And Responsibility Of The Courts Under The Constitution Of Kenya, 2010' (*Kenya Law*, 2011) <<http://kenyalaw.org/kl/index.php?id=1935>> accessed 27 May 2016.

¹¹⁵ Section 4 of the Court of Appeal (organization and Administration) Act No. 28 of 2015.

¹¹⁶ Article 164(3) of the Constitution.

2.6.1.3 The High Court

Article 165 establishes the High Court. The court consists of – the Principal Judge; and not more than two hundred judges appointed in accordance with Article 166(1) (b) of the Constitution.¹¹⁷

The Court shall exercise jurisdiction conferred to it by Article 165(3) and (6) of the Constitution; and any other jurisdiction, original or appellate, conferred to it by an Act of Parliament.

The High Court has been restructured into four divisions: Division of Land and Environment; Division of Judicial Review; Division of Commercial and Admiralty; and, Constitution and Human Rights Division.

2.6.1.4 Subordinate Courts

The subordinate courts are established under Article 169. They consist of the Magistrates Courts, Kadhis' Courts, Court Martial, and any other court or local tribunal established by an Act of Parliament.

2.7 Judicial Independence

The concept of independence of the judiciary can be well understood as per the dictum of Chief Justice Brian Dickson of the Supreme Court of Canada in *The Queen v. Beauregard*¹¹⁸ who stated that *'the role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.'*

The concept of judicial independence is an integral feature of Chapter Ten on the Judiciary. Article 160 (1) of the Constitution provides that in the exercise of judicial authority, the

¹¹⁷ Section 4 of the High Court (Organization and Administration) Act No. 27 of 2015

¹¹⁸ [1986] 2 S.C.R. 56 at Para. 30.

Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

The Constitution has therefore provided mechanisms for enhancing independence of the judiciary. The most notable ones include; Salaries payable to judges;¹¹⁹ Judicial Immunity;¹²⁰ Tenure of office;¹²¹ establishment of the Judiciary Fund.¹²²

2.7.1 Judicial Intervention

The High Court has jurisdiction to hear any question relating to the interpretation of the constitution including the question whether any law is inconsistent with or in contravention with it.¹²³ The judiciary is therefore an institution mandated to check the legislative power of parliament. However, the power of judiciary to intervene is only limited to interpretation and not amendment.¹²⁴

2.8 Conclusion

This chapter has taken the position that separation of powers and constitutionalism play a vital role in the smooth operation of any government. The three arms of government are meant to work separately yet complement each other. The CoK has dealt well with this issue and most of the functions of the judiciary, parliament and executive are clearly spelt out. It is puzzling then that the parliamentary and judiciary continues to engage in battles in the exercise of their functions.

¹¹⁹ Article 160(4) of the Constitution.

¹²⁰ Article 160(5) of the Constitution.

¹²¹ Article 167 of the Constitution.

¹²² Constitution of Kenya, Article 173 (1).

¹²³ Constitution of Kenya, Article 165 (3) (d).

¹²⁴ See the High Court decision in Institute of Social Accountability & another v National Assembly & 4 others, High Court at Nairobi, Petition No 71 of 2013.

In the next chapter, I highlight and analyze the supremacy conflicts. I will analyze instances when parliament and judiciary have clashed over their respective mandates.

CHAPTER 3

INTERROGATING THE CONFLICT BETWEEN PARLIAMENT AND JUDICIARY IN THE POST 2010 ERA

3.1 Introduction

This chapter will do a case study of the Kenyan situation and the governance stalemate that arises or is likely to arise when there is a conflict between different arms of government (the main focus is Parliament and the Judiciary). The Kenyan experience based on the decision of the High Court in *Institute of Social Accountability & another v National Assembly & 4 others*,¹²⁵ depicts a system which has been progressive going by how the courts have confronted and resolved such disputes. Courts for instance in this case though they declared the Constituencies Development Fund Act, 2013 unconstitutional, they left all the parties satisfied i.e. in a win-win situation. This ensures that the role of the court in the interpretation of the constitution is not compromised or seen by other arms of government as a tool used to usurp their constitutional powers. Moving forward, parties will always trust the court as their preferred avenue for resolution of any disputes. But the success of all this is hinged on the need to observe and uphold the rule of law as well as separation of powers by all the arms of government.

Retracing the journey of how courts have dealt with such supremacy battles between different arms of government especially post 2010 period, one can be able to fully appreciate how rulings from the High court are perceived by the respondents in the respective cases, for instance, in the *Speaker of the Senate & Another v Attorney General & 4 others*,¹²⁶ and *James Opiyo Wandayi*

¹²⁵ Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR.

¹²⁶ Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR.

v Kenya National Assembly & 2 others,¹²⁷ the respective decisions were ridiculed to a point that even the Speaker of the National Assembly in the Opiyo Wandayi case dismissed the decision of the court. On the other hand, following the decision in the Speaker of the Senate & Another v Attorney General & 4 others as well as the subsequent summoning of the JSC Commissioners and their refusal to appear before the National Assembly Committee, the judiciary budget was thereafter slashed by Ksh 500 million.

The way the High Court addressed the constitutionality of the Constituencies Development Fund Act, 2013, was novel and progressive in a maturing democracy. This study advocates that the approach adopted by the court in this particular case established the gold standard of how for instance a case emanating from an arm of government should be handled by the court, particularly to secure implementation as well as to maintain a healthy working relationship between different arms of government.

Critical lessons that this study seeks to further as well as analyze arises from the aforementioned decisions. First, Kenya being a constitutional democracy, where all the three arms of the government should work in harmony, what safeguards exist or should be deployed to bar the National Assembly from ‘retaliating’ as such when the High Court or any other court in future delivers a decision that does not go down well with it. Second, is there anything that the High Court would have done differently in respect to these cases that would have secured compliance and obedience by the National Assembly? Third, what lessons do we derive from the CDF case, if any? i.e. was the court combative in this decision as compared to the one in the Security Laws Amendment Bill? What is the remedy can be sought in such a situation?

¹²⁷ James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR.

The new constitution has enhanced independence of judiciary and parliamentary sovereignty. However, the expanding supremacy battle between parliament and judiciary is an issue of national concern.¹²⁸

Former Chief Justice Willy Mutunga opines, “That after the 2010 constitution was promulgated, the two houses of parliament have often engaged each other as with necessity and seen each other as clients and not as two arms of the state mandated to work together to achieve the aspirations of the people.”¹²⁹ It has reached a point where parliament deems superior to judiciary hence refusal to obey court orders on the other hand. The two houses have often depicted judiciary as activist who often meddle in the business affairs and on the flip side, judiciary paints parliament as being contemptuous of judicial orders and always undermining the rule of law.¹³⁰

The next section of this study shall therefore attempt to analyze these decisions in light of the concerns raised in the preceding paragraph and relating it with central theme of this study on how to diffuse tension between the different arms of government and at the same time respect the rule of law and uphold judicial obedience and constitutionalism. This Chapter will also analyze the conflicts that have arisen in light of the two arms of government while carrying out their functions. And in so doing, it will endeavour to identify constitutional overlaps and inquire into whether such overlaps are the cause of the various conflicts. This chapter will majorly focus on the post 2010 era, and how courts have dealt with the different situations.

¹²⁸Jackton Ojwang, ‘Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order’(Strathmore University Press 2013) 56.

¹²⁹Goin J <http://www.capitalfm.co.ke/news/2014/senate-judicairy-meet-on-separation-of-powers/in-lex/>(Goin,2016)

¹³⁰*ibid.*

3.2 Parliament - Judicial Relations in 2010 Constitution

There is no universally recognized adoption of the doctrine of separation of powers. Each country adopts the doctrine based on various factors such as observance of democracy, constitutionalism, rule of law, independence of judiciary, parliamentary sovereignty amongst others.¹³¹ Montesquieu argued that there would be no liberty if the judiciary could not be separated from the legislative and executive.¹³² He claimed that if judiciary was joined with the legislature the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.

The judicial-parliament relationships must adhere to the doctrine of separation of powers and the principle of checks and balances. Unlimited legislative usurpation or interference in judicial proceedings may pose a threat to the purposes underlying the separation of powers, in particular, ensuring that legal disputes are protected from political influence and factional interest.¹³³ Judicial power has to be respected by both the parliament and the executive. Judicial power is protected by guaranteeing the independence of the judiciary. In the West, judicial independence is perceived as a vital pillar in the constitutional order; and so undermining this principle raises a political question which, in the electoral democracies of the countries concerned, may work to the detriment of those who contest its status as a safeguard for the people's rights.¹³⁴

Parliament plays an oversight role over functions of judiciary in different ways. Article 125 of CoK grants parliament and any of its committees the power to summon any person to appear

¹³¹ Kate O'Regan, 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8 PER/PELJ 120.

¹³² Montesquieu, *The Spirit of Laws* 163.

¹³³ Peter Gerangelos, 'Separation of Powers and Legislative Interference in Pending Cases' 30 Sydney Law Review 61 <http://sydney.edu.au/law/slr/slr30_1/Gerangelos.pdf> accessed 15 August 2014.

¹³⁴ Jackton Ojwang, 'Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order' (Strathmore University Press 2013) 123.

before it for the purpose of giving evidence or providing information. Parliament can therefore summon any member of the judiciary before it.

In **International Legal Consultancy Group v Senate and Another**,¹³⁵ the senate summoned nine governors to appear before it and produced various documents pertaining to the financial management within the said counties. Lady Justice Mumbi Ngugi held that:

The Court appreciates that the Senate has an important role to play in the implementation of the Constitution, particularly so with regard to devolved government. However, just like all other state organs, it is bound by the Constitution, and it cannot arrogate to itself powers that it has not been given under the Constitution. On the material before me, and taking into account the provisions of Article 226(2), the Senate may have overstepped its mandate in purporting to summon the Governors and the County Finance Committees. While it does have power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily and in isolation. Put differently, the provisions of Article 125 cannot be read in isolation, but must be read in conjunction with other provisions of the Constitution which allocate functions and powers to the various organs created by the Constitution. The doctrine of separation of powers is, however, not an end in itself but a system of checks and balances. The Court, as the final arbiter under the Constitution is obliged to adjudicate any dispute between various arms of state and determine the contours of separation having regard to the constitutional functions of each organ.¹³⁶

¹³⁵ *International Legal Consultancy Group v Senate and Another* [2014] eKLR.

¹³⁶ *ibid.*

Parliament and any of its committees have the same powers as the High Court: to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; to compel the production of documents; and to issue a commission or request to examine witnesses abroad.¹³⁷

Parliament is therefore empowered to perform quasi-judicial functions. This then brings in the question of whether in exercising this power parliament is exercising judicial authority which is vested exclusively to courts and tribunals established by or under the constitution.¹³⁸ In **Judicial Service Commission v Speaker of the National Assembly & another**,¹³⁹ Justice G.V. Odunga held that:

A departmental Committee of the National Assembly when exercising quasi-judicial powers as opposed to legislative powers is subject to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution. Whereas under Article 125 of the Constitution “Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information” and for that purpose and that purpose alone, “a house of parliament and any of its committees has the same powers as the High Court—(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; (b) to compel the production of documents; and (c) to issue a commission or request to examine witnesses abroad, that power cannot be interpreted to equate a House to the High Court in the exercise of judicial authority. A departmental Committee of the National Assembly, in my view is not a Court or Tribunal established under the Constitution. It cannot purport to grant orders which the Courts and tribunals set up under the Constitution are empowered to

¹³⁷ Constitution of Kenya Article 125(2).

¹³⁸ Constitution of Kenya Article 159(1).

¹³⁹ Petition 518 of 2013.

grant. If the position was different the doctrine of separation of powers would be rendered illusory.¹⁴⁰

The High Court has the jurisdiction to hear any question respecting the interpretation of the Constitution. In so doing it can determine whether any law is inconsistent with or in contravention of the Constitution. Although parliament has the primary duty to make laws those laws must be consistent with the constitution. Judiciary oversees that laws enacted by parliament are constitutional.

High court also has jurisdiction under article 165 (3) (d) (ii) of the Constitution to hear any question respecting the interpretation of the Constitution including the determination of a question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. In *Njenga Mwangi & Another v Truth, Justice And Reconciliation Commission & 4 Others*¹⁴¹, the respondents filed a preliminary objection that the High Court had no jurisdiction to hear the application filed against the speaker of the national assembly, the clerk of the national assembly and the leader of the majority party in respect of acts of their respective offices in exercise of the powers conferred and vested in them by the Constitution of Kenya, the National Assembly Powers and Privileges Act and the Standing Orders. The argument of the respondent was that under Article 117 of the constitution members of parliament are entitled to speak freely on their own mandate and they have also the right to all relevant freedoms while in Parliament. Further, Section 29 of the

¹⁴⁰ *ibid.*

¹⁴¹ *Njenga Mwangi & Another v Truth, Justice And Reconciliation Commission & 4 Others*.
Petition 286 of 2013.

National Assembly Powers and Privileges Act (Cap. 6) denies jurisdiction to any Court to act against decisions of the Speakers. Justice Lenaola held:

I am also in agreement, that under section 29 of the National Assembly (Powers and Privileges Act) (Cap 6), Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly but I am certain that under Article 165(3) (d) of the Constitution, this Court can enquire into any unconstitutional actions on their part.” This means that although parliament enjoys certain privileges and immunities, the judiciary has constitutional mandate to inquire into its actions.

The courts in interpreting the laws must also ensure that it is not encroaching in the territory of parliament. In the case *Judicial Service Commission v Speaker of the National Assembly & another (JSC Case)*,¹⁴² the Court of Appeal had to determine if in its rationality test misapplied the doctrine of separation of powers thereby usurping the powers and functions of other arms of government. It held that:

It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the functions....We further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on

¹⁴² *Judicial Service Commission v Speaker of the National Assembly & another*, Petition 518 of 2014.

leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature's decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.

Parliament has the power to exercise quasi-judicial functions. However, Article 165(6) grants High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. This includes parliament.

When a court interferes with the conduct of any administrative body it does so because the conduct was unauthorized.¹⁴³ It is impossible to list grounds on which a court would interfere with decisions of another body. However the constitution underpins interference of court to provisions of the constitution as provided above.

3.3 Judiciary-Parliament conflicts in Kenya

The above mentioned judicial-parliament relationship was aimed to ensure checks and balances and therefore promote discharge of duties. However the relationship between judiciary and parliament is deteriorating day by day. Judiciary sees parliament as trying to intimidate and threaten its independence. Parliament on the other hand is of the view that judiciary is overstepping its mandate. This has led into instances where parliament fails to obey court orders

¹⁴³ RH Jones, *Constitutional and Administrative Law* (Macdonald and Evans Ltd 1968).

and judiciary refuses to appear before parliament leading to a standoff.. Senator Amos Wako argues that there are healthy and unhealthy constitutional tensions.¹⁴⁴ He argues that unhealthy and unnecessary constitutional tensions between the arms of government are caused by those whose mindset has not changed and who would want to claw back the gains of the new constitutional order and in particular to weaken the devolved system of the government and the promotion and protection of human rights.¹⁴⁵

Conflicts between the two arms of government have manifested in the following ways;

3.31 Parliament's refusal to obey court orders

Parliament refusing to obey court orders is not a new phenomenon in Kenya. The Kenyan members of parliament have in many cases defied court orders claiming their superiority over the judiciary.

In *International Legal Consultancy Group v Senate & another*,¹⁴⁶ the governors had initially failed to appear before the finance committee of the senate and a case was filed in Court. The court ordered the senate and clerk not to summon and question governors over the manner in which money allocated to counties had been spent pending the hearing of the case. The senators ignored summons by High Court judge Mumbi Ngugi to appear before her in the case.¹⁴⁷ The senate, defying the court orders went ahead and summoned the governors. Judge Mumbi Ngugi, in emphasizing the supremacy of constitution, held that:

¹⁴⁴Amos Wako (2014).

¹⁴⁵ *ibid.* Amos Wako argues that healthy constitutional tensions are good for dispensation of the constitution and will for a basis for jurisprudential discourse.

¹⁴⁶ *International Legal Consultancy Group v Senate & another*, Constitutional Petition 74 of 2014.

¹⁴⁷ *ibid.*

The Court appreciates that the Senate has an important role to play in the implementation of the Constitution, particularly so with regard to devolved government. However, just like all other state organs, it is bound by the Constitution, and it cannot arrogate to itself powers that it has not been given under the Constitution. On the material before me, and taking into account the provisions of Article 226(2), the Senate may have overstepped its mandate in purporting to summon the Governors and the County Finance Committees. While it does have power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily and in isolation. Put differently, the provisions of Article 125 cannot be read in isolation, but must be read in conjunction with other provisions of the Constitution which allocate functions and powers to the various organs created by the Constitution.¹⁴⁸

In *Judicial Service Commission v Speaker of the National Assembly & 8 others*,¹⁴⁹ the Speaker of the National Assembly disobeyed a court order on October 30, 2013 when he was served with an order stopping Parliament from debating or recommending the removal of six commissioners from the Judicial Service Commission (JSC). The court held that:

Respect of Court orders however disagreeable one may find them is a cardinal tenet of the Rule of Law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When the decision to obey particular Court orders are left to the whims of the parties public disorder and chaos are likely to reign supreme yet under the Preamble to our Constitution we do recognize the aspirations of all

¹⁴⁸ *ibid.*

¹⁴⁹ *Judicial Service Commission v Speaker of the National Assembly & 8 others*, Petition 518 of 2014.

Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.¹⁵⁰

The court issued a conservatory order that the said six Commissioners of the JSC should not be suspended or removed from the office as such Commissioners based on the said petition pending the hearing and determination of the petition or until further orders of the Court. However the national assembly defying this order forwarded the names of the said commissioners to the president for establishment of a tribunal to investigate them. The Judge went ahead to nullify the action of the president of establishing a tribunal to investigate the six commissioners. On the note GV Odunga stated that, “the action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed.”

In *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others (Wambora Case)*,¹⁵¹ the Embu County Assembly proceeded with an impeachment motion against Governor Martin Wambora and went ahead to impeach him despite being personally served with a court order stopping the debate. Parliament argued that courts could not injunct parliament, purport to control its calendar, designate when parliament carries its business and how it does it.¹⁵²

¹⁵⁰ *ibid.*

¹⁵¹ *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*, Petition 3 of 2014

¹⁵² Kithure Kindiki, Citizen Television news, ‘Parliament vows to ignore Wambora’s reinstatement’ (21 February 2014).

3.32 Parliament slashing judiciary budgetary allocation

Parliament reduced the expenditure of judiciary by 500 million Kenyan Shillings alleging that the judiciary had failed to absorb the monies allocated to it leading to the reduction. The judiciary perceived this as a threat to its financial autonomy as provided in the constitution. On this issue the CJ stated that:

Even as Parliament has the final word on how much access to justice to fund for the common mwananchi, on this we stand: no number of threats or amount of intimidation will deter the Judiciary from doing justice using the same plumb line of the Constitution, the law and the evidence in the quickest time possible.¹⁵³

Parliament though mandated to allocate moneys to the judiciary it has to do so without political bias and threats. Similarly parliament must check on how judiciary spends money allocated to promote accountability and transparency.

3.33 Refusal of members of JSC to appear before parliament

The JSC suspended the former Chief Registrar (CR) on grounds of corruption within the judiciary. According to Article 172 (1) (c) it is the mandate of JSC to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by an Act of Parliament. Parliament has already enacted the Judicial Service Act. Parliament then summoned CR to appear before it to explain what was happening. The CR argued that she was only accountable to parliament and not JSC.

¹⁵³ Judicial Service Commission Chairperson, *Judicial Service Commission (JSC) Statement on the Independence of the Judiciary* (2nd March 2014).

Parliament Justice Legal Affairs Committee summoned members of JSC to appear before it in accordance with Article 125 of the Constitution to explain why the CR had been suspended. The JSC after holding a meeting unanimously decided not to appear before the parliamentary committee arguing that it interfered with independence of judiciary. In *Joseph Mbalu Mutava v Attorney General & another*,¹⁵⁴ the judges ruled that JSC was not subject to the control of the National Assembly or any of its committees. The five judges also ruled that the Parliamentary Justice Legal Affairs committee was not entitled to supervise the JSC when it was discharging its lawful mandate. Parliament only has the power to oversee the JSC but not to subjugate or control it.

Judges threatened to strike if parliament insisted on summoning members of JSC to appear before it.¹⁵⁵ Justice Martha Koome, Chairperson to the Kenya Judges and Magistrates Association (KJMA) in a press release stated that, '*Accordingly the National Assembly has no constitutional mandate to summon Judicial Service Commission in its execution of the mandate to discipline an employee of the Judicial Service Commission.*'¹⁵⁶ They called upon National Assembly to respect the fundamental principle of separation of powers and desist from purporting to direct the judiciary on how to execute the mandate of how to employ, discipline or terminate the services of its employees.

¹⁵⁴ *Joseph Mbalu Mutava v Attorney General & another*, Petition 337 of 2014.

¹⁵⁵ Kenya Television Network, 'Judges Strike Threat' Press Release (26 October 2013) <https://www.youtube.com/watch?v=5hrgSTDVN_g> (Accessed on 28 June 2014).

¹⁵⁶ *ibid.*

3.34 Parliament threatens to disband the JSC

After members of JSC refused to appear before the parliamentary committee, parliament in response threatened to disband the JSC accusing JSC of unfair dismissal of the former Chief Registrar. The speaker of the National assembly in a debate in the house argued that, ‘the National Assembly of the Republic of Kenya exercises an oversight over all state organs.’¹⁵⁷ The JSC commission was not an exception.

3.35 Chief Justice’s Refusal to appear before Parliament's Public Accounts Committee (PAC)

PAC had summoned CJ to appear before it to respond to findings of an audit report on the Judiciary and the Judicial Service Commission (JSC). The CJ refused to appear. Parliament in discontent argued that under Article 125 of the CoK they had the power to summon anyone to appear before it or any of its committee. The refusal of CJ not to yield to the summons was against the provisions of the constitution and rule of law of which he was obliged to follow. The speaker of the National Assembly ordered that all state officers including the CJ who had been summoned to appear before parliament honour the date with parliament or risk sanctions, and a possible sack initiated by the law makers.¹⁵⁸

3.36 Senators accusing Judiciary of judicial activism.

The Senate County Public Accounts and Finance Committee in line with its mandate ordered several governors to appear before it and provide details as to how they managed the finances in their counties. On receiving this order, nine governors¹⁵⁹ went to court and asked for orders to

¹⁵⁷ National Television, ‘Parliament Endorses Proposal to Remove the 6 JSC officials’ (7 November 2013).

¹⁵⁸ Africa Policy Institute, ‘Kenya’s Fast Creeping Parliamentary Dictatorship’ (2013) <www.africapi.org/wp-content/uploads/2014/04/Parliamentary-Dictatorship.pdf> accessed 14 July 2014.

¹⁵⁹ The governors included: Ahmed Abdullahi Mohammed (Wajir), James Ongwae (Kisii), Isaac Ruto (Bomet), Patrick Khaemba (Trans Nzoia), Alfred Mutua (Machakos), Martin Wambora (Embu), Jack Ranguma (Kisumu), Wycliffe Oparanya (Kakamega) and William Kabogo (Kiambu).

bar the Senate committee from interrogating them.¹⁶⁰ The High Court then issued orders blocking the senate from summoning governors.¹⁶¹ This led to an uproar with several senators such as Boni Khalwale, Anyang' Nyong'o, Muriuki Karue, George Khaniri, Kimani Wamatangi and Kipchumba Murkomen accusing the governors of hiding behind the courts in order to avoid accountability.¹⁶² Dr Khalwale retorted that, *'The governors might seek to win points now by engaging the Senate in legal battles. But for how long? Their deeds will soon catch up with them.'* He appealed to Chief Justice Willy Mutunga to guide and advise his judicial officers on the issuance of orders.¹⁶³ Kipchumba Murkomen senator for Elgeyo Marakwet said judicial activism as practiced in Kenya is against the good of the public as compared to other jurisdictions.¹⁶⁴ The court orders have caused tension between the senate, governors and judiciary. The senate has recently vowed to deal with the governors who keep on getting court order to stop the committee from interrogating them.

3.4 Conclusion

This chapter has adopted the view that the various roles and duties of the arms of government are clearly dealt with in the CoK. The various instances where the two have been at loggerheads could have been easily avoided had the law been applied appropriately. An analysis of the incidences of conflict between the two arms of government has led to the conclusion that there is

¹⁶⁰ Edwin Mutai, 'Senate stopped from grilling governors on county finances' (2014) <<http://www.businessdailyafrica.com/-/539546/2457360/-/14tcgouz/-/index.html>> accessed 24 September 2014.

¹⁶¹ *ibid.*

¹⁶² Roselyne Obala, 'Senators accuse Kenyan Judiciary of interference' (2014) <http://www.standardmedia.co.ke/?articleID=2000135962&story_title=Kenya-senators-accuse-judiciary-of-interference> accessed on 24 September 2014.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

an ardent need for establishing proper checks and balances in the governmental system so that no organ can supersede another.

In order to restore good governance in any political system it is inevitable to maintain coordinative relationships between the two pivotal branches of the government. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures. This again warrants the system of checks and balance to be put in place so that no single institution gets to dominate the power structure at the cost of others. It is therefore necessary to give every state organ what its due is as defined in their constitutions.

CHAPTER 4

COMPARATIVE ANALYSIS AND LESSONS FOR KENYA AND SOUTH AFRICA

4.1 Introduction

Supremacy conflicts between the various arms of government have had a negative impact on the manner in which the government system operates. There is need to find a solution between Parliament and the Judiciary so that the three arms of government can work in harmony. In chapter 3, I have discussed the different conflicts between Parliament and the Judiciary. In Chapter 4, I will do a comparative analysis between Kenya and South African on the relation between Parliament and the Judiciary.

Additionally, I shall explore whether South Africa has experienced friction between the Judiciary and Parliament and how it has resolved the problem. The lessons drawn from these experiences could be useful in mapping the way forward for Kenya as a country.

The justification for using South Africa in the comparative study is premised on the fact that South Africa just like Kenya has had its fair share of conflicts between the Parliament and the Judiciary and it has a progressive jurisprudence as to how conflicts of this nature had been resolved. The Constitution of Kenya 2010 which was promulgated in 2010 is barely 6 years old. Though it clearly stipulates the functions of each arm of government, the jurisprudence from the courts regarding the interplay of separation of powers and check and balances has not been consistent. Kenya can therefore borrow some lessons from South Africa on these issues. The Kenyan Constitution is closely modelled along the Constitution of South Africa 1996. However, it is important that even as we benchmark from the South African experience, social and political differences that exist between these jurisdictions should be appreciated.

4.2 South African Case Study

The doctrine of separation of powers between the Judiciary and the Legislature in the current South African constitutional regime can be traced back to the Constitutional Principle VI, which is one of the principles that governed the drafting of the final constitution.¹⁶⁶ Schedule 4 of the Interim Constitution provided that *‘there shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’*

The question whether or not the doctrine of separation of powers forms part of the final constitution has been considered and explained in several Constitutional Court cases. It is axiomatic that the doctrine of separation of powers is part of the constitutional design of South Africa.

In the case of *Glenister v President of the Republic of South Africa*,¹⁶⁷ Langa CJ (as he then was) stated that *‘separation of power as a doctrine is part and parcel of South African constitutional design.’* Chaskalson P in *South African Association of Personal Injury Lawyers v Heath*,¹⁶⁸ stated as follows:

“That the constitution is structured in a way that makes provisions for separation of power between the three arms of government and that the laws which are inconsistent with the supreme law are void to that extent .”

¹⁶⁶ 4th Schedule, Constitution of South Africa.

¹⁶⁷ 2009 (1) SA 287 (CC) at p 298.

¹⁶⁸ 2001 (1) BCLR 77 (CC) P86 at par 22.

There are clear indications that just like Kenya; doctrine of separation of power is well captured in the South African constitution.

4.21 Parliamentary Sovereignty

The South African parliament comprises of the National Assembly and the National Council of provinces.¹⁶⁹ The National Assembly just like the Kenyan parliament is tasked with the responsibility of representing the people and ensuring the government is properly run.¹⁷⁰ The National Council of Provinces has the duty of representing the needs of the various provinces and to make sure that they are attended to.¹⁷¹ Parliamentary sovereignty is dealt with in section 43 of the South African constitution. This section clearly states that legislative authority in the national sphere is vested on the parliament.¹⁷² Parliament has the power to amend the constitution, pass legislation on any matter and to assign any of its legislative power to any other law making body in the government.¹⁷³ From this it is clear that parliament is not answerable to anyone when making the laws. However, the legislative power has also been allocated to other government bodies such as the provincial legislature and the Municipal councils though it is on a smaller scale, not the national level.¹⁷⁴

4.2.2 Judicial Independence

The judiciary in South Africa consists of four major courts namely: Constitutional Courts, The Supreme Court, The High courts, The Magistrate Courts and any other courts established or recognized by an Act of parliament.¹⁷⁵ The judiciary is an independent body and is only subject

¹⁶⁹ Section 42 (1) Constitution of South Africa.

¹⁷⁰ Section 42(3) Constitution of South Africa.

¹⁷¹ Section 42(4) Constitution of South Africa.

¹⁷² Section 43 Constitution of South Africa.

¹⁷³ Section 44(1) Constitution of South Africa.

¹⁷⁴ Section 44(2) Constitution of South Africa.

¹⁷⁵ Section 166 Constitution of South Africa.

to the Constitution and the law.¹⁷⁶ The courts are expected to follow the rule of law and to be impartial, acting without any fear or favour. Matters dealing with separation of powers are dealt with by the constitutional courts. The appointment of the Chief Justice and the Deputy Chief Justice is done by the President.¹⁷⁷ The President, Deputy President of the Supreme Court of Appeal and judges are also appointed by the President but after he has consulted with the Judicial Service Commission.¹⁷⁸ This affects the independence of the judiciary as most of the members of the JSC are politicians or political appointees.¹⁷⁹

4.2.3 Relationship between Parliament and Judiciary in the South African jurisdiction

Supremacy conflicts between the Judiciary and Parliament are not unique to Kenya. The same scenario is played out in South Africa. However, the approach taken by South Africa is more effective in dealing with the situation. Just like Kenya, South Africa has a Constitutional Court (CC) which has exclusive jurisdiction over matters dealing with disputes between any state organs regarding their constitutional functions, powers and status.¹⁸⁰ This court helps in dealing with cases expeditiously. The CC has handled several cases dealing with the separation of powers between the judiciary and legislature and addressing the question of who between the two has the upper hand.

One of the most significant decisions of the Constitutional court was in **Doctors for Life International v Speaker of the National Assembly and Others**.¹⁸¹ Whereby, the South African Parliament had passed four Bills namely the Choice on Termination of Pregnancy Amendment

¹⁷⁶ Section 165 Constitution of South Africa.

¹⁷⁷ Section 174 (3) Constitution of South Africa.

¹⁷⁸ *ibid*.

¹⁷⁹ Francois Venter, *South Africa: Introductory notes* http://www.icla.up.ac.za/images/country_reports/south_africa_country_report.pdf accessed 11 July 2014.

¹⁸⁰ Section 167 (4) Constitution of South Africa.

¹⁸¹ 2006 (12) BCLR 1399 (CC) pp 1428-1462.

Act 38 Of 2004, The Traditional Health Practitioners Act 35 of 2004, The Sterilization Amendment Act 3 of 2005 and the Dental Technicians Amendment Act 24 Of 2004. The applicants went to court complaining that the National Council of Provinces (NCOP) had not followed the correct legislative process in making of these laws. They argued that there was no public participation as required by the constitution. It provided that the NCOP must facilitate public involvement in its legislative and other processes.¹⁸² Three issues arose in this case. The relevant issue to our study that arose was whether the court had jurisdiction to decide the matter. With regard to the duty of the court in defending the Constitution the presiding judge said that;

“Under a constitutional democracy like ours, the supreme law is the constitution and it binds all branches of government. The judge stated that when exercising its legislative authority, parliament must act in accordance with and within the limits of the supreme law and that the supremacy of the constitution requires that the obligation imposed by it must be fulfilled.”

On jurisdiction and encroachment on parliament, the court ruled that it had a constitutional mandate to ensure that all the arms of government act within the confines of the constitution. The court further stated it could only intrude in exceptional circumstances where an aggrieved person cannot be allowed substantial relief once the process is completed because the underlying conduct would have violated the constitutional rights of that person. The court was also careful to set out the role of Parliament compared to its own.¹⁸³

¹⁸² Section 72(A) Constitution of South Africa.

¹⁸³ Francois Venter, *South Africa: Introductory notes*

http://www.icla.up.ac.za/images/country_reports/south_africa_country_report.pdf accessed 11 July 2014.

In *Ferreira v Levin No. 70*,¹⁸⁴ regarding the issue of separation of powers of the judicial and legislative authority Chaskalson P. stated that:

“The role of legislature as a body should be acknowledged and respected. He said that it is important as a court to take cognizant of the functions that fall properly within the domain of the courts and those that fall within the domain of legislature. He was alive to the fact there maybe functions which overlap but the terrains are in main separate and should be kept so.”

In Frieda Coetzee and The Government of the Republic Of South Africa,¹⁸⁵ the issue that the Constitutional Court was asked to determine was the constitutionality of certain sections of the Magistrates Court Act, which sections provided for the imprisonment of defaulting judgment debtors for what the sections referred to as contempt of court. Justice Sachs in his judgment considered the submission from the counsel of the applicant that the defect in the said sections of the Magistrates Court Act could easily be corrected by the legislature if properly directed. The applicants argued the court to make an order that Parliament should, in the interests of justice and good governance, correct the defect in the law. The argument by the counsel for the applicants was premised on Section 98(5) of the South African Constitution, which gives the South African Constitutional Court powers to ensure that their decisions find a place in statute law. Section 98 (5) of the South African Constitution provides that:

“In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good

¹⁸⁴ (CT5/95) [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) (19 March 1996).

¹⁸⁵The Constitutional Court of South Africa, Case No CCT19/94 <http://lawblogs.files.wordpress.com/2013/10/coetzee-cc.pdf>- as accessed on 10th August 2014.

government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.”

The provisions of Section 98(5) of the South African constitution enables the constitutional court to ensure that the decisions they render touching on the constitutionality of provisions of a statute are implemented by the legislature, which is the body charged with the mandate of passing and amending legislation. Having such a provision in the constitution would empower the Kenyan courts to ensure that any section(s) of a statute(s) or legislative processes by parliament they declare to be unconstitutional, are amended accordingly, this will to a great extent reduce the friction manifest in the supremacy battles between parliament and the judiciary.

There are also instances where the legislature and judiciary set apart from the doctrine of separation of powers through delegation of authority.

*In Executive Council Western Cape Legislature v President of Republic of South Africa*¹⁸⁶ the Constitutional Court held that the legislature may not delegate plenary law-making powers to the executive, but it may delegate subordinate law-making powers. The court thus confirmed reservation of plenary law making for the legislature and made it non-delegatable. This is because it is necessary for the effective law-making.

A test for determination of whether it is or is not permissible to assign non judicial functions to a judge was developed in the case of *South Africa Association of Personal Injury Lawyers v Heath*,¹⁸⁷ it was held that the judge may not head the Special Investigations Unit into public and

¹⁸⁶ 1995 (10) BCLR 1289 (CC).

¹⁸⁷ (CCT27/00) [2000] ZACC 22;

private corruption and maladministration which was set up in terms of the Special Investigating Unit and Special Tribunals Act.¹⁸⁸ The strict and formalistic approach as adopted in *De Lange v Smuts NO and others*¹⁸⁹ case also dominated the *Heath* case. The court held that the following factors should be taken into account when determining whether or not it is permissible to assign non judicial functions to a judge. They are whether the performance of a particular function:

- a) Is more usual or appropriate to another branch of government;
- b) Is subject to executive control or direction;
- c) Requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;
- d) Creates the risk of judicial entanglement in matters of political controversy;
- e) Involves the judge in the process of law enforcement;
- f) Will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.¹⁹⁰

Additionally, a question could be asked whether the functions delegated to the judiciary is appropriate to the central mission of the judiciary.

¹⁸⁸ Act 74 of 1996.

¹⁸⁹ *De Lange v Smuts NO and Others* (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998).

¹⁹⁰ *De Lange v Smuts No and Others* 1998 (7) BCLR 779 (CC).

4.2.4 Judicial law-making

Under the South African Constitution, courts have specific power to review legislation and to develop the common law in order to align it with the Constitution and in the interest of justice but only within the limits of the specific authority granted by the Constitution.¹⁹¹ It is the Courts which determine whether there is any element of inconsistency and declare inconsistent laws and conduct invalid.

4.2.5 Judicial deference

It influences and is reflected in the remedy that the court will be prepared to give in constitutional case. *In National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹⁹² Ackerman J stated that:

“The other consideration a court must keep in mind is the principle of the separation of powers and, flowing there from, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.”

The learned judge also stated that the court’s task is to ensure that legislation conforms and abides to the Constitution. And it is not the function of the court to interfere with issues such as the regulation of the economy and the redistribution of resources.

¹⁹¹ Section 173.

¹⁹² 2000 (2) SA 1 (CC)

In *Soobramoney v Minister of Health (Kwazulu-Natal)*¹⁹³ the court refused to order the state to provide expensive dialysis treatment to save the life of a critically-ill patient. In the course of his judgment Chaskalson P referred with approval to an opposite English authority where it was held that "*difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage to the maximum number of patients. This is not a judgment a court can make.*"¹⁹⁴

4.2.6 Checks and Balances

4.2.6.1 Legislative over Judiciary

If a court declares a statute invalid, in theory, parliament may amend the constitution to undo the court's decision. Within the SA jurisdiction this will be subject to the limitation that the amending legislation should not itself be invalid for unconstitutionality. Section 171 of the Constitution provides that the courts function in terms of national legislation and that their rules and procedures must be provided for in terms of national legislation. Currie and De Waal are of the view that Parliament may use that power to limit the court's power of judicial review and within constitutional limit and restrict their jurisdiction.

4.2.6.2 Judicial over Legislative

In South Africa the courts, depending on their jurisdiction, may declare any law which is inconsistent with the Constitution invalid. In *De Lille v Speaker of the National Assembly*,¹⁹⁵ the High Court held that courts may determine whether the internal procedures adopted by the National Assembly are consistent with the provisions of the Constitution. It has been argued on behalf of the speaker that, in so far as internal proceedings are a matter of parliamentary

¹⁹³ (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696

¹⁹⁴ R v Cambridge Health Authority, Ex parte B 1995 2 All ER 129 (CA).

¹⁹⁵ 1998 (3) SA 430 (C).

privilege, the court's jurisdiction to review them is excluded. The High Court rejected the argument and held that all Acts and decisions of Parliament are subject to the Constitution and therefore to the review power of the courts.

It must also be borne in mind that it is not often when we find litigants inviting the courts to intervene in parliamentary proceedings. In *Doctors for Life International v Speaker of the National Assembly*,¹⁹⁶ the case concerned the pregnancy and abortion related legislation, which was challenged on the grounds that parliament had failed in its duty to facilitate public involvement. The court had the following to say about the doctrine of separation of powers:¹⁹⁷

'The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceeding. This principle is not simply an abstract notion; it is reflected in the very structure of our government.'

The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle *'has important consequences for the way in which and the institutions by which power can be exercised.'* Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

¹⁹⁶ 2006 (12) BCLR 1399 (CC) pp 1428-1462

¹⁹⁷ 2006 (6) SA 416 (CC).

4.3 Lessons Kenya can draw from South Africa

Checks and Balances

The drafters of the South African constitution also adopted the principle of checks and balances to the doctrine of separation of powers. It requires different branches of the state to keep a check on one another in order to maintain a balance of power amongst them.

Although the principle of checks and balances infringe the original doctrine of separation of powers, the decision to include it was borrowed from American perspective that the realization that the principle division of functions in some of the early stage constitutions had failed to prevent the legislatures in those states from accumulating more and more powers.

Functions of the judicial officers

Through precedent, South Africa judicial officers have been seen to perform non judicial functions as further expounded through a test in the case of *South Africa Association of Personal Injury Lawyers v. Heath* where an acting judge was given to another arm of government in pursuance of the overall mandate of the court.

This is also seen through SA Judicial Service Commission whose members include members of the legislature and carryout the function of appointment of Judges. This begs the question whether this can be practicable in Kenya in tandem with the ingredients of the test in the precedent case mentioned above.

4.4 Conclusion

South Africa sets a good example of how conflicts between the different arms of the government can be resolved. Specifically, section 98 (5) of the South African Constitution has helped in creating harmony between the judiciary and parliament. The reality of the matter is that more often than not the supremacy battles are as a result of the inability or lack of room for a middle ground which would form the platform for a solution to the opposing views. This leads to hard line positions being taken by each institution leading to stalemates and ultimately to conflicts. The reprieve offered by giving time for parliament to rectify an unconstitutional act or even process, gives room for the much needed time for a middle ground and even wider consultations to take place. This is the panacea for good government and for the ugly supremacy battles between Parliament and Judiciary in Kenya.

Kenya may be heading to the right direction in resolving institutional conflict based on the decision made by the High Court. The High Court declared the Constituency Development Fund Act, 2013 as unconstitutional but went ahead and gave the government 12 months to make the necessary amendments, failure to which it will be nullified.¹⁹⁸

¹⁹⁸ *Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR.*

CHAPTER 5

CONCLUSIONS

5.1 Conclusions & Recommendations

This chapter gives a summary of key findings, conclusions and recommendations in this study as guided by analysis from preceding chapters. It also proposes possible reforms on how conflicts between Parliament and the Judiciary can be addressed. The measures recommended are drawn from international best practices especially from South Africa.

The four research questions that this study sought to answer were; first whether the Kenyan Constitution deals with separation of power? Second, whether parliament or judiciary is encroaching into the realm of each other? Third, what are the limitations of parliamentary sovereignty?¹⁹⁹

These research questions were guided by the following hypotheses: first that the constitution has clearly spelt out the powers/mandate of each arm of government so no conflict should arise. Second, the constitution has not adopted a pure separation of powers. Third, constitutional supremacy and sovereignty of the people has limited parliamentary sovereignty. Finally, the judiciary and parliament are encroaching into the functions of each other leading to a conflict between the two arms of government.

5.2 Summary of Findings and Conclusion

This study has established that the harmonious co-existence between Parliament and the Judiciary is very important for any constitutional democracy. The study has also explored the

¹⁹⁹ See Chapter 1 of this study.

impact of supremacy battles between the two institutions of government to the rule of law as well as other fundamental principles such as judicial independence.

As seen in Chapter 2, among the features of the Kenyan Constitution, is separation of powers. This doctrine which is entrenched in our current constitution has fundamentally altered the functioning of the three arms of the government as compared to the 1963 Constitution.

This chapter has also looked into and analysed concepts such as; separation of powers, parliamentary supremacy, and judicial independence and their relationship with each other.

In Chapter 3, the study has interrogated the conflict between parliament and judiciary post 2010 era. It has also looked into the disputes that have arisen between the two arms of government and how each arm has responded towards the conflict.

This chapter in conclusion holds that in instances where the two arms have been at loggerheads could have been easily avoided had the law been implemented appropriately. And that in order to restore good governance in any political system, it is inevitable to maintain coordinative relationships between the two pivotal branches of the government.

However, jurisprudence shows that recently courts have adopted remedies of leaving to Parliament to take remedial actions in cases where for instance a court finds that a particular statute is incompatible with the Constitution. This notwithstanding, there is need to review the working relationship of our institutions to ensure there is no domination by one institution over the others.

In Chapter 4, the study had focused on comparative analysis and lessons from South Africa. Supremacy conflicts between the Judiciary and Parliament are not unique to Kenya. The same

scenario is played out in South Africa. However, the approach taken by South Africa is more effective in dealing with the situation.

Having made the above findings, the study argues that separation of powers plays a vital role in a constitutional democracy. The three arms of government are meant to work separately yet complement each other. The CoK has dealt well with this issue and most of the functions for the judiciary, parliament and executive are clearly spelt out.

The constitution cushions the judiciary from undue influence under article 159 by providing that it shall only be subject to the law and shall not be subject to the control of any authority.²⁰⁰ This principle should be upheld whenever there is conflict between Parliament and the judiciary.

5.3 Recommendations from the Conclusions and Findings

Following the findings and conclusions from the study I make the following recommendations;

5.3.1 Embrace Alternative Dispute Resolution Mechanisms

Article 159(2) (c) of the Kenyan Constitution encourages parties to embrace alternative forms of dispute resolution in resolving disputes. These forms include conciliation, mediation, and arbitration. This will help to create room for much needed dialogue between the two institutions. It will also ensure that parties avoid the court process which in most cases affects the relationship of the parties after a matter has been adjudicated by the judicial organs.

5.3.2 Proper regard and mutual respect for each other's roles

In executing their roles, the different arms of government, should respect and cooperate with each other in conducting their relations.

²⁰⁰ Constitution of Kenya 2010, Article 160.

5.3.3 Adherence to the doctrine of separation of powers

Both Parliament and judiciary must adhere to separation of powers as well as checks and balances to avoid overstepping on each other mandate.

5.3.4 Respect for rule of law

The institutions should pay due regard to the rule of law. Their actions must have a foundation in law. This entails parliament respecting court orders and judiciary respecting parliament summons as long as they are founded with law.

5.3.5 Need to utilize the Mediation Committee by the Senate and the National Assembly

The Mediation Committee is established under Article 112 of the Constitution to help resolve disputes between the Senate and the National Assembly emanating from enactment of ordinary bills concerning county governments. Both houses of parliament should embrace the role of the mediation committee in their negotiation of contentious issues in the various ordinary bills concerning county governments. The Mediation Committee was first appointed during the enactment of the Division of Revenue Bill in 2013 but this matter proceeded to the Supreme Court in which an advisory opinion was rendered.²⁰¹

5.3.6 Judiciary should assert itself

Judiciary as the custodian of legality has the mandate to interrogate any action by any authority as long as that interrogation is founded on constitutionality. Judiciary should therefore assert itself and should not be intimidated by any person or institution. The rationale of judiciary independence is to promote both institutional independence and decisional independence of judiciary.

²⁰¹ See Article 112 and 113 of the Constitution of Kenya 2010.

5.3.7 Adoption of an Article similar to Section 98 (5) of the South African Constitution

The relevant part of section 98 (5) of the Constitution of South Africa is to the effect that the Constitutional Court (read as High Court in our case) may in the interest of justice require Parliament to correct the defect in the law or provision, which shall remain in force pending the period specified. It is my argument that if we had a similar provision codified in our law tension between the two arms of government would reduce as the judicial arm shall be viewed as providing guidance to Parliament rather than being 'combative and overstepping or undermining' Parliament by declaring a certain law as unconstitutional.

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