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Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?

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Abstract
The subject of separation of powers has arisen over and over again in Kenya since 2010 when Kenya instituted a new constitution. The Constitution has given rise to debate about the extent to which courts may intervene in the conduct of the affairs of other arms of government, spawned by accusations by other branches of government, especially the legislature that the judiciary is exceeding its mandate by interfering in the affairs of the other arms of government. An attempt to determine to what extent the judicial arm may intervene as such must directly interrogate the theoretical nature of the judicial function, and the judicial function in the context of the Constitution of Kenya.This article will seek to define the extent to which the judicial arm may intervene in the conduct of affairs of other arms of government. The subject is divided into three substantive parts. Part 1 examines the evolution of the theoretical underpinnings of the separation of powers doctrine, while Part 2 looks at separation of powers from a functional perspective, with specific focus being devoted to the judicial function. Part 3 then proceeds to analyse the operation of the concept of separation of powers with specific reference to the judicial function in the context of Kenya's constitution. In this part, special attention will be accorded to the doctrine of judicial restraint as a philosophy governing the fulfilment of the judicial function *vis-à-vis* the functions of other branches of government. It is concluded that the self-imposed limit objectified in judicial restraint constitutes a veritable device for giving expression to the doctrine of separation of powers.
Keywords: Separation of powers, judicial restraint, merit review, constitutionality of appointments

Separation of Powers in Theoretical Context

Separation of powers is now widely accepted as a constitutional doctrine. It is however rarely expressly provided for in the texts of national constitutions, although it is invariably implicit in the constitutional expression of division of functions in modern constitutions. In view of its influence in the structure of governments of modern nations, it is important to explore the origins and place of the concept in the operation of democratic governments.

This part will examine the evolution of the theoretical foundations of the doctrine to enable an assessment of the place of the doctrine in modern government.

Aristotlean Theory of Separation of Powers

In classical Greece, Aristotle, who was among the earliest writers on separation of powers, conceived of a distinction among the deliberative, the magisterial and judicial powers, which more or less corresponds to the modern day division of powers among the legislature, the executive and the judiciary (Rachham, 1932: 1297b-1298a). Aristotle's formulation did not however envisage the clear separation of functions between the legislature and the judiciary, for he considered the judiciary as a delegate of the former.

Lockian Theory of Separation of Powers

The traditional conception of separation of powers, predicated on the proposition that the functions of government are classifiable into executive, legislative, and judicial, and that no branch should exercise the functions of the other, concretised in the 15th Century (Ball, 1983). John Locke (1690: para. 143), a renowned theorist of the time, stressed the need for division of powers of government into the legislative, the executive and the federative. Explaining the rationale he argued that, "*it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute* them*, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage, and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government."*

Locke (1690: para. 144) also explained the basis of the functional distinction between executive and legislative power in well-ordered society when he wrote, "But because the laws that are at once and in short time made have a constant and lasting force and need a perpetual execution or an attendance thereunto; therefore, it is necessary there should be a power always in being which should see to the execution of the laws that are made and remain in force."

Locke did not however mention judicial power, a factor that led Laslett (1960: 132-133) to conclude that Locke did not have a theory of the importance and desirability of the reposition of these powers in separate hands in order to preserve liberty and constitutional harmony.

Montesquieu's Doctrine of Pure Separation of Powers

It is Montesquieu (1748), who developed his theory in the 18th Century, shortly before the outbreak of revolution in America and France, who has had the greatest influence on the emergence of the pure doctrine of separation of powers. Montesquieu's justification for the doctrine is the preclusion of tyranny. His basic outline of the doctrine is captured in his exposition that w*hen the legislative and executive powers are united in the same person, there can be no liberty; so also will it be, if the judicial power is not separated from* the *legislative and executive. "Were it combined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, be it of the nobles or the people, to exercise those three powers, that of implementing the public resolutions, and that of adjudicating the causes of individuals"* (1748: Chapter VI).

Drawing from Montesquieu's theory above, pure separation of powers embodies two elements. First, institutional or organic separation, which implies that the same person must not form part of more than one of the three arms of government, and that none of the arms performs any of the work assigned to the other arms of government (Wade & Phillips, 1977; De Smith, 1977). In general therefore the organization, personnel and tasks of the three different branches of the state machinery ought to be kept entirely separate. Institutional separation of powers has been explained as the demand for separation which would extend only to the three institutions of government and their personnel; it would have no further implications (Finnis, 1967-70).

Functional separation or separation of powers in the abstract is the second element of pure separation of powers. Vile (1967) postulated that a strict adherence to the separation of powers theory demands that one branch of government must not perform the functions of another branch. Separation of powers in the abstract has been explained by Finnis (1967-70: 168) as signifying a conceptual system of government functions in which there are three functions or powers of government-legislative, executive and judicial- and the institutions set up to exercise these powers or functions are subject to the overriding requirement that *that no person or body should exercise more than one such function.*

The cast iron doctrine of separation of powers has therefore come to signify organic separation as well as separation of functions, that is, that one branch of government should not usurp functions belonging to another branch. This view was espoused by the United States Supreme Court as early as 1881 in *Kilbourn v. Thompson* (1881: 190), where the Court stated that, "*It is essential to the successful working of this system that the persons entrusted with power in any one of these three branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."*

In practice however, a pure separation of powers in terms of institutions and functions of government has never been achieved, nor is it desirable, as elucidated in the succeeding section.

Modern Government and the Impracticability of Pure Separation of Powers

A neat separation in the sense of one branch of government being partitioned from the other would lead to a disjuncture in the actions of government, and probably result in the breakdown of government. This possibility was expressed by Woodrow Wilson (1908: 56) when he explained that "government is not a machine but a living thing". According to him, since government is a body of men, not blind forces, with highly differentiated functions but with a common task and purpose, their co-operation is indispensable, while their warfare fatal. Felix Frankfurter (1930) also affirms that in view of the complexities characterising modern governments, the enforcement of a rigid conception of separation of powers would make modern government impossible.

Modern constitutions therefore seek to balance between the powers of the three arms of government. Vile (1967: 291) asserts that the more successful varieties of the doctrine of separation of powers have endured because they were grafted with the theory of balanced government, or one of its derivatives such as mixed government, and the concept of checks and balances, to produce 'the multi-functionality of political structures."

Indeed in modern states, values once associated with a doctrine of the formal separation of legislative, executive and judicial powers may now depend on pluralistic arrangements, in which the powerful departments of central government operate in a web of countervailing powers exercised by legislatures, courts, devolved administration, local government and other public bodies, political parties, and a network of pressure groups (Turpin & Tompkins, 2007).

Functional Separation

The impracticability of a rigid separation of power in modern government has been noted in the preceding part. However, the task of formulating a precise definition of executive, legislative and judicial functions is a perennial problem (De Smith, 1980). In *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931: 91), Dixon, J stated in relation to the distinction between the three governmental powers that, "It is one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government and the practical and political consequences of an inflexible application of their delimitation."

In *Mutual Film Corp. v. Industrial Commission of Ohio* (1915), the United States Supreme Court similarly pointed out the difficulty of defining with precision the distinction between executive and legislative functions, and expressed the view that rather than attempting to so define, it is better to seek the distinction between administration and legislation by means of illustrations.

This part seeks to determine the province of the powers of each of the branches of government.

Distinguishing Legislative and Executive Powers

Montesquieu (1748) posited that by legislative power, a prince or magistrate makes laws, and rectifies or repeals laws. In practice law making must entail other important ingredients. Laws once made must be implemented for purposes of achieving the objectives that the legislature envisaged at the time of making the laws (Ojwang, 1990). Legislative power must accordingly entail the right and the competence to examine the mode of execution of laws. According to Ojwang' (1990: 120), as a matter of constitutional theory, the law-making power entails firstly, the making or repealing of laws (or simply, the power of law-making) and, secondly, the power to ensure due administration of the law. Given the fact that both law-making and administration of law must be concerned with or affected by society's resources, he asserts, the law-making power must entail a third ingredient, namely, due application of public resources.

Executive powers are even more difficult to define. Ojwang' (1990) notes that all public matters that, in their very nature, must be regulated through flexible discretion remain the domain of the executive. This point was earlier expressed by Locke (1690: 168) when he stated that the good of the society requires that several things should be left to the discretion of him that has executive power, "for the legislators not being able to foresee and provide by laws, the executor of the laws, having the power in his hands, has by the common laws of nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction."

Executive powers may therefore be construed as the residue of the functions of government after legislative and judicial functions have been taken away, subject of course to the provisions of the Constitution or the law. Thus the executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the state (*Ram Jawaya v. The State of Punjab*, 1955).

In seeking to distinguish between the nature of executive and legislative functions, Professor S.A. De Smith (1980: 17; Fairlie, 1922) averred that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases, while an administrative act, while incapable of exact definition, includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

Executive and Legislative Powers: The Case of Delegated Legislation

It has been noted that in practice, absolute separation of powers is untenable. Most constitutions provide for instances when one arm exercises functions similar to those of another arm. Indeed it is now trite law that the performance of some legislative functions by the executive, does not *ipso facto* amount to a violation of the separation of powers doctrine. A common example of an executive performance of legislative functions is delegated legislation (*Wayman v. Southard*, 1825). The necessity of relieving the legislature from the burden of taking care of the details of every law, and the need to have specialized agencies in modern societies, have been among the principal factors justifying delegated legislation (*Report of the Committee on Ministers' Powers*, 1932).

In *Weerasinghe v. Samarasinghe* (1966) a case which arose during the operation of the Soulbury Constitution in Sri Lanka, the power of the Governor General to make emergency regulations was challenged. It was argued that the constitution conferred the power to make laws on Parliament and nobody else. Therefore, no other authority had law making power. As against this, the Crown's position was that Parliament could delegate its power to make laws to the executive, as it did in that case, even though there was nothing said about it in the Soulbury Constitution.

Sansoni C.J., after considering a number of Commonwealth cases on the question of delegation of legislative power to the executive, stated at page 363 that, "One thing is essential for the validity of a delegation of [the legislature's] law making power, and that is that it should not abandon its legal authority to which it has delegated the power. It must not transform the executive into a parallel legislature and abdicate its function."

The Court held that the fact that the regulations made under the Public Security Ordinance were subject to the power of Parliament to add to, alter or revoke by resolution of the House, and the requirement that any proclamation of a state of emergency had to be communicated to Parliament forthwith and that Parliament must meet within at least ten days after that communication, was sufficient to infer that Parliament had not abandoned its control over the regulations.

Judicial Function

The Nature of the Judicial Function

The judicial function in contrast is the power to determine justiciable issues (*Attorney General for Australia v. The Queen and the Boiler Makers' Society of Australia and Others*, 1957*)*. Justiciability involves the determination of real controversies, what Ojwang (1990:120) described as a matter which is "legal in nature, affecting legal rights and relations, affecting proprietary, personal or jurisdictional situations". In *Khaira & Others v. Sherquill & Others* (2012), the Court explained the basis of justiciability as ensuring that judges do not overreach themselves and that they abstain from deciding questions that are neither appropriate for, nor capable of decision by, the judicial method. Thus a matter is non-justiciable when the court is asked to answer questions which are neither questions of law nor factual issues capable of proof in court by admissible evidence.

Similarly, in *Council of Civil Service Unions v. Minister for the Civil Service* (1985: 697-699) the House of Lords indicated that the exercise by Ministers of certain kinds of prerogative power is not controllable by the courts because, per Lord Roskill, "their nature and subject matter are such as not to be amenable to the judicial process". A similar line of thought is found in *Abbasi v. Secretary of State for Foreign Affairs and Commonwealth* (2002), where the English Court of Appeal affirmed that the courts could not enter the "forbidden area" of the government's decision in the conduct of foreign policy, although it envisaged that judicial review would be possible if the government, in failing to take action to protect British citizens from violations of their fundamental rights by a foreign government, could be shown to have acted irrationally or contrary to the legitimate expectations created by its own assurances and policy statements.

The requirement that the judicial function should be exercisable in relation to real controversies was examined in the Kenyan case of *Samuel Muigai Nganga v. The Minister for Justice, National Cohesion and Constitutional Affairs & Another* (2013). The petitioner sought an advisory opinion from the High Court of Kenya as to *inter alia*, who is a full time state officer, what constitutes general employment for purposes of Article 77(1) of the constitution, and whether members of parliament and members of a county assembly are full time state officers for purposes of Article 77(1) of the constitution. He contended that no statute defined who a full time state officer was, and the court should give an opinion in view of the restrictions created by Article 77 so as to shed light on what constitutes gainful employment. The court held that it had no jurisdiction to deal with hypothetical and abstract issues as its jurisdiction in interpreting the constitution is not to be exercised in the absence of a real dispute.

The judicial function is unique, in that of the three generic functions of government, only it enjoys safeguards of its independence, and exclusivity. These characteristics are examined below.

Independence of the Judicial Function

In liberal constitutional experience, the judicial function is an exclusive function that can only be exercised by judicial bodies, without external control or influence. The protection of the judicial function from external control or influence was in issue in *Don John Francis Douglas Liyanage & Others v. the Queen* (1967). The facts were that Criminal Law (Special Provisions) Act No. 1 of 1962, passed by the Parliament of Ceylon on 19th March 1962, contained substantial modifications of the Criminal Procedure Code, including purporting to legalise *ex post facto* the detention for sixty days of any persons suspected of having committed an offence against the state by widening the class of offences for which trial without jury by three judges nominated by the Minister for Justice could be ordered, by allowing arrest without warrant for waging a war against the Queen and prescribing new minimum penalties for that offence and for conspiring to wage war against the Queen and overawe the government by criminal force and by widening the scope of that offence.

The Act also provided for the admission in evidence of certain confessions and statements to the police, inadmissible under the Evidence Code. It was expressed to be retrospective to cover an aborted *coup de tat* on 27th January 1962 in which the appellant took part, and was to cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the state committed on or about the date of the *coup de tat* or from one year after the date of commencement of the Act, whichever was later.

The Criminal Law Act, No. 31 of 1962 substituted the Chief Justice for the Minister of Justice as the person to nominate the three judges before whom trial without jury might be ordered but left unaffected other provisions of the former Act.

The appellants were convicted under the Acts of conspiring to wage war against the Queen, conspiring to overawe by means of criminal force or the show of criminal force, the Government of Ceylon, and conspiring to overthrow by unlawful means the Government of Ceylon as by law established. They were sentenced and appealed.

The Privy Council held *inter alia* that the Acts, directed as they were at the trial of particular persons charged with particular offences on a particular occasion, involved a usurpation and infringement by the legislature of judicial power inconsistent with the written constitution of Ceylon which, while not vesting judicial functions in the judiciary, manifested an intention to secure the judiciary freedom from political,

legislative and executive control. The court observed at page 290:

The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable…and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them…These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.

At page 291, the Court, in adopting the words of the United States Supreme Court in *Calder v. Bull* (1799) described the Acts as, "legislative judgments; and an exercise of judicial power".

Exclusivity of the Judicial Function

(i) The General Principle

The exclusivity of the judicial function denotes that no other organ of the state other than judicial organs should exercise the judicial function. This principle was applied in *Attorney General of Australia v. The Queen and the Boiler Makers Society of Australia and Others* (1957). On January 16th 1952 an award was made under the Federal Act binding both the Boilermakers' Society of Australia, an employers' organisation registered under the Act, and the Metal Traders Employers' Association, also an employers' organisation similarly registered, in the following terms, "No organization party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award."

The proceedings arose from an order of the Commonwealth Court of Conciliation and Arbitration, a court established under the Act, fining the Society for contempt and ordering them to pay costs of the contempt proceedings instituted by the association. The association had alleged in the proceedings that the society had failed to comply with an order of the court directing it to comply with the award of the court, and enjoining it from further breach of the award.

The society thus applied to the High Court of Australia challenging the proceedings of the Commonwealth Court of Conciliation and Arbitration on the grounds that the court was vested by the Act with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character, and the powers which the Act purported to vest in it and which it exercised in making the said orders were judicial. It submitted that the sections purporting to vest in the said court the said powers were contrary and repugnant to the provisions of the constitution.

The High Court held that it would make a mockery of the constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it was a court vest in it judicial power. The Judicial Committee of the Privy Council, to which the matter finally ended found that the Act had vested in the court administrative, arbitral and executive powers, functions and authorities as well as judicial power, to the extent of fining a citizen or depriving him of his liberty. The Board also distinguished arbitral and judicial functions, recognizing that judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted, whereas functions of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other (*Waterside Workers Federation of Australia v. Alexander (J.W.) Ltd*, 1918). It also reiterated at page 319 that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue.

In the end the Judicial Committee affirmed the decision of the High Court.

(ii) Exclusivity of the Judicial Function in the Human Rights Context in the United Kingdom

The ascendency of the exclusivity of the judicial function has been pronounced in the human rights context in the United Kingdom. In earlier times, probably on account of historical constitutional circumstances, English courts did not enforce separation of powers. Thus in *Shaw v. D.P.P.* (1962) the House of Lords made a ruling which amounted to the creation of a wide new offence of conspiracy to corrupt public morals, a decision which was entirely incompatible with the basic tenets of separation of powers, and the principle of legality, *nullum crimen sine lege*.

The domestication of the European Convention on Human Rights by the Human Rights Act, 1998 of the United Kingdom, has however led to the recognition, in the human rights context, of separation of powers as a judicial principle, and with it the demarcation of judicial functions such as sentencing, as solely to be undertaken by judicial bodies in accordance with Article 6 of the Convention. Thus *R. v. Secretary of State for*

the Home Department, ex parte Venables (1998) involved the practice whereby if a young offender was convicted of murder and sentenced to be detained during Her Majesty's pleasure, the Home Secretary would fix a period of detention ('the penal element' or 'tariff') sufficient to meet the requirements of retribution and deterrence, which must be served before the release of the offender could be considered by the Parole Board. The House of Lords did not consider the practice contrary to the principle of separation of powers. But in subsequent proceedings in the European Court of Human Rights in *V and T v. United Kingdom* (1999) it was ruled that the fixing of the tariff amounted to a sentencing exercise, and that the Home Secretary as a member of the executive was not an independent and impartial tribunal, and accordingly there had been a breach of Article 6(1) of the European Convention on Human Rights on the right to a fair trial.

As a result of the decision, the Criminal Justice and Courts Service Act, 2000 provided in section 60 that in respect of young offenders convicted of murder and detained at Her Majesty's pleasure the tariff would be set by the trial judge in open court.

Similarly in *Stafford v. United Kingdom* (2000) the European Court of Human Rights dealt with the responsibility of the Home Secretary under section 29 of the Crime (Sentences) Act, 1997, to set the penal tariff for an adult prisoner serving a mandatory life sentence for murder, and for the eventual decision on release. The court noted that the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry was difficult to reconcile with the notion of separation of powers between the executive and the judiciary. Finally in *R (Anderson) v. Secretary of State for the Home Department* (2002) the House of Lords accepted without hesitation the decision in *Stafford* and made reference to the fundamental principle of separation of powers between the executive and the judiciary.

Non-Judicial Functions

On the converse, functions may sometimes be committed to a court which would, when considered independently, be deemed as belonging to an administrator. However when the functions form incidents in the exercise of strictly judicial power, they are judicial (*Queen Victoria Memorial Hospital v. Thornton*, 1853).

Separation of Powers in the Kenyan Constitutional Experience

In the preceding part, the theoretical foundation of the functions of different arms of government has been explored. This part will narrow down to the Kenyan experience with separation of powers in the context of the Constitution since its inception in 2010. Special attention will be accorded to the judicial function and the extent to which it can intervene in the conduct of the affairs of the other branches of government.

Architecture of the Constitution of Kenya

The architectural design of the Constitution of Kenya evinces separation of power. Thus Article 1(3) provides that the sovereign power, which by article 1(1) belongs to the people, is delegated to state organs, namely, parliament and legislative assemblies in the county governments, the national executive and the executive structures in the county governments, and the judiciary and independent tribunals, which all should perform their functions in accordance with the constitution. Article 94(1) then vests legislative power at the national level in Parliament, while Article 185(1) vests such power in the devolved government in the county assembly.

A notable outcome of the deliberate effort made during the formulation of the Constitution to tame the overbearing executive which characterized the first four decades of Kenya's post-independence period, is the omission by the Constitution to expressly vest executive authority at the national level in either the president or the cabinet, although the traditional executive functions such as foreign affairs, provision of public services, maintenance of law and order and defence are expressly vested in the President by Articles 131 and 132. This is unlike executive authority at the county level which is expressly vested in and exercisable by the county executive by dint of Article 179(1). It is also noteworthy that apart from the listed functions, Article 132(4)(a) provides that the president may only exercise such other executive function provided in the "constitution or in national legislation". This was seemingly intended to constrict the traditional notion of executive authority as the residue of state authority after legislative and judicial functions have been assigned.

With respect to the judicial function, Article 159(1) of the Constitution vests the same in courts and tribunals established by or under the Constitution. In the context of this constitutional architecture it is not surprising that courts in Kenya had to address the question about the extent to which they could adjudicate over the exercise of power by the other branches of government in several disputes which arose after the promulgation of the Constitution of Kenya in 2010. This issue, in the Kenyan context, went to the core of the relationship between the constitutional principles of separation of powers and supremacy of the constitution.

Justiciability of the Conduct of State Organs

The requirement that enacted laws should be consistent with the constitution is axiomatic, being the result of a long line of cases from *Marbury v. Madison* (1803), in the United States, and reflected in many Kenyan cases such as *Okunda v. Republic* (1970). In the latter case, the Official Secrets Act of the East African Community was declared unconstitutional and void to the extent that it required the consent of the Counsel to the East

African Community prior to the institution of criminal proceedings under the Act, whereas the Constitution of Kenya, which vested prosecutorial powers in the Attorney-General, provided that in the exercise of his functions, the Attorney general was not subject to the control or direction of any person.

Many modern constitutions also expressly affirm the cardinal principle that the acts of organs of state and state officials must be consistent with the constitution. In Kenya, the same is articulated in Article 2(4) of the Constitution which provides in part that "any act or omission in contravention of this Constitution is invalid". The constitutionality of actions of state organs and state officials was in issue in *Frank Mulisa Makola v. Felix G. Mbiuki & 4 others* (2013). The petitioner challenged the election of the speaker of Machakos County Assembly in the High Court on the grounds that the said election contravened constitutional principles, and violated his fundamental rights, more specifically his political rights. He alleged that the county assembly members were unduly influenced, bribed and intimidated to vote for the speaker, and that therefore the speaker was allegedly placed at an advantage by having unlimited access to the county assembly members to the exclusion of all other candidates, including the petitioner. The election was therefore conducted contrary to the principle and values of the Constitution.

Objection was taken by one of the Respondents that the court lacks jurisdiction to inquire into the proceedings of the County Assembly on account of the proceedings of the County Assembly being privileged under the Constitution and the law and under the doctrine of separation of powers. The High Court stated that the unconstitutional exercise of executive and legislative power cannot be shielded from judicial scrutiny by dint of the doctrine of separation of powers or in the name of parliamentary immunity or privilege. This, the court observed, is because Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya and is to be exercised only in accordance with the Constitution. Moreover, article 1(3) of the Constitution of Kenya provides that state organs should perform their functions in accordance with the Constitution. The High Court accordingly held that it had jurisdiction to entertain the petition, but as to what lengths it can actually go in doing so, is a second level of inquiry based on the circumstances of each case.

The authority of the judiciary to determine the constitutionality of the conduct of other branches of government was also asserted by the Supreme Court of Kenya in *The Speaker of the Senate and Another and the Attorney General and Others* (2013: para. 58) where the Supreme Court advised, "Parliament must operate under the Constitution which is the supreme law of the land…if Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the constitution."

The Constitution of Kenya has therefore expressly made the constitutionality of the conduct of other branches of government a justiciable issue, pitting the role of courts in such an endeavour directly in apparent conflict with the principle of separation of powers.

Separation of Powers and Judicial Restraint

Judicial Restraint

To what extent then may a court intervene in the functions of other organs? The court in *Frank Mulisa Makola v. Felix G. Mbiuki & 4 others* (2013) adverted to this question, and stated at paragraph 39 that as to what lengths a court can actually go in doing so, is a second level of inquiry based on the circumstances of each case.

In liberal political systems, the discipline of executive and legislative branches arises through the process of regular elections and other constitutional and political processes, unlike the judicial arm, in which the personnel are mostly appointed and enjoy security of tenure, and therefore do not have a popular mandate to support their personal policy decisions (*Speaker of the Senate and Another v. The Hon. Attorney-General and 3 Others*, 2013). The absence of direct popular accountability, and the safeguarding of the judicial branch from political processes, implies that the extent to which the judicial branch may intervene in the functions of the other branches of government must be clearly delineated, and limits of judicial power acknowledged. This is entry point of judicial restraint into the doctrine of separation of powers.

Judicial restraint is a theory of judicial interpretation that requires judges to limit the exercise of their own power, and to hesitate to strike down laws and interfere with the actions of other arms of government unless they are obviously unconstitutional. Accordingly, the function of the court is to examine the action that has been challenged, in accordance with law, and to determine whether the legislature or executive has acted within the powers and functions assigned to them under the constitution, and if not, strike down the action; but as it does so, the court must remain within self-imposed limits (*Asif Hameed and Others v. State of Jamu and Kashmir and Others*, 1998; *Re the Matter of the Interim Independent Electoral Commission*, 2011). Indeed in *The Speaker of the Senate and Another and the Attorney General and Others* (2013) the Supreme Court of Kenya rationalised that if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter-majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government.

Such judicial restraint has traditionally been exercised by courts through the application of various mechanisms such as rules on standing, the requirement of exhaustion of local remedies, strict application of *stare*

decisis, avoidance of the determination of political questions, and even the requirement of justiciability, to restrict the extent to which they may interfere with the conduct of affairs of other branches of government.

The case of *Marbury v. Madison* (1803) is probably the earliest case by the Supreme Court of the United States, in which it was recognised that judicial power did not extend to intervention in matters involving essentially executive discretion. Marbury was appointed a justice of the peace by President John Adams, but his commission was not delivered by the time President Thomas Jefferson took office. Marbury sued Jefferson's Secretary of State, James Madison, when the latter refused to give him his commission. The Supreme Court held that as a general principle, where heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or to act in cases in which the executive possesses a constitutional or legal discretion, their acts are only politically examinable; but where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, an individual who considers himself injured has a right to resort to the laws of the country for a remedy.

In the result, the court held that by signing the commission, the president had appointed Marbury a justice of peace, thereby conferring on him a legal right to the office, and a refusal to deliver the commission to him was a violation of his right, for which the laws of the land afforded him a remedy.

Interpretative Role and Judicial Restraint

Judicial restraint must however not be an excuse for dereliction of constitutional duty. In *Martin Wambora v. Speaker County Assembly of Embu & 5 Others* (2014), where the issue before the High Court of Kenya was whether the court could issue conservatory orders stopping any processes giving effect to the impeachment of the petitioner based on the allegation that the county assembly and senate proceeded to impeach the petitioner in contravention of an existing court order, the High Court was urged by the Attorney General to exercise restraint when called upon to intervene in functions of other state organs, since the matter at issue raised political questions which courts are ill suited to deal with.

With reference to *Nixon v. USA* (1993) where Justice Stevens had observed that the issue in the political question doctrine is not whether constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches, so that disputes implicating these powers should be non-justiciable, rather, the issue is whether the constitution has given one of the political branches final authority for interpreting the scope and nature of such a power, the High Court averred that the case did not impose a blind prohibition on judicial interference.

The interpretative role of the courts, which is the power to set the conduct of other branches of government against the constitution so as to determine the consistency of such conduct with the constitution, is therefore unquestionable. Nevertheless to accord with the philosophy of judicial restraint, thereby avoiding unjustified interference in the functions of other arms, and impeding the carrying out of their constitutional mandate, courts must persistently warn themselves of the need for balance while intervening in the conduct of other organs of government.

The South African Constitutional Court addressed the need for this balance *vis-a-vis* the legislative process in *Doctors for Life International v. Speaker of the National Assembly and others* (2006: para. 70) where it stated that courts should strive to achieve an appropriate balance between their role as the ultimate guardians of the constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

In the circumstances, courts should, in the absence of action that violate the constitution, decline the invitation to interfere in the functions of other arms of government. The Supreme Court of Kenya asserted this position in *The Speaker of the Senate and Another and the Attorney General and Others* (2013: para. 62), where it stated it would be averse to questioning parliamentary procedures that are formulated by the two houses of Parliament to regulate their internal workings as long as the same do not breach the Constitution.

The Principle of Deference

In the clearest case, separation of powers denotes that courts must guard against taking over the functions of other branches of government. In *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* (2013: para. 49), the Court of Appeal of Kenya expressed the need for such deference when it stated that separation of powers does not only proscribe organs of government from interfering with the other's function, but also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. It also warned that such powers are, however, not a license to take over functions vested elsewhere, and recommended that there must be judicial, legislative and executive deference to the repository of the function.

As an element of the doctrine of separation of powers, the principle of deference objectively defines the sphere of each organ of government's activities *vis-à-vis* the functions of the others, thereby restraining

institutional overreach. Three specific instances in which this issue has arisen in the Kenyan constitutional context are discussed below.

(i) Merit Review

In the first instance, courts must in showing deference to other state organs, avoid intrusion into the merits of decisions made by other organs of state, in essence sitting in appeal from decisions of other organs of state. In *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* (2013: para. 77), the Court of Appeal of Kenya stated with reference to judicial review of legislative decisions that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision making organ, "[The court] has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently."

Thus in *Washington Jakoyo Midiwo v. Minister, Ministry of Internal Security and 2 Others* (2013) the Petitioner, who was a member of the National Assembly, brought a petition challenging the deployment of Kenya Defence Forces to parts of Samburu, Turkana and Garissa counties in Kenya as being contrary to Article 241(3)(c) of the Constitution which demands parliamentary approval prior to deployment of the forces in any part of Kenya to restore peace in areas affected by unrest or instability.

The evidence submitted in court indicated that the issue had been raised in Parliament, where a parliamentary committee had concluded that there was no actual direct deployment of the forces in support of the National Police Service. The forces had merely provided logistical support. The parliamentary committee had therefore concluded that the Government should only consider deploying the KDF in aid of civil authority when necessary and in line with Article 241(1)(c) of the Constitution.

The Court noted that there was no requirement for approval by the National Assembly where the Kenya Defence Forces act under Article 241(3)(b) of the Constitution, which governs participation with other authorities in situations of emergency and disaster, unlike the circumstances in sub-article (c), and that the National Assembly had resolved the issue when raised by the Petitioner by investigating the matter and accepting a report by, and recommendations of, its committee. Accordingly, since the issue of whether and to what extent the Kenya Defence Forces can be deployed in the country was a matter within the competence of the legislature, in effect what the petitioner sought was for the court to evaluate the debate in the National Assembly. The court held that it would be interfering with what is clearly within the mandate of the legislature and rejected the petition.

(ii) Constitutionality of Appointments

The implications of the injunction on courts not to substitute their decisions for decisions of other organs of state purportedly in pursuit of their interpretative role also finds expression in the role of courts in reviewing the constitutionality of appointments. Two tests have been applied by courts in such review, the rationality test, and the fact dependent objective test. These tests are elucidated below.

(a) The Rationality Test

The rationality test seeks to determine whether the appointive decision was such that no reasonable person would have arrived at the decision if he had applied his mind to the question. The test may thus be reduced to an inquiry whether a reasonable person would not have reached the determination in question based on the available evidence (*Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, 2013: para. 53). The purpose of the rationality test is to limit arbitrariness.

The test was examined in *Democratic Alliance v. the President of the Republic of South Africa & 3 Others* (2012), which involved a challenge in court, of the appointment by the President of South Africa to a constitutional office, on the grounds that the executive failed to consider material adverse to the appointee in making the appointment. The challengers wanted the appointee declared unfit to hold office. The South African Constitutional Court had before it reports of a commission of inquiry and the Public Service Commission, both in which the appointee testified on oath, and the opposing Affidavit of the President. The South African Constitutional Court held that the appointment failed the test of rationality under the constitution and upheld the petition.

In Kenya, the Court of Appeal in *Mumo Matemu* (2013) essentially limited the application of the rationality test to clear cases like that in *Democratic Alliance* (2012) in respect of which it noted at paragraph 65 that "the court had before it conclusive evidence". The Court of Appeal explained that apart from a finding of procedural infirmity based on cogent evidence including the appointment official's affidavit, the court in that case was armed with tested evidence about the moral probity of the appointee with which to reach a conclusion that the appointee was unfit to hold office.

(b) The Fact Dependent Objective Test

The fact dependent objective test was enunciated in response to the need to ensure that in fulfilling their review function over constitutional appointments, courts would avoid transforming themselves into appeal bodies on the wisdom, correctness or desirability of the opinions of the other branches of government, in effect substituting the

decisions of those other branches of government with their own, thereby undermining the principle of separation of powers and straining judicial competence and authority (*Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, 2013: para. 54).

The test therefore requires courts to focus on examination of relevant available material and evidence *vis-à-vis* the objective criteria set out in Constitution and statute, as opposed to the likely subjectivity that may arise from the standard of the reasonable and rational person (*Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, 2013: para 79). Thus where the Constitution of Kenya prescribes in Article 73(2) that the guiding principles of leadership and integrity include, selection on the basis of personal integrity, competence and suitability, appointment to public office that meets procedural requirements can only be impugned on the basis of clear objective evidence demonstrating that an appointee fails to meet the criteria.

The Court of Appeal of Kenya had occasion to consider the application of the rationality test in appointments to public office under the Constitution of Kenya in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* (2013). The case was an appeal from a decision of the High Court in which it upheld a petition questioning the constitutionality of the appointment of the appellant as Chairman of the Ethics and Anti-corruption Commission, an independent commission provided for under Article 79 of the Constitution.

A selection panel constituted by the President comprising representatives from different bodies had conducted interviews and recommended to the President three persons including the appellant alongside four other persons for appointment as chairperson and members of the commission. The President and Prime Minister then selected the appellant from the list of persons recommended and submitted his name with those of other persons to the National Assembly for approval. The National Assembly invited the public to submit representations on the suitability of the nominees, including the appellant.

The appellant was then interviewed by Parliament's Departmental Committee on Justice and Legal Affairs, which recommended his rejection alongside the other nominees on the ground that they "lacked the passion, initiative and the drive to lead the fight against corruption". The report of the parliamentary committee however made no recommendations relating to the unfitness or unsuitability of the appellant or other nominees. The National Assembly however rejected the recommendations of the parliamentary committee, and approved the nomination of the appellant and the members of the commission. On receipt of the notification of approval from the National Assembly, the President appointed the appellant as chairperson of the Ethics and Anti-Corruption Commission.

The 1st Respondent, a non-governmental organization then petitioned the High Court to declare that the process and manner in which the appellant was appointed was unconstitutional. The High Court in applying the rationality test held that in view of the unresolved questions about the appellant's integrity, the appointing authorities did not sufficiently take into consideration the institutional integrity of the commission and its ability to function effectively with the appellant at its helm. It held the appointment unconstitutional and set it aside.

On appeal, one of the issues for determination in the Court of Appeal was whether the High Court misapplied the doctrines of separation of powers and constitutional supremacy in conducting an intrusive standard of review and setting aside an appointment by other branches of government. The court opined that in view of the nature of the principles contained in Article 73 of the Constitution of Kenya, a fact dependent objective test provides a less burdensome standard of review of constitutionality of appointments on grounds of integrity. Under this test the court will not be sitting in appeal over the opinions of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision maker. The court's view expressed at paragraph 54 was that, "the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the…Act as construed in light of Article 79 of the Constitution."

The Court of Appeal accordingly held, first, that while the High Court is entitled to conduct a review of appointments to state or public offices to determine the procedural soundness, as well as the appointment decision itself to determine if it meets the constitutional threshold, such a review by the court is not an appeal over the opinion, nor does it amount to a 'merit review' of the decision, of the appointing body. In the circumstances, the High Court had misapplied the rationality test in adopting a standard of review antithetic to the doctrine of separation of powers. Secondly, the court held that the High Court's conclusion of procedural impropriety on the part of the appointing organs and unsuitability of the appellant were not supported by evidence.

In Kenya, therefore, while the rationality test would be applicable in cases where the evidence is overwhelmingly against the fitness of an appointee to hold office, the so called 'fact dependent objective test' is the general rule applicable when the constitutionality of appointive decisions are under review by courts. The latter test would constrain the court to the constitutional and statutory criteria in appointments, thereby

precluding judicial adventurism, which is likely to result in the court substituting its subjective opinion in relation to an appointment for that of the mandated branch of government.

Intervention in Parliamentary Proceedings

The principle that courts must balance between their mandate to safeguard fidelity to the constitution by other branches of government, and the latitude accorded to other branches of government so as to enable them exercise their respective mandates, is recognized as a facet of separation of powers. In *Doctors for Life International v. Speaker of the National Assembly and others* (2006), the South African Constitutional Court observed at paragraph 68 that courts [in the Commonwealth] have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the constitution.

The Supreme Court of Kenya in *The Speaker of the Senate and Another and the Attorney General and Others* (2103) confirmed that courts indeed have the jurisdiction to intervene in parliamentary proceedings. The court asserted at paragraph 55 that, "We would state, as a legal and constitutional principle, that courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation."

The demand for balance implies that in borderline cases, where violation has not materialized, courts should only intervene in parliamentary proceedings in exceptional circumstances. In the Australian case of *Cormack v. Cope* (1974), it was held that it was not the mere introduction of a Bill that affects rights, but rather the making of law. Before a law has been enacted therefore, it would be extremely unusual to demonstrate harm. In *Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong & Another* (1970), the Privy Council held that a court in Hong Kong may interfere with the legislative process only if there is no remedy when the legislative process is complete, and the unlawful conduct in the course of the legislative process will by then have achieved its object.

A similar position was adopted in *Doctors for Life International v. Speaker of the National Assembly and others* (2006), where the South African constitutional court acknowledged that there are no constitutional provisions in the South African constitution which precludes a court from intervening in parliamentary proceedings before Parliament has concluded its deliberations on a Bill. The court however prescribed the limited circumstances in which it would be appropriate for a court to intervene in the legislative process before the process is complete as being to prevent the violation of the Constitution and the rule of law. It states in paragraph 69 of the judgment that, "intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the [legislative] process is completed because the underlying conduct would have achieved its object."

Indeed in the case Yacoob J. opined that the court should never intervene during the proceedings of Parliament unless irreparable and substantial harm would result, a position shared by the Court of Appeal of Trinidad and Tobago in *Trinidad and Tobago Civil Rights Association v. The Attorney General of Trinidad and Tobago* (2005), which held that courts should as far as possible avoid interfering with the pre-enactment legislative processes, but also added that the test to be formulated is whether it has been shown that, if a Bill is enacted, an applicant will not be able to access relief because the Bill's objects would have been achieved. The court nevertheless asserted that if the Bill in question were enacted, the courts would have the power to declare it void if it offended the constitution.

The Supreme Court of Kenya in *The Speaker of the Senate and Another and the Attorney General and Others* (2013) advocated for a similar approach at paragraph 60 when it observed that it makes practical sense that the scope of the Court's intervention in the course of a running legislative process should be left to the discretion of the Court, to be exercised on the basis of the exigency of each case. The relevant considerations for the court include the likelihood of the resulting statute being valid or invalid, the harm that may be occasioned by the invalid statute, the prospects of securing a remedy, where invalidity is the outcome, and the risk that may attend a possible violation of the Constitution.

In Kenya, the extent of intervention of courts in pre-enactment proceedings in the National Assembly was in issue in *Commission for the Implementation of the Constitution v. the National Assembly of Kenya and 2 Others* (2013). The Commission for the Implementation of the Constitution, an independent constitutional commission established under the Sixth Schedule to the Constitution of Kenya, with the function of monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement the constitution, filed a petition challenging the constitutionality of Kenya Gazette Supplement No. 100 (National Assembly Bills No. 15) by which the National Assembly published the Constitution (Amendment) Bill 2013. The Bill sought to amend Article 260 of the Constitution so as to remove the offices of members of Parliament, members of County Assemblies, judges and magistrates from the list of designated state officers.

The argument was raised in court that the exceptional circumstance warranting the court's intervention

at the early stage of the proceedings lay in the fact that once a Bill had been passed and assented to by the President, it would logically form part of the Constitution, and could not be challenged as Article 2(3) of the Constitution prohibited challenges to any provision of the constitution, thereby causing irreversible harm. The High Court, in exercise of its discretion declined the petition. It held that while the court had jurisdiction to restrain Parliament in the course of the legislative process, the Bill was yet incomplete, and its language was yet to be settled. In any event, the Bill may not receive the constitutional threshold of two-thirds required for it to pass, and even if it did, there would be time before it is assented to, for the court's intervention to be sought were its contents to be destructive to the structure of the Constitution. The petition was therefore premature.

The court exercised self-imposed restraint, and deferred to the legislature so as to enable it conclude its process, and accordingly avoided to unduly interfere with the conduct of the affairs of the legislature. Such an approach was entirely consistent with the philosophy of judicial restraint.

Conclusion

Key questions have arisen in Kenya's constitutional context about the ambit of the principle of separation of powers. The principle co-exists with the principle of the supremacy of the constitution in Kenya's constitutional edifice, and the Constitution of Kenya has conferred on the judicial branch the authority to ensure that the actions of state organs are consistent with the constitution. The emerging jurisprudence is that this interpretative function of the courts must be applied in clear cases to uphold the supremacy of the constitution. In less clear cases, the actions of courts must be suitably tempered by judicial restraint. It is only by the judicial branch exercising self-imposed limits on the exercise of their powers that it will avoid encroachment into the functions of other branches of government, thereby avoiding "the remotest possibility of judicial tyranny" and being accountable to the people of Kenya for the exercise of their functions (*The Speaker of the Senate and Another and the Attorney General and Others* (2013: para. 249).

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