

CONTEMPORARY ISSUES OF LAW. SEPARATION OF POWERS: JUDICIAL INDEPENDENCE IN KENYA.

Gladwel M. Wawira¹¹⁴

ABSTRACT

According to Montesquieu, there would be an end of everything if the same person exercised the powers of implementing public decisions, enacting laws, and deciding cases. For this reason, democratic countries have incorporated the doctrine of separation of powers in their jurisdictions. Kenya, being one of the democratic countries, has incorporated in its Constitution the separation of powers by creating three arms of the government which are to work independently, and interdependently in exercising checks and balances.

However, since independence (1963), the Judiciary (one of the three arms of government) has been prone to control and attacks from the other arms (Executive and the Legislature) and this has undermined its independence.

The health of judicial independence has come under scrutiny since the start of this year, 2024. It has been so sad to see the head of the Executive threatening to ignore the Court orders (Contempt of Court) that he feels they are delaying his planned public developments. This has therefore interfered with the independence of the judiciary.

This research paper aims at recognizing the doctrine of Separation of powers and the Constitutional provisions of the Independence of the judiciary. It discusses the challenges that the judiciary is likely to encounter when its independence is interfered with. This paper finds the need to uphold the rule of law and respect the Judiciary and other arms of government.

¹¹⁴ Wawiragladwel1@gmail.com

INTRODUCTION

Constitutionalism and rule of law are the key factors to a political democracy that respects human rights. As it turns out to be, Judiciary is the custodian of the rule of law and is the linchpin of the scheme of checks and balances through which the separation of powers is assured. The Executive and the Legislature are very powerful arms of government and in order to ensure that they do not misuse their powers, the Judiciary comes in to play. The Judiciary comes in to guarantee that the Executive-the government- will respect the rule of law and act within the established legal norms, processes and institutions. For this reason, the judiciary has to be independent and be free from interference by the executive.

During the pre-2010 Constitutional era, the independence of the judiciary was only found in writings but in reality, no such a thing existed. That era was characterized by the Executive controlling the judiciary; the rulings and judgments were made in favour of the government, as a ruling made against **it would cost one's job. There were so many political murders, detention** without trial, arbitrary arrests and detentions, false and politically motivated charges of opponents of the government, both real and imagined, became the business of the state. State and KANU officials committed crimes with impunity. When all those were happening, the judiciary was quiet and took no action to respond. There were also laws passed by the parliament against the interest of the public, for instance, the amendment of Section 2A which turned Kenya into a one-party State. During that era, the people had no freedom of expression and their rights were violated by the government as Judiciary could not even guarantee a protection of the same.

The 2010 Constitution is the *crème` dela` crème`* constitutions that Kenya has ever had. Under this constitution, the freedom of the media is guaranteed and free from State control as it used to

be during the era of president Moi. Also, there was protection of human rights, guaranteed by the judiciary-it gives remedies to one whose rights have been violated or even threatened. This constitution also set out the role of each arm of government, separately, hence the doctrine of Separation of powers. Since 2010, we have had a better judiciary that is more independent compared to the pre-2010 judiciary. The current judiciary is free to make judgments and rulings against the Executive. An example of this is the ruling against the Building Bridges Initiative (BBI) report which had emanated from the then Head of State. Sadly, the independence of the judiciary has currently been challenged by the Head of State by threatening to defy Court orders that have been issued against his development plans. He feels that those projects should be implemented even after the Courts decision that they are against the interests of the people. This **has left the country worried about going back to the Independence Constitution's era.**

SEPARATION OF POWERS

John Locke argues that man is weak by nature, therefore, if all the power is left in one man or a few hands, such power will be abused. He then concludes that power should be divided into three branches, namely: the executive, the legislature and the federative. This is to avoid a situation where the same persons who have law-making power have also in their hands the power to execute or adjudicate laws. He further illustrates that separating the functions of the creators of the law from those of the executors of the law would lessen the temptation to abuse power. Similarly, in Kenya power is divided into three arms, namely; the executive, legislative and the judiciary, which are meant to ensure that the law makers do not implement the law and interpret the law too.

Baron de La Montesquieu envisions a government made up of the executive, legislature and the judiciary and a pure separation of powers of these three bodies aimed to protect fundamental

human rights and liberties. However, in an ideal democratic system, pure separation of powers does not exist as there exists a system of checks and balances which hinder the pure separation of powers. No democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Governmental powers and responsibilities intentionally overlap; they are too complex and interrelated to be neatly compartmentalized. As a result, there is an inherent measure of competition and conflict among the branches of government. As a democratic country, Kenya in its constitution has provided for the separation of powers under Article 1(3). The Constitution delegates power to parliament and legislative structures at the counties, national executive, executives at the counties, and the judiciary. However, this separation of powers is not absolute as there is an element of checks and balances among the three arms of government.

The role of the three arms of government is provided for in Chapter 8, 9 and 10 of the Constitution. The key role of the Legislature as stipulated in Chapter 8 is to enact and amend laws, with the role of the Executive in Chapter 9 being to implement the laws made and that of the Judiciary being to interpret the laws made by the legislature. The doctrine of separation of powers, according to **Montesquieu is necessary, according to his research, “every man invested with power is apt to abuse it, and to carry his authority as far as it will go.” Van der Vyver simplifies the doctrine of separation of powers into certain principles, which are as follows:**

- i) distinction between the three branches of government, to avoid the same people serving in more than one arm of government at a time;
- ii) the three arms should have separate and independent functions in order to avoid interference from other branches; and
- iii) the principle of checks and balances.

The judiciary exercises check and balances in the following ways; checking and ensuring that the laws passed by the government are constitutional or rather they comply with the law and that the interests of the people are considered before enacting the laws. It also checks on the policies formulated by the Executive; whether they are in compliance with law, and that the interests of the people are considered first before the implementation. When the government fails to obey Orders made by the Judiciary, it amounts to it undermining the role of the Judiciary, and not adhering to one of the principles of separation of powers as expressed by Van der Vyver. **The Executive should therefore avoid “killing” the doctrine of Separation of powers in the country.**

INDEPENDENCE OF THE JUDICIARY

In adhering to the doctrine of separation of powers, the Kenyan constitution has created three arms of government (Legislature, Executive and Judiciary) in which each of the arm has a role to play, free from interference from the others, for effective performance of its roles. In as much as each arm of the government is to be independent and free from interferences from the other arms, there is need for checks and balances. The justification for the exercise of checks and balances among the three arms of the **government is to avoid what Montesquieu calls “Pure Separation of powers” which according to Ambani and Mbondenyi would result to collapse of a democratic government.** According to Ambani and Mbondenyi, rigid separation of powers would be **‘subversive of the efficiency of government’ and as a result would lead to its collapse.**

In an ideal democracy, the Judiciary must be independent and allowed to decide matters before them without any restrictions, improper influences, pressures, threats or interference, direct or **indirect, from any quarter or for any reason. Article 160(1) states, “in exercise of judicial authority,** the judiciary, as constituted by Article 161, shall be subject to this Constitution and the law and

shall not be subject to the control of any **person or authority.**” **This is where the judiciary draws** its independence from. Judicial authority is exercised by the Courts and the Tribunals in Kenya. The role of the judiciary is to interpret the law. In carrying out its role, the judiciary promotes Constitutionalism and protects the rule of law.

The Courts have the role to determine the question as to whether any law is inconsistent or in contravention of the constitution, matters relating to the powers of State organs, also determine the question of whether anything said to be done under the authority of the constitution or any other law is inconsistent or in contravention of the Constitution.

In the words of Justice Gicheru, “it would seem therefore that the legislature’s power to make laws and the executive’s power to implement them does not entitle these two institutions of government to usurp judicial power of the judicature.”

CHALLENGES FACED BY THE KENYAN JUDICIARY

The current judiciary is facing a number of challenges inter alia; financial challenges, political interference, attacks on judicial officers and attempts to undermine court decisions. For instance, in November, 28, 2023, Peter Salasya, Mumias East Member of Parliament, was accused of threatening to kill a Magistrate who failed to rule in his favour- ordered him to pay Kshs 500,000. Despite the constitutional provisions aimed at protecting the Judiciary and its independence, the current judiciary continues to face political interference and threats to defy court orders. Early this year (at the beginning of January, 2024), the Head of State threatened to defy Court orders. This came after the Courts ruled against his policies-Housing levy and the Universal health project. The High Court in November 28, 2023 declared the Housing Levy, which was set to be 1.5 % per month for both the employers and employees, unconstitutional. The government, **however appealed this decision, and the Court of Appeal held the High Court’s decision saying**

that, **“the question that begs an answer is whether in the circumstances of the case it would be in the public interest to grant a stay whose effect is to allow a statute that is unconstitutional to continue being in the law books pending the hearing of an appeal.”** On January 4, 2024, President William Ruto complained that his plans were being sabotaged through Court orders. He vowed to **disobey the orders and implement the projects. The President’s threats to defy court orders** currently remains the biggest challenge to the Judiciary that is undermining its independence.

He also expressed his decision for not respecting the judiciary by saying that, **“it is not possible that we respect the judiciary yet a few individuals who are beneficiaries of corruption are blocking our development agenda through court cases.”** **“We have said we will change the laws. We will change the way NHIF operates so that we stop public funds from being stolen through digital systems that protect resources that are meant to help Kenyans.”** The Kenya Magistrates and Judges Association on January 3, 2024 noted that Ruto’s remarks are **unfortunate and are aimed at ridiculing and painting the judiciary negatively hence interfering with judicial independence.**

The utterances of the Head of State have left the judiciary in trouble and at risk of losing public confidence since the person who is supposed to be protecting the Rule of Law and the Independence of the Judiciary is expressing the need to disrespect it and act in Contempt of Court.

The President’s accusation that corruption exists in the Judiciary has a negative impact on the Judiciary as it is robbing it off its public confidence. With this we are left wondering whether the provision of the Constitution on equality before the law, the doctrine of Separation of powers and the independence of the Judiciary are just mere provisions that should only remain in writings or should be practical.

CONCLUSION

Despite facing the above-named challenges, the judiciary has maintained resilience in fighting against them. For instance, despite the Executive asking for a meeting with the Chief Justice, the Courts have maintained their independent decisions on ruling against some of the governmental policies, the case of deploying Kenya Police to Haiti to tackle gang violence, contrary to what the people expected to happen after the talks.

This paper finds the need to respect the judiciary and that the Executive and the legislature should not interfere with the independence of the Judiciary and its acts of exercising checks and balances.

When an one's rights are infringed or threatened to be infringed, one runs to the Judiciary to seek remedies, when there is a question of interpretation of a law, and a question of public interest, the decisions of the Courts are sought. This therefore shows how the Judiciary is an important arm of the government that does not deserve to be trolled or even threatened especially by the Head of State who is supposed to be a model to the citizens. The Kenya Magistrates and Judges Association **on January 3, 2024 observed that, “where the** decisions of the court are not respected, the rule of law is betrayed and anarchy prevails. Judges and Judicial officers cannot work freely with such **threats especially when made by no other than the President himself.”**

In conclusion, the doctrine of separation of powers is essential in running a democratic State, although there should be an element of checks and balances to avoid what Ambani and Mbondenyi call **“rigid separation of powers” which they argue would be ‘subversive of the efficiency of government’ and as a result would lead to its collapse. Come to think of it, what would happen if** the power of the Judiciary would be vested in the Legislature? Montesquieu thinks that if the judicial power was to be delegated to the Legislature there would be arbitrary control, and, if entrusted in the executive only, there would be oppression.