

The judicial appointment process in Kenya and its implications for judicial independence

By

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Abstract

In order to complement existing empirical research on democratic consolidation in Kenya and the role of the judiciary in particular, this mini-dissertation analyses the relationship between judicial appointment processes and judicial independence in Kenya. The escalation of corruption, centralisation and abuse of power by the executive, the lack of government accountability and post-election conflict of 2007 is linked to the dominance of the executive and corresponding subservience of the judiciary. Historically, judicial appointments have been the ambit of the President. The powers given to the President to appoint and remove judges have resulted in judicial appointments premised on allegiance to the executive rather than on upholding justice and the Bill of Rights. To rectify this deficiency, the 2010 Constitution has introduced a merit based system of judicial appointments that meets international standards on judicial independence. The new process requires the President to limit his appointments to the recommendations of a Judicial Service Commission whose responsibility it is to shortlist candidates through a transparent public process. An analysis of the selection of Kenya's sitting Chief Justice and Deputy Chief Justice demonstrates that the reformed judicial appointment process has delegitimised the executive's dominance over the judiciary and by so doing has placed Kenya on the road restoring judicial independence.

Chapter 1: Introduction

This multidisciplinary study highlights the intersection between politics and law. It focuses on the impact of the judicial appointment process on judicial independence and democracy in Kenya. Judicial independence is important as it is indelibly linked to the fair administration of justice. It is a modern concept premised on the principles of separation of powers and the rule of law, characteristic of democratic systems. A democratic political dispensation is built upon the principles of equality, justice, fairness and respect for the rights of people. These principles must be guarded by a country's constitution that should provide for the separation of powers between the executive, the legislature and an independent judiciary.

There is international consensus on the importance of judicial independence. In the Preamble to the UN Charter, member states commit to establish conditions in which justice can be maintained and judicial independence is a crucial component of such conditions. Article 10 of the Universal Declaration of Human Rights states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal'.¹ However the Universal Declaration of Human Rights is a non-binding treaty.

In addition to the Universal Declaration of Human Rights, the UN General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 endorsed the *Basic Principles On the Independence of the Judiciary* adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985. In these principles the international community recognises that an independent judiciary is indispensable to ensuring the construction of societies in which justice is upheld and human rights respected. The principles enjoin all states to respect the independence of the judiciary and declare that the judiciary should be able to decide all matters impartially based on facts and the law. The statement also pronounces on the selection of judges, their conditions of service and their professional conduct, including the proper grounds for their removal.

¹ General Assembly Resolution 217 A (III).

African states have also recognised the centrality of independent courts towards the protection and promotion of human rights observance on the continent. Article 26 of the African Charter on Human and People's Rights obliges state parties to the Charter to guarantee the independence of the judiciary through the establishment of institutional mechanisms for the promotion and protection of the rights enshrined in the Charter.²

It is incontrovertible that:

the judiciary plays a crucial role in the system of checks and balances, a role which demands independence from the executive and legislature. By applying national constitutions, legislation and the common law to official actions, courts are supposed to ensure that the other branches of government respect the rights of the people and do not act illegally.³

This study focuses on the reformed judicial appointment process as it appears in Kenya's 2010 Constitution and what it means for judicial independence and democracy in Kenya. Laws may be enacted with the aim of contributing to the transformation of society; however, these laws cannot achieve social change without the intention, and the will of the various actors in the political sphere.

1.1 Characteristics of a democratic system of governance

Democracy is a contested concept and there are varying approaches to defining democracy. The minimalist definitions⁴ view democracy as the periodic conduct of free and fair elections. There are the more expansive views⁵ that construe democracy to be more than just procedures by which rulers attain to rule, but also concerned with how rulers exercise their rule.

For the purposes of this study, democracy is a system of governance characterised by popular participation through regular, competitive, free and fair elections. In addition,

² African Charter on Human and People's Rights Article 26.

³ A Gordon & D Bruce 'Transformation and independence of the judiciary in South Africa' (2007) in *After the transition – justice, the judiciary, and respect for the law in South Africa. A collection of papers from a project on Justice and Transition*, 7 <http://www.csvr.org.za/wits/papers/paptjust.htm> (accessed 16 November 2011).

⁴ S P Huntington (1991) *The third wave: Democratization in the late 20th century* 6-11; P Chabal 'A few considerations of democracy in Africa' (April 1998) 74(2) *International Affairs* 296; L Kekic (2007) *The Economist Intelligence Unit's index of democracy* Economist Intelligence Unit 1, 2.

⁵ F Zakaria 'The rise of illiberal democracy' (1997) 76(6) *Foreign Affairs* 22; Kekic (n 4 above) 1.

democracy is a system that enshrines the rule of law, which includes the guarantee and protection of civil and political rights, as well as checks and balances on executive power through the establishment of democratic institutions to ensure government accountability, that is, constitutional democracy.

Democracy should be entrenched in the psyche of most if not all groups within society. Additionally, the majority of the public must accept democracy as the best way of maintaining order in society. This will be attested by a willingness to subject all conflicts arising within democratic society to 'specific laws, procedures, and institutions sanctioned by the new democratic process'⁶ for resolution. Democracy in essence emphasises accountability to democratic values both by the governors and the governed.⁷

Therefore, the success of democracy is by and large determined by the attitude and behaviour of the individuals that by virtue of being elected occupy posts in state institutions. The expectation is that they will rule in the interests of the people, as they are accountable to the people. It is this notion of political accountability provided for by elections that gives elected officials legitimacy. Therefore, in order to retain legitimacy beyond elections, these individuals must assent to democratic principles and demonstrate these in their conduct.⁸ These democratic principles as well as other values and norms that a society seeks to promote and uphold are more often than not entrenched in the country's constitution.

1.2 The importance of constitutions in democracies

The historical purpose of a constitution is to delineate the extent of the state's authority or power in relation to that of its citizens. From this perspective, it is a declaration of the rights of the individual whilst outlining the limits on government powers. In addition, the constitution functions to specify and define the structure (organogram) and extent

⁶ JJ Linz and A Stepan 'Toward Consolidated Democracies' (1996) 7(2) *Journal of Democracy* 16.

⁷ Chabal (n 4 above) 302.

⁸ Huntington (n 4 above) 279.

of government, the rules and procedures for attaining to power as well as the rules and procedures on how the powers of government are to be exercised.⁹

Constitutions are political statements because they are the products of the sociopolitical and economic environments in which they were constructed. Furthermore, constitutions reflect the compromises between varying interests within societies at the time of their compilation and are more often than not a settlement reached at the end of a major disruption in political life, either as a result of war, regime change or gaining of independence after a period of foreign occupation.¹⁰

Because constitutions are products of compromise, they are often unclear and lined with inaccuracies and ambiguity that may at times render them obstacles to the practicalities of governing. Since most constitutions are preceded by a legacy of the abuse of power by former rulers and because of the fear of such abuse becoming a future reality, constitutions run the risk of over-circumscribing the authority of rulers to the point of undermining government's ability to achieve policy goals.¹¹

It is for this reason that President Jomo Kenyatta, Kenya's first President after independence, felt it necessary to amend the 1963 independence constitution to increase his own discretionary powers in order to be able to address the many social, economic and political challenges facing the newly independent country. However noble his intentions may have been his actions resulted in the very abuses, such as corruption and violation of human rights. These are the very vices that the original constitutional restrictions were attempting to prevent.

Hence, Diamond *et al*, refer to the need to strengthen horizontal accountability and the rule of law.¹² This has to do with how to keep political actors accountable to the rule of law. Herein lays the important role of the judiciary as an independent and impartial institution and interpreter of the law, acting as a referee to ensure that all members of

⁹ R Hague and M Harrop (2010) *Comparative government and politics: an introduction* 8th ed. 250, 251; A Heywood (2007) *Politics* 3rd ed. 316.

¹⁰ Hague and Harrop (n 9 above) 252; Heywood (n 9 above) 316, 317.

¹¹ Hague and Harrop (n 9 above) 252, 253.

¹² L Diamond, M F Plattner, Y Chu, and H Tien (1997) 'Consolidating the third wave democracies: Regional Challenges' 111.

society including state organs and state officials play by the rules of the game and to prevent executive overreach.¹³

1.3 The importance of judicial independence in a democracy

It is important to highlight some vital elements about the nature and role of the judiciary within the broader political landscape of a democratic state. In a democracy, judges are thought and portrayed to be independent, non-political actors. Though the judiciary is viewed as non-political in nature, the reality is that judges have an influence on political activities including resolving conflict and safeguarding the rule of law. Indeed the decisions that judges make carry political implications.¹⁴

Furthermore, it can be postulated that judges have political influence in two important ways. Firstly, judges may be subject to external influences and pressures to decide in one way or another in a specific matter. Secondly, like all other human beings, judges have personal biases, which are informed by their background, worldview and interests, and these may encroach on their adjudication activity.

Additionally, the selection process of judges plays a vital role on their independence. It can be argued that the external pressure on judges is more pronounced in cases where politicians are deeply involved in the selection and promotion of judges. In democratic societies, judges are shielded from external bias by the entrenchment of the principle of judicial independence, guaranteed and safeguarded by the judiciary's security of tenure and intolerance for interference with and criticism of judges' decisions.¹⁵

1.4 Overview of political developments in Kenya since independence

The incumbency of President Jomo Kenyatta, Kenya's first president, was characterised by increasing centralisation of power in the office of the President. President Kenyatta instituted constitutional amendments to give greater powers to the presidency with the

¹³ Minutes of ISS training workshop, Comment made by Judge Moloto, ICTY, at a training workshop hosted by the International Crime in Africa Programme of the Institute for Security Studies at 314 On Clarke Guest House in Brooklyn, Pretoria, 22 – 25 March 2011.

¹⁴ Heywood (n 9 above) 329.

¹⁵ Heywood (n 9 above) 329.

aim of minimising challenges and distractions from his (and the ruling party's) goal of establishing strong government and promoting security and development in the country. Moreover, he adopted policies aimed at co-opting opposition parties, thereby undermining multiparty democracy thus making Kenya a *de facto* one-party state. Besides, President Kenyatta perpetuated the politics of ethnicity that were made prominent by the colonial administration. Consequently, members of his Kikuyu tribe who have dominated the political and economic scene in Kenya since independence constituted the bulk of his government.¹⁶

President Daniel Arap Moi, his successor, used constitutional amendments to change Kenya into a *de jure* one-party state in 1981. Continuing in President Kenyatta's tenor, President Moi increased his powers by diminishing the authority and security of the judiciary and legislature. He used a combination of patronage and repression to secure allegiance, and overlooking and allowing corruption was a popular form of patronage under President Moi and through this he favoured his tribesman, the Kalenjin, at the expense of other tribes.¹⁷

Resultantly, this created conditions in which the judiciary could not carry out their duties with fidelity and integrity, without threat, improper influence, interference, restrictions, pressures and inducements.

Both Kenyatta and Moi's presidencies led to the politicisation of ethnicity and entrenched the perception that marginalised ethnic groups could only achieve their developmental goals and necessities as well as access economic prowess by capturing the state. This has proved to be a great source of instability in Kenya. For instance, a feeling of resentment towards the dominant Kikuyu tribe among the marginalised ethnic groups was a key factor in the violence and killings of the post-election clashes of 2007/2008.¹⁸

¹⁶ J D Barkan 'Kenya: Assessing risks to stability' (June 2011) *Report of the Center for Strategic & International Studies Africa Program* 5, 6 www.csis.org (accessed 16 November 2011).

¹⁷ Barkan (n 16 above) 6.

¹⁸ Barkan (n 16 above) 7, 8.

In the prevailing context of executive dominance of the judiciary, corruption in Kenya reached record levels under President Moi.¹⁹ Human rights violations and harassment of opposition and civil society activists also increased. From the late 1980's those activists who sought relief from the Kenyan courts were disappointed because judges complied with executive policies over the Bill of Rights.

Under pressure from donors and civil society in 1991, President Moi reinstated the multiparty system through a major constitutional amendment. The adoption of multipartyism did not restore political trust and stability and Kenya, mainly because President Moi and his ruling Kenya African National Union (KANU) manipulated the system. He allowed opposition parties to register but frustrated them through delays in the application process and worked towards dividing the opposition. He restricted the opposition's ability to campaign by denying permits for rallies. He also constrained media freedom. President Moi nominated all members of the Electoral Commission thus securing the outcome of the 1992 elections in his favour. During the elections, President Moi dispatched security forces into the various regions to destabilise the electoral process in order to 'confirm his prediction that the transition to multiparty politics would lead to disunity and violence'.²⁰ President Moi won the 1992 elections, defeating a split opposition with 36% of the vote. The 1997 election went the same way as the 1992 polls. President Moi retained power using the same tactics.²¹

True change in Kenya could therefore only be accomplished by a complete constitutional reform that would reinstate fundamental principles of democracy, that is, separation of powers and the rule of law. Such a reform would also require the overhaul of the judiciary, which has for far too long been an instrument of oppression in the hand of the executive.

Branch and Cheeseman argue that: 'In the Kenyan context, divorcing appointments to the Electoral Commission and the judiciary from executive control would give the opposition greater faith in these institutions'.²² They also state that 'effective

¹⁹ Barkan (n 16 above) 6.

²⁰ Barkan (n 16 above) 7.

²¹ Barkan (n 16 above) 7.

²² D Branch & N Cheeseman 'Democratization, sequencing, and state failure in Africa: Lessons from Kenya'

institutional reform is essential to prevent the transition to multi-partyism being self-defeating and forever incomplete.’²³

Although the autocratic system of governance was taking long to capitulate, there were signs of progress. In 2001 Parliament adopted legislation to separate the legislature from the executive and President Moi accede to it. Since then, Parliament has asserted its authority and is willing and able to challenge the executive.

Mwai Kibaki (current Kenyan President) served as the Minister for Economic Affairs and Planning and Minister of Finance under President Kenyatta. In the lead up to the 2002 elections, Mwai Kibaki and Raila Odinga (Kenyan Prime Minister since 2008) formed the National Rainbow Coalition (NARC) in the bid to unite Kenya’s biggest opposition parties. NARC won the 2002 elections following Odinga’s endorsement of Kibaki and Kibaki was installed as third President of Kenya. Although they worked together, Kibaki and Odinga differed on a number of issues including the creation of a Prime Minister post, the number of Parliamentary seats to be allocated to each coalition member and the distribution of ministerial posts among the coalition parties. President Kibaki populated his cabinet with his Kikuyu tribesmen together with individuals from the Meru and Embu tribes, cousins to the Kikuyu.

Despite the wrangling within the coalition, the socio-economic conditions in Kenya improved under President Kibaki.

Economic growth resumed, reaching 7 per cent in 2007. The quality of public administration was substantially restored, as was the performance of state-owned corporations such as Kenya Airways and the marketing boards for coffee and tea. Personal incomes rose for the first time in two decades. Tourism and investment, which had deserted Kenya under Moi, returned.²⁴

The one thing President Kibaki failed to improve upon was the high levels of corruption that persisted in his administration. The gains made under President Kibaki were not enough to guarantee long lasting stability in the country. The 2007 polls were highly

(2008) 108 (430) *African Affairs* 26 <http://afraf.oxfordjournals.org/> (accessed 16 November 2011).

²³ D Branch & N Cheeseman (n 22 above) 26.

²⁴ Barkan (n 16 above) 8.

contested. The bloodshed and chaos lead all parties to realise the need for constitutional reform and an overhaul of Kenya's political system. The greatest test is whether the political elite will subject themselves willingly to the process and cooperate to ensure that the fresh 2010 Constitution is implemented.

It is for this reason that it is important to analyse and assess the implementation of the new judicial appointment process, which was the first of the reforms to be implemented, in order to determine the prospects for judicial independence in Kenya moving forward.

Judicial independence is one indicator of the state of democracy in a society. The judiciary in the separation of powers scheme acts as a check and balance on the legislature's and executive's actions. In this way the judiciary may prevent the other two branches of government from overstating and abusing their powers. Therefore, evaluating the state of judicial independence in Kenya is important to assess the future of democracy in Kenya.

This study provides opportunity to test two assumptions. Firstly, that democratisation without the protection of a legal framework creates uncertainty which may lead to instability and cannot be viable in the long term. The executive's interference in judicial processes and dominance over judicial officers since independence has undermined has weakened the justice system and democracy in Kenya. Secondly, that a judicial appointment process that is insulated from executive control guarantees the election of good judges, secures judicial independence which in turn contributes to strengthening the justice system and the rule of law which are the bedrock of democracy.

1.5 Methodology

This study adopts the case study method, which is appropriate in this case because it allows for a thorough exploration of social phenomena in a specific milieu. It also provides for the collection of data from a variety of sources in order to arrive at an in

depth understanding of the subject of study.²⁵ Case studies are excellent to shed light on underlying issues in society and can be very useful to determine the impact of policies on societies.

The author will analyse provisions for the judicial appointment process in Kenya's 1963 and 2010 Constitutions, journal articles, newspaper articles, and other published media that reflect on and provide an account of the above mentioned appointment process. In addition, the author conducted telephone interviews with some civil society organisations in Kenya, based on open-ended questions, to get their sense of the future prospects for judicial independence in Kenya within the current context of the implementation of constitutional reform. The respondents' consent was sought for the interviews and each is identified in the study by the organisations they represent.

The study explores the intersection between the law and politics. In particular, the author reviews the relationship between the judiciary and the executive in Kenya from the colonial period to the enactment of the 2010 Constitution. The main focus is on provisions in Kenya's 2010 Constitution for judicial independence and the judicial appointment process. These provisions are measured against the criteria for the selection of good quality, independent, and impartial judges.

The author considers the reforms made to the judicial appointment process and focuses on the 2010 Constitution provisions regulating the selection of the Chief Justice, the role of the Judicial Service Commission (JSC), the powers of the executive (specifically the President) and the role of Parliament. The level of public participation in the judicial selection process is also assessed. The study also analyses the political contestation brought about by the implementation of these provisions involving the executive, Parliament, civil society and the High Court.

The nomination process that led to the selection of the Chief Justice – which was the first step in implementing the reformed appointment process – and deputy Chief Justice is analysed as a case study to determine which constitutional provisions were applied

²⁵ P Baxter and S Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (December 2008) 13(4) *The Qualitative Report* 544, 545.

and the impact of this application on the broader issue of consolidating democracy in Kenya.

1.6 Structure

In an effort to address the topic effectively, the remainder of this mini-dissertation is divided as follows:

Chapter two provides an overview of the relationship between the judiciary and the executive in Kenya from the colonial period to the enactment of the 2010 Constitution. It also considers how the reformed judicial appointment process may contribute to altering the historical legacy of executive dominance over the judiciary and to re-establishing judicial independence.

Chapter three discusses the qualities required in individuals to be selected as judges as well as the available methods to select judges. It also provides a brief historical overview of the judicial appointment process in Kenya since independence in 1963 and the changes made to the process in the 2010 Constitution. Included is an analysis of Section 166 (1) (a), Section 118(1) & (2) and the Sixth Schedule Part 4 Section 24 (2) of the 2010 Constitution which elucidates the role of Parliament and also delineate the framework for public participation in the judicial appointment process.

Following the assessment of the judicial appointment system as delineated by the 2010 Constitution, chapter four investigates whether the reformed appointment process is appropriate to ensure the selection of ‘good judges’ (as discussed in chapter 2) by considering the appointment of Kenya’s Chief Justice and Deputy Chief Justice in 2011. The chapter concludes with an analysis of and observations about the impact of Kenya’s reformed judicial appointment process and the developments around the appointment of the Chief Justice and Deputy Chief Justice on the consolidation of democracy in Kenya drawing from the insights of active members of Kenyan civil society.

Chapter 2: Judiciary-executive relations in Kenya

This chapter provides an overview of the relationship between the judiciary and the executive in Kenya from the colonial period to the enactment of the 2010 Constitution. Consideration is given to the history of the judiciary's subservience to the executive and how the reformed judicial appointment process may address this challenge and restore healthy relations between the executive and judiciary.

2.1 Introduction

An independent judiciary is a safeguard to the rule of law and is indispensable in the system of separation of powers. Without it, the other branches of government, especially the executive, may choose to disregard the rule of law and democratic principles in the exercise of its powers. The presence of the judiciary ensures that the constitution is a living document and the bedrock of the society guiding, defining and permitting the actions of all citizens and most importantly, government. All are subject to the constitution as the highest law of the land with no exception to the state and its officials.²⁶

Courts in a newly established and consolidating constitutional democracy are in a privileged position to influence society to embrace a new constitution and the values, principles and norms it espouses. Courts may position themselves as guardians and guarantors of the founding essence of the political and social order by adhering to the letter of the constitution and displaying courage to withstand challenges from other branches of government. Ideally judges must adjudicate strictly according to the law; however, national political dynamics can impact negatively on the legitimacy and effectiveness of the judiciary when dominant political leaders do not accept the restrictions of the courts. Moreover, public attacks by political officials on judges who are perceived to be too strict can diminish the influence of the courts.

²⁶ M Mutua 'The rule of Law and Judicial Subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 96, 97.

The result is that courts cannot protect the constitution when they do not have confidence, credibility and legitimacy.²⁷

In the attempt to overcome a legacy of political interference in the functioning of the judiciary, courts in Kenya have the task of winning the confidence of the public and politicians alike by interpreting the new Constitution (2010) with integrity. In doing this, Kenya's courts may draw from the experience of courts which have found themselves in similar circumstances, including the Constitutional Court of South Africa (CCSA).

Roux²⁸ assesses how the CCSA makes decisions that are unpopular with the other branches of government but successfully retain its independence from political interference. He identifies requirements that may be applicable to other consolidating democracies including Kenya:

- 1) Institutional security: The acquiescence of the other branches of government and their willingness to be subject even to the court's unfavourable rulings and the court's ability to withstand threats to its independence.²⁹
- 2) Legal legitimacy: The extents to which its decisions are credible, that is, 'are generally regarded as having been founded on plausible interpretations' of the transitional constitution.³⁰
- 3) Institutional legitimacy: The level of public support that the court enjoys regardless of disagreement with its decisions.³¹

Constitutional courts in consolidating democracies or courts with jurisdiction over constitutional matters must weigh up the advantages and disadvantages of pursuing

²⁷ N Maveety and A Grosskopf "'Constrained" Constitutional Courts as conduits for democratic consolidation' (September 2004) 38(3) *Law and Society Review* 466, 467.

²⁸ T Roux, 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7(1) *ICON*.

²⁹ Roux (n 28 above) 107, 109 & 110.

³⁰ Roux (n 28 above) 109.

³¹ Roux (n 28 above) 109.

legal legitimacy at the expense of institutional security. Sometimes courts can pursue legal legitimacy to the peril of their institutional security.

In such cases, courts should consider relaxing the law unless such action would permanently undermine their credibility in future.³² Handing down decisions that undermine the credibility of the court could be detrimental to public support for the judiciary.

What follows is an assessment of the relationship between the judiciary and executive in Kenya from the colonial period to the enactment of the 2010 Constitution, and of how the reformed judicial appointment process contained in the 2010 Constitution may contribute to altering the historical legacy of executive dominance over the judiciary and thereby establish judicial independence.

2.2 Executive-judicial relations during the colonial period in Kenya

The judicial system in colonial Kenya was fashioned according to the British court system in which the judiciary is seen as separate from the machinery of government and thus does not have the power to review the executive's decisions. Judges in colonial Kenya were by socialisation inclined to believe in the complete separation of the judiciary from the politics of governance.³³ The colonial administration was characterised by the unencumbered exercise of power. 'The colonial state employed authoritarian force to hold Kenya's diverse communities together'.³⁴

Pfeiffer³⁵ highlights the following characteristics of the East African colonial administration judiciary which would limit the ability of the judiciaries to play the independent oversight role given to them in the independence constitutions:

³² Roux (n 28 above) 110.

³³ S B Pfeiffer 'The Role of the Judiciary in the Constitutional Systems of East Africa' (1978) 16(1) *The Journal of Modern African Studies* 35, 36.

³⁴ P O Ndege 'Colonialism and its Legacies in Kenya' (5 July – 6 August 2009) *Lecture delivered during Fulbright – Hays Group project abroad programme at the Moi University Main Campus 3* <http://international.iupui.edu/kenya/resources/> (accessed 1 November 2011).

³⁵ Pfeiffer (n 33 above) 40-45.

Administrative officials also exercised judicial powers as magistrates, leading to a conflation of the executive and the judiciary. Although the union of the executive and judiciary was not a norm in Britain, it was deemed acceptable as a part of African culture because the indigenous peoples had no objections. The Governor wielded the greatest authority in the colonies along with his representatives across the colonies. The Legislative Council was formed later and thus was obscured by executive authority. The courts had no role in limiting the extensive executive powers of the Governor.³⁶

The courts in Britain by design and practice defer to the executive branches of government. They neither have the authority nor duty to 'resolve constitutional or administrative grievances against the executive in a judicial or quasi-judicial forum'³⁷ and this is the legacy of administrative law practice that was entrenched in Kenya courts by the time of independence.³⁸

The legal profession was elitist, dominated by Europeans and those Africans who could afford to study overseas. Europeans therefore dominated the High Court and thus their proximity to the colonial state delegitimised the courts in the eyes of African leaders as elitist and aligned to the interests of the colonial master. The colonial courts imposed English and Indian law and precedent on heterogeneous Kenyan society and thus these courts were not relevant to the needs of the indigenous population. The fact that even at independence the courts were bound by English precedent of the colonial period further undermined the credibility of the courts as upholding the values of the new nation.³⁹

Although the colonial judiciary did enjoy security of tenure, a Council order of 1958 placed strict legal prescriptions that had the effect of undermining judicial independence. This was to be repeated by post-colonial government in Kenya.⁴⁰

³⁶ Pfeiffer (n 33 above) 40-45.

³⁷ Pfeiffer (n 33 above) 40-45.

³⁸ Pfeiffer (n 33 above) 40-45.

³⁹ Pfeiffer (n 33 above) 40-45.

⁴⁰ Pfeiffer (n 33 above) 40-45.

During the colonial period the judiciary functioned at the behest of the executive as an enforcer of the executive's injunctions rather than as an impartial arbiter between the colonial administration and the people. The colonial state was intolerant to dissent and implemented policies and institutions of repression to crush any African opposition to its authority. At independence, the African population perceived the judiciary as an illegitimate institution. The judiciary at the time was 'identifiable as an upholder of colonial rule', a system which the people had fought to end. 'To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect'. Thus the people in post-independence Kenya had little reason to believe in an impartial and credible judiciary because of the example provided by the colonial administration. Politicians also had little faith in the impartiality and integrity of the judiciary.⁴¹

2.3 Executive-judicial relations in post-colonial Kenya

Kenya inherited a tradition where the judicial function was intrinsically linked to the ruling colonial administration. In the English tradition, the judiciary was the instrument of the crown and adjudicated according to its discretion.⁴² Constitutionalism and the principle of separation of powers that came with it were relatively new concepts, only introduced in the independence Constitution adopted in 1963. Inscribing the principle of non-executive interference in the judiciary into law was to prove insufficient to transform the opinion and practice of the incoming independence government.

The Kenyan government at independence had to contend with a challenging socioeconomic context. Part of the legacy of colonialism was the imposition of arbitrary borders, which had the effect of separating various ethnic groupings and peoples between the borders of the colonial states. Kenya had to deal with the challenge of secessionist Somalis and various minorities' demands for recognition. Therefore, similar to the colonial government which 'was mainly interested in the maintenance of law and

⁴¹ Y Vyas 'The Independence of the Judiciary: A Third World Perspective' (1992) 11 *Third World Legal Studies* 131.

⁴² A M Akiwumi 'Towards an independent and effective judiciary in Africa' (October 2004) http://www.uneca.org/adfiv/documents/speeches_and_presentations/speech_akiwumi.htm (accessed 17 November 2011).

order'⁴³ and 'had no respect for the independence of the judiciary or for the fundamental rights of the ruled',⁴⁴ similarly post-independence leaders in Kenya were more preoccupied with how to maintain public order rather than promoting and protecting human rights.⁴⁵

Strengthening the executive authority was the focus of the earlier constitutional revisions under President Jomo Kenyatta, and later under President Daniel Arap Moi. These amendments were aimed at counteracting what the independence leaders thought to be the flaw of the Constitution (1963) by relaxing the limits on executive power. These changes led to the concentration of power in the office of the President and paved the way for President Jomo Kenyatta to turn Kenya into a *de facto* one party state.⁴⁶

Indeed in 1966 the Kenyan government adopted a constitutional amendment that would allow, in certain circumstances, to set aside fundamental human rights contained in the Constitution for security reasons, namely Part III – Special Public Security Measures – of the Preservation of Public Security Act. This part allowed the President to among others restrict movement, quash the right of assembly, ban publications, thwart freedom of speech, restrict the selling and procurement of immovable property, enforce arrests without trial as well as amend, modify or set aside any existing legislation except the Constitution. Although this activity had the effect of curtailing judicial oversight over administrative law and executive action as well as the courts' power to guarantee human rights, the independence government did not straight away think to tinker with the constitutional powers of the judiciary.⁴⁷

Amending the Constitution to centralise power in the executive, and the President in particular, had the effect of replicating the intolerance of the colonial state. After the 1966 amendment to the Constitution the Kenyan government, dominated by the ruling Kenya African National Union (KANU), proceeded to implement policies to either co-opt

⁴³ Vyas (n 41 above) 131.

⁴⁴ Vyas (n 41 above) 131.

⁴⁵ Pfeiffer (n 33 above) 48; Ndege (n 34 above) 2,3.

⁴⁶ Pfeiffer (n 33 above) 48.

⁴⁷ Pfeiffer (n 33 above) 49.

or crush political opposition, thereby turning Kenya into a *de facto* one-party state. The independence government's approach was an inheritance passed down to it by the colonial state. Post-colonial Kenya under both President Kenyatta and Daniel Arap Moi was characterised by authoritarian rule and repression, preventing civil society to organise politically and monopolising the political and economic space.⁴⁸

President Moi used constitutional amendments to change Kenya into a *de jure* one-party state in 1981. Furthermore, continuing in President Kenyatta's tenor, President Moi increased his powers by diminishing the authority and security of the judiciary and legislature. He used a combination of patronage and repression to secure allegiance, and overlooking and allowing corruption was a popular form of patronage under President Moi and through this he favoured his tribesman, the Kalenjin, at the expense of other tribes.⁴⁹ This created conditions in which the judiciary could not carry out their duties with fidelity and integrity, without threat, improper influence, interference, restrictions, pressures and inducements, as outlined above.

The suppression of civil participation in politics involved the violation of rights contained in the Bill of Rights including freedom of expression and freedom of assembly among others, which the judiciary was supposed to protect and promote. Following decades of monopolising power and quelling all opposition using varying tactics, in 1988 and 1990 President Moi instituted constitutional amendments that had the effect of reining in the judiciary's authority and independence. These particular amendments had the effect of undermining the security of tenure that judges of the High Court had under sections 61 and 62 of the 1963 Constitution. The tribunals whose function it was to pronounce on the tenure of judges in order to maintain the independence of the judiciary from executive abuse were removed and judges retained or lost their positions at the "pleasure of the President". This surrender of security of tenure to the whims of the executive further compromised the separation of powers in Kenya.⁵⁰

⁴⁸ S D Mueller 'Government and Opposition in Kenya, 1966-9' (1984) 22(3) *The Journal of Modern African Studies* 401-405.

⁴⁹ Barkan (n 16 above) 6.

⁵⁰ G K Kuria & A M Vazquez 'Judges and Human Rights: The Kenyan Experience' (1991) 35 (1/2) *Journal of African Law*, 146.

Section 84 of the 1963 Constitution gave the Kenyan judiciary original jurisdiction to interpret and adjudicate over questions arising over the protection of fundamental rights and freedoms of the individual.⁵¹ However, it is in this area that the judiciary has been reluctant to exercise its powers.

In 1989 the High Court of Kenya repudiated its power and responsibility to enforce the Bill of Rights by ruling section 84 of the 1963 Constitution void in *Maina Mbacha v Attorney General* and confirming that verdict in *Kamau Kuria v Attorney General*. In these cases the court substantiated its decision by claiming a lack of jurisdiction (ironic as Section 84 grants it original jurisdiction) as well as the absence of procedures by which the court may enforce the Bill of Rights.⁵² In making the above determination, the High Court has invariably voided the constitutional role of the judiciary and has relegated the Constitution below other laws.

Once the Bill of Rights was enacted in the Constitution, its enforcement became supreme to all other law, including procedural rules, for the supremacy clause of the Kenya Constitution states: “. . . if any other law became inconsistent with this Constitution, this Constitution shall prevail and the other law shall to the extent of the inconsistency be void”.⁵³

However, the two cases deviate from the principle of constitutional supremacy outlined in Section 84 of the 1963 Constitution as well as the role of the judiciary in protecting and promoting the fundamental rights contained in the Bill of Rights. Such verdicts as in *Maina Mbacha v Attorney General* and *Kamau Kuria v Attorney General* render the Bill of Rights irrelevant.⁵⁴

It is important to place these two cases in their proper context. These were decided subsequent to the removal of the constitutional guarantee of security of tenure for judges. In addition, both cases involved individuals that were seen to be in opposition to the government. In *Maina Mbacha v Attorney General* the applicants challenged the state’s right to prosecute them for expressing their views about the conduct of the 1986 election, which in their opinion was rigged, and argued that their prosecution amounted

⁵¹ Constitution of Kenya, 1963 (Amended 2008).

⁵² Kuria & Vazquez (n 50 above) 142 & 145.

⁵³ Kuria & Vazquez (n 50 above) 142.

⁵⁴ Kuria & Vazquez (n 50 above) 142.

to a violation of the right to freedom of expression. In *Kamau Kuria v Attorney General* the applicant, Gibson Kamau Kuria who was a prominent human rights lawyer who defended political prisoners, argued that the confiscation of his passport amounted to a violation of the right to free movement.⁵⁵ Thus the adjudication of these cases would have major implications for institutional security of the judiciary and job security of judges as the executive had a great interest in the outcome of these cases, which directly challenged its actions. Therefore the High Court chose to cower to the interests of the ruling administration.

2.4 Winds of change: The reformed judicial selection process may contribute to the alteration of executive-judiciary relations

On Friday 28 January 2011 President Mwai Kibaki announced the names of his nominees for the posts of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget. However, when the Prime Minister Raila Odinga protested the President's nomination, saying that the President had failed to consult him, it became clear that the President may have undertaken to overstretch his powers and had acted unconstitutionally.⁵⁶

According to Section 166(1) of the 2010 Constitution the President is to appoint the Chief Justice and Deputy Chief Justice upon the advice of the Judicial Service Commission (JSC) and these appointments must be approved by the General Assembly. In addition, Section 24 (2) of the Sixth Schedule of the same Constitution states that the President shall appoint the Chief Justice 'subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly'.⁵⁷ Because the President had taken it upon himself to nominate certain individuals without taking counsel from the JSC, or consulting adequately with the Prime Minister, the nominations were called into question. Not only did the opposition, Mr Odinga's Orange Democratic Movement (ODM) oppose the move,

⁵⁵ Amnesty International 'Kenya Silencing Opposition to One-Party Rule' (November 1990) <http://www.amnesty.org/en/library/asset/AFR32/028/1990/en/d7c47a57-ee68-11dd-96f1-9fdd7e6f4873/afr320281990en.html> (accessed 10 August 2011).

⁵⁶ Kenya Weekly Post 'Kibaki Nominates, Chief Justice, AG, DPP and Budget controller' 28 January 2011 <http://www.kenyaweklypost.com/modules.php?name=News&file=article&sid=2453> (accessed 7 May 2012).

⁵⁷ Constitution of Kenya 2010

various nongovernmental organisations proceeded to launch a high court application challenging President Kibaki's decision. The Speaker in Parliament, Mr Kenneth Marende, who was petitioned to make a ruling on the unconstitutionality of the President's nominees, opted to throw the question back at the Parliamentary committees, that is, the Justice and Legal Affairs Committee as well as the Finance and Trade Committee, before giving his ruling at a later stage.⁵⁸

Non-governmental organisations petitioned the High Court to declare the President's nomination unconstitutional in terms of Articles 2(1), 2(5), 3, 10, 27, 73, 129, 131, 166, 156, 157, 228, Section 12 and 24 of the Sixth Schedule of the 2010 Constitution and Article 259. The following NGO's were part of the petition: The Centre for Rights Education and Awareness (CREAW), Caucus for Women's Leadership (CAUCUS), Tomorrows Child Initiative (TCI), Women in Law and Development (K), Development Through Media (DTM), Petitioner Coalition of Violence Against Women (COVAW), Young Women Leadership Institute (YWLI), and The League of Kenya Women Voters.⁵⁹

In the petition, the complainants took issue with the announcement made by the Office of the President on 28 January 2011 of the nomination of individuals to be approved for the positions of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget, which they deemed unconstitutional. The complainants launched the petition on the grounds that all the nominees posited for the posts were male, which goes against the grain of promoting gender parity. Besides, the petition noted that the Office of the Prime Minister claimed that it had not been consulted on the nomination of the individuals. In addition, the petition referred to the admission by the JSC it too had not been consulted and that it had not recommended any of the individuals nominated. Moreover, the petition highlighted that the positions were not duly advertised and therefore Kenyans eligible to apply for the said positions were deprived equal

⁵⁸ Daily Nation 'Speaker declines to make ruling over nominees' 3 February 2011 <http://www.nation.co.ke/News/politics/-/1064/1100898/-/view/printVersion/-/l7rfgs/-/index.html> (accessed 12 August 2011); Daily Nation 'Marende: Sorry, go back and try again' 17 February 2011 <http://www.nation.co.ke/News/politics/-/1064/1109824/-/view/printVersion/-/jx5e7o/-/index.html> (accessed 12 August 2011).

⁵⁹ Justice Musinga, 'Ruling in: Centre For Rights Education And Awareness (Creaw) & 7 others v Attorney General' 2011 www.kenyalaw.org (accessed 12 August 2011).

opportunity. Therefore the President's nomination has had the effect of fuelling tensions to the point of threatening national cohesion.⁶⁰

In his judgment on 3 February 2011 Justice Musinga, noting his responsibility to uphold the 2010 Constitution and the rule of law, held that the petitioners had proven that the President had breached Article 166 of the Constitution by failing to take advice from the JSC on the possible nominee for the post of Chief Justice. He also held that the President had also violated the right to equality by not including a women candidate on his list. He thus gave a declaratory order to the effect that "it would be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011".⁶¹

Following the High Court ruling, National Assembly Speaker Mr Marende declared the President's nominations unconstitutional on the basis that President Kibaki had failed to follow the process of consultation prescribed in the Constitution as well as in the National Accord that created the Unity Government. He thereby blocked Parliament from deliberating on the names and declared that the President and Prime Minister needed to start afresh and come up with a new list of nominees. The President respected both the High Court order and the Speaker's ruling.⁶²

The above account is a positive indication that the aims of the new Constitution are being achieved. The High Court of Kenya boldly upheld the principles and values of the Constitution whilst Parliament was also unwavering in affirming and asserting the

⁶⁰ Musinga (n 59 above) 5 & 6.

⁶¹ Musinga (n 59 above) 17.

⁶² Daily Nation 'Speaker Declares Kibaki Nominees Void' 17 February 2011 <http://www.nation.co.ke/News/politics/Speaker+declares+Kibaki+nominees+void/-/1064/1109424/-/view/printVersion/-/7hgxyf/-/index.html> (accessed 12 August 2011); English People's Daily Online 'Kenyan Parliamentary Speaker declares judicial nominations unconstitutional' 18 February 2011 <http://english.peopledaily.com.cn/90001/90777/90855/7291716.html> (accessed 19 June 2011).

same. All this has contributed to the development of an effective, independent judiciary with the ability to defend Kenya's democracy.

2.5 Conclusion

In the quest to preserve their independence, courts in consolidating democracies have to balance their strict adherence to the new Constitution with achieving the cooperation of other branches of government whilst winning public confidence. Making decisions that are unpopular with the executive, for instance, could antagonise powerful leaders who may coalesce to attack or threaten the judiciary. However, public support for the judiciary tends to counter the threat the executive may pose. At independence the Kenyans perceived the judiciary as an illegitimate institution and had little reason to believe in its impartiality and credibility.

During colonial rule, the courts had no power to circumscribe the authority of the colonial administration. The judiciary was used to rubber-stamp the governor's proposals and unjust actions. This context allowed authoritarianism to thrive and diminished public confidence in the legitimacy of the colonial government and the integrity and credibility of the judiciary.

The drafters of the 1963 Constitution sought to confer the power of judicial review on Kenyan courts, giving them powers to limit the authority and overturn the decisions of the executive. This was however not welcomed by post-independence leaders that relished the unlimited powers of the colonial administration. The outgoing colonial administration expected the post-independence government to place its confidence in a judiciary that was for a long time manipulated for the benefit of the colonial state. Although the independence Constitution's aims were noble, it would prove difficult to undo decades of institutionalised executive domination and judicial subservience. The executive and legislature have continued to view the judiciary with suspicion, whilst at the same time the judiciary has continued to cower in the face of the executive due to its institutional culture of deference and subservience⁶³. Both Presidents Jomo Kenyatta and Daniel Arap Moi later amended the Constitution to centralise power in the

⁶³ Vyas (n 41 above) 131.

executive. These amendments left the judiciary vulnerable to political interference and undermined its effectiveness.

Under the independence Constitution, the executive's focus was placed on strengthening executive authority – state building and stability – thus putting democracy on the back burner. The negative consequences of this were centralisation of power in hand of executive, human rights abuses and corruption. The 2010 Constitution remedies the situation by limiting the powers of the executive, re-establishing the independence of the judiciary leading to the deepening of democracy. The two Constitutions reflect two phases in the development of Kenya's democracy.

The problematic relations between the executive and judiciary highlighted above have impacted on the quality of judges selected to serve on the bench. The process of appointing judges delineated in the 2010 Constitution is an attempt to overcome the challenges of the past. As such, an assessment of this new appointment process, including the criteria used to identify suitable candidates and the composition of the body that nominates candidates for selection, is important in order to determine whether the new process is a sufficient improvement on the previous system. The process of appointing judges in large part determines whether or not the judiciary will be impartial and function independently. The process therefore has serious implications for democracy.

Chapter three investigates the judicial appointment process in Kenya and assesses whether the reformed appointment process is appropriate to ensure the selection of 'good judges' by considering the appointment of Kenya's new Chief Justice and Deputy Chief Justice in early 2011.

Chapter 3: Judicial appointment processes in Kenya

This chapter discusses the qualities required in individuals to be selected as judges as well as the available methods to select judges. It also provides a brief historical overview of the judicial appointment process in Kenya since independence in 1963 and the changes made to the process in the 2010 Constitution. Included is an analysis of Section 166 (1)(a), Section 118(1) and (2) and the Sixth Schedule Part 4 Section 24 (2) of the 2010 Constitution which elucidates the role of Parliament and also delineates the framework for public participation in the judicial appointment process.

3.1 Introduction

It is necessary to highlight important elements about the nature and role of the judiciary within a democratic state's broader political landscape. In a democracy judges are thought and portrayed to be independent, non-political actors. The non-political nature of the judiciary is challengeable as judges have an influence on political activities such as resolving conflict and safeguarding the rule of law and state authority. Indeed the decisions that judges make carry political implications.⁶⁴

Judges can become political role-players or acquire political influence in two important ways:

First, judges may be subject to external influences and pressures to rule in one way or another. This external pressure on judges is more pronounced in cases where politicians are deeply involved in the selection and promotion of judges. However, in democratic societies, judges are shielded from external bias by the entrenchment of the principle of judicial independence, which is guaranteed and safeguarded by the judiciary's security of tenure and intolerance for interference with and criticism of judges' conclusions.⁶⁵ This highlights the importance of *how* judges are selected, that is, what method or process of selection is used to appoint judges as judicial independence is determined to a large extent by this factor.

⁶⁴ Heywood (n 9 above) 329.

⁶⁵ Heywood (n 9 above) 329.

Second, like all other human beings judges have personal biases, which are influenced by their background, worldview and interests and these may encroach on their adjudication activity. Thus judicial independence does not only depend on how judges are selected but *who* is selected. A criticism of the judiciary is that it tends to be a reflection of the elite, powerful and dominant section of society at any given time. In other words, the judiciary is not representative of the demographics of society and generally has a bias against women, minorities and the poor. However, prioritising representativeness of the judiciary may mean necessarily dispensing with important criteria such as qualifications and experience.⁶⁶

The questions of how judges are selected and who is selected become all the more important against the backdrop of their role of reviewing laws and policies made by the legislature and the executive branches of government. Because of their authority to overrule decisions of government and legislation, judges are not mere appliers of the law but also makers of the law, as they impose meaning on the written text of legislation and more importantly the written constitution. Through their interpretation, the constitution is understood to be leaning in a specific ideological direction as dictated by their decisions.⁶⁷

Even so, judges do not have unfettered power. They are bound by the very text of the constitution they interpret and cannot go beyond the parameters set by the constitution. Also, in the interests of institutional security, judges must beware of taking their role too far. Doing this will threaten the courts' ability to have an impact on societal change. Judges may avoid overstressing the judiciary's role by deferring to the other branches of government if this does not amount to the subversion of justice. In addition, the extent of the impact of court judgments is limited or constrained by the fact that the judiciary has no means to enforce these, but has to rely on the goodwill and cooperation of the executive and legislature to ensure that its orders are carried out.

⁶⁶ Heywood (n 9 above) 329, 330.

⁶⁷ Heywood (n 9 above) 330.

Therefore ‘because decisions that are ignored damage a court’s credibility, courts must follow a delicate course, heeding the climate of opinion without pandering to it’.⁶⁸

Legal legitimacy is a goal that all courts should strive to achieve. However, in a context where judicial independence is undermined by political interference, the integrity and legal credibility of court judgments are marred. Public support for the judiciary may deter politicians or organs of the state from interfering with the functions of the judiciary. The executive is unlikely to obstruct the judiciary if it would result in the loss of public support for politicians and thus a loss of votes.⁶⁹

Kenya’s 2010 Constitution elevates the value of public support by giving the National Assembly, which is constituted by individuals who represent constituencies that voted them into Parliament, a major role in the selection of judges. The President is obliged not only to nominate candidates from the list drawn up by the Judicial Service Commission (JSC) but further requires the President’s nominations to be approved by the National Assembly.

This constitutional provision enhances a very important element of democracy, which is political accountability. That is, the expectation that government and its officers will rule in the interests of the people and will be accountable to the electorate, which elected it into power as highlighted in Chapter one.

3.2 The qualities of ‘good’ judges

For courts to fulfil their important role, individuals of integrity and of a high calibre must man courts. According to Goldman the qualities that make ‘good’ judges are neutrality, fair-mindedness, knowledge of the law, excellent thinking and writing skills, personal integrity, a healthy physical and mental state, an even temperament, and the ability to use judicial power responsibly – in other words, judges who understand their limitations, defer to other branches of government where necessary and promote the

⁶⁸ R Hague and M Harrop (n 9 above) 253, 254; Heywood (n 9 above) 332.

⁶⁹ Roux (n 28 above) 110.

constitutional vision for society.⁷⁰ By deduction, if the judiciary is to hold other members of society accountable to democratic values, principles and behaviour, judges themselves must uphold these characteristics in their conduct and person.

De Vos is of the opinion that an individual's legal adeptness is not enough to qualify him or her for the bench. He agrees with Goldman that a good judge should be of calm temperament; be fair and able to apply legal rules justly; should consider the effects of his judgments on the litigants as well as broader society; and should understand the limitations of judicial power. However, he identifies other important characteristics that judges must have (based on the South African experience). De Vos contends that a good judge will, where necessary, make unpopular decisions. A good judge will use the limited powers he or she has towards upholding the Bill of Rights and to safeguard the interests and wellbeing of vulnerable groups and individuals from abuse, including abuse by the state. De Vos adds that a good judge will be committed to promoting social justice and do so by considering the inequalities between the rich and poor, educated and uneducated, male and female in society, and thus interpret legal rules so as not to further disadvantage those who are already in some way incapacitated.⁷¹

3.3 Methods for selecting judges

The process and procedure for the selection of judges must be one that can be held up to democratic standards. The procedures for the selection of judges and judicial officers must 'enhance the probability of good judges being selected and decrease the chances of unqualified judges [being selected]'.⁷² The method selected must be able to separate individuals who are fit to be judges from those who do not qualify to be judges.

Goldman outlines four principles that should form the basis of judicial selection: 1) an open process; 2) a decided effort to recruit members of previously disadvantaged

⁷⁰ S Goldman 'Judicial Selection and the Qualities That Make a "Good" Judge' (July 1982) 462 *Annals of the American Academy of Political and Social Science, The American Judiciary: Critical Issues* 113, 114.

⁷¹ P de Vos 'What makes a good judge?' 19 April 2010 <http://constitutionallyspeaking.co.za/what-makes-a-good-judge/> (accessed 31 October 2011).

⁷² Goldman (n 70 above) 118, 119.

groups; 3) thorough vetting of candidates; and 4) a 'democratic framework of accountability' for judges.⁷³

Judges have an impact on and may influence policy through the decisions they make. Therefore the above four principles emphasise the fact that any method employed for the selection of judges should ensure that judges will be held accountable for their actions and decisions. This is further justification for the view that judges should not be embroiled in politics and should not entertain partisan considerations.

[According to] '[T]he Universal Charter of the Judge, 'The selection and each appointment of a Judge must be carried out according to objective and transparent criteria based on proper professional qualifications'. Similarly, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that: 'The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability'.⁷⁴

The methods for the selection of judges include the following:⁷⁵

- 1) Electoral methods, where citizens elect judges by ballot, thus the judiciary is directly accountable to the public;
- 2) Executive selection, where the President (with or without advice) appoints judges, thus the judiciary is indirectly accountable to the public as the President selects judges on its behalf; and
- 3) Merit selection, where judges apply for positions and are selected through commissions empowered under law.

The concern with the executive selection method is that it often amounts to the President having ultimate discretion in the appointment especially of senior judges. As such the President, as a politician, may be tempted to select individuals who support his political views, interests and policy positions, thus making the appointment of judges a

⁷³ Goldman (n 70 above) 119.

⁷⁴ International Bar Association and International Legal Assistance Consortium 'Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya' February 2010 44 www.ibanet.org (accessed 17 February 2011).

⁷⁵ Goldman (n 70 above) 120, 121.

political process. This may undermine judges' neutrality and negatively affect their accountability.⁷⁶ Goldman emphasises this point when he says:

Judges selected through a political process can hardly be expected to be public policy virgins, and political officials rightly feel justified in examining previous choices made by candidates for judgeships to see if they coincide with their own.⁷⁷

The drawbacks of the executive method may be overcome by the creation of a judicial service commission, which will advise and guide the head of state. The President would have to be obliged to consider the recommendations of the judicial service commission in making his or her nominations. Rakshit argues that this is the case in India. In India the Judicial Commission prepares a list of names of possible candidates and the head of state has to make his or her selection from that list. In this way, 'naturally, politics and justice would remain dissociated'⁷⁸ somewhat.

3.4 Kenya's judicial appointment process prior to the adoption of the 2010 Constitution

Different countries use different methods of judicial appointment and, in some instances, use a combination of the three. Since its independence in 1963, Kenya has made use of the combination of executive and merit selection in which the President appoints judges and has a Judicial Service Commission to advise him.

Judicial independence has been an elusive ideal in Kenya. This has made the judiciary vulnerable to executive interference and political pressure, as has been evident in a number of High Court decisions involving corruption charges against prominent politicians that have been set aside without a clear legal basis. This has led to lack of public confidence in the judiciary.⁷⁹ The International Bar Association and International Legal Assistance Consortium (IBA-ILAC) delegation that undertook an assessment of the Kenyan judiciary and conducted interviews with various stakeholders found that the executive has a tendency to interfere with judicial proceedings by coercing judges to set the law aside when deciding cases. The delegation was given examples of prominent politicians who were charged with corruption but later acquitted by the High Court

⁷⁶ N B Rakshit 'Judicial Appointments' (July 2004) 39 (27) *Economic and Political Weekly* 2959

⁷⁷ Goldman (n 70 above) 115.

⁷⁸ Rakshit (n 76 above) 2959, 2960

⁷⁹ International Bar Association (n 74 above) 36.

even though there was sufficient evidence to convict them. Transferring magistrates and judges to unpopular regions in the country if they happen to rule against the executive, is another tactic that the executive has used to compel the judiciary to toe the line. In addition, the IBA-ILAC report notes the incident after the Presidential election of December 2007 in which the Orange Democratic Movement (ODM) opposition party took to the streets rather than turning to the courts to adjudicate on the disputed election result, suggesting the leadership had no confidence in the impartiality of the judiciary.⁸⁰

The process of selecting judges has also undermined the Kenyan judiciary's independence. Until 2010, the President has had the prerogative in the selection of judges with the advice of the Judicial Service Commission (JSC). However, a close look at the composition of the JSC reveals that it was composed of individuals who were political appointees⁸¹, directly appointed by the President and therefore was likely to be partisan and open to executive influence. The President appointed the Chief Justice, who was the head of the JSC and held great sway in the selection of other judges. This created a situation in which members of the Commission were unwilling to independently air their views or even disagree with or criticise the Chief Justice.⁸² Thus the fact that the JSC itself lacked independence and impartiality compromised the nomination of suitable candidates for the bench.

Adding to the concerns about the independence of the JSC, the judicial appointment process was neither public nor transparent and therefore there was no mechanism to ensure that the JSC remained accountable to the public interest. This undermined public confidence in the legitimacy and integrity of the judiciary. The lack of transparency manifested itself in the fact that judicial vacancies prior to the enactment of the 2010 Constitution were not advertised and the criteria for selecting individuals for judicial office was concealed from the public. The perception therefore existed that the executive selected individuals based on its own political, ethnic and partisan interests.

The politicisation of the process of selecting judges has invariably led to a compromise in standards on the quality and merit of the individuals appointed.

⁸⁰ International Bar Association (n 74 above) 36.

⁸¹ Constitution of Kenya, 1963 (Amended 2008) Section 68(1) a – d.

⁸² International Bar Association (n 74 above) 38.

The minimum requirements for individuals to qualify to be a judge in Kenya illustrate these low standards. According to the 1963 Constitution an advocate of the High Court of Kenya with seven years' experience, with no requirement to have practiced as an advocate, could qualify to be appointed as a judge and there were no written criteria to guide the President's selection of a Chief Justice.⁸³

The quality of candidates did not meet the international, regional and Commonwealth requirements for the process of selecting judges to guard against selecting individuals for the wrong reasons. This requirement is compatible with the UN Basic Principles on the Independence of the Judiciary, which states that 'Any method of judicial selection shall safeguard against judicial appointments for improper motives'.⁸⁴

In addition to opening the door for sub-standard appointees, the judicial selection process in Kenya has failed to safeguard against 'judicial appointments for improper motives'.⁸⁵

3.5 The impact of the politicisation of the judicial appointment process on the functioning of the judiciary

Mutua's study, which focuses on the Kenyan judiciary in the years from independence to the early 1990s, concludes that the Kenyan judiciary lacks independence, has a reputation for subservience to other state organs and, in particular, has been used as an "instrument of repression".⁸⁶

Mutua eloquently outlines the efforts made by the executive to undermine judicial independence and to entrench a culture of judicial subservience. During the tenure of President Jomo Kenyatta, Kenya's first President after independence, Kenya was a *de facto* one-party state. The ruling party at the time, the Kenyan African National Union (KANU), successfully co-opted the existing opposition, the Kenya African Democratic Union (KADU), into its ranks. Although that was a threat to democracy in itself, the greatest blow came when President Kenyatta pushed for the passing of the detention law of 1966 banning opposition parties and making Kenya a *de jure* one-party state. The

⁸³ International Bar Association (n 74 above) 44.

⁸⁴ International Bar Association (n 74 above) 44.

⁸⁵ International Bar Association (n 74 above) 44.

⁸⁶ Mutua (n 26 above) 101.

passing of the law received no challenge from the bar, an indicator of the legal fraternity's subservience to the executive. In addition, Mutua notes that in 1986 President Moi through an amendment to Section 109 and 110 of the 1963 Constitution acquired the power to hire and suspend the Attorney General and Auditor General. Two years later, in 1988, Parliament passed a constitutional amendment effectively removing security of tenure for all judges, resulting in the erosion of judicial independence and creating a greater compulsion to accede to the executive's wishes.

Considering the above account the following statement rings true, "legal systems cannot function effectively to guarantee basic rights if the private bar is not free of state coercion".⁸⁷

Judges can hardly be expected to perform their jobs optimally when their decisions in court are directly linked to their job security and when deciding against the executive could cost them their careers and livelihood. This has affected the quality of judges who are serving in Kenyan courts, as they are selected on the grounds that they will serve the interests of the President and his allies. Thus their personal integrity and ability to be objective is compromised. According to Mutua's observations judicial officers have been appointed not for competence but for compliance with the executive's injunctions. More so, what is disheartening is that judges themselves have been willing collaborators with the executive as Mutua pointed out, failing to challenge the status quo through some form of combined action. Instead, they have opted and accepted to subvert justice for financial and political benefits.⁸⁸

The judicial appointment process that existed prior to the adoption of the 2010 Constitution fell far short of Goldman's four principles for judicial selection, namely, openness, inclusion of individuals from previously disadvantaged groups, thorough vetting of candidates and accountability of judges.

⁸⁷ Mutua (n 26 above) 101, 102.

⁸⁸ Mutua (n 26 above) 101, 102.

Moreover, the judiciary's conduct contradicted De Vos's view⁸⁹ that judges should use their powers to defend the Bill of Rights and safeguard citizens – especially the most vulnerable – from abuse by the state.

It is not surprising therefore that corruption in Kenya is not a serious challenge both in public and private life. The weaknesses in the judicial system and unchallenged executive dominance, outlined above, have resulted in rampant corruption even in the upper echelons of government. Corrupt practices, including 'Petty corruption occurs when citizens are asked for *kitu kidogo* ("a little something"): to get a document stamped, a service provided, or an infraction overlooked'⁹⁰ as well as the abuse of power for personal gain, bribery and irregular awarding of contracts.⁹¹

The extent of corruption in Kenya was illustrated in one of the country's biggest corruption scandals – the Goldenberg scandal. In sum, Goldenberg International Ltd., headed by businessman Pattni Kamlesh, purported to provide a solution to the Moi government's shortage of foreign reserves. Goldenberg International Ltd. posed as an exporter of gold and diamond jewellery. The company was designed to exploit Kenya's export compensation scheme, which was designed to encourage companies to export more in order to gain Kenya more foreign exchange, by compensating them 20% of the value of their exports.⁹²

Goldenberg International Ltd. applied to get the exclusive right to export gold and diamond jewellery against the Monopolies and Price Act, which outlaws monopolies and also requested 35% compensation rather than the 20% stipulated in the Export Compensation Act. This was approved by Professor George Saitoti the then Finance Minister. Goldenberg presented fraudulent compensation claims to the Central Bank of Kenya (CBK) for large sums of exports that did not actually take place. Although the CBK

⁸⁹ De Vos (n 71 above).

⁹⁰ J Zutt – Africa Can ... End Poverty: A blog by Shanta Devarajan, World Bank Chief Economist for Africa 'Corruption in Kenya' 8 November 2010 <http://blogs.worldbank.org/africacan/corruption-in-kenya> (accessed 3 June 2011).

⁹¹ J Zutt – Africa Can ... End Poverty: A blog by Shanta Devarajan, World Bank Chief Economist for Africa (n 90 above).

⁹² P Warutere 'The Goldenberg conspiracy: The game of paper gold, money and power' (September 2005) *ISS Occasional Paper 117* <http://www.iss.co.za/pubs/papers/117/Paper117.htm> (accessed 21 November 2011).

and First American Bank (where Goldenberg did its banking) picked up discrepancies when processing Goldenberg's claims, they did not act. In 1991 the Exchange Controller who monitored the payment of compensation raised alarms about Goldenberg's fraudulent activities. First American Bank which had a problem with how Goldenberg declared its foreign exchanges also raised concerns. Even so, Goldenberg International Ltd. was permitted to open an exchange bank under the auspices of the Minister of Finance and the then Governor of the CBK – Eric Kotut.⁹³

The establishment of Exchange Bank was a turning point in the Goldenberg scandal because it meant Goldenberg's transactions were controlled under one umbrella and it was more difficult to subject them to the kind of scrutiny that had been possible when its affairs were reported on by the bankers who previously dealt with Goldenberg accounts. Indeed, this marked the beginning of new money laundering operations that quickly evolved into one of the biggest financial scandals ever seen in Kenya and probably in the whole of the Eastern Africa region.⁹⁴

The scandal was uncovered in 1992 when the Daily Nation, a Kenyan newspaper, first published a story about Goldenberg International Ltd.'s fraudulent diamond and gold jewellery exports. In May 1992 the Controller and Auditor General presented an audit questioning various compensation payments made to Goldenberg. The Minister of Finance persisted to defend Goldenberg and his Ministry's decision to give Goldenberg a monopoly and 35% compensation instead of 20%, and by claiming that Goldenberg's documents were in order. In June 1993 the Central Bureau of Statistics presented an Economic Survey that did not reflect the large amounts of exports in gold and diamond jewellery that Goldenberg claimed to be exporting. The survey also found that the foreign companies that Goldenberg claimed to be exporting its goods to, had no dealings with it at all. IMF and World Bank audits in 1993 as well as investigations by Price Waterhouse Coopers 'revealed that Exchange Bank and Goldenberg were at the centre of extensive money laundering activities with the other politically connected banks and the CBK'.⁹⁵

Although the evidence pointing to large-scale corruption and money laundering abounded, government failed to prosecute the masterminds of the scandal:

⁹³ Warutere (n 92 above).

⁹⁴ Warutere (n 92 above).

⁹⁵ Warutere (n 92 above); Mutua (n 26 above) 116, 117; C Goredema 'Profiling Money Laundering in Eastern and Southern Africa' (December 2003) 90 *Institute for Security Studies Monograph* 193, 194.

Amos Wako, the Attorney General, faced considerable pressure to start prosecution but he always scuttled the matter, saying the police were still investigating and there was insufficient evidence to sustain a prosecution. The Law Society of Kenya (LSK) took up the matter and gave Wako until 31 August 1993 to prosecute those associated with Goldenberg and, when he failed to do so, the society filed a private prosecution in the Kenyan High Court. However, the Attorney General used his constitutional powers to sabotage the prosecution by taking it over and thereafter terminating it.⁹⁶

The fact that the Office of the Attorney General frustrated the judiciary by interfering in court proceedings is an indication of the serious need for reform in Kenya's justice system and the need to guarantee the independence of the judiciary.

Although Amos Wako had failed to ensure prosecutions in the 1990's, in 2006 following a report by the Goldenberg Commission set up by President Kibaki in February 2003, charges were laid against Mr Pattni, former head of intelligence James Kanyotu, former treasury permanent secretary Wilfred Karuga Koinange, former central bank governor Eric Kotut and his deputy Eliphaz Riungu. However Professor Saitoti was omitted from the list, 'a court order is in force exempting him from prosecution'⁹⁷ although the Commission's report recommended that he should also be charged.⁹⁸

3.6 Reforms to the judicial appointment process and safeguarding of judicial independence in the 2010 Constitution

Resolving the challenge of judicial independence, section 160(1) of the 2010 Constitution provides that the judiciary is answerable only to the Constitution and to the law and that the judiciary 'shall not be subject to the control or direction of any person or authority'.⁹⁹ Strengthening this independence further, section 160(2) to (5) guarantees security of tenure (sections 167 and 168 of the 2010 Constitution), remuneration and benefits, and protects judges from liability for actions or omissions committed in the course of carrying out their judicial activities. In this way the new Constitution remedies the shortcomings of the previous Constitution by clearly

⁹⁶ Warutere (n 92 above).

⁹⁷ BBC News 'Q&A: Kenya's Goldenberg affair' 15 March 2006
<http://news.bbc.co.uk/2/hi/business/4808618.stm> (accessed 22 November 2011).

⁹⁸ BBC News 'Q&A: Kenya's Goldenberg affair' 15 March 2006
<http://news.bbc.co.uk/2/hi/business/4808618.stm> (accessed 22 November 2011).

⁹⁹ n 57 above

demarcating the authority and independence of the judiciary and its right to operate without interference from any other organ of state or individual.

On the appointment of judges, the new Constitution has provided mechanisms that circumscribe the President's discretion in the selection of judges. Although the President retains the prerogative to appoint the Chief Justice and the newly created position of Deputy Chief Justice, Section 166(1) of the new Constitution holds that he has to appoint them 'in accordance with the recommendation of the Judicial Service Commission'.¹⁰⁰ In addition, his decision has to meet the approval of the National Assembly. Section 166(2) stipulates that the President shall appoint all other judges 'in accordance with the recommendation of the JSC'.¹⁰¹ Thus the President cannot act arbitrarily to serve his own narrow interests.

The new Constitution incorporates UN and other international standards noted in the IBA-ILAC report, standards that were not previously upheld by Kenya's Constitution and judicial selection process, including the question of appropriate qualifications and experience. The criterion for persons to be appointed to the offices of Chief Justice and judge of the Supreme Court has graduated beyond the sole requirement of selection by the President. The 2010 Constitution promotes the quality of appointees by increasing the requirements that allow individuals to be eligible for selection. Section 166(2) stipulates the following about judges' qualifications:

Each judge of a superior court shall be appointed from among persons who—

- (a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Section 166(3) turns to the experience necessary for the offices of Chief Justice and Supreme Court judgeship, stipulating that individuals must be among persons who have:

¹⁰⁰ n 57 above

¹⁰¹ n 57 above

1. at least fifteen years' experience as a superior court judge; or
2. at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
3. held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years;

Section 166(4) similarly requires ten years' experience for persons seeking appointment to the Court of Appeal and High Court.

This is a substantial improvement from the previous standard: 'any person who is an advocate of the High Court of Kenya of not less than seven years'¹⁰² standing is eligible for appointment to high judicial office' regardless of personal integrity and practical experience. With these new conditions in place, Kenya stands in good stead to ensure that courts are manned by, as Goldman emphasises, 'good judges'¹⁰³.

However, these gains could still be undermined if the character and composition of the JSC remains unchanged – that is, constituted by individuals who may see it as more beneficial to their occupational security and career advancement to serve the interests of the President and Chief justice rather than legal principle. The new Constitution deals with this fundamental concern. According to Section 171(1) to (3), the Chief Justice is, as in the past, the head of the JSC. However, his independence from the executive is guaranteed by the fact that his appointment has to be approved by the National Assembly. The other members of the JSC are no longer chosen by the President the superior courts (Supreme Court, Court of Appeal and High Court) will each have a representative in the JSC who is elected by the judges of those courts. The JSC will also include representatives from the public to ensure the public interest is represented – thus addressing the need for transparency. In addition the JSC will also include two advocates who will represent the views of the bar, as well as the Attorney General, the Chief Registrar and one person nominated by the Public Service Commission. This composition makes it less likely for the President to influence the process to serve his partisan interests.

¹⁰² International Bar Association (n 74 above) 44.

¹⁰³ Goldman (n 70 above).

3.7 Role of Parliament in the judicial selection process in the 2010 Constitution

Section 166(1)(a) of the 2010 Constitution sets out that the President shall appoint the Chief Justice and Deputy Chief Justice as per the recommendation of the JSC and subject to the approval of the National Assembly. In requiring Parliament's approval, the Constitution is buttressing the principle of separation of powers.

The principle of the separation of powers refers to the division of the three powers of government, the *trias politica*, into the legislative, executive and judicial powers. This principle ensures that the functions of government are divided amongst separate branches for the purpose of guarding against the concentration of power in one individual or office.¹⁰⁴

The different spheres of government act as a check and balance on each other's powers. The legislature (Parliament) makes laws and has oversight over the executive; the executive proposes laws, formulates policy and has an implementation function. The judiciary administers justice and should be independent not only of the other spheres of government but also of public opinion or interference, as members of the judiciary are not elected by popular vote.¹⁰⁵

The principle of a separation of powers ensures that power is diffused amongst the three spheres of government and has the aim of strengthening democracy, ensuring accountability and responsiveness and preventing abuses against the rights of citizens.¹⁰⁶ It prevents undue interference by one sphere of government in the functioning of another. By way of illustration judges cannot pass legislation but can pronounce on the actions of the legislature, the legislature cannot enforce laws just as the executive cannot hand down court judgments.¹⁰⁷

¹⁰⁴ A Venter (2001) *Government and Politics in the new South Africa*, 2nd Ed. 23, 67.

¹⁰⁵ Constitutional Court of South Africa 'What is a Constitution?'

<http://www.constitutionalcourt.org.za/text/constitution/what.html#SEPARATION> (accessed: 19 May 2010).

¹⁰⁶ B Mabandla, Minister for Justice and Constitutional Development 'Address at the Konrad Adenauer Foundation's Rule of Law Conference, 8 November 2006, in Somerset West'

http://www.justice.gov.za/m_speeches/sp2006/2006%2011%2008_sp_MIN_KAF.pdf (accessed: 19 May 2010).

¹⁰⁷ Constitutional Court of South Africa (n 105 above).

The principle of separation of powers has a dual function, that of diffusing power across the three spheres of government and that of ensuring that the three spheres do not unduly or illegitimately interfere in each other's proper functioning. The principle works towards strengthening and safeguarding democracy. It is under this principle that the independence of the judiciary is safeguarded.

The 2010 Constitution's provision that the National Assembly approve the President's judicial nominations also ensures that the executive does not exert undue influence on the judiciary and that it does not impose its own political interests on the judicial appointment process. In this way, the integrity and independence of the judiciary is safeguarded.

3.8 Public participation in the judicial appointment process according to 2010 Constitution

The enactment of the 2010 Constitution as well as the various reforms that are prescribed therein, have brought about courage within Kenyan society. Based on the vibrancy of civil society witnessed in the lead up to the process of selecting the Chief Justice and Deputy Chief Justice, it is apparent that Kenyans are intent on guarding jealously their right to hold the executive accountable and answerable to the spirit and letter of the Constitution.

Section 118(1) and (2) of the 2010 Constitution provides that Parliament shall conduct its activities in a transparent manner and that its sittings and that of its committees shall be open to the public and that in so doing, Parliament should facilitate the involvement and participation of the public in the legislative process and other business. In addition it stipulates that Parliament may not prevent such public participation by disallowing the public or the media from attending its sittings except in exceptional cases as determined by the Speaker of Parliament.

National Assembly Speaker, Mr Marende, promoted public participation in the appointment of the Chief Justice and Deputy Chief Justice (see chapter 4) by inviting members of the public to submit queries, information and opinions for the attention of

Parliament's vetting committee regarding the nominees that the President submitted to Parliament.¹⁰⁸

3.9 Conclusion

Kenya's 2010 Constitution entrenches the separation of the powers of the executive, legislature and judiciary. Section 166(1)(a) provides for the oversight role of the National Assembly over the President in the selection of the Chief Justice and Deputy Chief Justice. Through Section 118(1) and (2) the public are also included as key stakeholders in the selection of judicial officers.

Public support for the judiciary is important because civil society plays the important role of watchdog over government and has the prerogative to challenge politicians if they act contrary to their constitutional mandates. Conversely, establishing judicial independence is in the public interest as the courts are the only mechanism through which citizens may challenge the illegitimate actions and policies of government. Because the public has an interest in an independent judiciary Chapter four focuses on public participation in the judicial appointment process.

¹⁰⁸ A Shiundu 'New house to vet judicial nominees' 3 June 2011 <http://www.nation.co.ke/News/politics/-/1064/1174650/-/7sofls/-/index.html> (accessed 23 September 2011); D Opiyo 'MP's turn to vet Judiciary nominees' 5 June 2011 <http://www.nation.co.ke/News/politics/MPs+turn+to+vet+judiciary+nominees/-/1064/1175586/-/view/printVersion/-/14dumpm/-/index.html> (accessed 21 September 2011).

Chapter 4: The role of Parliament and public participation in the judicial appointment process in Kenya

4.1 Introduction

This chapter will assess whether the reformed appointment process is appropriate to ensure the selection of ‘good judges’ (as discussed in chapter 3) by considering the appointment of Kenya’s Chief Justice and Deputy Chief Justice in 2011. The chapter concludes with analysis and observations about the impact of Kenya’s reformed judicial appointment process and the developments around the appointment of the Chief Justice and Deputy Chief Justice on the consolidation of democracy in Kenya drawing from the insights of active members of Kenyan civil society.

4.2 Embracing reforms

The reforms brought about by the 2010 Constitution are indeed a step in the right direction. Even so, observations and experience from across the world reveal that the law in and of itself is not enough to bring about social change. The success of reforms relies heavily on the actions of political actors, especially the incumbent officials who have the responsibility to implement changes and much rests on the political will of those in power.

The High Court ruling that found President Kibaki’s initial nomination of the Chief Justice unconstitutional for failing to uphold the constitutional right to equality (Article 27(3)) and for failing to ensure public participation has highlighted Kenya’s renewed commitment to ensuring government accountability. Similarly, the Kenyan National Assembly Speaker Kenneth Marende’s declaration that President Kibaki’s nominations were unconstitutional for failing to adequately consult with the Judicial Service Commission (JSC) and National Assembly as prescribed by the Constitution and by the National Accord that created the Unity Government provides more evidence of this commitment.

Allowing the public to participate in the selection of judges through an open and transparent process contributes to establishing public support in the judiciary early on.

Not only does providing for public participation strengthen political accountability, it also contributes to the development of a vibrant civil society. Through involvement in the judicial nomination process, civil society may see the value of participating in and contributing to the political discourse and thus to shaping the country's democracy and ensuring that the public interest is upheld.

4.2 Implementing the 2010 Constitution judicial appointment process: Selection of the Chief Justice and Deputy Chief Justice in 2011

These 2010 Constitutional judicial appointment provisions discussed in chapter three were recently put to the test with the appointment of Kenya's new Chief Justice and Deputy Chief Justice. The appointment process highlights the tension between the reform of law and the reform of political behaviour (that is, the political will to implement reforms).

The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) cautioned in the lead up to the appointments:

ICJ Kenya reiterates that the appointment of the Chief Justice should be open, transparent, and competitive and adhere to the international best practices. Whilst the prerogative is on the two principals, a wrong formula will undermine all efforts that have been put in place to restore the legitimacy of the judiciary in the perception of citizens. The current situation in Kenya is an antithesis to international best practices that require the appointment process to be transparent, competitive and based on merit.¹⁰⁹

The statement by ICJ-Kenya notes the general concern over whether the executive would fully implement the Constitution's provisions, and the tension was apparent from the outset of the process. On 28 January 2011, President Mwai Kibaki sought to unilaterally nominate the new Chief Justice without any consultation with the JSC or approval from the General Assembly, as stipulated by the 2010 Constitution. The general public, led by Kenyan civil society organisations including ICJ-Kenya as well as the Kenya Law Society, subsequently protested the move.

¹⁰⁹ International Commission of Jurists (ICJ)-Kenya 'ICJ Kenya's Position Paper on the appointment of the next Chief Justice' January 2011 6 www.icj-kenya.org (accessed 7 July 2011).

After a High Court ruling declared the nominations unconstitutional and the Parliamentary Speaker's ruling reiterated the High Court ruling (See chapter three for detailed discussion), President Kibaki was compelled to rescind his nominations and revert to the JSC.¹¹⁰

Following President Kibaki's withdrawal of his nominations, the JSC proceeded to advertise the posts of Chief Justice and Deputy Chief Justice in accordance with the principle of transparency, in order to give eligible persons the opportunity to be considered.

Many people applied for the posts, including Kenyan lawyers, some of whom were sitting judges, as well as lawyers from other member states of the Commonwealth. From these applications, the JSC put together a shortlist of candidates. All shortlisted candidates were subjected to public interviews, which appeared in various broadcast and print media, and public participation and discourse was enhanced, 'triggering a vigorous public debate on the competence and suitability of the respective candidates'.¹¹¹ This has contributed to the development of a democratic political culture where freedom of expression is protected and encouraged. In the same way, the vetting of the nominated candidates by the National Assembly was broadcast to the public.

As noted earlier, safeguarding the independence of the judiciary does not only rest on the credibility and transparency of the judicial appointment system but also depends on the quality, impartiality, integrity and resolve of the individuals who are selected to serve in the judiciary. It is because of this understanding that the JSC 'questioned [candidates] on their integrity, character, judicial philosophy and past conduct, among other things'.¹¹²

The individuals to emerge as the successful candidates for the position of Chief Justice and Deputy Chief Justice would be the face of Kenya's judicial reform process and a

¹¹⁰ Njoroge Regeru & Company 'Competitive and transparent new process for hiring top judicial officers' 5 July 2011
<http://www.internationallawoffice.com/newsletters/detail.aspx?g=681d3fa177d04973a4c40504fe874e96&rdr=1> (accessed 20 July 2011).

¹¹¹ Njoroge Regeru & Company (n 110 above).

¹¹² Njoroge Regeru & Company (n 110 above).

reflection of its legitimacy and credibility. Thus the background, values and experience of the selected persons were very important in establishing whether the current judicial appointment process is indeed credible and legitimate, and reflective of the aims of the 2010 Constitution's provisions.

To evaluate whether the outcome of the appointment of the Chief Justice and Deputy Chief Justice live up to the aims of the 2010 Constitution of selecting independent judges who uphold the values of the Constitution in their conduct, the biographies of the selected candidates are outlined below for scrutiny:

Dr Willy Mutunga, Kenya's new Chief Justice, has a background in academia as well as civil society activism. He is an Advocate of the High Court of Kenya and holds a Bachelor of Law degree from the University of Nairobi, a Master of Law from the University of Dar Es Salaam and a PhD from Osgood Hall Law School, York University. He joined the University of Nairobi as a lecturer from 1974 to 1982. In 1979 he became the General Secretary of the University Academic Union, making him a prominent activist until Kenyan police detained him for his alleged involvement in an underground insurgent group. Dr Mutunga practiced law from 1984 to 1998. In 1993 he was elected as the Chair of the Law Society of Kenya (LSK). During his tenure he led a campaign to push for constitutional change and to pressure the Moi government to reform. At this time he spearheaded the formation of strong civil society groupings that lobbied for constitutional reforms, including the Citizens' Coalition for Constitutional Change (4Cs) and National Convention Executive Council (NCEC). Despite his legal experience his nomination was criticised in some quarters due to his lack of judicial experience. However, his years in academia and private practice put him in line with the constitutional stipulation of experience. Members of civil society have argued, in his favour, that as an outsider and activist he is most suitable to carry out the project of transforming the Kenyan judiciary.¹¹³

¹¹³ G Kirwa & S Ruto 'I am not gay' says Dr. Mutunga' 7 June 2011 <http://www.kbc.co.ke/news.asp?nid=70633> (accessed 20 July 2011); M Mwanzia 'Why Mutunga's past, credentials fit for the job', 20 July 2011, <http://m.standardmedia.co.ke/news.php?id=2000036118> (accessed 20 July 2011); Kenya Citizen TV 'Willy Mutunga's Profile' 24 April 2011 <http://www.youtube.com/watch?v=xhI-5yt8ok4> (accessed 20 July 2011).

Ms Nancy Barasa, Kenya's new Deputy Chief Justice, is an Advocate of the High Court with a Master of Law from the University of Nairobi; she is a PhD candidate at the same university. Barasa has practiced law for over 30 years and served as the Chair of the Kenya Law Reform Commission. She is also a former Chair of the Federation of Women Lawyers in Kenya (FIDA Kenya). Like Dr Mutunga, she has played a major role as a legal reform activist in Kenya.¹¹⁴

Following are the sentiments expressed by prominent civil society organisations at the JSC's nominations of Dr Mutunga and Ms Barasa.¹¹⁵

Executive director of the Africa Centre for Open Governance Gladwell Otieno praised the Judicial Service Commission for 'a process which was open, transparent and innovative' and that '[t]he process is also beneficial in that, in its openness and rigour, it was completely opposed to the unfortunate recent attempt to nominate heads of the judicial institutions.'¹¹⁶

The NGO Council lauded the JSC for conducting a 'transparent recruitment process' and hopes that it will restore the faith of Kenyans to the judicial process.¹¹⁷

In a press statement, Administration Manager Fred Ochieng-Olendo said the method used to go about the interviews has given the judiciary 'much needed' integrity.¹¹⁸

Kenya National Commission on Human Rights Commissioner Hassan Omar Hassan challenged judges and magistrates to prepare themselves for serious judicial reforms.

¹¹⁴ NTV, 'Kenya's best CJ & his Deputy Dr Willy Mutunga & Nancy Barasa' 18 May 2011 <http://www.youtube.com/watch?v=bQ0kNwE4SPA> (accessed 20 July 2011).

¹¹⁵ L Onyango & G Bocha 'Many happy with choice of Mutunga, Barasa but few fault process' 14 May 2011 <http://mobile.nation.co.ke/Many+happy+with+choice+of+Mutunga+Baraza/-/1292/1162602/format/xhtml/-/d19qo3/-/index.html> (accessed 20 July 2011).

¹¹⁶ Onyango & Bocha (n 115 above).

¹¹⁷ Onyango & Bocha (n 115 above).

¹¹⁸ Onyango & Bocha (n 115 above).

While praising Dr Mutunga's nomination, Hassan said the long journey to transforming the country's judicial system has just begun, and he put on notice judges who failed to meet Kenyans expectation. Hassan urged President Kibaki and Prime Minister Raila Odinga to quickly endorse the nominations and set a good precedent for MPs to approve the appointments of Dr Mutunga and Ms Barasa. Muslims for Human Rights Executive Director Hussein Khalid praised the JSC for conducting thorough and transparent interviews.¹¹⁹

These positive pronouncements together with the character, integrity, conduct and values of the two selected individuals, are evidence that the reformed judicial appointment process is able to ensure the appointment of good judges and is able to secure and guarantee their independence.

Both Dr Mutunga and Ms Barasa have demonstrated personal integrity as well as independence of thought, as is evident in the activities and struggles they have fought towards the realisation of true democratic principles and safeguarding of human rights in Kenya. Even when such activism has pitted them directly against the executive, the candidates have borne the consequences and continued their efforts rather than be co-opted. These individuals are not likely to play the role of the executive's mouthpiece and are set to transform the judiciary's position of subservience into one of assertiveness and commitment to the promotion of constitutional values and principles. However, due to their strong leaning towards activism for social reform, the candidates need to be cautious not to convert 'their court into a continuous constitutional convention'¹²⁰ by maintaining the balance between making norm changing decision and decisions that are likely to be enforced by the executive and legislative branches of government.

¹¹⁹ Onyango & Bocha (n 115 above).

¹²⁰ Hague and Harrop (n 9 above) 253.

4.3 Implications for the consolidation of democracy in Kenya: Interviews with three active members of Kenyan civil society

The adoption of the 2010 Constitution has reinvigorated Kenya's democracy. The new found vibrancy of the political system has been illustrated in the judicial selection process which was among the first of the reforms to be implemented by the state. The process was a litmus test for the prospects for the transformation of Kenyan politics. The process has brought together the necessary ingredients for democratic society including respect for and promotion of the rule of law, accountability of state officials, and an active civil society.

Commenting on the implications of this process on Kenya's democracy, a prominent Kenyan Defence Lawyer with Haki Focus, described the developments as the 'Kenyan people taking back their power... showing the executive that it holds power in trust for the Kenyan people as it is captured in the Preamble of the Constitution'. In this way, the judicial selection process has given substance to the crude definition of democracy as rule of the people, for the people and by the people.¹²¹

A natural result of the citizenry regaining its voice and influence over developments in the public arena is that the historical dominance of the executive (detailed in this study) is no longer a barrier.

A member of senior management of the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), who is also an Advocate of the High Court of Kenya, observed that executive interference in the judiciary relied on the judicial officers' fear of the executive and was also motivated by the desire to gain outcomes favourable to specific political interests. He noted that although the reforms and constitutional provisions cannot guarantee the annihilation of abuse of power in government the executive can no longer wield the type of influence on the judiciary that it did in the past – the JSC acts as a buffer against this. He asserted further that there is an expectation on the part of the Kenyan people that the reforms in the judiciary will strengthen the fight against corruption. "The judiciary has been the graveyard for corruption cases and

¹²¹ Face-to-face interview with Kenyan Defence Lawyer Haki Focus (an organization in Kenya) at White Sands Beach Hotel, Dar Es Salaam, Tanzania on 18 October 2011.

therefore the judiciary has to prove to the Kenyan people that it is willing and capable of stamping down corrupt practices and meting out judgments that reflect its intolerance".¹²²

Another Advocate of the High Court of Kenya currently and Programme Officer at Transparency International Kenya (TI Kenya), reflecting on the reform of the judiciary noted that the Kenyan judiciary has traditionally had a bias in favour of the executive, corroborating the assertions made in chapter two concerning the judiciary's subservient disposition towards the executive.¹²³

According to the TI official the judiciary was more executive minded than the executive itself. He elaborated that in some instances a judge would give a verdict favourable to the executive without the executive having to exert any direct or indirect pressure on the judge.

This was largely due to the fact that the criteria for the selection of judges were opaque and the selection boiled down to a question of political patronage, as highlighted in Chapter three. Because judges did not themselves know the reason for their selection they were always in doubt as to why they were selected as opposed to perhaps better qualified colleagues. This situation caused judges to feel insecure since if a judge realised that he owes his job to political patronage rather than to his professional status or qualification he will then be bound to serve the political interests that put him in that position.¹²⁴

Turning to the reformed judicial appointment process he asserted that the new dispensation improves upon the weaknesses of the former in that candidates are given the opportunity to apply so individuals know that they are going to be judges or are not ready to be judges based on their qualifications. The interview process is open to the public. After surviving that kind of public scrutiny, an applicant is emboldened to stay true to the law. An additional strength of the new process is that the JSC is itself independent of political interests. The composition was designed in such a way as to

¹²² Telephone interview with member of senior management at the Kenyan Section of the International Commission of Jurists on 27 October 2011.

¹²³ Telephone interview with Advocate of the High Court of Kenya and Programme Officer in the Governance and Policy Programme at Transparency International Kenya on 25 October 2011.

¹²⁴ n 122 above.

shield the JSC from political patronage and make it almost impossible to control. Individuals who hold positions in the JSC are not appointed through a common channel; and this ensures that the body that is to select an independent judiciary is itself independent. The appointment of judges being done in a public manner with the involvement of the citizenry also ensures independence. To the extent that the role of the President in the appointment process has been whittled down means that the executive's dominance *vis a vis* the judiciary has been diminished.¹²⁵

Both the Defence Lawyer and TI Programme Officer agreed that the question of the judiciary taking stronger action on corruption would be enhanced by the process of vetting sitting judges. The 2010 Constitution provides for the vetting of existing judges. Vetting judges is a process that seeks to ensure that the judiciary will only consist of judges who have proven themselves through their past conduct and decisions to be individuals of the highest integrity so as to build the confidence of the Kenyan people in the judiciary.¹²⁶

4.4 The contribution of the judiciary to the consolidation of democracy in Kenya

According to the ICJ-Kenya official, the prospects for the consolidation of democracy are good. He reiterated that the judicial appointment process has opened up the political space in the country in that the public and the media were able to participate in it, as it was an open and transparent process. His critique was that some members of the public trivialised the process by raising issues and questions that, in his opinion, had no substance in determining the suitability of candidates, such as dwelling on the stud worn by Dr Willy Mutunga (current Chief Justice).¹²⁷

Continuing his observations on the future of democracy he highlighted the challenge of electoral violence that has plagued Kenya. However the reforms in the judicial appointment process and the attendant results – an independent judiciary with popular support – mean that there is a greater likelihood that election disputes will in future be referred to the courts rather than fought out in the streets. The Supreme Court now has

¹²⁵ n 122 above.

¹²⁶ n 121 above; n 108 above.

¹²⁷ n 121 above.

jurisdiction over such cases and the Constitution stipulates 21 days as the maximum turn-around time for judgment following the lodging of such a complaint. This improves on the situation that prevailed in the 1992 and 1997 elections in which opposition lodge legal disputes against the election outcomes however judgments were only handed down 12 months and 24 months following the lodging of complaints respectively. The delays amounted to a subversion of justice leading to diminished confidence in the ability and willingness of the legal process to address the grievances of the opposition.¹²⁸

4.5 Conclusion

Reforming the judicial appointment process forms part of the institutional reform that Branch and Cheeseman¹²⁹ were alluding to as a necessity to make Kenya's transition to multiparty politics effective and complete. Although born out of compromise after a period of conflict – as are most of the world's constitutions – Kenya's 2010 Constitution reflects the society's desire to strengthen and entrench the values of accountability and responsiveness to the electorate. It reflects the willingness on the part of Kenya's leaders and citizens to restore the rule of law in a society riddled with corruption. The fidelity with which the judicial appointment process was implemented and guarded is evidence of the strengthening and maturity of Kenya's democracy.

This new process satisfies Goldman's four principles for judicial selection: the process was open and transparent, it provides the opportunity for previously disadvantaged groups to be recruited – e.g. women, it ensures that candidates are comprehensively scrutinised and provides a democratic framework of accountability for judges.

The nomination and appointment of the Chief Justice and Deputy Chief Justice is an encouraging development for democracy in Kenya and for restoring public confidence in the judiciary. The two are individuals of high calibre and have been found to have the qualities that make a good judge: merit, independence, impartiality and integrity.

¹²⁸ n 121 above.

¹²⁹ D Branch & N Cheeseman (n 22 above) 26.

Through the process of appointing the Chief Justice and Deputy Chief Justice, the dominance of the executive power in the political and judicial life has been delegitimised. The challenge of executive dominance over the judiciary (as discussed in Chapter two) is addressed by the reformed judicial appointment process. Very few people in Kenya would disagree that the process was open, transparent and accountable. The conduct of these appointments bodes well for the promotion of the values of accountability and transparency in the functioning of courts and the adjudication of judges moving forward, as well as for the restoration of public confidence in the legitimacy of the judiciary in the long term.

In addition, the High Court's ruling against the President's initial selections reflects De Vos's sentiments about judges acting to defend and further the country's Constitution in the interests of the citizenry, even if it means making unfavourable decisions.

Because of the independence and legitimacy of the appointment process, buttressed by the decision of the High Court, the judiciary can confidently play its role of oversight over the other branches of government and withstand any attempts by the state to undermine the tenets of the country's Constitution.

The reforms to the process would be meaningless if Parliament was unwilling to defend its role in the process. The fact that the National Assembly Speaker ruled against President Kibaki's initial nominations for the posts of Chief Justice and Deputy Chief Justice has shielded the legislature from executive encroachment and has strengthened Parliament's oversight role over the President as well as the public's right to participation, bodes well for the observation of the judicial appointment process.

Action by Parliament in the initial stages of the implementation of the new appointment process should contribute to shaping the relations between the executive, legislature and judiciary and challenging the executive's dominance in the country's political discourse.

The political space, which has for decades since independence been dominated by the executive, has been opened up through the constitutional provision for public

participation in the appointment of judges. This bodes well for the strengthening of democracy in Kenya as illustrated by civil society's actions in regard to the President Kibaki's nominations.

Not only the outcomes in the form of an independent and strong Chief Justice and Deputy Chief Justice, but the entirety of the process, has breathed new life into Kenya's democracy. The active members of civil society interviewed for this study – who are lawyers, analysts as well as human rights activists – concur that the current appointment process greatly improves on that which it has replaced. They agree that the developments around the appointment of the current Chief Justice and Deputy Chief Justice create room for optimism about the prospects for consolidating democracy in that country.

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