THE INDEPENDENCE OF THE JUDICIARY IN KENYA: AN ANALYSIS OF PRESIDENTIAL ELECTION PETITIONS PRE AND POST 2010

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DECLARATION

I, undersigned, declare that this is my original work and has not been submitted to any other college, or university other than the United States International University- Africa for academic credit.

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ABSTRACT

In a historic and first of its kind ruling, the Supreme Court of Kenya showed the fortitude and courage of the judiciary by nullifying the August 8th 2017 presidential election that had been tainted by irregularities. This sent word to the country that the Kenyan Judiciary is not an institution to be taken for granted and can be counted upon to uphold the rights of the people irrespective of their position within the spectrum of power. The independence of the judiciary is critical to the functioning of any democracy, as such, evidenced by its incorporation into the structure of Kenya’s government established by the Constitution of Kenya, 2010. This research examines the independence of the judiciary in regard to presidential election petitions, exploring the extent to which the Constitution of Kenya, 2010 guarantees the independence of the judiciary, the effect that politics has had on judicial decisions and the independence of the Kenyan judiciary and further investigating the influence of the executive’s powers in politically charged cases. Adopting constitutionalism, realism and rational choice institutionalism as theoretical frameworks of analysis of the topic, data collected from interviews and secondary sources primarily from books, journals, constitutions and their provisions and case law were analyzed and used to draw substantive conclusions and recommendations regarding the independence of the judiciary in Kenya. This thesis concludes by providing specific recommendations such as the amendment of some constitutional provisions as well as finding the legislature as an emerging nemesis to the independence of the Kenyan judiciary.
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DEDICATION

To my loving mother, Mrs. Esther Kayanga Nyambok – Owuor and my Auntie Selina. Thank you for standing by me, when nobody else did.
LIST OF ACRONYMS AND ABBREVIATIONS

COE – Committee of Experts


ECK – Electoral Commission of Kenya

EMB – Electoral Management Bodies

IEBC – Independent Electoral and Boundaries Commission

IIEC – Interim Independent Electoral Commission

IT – Independent Tribunals

JSC – Judicial Service Commission

KANU – Kenya African National Union

MP – Member of Parliament

NASA – National Super Alliance

ODM – Orange Democratic Movement

PNU – Party of National Unity

PPDT – Political Parties Disputes Tribunal
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CHAPTER ONE

1.0 Introduction

The independence of the judiciary exists primarily as a rhetorical notion rather than as a subject of sustained, organized study (Burbank, 2003). Many scholars assume that a judiciary with at least some independence is important to the protection of rights and individual liberties, if not to the maintenance of democratic governance itself (ibid, 2003). The independence of the judiciary involves judges acting independently of the government of the day and free from any external pressure. It is concerned both with the institutional and individual autonomy of judges as well as the actual capacity of the judiciary to render independent decisions. An idea traceable to the liberal democratic ideals including the separation of powers espoused by Aristotle, Locke and Montesquieu (Nyanjong & Dudley, 2017); the independence of the judiciary, is a logical corollary of the principle of separation of powers in that the vesting of judicial functions in a body of persons separate from the executive and the legislature and can only have real meaning if that body of persons is truly independent (Madhuku, 2002).

Most constitutions pay some regard to the principle of separation of powers but the extent to which it would guarantee the independence of the judiciary shows the seriousness the principle of separation of powers is accorded (Madhuku, 2002). The independence of the judiciary entails a feel of confidence in the integrity and impartiality of the judiciary. As such, judges must therefore be secure from undue influence and enjoy autonomy in the performance of their duties. Furthermore, it encompasses fair and transparent appointments to judicial office, renewal of part-time appointments and promotions (Feldman, 2009). According to De Smith (1964) constitutionality reflects the independence of the judiciary doctrine as thus;
“A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be willing to concede that constitutionality is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judicial; and he may not easily be persuaded to identify constitutionality in a country where any of these conditions is lacking.”

From the aforementioned, the independence of the judiciary first necessitates impartiality whereby judicial decisions are not influenced by the judge’s personal interest in the outcome of a case (World Bank, n.d.). Second, judicial decisions, once rendered, should be respected. Either the parties to the case must comply voluntarily with the decision, or those with the power to coerce compliance must be willing to use this power if compliance is not forthcoming (World Bank, n.d.). Finally, is that the judiciary is free from interference whereby parties to a case, or others with an interest in its outcome, cannot influence a judge’s decision (World Bank, n.d.). Politically, it enables members of the public to criticize any tendencies by the executive to interfere with the work of the judiciary (Madhuku, 2002).

A strong and independent judicial system is key to a positive and thriving state and democracy. For example, in 2004 a bitter dispute over the Ukrainian presidential election was resolved peacefully by intervention from the Ukrainian Supreme Court (Randazzo & Gibler, 2011). Initially, the pro-Russian candidate, Viktor Yanukovych, claimed victory amid cries of election fraud by the citizens of Ukraine and international election observers. Fearing potentially violent protests, the Ukrainian Supreme Court annulled the election results and ordered a new
election, which was eventually won by the pro-Western candidate, Viktor Yushchenko. In addition to helping ensure peaceful transitions of power, independent judicial systems assist in maintaining the rule of law and protecting individual rights within democracies (ibid, 2011).

From an international standpoint, the independence of the judiciary is enshrined in the United Nations Basic Principles for the independence of the judiciary (1985a) that states the following under articles 1-7. (1) The independence of the judiciary shall be guaranteed by the states and enshrined in the constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary; (2) The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason; (3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law; (4) There shall not be an inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This privilege is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law; (5) Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to ordinary courts or judicial tribunals; (6) The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected; and (7) It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions.
The above is further supported by the Bangalore principles of Judicial conduct (2002) whose first value is Independence and asserts that the independence of the judiciary is a prerequisite to the rule of law and a fundamental guarantee of a fair trial and that a judge shall therefore uphold and exemplify the independence of the judiciary in both its individual and institutional aspects. Additionally, the Judicial Service Act of 2011 refers to the independence of the judiciary as a constitutional requirement to the rule of law and a fundamental guarantee of fair trial and thus a Judge shall therefore uphold and exemplify independence in both individual and institutional aspects, independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.1 Background of the study

Former Chief Justice, Dr. Willy Mutunga (2013), regards the promulgation of the Constitution of Kenya 2010 (CoK 2010) as representing a second independence for Kenya, seeking change from the 68 years of colonialism and 50 years of independence that reflected an unacceptable and unsustainable status quo. This has been made possible through provisions on the democratization and decentralization of the executive, devolution, the strengthening of institutions through the provision of democratic checks and balances, decreeing values in the public service and finally giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them (Mutunga, 2013).

Kenya’s judiciary is established as an independent body by the Constitution of Kenya, 2010 (CoK 2010). Article 160 (1) of the CoK 2010 affirms that, “In the exercise of judicial authority, the judiciary, as constituted by Article 160, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.” Apparently, in both
spirit and text, the CoK 2010 recognizes and affirms the independence of the judiciary as an important aspect in safeguarding the rule of law. Further, Article 166 of the CoK 2010 spells out judicial autonomy from the executive. It states that the president shall appoint the chief justice and judges of the superior courts, subject to the recommendations of the Judicial Service Commission (JSC) and the approval of the National Assembly (Akech, 2010). This is backed by the Judicial Service Act (2011) whose aim is to, among other things, ensure that the JSC and the judiciary shall; be the organs of management of judicial services and, in that behalf, shall uphold, sustain and facilitate a judiciary that is independent, impartial and subject only to the provisions of the CoK 2010 and the law; facilitate the conduct of a judicial process designed to render justice to all and be accountable to the people of Kenya;

The common law applicable in Kenya, as in British colonies, generally was fleeced of many of its positive elements. It was during that colonial era that the general public was not allowed freedom of speech, assembly or association. At the time, the judiciary lacked independence and was essentially a civil service, beholden to the colonial administration and very rarely minded to stand up to it, whereby, administrative officers from time to time took judicial decisions. There was no separation of powers and institutions trusted by the people were undermined or even destroyed. Unfortunately, even after independence, colonial mindsets persisted in the executive, legislature and judiciary as well (Mutunga, 2013).

The post-colonial judiciary in Kenya like in most African states, was but a handmaiden of the dictatorial regime, incapable of operating effectively as the guardian of the constitution, as a defense against human rights violations or neutral arbiter of the rule of law. On top of that, many post-independence African constitutions retained colonial mind-sets in the set-up of systems of governance including in the establishment of the post-colonial state whose essence, character, and
modus operandi never changed. Further, even in the presence of a written constitution, post-colonial Kenya was largely marked by its failure to check the exercise of power or entrench itself as the basic norm of the legal system and touchstone for accountability in the exercise of the function of governance (Nyanjong & Dudley, 2017).

The absence of sufficient constitutional assurances of an independent judiciary and the resulting lack of confidence in the Kenyan judiciary was one of the catalysts for the 2007-2008 post-election violence (Constitution of Kenya Review Commission, 2002). The state of Kenya’s judiciary in the pre-2010 era was aptly captured by the recurring theme of judicial reforms in the dialogue held during the constitution making process with the Constitution of Kenya Review Commission (2002) in its report also noting that the judiciary rivals politicians and the police for the most criticized sector of the Kenyan public society today.

Correspondingly, the background to this study is informed by the events following the December 2007 general elections in Kenya. The opposition leaders and members of the Orange Democratic Movement Party (ODM) refused to submit to the jurisdiction of the courts to resolve the election dispute, rejecting the judiciary as an impartial and independent body. They instead called for mass action to protest against the stolen votes. This event put the rule of law to the ultimate test and was a clear pointer to the fact that the institutions charged with the responsibility of ensuring that the rule of law prevailed had failed. Lack of independence and impartiality of the courts had failed to create the necessary level playing field for all political actors. The judiciary was viewed as weak, vulnerable to executive pressures and incapable of checking its excesses and it was without doubt that the people had lost faith in the judiciary’s ability to dispense justice fairly, impartially and without fear (Woolf, 2004).
It was after this rejection of the judiciary that the need to conduct an extensive in depth study of this subject with a view to appreciating the critical role that the other arms of government, especially the executive, play in securing, protecting and promoting the independence of the judiciary became more urgent. An independent judiciary depends on the legal arrangements that guarantee it, arrangements that are actualized in practice and are themselves guaranteed by public confidence in the judiciary and unless the public accepts that the judiciary is independent, they will have no confidence in the honesty and fairness of the courts (Woolf, 2004).

The CoK 2010 has thus marked a period for Kenya to rise to the occasion and shake off the last traces of the colonial legacy. There must be no doubt in the minds of Kenyans about the impartiality and integrity of the judiciary together with no suspicion that it defers to the executive or bends the law to suit its long term associates or their clients.

1.2 Statement of the Problem

“Constitutionalism and the rule of law are the central features of any democracy that respects human rights. An independent judiciary, essential guardian of the rule of law, is the linchpin of the scheme of and balances through which the separation of powers is assured. Otherwise, there is no other guarantee that the executive will respect the rule of law and act within established legal norms processes, and institutions” (Mutua, 2001, p 96).

The Constitution is the fundamental and supreme law that guides, defines and permits all actions by the state. No individual or state official is above the law or can act against the Constitution (Mutua, 2001). Most individuals would then agree that the ability of courts to provide legal checks and balances against other branches of government without undue political influence is important; thus, an independent judiciary offers protection for minority rights and checks against
abuses of power by the political branches of government. Indeed, it may be one necessary component for the development of democracy (Randazzo, Gibler, & Reid, 2016).

In the 1997 election, President Moi, garnered 2.5 million votes compared to his main challenger Mr Kibaki who received 1.9 million votes. Mr Kibaki challenged the results in court and raised issues regarding the ‘free and fair’ doctrine of the electoral process. The petition was struck out as President Moi argued that he had not been personally served by the petitioner according to the National Assembly and Presidential Elections Act. The draconian Act, amended by Act No. 10 of 1997, provided that a petition questioning the validity of an election had to be served within 28 days of the election results’ publication of which was a virtually impossible process for servers to serve then President Moi inside State House. Both the High Court and court of appeal struck out the petition holding that the service of election petitions must be personal and the court has no otherwise but to enforce the law. In stark contrast, as the first presidential election under the CoK 2010 and the first to be determined by the Supreme Court on merits by a radically restructured judiciary, the widespread focus on Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others (2013) was expected as it acted as a litmus test for the said independence of the judiciary. However, the Supreme Court’s hearing and deciding the case was heavily criticized by sections of Kenya’s legal fraternity and was the source of negative press and low confidence ratings in public opinion polls for the judiciary (Aywa, 2016).

In one of the critiques, lawyer Wachira Maina came close to calling it the ‘death of presidential petitions’ in the post-2010 constitutional era (Musau, 2017). Wachira faulted the ruling on several grounds; notably, over tolerance of the Independent Electoral and Boundaries Commission’s (IEBC) explanations on voter registration, disregard for the court’s own tallies in the final judgment, reliance on subsidiary legislation to limit meanings of constitutionally
unambiguous terms and for merely taking judicial notice of serious travesties on the part of IEBC (Musau, 2017). Cardiff University professors John Harrington and Ambreena Manji also described the ruling as inconsistent with the transformative ambitions of the CoK 2010 (Musau, 2017).

The re-run elections after the annulled 8th August 2017 presidential elections also came under harsh criticism from human rights activists Njonjo Mue and Khelef Khalifa who petitioned the Supreme Court to annul the declaration of Uhuru Kenyatta as president-elect with claims that the IEBC failed to hold the fresh election in strict compliance with the CoK 2010 and the law as ordered by the Supreme Court (International Commission of Jurists, 2017). Mr Mue, who is also the chairman of the Kenya Section of the International Commission of Jurists, argues in his supporting affidavit that the IEBC went ahead to hold the fresh election despite Raila Odinga’s withdrawal from the race, which he maintains, automatically triggered a vacation of the scheduled election (International Commission of Jurists, 2017). Also, by presiding over an election in which 27 constituencies did not vote, the petitioners argued that the IEBC violated Article 81 (d) of the CoK 2010 of universal suffrage based on the aspiration for fair representation and equality of vote together with Article 138 (2) which provides that at a presidential election where two or more presidential candidates are nominated, an election shall be held in each constituency (International Commission of Jurists, 2017).

Education Cabinet Secretary Dr. Fred Matiang’i also came under fire for declaring October 25th as a public holiday. A move the general public felt tried to frustrate the hearing and determination of cases in the courts ahead of the election along with further claims that the IEBC was being controlled by President Kenyatta and his Jubilee party, because lawyer Evans Monari, a known personal advocate for the President, having represented him in Supreme Court Petition No. 1 of 2017, appeared for the IEBC in Nairobi High Court Petition John Harun Mwau vs
Independent Electoral and Boundaries Commission & Others (2017) (International Commission of Jurists, 2017). In this manner, on paper the CoK 2010 paints a picture of an independent and reformed judiciary, as constituted by Article 161, where it shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority, yet, public confidence in the judiciary remains low especially regarding its judicial decisions and presidential petition decisions in particular.

Election petitions being fairly heard and resolved by a court is not a new phenomenon in democratic states but is however new in transitional democracies especially in Africa where the topic still is a contemporary area of study. Thus, this thesis endeavors to examine the principle of the independence of judiciary in the context of the judiciary in Kenya specifically on the handling of presidential petitions, assess the practical difficulties in applying the concepts of separation of powers and independence of the judiciary for achieving the rule of law objectives in an emerging democracy. It further seeks to analyze the dangers of failing to separate the judiciary from the executive and legislature, the difficulties of applying legal concepts in practice, the perpetual tensions and conflicts that occur in the processes of the exercise of power between the three arms of government and the appropriate role of judiciaries in the axis.

1.3 Objectives of the research

1. To examine the relevant provisions of the Constitution of Kenya 2010 relating to the independence of the judiciary in order to identify their strengths and weaknesses.

2. To examine the extent politics has affected the outcome of judicial decisions and undermined the independence of the Kenyan judiciary post 2010.

3. To examine the influence of the executive over the decision making of courts in Kenya in politically charged cases post 2010.
1.4 Research Questions

1. Does the Constitution of Kenya 2010 guarantee the independence of Judiciary?
2. Has politics affected the decisions rendered by the judiciary and hence undermined the independence of the judiciary post 2010?
3. Is the executive branch of government entrenching its grip and controlling the judicial branch and hence influencing decision making of courts in politically charged cases post 2010?

1.5 Justification of the study

1.5.1 Academic Justification

This thesis expands on the literature on the independence of the judiciary, focusing on Kenyan courts with regards to election petition decisions post promulgation of the CoK 2010. Findings were applied in a thematic manner by extracting the constitutional aspects related to the independence of the judiciary in an attempt to find a balance between theory and practice. Furthermore, it analyzed opportunities for judicial reform, particularly the recently promulgated CoK 2010, with the aim of assessing the extent to which it limits executive intrusion and control on the judiciary, offering better protection of its independence than previous constitutions.

1.5.2 Policy Justification

The judicial system in Kenya has recently gone through major transformations. With these transformations, the concepts that once shaped the Kenyan judiciary must equally change in order to maintain both relevance and effectiveness. The findings of this thesis can be used to extrapolate how the CoK 2010 has been able to combat past concepts that continuously plagued the judiciary.
In doing so, it will also provide statesmen with instruments of statecraft with regards to the independence of the judiciary and impartiality.

1.5.3 **Scope and delimitations**

This thesis provided a critical analysis on the issues centered on the independence of the judiciary post promulgation of the CoK 2010, making comparisons on the politics surrounding judicial decisions on the presidential election petitions of 1997, 2013 and 2017, and relevant statutory provisions in the CoK 2010 and judiciary-executive relations.

1.5.4 **Limitations of the study**

This thesis focused on introducing the concept of the independence of the judiciary and the core issues surrounding this concept by using the Kenyan judiciary and court decisions on presidential election petitions as the main subject matter. Also, the scope was wide and time consuming due to the wide coverage of the phenomena under investigation. Also, the heavy reliance on secondary data of which was significantly institutional based at times exaggerated facts to suit these institutions or underplayed some facts which had a negative reflection on them. Furthermore, due to the engaging nature of their jobs, the amount of data gathered from respondents was less than that planned for the study.
CHAPTER TWO

Literature Review

2.0 Introduction

Montesquieu (1748) argues that one agency of government should not exercise a function suited to another branch and that separation of the judicial element has an important role in the prevention of illegal oppression. In his view there is a threat to liberty where powers are united in the same person or body, especially in the case where judicial power is not separated from the legislative and/or executive power (Montesquieu, 1748). The independence of the judiciary also relates to the idea of the rule of law which requires, equality of all parties before the law irrespective of their status, protection of fundamental rights and freedoms and the absence of arbitrary power by government. At a minimum, rule of law encapsulates the idea that both government officials and citizens are bound by and abide by the law (Ghai, 2017). This chapter analyzes the origins of the independence of the judiciary, explains its relationship with the doctrines of separation of powers and rule of law, the importance of judicial stability and the interplay of the aforementioned doctrines with the notion of justice

2.1 Understanding the independence of the Judiciary

The onset of the independence of judiciary doctrine can be traced to the evolution of a constitutional democratic state in Europe, accompanied by the development of the rule of law, with the attendant prerequisites of the separation of powers and the existence of checks and balances (Diescho, n.d.). The debate about the role of the courts in general and the judges in particular evolved in the context of the history of the exercise of unfettered power by political rulerships, mainly in Great Britain, but also later in the United States and Europe (ibid, n.d.).
Traditionally, a judiciary in a constitutional democracy is expected to perform four functions; namely, dispute resolution, judicial review, administration of criminal justice and protection of human rights (Domingo, 2004). The judiciary is responsible for the maintenance of a balance of interests between individual persons, as well as, between individual persons and the state, and between government organs. Under the CoK 2010, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and can only achieve this in as far as its independence.

Baum (2003, p.1) defines the independence of the judiciary as a condition in which judges are entirely free from negative consequences for their decisions on the bench and the degree of judicial independence is directly proportional to the degree of such freedom. The independence of the judiciary is one of the most valuable institutional resources of courts and for courts to properly fulfill their role as impartial arbiters of disputes, they must be insulated to some degree from ordinary political pressures. When the independence of the judiciary is not guaranteed, the judiciary may lose its effectiveness (Gibson, 2006).

The independence of the judiciary comprises two fundamental elements. These are, the independence of the judiciary as an organ and as one of the three organs of the state and independence of the individual judge (Vyas, 1992). As an organ, the independence of the judiciary concerns the capacity of the judiciary as a separate branch of government, to resist encroachments from political branches and thereby preserving the separation of powers. Judicial accountability, in contrast, concerns capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law (Geyh, 2006b).

Separation of powers requires that governmental power be divided between the judiciary, executive and legislature. The requirement is that each branch is able to check the exercise of
powers by the others either by participating in the function conferred on them or by reviewing the exercise of that power. As such, the separation of powers in this case is invoked as a mechanism for restraining and limiting government power or allocating such power (Bradley & Ewing, 1997). However, the requirement of the independence of the judiciary, supported by separation of powers is not just enough.

Additionally, it is meant to further certain virtues and aspirations of the society which are portrayed by the doctrine of rule of law. The rule of law, requires that government and citizens submit to the authority of the law, that there is equal treatment before the law and that there is impartial arbitration of disputes according to law. Consequently, the need for separation of powers arises not only in political decision making, but also in the legal system, where an independent judiciary is essential if the doctrine of rule of law is to have any tangibility (Bradley & Ewing, 1997).

2.1.1 Separation of Powers

The modern design of the doctrine of separation of powers is to be found in the constitutional theory of John Locke who in his Second Treatise of Civil Government (1869) claims that it may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage.

What this means is that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, legislature, executive and judiciary. Ordinarily, if one
of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws (Mojapelo, 2013). An independent judiciary enables judges to follow the facts and the law without fear or favor, so as to uphold the rule of law, preserves the separation of governmental powers and promotes due process. It is instrumental to the pursuit of other values, such as the rule of law or other constitutional values, of which separation of powers is also an important integral part (Burbank & Friedman, 2002).

The Independence Constitution (1963) provided for the three conventional arms of government, the executive, legislature and judiciary. However the tripartite was an unequal with the executive, more specifically the presidency having more power compared to the other arms of government, occasioned by several amendments to the constitution vesting most of the state power on the executive, designed to serve the interests of the government of the day (Oseko, 2011). During this time, the country was under the authoritarian regime of President Moi where pro-government electoral candidates were rigged in as members of parliament and judges appointed to superior courts to play a puppet like role for the presidency. Moi’s government went further by removing provisions guaranteeing security of tenure of judges in 1988 which seriously undermined personal independence of the judges (Mutua, 2001). The main shortcoming of the Independence Constitution (1963) was that it failed to explicitly provide for the independence of the judiciary in the same way it did for the other two arms of the government, ultimately failing to set a foundation on which the independence of the judiciary could be built on.

Upon the promulgation of the CoK 2010 there came much clearer separation of powers compared to the Independence Constitution (1963) that had a president with unfettered powers to
influence the legislature and judiciary. Article 1 (3) of the CoK 2010 states that the sovereign power of the people is delegated to the legislature, executive and judiciary and goes on further to assign their functions (Kibet & Wangeci, 2016). Due to the clear measures to ensure the independence of the judiciary by the CoK 2010, it was 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 post 2010. This issue, went to the core of the relationship between the constitutional principles of separation of powers and supremacy of the CoK 2010 (Masinde, 2017).

Two main schools of thought compete to analyze the separation of powers questions in an attempt to understand the application of the concept. These are, the ‘pure’ and ‘partial’ separation theory (Vile, 1967). The pure approach emphasizes the necessity of maintaining three distinct branches of government based on function: one to legislate, one to execute and one to adjudicate. Each branch is expected to exercise power only assigned by it. On the other hand, partial separation theory like the pure separation theory recognizes that each of the three branches has a core function and that it is most critical to maintain separation around these core functions. However, it also posits that the overlap beyond the core functions is necessary and even desirable and paints a picture where each of the institutions of the state is given some power over the others; deliberately constructing their functions to overlap (Barber, 2001).

2.1.2 Rule of Law

Raz (1979) argues that the rule of law is intended to correct dangers of abuse that arise from law. According to him, the law inevitably creates a great danger of arbitrary power, with the rule of law being designed to minimize this danger created by the law itself. This implies that before you even get to the rule of law, you must understand what law is and the dangers to which it gives rise.
Contrary to the arguments of Raz (1979), the rule of law is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular. Indeed, the rule of law aims to correct abuses of power by insisting on a particular mode of the exercise of political power; governance through law (Waldron, 2008).

Independence of the judiciary is considered a necessary precondition for the observance of separation of powers and also for the achievement of the rule of law. Lord Woolf (2004) claims that one of the most important responsibility of the judiciary is to uphold the rule of law since it is the rule of law which prevents the government of the day from abusing its powers and it is this rule of law which ultimately stops a democracy from descending into an elected dictatorship. All this hinges on the independence of the judiciary. Woolf includes another important aspect to the relationship which is the perception of independence, whereby, the judiciary actually upholding the rule of law is not enough. It must also be seen to be independent and in the case where an impression is created that the judiciary is not separated from the executive, then however genuinely it prevents abuse of power by the executive, its decisions, especially those that uphold executive action, can never be trusted to have been devoid of executive influence (Woolf, 2004).

The rule of law’s demand of equality before the law, impartiality in court decisions, and the power of courts to protect rights and review government action, are ends secured and protected by an independent judiciary. Both concepts place the judiciary at the center of the power balance by identifying it as the equilibrium upon which the interests of the state and the citizens are to be deliberated and determined (Oseko, 2011). To this extent, the judiciary must be independent in order to effectively play its role of bringing about the realization of the rule of law (Oseko, 2011).

As we interrogate the justice sector institutions in Kenya, it is important to appreciate that their interactions with the rule of law are shaped by political, cultural, social and economic factors.
More significantly, these interactions determine whether or not the rule of law will produce perceptions of justice or fairness among the citizenry. In the absence of such perceptions, it is arguable that many citizens may not consider the justice sector to be legitimate or relevant, with immediate outcomes being a citizenry that may choose to resolve their disputes and other legal affairs outside the established formal legal system (Mbote & Akech, 2011). The September 1st 2017 decision by the Supreme Court of Kenya to some extent demonstrated that the Kenyan judiciary can effectively and efficiently handle electoral disputes in line with the CoK 2010. The ruling was a clear demonstration of why supporting the independence of the judiciary and investing in building judicial capacity, including to resolve electoral disputes, builds the democratic process and was an encouraging sign of respect for the rule of law (International Development Law Organization, 2017).

2.1.3 Judicial Stability and the Independence of the Judiciary

From the aforementioned, key to the independence of the judiciary is stability as well, which brings to the fore several important and related questions in regard to newly installed democratic regimes. Particularly, how should new transitional governments treat judges who were either appointed by or served under past authoritarian regimes? Should the government do away with the old judges or seek to reform the judiciary with the current personnel? How does this decision affect the independence of the judiciary? (Larkins, 1996)

According to Fiss (1993) the independence of the judiciary can be viewed from a ‘regime relative’ perspective. This means that one regime need not respect the independence of the judiciary established by a previous regime, any more than one nation is obliged to respect the independence of the judiciary established by another. This theory advocates for the wholesale
dismissal of a judiciary by newly installed democratic governments. At face value, the theory makes some sense. It could be argued, for instance, that the transition to democracy would be injured if the judges who determined constitutional values were appointed by those who were not dedicated to democratic ideals in the first place. Furthermore, those judiciaries which were highly discredited by their complicity with or treatment by past authoritarian regimes may not be up to the task of constitutional adjudication (Fiss, 1993).

Yet there are some dangers to this theory that require it be carefully qualified, for the concept of judicial independence is much more complex than Fiss seems to consider. For example, in the case of Argentina’s transition to democracy. Upon the inauguration of Raul Ricardo Alfonsin’s government, the entire Supreme Court, somewhat discredited by its behavior during the dirty war but nonetheless composed of some noted jurists, resigned to allow the new democratic president to appoint a new court. However as per Fiss (1993), had the judges not stepped down, Alfonsin should have had the moral power to seek the court's wholesale dismissal and re-composition (Larkins, 1996).

Such a blanket theory towards the independence of the judiciary is risky as it is certainly difficult for the courts to evolve when they are continuously being altered, especially without precise cause. Making an argument that the past court was not consistent with the new democratic ideals being established in Argentina is one thing; saying that it should be dismissed without regard to it is another. Rather, courts actually need to institutionalize before they can be able to more forcefully act upon their independence. When the judicial body is dismissed and reconstituted, it needs to begin its process of development all over again, thereby delaying by many more years the establishment of an independent judiciary (Larkins, 1996).
On the other hand, Geyh, makes an outstanding contribution to the growing literature on the subject of the independence of the judiciary with his taxonomy on decisional independence which has been particularly insightful in helping us distinguish between relatively uncontroversial attempts to hold the judiciary accountable. Efforts such as to improve judicial administration or actions against judges for personal ethical violations and the more problematic challenges to judicial independence that arise when politicians attack judges for issuing decisions they do not like (Geyh, 2006a).

Geyh is of the idea that judges can be sanctioned for certain improper judicial decisions. Specifically, that judges should be held accountable for willfully deciding cases wrongly. He states that, “It is hard to quarrel with the notion that judges should be accountable for intentional decision-making error; the judge who makes such errors has knowingly violated her oath of office, in which she swore to uphold the law (Geyh, 2006a)”. Again, he also remains aware that opening up the judiciary to sanction on grounds of legal error is risky and as a result proposes that there should be a strong presumption against any finding that a judge's erroneous decision was willfully made. Basically this means that a judge should not be found to have acted improperly unless it is shown, by clear and convincing evidence, that the judge knowingly or recklessly reached an erroneous decision.

From Geyh's contention, two interrelated questions immediately arise. First, what does it mean for a judge to knowingly violate the law? Second, does it make sense to sanction a judge for intentionally reaching ‘erroneous’ decisions in an intellectual climate dominated by the legal realist view? (Marshall, 2006) Proving that a judge acted willfully or with reckless disregard would necessarily require a probing inquiry into the judge's subjective mental state that could itself threaten the values of independence of the judiciary. Furthermore, the primary motivation of most
defamation plaintiffs is to make a point rather than to win damages and if a similar motivation to make a political point is the one that compels most of those attacking judges, they are unlikely to be deterred by having to face a high threshold in order to prove their claim as their goals are reached merely by the assertion of judicial misfeasance (Marshall, 2006).

So essentially, a judicial system can arguably better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of independence of the judiciary that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable. Independence has always been crucial for judges to perform their function properly and paramount to this is to provide judges secure tenure. Various constitutions abide by this, allowing removal only for the most serious causes and by the strictest procedures. This design has operated with great success and is supplemented by potent, yet informal and generally invisible restraints against aberrant behavior. On the other hand, disciplinary schemes pitting judge against judge are not only unnecessary and of dubious constitutionality, but they would also disrupt the sense of community so essential to the functioning of the courts and would weaken the quality of judicial individualism that has been responsible for the bench's most creative advances and its noblest defenses of liberty (Kaufman, 1979).

2.2 The Independence of the Judiciary and Justice

A theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust (Rawls, 1999). The rights secured by justice are not subject to political bargaining or to the convergence of social interests. The only situation that permits acceptance of an erroneous theory is the lack of a better one. Basically, an injustice is tolerable only when it is necessary to avoid an even greater injustice (Rawls, 1999).
Justice denotes what is right, fair, appropriate or deserved in social relations (Mbote & Akech, 2011). The need to determine what is right, fair, appropriate or deserved arises in the context of competition for nature’s scarce resources and in the absence of mechanisms to determine what is justly due to one human being in relation to another human being relative to a given resource, it can be expected that the natural lawlessness of human beings will lead to the strong trampling over the weak (Mbote & Akech, 2011). It is for this basic reason that human beings need the institution of law and an independent one for that matter. As an instrument of social control, law establishes principles and procedures that, by facilitating the equal treatment of human beings, will hopefully ensure that the scarce resources of nature are shared fairly and legitimately, thereby enabling social stability. Where law leads to fair and legitimate outcomes in this manner, a claim can then be made that law has delivered justice.

Law is necessary to legitimize authority and the existing political order, and authority is indispensable for the enforcement of the law and the prevailing legal or judicial system. On the other hand, law is essential in dictating the limits and rules with which power will be exercised legally, and power is imperative for revitalizing the confines and precepts of the rule of law and modern Constitutionalism. Ideally, law and power must match each other to form a complimentary pair, since law without power is impotent, while power without law is unfair and illegitimate (Srivastava, 2012). Much of the current debate between activists on ‘the left’ and ‘the right’ concerning the legal system can be conceived in purely jurisprudential, as opposed to political, terms. Today, many on the left insist that the decisions made by the legal system conform as closely as possible to some substantive conception of justice that is independent of the legal system itself and view those who disagree as formalists. On the right, many insist that the procedural values of
the rule of law preempt concern for correct outcomes terming those who believe otherwise as result-oriented (Barnet, 1988).

Frank (1931), a scholar on the left for example, rejects the rule of law values of generality and uniformity in legal precepts in favor of justice. He attests that once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance, and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, refusing to do justice in the case on trial because he fears that ‘hard cases make bad laws’ arising to what may aptly be called ‘injustice according to law’ (Barnet, 1988). In such a situation explained by Jerome Frank, where justice in the particular case and the tenets of the rule of law correspond, the rule of law is redundant. Where justice in the particular case and the rule of law diverge, the rule of law is pernicious to the extent that it detracts from achieving justice.

Alternatively, scholars on the right such as Robert Bork favor the rule of law over justice based on the fact that he believes there is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another (Bork, 1971). To Bork, there is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ and the issue of the community's moral and ethical values, are matters concluded by the passage and enforcement of the laws in question. Essentially to scholars on the right, the judiciary has no role to play other than that of applying the statutes in a fair and impartial manner (Bork, 1971). In this situation, there is no objective category of justice to which judges may appeal and since justice is not neutral, there are no ‘neutral principles’ by which judges
may conclude that one result is more just than another and as such judges must defer to the legislative will, conforming to the procedural constraints of the rule of law.

Prior to the judgment that annulled the 2017 presidential election of Kenya being delivered, Chief Justice Maraga noted that the greatness of any nation depends on its fidelity to its Constitution and adherence to the rule of law and above all respect to God, a statement which acted as the backdrop to which the majority decision was made (Falana, 2017). However, despite his initial reaction to the verdict where President Uhuru Kenyatta said that even though he disagreed with the decision he would respect it, he instead launched an angry attack on the judiciary at a rally held in Nairobi later that day insinuating that every time the government does something, a judge comes out and places an injunction, further adding that it is a problem that must be fixed and that the will of the general public cannot be overturned by a few people (Falana, 2017). Apparently disturbed by the highly contemptuous statements by the Head of State, the Kenyan Law Society promptly criticized the claims and viewed them as a ploy to subvert the independence of the judiciary and intimidate independent minded judges in the country. In a statement issued by the Kenyan Magistrates and Judges Association, the judges also condemned what it termed as an assault on the decisional independence of the honorable judges (Falana, 2017).

This tension between justice and the rule of law should come as no surprise. Conceived substantively, justice speaks to the correctness of the outcome of individual cases. Conceived procedurally, the rule of law speaks to the form of a fair legal process. Conflict between these two values arises when the outcome of a fair legal system is deemed to be unjust; or when the effort by the legal system to be just is deemed by critics to be unfair (Barnet, 1988). Such a conflict is inevitable because these concepts are not identical and usually, when applied to particular, concepts that are different must sometimes point in different directions (Barnet, 1988).
From the above, the rule of law seems to emerge as the best strategy for imposing limits as well as curtailing the exercise of power, and, within it, the establishment of a Constitution is that which regulates both, the legitimacy and legality of political power. This is the reason perhaps why the rule of law is a sacrosanct feature of the CoK 2010 because it is law that brings forth justice. Law is at the apex as far as the hierarchy of the Kenyan justice delivery system goes and it will be futile if it is not guided with the sole aim of achieving justice. Ironically though, even some of the developed states do not possess some of the key formal attributes of the rule of law. For instance according to Frank Upham, the United States judiciary is permeated by politics and most state judges belong to political parties and are chosen for their allegiance to partisan platforms. Even the process of appointing federal judges in the United States is overwhelmingly political (Patricia Kameri Mbote & Akech, 2011).

Yet, in spite of this politicization, most Americans still perceive the legal system as fair and just, since, among other things, the political role of the judiciary is structured and managed in a manner that is democratic and fair (Patricia Kameri Mbote & Akech, 2011). This shows that despite its importance, a legal system that strictly conforms to the formal criteria of the rule of law might still not be perfect on its own. Rather social, cultural, political and economic contexts prevailing in a given country also facilitates the utilization of the prescriptions of law to facilitate the realization of justice or fairness for all (Mbote & Akech, 2011).

2.3 Theoretical Framework

Theories are formulated to explain, predict and understand phenomena and in many cases, to challenge and extend existing knowledge within the limits of critical bounding assumptions (Abend, 2008). The theories under this theoretical framework shall seek to explain and provide a better understanding of this proposal’s research questions.
2.3.1 Constitutionalism

The concept of constitutional government, rooted in liberal political ideas, originated in Western Europe and the limited state as a defense of the individual’s right to life and property and to freedom of religion and speech. In order to secure these rights, constitutional architects emphasized checks on the power of each branch of government, impartial courts and equality under the law (Adagbabiri, 2015).

Constitutionalism refers to the limitations of the power of leaders and government bodies and the enforcement of these through established procedures. It envisages a government that is, in the first instance, devoted both to the good of the entire community and to the preservation of the rights of individual persons. It explains that a government does not derive its power from itself, but rather gains its power as the result of there being a set of written laws. This concept is in sharp contrast to monarchies, theocracies, and dictatorships, in which the power does not derive from a pre-drawn legal document. Instead, in a monarchy, the power is derived as an inalienable right of the king or queen. In a theocracy, all of the power of a governing party is derived from a set of religious beliefs, thought to exist as a result of the will of God, and in a dictatorship, the power is derived from the will of a single or group of people and their ideology, which does not necessarily represent the will of the people (Adagbabiri, 2015).

Constitutionalism therefore naturally prescribes a system of government in which the government’s powers are limited. Government officials, whether elected or not, cannot act against their own constitutions. Constitutional law is the highest body of law in the land, which all citizens, including the government, are subjected to. In the United States, not only does the constitution itself limit the power of the government, it prescribes that the three different branches of the government limit the powers of the other branches of government by imposing a system of checks
and balances. For example, in the United States, the president, who is the chief of the executive branch of government, may not declare war on another nation without congressional approval. On the other hand, states such as the United Kingdom, New Zealand and Israel have uncodified constitutions. Unlike written constitutions, uncodified constitutions are systems of unwritten laws, which depend heavily on legislative precedence and parliamentary procedure. Regardless of the lack of an actual physical document in which the supreme law of the land is used, the Constitution may be referred to in court in these nations, to which the government themselves must also submit and cannot act against. Constitutionalism is a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law. Therefore, a political organization is constitutional to the extent that it contains institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry (Davies, 1996).

In Kenya, Article 2 of the CoK 2010 provides that the Constitution is the supreme law of the land and binds all persons and all state organs at both levels of government; meaning that, all institutions established under the CoK 2010 are required to act in compliance with it. The Bill of Rights in the Constitution also guarantees access to justice for all persons and in particular provides that where any fee is required, it shall be reasonable and shall not impede access to justice. Important also is the fact that the CoK 2010 puts an affirmative duty on the state to ensure that the provisions in the Bill of Rights are observed, respected, protected, promoted and fulfilled. Article 160 (1) of the CoK 2010 also provides that, in the exercise of judicial authority, the judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority. In addition, the independence of the judiciary is protected by a special amendment provision to the Constitution. No amendment of the
Constitution that relates to the independence of the judiciary can be made unless it is approved not only by the usual two-thirds majority in both houses of parliament, but also by the people in a referendum (Gathii, 2016).

2.3.2 Realism

Realism is an international relations theory that is used in a variety of ways in many different disciplines. Philosophically, it is an ontological theory opposed to idealism and nominalism. In science, it is a philosophy opposed variously to empiricism, instrumentalism, verificationism and positivism and in literature and cinema, realism is opposed to romanticism and escapist approaches. Of importance to this research however, is its meaning in international relations. Political realism is a tradition of analysis that stresses the imperatives states face to pursue a power politics of the national interest (Donnelly, 2005). Hence, at the core of realism is the belief in the primacy of sovereignty and the centrality of nation-states in the international sphere. States, at the most basic level, are viewed as power-seeking and interest-pursuing entities (Kersch, 2006).

The realist insight that judges do more than locate objectively discernible answers within a logically coherent legal framework has irrevocably altered the way we conceive the task of judging (Abrams, 1998). Realists argue that legal rules are not determinate because the abstract terms in which they are framed could be subject to varying interpretations. As a result, judges can appeal to contrasting rules in order to resolve many of the most hotly contested cases. It is thus not possible to say that rules alone could be used to resolve or predict the resolution of cases.

The system makes it inevitable and necessary for judges to bring factors from their knowledge of the social context of a particular case to their own normative premises and goals to bear on the decisions they make. Thus, judicial decision-making infused the body of legal rules
with ‘external’ influences, which meant that the law integrated insights from social policy, ethics, and other fields of practical and intellectual endeavor. This descriptive observation has dovetailed with the realists' normative conviction that law should be an instrument for responding to social needs and with the belief of some realists that forging a connection between law and social science could help serve this goal (Abrams, 1998).

These challenges to the conceptual autonomy of law have also had implications for notions of judicial independence. The conceptual determinacy and independence of certain formalist visions of law secure at least one kind of independence for the judge. A judge who must simply deduce answers from a self-contained conceptual scheme can remain independent of other bodies of knowledge or of the impinging influence of the immediate political context (Abrams, 1998).

When realists acknowledge that there are ambiguities to be resolved and choices to be made in the determination of legal controversies, they imply that judges cannot be wholly independent in these ways. They also imply that a judge’s ethical precepts or policy preferences might play a supplementary role in dispute resolution. Frank (1998) presupposes that personality includes not only elements of the judge's psychological makeup but also broader range of influences, such as judges’ political commitments or shared professional understandings. These notions introduce doubts not only about judges’ independence from non-legal bodies of thought, but also about their independence from other groups. As members of an institutional elite, and, more generally, as citizens whose political consciousness tends to be shaped by dominant ideological premises, judges’ thinking becomes infused with assumptions that tend to reproduce features of the existing legal, political, and economic system. These assumptions probably operate beneath the explicit awareness of many judges and serve to moderate judicial impulses toward transformation (Abrams, 1998).
Again, for realists, it is perfectly legitimate for states to pursue the interests of itself and its citizens, sometimes contentiously, in the international arena. This ‘legitimacy’, though, is drawn not from the fact that it is morally right as a matter of the application, but because that is all states can do and will do, either because that behavior is inherent in the nature of a state or because the international system is structured so as to require that they behave that way (Kersch, 2006).

In a case where a state’s presidential seat is not occupied for a prolonged period, such as that of an annulled presidential election, it creates a sort of power vacuum threatening aspects such as the economy, stability and position of that particular state in the international system. For instance, leading up to the 2017 election re-run in Kenya, issues of national interests began to gain momentum with arguments that it is in the greater interest of the country that the Supreme Court rises above another annulment and put Kenya back on track. Estimates showed that the economy had lost up to Sh700 billion in the last three months of uncertainty after the annulled August 8th elections. Thus, while the judiciary is guided by the strict adherence to the law and the CoK 2010, it must also be guided by the public interest. The public good must at time, override the legal framework, when the interests of the nation are threatened and ultimately, despite a boycott of the re-run election by the opposition NASA, President Kenyatta’s re-run win was ultimately upheld by the Supreme Court (Waikenda, 2017).

Basically, to the realist, the judicial practitioner, is a typical human being, whose judicial votes, are influenced by life experiences, professional training and experiences, political ideology, temperament, personal-identity characteristics such as race and sex, energy, ambition, sentiment, taste for leisure or for hard work, cognitive quirks, training and intelligence, and the other influences on human behavior. Out of these elements some judges have built elaborate theories such as the law as the quest for original meanings, law as active liberty, law as libertarianism, law
as integrity and so forth, of which, the realist regards more as rationalizations of dispositions than as theories that actually guide decisions and can be verified or refuted, rather than simply accepted or rejected (Posner, 2010).

Furthermore, it is important to note that, self-interest, along with personality and politics plays a role in their behavior. The realistic view of judges is that they care about the same things that other people care about, including salary, benefits, how hard they work and how well they are treated by their colleagues. They thus have ‘leisure preference’ and ‘effort aversion’, but also a desire to be respected and influential. They thus respond to incentives and constraints, like other people; from the assumption that they are like other persons, the hypotheses the realistic approach derives from (Posner, 2010).

2.3.3 Rational Institutional Choice

Rational choice theory, ever since its inception almost four decades ago, has grown to become a key theory in social science research, going on to produce theoretical micro foundations, equilibrium orientations, deductively derived theorems and propositions about political activity, and finally, a comparative statics methodology that has been able to yield testable hypothesis (Shepsle, 2006). The general public has always had different views as to how political activity unfolds, how certain contexts bring about certain behavior and the way this behavior in turn maintains or alters these particular contexts. And while political actors and organizations also hold on to these contexts, it is institutions and their institutional set-ups that provide direction for political processes (Shepsle, 2006).

In providing direction to political processes, an institution such as that of the judiciary, selects its actors, provides them with their respective behavioral strategies, the manner in which
these actors shall choose from the strategies, the information they shall possess when making their choices and the outcome resulting from the combination of choices made. Institutions are simply important in providing and maintaining a level playing field among actors (Shepsle, 2006). As such if judges always threaten resignation if certain rules are not adjusted to their preferences then arguably, the rules of the judicial institution are not in equilibrium and is technically a fragile institution.

The judiciary, in its make-up and activity, heavily mirrors the analysis of structured institutions by rational choice institutionalism. First, judicial actors are selected in well-defined ways, for example the presidential appointment of judges in Kenya. As a result, such judges are to an extent agents of the appointer, where their activities while in office may be motivated or influenced in part by the objectives of the appointer (Mesquita, Smith, Siverson, & Morrow, 2003). Second, the objectives of these judges can be precisely specified often being grouped into office preferences and policy preferences. Usually, office-oriented judicial officers make policy in order to be appointed while policy-oriented politicians seek appointment in order to make policy. However, it should also be taken into account the fact that ambition, whether for policy influence or for office enjoyment is not always static. Progressively ambitious judicial officers, for instance, continuously monitor their environment for opportunities to grow further (Shepsle, 2006). Finally, a judges behavioral strategies are delineated by judicial rules and processes that outline clear and concise procedures and boundaries (Shepsle, 2006).

Epstein and Knight (2000) have also documented the relevance of rational choice approaches in making judicial decisions, particularly focusing models of strategic choices by judges. They define the strategic model as; “(1) social actors make choices in order to achieve certain goals; (2) social actors act strategically in the sense that their choices depend on their
expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made” (Epstein & Knight, 2000).

So while judges may have policy preferences that they will try to implement, it is impossible for them to act entirely as free agents since they must always take into account the preferences of their constituents as well as the formal and informal institutional rules and prescriptions of the judiciary of which is line with respecting the doctrine of Separation of Powers where judges must factor into their decision-making, beliefs and perceptions, the reactions of the executive and legislature towards their policies (Segal, 1999).

Judges however do not operate in a vacuum and like any other human being, may attempt to maximize certain personal objectives by their actions on the bench, but there is no clear evidence that seeing to the implementation of their policies is the overriding goal of most justices. For instance, in a case where the single-minded pursuit of certain policies may threaten the legitimacy of the judiciary, most judges will respond in a manner that protects the institution rather than that maximizes single-minded policy preferences (Gibson, 2006).

2.4 Gaps in the Literature

Notwithstanding, despite the idealistic appeal of the independence of the judiciary doctrine, some rational politicians, still, would not really want courts to enjoy complete decisional independence, meaning, freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective (Burbank, 2003). Basically, courts are institutions run by human beings and human beings are subject to selfish and/or venal motives, and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom. As the reference to the rule of law may suggest, completely independent courts in this sense would
also be intolerable because they would render impossible the orderly conduct of the social and economic affairs of a society (Burbank, 2003). Case in Kenya as well is that even though the CoK 2010 has provided a rosy picture of separation of powers and an independent judiciary, its practicality still remains up for debate as these powers tend to overlap and face difficulties being compartmentalized. Equally, there still remains an inherent measure of competition and conflict among the three branches of the government (CK Advocates, 2014).

Again, citizens would not turn to courts for the resolution of their disputes if the result of each case were an immaculate conception, worthless for the governance of future conduct and, to citizens unguided by authoritative norms, apparently in conflict with the decision in another case involving similar facts and similar equities. Thus, once a political society accepts the importance of law for the prospective governance of human affairs, it to some extent brings about some difficulty for courts to be accorded complete decisional independence. It is also important to note that most developed political society’s give preference to law made by legislatures. In such societies courts have the obligation to interpret and apply legislative law, with which obligation complete decisional independence is obviously and fatally inconsistent (Burbank, 2003).

Also, law has been used to create a climate of social order, justified by its benefits to members of society. Despite this, the issue whether human made laws are exact machinery to serve justice and fairness to all the society is always questionable. Many consider the proper implementation of laws as a justice but since every law has its own political, sociological, philosophical and historical background in a given society, it will almost always benefit and harm different groups in society and whether it actually serves justice to all of society is still up for debate especially when it comes to the hearing and deciding of presidential election petitions in Kenya (Tamirat, n.d.).
Additionally, in line with realist thought, it is also important to understand that a state’s national interests come first, at times even before the law. For instance in the United States of America, no federal or state court has ever enjoyed complete decisional independence and if that is what the independence of the judiciary is taken to mean, as a historical matter it is, indeed, a myth that requires much deeper critical analysis especially in the Kenyan context (Burbank, 2003).
CHAPTER THREE

Research Design and Methodology

3.0 Overview

This thesis employed the use of qualitative methodology. Reason for adopting this method was that qualitative research was able to provide complex textual descriptions of how people experience a given research issue. It provided information about the ‘human’ side of an issue, which often consisted of, contradictory behaviors, beliefs, opinions, emotions and relationships of individuals. The qualitative research method was also effective in identifying intangible factors, such as social norms, practices and mindsets whose role in the research topic may have not been readily apparent (Qualitative Research Methods Overview, n.d.).

The interaction between the individuals and the judiciary is laden with values, moral judgments and perceptions and that determines how citizens relate to it as a legal system institution and whether they will respect the law or opt for non-legal methods in resolving their disputes. Law, being a reflection of social values of a society, further supported the need for a qualitative research design.

3.1 Population and Study Sample

The target population of the research comprised mainly of the Kenyan Judiciary together with its practitioners; namely, judges. Additionally practitioners in the field of law and advocacy and political stakeholders shall be part of the study population. The judicial arm represented the entirety of the subject matter since they had common observable features of interest to the research while the practitioners provided a much deeper analysis and answers regarding judicial independence.
3.2 Sampling Procedure

Participants of the research were selected based on their particular characteristics that are of interest to the thesis. In this case the respondents were specific persons with in-depth knowledge and experience in issues regarding the judicial independence, constitutionalism and politics.

As a result, purposive sampling was used as it facilitated grouping participants according to preselected criteria relevant to the research questions and involves the conscious selection by the researcher of certain persons to include in a study (Qualitative Research Methods Overview, n.d.).

3.3 Sample Size

The concept ‘information power’ acted as a guide in selecting the adequate sample size for this thesis. Information power indicates that the more information the sample holds, relevant for the actual study, the lower amount of participants is needed (Malterud, Siersma, & Guassora, 2016). Thus, a sample size with sufficient information power depends on;

a) The aim of the study. In this case the analysis of the independence of the judiciary was quite broad thus needing a larger sample size to fully address the issue.

b) Sample specificity. The research population were persons with in depth knowledge on the matter thus requiring a smaller sample size.

c) Use of established theory. The research used realism, constitutionalism and rational institutional choice as theories which acted as a guide in identifying relevant issues surrounding the independence of the judiciary in Kenya.
d) Quality of dialogue. The respondents to the research were of high educational qualification and possessed deep understanding on the doctrine of the independence of the judiciary leading to a reduction in sample size.

e) Analysis strategy. The research sought in-depth analysis of narratives surrounding the discourse of the independence of the judiciary. As a result, details from the few selected participants were sufficient (Malterud et al., 2016).

From the above points, the proposed research sample size was 8, consisting of two judges, two magistrates and four lawyers who have dealt with judicialized politics. However, only one magistrate and four lawyers responded to the interview. This was attributed to time constraints, sensitivity of the subject matter and the difficulty in personally engaging members of the bench.

3.4 Data Collection

This thesis relied on primary and secondary sources of data which were picked based on their reliability and suitability on the subject matter which is the independence of the judiciary. The primary sources included interviews from respondents while the external secondary data sources used in this thesis included books, journals, statutes, constitutions, case law, magazines, newspapers, government policy papers, research papers, reports both official and unofficial, statistics, mass media records and web based materials.

3.5 Data Analysis

Content analysis was developed decades ago as a method to systematically read and analyze texts. Researchers can apply content analysis to texts of any kind, including legal documents such as trial court records, statutes and regulations (Hall & Wright, 2008).
This thesis, relying heavily on both local and international legal instruments, case law, statutes and publications such as books and journals used content analysis to analyze the data. The interviews with the respondents were transcribed and then analyzed through content analysis as well. Content analysis provided a platform for the construction of meaning in texts. It comprised of the search for underlying themes in the data being analyzed where a theme was a category identified by the thesis through data that relates to the research questions and provided the researcher with the basis for a clearer understanding of the data that could make relevant contributions to the literature gaps relating to the thesis focus (Bryman, 2012).

The content analysis of case law for this thesis was done in two stages;

1. **Systematic Case Selection**

   This was based on the researcher’s judgment about which cases are worth reading, that is, which are the ‘leading cases’ that best illustrate the legal issues in question and which opinions might best answer the research questions (Hall & Wright, 2008).

2. **Systematic Case Coding**

   Here, features of cases worth studying and of relevance to the thesis were articulated. To boot, the coding of cases, even for just qualitative description and analysis, strengthened the objectivity and reproducibility of case law interpretation (Hall & Wright, 2008).

   Content analysis was also used to analyze text data from books, journals, statutes, constitutions, constitutional provisions, past case law, magazines, newspapers, government policy papers, research papers, reports both official and unofficial, statistics, mass media records and web based materials. The findings from content analysis were then used to provide more literature,
understanding and correlation of the independence of the judiciary, rule of law, the separation of powers doctrine and justice in respect of court decisions on presidential election petitions.

3.6 Ethical Considerations

First, respect for the respondents was achieved through ensuring their autonomy and protection from exploitation during the interviews. Second, the dignity of all research respondents was respected by ensuring confidentiality at all times and minimizing the risks associated with research. Finally, the research was committed to ensuring a fair distribution of the risks and benefits resulting from research where those who take on the burden of research participation also shared in the benefits of the knowledge gained (Qualitative Research Methods Overview, n.d.).
CHAPTER 4

Research Findings

4.0 Introduction

Scholars observe that although there is an international convergence, especially in new democracies regarding what an independent and an impartial court is, requirements for the implementation of the independence of the judiciary persist as challenges due to different legal systems in different states. However, are the practical challenges regarding the principle of the independence of the judiciary really about the differences that exist in terms of legal systems, or rather, has much to do with the cultural attitude and politics within these states? (Were, 2017) This chapter shall present and analyze data on the presidential elections as well as petitions from 2007-2017, constitutional safeguards by the CoK 2010 relevant to the independence of the judiciary, the effect politics has had on the independence of the judiciary through politically charged cases and lastly judiciary-executive relations in Kenya post-2010 and its contribution to the independence of the judiciary.

4.1 Kenya’s Presidential Elections Petitions Pre and Post Promulgation of the Constitution of Kenya 2010

4.1.1 The 1997 Presidential Elections

After choosing to run individually, opposition groups failed to unseat President Moi, who garnered 2.5 million votes compared to Mwai Kibaki who received 1.9 million votes. President Moi’s KANU party also managed to win a majority 107 seats in parliament (Kamau, 2017). Mwai Kibaki swiftly moved to court to challenge the validity of the election results. In a twist of events, the respondents to the election petition moved the court to strike out the petition principally on the
ground that it had not been personally served on them as required by law with each respondent swearing an affidavit to support his application (Awuor & Achode, 2013).

The application by the 1st respondent was allowed and the election petition struck out, where it was held that the requirement in rule 14 of serving an election within 10 days applied to a petition under section 20 (1) (c) of the National Assembly and Presidential Elections Act and that the only mode of service under rule 14 (1), if the rule still applied to a petition under section 20 (1) (a) was personal service. As such, service had not been effected, and indeed there was no suggestion that personal service was attempted and repulsed, thus nullifying the petition (Awuor & Achode, 2013). Justice Githinji, dissenting in the Court of Appeal, outlined five key points:

1. On the material before the trial Judge, any reasonable tribunal would be fully justified in concluding, as those who wanted to effect service upon the appellant did, that the appellant had gone underground with the sole purpose hiding from those who intended to effect personal service upon him.

2. The Kibaki v Moi decision did not establish any proposition that even where it is proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served.

3. The decision clearly recognized that if personal service which is the best form of service in all areas of litigation is not possible, other forms may be resorted to.

4. Personal service remains the best form of service in all areas of litigation and to say that Members of Parliament are a different breed of people and different rules must apply to them as opposed to those applicable to other Kenyans cannot support the principle of equality before the law.
5. No man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man. The appellant could not be allowed to rely on his having successfully hidden himself from the attempts of the 1st respondent to personally serve him to defeat the 1st respondent’s petition challenging the validity of his election. The effort made by the 1st respondent to personally serve him amounted to personal service on him and the learned trial Judge was right in holding that he had been served (Auwor & Achode, 2013).

Section 20 (1) (c) of the National Assembly and Presidential Elections Act, was nothing but a tool used by President Moi that not only ensured he legally held on to power but also one that rendered the judiciary a handmaiden to the all-powerful executive.

4.1.2 The 2007 Presidential Elections

On 27th December 2007, Kenya held peaceful presidential, parliamentary and local elections. Eight candidates stood for the presidency but in the end the contest was between President Mwai Kibaki and his Party of National Unity (PNU) against Raila Odinga of ODM. It was the closest election since the reintroduction of multiparty politics in 1992. According to disputed results released by the Electoral Commission of Kenya (ECK), President Kibaki won 4,578,034 and Raila Odinga 4,352,860 votes (The Office of the AU Panel of Eminent African Personalities, 2013). The voting was peaceful, but confusion and delays in announcing the result began to create unease, then unrest, and eventually violence. The ODM refused to accept the outcome and rejected ECK’s declaration that President Kibaki had been legitimately elected to the presidency, triggering a political crisis engulfing Kenya in violence that lasted for almost a month. The ODM alleged that the ECK had released results in 48 constituencies without the mandatory Form 16A, had announced results that varied from the results issued and confirmed by Returning Officers and its own agents, and that in 10 disputed constituencies the presidential vote cast had exceeded the
parliamentary vote by an unusual margin. For the first time in Kenya’s history, it said, local and international observers were unanimous in saying that counting and tallying had been flawed (The Office of the AU Panel of Eminent African Personalities, 2013).

Despite this, on 30th December, ECK chairman Samuel Kivuitu declared President Kibaki the winner, who was sworn in the same day at dusk, less than half an hour after Kivuitu’s announcement further deepening public suspicion since previous ceremonies had taken place at least 48 hours after the result, in the presence of regional and international leaders. The PNU though asserted that President Kibaki had been duly elected President and that complaints about the conduct of the election should be resolved in the courts. It argued that the votes cast for presidential and parliamentary elections have always varied and that errors in the electoral process, particularly in counting and tallying were not sufficient to falsify the result. The ODM refused to take the dispute to court, believing that the judiciary was not independent. Reasons cited were that past electoral petitions had consistently faced delay as ten petitions arising from the 2002 elections had still not been adjudicated in 2007 together with the fact that President Kibaki’s own petition in 1997 had been dismissed on grounds of a constitutional amendment that made the President virtually immune to service (The Office of the AU Panel of Eminent African Personalities, 2013).

Following this disputed presidential elections and the ensuing post-election violence, two pieces of legislation were enacted to lead Kenyans to a new Constitution. First was the Constitution of Kenya (Amendment) Act 2008, which was enacted on 22nd December 2008. The 2008 Amendment Act provided a new roadmap for constitutional reforms and established the organs and mechanisms for constitutional review. Second was the Constitution of Kenya Review Act 2008, which was enacted on 29th December 2008 that sought to facilitate the completion of the review process thereby providing a legal framework for the review mechanisms and establishing
organs charged with the responsibility of facilitating the review process (Judiciary Working Committee on Election Preparations, 2013).

The 2008 Review Act established a Committee of Experts (COE) mandated to finalize its work on a new draft Constitution within twelve months from the date of appointment. On 17th November 2009, the COE published a Harmonized Draft Constitution which was approved by the National Assembly and subjected to a referendum conducted by the Interim Independent Electoral Commission (IIEC). In the referendum conducted on 4th August 2010, the Draft Constitution received 67% support of the electorate and, in accordance with the enabling law, came into force on 27th August 2010, the date on which it was promulgated by the President. The promulgation of the Constitution on 27th August 2010 therefore marking a supposed beginning of an era of good governance and political administration (Judiciary Working Committee on Election Preparations, 2013).

The CoK 2010 gave Kenya another chance, in this respect as in so many others. It insists in clear terms that the judiciary is independent, not only by use of rhetoric but by clear provisions to protect the judiciary from executive or legislative interference. It goes further by providing that the independence of the judiciary can only be affected by a constitutional amendment if the people approve it in a referendum. The CoK 2010 gave Kenya a chance to start, if not with a completely clean slate, with one that was wiped clean of some of the most egregious mistakes of the past. The vetting process cleaned away some of the human relics of the past. And new people were prepared to come onto the bench, committed to the values of the Constitution, and to the values of the judiciary. For the first time for many years, accountability of the judiciary, and of the individuals within it, could be thought about and focused on (Ghai, 2017).
4.1.3 The 2013 Presidential Elections

What distinguishes the CoK 2010 from the previous Independence Constitution (1963) is that the drafters were sensitive to the interests of the commonality of the people, thus moving it away from being a rigidly power based document only relevant to the political elite. Before, politicians invoked the Constitution in so far as power and distribution of the same among themselves was concerned. However, despite the progressive nature of the CoK 2010, it is argued that the absence of a culture of accountability and political will, will ultimately stifle its implementation, ensuring that room remains for political activity along tribal lines (Patricia Kameri-Mbote & Murungi, 2016). Also, the performance of the electoral body during the elections left a lot to be desired and would have plunged the country into violence had the opposition not petitioned the presidential results in court, despite the Supreme Court unanimously upholding Uhuru Kenyatta’s win citing that human actions are never pure and elections are bound to tolerate simple human errors as well as election petitioners having a tall order to prove that major errors, which if they did not occur, would have changed the outcome of the election.

To add, the Supreme Court of Kenya further ascertained that the standard of proof in a presidential election petition is higher than that required in civil matters and close to that required in criminal matters due to the fact that the burden of proof is on the petitioner. Consequently, unless the elections are substantially fraudulent they will not be nullified and the Presidential Election Petition of 2013 subsequently presented itself as a disciplined litigation (Ribathi, 2017). This was despite multiple voter registration issues, malfunctioning of the electronic voter identification system and of the results transmission system. Also, in the aftermath of the elections, allegations of corruption, that implicated the then chairperson of the electoral body, Mr, Isaak Hassan, emerged.
The Supreme Court decision in *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* (2013) was criticized for textual errors and for weaknesses in its doctrinal reasoning. Instead of a shift in legal culture away from the narrow, technical style of interpretation characterized in the 1997 election petititon, the Supreme Court allegedly spurned this opportunity by the disposing of many of the key issues in the case without reflecting in any serious manner on the deep and difficult conflicts of principle which they raised. Values and principles were sometimes listed, but were assumed to lead to the preferred conclusion without further argument (Harrington & Manji, 2015). In adopting this fairly unreflective mode of decision-making, the Supreme Court lost a perfect opportunity to contribute to a culture of justification and to the development of a rich jurisprudence that respects Kenya’s history as mandated by its founding statute under Article 163 of the CoK 2010.

The judgment did not engage with the remedial and reconstructive dimensions of the relevant constitutional provisions and statutes. Instead, the petitioners’ claims were largely treated as raising questions of fact and accordingly determined by procedural rules regarding time limits on the admissibility of evidence and the operation of devices such as judicial notice, the presumption of regularity, the definition of the standard of proof, and the allocation of the burden of proof. Technical rules served to insulate the IEBC from scrutiny and to secure its freedom of action in discharging its executive functions with the court subsequently suppressing its constitutional role as the ultimate instance for scrutiny of executive action and for upholding the supremacy of the constitution (Harrington & Manji, 2015).

Hence, Kenya’s reform process might still have to contend with ethnic polarization, disregard for the rule of law, cynicism among the political elite as well as an old order mentality
within the ruling kleptocracy. Competitive plural multiparty politics was yet to find traction in 2013, owing to a self-reproducing plutocracy anxious about a possible threat posed by a reformed state (Patricia Kameri-Mbote & Murungi, 2016).

4.1.4 The 2017 Presidential Elections

In 2017, the Supreme Court of Kenya nullified the August 8th general election results, causing profound sensation countrywide. That an electoral body announces results which favor the incumbent and the incumbent is declared president-elect and then a court of law comes up with a decision that declares the election null and void was unheard of. Even those who strongly believed the election was not free and fair and wished for a Raila Odinga presidency, had doubts as to whether the Supreme Court could reverse the results and order a fresh election (Ulimwengu, 2017).

How this happened basically came down to the presumed degree of independence enjoyed by the Judiciary and the will to right the wrongs made in the 2013 presidential election petition. However, this high degree of the independence of the judges would not be possible outside a constitutional arrangement that allowed for it. The Kenyan judiciary is made up of judges who are recruited according to the CoK 2010, which provides for very high standards of probity and scrutiny. The judges are not necessarily beholden to the executive serving as a lesson and example to ultra conservatives in the other African countries, to recognize the importance of re-examining their constitutions and rewriting them with a view to giving their people a level playing field in which to practice politics (Ulimwengu, 2017).

Though while President Kenyatta accepted the ruling at first, lack of political will was evident again. This is through the fact that he increasingly became adamant that changes should be made to the CoK 2010 to protect the sovereign will of Kenyans, exercised through their elected
representatives. As such, the Kenyan parliament, dominated by Kenyatta's Jubilee party, moved swiftly to make a crucial change to the electoral law to be used during the October 26th re-run, yet again, exposing loop holes in the perceived independence of the judiciary where a government majority parliament can easily shape the laws that govern elections and petitions (Kimutai, 2017).

The introduction of these electoral laws to parliament on 28th September was antagonistic, brought uncertainty and further divided the two camps; Jubilee and NASA. The bill was in part used as a justification for non-participation by NASA in the electoral process as was the IEBC’s lack of reform. Of the proposed changes, none were critical for Kenya to comply with international commitments nor were pre-requisites for improvements to the fresh election. The bill went to the President for assent on 13th October and following the lapse of 14 days, automatically passed for gazette notification (European Union, 2018).

This move drew harsh criticism not only from NASA, but also some liberal Members of Parliament (MPs) from the Jubilee ruling party, who warned that the changes would undermine Kenya's credibility and usurp the Supreme Court's powers to correct election mistakes (Kimutai, 2017). Mithika Linturi, a Jubilee senator from Igembe South in Meru County, argued that a time of crisis is not ideal in creating laws (Kimutai, 2017). Instead, as per Article 10 of the CoK 2010, the best laws, would require the participation of all people of goodwill, under a prevailing atmosphere of trust for each other. And despite belief that the ruling party won the election, making a law in the absence of the other party is a grave mistake. To make Kenya safe and secure, there is need for more consultation and relationship building towards passage of this particular law (Kimutai, 2017).
And while Jubilee emphasized a clear victory after the 26th October re-run and the need for Kenya to move on as a country, NASA leader Raila Odinga denounced the ‘sham election’, calling for fresh elections and establishing a resistance movement against the government leading to uncertainty, tensions and concerns about violence continuing with consequent effects on business and national functioning (European Union, 2018). This led to various public calls to address overarching problems of exclusion, Kenya’s winner-takes-all politics, and the lack of rotation in the presidency beyond two ethnic groups and the perceived over-reach of the government. It was contended that without reform in these areas, presidential elections would continue to be a point of conflict, with suggestions such as the establishment of parliamentary positions for opposition leaders to serve as a platform for their contribution to national debates being made. For example, religious leaders under the umbrella of the National Council of Churches of Kenya proposed restoring the positions of Prime Minister and Deputy Prime Minister, as well as an official Leader of the Opposition and Deputy in parliament. The reactions to this were mixed, with some Jubilee politicians strongly opposing the proposal and NASA representatives proposing amendment of the CoK 2010 to change to a parliamentary system of democracy (European Union, 2018).

Common in all cases after the 1997 and 2007 disputed presidential elections, nonetheless, is that, there has been a perceived increase in the degree of independence afforded to the judiciaries, particularly attributed to the promulgation of the CoK 2010 and it is now necessary that such independence be fortified with the integrity of the judicial institution (Sharman, 1996). To achieve judicial legitimacy as well as proper functioning of the internal workings of a judiciary, judicial integrity is key. If the judiciary is perceived as being corrupt, biased, or unethical, society’s confidence in the legal system and its respect for the rule of law will eventually (Krishnaswami, 2008). Judges must not only avoid impropriety, but also the appearance of impropriety, if public
confidence in the judiciary is to be maintained. It is recognized that some behaviors pose a threat to judicial integrity. Such behavior includes corruption and nepotism, inefficiency and unbecoming conduct on the part of individual judges.

The judicial system is part of a dynamic political system of a particular nation or time, influenced by cultural and historical circumstances that are not static. Different epochs in history and political experiences that people go through have an effect on their understanding of the law, and influence their roles in society. The courts are but a segment of a system with which people who are qualified to use it shed light on the general life of a nation at a given time. Thus, like any other organ of a big machine called the state, the judiciary still has its limitations. The fact that the courts are meant to adjudicate on the constitutionality of laws within the framework of the CoK 2010 and the precedents of previous cases, greatly limits the court’s discretion to write into a decision anything it sees fit. In other words, judges hardly apply discretion of their own but rather they merely compare the clear statements of the CoK 2010 against Acts of Parliament or the local legislature in question, merely in order to ascertain congruence.

On the other hand, politics as well, places major limitations on the powers of the judiciary. Judges themselves are appointed by the president who may be keen to promote certain policy and ideological agendas of his regime. Again, members of the legal fraternity are citizens of nations and, thus, live in the same circumstances as their fellows. Their opinions are influenced not only by what they hear when in session, but also by their own experiences, hopes, frustrations, and even concerns about the possible repercussions of their judgements at a given time (Diescho, n.d.).
4.2 Constitutional Safeguards to the Independence of the Judiciary in Kenya

The Independence Constitution (1963) unlike the current dispensation, lacked sufficient constitutional safeguards regarding the independence of the judiciary. For instance it did not have well defined and robust procedures for judge selection thus making the process highly susceptible to manipulation and compared to the CoK 2010, the process of judge removal was not as robust and the lack of a Judicial Service Commission, failed to properly guarantee job security.

The constitutional safeguards enshrined in the CoK 2010 serve to embolden judges so that they can carry out their work with courage and diligence, this is based on the theory of constitutionalism that prescribes a system of government in which the government’s powers are limited and government officials, whether elected or not, cannot act against their own constitutions (Adagbabiri, 2015). However, as per history, even with all these constitutional protections of judges and the judiciary, Kenya’s executive and legislative arms still have uninhibited nerves to reprimand judges and intimidate the judiciary, further shaking the foundation of the independence of the judiciary in Kenya (Were, 2017). On 4th August 2010, the efforts at constitution making finally bore fruit leading to the adoption of the current Kenyan Constitution, marking a sort of second rebirth for the hitherto wounded nation. The CoK 2010 introduced key reforms in governance where the independence of the judiciary was now explicitly secured under Chapter 10.

The essence of separation of powers is that it requires a clear demarcation of functions between the legislature, executive and judiciary where none should have excessive power and further that, there should be in place a system of checks and balances between the institutions. The CoK 2010 takes cognizance of the reform proposals and now expressly recognizes the judiciary as a state organ, further vesting in it judicial authority. The institution of the judiciary is identified by naming the courts comprising of it as well as the staff who make up the respective courts. Namely;
the Supreme Court, Court of Appeal, High Court, magistrates and other judicial staff. Article 161 of the CoK 2010 defines judicial offices and judicial officers as also including Kadhis and presiding officers of any other court or local tribunal as may be established by an act of parliament. It is the judiciary so defined under Article 160 whose members exercise judicial authority and in addition are constitutionally guaranteed judicial independence.

In this research, key constitutional safeguards to judicial independence shall be determined from four key points. These are; electoral provisions, security of tenure, financial security and autonomy, constitution amendment and, judicial appointments and accountability.

4.2.1 Electoral and Dispute Resolution Provisions

Among the factors that informed the push for constitutional and legal reforms in Kenya through history was the desire to have an electoral system that accords to the fundamentals of democracy. Free and fair elections are a result of a sound electoral management system that is itself founded upon a sound legal and administrative framework (Ongoya & Otieno, 2012). The legitimacy of any government, which is foundational to proper governance, is dependent on the confidence that people have in the electoral system. On the other hand, an electoral system founded on a weak legal framework is less than likely to inspire people’s confidence in the resultant government.

Following the resounding adoption of the new CoK 2010, a number of institutional and legal reforms were ushered in, either expressly required under the Constitution within prescribed time-frames or implicitly required to make the legal regime in the relevant sectors compliant with the new constitutional order. One of the sectors that was inevitably affected by the promulgation of the new Constitution of Kenya was the electoral sector (Ongoya & Otieno, 2012).
In addition to the Constitution, the Elections Act (2011), The Independent Electoral and Boundaries Commission Act (2011) and the Political Parties Act (2011) were all enacted so as to provide a reformed legal and administrative environment for the conduct of elections of which formed the backdrop against which the 2013 general elections were conducted. An election quite unique as it marked the first time that Kenyans were exercising their sovereign rights to elect their representatives under the CoK 2010. Again, it was the first general election to be held following the disputed 2007 General Elections and as expected, there was a lot of anxiety as many feared a reoccurrence of the events of 2007. Also, about 14,352,545 Kenyans registered as voters while 12,330,028 voted, representing 85.91% voter turnout, the highest ever recorded (“Voter turnout in Kenya,” 2013). Finally, it was a litmus test for the efficacy of the changes that were brought about by the CoK 2010.

First of the key reforms provided are the principles that govern elections. All elections are to be free and fair, free from violence and administered in an impartial, neutral, efficient, accurate and accountable manner. While all past elections had been judged against the standard of whether they were free and fair or not, the constitutional provisions now clarified what free and fair would comprise of in the Kenyan context. The CoK 2010 also addressed the shortcomings of the ECK by establishing a new independent electoral body, the IEBC that is only subject to it under Article 88 together with prescribing the criteria for appointment of its commissioners.

It also provides for the independence of the IEBC in the management and conduct of elections, a critical prerequisite for the legitimacy of the elections and the elected government and was not limited only to the conduct of elections, but its mandate also included the peaceful settlement of electoral disputes. The disputes included those relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election
results of which were to be settled within seven days. Electoral dispute settlement mechanisms were split into two categories with the first handling pre-election disputes, which consisted of the courts, the IEBC and the Political Parties Disputes Tribunal (PPDT) and the second category of hearing and determining post-election disputes being left exclusively to the courts (Odote & Musumba, 2016).

According to the CoK 2010, the Supreme Court has exclusive original jurisdiction to hear and determine disputes regarding elections to the office of president. The High Court hears election petitions concerning election to the offices of Governor, Senator and Member of the National Assembly. On the other hand any petition on the election of a Member of a County Assembly shall be heard and determined by the Resident Magistrates’ Courts as designated by the Chief Justice. Besides having the exclusive jurisdiction in matters arising from the conduct of the elections and the declaration of results, the courts and especially the High Court have an appellate mandate in disputes from the quasi-judicial bodies. For instance, there is a right to appeal the decision of the PPDT to the High Court on matters of law and fact and to the Court of Appeal and the Supreme Court on matters of law. These reforms to the legal framework, thus seeking to address the shortcomings in the previous processes for dispute resolution in election matters (Odote & Musumba, 2016).

4.2.2 Amendment of the CoK 2010

A constitutional amendment is a formal change in the text of a constitution. The change can take the form of a variation to the text, a removal of text or an addition to the text. Most constitutions have relatively burdensome amendment procedures, often involving multiple actors and institutions. The greater the number of procedural burdens and actors involved in amendment processes, the more rigid the constitutional provisions are and the less vulnerable it is to change at
the will of powerful individuals or groups. The involvement of multiple stakeholders in the amendment process, time delays, and opportunities for public input to the process, protects against self-serving amendments or those that only reflect the preference of a narrow majority and not a broad consensus in a state society (Hedling, 2017).

Such rigid constitutions are fundamental in the establishment of a stable and reliable legal landscape, the heightened protection of constitutional rights and values and perhaps increasingly consistent enforceability of constitutional structures and provisions. Flexible constitutions, in contrast, allow the constitution and the government to act and react more easily as times change; at most times, providing less protection, against actors or parties who wish to promote self-serving constitutional changes or amendments (Hedling, 2017). Again, several constitutions have mixed amendment rules, with different degrees of rigidity for the amendment of different parts of the constitution on top of containing some unamendable provisions. These are provisions that declare an essential aspect of the state or an essential element of the national identity. Additionally, they may be provisions that protect against specific potential problems such as an undemocratic amassment and entrenchment of power. For instance, Tunisia’s 2014 Constitution, contains several unamendable provisions such as Article 1, which declares Tunisia’s freedom, independence, sovereignty, religion, language, and system of government (Hedling, 2017).

In Kenya, amendments to the provisions relating to the independence of the judiciary have been made more difficult than it was under the independence constitution. A proposed amendment to the CoK 2010 shall be enacted in accordance with Article 256 or 257 and approved in accordance with clause (2) by a referendum, if the amendment relates the independence of the judiciary and the commissions and independent offices to which Chapter 15 applies. Essentially, a 2/3rd majority parliamentary vote and also a referendum is now required in order to secure an
amendment, further securing and protecting judicial independence. These new provisions did not exist in the Independence Constitution (1963) which only required a 2/3rd majority for any provision to be amended. As a result today, protection of the independence of the judiciary is not only left to the whims of the executive and the legislature, but also involves direct public approval.

Nonetheless, according to most respondents, these provisions have also been key contributors to the problem of judicialization of politics. Since the promulgation of the CoK 2010, many political issues in Kenya have, inevitably, become legal questions to be resolved by the courts. Most prominent reason for this being the difficulty in amending the constitution. Parliament may make some amendments but changes to the most basic articles must be ratified by a referendum. Likewise, not only do the courts have wider powers to interpret the constitution, but also, are more accessible financially for many citizens. By making the amendments harder and access to courts cheaper, the CoK 2010 has substituted the court for Parliament as the preferred site for political change (Maina, 2015).

If a constitution is difficult to amend, as the CoK 2010 is and access to court is cheap or easy, as it is in Kenya today, contending parties to a political controversy will first seek a judicial interpretation that favors their view of the matter before they consider invoking the amending powers of Parliament. The downside of this is that, politicians now understand that the courts are important political arenas, and continuously fight to usurp or control the power to appoint judges, challenging the concept of judicial independence (Maina, 2015).

4.2.3 Financial Security and Autonomy

At the root of many conflicts between the branches of government is money (Webb & Whittington, 2004). It is at the heart of many policy disputes as different interests, political parties, and
government officials stake out divergent priorities in the raising and spending of public funds and create substantial institutional tensions within any system of separated powers. In such a system, the legislature rightfully holds the power of the purse (Webb & Whittington, 2004), given the intimate connection between effective democratic representation and control over government taxation and spending. Control over the treasury is a powerful political weapon that can be used against other government institutions. In controlling the purse strings, the legislature can reward or punish members of the executive and judicial branches, depending on how the conduct of their offices (Webb & Whittington, 2004). In Kenya, where the majority of the legislature is affiliated to the President’s Jubilee party, such control gives both the legislature and executive a powerful trump card when disagreements arise between them and the judiciary.

To limit this threat, the CoK 2010 establishes the Judiciary Fund, which is to be administered by the Chief Registrar of the judiciary and to be used for administrative expenses of the judiciary and such other purposes as may be necessary for the discharge of its functions. Each year, the Chief Registrar is required to prepare estimates of expenditure for the following year and submit them to parliament for approval where once approved, the expenditure of the Judiciary becomes a direct charge on the Consolidated Fund, which is then paid directly into the Judiciary Fund (Special Audit Report on the Judicial Service Commission and the Judiciary, 2014). Appropriately, the bureaucratic and executive laden budgeting procedures which exposed the judiciary to manipulation by the executive, appear to have been removed with this shortened process.

The involvement of parliament in scrutinizing the budget, is in line with the checks and balances principle of separation of powers. Also, the requirement that the Chief Justice must, once every year, give an account on the state of the judiciary to the nation, creates an effective and
public audit of its activities and check on possible misuse or abuse, internally by itself, or externally by the other branches. It injects some amounts of institutional accountability in how the judiciary uses and manages the funds it is allocated. With these provisions in place, one can now state with some degree of confidence that the judiciary has taken major steps in achieving its fiscal independence from the executive. The CoK 2010 prima facie creates an effective platform conducive to the realization of the financial independence of the judiciary.

The CoK 2010 however, also gives Parliament the power to enact legislation to provide for the regulation of the Fund of which it has exercised by enacting the Judicial Services Act (2010), where, Part 4 of the Act contains conditions to be met before the funds can be utilized. First, the judiciary is allowed to raise money, from sources outside the Consolidated Fund, in the form of gifts, grants, donations, or bequests, but it is prohibited from accepting monies pursuant to any conditions which are incompatible with its functions duties or obligations. The statute however fails state what is to happen should its provisions regarding this prohibition be flouted with relevant oversight bodies, tasked with vetting the receipt of such funds not being identified. This omission can result in politically calculated delays in receipt or disbursement of funds, leading to delays in administration of justice or undermine the independence of the judiciary.

The Judicial Services Act (2010) also establishes the National Council on the Administration of Justice, of which most of its members are largely drawn from the executive. As one of the bodies overseeing receipt or disbursement of funds to the judiciary, the possibility of conflict of interest cannot be ruled out and such a conflict can affect the functions of the JSC in administering the funds received. Also, it poses the danger that the executive may want to control the judiciary’s funds and can even hold them if it is not in agreement with the decisions of the judiciary. Payment out of the fund is again subjected to all laws, which may facilitate backdoor
executive control or influence in the judiciary thus compromising the intended checks and balances that are desirable.

4.2.4 Security of Tenure

The United Nations Basic Principles on the Independence of the Judiciary (1985) states that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Furthermore, judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists and shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

Life tenure or long terms of office tend to promote the independence of the judiciary. Short terms of service on the other hand, have the opposite effect. Judges seeking reappointment will need to satisfy and defer to the appointing body in order to keep their jobs, while those who are not eligible for reappointment will need to seek positions elsewhere, potentially compromising their independence (Bulmer, 2017). Yet, life tenure subject to removal only on the grounds of misbehavior may mean that very elderly people continue in office as judges despite declining health. Moreover, turnover can be slow and vacancies irregular, which potentially raises the stakes and uncertainty of each appointment. To address this, states usually have a compulsory retirement age for judges.

If constitution makers cannot decide on a suitable retirement age nor do not wish to specify a fixed retirement age in the text of the constitution, phrases such as ‘subject to retirement at an age to be prescribed by law’ may be used. To prevent the manipulation of such provisions, the constitution might also stipulate that any future reduction of the retirement age would not apply to
existing judges without their consent. A higher retirement age is often applied to Supreme Court judges in recognition of the fact that judges will typically be appointed to these courts at the end of their careers. (Bulmer, 2017).

Kenya has been able to provide constitutional safeguards for members of the bench by ensuring that all judges enjoy security of tenure and earn competitive salaries in order for them to comfortably do their job without fear or favor. Article 167 of the CoK 2010 asserts the tenure of office of the Chief Justice and other judges. This law requires judges to work until they reach the age of 70 then they can retire rather than the usual retirement age for all public servants in Kenya which is 60 years. Also, Article 160 (4) says that subject to Article 168 (6) of the Constitution, the remuneration and payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge. Further, Article 160 (5) of the Kenya’s Constitution says that, “A member of the Judiciary is not liable in an action or suit in respect to anything done or omitted to be one in good faith in the lawful performance of a judicial function.”

Notwithstanding, the holder of the office of the Chief Justice under the independence constitution was to vacate office within six months of the promulgation of the CoK 2010. It specifically provides that the former Chief Justice vacates office and does not serve under the new constitution giving Kenya an opportunity for the launch of a new independent judiciary and a search for independent judges not tainted by political partisanship. Through this, the CoK 2010 protects the independence and integrity of the judiciary, as an institution, by giving it a chance to reinvent itself under a new leadership and reclaim its legitimacy. Differently, a closer scrutiny reveals that the Chief Justice’s right not to be removed from office, save through a tribunal process makes a mockery of the concept of security of tenure.
4.2.5 Judicial Appointments and Accountability

The independence of the judiciary is a central goal of most legal systems, and the systems of appointment are seen as a crucial mechanism to achieve this goal. Judges who are dependent in some way on the person who appoints them may not be relied upon to deliver neutral, high-quality decisions and so undermine the legitimacy of the legal system as a whole. While there is near-universal consensus on the importance of the independence of the judiciary as a matter of theory, legal systems utilize a wide range of selection mechanisms in practice, often reflecting slightly different conceptions of independence. The diversity of systems of judicial selection suggests that there is no consensus on the best manner to guarantee independence. One reason for the diversity is that judicial appointment systems also implicate other values that may be in some tension with the ideal of judicial independence. For example, appointments must also ensure judicial accountability, the idea that the judiciary maintains some level of responsiveness to society. In recent years, there has been concern in several societies about the composition of the judiciary on ethnic and gender lines. The underlying concern is that the judiciary should loosely mirror, to a certain degree, the diversity of the society in which it operates (United States Institute of Peace, 2009).

As such, judicial appointment in Kenya has been subject to numerous debates and criticism especially in the past. Most times, the process was enveloped in opacity and judges were appointed not on merit, but on political considerations, leading to a judiciary that showed no ability or inclination to uphold the rule of law against the express whims of the executive, senior government officials and their associates. Simply put, the judiciary was seen as nothing but the handmaiden of the executive.
Under the CoK 2010, all judges of superior courts must hold a minimum of a law degree from a recognized university or be advocates of the High Court of Kenya or possess an equivalent qualification in a Commonwealth jurisdiction—a shift from the independence constitution where non-lawyers could be judges. Furthermore, the Chief Justice, Deputy Chief Justice and judges of the Supreme Court are now required to have served for a period of no less than 15 years, either as a superior court judge, distinguished academic, legal practitioner or have such experience in other relevant legal field. Judges of the Court of Appeal and High Court require no less than 10 years’ experience.

Also, judges including the Chief Justice and Deputy Chief Justice must be persons who possess high moral character, integrity and impartiality. This tends to promote judicial independence and to a lesser extent, accountability among peers. Aspects of integrity, involve the personal profile of judges, their extra judicial activities, the behavior of judges in private and their relation with certain organizations. Judicial accountability promotes the rule of law by deterring conduct that could compromise the independence, integrity and impartiality of the judiciary. Employed properly, accountability merely diminishes a judge’s freedom to make himself or herself dependent on inappropriate internal or external influences that could interfere with her capacity to follow the rule of law (Geyh, 2006a).

By deterring bribery, favoritism, bias and so on, accountability promotes the kind of independence needed for judges to adhere to the rule of law. Judicial accountability also promotes public confidence in judges and the judiciary. Regardless of whether independent judges follow the law, if the public’s perception is otherwise, reforms calculated to render judicial decision making subject to popular or political branch control are sure to follow, to the ultimate detriment of the rule of law itself. A system of judicial accountability that reassures a sometimes-skeptical
public that judges are doing their jobs properly and yet respects the judiciary's independence can forestall resort to more draconian and counter-productive forms of court control. Finally, judicial accountability promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of government. The public is entitled to courts that administer justice effectively, efficiently and expeditiously (Geyh, 2006a).

An interesting aspect of accountability comes about with the question concerning whether a judge should be held accountable upon willfully deciding a case ‘wrongly’ because of disagreement with the governing law or with the result that the application of the law would have in the case before them. Professor Geyh (2006a) states that, devotees of civil disobedience the world over understand that when they intentionally violate a law, even when their motives are pure and the law is unjust, they are subject to sanctions and thus would hold the judge accountable in these circumstances. An anti-death penalty judge who continually refuses to uphold capital punishment sentences, even when they are clearly in the bounds of the relevant statutes and the Constitution, may be appropriately sanctioned for ignoring her legal duties. Similarly, a pro-life judge who categorically refuses to grant judicial bypass to minors from parental notification requirements, even when the circumstances clearly call for such action, should also be penalized for ignoring his legal obligations.

Again, but whether a judge should be disciplined for willfully violating the law may not always be so clear. Geyh recognizes this and cites the example of Judge Anthony Kline’s use of a dissent against controlling precedent as a vehicle to trigger reconsideration of a decision that he believed in error. Kline may have intentionally reached an erroneous result, but his purpose in doing so was not to usurp the rule of law, but rather to take the steps necessary to allow the judicial processes to reconsider what he believed was an erroneous decision (Marshall, 2006).
4.3 Election Petitions and the Judicialization of Politics

The comparative list of judicially settled election contests has grown considerably longer in recent years, with courts increasingly being called upon to decide disputed national presidential elections in Uganda, Ukraine, Taiwan, Nigeria, Sierra Leone, Italy, Mexico, Ghana and Indonesia among others (Independent Review Commission, 2007). Kenya’s 2013 General Elections, much anticipated after the dubious 1997 election petition and in light of the bloody aftermath of the disputed 2007 elections produced The Raila Odinga Case and several parliamentary and county level election petitions, which put to the test Kenya’s newly transformed judiciary and the legal framework as well as machinery tasked with handling and resolving election disputes put in place by the CoK 2010.

This growth of judicialization of elections, more so outside long established democracies, is one of the fruits of the third wave of democratization (Huntington, 1993) and reflects the fact that, the rise of competitive multiparty politics in post authoritarian democracies has been accompanied by the emergence of independent and assertive courts. Not only are election petitions inherently fact-specific national differences in both political and legal systems, but also add a layer of uniqueness when compared across jurisdictions. From both a judicial and an analytical standpoint, election petitions in competitive democracies generally implicate roughly the same policy concerns and present common challenges, making such cases, as a class, different in kind and significance from the cases that dominate judicial dockets everywhere. As such, judicial references to election petitions as matters sui generis are fairly common across various jurisdictions (Prempeh, 2016).

Sui generis is Latin for ‘of its own kind’. The term is used to describe a form of legal protection that exists outside typical legal protections (Cornell Law School, n.d.). Essentially, as a
cause of action, an election petition has a kaleidoscopic quality to it; being that, it defies easy classification as a civil or a criminal case, or, for that matter, as any other conventional type of case. On appearance, an election petition looks like any other civil case. Nothing more than an adversarial legal proceeding initiated and prosecuted by a private or non-state party against another party seeking remedies of a non-criminal character. Practically however, it is not as straightforward since election petitions often contain a mix of claims, some of which allege criminal offenses such as fraud that may invite penal sanctions or consequences (Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others, 2013). Again, the fact that the election whose results the petitioner seeks to invalidate as being in violation of law is typically the act of a public body, which body is often a named respondent in the suit, also gives an election petition proceeding an administrative law posture.

Away from a classificatory sense and of keen interest to this research, an election petition is also inherently political. Before the inception of the election petition, disputes over which candidate was the rightful winner of an election were usually resolved by and within legislatures with the court system gaining a role in the electoral process only after parliaments proved incapable of settling disputed elections impartially and decisively, consequently ceding that role wholly or partially to the judiciary (Massicotte, Blais, & Yoshinaka, 2004). However, turning election disputes over to the courts does not, in and of itself, alter the political character and context of such disputes. Stripped of its legal mantle, an election petition is but a partisan fight between two rival contenders for an elective political office; a political fight that has spilled over into the courtroom.

Making it more political still is the fact that, beyond the rival parties, the real party in interest in this struggle for power is the voters. It is the voters’ preferences, expressed through their
votes, that the court is supposed to respect and uphold above all else (Prempeh, 2016). This in turn puts judges on trial, as it tests their independence and heightens the risk of politicization of the judiciary. Partly in response to this feeling and pressure of being on trial, normally camera-shy courts have lately been willing to make an exception for high profile election petitions by agreeing to have the proceedings televised live, as have happened recently in Kenya. This development recognizes that, from a political standpoint, the election petition is indeed quite unlike any other case (Hirschl, 2006)

Election petitions are also distinguishable by their inherent claim to priority on account of their exceptionally time-sensitive character. Not only can the business of government not wait while litigation proceeds as to who lawfully must occupy an elective office, the office at issue in an election petition is itself typically term limited and therefore, time-bound. Prolonged litigation over succession to the office will create uncertainty in the processes of government and may even diminish the effective tenure of the eventual winner. Public anxiety and tensions also tend to remain high while an election dispute remains unresolved. Moreover, the longer an election petition remains in the courts, the greater the risk that facts on the ground might shift politically in a way that tests, or raises public doubt as to, the ability of the judiciary to render a fair and impartial verdict as seen in the 1997 election petition that was heard 18 months after its filing. In short, with election disputes time is of the essence and in a politically urgent manner (Prempeh, 2016).

Realist thought suggests that the judicialization of politics is largely a function of concrete choices, interests, or strategic considerations by self-interested political stakeholders. From the politicians’ point of view, delegating policy-making authority to the courts may be an effective means of shifting responsibility, thereby reducing the risks to themselves and to the institutional apparatus within which they operate (Hirschl, 2013). At the very least, the transfer to the courts of
contested political ‘hot potatoes’ offers a convenient retreat for politicians who have been unwilling or unable to settle contentious public disputes in the political sphere. Conversely, political oppositions may seek to judicialize politics for example, through petitions, in order to harass and obstruct governments (Hirschl, 2013).

4.3.1 The CoK 2010, the Judiciary and the Raila Odinga Case

After the Supreme Court tossed out his petition on April 9, 2013, Raila Odinga not only rejected that decision, but also went ahead and implied that the Court had been compromised. According to three out of the four respondent lawyers, they viewed this as Mr. Odinga using the courts as an instrument for manipulation in his quest for power. In 2007, ODM had argued, legitimately, that one of the clearest indicators that Odinga had won the 2007 presidential election was the fact that the party on which he contested the Presidency, ODM, had more MPs than Kibaki’s PNU. However, in 2013, Uhuru’s Jubilee had more MPs, Senators and women representatives than CORD. On what basis, therefore, would Odinga and his cohorts, be arguing that he won the popular vote when clearly he has less representatives than his main opponent (Miguna, 2013)

The rules and principles governing election petitions have a significantly greater impact on the petitioner challenging a presidential election result than on any other petitioner. This is because, the national, as opposed to local, geographic scope of a presidential election means that the loser who seeks to contest a presidential election in court faces significantly greater difficulties and costs in meeting the time limits and evidentiary burdens and proofs associated with election petitions. Second, the policies that animate and inform the adjudication of election petitions assume far greater force and significance in the case of the election of the one person who shall occupy the office of president, the sole office in which is reposed the executive authority of the
state, than the election of one legislator among a few hundred members of a legislative assembly (Prempeh, 2016). Thus, successful presidential election petitions are not common.

The Supreme Court Presidential Election Petition Rules (Maraga, 2017) treats election petitions as cases sui generis, reflected by tighter statutes of limitations, adjudication timeframes and much higher standards of proof that the courts apply in resolving such cases. Not unusually, too, in the litigation that ensued in the aftermath of the 2013 general elections, the burden of these procedural and substantive rules was felt more by the petitioners in The Raila Odinga Case than by the petitioners in the many parliamentary and other local election petitions across the country. The harshness of the restrictive time frames relating to election petitions in Kenya, and especially their possible adverse impact on substantive justice, is more evident in a presidential election petition than other election petitions. Compared to a parliamentary petition, which has to be resolved within six months at the High Court, subject to appeal, a presidential petition must be tried and determined, once and for all, by the Kenyan Supreme Court within 14 days. This tight timeframe adversely affected the First Petitioner’s case. Not surprisingly, the bulk of the criticism and negative commentary directed at the judicial resolution of the court challenges arising from the 2013 general elections dispute resolution have, in fact, been directed primarily at The Raila Odinga Case (Mogeni & Kerretts-Makau, 2014).

The Supreme Court declined to entertain a “further affidavit” submitted by the First Petitioner and by means of which the Petitioner had sought to introduce new evidence into the case after the petition had been filed. The First Petitioner also failed to get into his filed petition the claim that his votes had been deflated by 11,000 votes (Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others, 2013). That evidence came in later, at the submission stage of the proceedings and was excluded for being procedurally out of time. In
essence, then, the merits of the First Petitioner’s case did not get a full hearing, primarily for reasons of time. Were the Supreme Court to admit the new evidence, then the ends of justice would demand that the Respondents be granted reasonable time to file a response. The Respondents urged that they needed the same length of time it had taken for the 1st Petitioner to file the “further affidavit”, to make a response – six days as from 27th March, 2013. Even had the Supreme Court granted only half that time, the main hearing of the Petition would not have started before 30th March, 2013, and the Supreme Court would, consequently, have failed to hear and determine the Petition within 14 days as required by the Constitution (*Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others, 2013*).

Rightly so, Odinga’s team protested that the prescriptions of procedure and form had been allowed to trump substantive justice. To that charge, the Supreme Court had no choice but to invoke as authority for its inflexible stance, Article 140 of the CoK 2010. The policy behind the tight, non-extendable constitutional timeframe, as the Court explained, was expedition in the resolution of presidential petitions, which, in turn, was necessary since the protracted holding on of a President-elect, as well as a retiring President, would present a state of anticipation and uncertainty which would not serve the public interest (*Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others, 2013*). In contrast, petitioners in the parliamentary and county election cases did not suffer a similar curse of insufficient time. In accordance with the CoK 2010, each had 28 days after the declaration of results to file their petitions and the High Court had six months within which to conclude a filed case.

Moreover, the Supreme Court’s assertion of appellate jurisdiction in non-presidential elections, in reliance on a peculiar theory arising from its interpretation of the interaction between Article 163 (4) (a) of the CoK 2010 and the Election Petitions Act, means that, unlike the one-stop
adjudication of presidential petitions, parliamentary petitions have the benefit of a three-tier adjudication structure, comprising initial trial before the High Court plus the possibility of two appeals, first to the Court of Appeal, then to the Supreme Court. Indeed, one could pragmatically argue that parliamentary petitions in Kenya have lost essential aspects of the general sui generis character of election petitions. Correspondingly, in comparison with petitioners in presidential election disputes, parliamentary election petitioners in Kenya receive far greater procedural justice and with that, a much enhanced prospect of obtaining substantive justice from the judicial system.

4.3.2 Electoral Management Bodies and Accountability in Election Jurisprudence

Electoral systems are the primary vehicle for choice and representational governance, which is the basic foundation for democratization. These systems must provide opportunities for all to participate in and influence government policy and practice. Effective management of electoral systems requires institutions that are inclusive, sustainable, just and independent. Which includes, in particular, Electoral Management Bodies (EMB) that have the legitimacy to enforce rules and assure fairness with the cooperation of political parties and citizens (López-Pintor, 2000). Permanent, independent electoral authorities are emerging as the preferred form of EMBs in various states that have undertaken electoral reform. Alternately to this model, is one in which the election is run by the government, but regulated and monitored to some extent by an independent commission that also has adjudication capacity for questions of electoral conduct. Within both these EMB models, membership is either party-based or includes at least a few representatives of political parties. Elections conducted exclusively by the executive tend to be products of history rather than responses to contemporary needs (López-Pintor, 2000).

The question of the EMB accountability and the related charge that the emerging election jurisprudence in Kenya that leaves the Kenyan EMB, the IEBC, largely footloose for its conduct

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of elections, is one that arises primarily in the presidential election petition context than in the parliamentary context (Prempeh, 2016). Paramount to the litigation in The Raila Odinga Case was the conduct of the IEBC, not so much the conduct of Mr. Odinga’s rival in the elections. The Petitioners’ case alleged multiple violations of law and administrative regulations by the IEBC.

As follows, the Supreme Court’s ultimate conclusion that, such irregularities, although factually established, did not represent substantial noncompliance enough to affect the results, was bound not only to leave the petitioners aggrieved, but also raised questions about impunity and accountability in relation to the IEBC (Prempeh, 2016). In contrast to The Raila Odinga Case, the post-2013 parliamentary petitions were frequently about alleged illegalities and general malfeasance on the part of the declared winner or his campaign. Irregularities attributable to the IEBC do not appear predominant in the non-presidential petitions; not the successful cases, at least.

The disparity in constitutional, statutory and jurisprudential treatment between presidential election petitions, as represented by The Raila Odinga Case on one hand and parliamentary election petitions, on the other, is no doubt attributable to the sharp difference in the political stakes of the two classes of petitions. As the Supreme Court postulated in The Raila Odinga Case, “It is particularly significant that the organ which is the subject of dispute is the most crucial agency of the Executive branch, namely the Presidency. The CoK 2010 will not be fully operational without the Presidential office being duly filled, as provided by the Constitution and ordinary law (Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others, 2013).” There is no comparable judicial acknowledgment of the political weightiness and urgency of a parliamentary or county council election petition as incontestably, the business of government will not grind to a halt merely because of prolonged litigation over the election of one or a few members of a large, multi-member legislature.
This situation occasions an interesting paradox; the greater the political stakes associated with a particular class of elections, the less the procedural and substantive justice the petitioner can expect to receive. While this is driven, understandably, by a need to resolve a specific presidential election dispute speedily in the interest of finality and timely succession and continuity in government, it does indeed create a substantially inferior system of justice for presidential election petitioners (Prempeh, 2016). In that regard, it is likely to leave such petitioners unsatisfied and feeling still aggrieved even after getting their day but not their due in court. Such a persistent sense of grievance and injustice on the part of presidential election petitioners carries a risk of complicating and undermining the orderly conduct of future presidential elections. Specifically, the emerging jurisprudence of presidential election petitions, including the procedural and substantive rules governing the petition, if it is inferred to say that a post-election presidential election petition is doomed to fail from the start, might signal to rival candidates and presidential campaigns that the election must be won, fair or foul, at the polling station. In political contexts such as Kenya, where the stakes in presidential elections are extraordinarily high and feelings of electoral injustice have led to violence in the past, a regime of procedural and substantive rules that is perceived as incapable of delivering justice poses a threat to election security, social peace and order.

### 4.4 Judiciary - Executive Relations

In Kenya’s 2017 general elections, held on 8th August 2017, the IEBC declared the incumbent Mr. Uhuru Kenyatta to have won the presidential election by 54 percent over his closest rival Mr. Raila Odinga who had obtained 45 percent. Mr. Odinga successfully launched an election petition in the Supreme Court which nullified the presidential election terming it as null and void due to several irregularities and illegalities that failed to comply with the CoK 2010 as well as electoral laws.
After the Supreme Court verdict, President Kenyatta was angered and openly attacked the Chief justice and other judges of the Supreme Court whom he accused of deliberately nullifying his victory, even going ahead and terming the bench as *wakora*, a Swahili word meaning crooks (Were, 2017).

“As you all know, I had been declared as the president-elect, but Maraga and his people have decided that I lose it. But Maraga and his team of thugs should know that I am the sitting President),” (Were, 2017) said Uhuru at Burma Market.

The Supreme Court ordered for a fresh election within 60 days based on the CoK 2010 provisions, yet, the NASA coalition headed by Mr. Odinga felt that the IEBC was being unduly influenced by the executive to bungle elections in favor of President Kenyatta. The IEBC set the fresh presidential elections for October 26th, undeterred by several petitions launched in the Supreme Court to call off and postpone the elections as it had not fully complied with the constitutional requirements for conducting a fresh election. What is more, on the eve of October 25th, which was the day the Supreme Court had scheduled to hear the pre-election petition before the October 26th fresh elections, a driver of the Deputy Chief Justice was attacked and shot by unknown persons along Ngong Road, Nairobi (Were, 2017).

Equally, on October 25th when the Supreme Court was supposed to sit, only 2 judges out of 7 showed up. Chief Justice Maraga turned up with one of the judges addressed the Court and said that one judge was reportedly unwell and hospitalized and the Deputy Chief Justice was attending to her official driver who had been shot the previous evening. The remaining three other judges were simply unable to come. A move that saw the Supreme Court suffer an artificial quorum
hitch, occasioning the calling off of the petition hearing which was postponed to later date, of course, after the fresh presidential election that was to take place on October 26th (Were, 2017). Ergo, speculations were rife among the citizenry that the judges were under threat by the executive. One of the respondents of whom is a magistrate agreed that the ‘artificial’ quorum hitch, the shooting of the Deputy Chief justice’s driver and the President issuing direct threats to the judiciary all added fuel to the fire that the judiciary was under attack by the executive, but was also quick to add that a lot of it were all but speculations by the general public and not a true depiction of the situation.

**4.4.1 Executive Power under the Independence Constitution**

The Constitution may be defined in terms of governance as the law that seeks to define, distribute and constrain the use of state power so that power is applied to the objectives for which it was invented and in the manner in which it was intended. It is this dispersal of power that is ordinarily referred to as separation of powers. Indeed throughout human history, the structuring and design of governance has always had to contend with the problem of a concentration of power in one center of power with the attendant temptation for abuse of power (Omondi, n.d.).

In the repealed Constitution, separation of powers was not promoted. The Kenya African National Union (KANU) regime found that it was essential to gain a firm control of all the arms of the government and eliminate all avenues of independent action by persons that were holding Constitutional offices. For this reason the Independence Constitution had consolidated power in the presidency enshrined in Chapter 2. The Constitution that was come up with during the Lancaster discussions only transferred power from the colonial masters to one of African self-rule and initially proposed a *majimbo* system of government intended to decentralize power from the executive, but collapsed due to lack of political will. This reverberated in a Constitution where the
executive was vested with more powers than any other organ of government, making easy constitutional amendments every time there was a shift in power ensuring a strong executive against the legislature and judiciary arms which was key in ensuring President Moi held on to power following the 1997 election petition.

The CoK 2010 promotes independence of the arms of the government by clearly outlining the functions of the executive under Chapter 9. Article 129 establishes that the executive’s authority is derived from the people. This designates that the executive authority must defer to the sovereignty of the people and respond to the national objects values and accountability mechanisms throughout the CoK 2010 as provided under Article 10. The Constitution has also seen the re-introduction of the devolved government system, quite similar to what was to be the majimbo system, whose objectives include among other things decentralization of the state organs, functions and services. The CoK 2010 has also eliminated a number of powers that the Independence Constitution had furnished to the presidency. No longer can the president, under the CoK 2010 be sworn in at odd hours of the day as was the case during the 2007 Kenyan general elections. Article 141 has outlined the manner in which the elected president should assume office, going further to provide timelines for elections and the procedure to challenge any to the presidential elections. To boot, members of the Cabinet are to be appointed from outside parliament taking away the powers that the Independence Constitution (1963) had given to the president to reward members of parliament for their support along with reducing the number of Cabinet Secretaries in a bid to take away corrupt political practices and reduce unnecessary expense in servicing politically expedient objects (Omondi, n.d.).
4.4.2 Executive Power addressed under the CoK 2010

In contrast to the Independence Constitution (1963) and its focus on an all-powerful executive, the CoK 2010 constructs an administrative, political and juridical empowered and independent judiciary that is to implement, enforce and offer an authoritative interpretation of the Constitution. In this role, the judiciary will be instrumental in adjudicating the constitutionality and legality of the exercise of presidential and public authority in Kenya. Administrative independence of the judiciary has been partially achieved through the Judicial Service Commission (JSC), the related administrative bureaucracy in the judiciary and the financial autonomy of the judiciary from the executive, whereas political autonomy has been partly achieved by vesting in a reconstituted and empowered JSC, the power to nominate judicial appointees (Sihanya, 2011).

In a democracy, judges are thought and portrayed to be independent, non-political actors. Though viewed as non-political in nature, it would be ignorant to ignore the reality which is, the judiciary does have an influence on political activities including resolving conflict and safeguarding the rule of law. As a matter of fact, some of the decisions that judges make carry political implications as like all other human beings, judges have personal biases, which are informed by their background, worldview and interests, of which may encroach on their adjudication activity. Over and above that, the selection process of judges plays a vital role on their independence (Sibalukhulu, 2012). Where politicians are deeply involved in the selection and promotion of judges, external pressure on the judiciary is more pronounced. In consequence, democratic societies seek to shield judges 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 actions, all now consecrated in the CoK 2010.
An independent judiciary, safeguard to the rule of law, remains 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 (Sibalukhulu, 2012). Courts, under the newly established and consolidating CoK 2010, are in a privileged position to influence society to embrace the new constitution and the values, principles and norms it espouses.

Courts now have the tools to position themselves as guardians and guarantors of the founding essence of the political and social order by adhering to the letter of the CoK 2010 and displaying courage to withstand challenges from other branches of government. Admirably, judges must adjudicate strictly according to the law, but be that as it may, national political dynamics at times reign supreme and can impact negatively on the legitimacy and effectiveness of the judiciary when top political leaders fail to accept the restrictions of the courts (Sibalukhulu, 2012). All things considered, in the attempt to overcome a legacy of political interference in the functioning of the judiciary, courts now have the task of winning the confidence of the public and politicians alike by interpreting the CoK 2010 with integrity.

4.4.3 The Judiciary under the CoK 2010 standing up to the Executive

There have been several instances when the court has stopped or nullified the decisions of the executive. A case in point is in Judicial Service Commission v Speaker of the National Assembly & another (2013) which the petitioners sought, among other petitions, that pending the hearing and determination of the substantive constitutional petition, an order be issued restraining
parliament or the Departmental Committee of Justice and Legal Affairs from presenting to the President or forwarding the petition filed by Riungu Nicholas Mugambi seeking the removal of six commissioners of the JSC. The court aptly ordered that, “The six commissioners of the Judicial Service Commission, who are the subject of the petition filed by Riungu Nicholas Mugambi, shall not be suspended or removed from the office as such commissioners based on the said petition pending the hearing and determination of this petition or until further orders of the court” (Kibet & Wangeci, 2016, p.229).

This was in succession of initial orders by the court restraining parliament which had been ignored. The court advanced that by ignoring court orders, the respondents would be sending the signal to the people of Kenya from whom they derive their authority, their disregard for the rule of law. In a case where constitutional safeguards provided under Article 47 of the CoK 2010 are destroyed by being whittled at and judicial officers are put under the sufferance of the executive or at legislative impulses, the independence of the judiciary is the first victim. Among the rights and fundamental freedoms which cannot be limited, under Article 25 of the CoK 2010 is the right to a fair trial. Subsequently, the courts are empowered to investigate allegations of abuse of power and improper exercise of discretion as well as the right to fair hearing or trial which in essence are what the petitioner alleges in the petition. The court associated itself with the decision of Hon. Mr. Justice Lenaola, in Kariuki & 2 Others V Minister for Gender, Sport and Culture & Social Services & 2 Others (2004) where he expressed himself as follows:

‘The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more “muscle” in certain matters where their decisions have been questioned, in court! Courts, unlike the politically minded minister, are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the Constitutional mandate to bring them back to track
and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws. . . Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which courts are set up. . . If those who have knowledge of court orders and also have knowledge that the way to avoid those orders is to avoid personal service are sleeping well in the guise that by hiding behind the shield of muscle’

In any case where the executive violates the procedural requirements of the supreme law of the land, it is for the courts to uphold the authority and supremacy of the CoK 2010.

Essentially, there are certain matters such as those of state policy, that are pre-eminently within the domain of the executive and the courts may not make orders on. Duly, the courts may not involve themselves in policy formulation and in instances where the constitutionality of the policies of the executive are challenged, the courts should give orders accordingly only to the extent of the unconstitutionality of such policy and must be done carefully without discrediting the legitimate function of the executive from formulating such policies. In the Judicial Service Commission v Speaker of the National Assembly & another (2013) case, the court acknowledged the tension with regard to the doctrine of separation of powers and the relationship between the arms of government and state organs in the execution of their respective mandates under the CoK 2010.

Among other petitions, the petitioners also sought a declaration that the appointment of the 3rd to 6th respondents by the President as members of the tribunal contemplated under Article 251 (4) was null and void posing a challenge to the distinctive role of the executive arm and the limits of the judiciary in interfering with the President’s role under the CoK 2010. In the aforementioned petition, the court relied on an observation by the Supreme Court of Zimbabwe in Smith v Mutasa (1990) that the judiciary should not interfere in the processes of other branches of government unless the constitution gives it the mandate to do so (Kibet & Wangeci, 2016).
CHAPTER 5

Recommendations and Conclusions

5.0 Introduction

Scholars of the doctrine of independence of the judiciary submit that it is not only one of the basic values which lie at the core foundation of the administration of justice, but also very useful in creating an efficient and reliable judiciary (Were, 2017). The independence of the judiciary is also an important element of fair trial and not as an end to itself, but as a means to achieving ends. If judges are independent, they are essentially protected from undue influences from all possible agents in society that could undermine their impartiality. Consequently, judges are more likely to uphold the rule of law, preserve the separation of powers, promote the due process of law and provide fair adjudication especially in presidential election petitions. While the desire to have an independent judiciary is fairly critical in many democratic societies, there are certain important factors both socio-political and economic that continue impede this desire from being realized (Were, 2017)

5.1 Recommendations

5.1.1 Gaps in the Constitutional Safeguards for the Independence of the Judiciary under the CoK 2010

Striking under the guarantees protecting abolition of office, remuneration and benefits, before or after retirement is that there are only availed to the judges of superior courts. Meaning, that the executive or legislature has power to reduce salaries, benefits, pensions to the disadvantage of lower court practitioners at any time, exposing them to the threat of arbitrary action by other arms of government should their decisions not sit well with these other arms. In respect to that, the
personal independence of lower court justices which requires that they be insulated from executive control which could be exercised through removal suspension, transfer, salary cuts administrative retirements is not constitutionally protected (Shetreet, 1984).

Lower court justices play a crucial role in the judicial system given that they hear the vast majority of both civil and criminal cases, again it is in these lower courts where the impoverished, powerless and defenseless seek justice and redress. Once they have no confidence in the lower courts and justices alike, of whom are then perceived them as dispersing a lower form of justice, a risk arises of persons resorting to self-help and informal ways of justice, posing a significant detrimental effect on society and the development of the rule of law. The constitutional guarantee for only judges of superior courts exposes the bulk of the judicial arm of government to possible tyranny by the executive affecting the independence of the majority of the members of the judicial branch (Oseko, 2011).

The CoK 2010 fails to provide security of tenure to magistrates. Magistrates exercise judicial power and are part of the judiciary which exercises judicial authority, yet it piles on more responsibility upon the subordinate courts to hold government accountable to the law under Article 1 (3) (c). The CoK 2010 authorizes parliament to give subordinate courts original jurisdiction to hear and determine applications for redress of denial, violation or infringement or threat to a right or fundamental freedom in the bill of rights under Article 23 (2). In the process, the subordinate courts so authorized, exercise judicial review and declare laws invalid where human rights are infringed, the same authority the CoK 2010 confers on the High Court.

Subordinate courts thus have veiled jurisdiction, to hold the government accountable to the citizen by checking its excesses just like the superior courts and if they lack the security of tenure as provided to superior court judges, obviously their independence would be seriously
compromised in exercising these enhanced functions. Identified as probably the most fundamental guarantees of judicial independence, security of tenure depends largely upon the rules for removal of a judge from office (King, 1985). The lack of security of tenure, that which protects magistrates from fearing that should they make decisions unpopular to the executive risk removal from office, is not desirable. The fact that their security is not hinged in the CoK 2010, but merely left to the JSC to be regulated according to statute which is much easier to amend by a simple majority is itself a danger to the independence of the judiciary and a serious omission by the CoK 2010.

To this extent, the CoK 2010 has failed to go far enough in regard to the protection of judicial independence with such exclusions being technicalities that can be easily exploited by a miscreant parliament and executive. Moreover, constitutional reforms alone cannot solve the problem of the independence of the judiciary. It has been correctly observed that an important element of the independence of the judiciary is its popular acceptance based upon the support of public opinion, without which, is in grave danger (Ikhariale, 1990).

5.1.2 The Judiciary and the Judicialization of Politics

Over the last few decades, it is no doubt that the world has witnessed a profound transfer of power from representative institutions to judiciaries. In that event, has been the transformation of courts and tribunals worldwide into major political decision-making arenas. Today, the judicialization of politics has extended well beyond the judicialization of policy-making, to encompass questions of pure politics. These are electoral processes and outcomes, restorative justice, regime legitimacy, executive prerogatives, collective identity and nation-building. And just like to any other transformation of such magnitude and scope, the judicialization of politics is not derivative of a single cause but rather an assemblage of institutional, societal and political factors convivial to the judicialization. All this, a result of three salient factors as seen in the research; the existence of a
constitutional framework that promotes the judicialization of politics, a relatively autonomous judiciary that is easily enticed to dive into deep political waters; and a political landscape conducive to the judicialization of politics (Hirschl, 2013).

The benefits of the judicialization of politics arise from deducing the arguments in favor of an independent judiciary. Essentially, if a judiciary plays a positive role, a stronger and more active judiciary can only be better in preventing abuse of power by the government and to a lesser extent, by the majority against the minorities (Yepes, 2007). This argument is an inference of the argument that a judiciary acts as a check on the exercise of power by the executive and the legislature. An empowered judiciary that has jurisdiction to examine and adjudicate policy and political disputes has a better chance of ensuring that power is exercised as precisely provided for in the law.

This acts not only as a tool to prevent abuse but also as a means of increasing transparency and accountability in the government, in turn boosting democratic governance. The dangers of the judicialization of politics however, seem to supplant the benefits. The judicialization of politics creates a judicial autocracy or a rule of an unrepresentative minority elite thus threatening democracy. Again, a judiciary that is too strong dominates governmental processes and as a consequently mocks the concept of separation of powers. It is also reasoned that the judicialization of politics encourages the concentration of power in a privileged minority, further robbing the public of their faith in democratic processes and ultimately posing a threat to judicial legitimacy (Eboso, 2014).

The CoK 2010 does not expressly define justiciability. Article 50 (1) of the CoK 2010 merely provides that the courts have jurisdiction to determine matters to which the law is applicable. This may be interpreted to mean that the courts may determine what is justiciable and what is not. This thesis recommends that the judiciary should use the lack of a constitutional
definition of justiciability to develop guiding principles of justiciability that safeguard the institutional integrity of the judiciary. The judiciary can develop principles of justiciability in a number of ways; a) in as far as is practically possible, the judiciary should endeavor to take a standard approach when defining justiciability. Such a stand should be guided by an insightful interpretation of the CoK 2010 tempered with an appreciation of the worldwide shift towards the judicialization of politics and the dangers attendant to such a shift. Such uniformity once established would become a standard by which the courts would abide; and b) the Supreme Court should pay special attention to the nature of their decisions in judicialized disputes (Eboso, 2014). This is because their decisions bind lower courts by the doctrine of *stare decisis*. When precedents are set that clearly define justiciability, then it is likely that a clear delimitation of the scope of justiciability within the framework of the CoK 2010 will emerge.

### 5.1.3 Judiciary – Executive Relations

The separation of powers doctrine gives the judiciary a constitutional role equal in importance to the legislature and the executive, ensconced within a Lockean constitution of checks and balances (Jenkins, 2011). Just like the legislature and executive, the judiciary exercises its power in trust on behalf of the people who have consensually delegated that power to it. Even if judges are not electorally accountable, the judiciary’s trust carries a special, indirect representational mandate to hold impartially both the legislature and the executive to their prescribed powers and to the rule of law giving it an intermediary role between the people and the other two branches.

Within Locke’s constitutional model, judicial power is permanently counterpoised against that of the executive. And it is from this position that it is expected to hold the executive legally accountable even for prerogative acts. Of course still, the executive might extraordinarily and temporarily act outside of the rule of law or refuse to answer to legal process, in the face of an
emergency threatening the existence of the political society. Although unusual circumstances might necessitate such actions, they remain subject to political condemnation or indemnification by the legislature, as well as to legal consequences in the courts. Therefore, the executive can no longer reject or undermine judicial oversight any more than that of the legislature. Doing so will violate the CoK 2010, public good and threaten war with the people (Jenkins, 2011).

From the data, parliament has emerged as a new source of threat to the independence of the judiciary in an unprecedented manner. Its new found power now securely recognized and entrenched in the CoK 2010 to check the functions of the judiciary was tested by its enactment of the Judicial Services Act No. 1 of 2011 and the Vetting of Judges and Magistrates Act No. 2 of 2011 (Oseko, 2011). Parliament can now manipulate, slow down or reverse the independence of the judiciary calling for a paradigm shift away from the belief that the executive is the greatest adversary of judicial independence. This work recommends that attention should also urgently be focused towards the relationship between the judiciary and the legislature within the context of judicial independence, which in the past, has not received sufficient attention. Further research could draw from the Kenyan experience on how the legislature may impact on judicial independence. According to one of the respondents who is a lawyer, politics may influence perceptions around election petitions, but may not actually influence the determination of the case. Be that as it may, laws are passed by Parliament in Kenya where the proverbial ‘tyranny of numbers’ exists, where politics can actually shape the laws that govern elections and petitions.

5.2 Conclusions

As observed from the research, it remains quite impossible to achieve an absolute separation, between the three arms of government. According to one respondent lawyer, it is a rather perfect system in a utopian land, as there will always be cracks and fissures in any judicial system.
Instances of threats and attempts by the legislature to cut down judiciary funding only goes to show intolerance and vengeance against the judiciary for their unfavorable orders and thus, the process of judicial review is therefore vital in checking the power of government, especially as regards the use of statutory instruments, but is only guaranteed where the three arms of government work in understanding their constitutional role and not self-interest (Manicas, 1981). If not, the doctrine of separation of powers may not serve its intended purpose.

Superior court judges together with other judicial officers have all sworn a solemn oath to diligently serve the people, impartially and in accordance with the CoK 2010, the law and the customs of the Republic of Kenya without fear, favor, bias, affection, prejudice or any political or religious influence. The respect of the rule of law, not only applies to the three arms of government, but also calls upon each and every person in the citizenry, indiscriminately, to respect the institution that interprets the law. There will arise many instances where the courts will make decisions that certain sections of the population do not agree with, but the rule of law means that we cannot choose which court orders to obey and which not to obey as doing so will be an abdication of duty to respect and uphold the law.

Among judges, the interpretation of the law may differ and sometimes errors in judgement may arise. It is on this premise that the CoK 2010 sets out an appellate process in court system. The legal system has an inbuilt review and evaluation mechanism that exists solely for the purpose of appeals and other jurisdictional matters which should be explored in full if a court order is unfavorable in preference to disobedience and disregard of such orders. What is more, in an attempt to assert its independence the judiciary will always look mischievous in the eyes of those who control the state, especially in cases such as presidential election petitions. This situation is worse in states such as Kenya that are still fragile and unstable compared to other much developed
democracies in the developed world (Peter & Wambali, 1988) and is thus easily irritated by any seemingly divergence from the expected behavior by any of its organs. Therefore, a progressive and popular judiciary, manned by principled and honest men will always be operating in a very delicate balance (Peter & Wambali, 1988).

In ensuring its independence, the judiciary must also function with prudence and respect the political boundaries so as to maintain public trust. The Supreme Court’s decision to nullify the 2017 presidential election through a presidential petition displayed public trust in the judiciary to accept the court’s determination of an issue of such magnitude amidst a backdrop of political intolerance. To raise and sustain this record, the courts must now seek to refrain from engaging in a political tussle and be pragmatic and vigilant of politicians who may taint the hard-earned image of a credible judiciary. In conclusion, the three arms of government, especially the notorious executive and legislature, must lead by example by showing dignity and respect for the rule of law. This includes institutional conduct with integrity and transparency aimed at protecting and upholding the CoK 2010 at all times pursuant to the oath of office. Only then, will other institutions follow suit to defend the rule of law in a manner that promotes the aspirations of a democratic republic.

Ultimately, if there is any concept of modern governance that enjoys more widespread admiration even than democracy, it is that of the independence of the judiciary (Helmke & Rosenbluth, 2009). Judiciaries are viewed with as much optimism by investors desiring to secure economic rights as by the downtrodden who seek basic constitutional protections and for societies to enjoy a wide range of political, legal, and economic rights, either such rights must be self-enforcing, or the institutions that protect those rights, in this case an independent judiciary, must be self-enforcing (ibid, 2009).
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critical-lessons-learnt-from-2013-presidential-poll-petition


APPENDIX

Dear Sir/Madam,

RE: Request to participate in a Master’s Thesis Research

I am a student at the United States International University-Africa, undertaking a Master of Arts Degree in International Relations (Peace and Conflict major). I am carrying out Master’s Thesis as part of the degree requirements, researching on ‘The Independence of the Judiciary in Kenya: An Analysis of Presidential Election Petitions Post 2010’. Given your position and experience in the field of law and politics, you have been selected as one of the respondents for the study. As a respondent, your role shall involve answering the questions on the interview schedule either through a direct interview or phone call based on your preference. Any information you provide shall be treated with confidentiality and at no instance used for any other purpose other than this research. Your participation will be highly appreciated.

Kind Regards,

Wilson Shadrack Owuor.
The purpose of this thesis is to analyze the independence of the judiciary in Kenya based on the election petitions of 2013 and 2017.

The questions I shall ask shall be centered on issues in the field of law and politics relevant to the research topic.

Knowledge collected shall be used to contribute and support existing literature on the subject.

Your time is highly appreciated.

General Information

1. What is your professional background?

2. Do you have any experience working on any of the election petitions from 1997 to 2017?

If yes, what was the experience like?

The Independence of the Judiciary

3. From your experience is the Kenyan Judiciary independent? If yes, what are some of the reasons you would attribute to its independence?

4. What are some of the barriers the judiciary faces in trying to maintain its independence?

5. What role has the CoK 2010 played in guaranteeing the independence of the judiciary in Kenya?

Politics and the Judiciary

7. Has politics influenced election petitions? If yes in what ways and to what extent?

8. What would you attribute to the recent rise of political issues being transferred to the courts?

Conclusion
9. Do you think a totally independent judiciary is achievable and sustainable in Kenya?

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10. What steps and measures would you recommend in order to better maintain the independence of the judiciary in Kenya?

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Thank you for your participation