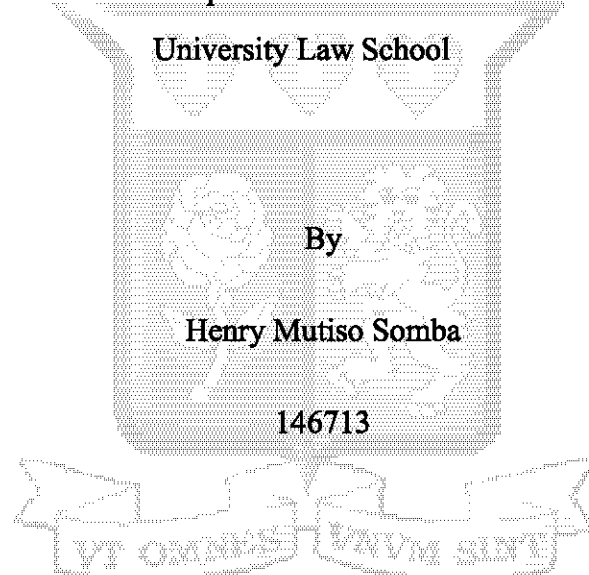


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**NAVIGATING THE LINE BETWEEN PARTY DISCIPLINE AND PARTY  
TYRANNY AND ITS EFFECT ON THE INDEPENDENCE OF THE  
NATIONAL ASSEMBLY OF KENYA, 2013 - 2024**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore



Prepared under the supervision of


Dr. Melissa Muindi

December 2024

10205 words

## Declaration

I, HENRY MUTISO SOMBA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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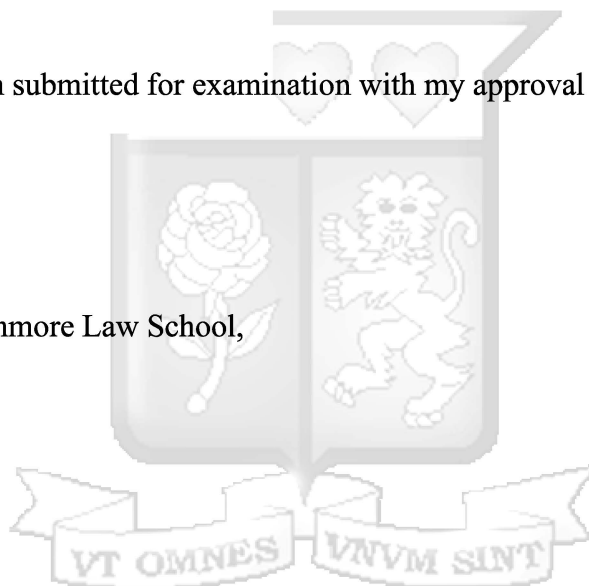
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This dissertation has been submitted for examination with my approval as University Supervisor.

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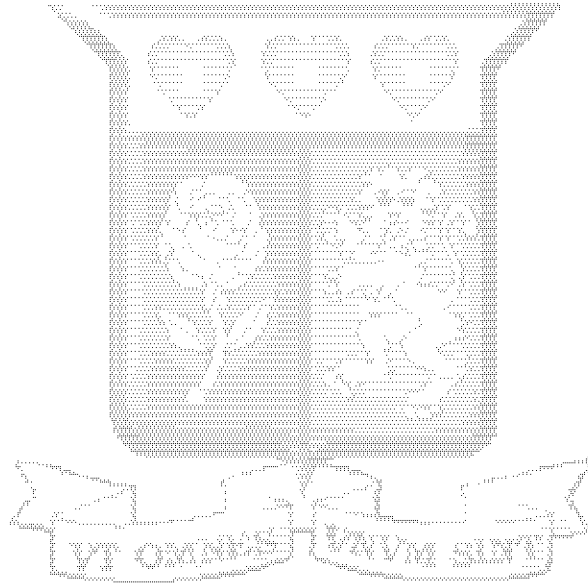
Dr. Melissa Muindi,  
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Strathmore University.

Date: 31/12/2024



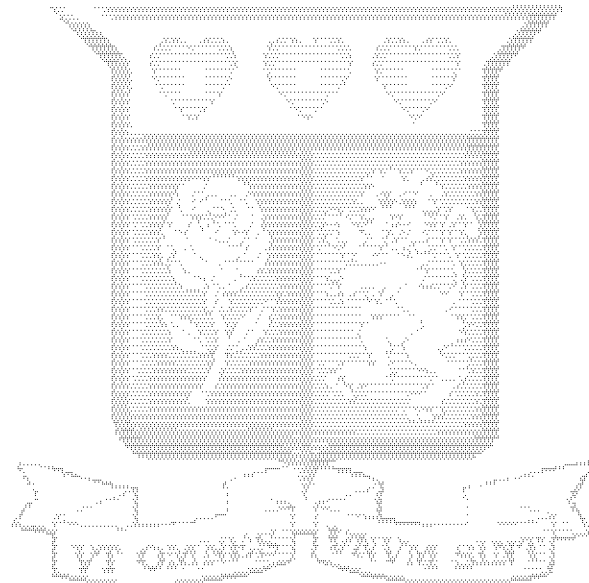
## Acknowledgement

My profound appreciation is extended to my supervisor, Dr. Melissa Muindi, for her patience in helping me with my dissertation. I have nurtured my research skills and the self-discipline to turn in assignments on time thanks to her mentoring. I would also like to thank the faculty at Strathmore University's School of Law for helping me develop my thinking as a young scholar and the library staff for providing the tools I needed to finish this dissertation.



## Dedication

I dedicate this work to God, whose unwavering love and infinite wisdom have been the foundation of this journey. To my family, whose encouragement, and support have been instrumental to my academic journey. To my parents, who have always believed in my potential and continuously inspired me to strive for excellence, your sacrifices and guidance have shaped the person I am today. I dedicate this work to my siblings, whose diverse talents and perspectives have motivated me to pursue my dreams with passion and determination. I also dedicate this work to my supervisor, mentors, and peers, whose intellectual contributions and constructive feedback have enriched my research and learning experience.



## **List of Legal Instruments**

### **Indonesia**

Constitution of the Republic of Indonesia (1945)

General Election of President and Vice President Act, 2008 (No. 42 of 2008)

### **Kenya**

Constitution of Kenya (2010)

Cooperative Societies Act (Chapter 490, Laws of Kenya)

Elections Act, 2011 (No. 24 of 2011)

Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011)

National Accord and Reconciliation Act, 2008 (No. 4 of 2008)

Political Parties Act, 2011 (No. 11 of 2011)

Presidential Retirement Benefits Act, 2003 (No. 11 of 2003)

Public Finance Management Act (No. 18 of 2012)

Supreme Court Act (No. 7 of 2011)

### **Switzerland**

Federal Constitution of the Swiss Confederation (1999)

### **United States of America**

Constitution of the United States of America (1787)

## **List of Case Law**

*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*  
[2014] KESC 53 (KLR)

*David Ndii & others v Attorney General & others* [2021] eKLR

*Gachagua & 40 others v Speaker, National Assembly & 15 others* (2024) KEHC 13473 (KLR)

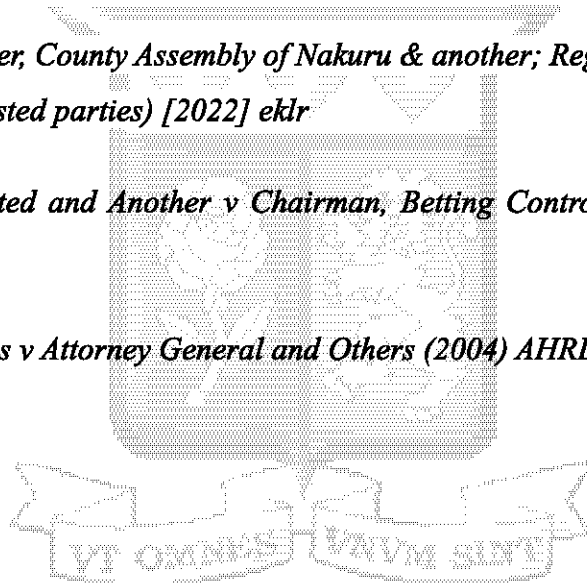
*Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr* (1973) (KLR)

*Martin Nyaga Wambora v Speaker of the Senate & Others* (2014) eKLR

*Peter Kibe Mbae v Speaker, County Assembly of Nakuru & another; Registrar of Political Parties*  
& 49 others (Interested parties) [2022] eKLR

*Pevans East Africa Limited and Another v Chairman, Betting Control and Licensing Board 7*  
*Others* (2018) eKLR

*Timothy Njoya and Others v Attorney General and Others* (2004) AHRLR 157 (KeHC)



## List of Abbreviations

ANC	African National Congress
BBI	Building Bridges Initiative
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
CoK	Constitution of Kenya
IEBC	Independent Electoral and Boundaries Commission
KK	Kenya Kwanza
KNBS	Kenya National Bureau of Statistics
MCA	Member of County Assembly
MP	Member of Parliament
NCIA	National Cohesion and Integration Act
ODM	Orange Democratic Movement
ORPP	Office of Registrar of Political Parties
PDI-P	Partai Demokrasi Indonesia Perjuangan
TDC	Taifa Democratic Coalition
UDA	United Democratic Alliance
UK	United Kingdom

## **Abstract**

This research paper examines the effect of political party affiliation and the prevailing legal framework on the principle of separation of powers, with a specific focus on the independence of Kenya's National Assembly, post the new constitution. The study explores how political party dynamics influence decision-making, legislative autonomy, and the effectiveness of checks and balances in the legislative sphere. Against the backdrop of Kenya's vibrant political landscape and evolving party structures, the research delves into the challenges legislators face in adhering to party directives while striving to uphold their autonomy.

Employing a doctrinal legal research methodology, the study provides an in-depth analysis of the legal provisions governing political party affiliation and governance and their implications on legislative independence. The findings reveal that the National Assembly is increasingly under the influence of the executive, often through the guise of political party discipline. This has resulted in the President wielding unchecked power, undermining the principle of separation of powers and compromising the autonomy of the legislature.

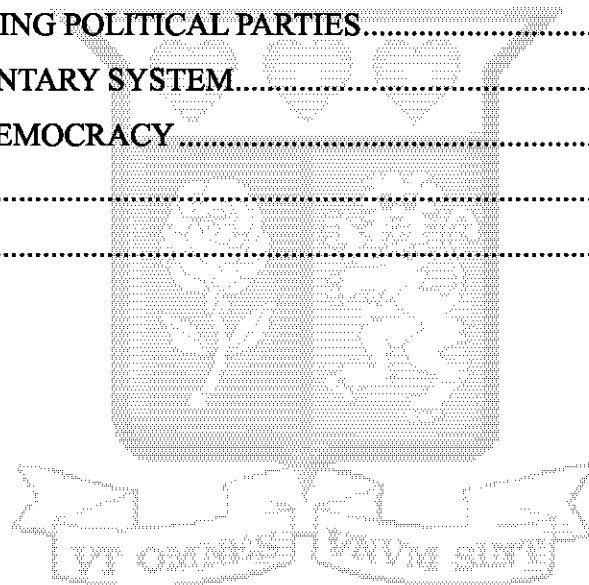
To address these challenges, the study recommends abolishing the legal provision that exempts the President and executive members from being classified as state officers in the context of political party leadership. This exemption enables them to hold party leadership positions, thereby exerting undue influence over legislative processes. The conclusions and recommendations presented in this study aim to contribute to policy reforms that enhance the autonomy of Kenya's National Assembly and strengthen the principle of separation of powers, ultimately supporting democratic governance and national unity.

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# CHAPTER 1: INTRODUCTION

## 1.1 BACKGROUND

Winston Churchill once remarked, “*Democracy is the worst form of government, except all those other forms that have been tried from time to time.*”<sup>1</sup> At the centre of a democratic society is the principle of separation of powers which encompasses the autonomy of the legislature, executive, and judiciary.<sup>2</sup> The question of how well a state achieves the principle must be continuously posed to avoid the dangerous vulnerability to concentration of power and legislative subordination.

The inception of Kenya's 2010 Constitution (CoK) aimed to tackle a longstanding theme of Kenyan politics which was characterised by the concentration of political and economic power within the presidency, which had undermined and disregarded legislative independence.<sup>3</sup> This prompted the adaptation of the American presidential model and the disposal of the Westminster parliamentary system where the President and Ministers held a dual role as elected members of the legislature and executive.<sup>4</sup> However, the assumption that separation of office prevented legislative interference hit a rock and only introduced new challenges.<sup>5</sup>

In the last three electoral cycles, a notable trend has emerged, where the president has consistently been either the leader of the political party holding the legislative majority as seen in the Jubilee administration<sup>6</sup> or has effectively aligned independent candidates to their party to form the majority seen during the Kenya Kwanza (KK) administration through post-election coalitions including the Taifa Democratic Coalition (TDC).<sup>7</sup> This creates a double-edged sword, some may argue that it ensures alignment between executive and legislative policies fostering development,<sup>8</sup> while others contend that it leads to a consolidation of power, eroding the independence of the

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<sup>1</sup> [https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/?utm\\_source](https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/?utm_source) on 11 November 1947.

<sup>2</sup> Ochieng' K, 'Constrained Presidential Power in Africa, Legislative Independence and Executive Rulemaking in Kenya, 2017', 12.

<sup>3</sup> Mutua M, 'Justice under siege: The Rule of law and judicial subservience in Kenya, 1 *John Hopkins University Press*, 23, 2001, 22.

<sup>4</sup> Bosire C, 'The Relationship Between the Legislature and the Executive' 2 *Oxford Constitutional Law Review* 1, 2016, 116.

<sup>5</sup> Ochieng' K, 'Constrained Presidential Power in Africa, Legislative Independence and Executive Rulemaking in Kenya,' 2017, 15.

<sup>6</sup> <https://orpp.or.ke/summary-of-seats-won-per-party-in-the-2013-general-election/> on 7 March 2013.

<sup>7</sup> <https://orpp.or.ke/coalitions-coalition-political-parties/> on 7 September 2022.

<sup>8</sup> Ochieng E, 'The influence of Executive-Legislature Relations on Legislative Oversight in Kenya, 2008-2013' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2019, 10.

legislature.<sup>9</sup> However, the latter has dominated with contentious bills being passed, most notably parliament ceding its oversight powers as outlined in the CoK<sup>10</sup> thereby granting the executive exclusive authority over the management of public finances.<sup>11</sup> This harks back to the dark days when the subordination of the legislature was driven by numerous constitutional amendments that significantly affected its development in Kenya.<sup>12</sup> Evidence of executive overreach reached its brim when the former deputy president, described it as a “*characteristic of Kenyan politics.*”<sup>13</sup> This raises the question of whether the legislature is truly independent in the face of party control and executive overreach.

## 1.2 STATEMENT OF PROBLEM

Historically state officials, including legislators, struggled to execute their roles to the public effectively and were often bound by executive and/or partisan directives.<sup>14</sup> The CoK, described as autochthonous, as it is contextually appropriate and consciously awake to the lived realities of the people it affects,<sup>15</sup> in a pre-emptive way, imposed a notable restriction on public officers, prohibiting them from holding leadership roles in political parties while in office, aiming to maintain the independence of other state officers from partisan directives.<sup>16</sup> However, through legislation, the president is omitted from the definition of a public officer thus allowing them to maintain a dual role as leaders of political parties and public officers.<sup>17</sup> This provision gains additional weight, as legislators elected through a political party are considered to have resigned if they advocate for the ideology or policies of another party, potentially resulting in the loss of their positions.<sup>18</sup> As a result, legislators are often constrained to align with the directives of their

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<sup>9</sup> Mutisya S, ‘Influence of Political Parties’ Affiliations on County Assemblies’ exercise of Oversight Authority over County Government in Kenya: A case study of Makueni County Assembly’ 2 *Saudi Journals*, 5, 385.

<sup>10</sup> Article 206, *Constitution of Kenya*, (2010).

<sup>11</sup> Section 50(7) *Public Finance Management Act* (Act No 18 of 2012).

<sup>12</sup> Barkan J and Matiangi F, *Legislative Power in Emerging African Democracies*, in Barkan, 1 ed, Lynne Rienner Publishers, Colorado, USA, 2009, 33.

<sup>13</sup> Kinyanjui M, ‘Gachagua’s tipping point: What does the law say about impeaching a Deputy President?’ Citizen Digital, 25 September 2024 on <https://www.citizen.digital/news/gachaguas-tipping-point-what-does-the-law-say-about-impeaching-a-deputy-president-n350192> 25 September 2024.

<sup>14</sup> Mutua M, ‘Justice under siege: The Rule of law and judicial subservience in Kenya’ 1 *John Hopkins University Press* 23, 2001, 20.

<sup>15</sup> Wangai M, ‘Religious Pluralism and Liberal Constitutionalism: Secularity and Secularism in Kenya’s religious freedom jurisprudence’, 11.

<sup>16</sup> Article 77(2), *Constitution of Kenya*, (2010).

<sup>17</sup> Section 12, *Political Parties Act* (Act No 11 of 2011).

<sup>18</sup> Section 14, *Political Parties Act* (Act No 11 of 2011).

political party leaders, many of whom hold positions within the executive branch.<sup>19</sup> This regulatory framework poses inherent challenges to the principle of separation of powers as legislators do not have the opportunity to bolt out or/and speak contrarily when dissatisfied with their political party leaders in the executive branch.

## **1.3 STATEMENT OF OBJECTIVES**

### **1.3.1 Overriding Objective**

The main aim of this paper is to critically analyse and assess the effect of political parties on the independence of the legislative branch.

### **1.3.2 Specific Objectives**

1. To assess and analyse the Constitution of Kenya and the political party's legal framework in contrast to the doctrine of separation of powers.
2. To analyse the contemporary application of political party affiliation and its effect on the legislative arm.
3. To critically analyse and identify best practice mechanisms from comparative jurisdictions that effectively balance executive authority with political party discipline.

## **1.4 RESEARCH QUESTIONS**

1. What variations exist in the Constitution of Kenya, the political party's legal framework and the doctrine of separation of powers regarding the independence of legislators?
2. What are the existing interpretations and contemporary issues of the political party framework and its impact on legislators?
3. What best practice mechanism effectively balances executive authority and political party discipline while promoting democratic principles and inclusivity in Kenya?

## **1.5 HYPOTHESIS**

Executive control mechanisms through political party discipline and patronage, significantly influence legislative decision-making processes, leading to diminished autonomy of the legislative branch.

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<sup>19</sup> Independent Electoral & Boundaries Commission Data Report 2017, 5.

## 1.6 JUSTIFICATION OF THE STUDY

The dissertation serves as a pivotal platform for proposing actionable strategies and policy recommendations designed to fortify and elevate the autonomy of the legislative domain, ultimately helping protect constitutionalism and national unity. In addition, by shedding new light on unexplored facets, the study not only enriches scholarly discourse but also aims to form a platform to inform future research. Moreover, the study provides a robust foundation for addressing contemporary challenges and fostering sustainable solutions that resonate deeply with democratic principles. Ultimately, the findings of this research possess the transformative potential to catalyse positive political change and instigate a paradigm shift towards an independent legislature.

## 1.7 THEORETICAL FRAMEWORK

First and foremost, why is it necessary to divide power between different branches of government? The classical answer from the 18<sup>th</sup> century is that separating powers helps prevent tyranny.<sup>20</sup> The doctrine of separation of powers has its roots in ancient political thought, with early contributions from philosophers like Aristotle, who explored the division of government functions.<sup>21</sup> However, it was during the Enlightenment era that the doctrine was more fully articulated, particularly by Montesquieu.<sup>22</sup> This principle is a cornerstone of modern political philosophy, aimed at preventing the concentration of power within a single entity by distributing power across distinct branches of government typically the executive, legislature, and judiciary.<sup>23</sup>

In the spectrum of principles guiding constitutional government, the doctrine of separation of powers holds a position marked by profound ambivalence. Moreover, the separation of powers is invoked as an ideal to which a modern state's legal and constitutional arrangements ought to conform. The principle is hailed as a bulwark against the abuse of state power and the threat of tyranny.<sup>24</sup>

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<sup>20</sup> Vile M, 'Constitutionalism and the Separation of Powers: The New Separation of Powers: A Theory of the Modern State' Powers' Oxford University Press, 2009, 18.

<sup>21</sup> Diamond M, 'The Separation of Powers and the Mixed Regime' 8 Oxford University Press 3, 1978, 33.

<sup>22</sup> Montesquieu B, 'The Spirit of the Laws' 11 *McMaster University Press* 6, 1748, 6.

<sup>23</sup> Kavanagh A, 'The Constitutional Separation of Powers', 1 *University of Oxford Press* 1, 2014, 15.

<sup>24</sup> Kavanagh A, 'The Constitutional Separation of Powers', 1 *University of Oxford Press* 1, 2014, 1.

Despite being a fundamental principle of constitutional democracies, the separation of powers faces significant criticism in modern times. One of the main concerns is the perceived rigidity of the concept. If the expectation is that the three branches of government, must operate with entirely distinct, non-overlapping functions, then no modern state has fully realized this ideal, and nations would become ungovernable.<sup>25</sup> Many argue that some degree of overlap of functions between branches is both necessary and desirable for effective governance. This marks a shift away from the pure view of separation of powers and towards a reconstructed view.<sup>26</sup> However, acknowledging this overlap introduces the concern that the separation of powers is being compromised, undermining the ideal of clear, distinct boundaries between the branches of government.

In the context of this dissertation, the theory underscores the importance of the division of labour between distinct organs of government. By examining how political party affiliation and governance influence legislative processes and autonomy, the theory aids in analysing the extent to which the actions of political parties misalign with the consent and welfare of the governed who are subjected to autocracy. Ultimately, the doctrine serves as a fundamental framework through which the balance of power and governance can be evaluated, ensuring that each branch operates independently while providing checks on the others in contemporary political systems.

## **1.8 LITERATURE REVIEW**

This section provides a comprehensive review of previous studies examining the impact of political party affiliation on legislative independence, intending to identify gaps in existing knowledge. It focuses on local perspectives, emphasizing the intertwined nature of executive-legislature relations due to partisan dynamics.

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<sup>25</sup> Carolan N, 'The Vertical Separation of Powers' 49 *Duke Law Journal* 749, 1999, 8.

<sup>26</sup> Pierce R, 'Separation of Powers and the Limits of Independence' 30 *William & Mary Law Review* 365; 1989, 318.

### 1.8.1 Executive Overreach

The issue of executive control has been a challenging problem in Kenya's legal system. Makau Mutua's article, *"Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,"* addresses this issue comprehensively from a historical perspective and examines the consequences of executive control which results in human rights violations. The article examines the state of the Kenyan legal system and highlights the challenges and implications of legislative subservience to the executive branch, particularly under the time of President Moi.<sup>27</sup> The paper emphasises the detrimental effect of executive interference on the legislature's ability to oversee governmental power, thereby weakening the separation of powers and undermining constitutionalism in Kenya.<sup>28</sup>

In Mai Hassan's article; *"Executive-Legislative Relations, Party Defections, and Lower-Level Administrative Unit Proliferation: Evidence From Kenya,"* he explains the continuation of strong executive power despite introducing new formal constraints on the imperial presidency in the CoK.<sup>29</sup> He acknowledges that implementation of the CoK has progressed, however, the executive bureaucracy has not changed contrary to the explicit goals of the CoK. Through interviews and archival evidence, he notes that formal rule change may be insufficient to spur democratization in the face of entrenched authoritarian bureaucracies with strong incentives to maintain their pre-existing interests.<sup>30</sup>

### 1.8.2 Political Party Affiliation

Sebastian Elischer, in *"Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya,"* explores the ethnic underpinnings of Kenya's political parties. Drawing on a constructivist conception of ethnicity, he uses a framework of comparison derived from Donald Horowitz and categorizes Kenyan parties as mono-ethnic, multi-ethnic alliances, or multi-

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<sup>27</sup> Mutua M, 'Justice under siege: The Rule of law and judicial subservience in Kenya' 1 *John Hopkins University Press*, 23, 2001, 20.

<sup>28</sup> Mutua M, 'Justice under siege: The Rule of law and judicial subservience in Kenya' 1 *John Hopkins University Press*, 23, 2001, 22.

<sup>29</sup> Article 1(3), *Constitution of Kenya*, (2010).

<sup>30</sup> Hassan M, 'Executive-Legislative Relations, Party Defections, and Lower-Level Administrative Unit Proliferation: Evidence From Kenya' 22 *Journal of Contemporary African Studies* 3, 2014, 319.

ethnic integrative entities.<sup>31</sup> He concludes that Kenyan political parties operate as ethnic coalitions of convenience rather than ideological platforms which were responsible for the 2007 post-election violence. This dynamic erodes legislative independence through ethnic manipulation by the elite and ultimately undermines the development of robust party systems.<sup>32</sup>

Several scholars from various jurisdictions have explored the issue of political party affiliation. However, Shadrack Mutisya's article, *"Influence of Political Parties' Affiliations on County Assemblies' Exercise of Oversight Authority over County Government in Kenya,"* particularly highlights the impact of political party interference on county legislative independence in Kenya. The article investigates the impact of political parties' affiliations on the exercise of oversight authority by County Assemblies in Kenya.<sup>33</sup> The author contends that the alignment of Members of the County Assembly (MCA) at the county level with political parties influences their approach to oversight, potentially affecting the robustness and impartiality in holding county governments accountable.<sup>34</sup>

### 1.8.3 Legislative Siege

In Conrad Bosire's article, *"The Relationship Between the Legislature and the Executive,"* he discusses the transformative intentions of the CoK. Bosire highlights several reforms aimed at developing legislative independence, including the establishment of a presidential system to strengthen the separation of powers,<sup>35</sup> the introduction of county governments,<sup>36</sup> and the creation of a Senate to safeguard county autonomy.<sup>37</sup> However, he recognizes that these reforms encounter substantial obstacles stemming from Kenya's deeply rooted history of legislative subordination.

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<sup>31</sup> Horowitz D, 'Ethnic Power Sharing: Three Big Problems' 25 *Boston University African Studies Centre* 2, 2014, 5.

<sup>32</sup> Elischer S, 'Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya' 4 *German Institute for Global and Area Studies (GIGA) GIGA Working Papers* 1, 2008, 8.

<sup>33</sup> Mutisya S, Influence of Political Parties' Affiliations on County Assemblies' exercise of Oversight Authority over County Government in Kenya: A case study of Makueni County Assembly, 2 *Saudi Journals*, 5, 385.

<sup>34</sup> Mutisya S, Influence of Political Parties' Affiliations on County Assemblies' exercise of Oversight Authority over County Government in Kenya: A case study of Makueni County Assembly, 2 *Saudi Journals*, 5, 388.

<sup>35</sup> Article 132, *Constitution of Kenya*, (2010).

<sup>36</sup> Article 176, *Constitution of Kenya*, (2010).

<sup>37</sup> Article 96, *Constitution of Kenya*, (2010).

He contends that the entrenched institutional and political culture continues to influence the implementation of the CoK, hindering its ability to fully empower the legislature. He emphasizes that breaking this tradition will require additional transformative measures.<sup>38</sup>

Yash Pal Ghai and Jill Cottrell Ghai, in their article “*Ethnicity, Nationhood and Pluralism*”, examine the distinctive dynamics of Kenya's concurrent presidential and parliamentary elections, contrasting them with the staggered mid-term elections in the United States.<sup>39</sup> The article argues that holding simultaneous elections enables presidential candidates to form political coalitions designed to promote executive-legislative relations, often at the expense of legislative independence. This alignment creates a parliamentary environment favourable to advancing the executive's agenda without the necessary checks and balances. This results in a concerning pattern wherein the executive consolidates legislative support while undermining the legislature's oversight role.<sup>40</sup>

However, existing literature often highlights legislative capture, executive authoritarianism, and political party tyranny as separate issues. However, it fails to adequately explore the correlation between how political party dynamics facilitate executive overreach causing legislative subordination. This gap leaves questions about the interplay between party loyalty, legislative subordination, and executive dominance insufficiently addressed.

## 1.9 RESEARCH DESIGN

Much like other dissertations, the study requires a considerable amount of preparation work before. This work involves reading, reflecting and selecting an appropriate methodology.<sup>41</sup>

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<sup>38</sup> Bosire C, 'The Relationship Between the Legislature and the Executive, Kenya's Budding Bicameralism and Legislative-Executive Relations' 1 *Oxford University Press* 2, 2016, 18.

<sup>39</sup> Pierson J, 'Presidential popularity and midterm voting at different electoral levels' 19 *American Journal of Political Science* 4, 1975, 683.

<sup>40</sup> Ghai Y and Ghai J, 'Ethnicity, Nationhood and Pluralism' 1 *Katiba Institute* 1 2010, 12.

<sup>41</sup> Lukenchuk A, 'Methodology: Choosing among Paradigms and Research Designs' in Lukenchuk A (ed) *Outliving Your Dissertation: A Guide for Students and Faculty*, 1ed, Peter Lang AG, New York, 2017, 57.

### 1.9.1 Research Methodology

This study relies on the doctrinal legal research methodology. This is a methodology often referred to as "black letter" law research, as it is used in legal studies that focus on analysing existing legal principles, doctrines, and case law to address specific legal questions.<sup>42</sup> The study relies on data from primary and secondary legal sources. The primary sources include constitutions, statutory legislations, and case laws while the secondary sources include legal papers, articles, journals, reputable internet sources, and annual reports that will be reviewed as supplements. The methodology is valuable for its precision in analysing legal principles and supporting legal practice, reform, and education by identifying gaps and clarifying ambiguities.<sup>43</sup>

Similarly, the study employs a comparative methodology to examine how to bridge the administrative gap in political party governance. Comparative legal research involves analysing laws, legal systems, or practices across different jurisdictions.<sup>44</sup> By drawing on Indonesia's democracy, renowned for its historical resistance to tyranny and executive overreach, alongside Switzerland's democracy, celebrated for its principles of inclusive governance, the study gathers valuable insights. These lessons offer a foundation for potential reforms and adaptations that could be effectively incorporated into Kenya's legal framework.

### 1.9.2 Research Assumptions

In researching the effects of political party affiliation and framework on legislative independence in Kenya, several assumptions underpin the study. Firstly, the research assumes that political parties play a significant role in shaping legislative seats. This assumption is based on the understanding that political parties serve as key actors in the political system and often wield considerable power in determining elected members. Secondly, the research presumes that a

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<sup>42</sup> Aarnio A, 'Role of Doctrinal Study of Law' in Aarnio A (ed) *Essays on the Doctrinal Study of Law*, 1ed, Springer, Dordrecht Press, 2011, 41.

<sup>43</sup> Aarnio A, 'Role of Doctrinal Study of Law' in Aarnio A (ed) *Essays on the Doctrinal Study of Law*, 1ed, Springer, Dordrecht Press, 2011, 80.

<sup>44</sup> Legrand P and Munday R, 'Comparative Legal Studies and Its Boundaries' in Legrand P and Munday R (eds) *Comparative Legal Studies: Traditions and Transitions*, 1ed, Cambridge University Press, Cambridge, 2003, 129.

significant portion of voters cast their votes based primarily on ethnic affiliations. This assumption stems from historical and sociopolitical contexts where ethnicity often shapes political alignments and influences electoral behaviour. While these assumptions provide a theoretical basis for the study, they also warrant critical examination and validation through empirical investigation to ensure the validity and reliability of the findings.

### **1.9.3 Research Limitations**

While this research endeavours to provide a comprehensive analysis of the effects of political party affiliation and framework on legislative independence in Kenya, it is important to acknowledge certain limitations inherent in the study. Firstly, the study primarily relies on doctrinal legal research methodology, which may constrain the depth of analysis by not incorporating empirical data or qualitative interviews with key stakeholders such as legislators, party officials, and members of civil society. Additionally, the scope of the research is limited to the examination of legal frameworks and historical contexts, thereby potentially overlooking nuanced socio-political dynamics including ethnical alignment that could influence legislative autonomy. Furthermore, the study's focus on Kenya's political landscape may limit the generalizability of findings to other jurisdictions. Despite these limitations, the study aims to provide invaluable insights and recommendations for addressing the challenges related to legislative independence in Kenya.

## **1.10 CHAPTER BREAKDOWN**

### **1.10.1 Chapter 1: Introduction**

The chapter lays out the study's background, the problem statement, the research objectives, the research questions, the theoretical framework, the hypothesis, and the justification of the study. Additionally, it outlines the research design, including the selection of data collection methods as well as the rationale for the method and limitations of the study. In essence, it is a summary of the dissertation.

### **1.10.2 Chapter 2: Exploring the Legal Framework**

The chapter delves into an examination of the legal framework governing political parties in Kenya, exploring how it aligns with or diverges from the Constitution of Kenya and the doctrine of separation of powers. It investigates the extent to which political party laws and structures reflect or conflict with constitutional principles and the broader separation of powers doctrine.

### **1.10.3 Chapter 3: Contemporary Implications and Problems**

The chapter explores the various implications of the political party framework in Kenya. It also addresses the current challenges faced by the legislature, particularly those arising from a diminished independence of the legislative branch. The discussion includes how these issues impact the functioning of the legislature and its ability to operate independently of political party influence.

### **1.10.4 Chapter 4: Benchmarking Quest**

This chapter focuses on a comparative analysis of selected jurisdictions to identify best practices in mitigating executive overreach while maintaining political party discipline. It examines legal frameworks, constitutional provisions, and political traditions in Indonesia and Switzerland with varying approaches to the separation of powers and executive neutrality. By critiquing and evaluating these practices, the chapter aims to derive actionable insights that can inform Kenya's political and governance systems.

### **1.10.5 Chapter 5: Conclusion and Recommendations**

The chapter discusses proposals in the Kenya political sphere. The chapter ultimately provides recommendations aimed at improving the legislature and explores several necessary developments in the legal system that could address the challenges faced by legislative bodies.

## CHAPTER TWO: EXPLORING THE LEGAL FRAMEWORK

### 2.1 INTRODUCTION

Previously, political parties were registered as societies under the Cooperative Societies Act.<sup>45</sup> Notably, the first law exclusively governing political parties was enacted in 2007 with the passage of the Political Parties Act No. 10 of 2007. Subsequently, to integrate the spirit of the 2010 Constitution, the Political Parties Act No. 11 of 2011 was introduced. The other laws that govern political parties include the Elections Act No. 24 of 2011, the Independent Electoral and Boundaries Commission (IEBC) Act, and the National Cohesion and Integration Act (NCIA).<sup>46</sup>

This chapter explores the necessity of political parties and how they relate to the doctrine of separation of powers. Thereafter, it delves into the legal framework surrounding political parties, focusing on their potential to effect legislative independence through three key areas. First, it examines the CoK to understand the framers' intentions regarding the role of political parties. Next, it analyses statutory provisions, to assess how their provisions on party discipline and internal governance affect legislative independence. Lastly, it examines judicial decisions related to political party discipline and governance to assess whether courts safeguard the independence of the legislature through their interpretation of party governance and discipline. By addressing these areas, this chapter establishes whether the existing legal and institutional framework enables political parties to strengthen the separation of powers or undermine legislative autonomy

### 2.2 WHEELS OF DEMOCRACY

Political parties are integral to the functioning of a democracy, as their roles are fundamental to the political system. They perform essential functions such as recruiting political leaders, organizing opposition and resolving conflicts by establishing representative channels. Additionally, political parties are crucial for providing accountability, aggregating and articulating diverse interests, mobilizing voters during elections and forming a government.<sup>47</sup> As a result, the CoK enshrines political rights for all citizens, guaranteeing their freedom to make political choices.<sup>48</sup>

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<sup>45</sup> Karuti Kanyinga, *Kenya-Democracy and Political Participation*, 2014, 145.

<sup>46</sup> Office of the Registrar of Political Parties, 'The Political Parties Act in a Nutshell', 2014, 2. 39

<sup>47</sup> Otele O, 'Party Institutionalization in Africa: Kenya's 2013 Elections in Comparative Perspective' *42 The African Review* 1, 2015, 29 <https://www.jstor.org/stable/45341694>.

<sup>48</sup> Article 38, *Constitution of Kenya*, (2010).

### **2.2.1 The gear that keeps the wheel turning**

Although political parties are essential for advancing democracy, they must be built on foundational principles. The CoK mandates that every political party must uphold the values and objectives enshrined within it, including the doctrine of separation of powers.<sup>49</sup> Similarly, parties established in Kenya must pursue objectives that are consistent with, and not contrary to, the CoK or any other written law.<sup>50</sup> This ensures that political parties align with their role in fostering a democratic and lawful political environment.

While the political party's legal framework in Kenya represents a significant development in the country's political landscape, its implementation and impact on legislative members deserve closer scrutiny. This critical examination is essential to ensure that the framework contributes to, rather than hinders, a robust and inclusive democracy in Kenya. Political parties have faced considerable criticism for their restrictive influence on the legislature, limiting dissenting opinions among their members and ultimately fostering autocracy, which diminishes democracy.<sup>51</sup>

### **2.3 CONSTITUTIONAL ANALYSIS**

The constitution can be described as autochthonous, having been written by the local people of Kenya and reflective of their past experiences. This quality makes the 2010 Constitution and the provisions therein more contextually appropriate and consciously aware to the lived realities of the people whom it affects.<sup>52</sup> In crafting the Constitution, there was broad consensus on the pivotal role of political parties in the democratization process. Political parties serve as a crucial intermediary between the public and political decision-makers, which is important in democracies that are still maturing after the third wave of democratization.<sup>53</sup>

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<sup>49</sup> Article 91, *Constitution of Kenya*, (2010).

<sup>50</sup> Section 3, *Political Parties Act* (Act No 11 of 2011).

<sup>51</sup> Fombad C, 'Conceptualising a Framework for Inclusive, Fair and Robust Multiparty Democracy in Africa: The Constitutionalising of the Rights of Political Parties' 48 *University of London Press* 1, 2015, 18.

<sup>52</sup> Mukami W, 'Religious Pluralism and Liberal Constitutionalism: Secularity and Secularism in Kenya's religious freedom jurisprudence' 1 *Instytut wymiaru sprawiedliwości* 1, 2021.

<sup>53</sup> Sebastian E 'Do African Parties Contribute to Democracy? Some Findings from Kenya, Ghana and Nigeria' 43 *Africa Spectrum* 2, 2008 175.

### 2.3.1 Party Governance

The CoK, as the country's highest legal authority,<sup>54</sup> prohibits state officers from holding dual roles as both state officers and leaders of political parties.<sup>55</sup> State officers encompass individuals serving in both the executive and legislative branches of government.<sup>56</sup> The framers of the CoK emphasized the importance of this rule to prevent conflicts of interest and preserve the integrity and independence of public offices. This is indirectly designed to ensure the separation of powers between the executive, legislature, and political parties, which is critical for maintaining a fair and balanced governance system. By keeping the roles of public officers and party leaders distinct, the Constitution aims to avoid situations where political loyalty to a party could unduly influence official duties or policy decisions. It also seeks to protect the independence of state institutions, ensuring that they operate impartially and are not subordinated to partisan interests.<sup>57</sup>

### 2.3.2 Party Discipline

The CoK introduces a provision requiring elected members of parliament to vacate their seats if they either resign from the party that sponsored their candidacy or are deemed to have effectively resigned from that party.<sup>58</sup> This provision is further reinforced by the Political Parties Act, which considers legislators to have resigned if they promote the ideology of a different political party.<sup>59</sup> The intent behind this provision can be fully understood by applying a critical analysis through the lens of the Crispus Njogu doctrine of constitutional interpretation, which advocates for a purposive approach to understanding the law.<sup>60</sup> In this context, the provision advocates for legislators to act in a manner that reflects the original intent of the electorate, embodying the will and expectations of the people who elected them and not through their self-interests while in office.<sup>61</sup>

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<sup>54</sup> Article 2(1), *Constitution of Kenya*, (2010).

<sup>55</sup> Article 77(2), *Constitution of Kenya*, (2010).

<sup>56</sup> Article 260, *Constitution of Kenya*, (2010).

<sup>57</sup> Oluoch E, Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goth the Law, 35 *Jomo Kenyatta University of Agriculture and Technology Journal of Law* 2224-3240, 2015, 5.

<sup>58</sup> Article 103, *Constitution of Kenya*, (2010).

<sup>59</sup> Section 14, *Political Parties Act* (Act No 11 of 2011).

<sup>60</sup> Timothy Njoya and Others v Attorney General and Others (2004) AHRLR 157 (KeHC 2004).

<sup>61</sup> Ondieki D, 'The Impact of Party Constitutionalising on Democratic Governance in Kenya: A Detailed and Comprehensive Analysis' 2024, 6.

In practical terms, this provision serves to safeguard democratic governance by reinforcing the idea that elected officials are primarily accountable to the people. It ensures that the political mandate given by the electorate is not diluted or undermined by party politics or personal ambitions, thereby promoting transparency, accountability, and a more effective system of representation.

## 2.4 STATUTORY ANALYSIS

The Political Parties Act is crafted within the framework established by the Constitution, which mandates Parliament to enact legislation for the regulation of political parties.<sup>62</sup> Effective regulation of political parties is essential to maintain the integrity of the political system. It helps prevent abuse of power, ensures fair competition, and fosters democracy.<sup>63</sup>

### 2.4.1 Party Governance

The CoK restricts appointed state officers from holding office in a political party. However, the President through the legislation of the Political Parties Act is removed from the definition, allowing them to continue holding a leadership role in a political party even after assuming office.<sup>64</sup> Additionally, every citizen has the right to make political choices, which includes the right to form or participate in forming a political party,<sup>65</sup> hence the question that lingers is; 'is it the provision breaking the Constitution or is it the Constitution infringing a right?'

The critical question here is whether the separation of powers necessarily requires a separation of personnel. Proponents of the practice may argue that a leader can wear "two hats" for efficiency, as has been the case in historical examples like the United Kingdom (UK), where judges once held seats in the House of Lords.<sup>66</sup> There, it was believed that judges could offer legal expertise to the legislative process while maintaining their independence in judicial decisions. While some overlap might occasionally appear to promote effective governance, a clear separation of individuals

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<sup>62</sup> Article 92, *Constitution of Kenya*, (2010).

<sup>63</sup> Branch D, 'Democratisation, Sequencing, and State Failure in Africa: Lessons from Kenya' 108 *Oxford University Press* 430, 2009, 10.

<sup>64</sup> Article 77, *Constitution of Kenya*, (2010).

<sup>65</sup> Article 38, *Constitution of Kenya*, (2010).

<sup>66</sup> Allan S, 'Law Liberty and Justice: The Legal Foundations of British Constitutionalism' 1 *Oxford University Press* 1, 1994, 3.

between branches is generally advisable. The reason is simple, it ensures that distinct roles and responsibilities are properly carried out, preventing concentration of excessive power.<sup>67</sup>

The primary responsibility of a state officer is to serve the public impartially, free from the influence of political affiliations. However, when a state officer simultaneously holds a leadership position in a political party, it presents an evident conflict of interest. Specifically, the President can then serve as the head of the executive and through the provision may become the *de facto* leader of the political party holding a majority in Parliament and consequently exercise undue influence over legislative processes.<sup>68</sup> Therefore, allowing state officers, particularly the President, to lead political parties undermines the principle of separation of powers.

Similarly, a retired president, owing to their designated role as a consultant and advisor to both the Government and the people of Kenya, and given the potential for engagement in specific official functions, is prohibited from holding office within any political party following their tenure.<sup>69</sup> By imposing these limitations, the law safeguards the independence of the post-presidential advisory role and prevents a retired president from exerting influence through indirect governance via partisan directives, thereby protecting democracy.

#### **2.4.2 Party Discipline**

The CoK introduces a provision requiring elected members of parliament to vacate their seats if they either resign from the party that sponsored their candidacy or are deemed to have effectively resigned from that party.<sup>70</sup> This provision is further reinforced by the Political Parties Act, which considers legislators to have resigned if they promote the ideology of a different political party.<sup>71</sup>

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<sup>67</sup> Kavanagh A, *The Constitutional Separation of Powers*, 1 *University of Oxford Press* 1, 2014, 13.

<sup>68</sup> Seligman L, 'The Presidential Office and the President as Party Leader' 21 *Duke University School of Law* 4, 1956, 18.

<sup>69</sup> Section 6, *Presidential Retirement Benefits Act* (Act No. 11 of 2003).

<sup>70</sup> Article 103, *Constitution of Kenya*, (2010).

<sup>71</sup> Section 14, *Political Parties Act* (Act No 11 of 2011).

Despite the original intent of the framers of the CoK, this provision has led to unforeseen challenges, particularly in situations where political party governance undergoes significant changes than what was intended.<sup>72</sup> Under such circumstances, members of the executive may retain leadership positions within their respective parties, creating a situation where political party allegiance and executive power become intertwined. This is evident in the United Democratic Alliance (UDA) administration, where the President, through statutory provisions, holds dual roles as both a public officer and the head of a political party.<sup>73</sup> This interlocking raises concerns about the concentration of power, as party leaders may therefore hold significant influence over the direction of political discourse within the legislature in the name of party allegiance.<sup>74</sup> As a result, the original intention of ensuring accountability through party discipline may, therefore, be overshadowed by executive overreach.

## 2.5 JUDICIAL ANALYSIS

Courts play an essential role in both shaping and advancing the law, particularly when it comes to interpreting the Constitution and safeguarding justice.<sup>75</sup> Courts do not function in isolation and are required to adopt a flexible approach, moving away from a strict, positivist interpretation of the law.<sup>76</sup> Rather than focusing solely on the letter of the law, courts must consider the contexts surrounding each case to ensure that justice is upheld.<sup>77</sup>

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<sup>72</sup> Section 12 (2), *Political Parties Act* (Act No 11 of 2011).

<sup>73</sup> Kiplagat R, 'Ruto: I will go after Kenya Kwanza MPs who oppose Finance Bill 2023' Nation Media, 4 June 2023. <https://nation.africa/kenya/news/politics/ruto-i-will-go-after-kenya-kwanza-mps-who-oppose-finance-bill-2023-4258206>

<sup>74</sup> Ochieng A, 'The Influence of Executive-Legislature relations on legislative oversight in Kenya, 2008-2013' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2019, 30.

<sup>75</sup> Article 20 (3) and (4), *Constitution of Kenya*, (2010).

<sup>76</sup> Section 3 *Supreme Court Act* (Act No. 7 of 2011).

<sup>77</sup> *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated) [2014] KESC 53 (KLR)).

### 2.5.1 Party Governance

Courts have a critical role in reinforcing the separation of powers, ensuring that no branch of government, particularly the executive, wields unchecked authority.<sup>78</sup> Kenyan courts operate within an adversarial legal system, where disputes are typically resolved through the confrontation of opposing parties, each presenting their case to an impartial judge. Despite the clear constitutional provision that prohibits the president from holding dual roles, there has yet to be any legal challenge questioning this restriction or its potential impact on the integrity of public office.

The only petition challenging the governance structure of political parties was brought by Peter Odhiambo Agoro which sought a declaration from the court that excluding retired presidents from holding key leadership roles in political parties was discriminatory and infringed on their constitutional right to make political choices.<sup>79</sup> However, this highly anticipated petition was never adjudicated, fading into obscurity. The absence of a challenge, however, does not necessarily imply that the provision is beyond reproach. However, the provision's lack of challenge potentially leaves room for the executive to exert undue influence over the legislative process, ultimately undermining the system of checks and balances that is vital to a functioning democracy. Therefore, it may be argued that the provision deserves more robust judicial engagement to assess its full implications on governance and the integrity of public office.

### 2.5.2 Party Discipline

The court's interpretation of anti-defection or party-hopping laws<sup>80</sup> is to promote party discipline by preventing political defections that could be driven by promises of office or other unprincipled motivations.<sup>81</sup> This concept of party discipline is two-pronged. On one hand, it ensures that political parties and their elected members maintain a unified front, preventing instability due to unprincipled political shifts. On the other hand, it benefits the electorate by enhancing democracy by holding representatives accountable to the party under which they were elected.<sup>82</sup>

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<sup>78</sup> *Pevans East Africa Limited and Another v Chairman, Betting Control and Licensing Board 7 Others* (2018) eKLR.

<sup>79</sup> Article 38, *Constitution of Kenya*, (2010).

<sup>80</sup> Article 194(1)(e), *Constitution of Kenya*, (2010).

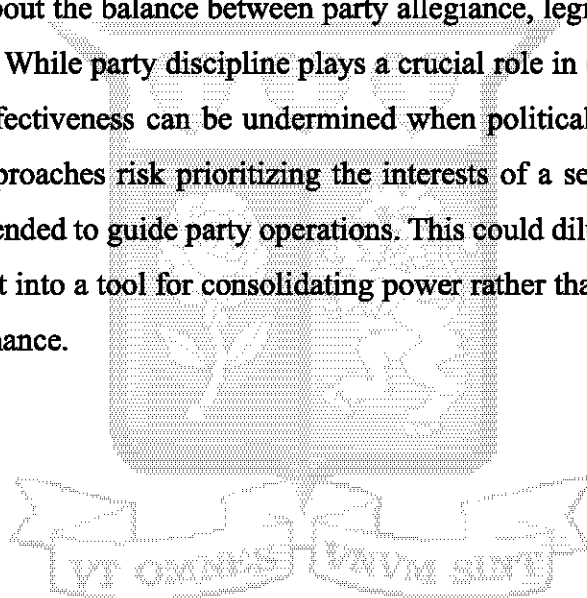
<sup>81</sup> Article 103, *Constitution of Kenya*, (2010).

<sup>82</sup> *Peter Kibe Mbae v Speaker, County Assembly of Nakuru & another; Registrar of Political Parties & 49 others (Interested parties)* [2022] eKLR.

However, with the evolution of statutory provisions on partisan governance, which excludes the president from being considered a public officer as discussed above, the principle and interpretation of party discipline may be misused, failing to achieve its intended purpose of protecting citizens' interests. Instead, it becomes a tool for those in leadership positions within parties to expel members who do not align with their wishes, thereby promoting executive overreach.<sup>83</sup>

## 2.6 CONCLUSION

In conclusion, the controversial reinstatement of the president into political party leadership roles raises critical concerns about the balance between party allegiance, legislative independence, and the separation of powers. While party discipline plays a crucial role in ensuring political stability and accountability, its effectiveness can be undermined when political party governance adopts elitist practices. Such approaches risk prioritizing the interests of a select few over the broader democratic principles intended to guide party operations. This could dilute the original purpose of party discipline, turning it into a tool for consolidating power rather than fostering accountability and representative governance.



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<sup>83</sup> Ochieng A, 'The Influence of Executive-Legislature relations on legislative oversight in Kenya, 2008-2013' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2019, 30.

## **CHAPTER 3: CONFLICTING ROLES, COMPOUNDED ISSUES**

### **3.1 INTRODUCTION**

This chapter explores the implications of allowing state officers, especially executive members, to hold dual roles as both state officials and leaders of political parties. Particularly, how this practice has affected the legislative independence following the enactment of the Political Parties Act.<sup>84</sup> The analysis begins with an examination of legislative roles, serving as the primary point of comparison to assess what ought to be done. This is followed by an exploration of key scenarios in which the executive has exerted substantial influence over parliament, resulting in the passage of contentious legislation, the erosion of checks and balances, the weakening of opposition, and the decline of internal party democracy. This will serve as the contrasting focal point of comparison, highlighting what happens in practice and consequently weakens legislative independence. By critically evaluating these dynamics, this chapter directly addresses the study's research problem, which investigates how the dual roles of state officers affect the autonomy of the legislature.

### **3.2 LEGISLATIVE COMPASS**

The doctrine of separation of powers is broadly recognized as a fundamental constitutional doctrine.<sup>85</sup> Although rarely explicitly stated in constitutional drafting, the separation of powers is almost universally implied through the constitutional delineation of functions in modern governance. Thus, the framers of the CoK, expressly stated that sovereign power belongs to the people, which is delegated to state organs, namely, parliament, executive, and the judiciary.<sup>86</sup> This division of powers serves as a critical system designed to prevent consolidation of power within any single branch, preserving checks and balances. Parliament's primary role is to legislate and represent the people's will.<sup>87</sup> In fulfilling its mandate, the legislature not only enacts laws but also holds the executive accountable, ensuring that governmental actions align with the will and best interests of the people. Therefore, the legislative arm should carry out its duties independently, free from coercion or undue influence, and fulfill its oversight responsibilities.

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<sup>84</sup> Section 12, *Political Parties Act* (Act No 11 of 2011).

<sup>85</sup> Oluoch E, Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; *Whither Goeth the Law*, 35 *Jomo Kenyatta University of Agriculture and Technology Journal of Law* 2224-3240, 2015, 5.

<sup>86</sup> Article 1(3), *Constitution of Kenya*, (2010).

<sup>87</sup> Article 94, *Constitution of Kenya*, (2010).

### 3.3 EROSION OF LEGISLATIVE PURPOSE

Recently, there has been a growing wave of dissatisfaction with the legislative body, largely due to its reliance on executive directives under the guise of political party positions.<sup>88</sup> In light of this, the section takes a journey through recent history to examine the validity of these allegations. Firstly, it analyses the Building Bridges Initiative (BBI) under the Jubilee administration, a political and constitutional reform effort that generated considerable debate. Secondly, it analyses the Finance Bill under the KK administration. Finally, it explores the deputy president impeachment process, where political dynamics between the executive and legislature became a focal point of contention, casting doubt on legislative independence.

#### 3.3.1 Policy Making

The independence and credibility of Parliament have been under threat. The core role of Parliament is to represent the will of the people and enact laws per public interest.<sup>89</sup> However, given the way consequential bills have been handled raises doubts about whether it has faithfully upheld that role. Political parties have increasingly resorted to threatening their members with punitive measures for not adhering to what they define as party positions. In 2023, for example, the President expressed that he was eager to see who would oppose the Finance Bill, a statement that could be interpreted as a subtle threat to members of his own UDA party. This sentiment was reinforced by the UDA whip, who vowed that the party would take disciplinary action against any member who opposed the bill.<sup>90</sup> Consequently, voting patterns showcased that Members of Parliament (MPs) are overwhelmingly loyal to party positions and executive directives. Opinion polls show a stark difference between how parliament votes and what the people they represent want. In 2024, for instance, a poll showed that 83% of Kenyans were opposed to the proposals that Parliament had passed.<sup>91</sup>

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<sup>88</sup> Mwangi M, 'Kenya impeaches deputy president over 'corruption, undermining government' Al Jazeera, 17 October 2024.

<https://www.aljazeera.com/news/2024/10/17/kenya-impeaches-deputy-president-over-corruption-undermining-government>

<sup>89</sup> Article 94, *Constitution of Kenya*, (2010).

<sup>90</sup> Kiplagat R, 'Ruto: I will go after Kenya Kwanza MPs who oppose Finance Bill 2023' Nation Media, 4 June 2023.

<https://nation.africa/kenya/news/politics/ruto-i-will-go-after-kenya-kwanza-mps-who-oppose-finance-bill-2023-4258206>

<sup>91</sup> Achieng S, 'Infotrak poll shows 83% of Kenyans oppose Finance Bill 2024 proposals' Citizen Digital, 6 June 2024.

<https://www.citizen.digital/news/infotrak-poll-shows-83-of-kenyans-oppose-finance-bill-2024-proposals-n343539>

### ***a) Building Bridges Initiative (BBI)***

The Constitution Amendment Bill 2020 originated from the BBI, a political effort spearheaded by then-President Uhuru Kenyatta and Raila Odinga. Some critics have labelled it as an "elitist" move, particularly given the prominent roles of the two political figures driving the initiative.<sup>92</sup> Under strong political party directives, parliamentarians turned out in numbers not seen before, even extending their sessions past midnight to ensure the swift passage of the amendments.<sup>93</sup> However, in a constitutional petition, the court relied on the Kesavananda doctrine, which asserts that the Constitution contains fundamental principles that cannot be altered by Parliament alone and requires a popular initiative.<sup>94</sup>

However, this ruling does not fully address the broader issue of executive overreach concerning legislative independence; rather, it primarily serves to protect the constitutional process for amending the Constitution itself. Thus, while the ruling protects the procedure for constitutional amendments and reaffirms the importance of the basic structure doctrine, it does not resolve the ongoing challenge of balancing executive power with legislative independence in the broader governance framework. The potential for executive overreach remains a concern, particularly in a system where the line between party loyalty and legislative decision-making can be easily blurred.

### ***b) Finance Bill***

In this section, the focus will not be on whether the 2024 Finance Bill, hereinafter referred to as the 'bill', represents a progressive or regressive taxation system, but rather on the way the bill was pushed through Parliament. The bill became a significant moment in Kenya's political landscape, sparking an unprecedented wave of opposition erupting across the country, including areas traditionally considered strongholds of the government. Despite the overwhelming public outcry, MPs followed the directives of their political parties, which were heavily influenced by the president who insisted on the bill's importance for the country's economic trajectory.<sup>95</sup>

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<sup>92</sup> David Ndii & others v Attorney General & others [2021] eKLR.

<sup>93</sup> Omondi I, 'National Assembly overwhelmingly passes the BBI Bill' Citizen Digital, 7 May 2021. <https://www.citizen.digital/news/national-assembly-overwhelmingly-passes-the-bbi-bill-11198191>

<sup>94</sup> Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr (1973).

<sup>95</sup> Kiprono F, 'How the 2024 Finance Bill reveals the disconnect between Parliament and the people' Africa Uncensored, 26 June 2024.

The bill was ultimately passed, with this exercise being termed as a rubber-stamping exercise to the government. However, following persistent demonstrations, the President refused to sign the Bill and sent it back to Parliament for amendments and further debate.<sup>96</sup> What was most intriguing is that, despite parliament's previous unwavering support for the bill under executive orders, it was rejected, unanimously and without any dissent, only after the President shifted his position. Parliamentarians, are expected to be stewards and watchdogs for public resources but have recently come out as puppets and the president's cheerleaders.<sup>97</sup>

### 3.3.2 Checks and Balances

#### *a) Impeachment Process*

This section does not delve into whether the grounds relied on by the national assembly while impeaching the deputy president were substantial. The main point of focus is the procedure of the process in the national assembly. The impeachment process has been termed by many as a political lynching rather than an oversight process. In addition, the speed with which the gazette notice was issued, the rapid preparation of documents for public participation, and the sudden availability of funds especially in a country where financial constraints are often cited suggested that this was a decision that had been finalized at the very top.<sup>98</sup> The court remarked that the current applications were far from routine and acknowledged they were deeply influenced by political manoeuvrings.<sup>99</sup> However, this creates a scenario that calls for judicial restraint even in cases where there may be indications of undue influence from the executive through political parties.<sup>100</sup>

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<sup>96</sup> Kiprono F, 'How the 2024 Finance Bill reveals the disconnect between Parliament and the people' Africa Uncensored, 26 June 2024.

<https://africauncensored.online/how-the-2024-finance-bill-reveals-the-disconnect-between-parliament-and-the-people/>

<sup>97</sup> Gachane N, Controversial Adani deals expose impotence of MPs, 26 November 2024.

<https://www.standardmedia.co.ke/main-staging/article/2001506920/controversial-adani-deals-expose-impotence-of-mps>

<sup>98</sup> Muria J, 'Silence is consent: PLO Lumumba points to Ruto's invisible hand in Gachagua impeachment' Citizen Digital, 9 October 2024.

<https://www.citizen.digital/news/silence-is-consent-plo-lumumba-points-to-rutos-invisible-hand-in-gachagua-impeachment-n351080>

<sup>99</sup> Gachagua & 40 others v Speaker, National Assembly & 15 others (2024) KEHC 13473 (KLR).

<sup>100</sup> Martin Nyaga Wambora v Speaker of the Senate & Others (2014) eKLR.

## 3.4 EROSION OF INTERNAL PARTY AFFAIRS

### 3.4.1 Internal Party Democracy

Every citizen has the right to be registered as a voter, vote by secret ballot in an election or referendum and be a candidate for public office, or office within a political party of which the citizen is a member.<sup>101</sup> It follows therefore that in elections, adult citizens have the right to contest for elections either as independent candidates or under the sponsorship of political parties.<sup>102</sup> Under the sponsorship of political parties, there are only two types of nominations; direct party nomination and indirect party nomination. Direct party nomination is arrived at by votes of its registered members, whereas indirect party nomination is by delegates selected from registered members of the political party.<sup>103</sup>

Kenyan politics has increasingly been characterized by a troubling trend where direct tickets are awarded to party loyalists under the guise of consensus-based nominations.<sup>104</sup> The consensus-based nominations are not without their victims as they eat their children. The victims resign from their respective parties and present themselves as independent candidates.<sup>105</sup> The question to be asked is whether the consensus-based nominations or rather negotiated democracy,<sup>106</sup> as other people prefer to call it, further democracy.

Internal party democracy in Kenya is elusive due to the oligarchic nature of political parties.<sup>107</sup> This practice bypasses inclusive internal processes, silencing dissent and reducing the participation of grassroots members in leadership selection. Consequently, individuals who owe their positions to such undemocratic processes feel a stronger allegiance to party leaders, often or not persons in the executive, than to their constituents. This dynamic prioritizes the interests of powerful leaders over public needs, compromising the legislature's independence to carry out their duties.

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<sup>101</sup> Article 38(3), *Constitution of Kenya* (2010).

<sup>102</sup> Section 2, *Elections Act* (Act No. 11 of 2011).

<sup>103</sup> Section 2, *Political Parties Act* (Act No. 11 of 2011).

<sup>104</sup> I Mwangi, 'Direct Tickets Issued Only Where There Was Consensus-ODM.' 29 March 2022. Available at <https://www.capitalfm.co.ke/news/2022/03/direct-tickets-issued-only-where-there-was-consensus-odm/>

<sup>105</sup> N Gachane, 'Nomination losers 'shouldn't vie as independents.' 12 May 2022. Available at <https://www.standardmedia.co.ke/politics/article/2001445202/nomination-losers-shouldnt-vie-as-independents>

<sup>106</sup> The Standard Editorial, 'Handpicking candidates is weakening democracy.' 15 April 2022. Available at <https://www-standardmedia.co.ke/opinion/article/2001443211/handpicking-candidates-is-weakening-democracy>

<sup>107</sup> Karuti Kanyinga, *Kenya-Democracy and Political Participation*, 2014, 155.

### **3.4.2 Internal Party Financing**

Similarly, political party financing plays a crucial role in shaping party discipline and the loyalty of legislators. Executives who often hold key party positions, have the power to direct financial support toward MPs, particularly during election periods or for day-to-day operations. This financial leverage encourages legislators to remain loyal to the party leadership, as they rely on these funds for their political survival and success. As a result, MPs may prioritize their relationship with the executive and their continued access to party resources over their independence or duty to represent their constituents. This dynamic of financial dependence fosters a system where legislators, seeking to secure their political future, become increasingly subservient to the executive, ultimately undermining the autonomy of the National Assembly and reinforcing party discipline at the expense of independent legislative action.

### **3.5 EROSION OF OPPOSITION**

The President as a party leader in Kenya often consolidates significant power, creating a scenario where the lines between governance and political dominance blur. This centralization of authority results in the dilution of opposition parties as key members are co-opted into the President's camp, effectively weakening checks and balances and the independence of the legislature. Such actions, while often framed as fostering inclusivity, can instead undermine the core democratic principle of a vibrant opposition.

A notable illustration of this dynamic was under the Jubilee administration under the well-known 'handshake deal', a political partnership between the then President, and the then-opposition leader. Kenya was left without robust opposition, as the lines of political accountability became increasingly indistinct. In fact, the opposition was termed to be more government than the government itself.<sup>108</sup> More recently, a similar dynamic has played out under the KK administration. Collaborations with the opposition leader in support of what may be termed as political interests have contributed to the assimilation of ODM members.<sup>109</sup> This realignment has further eroded the

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<sup>108</sup> Warah R, The Building Bridges Initiative Has Distorted Kenya's Democracy

<https://progressive.international/wire/2021-01-29-the-building-bridges-initiative-has-distorted-kenyas-democracy/de>

<sup>109</sup> Africa Confidential, Raila's exit deal highlights Ruto's co-option of the opposition, 65 8 December 2024 19,

<https://www.africa-confidential.com/article-preview/id/15147/raila%27s-exit-deal-highlights-ruto%27s-co-option-of-the-opposition>

strength of the opposition and the independence of the legislature, leaving critical governance functions unchecked.<sup>110</sup>

While inclusivity aims to foster representation and national cohesion, such political collaborations often tilt towards assimilation rather than genuine inclusion. Inclusivity involves creating a platform where diverse voices, including dissenting ones, can contribute meaningfully to governance without compromising their identity or principles. Conversely, the absorption of opposition members into the ruling side undercuts their ability to serve as effective watchdogs, leading to a weakened democracy where critical scrutiny of the executive is diminished.

### 3.6 CONCLUSION

In conclusion, the dual roles held by state officers, particularly those in the executive, as political party leaders have significantly compromised Kenya's legislative independence. This dynamic erodes the separation of powers and weakens the legislature's capacity to function as an effective check on the executive. At its core, Parliament is meant to be the people's representative, representing their views in line with the Constitution, and acting as a check to the executive, but the question is, does the Kenyan democracy work that way? Kenyan legislatures are still subject to the will of their party leaders, meaning that the will of the people is secondary to the priorities of the government.<sup>111</sup> Only by taking decisive steps to safeguard and empower legislative autonomy can Kenya's democratic institutions truly fulfill their constitutional mandate and serve the people without the distortion of political power struggles.

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<sup>110</sup> Gachane N, Controversial Adani deals expose impotence of MPs, 26 November 2024. <https://www.standardmedia.co.ke/main-staging/article/2001506920/controversial-adani-deals-expose-impotence-of-mps>

<sup>111</sup> Cottrell J, The idea and the reality of independent candidates' Katiba Institute <https://katibainstitute.org/the-independent-candidates/>.

## **CHAPTER 4: A COMPARATIVE BEST PRACTICE ANALYSIS**

### **4.1 INTRODUCTION**

This chapter explores effective strategies for addressing the challenge of executive overreach in Kenya, particularly when it is justified under the framework of political parties. The discussion is structured into three main sections, each focusing on a different approach to tackling this issue. The first section explores the root causes of political party overreach. The second section looks at countries that have implemented restrictive measures to combat such challenges. Finally, the last section examines jurisdictions that adopt inclusive measures to address the issue. Through this comparative analysis, the chapter offers insights into potential solutions for strengthening legislative independence and curbing executive overreach in Kenya, particularly in the context of political party influence.

### **4.2 DRIVERS OF POLITICAL PARTY OVERREACH**

#### **4.2.1 Statutory Mechanisms**

One significant factor contributing to political party overreach in Kenya is the legal framework that permits executive members to hold leadership positions in political parties, despite being state officers.<sup>112</sup> This overlap between political party leadership and executive power results in inadequate separation, leading to undue influence over legislators who are members of these political parties. By embedding such provisions, these laws diminish the legislature's independence, allowing the executive to use party loyalty and directives as a tool to consolidate power. This dynamic undermines the checks and balances necessary for good governance and threatens the integrity of the legislature.<sup>113</sup>

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<sup>112</sup> Section 12, *Political Parties Act* (Act No 11 of 2011).

<sup>113</sup> Hassan M, 'Executive–Legislative Relations, Party Defections, and Lower-Level Administrative Unit Proliferation: Evidence From Kenya' 22 *Journal of Contemporary African Studies* 3, 2014, 319.

### 4.2.2 Zero-sum game

The “winner-takes-all” nature of Kenyan elections exacerbates political party overreach.<sup>114</sup> In this system, the victorious party gains total and unchecked control over the executive. Additionally, it creates a situation where MPs shift their loyalty to align with the ruling party to gain access to key positions or to have any meaningful influence within the government. This dynamic not only strengthens the power of the ruling party but also perpetuates a cycle where political power is concentrated in the hands of a few, rather than being broadly distributed and consequently diminishes legislative independence.<sup>115</sup>

### 4.2.3 Ethnic Alliances

The colonial government's divide-and-rule strategy has had a long-lasting impact on Kenya's political and governance structures. During the colonial era, ethnic divisions were deliberately heightened as a means of maintaining control and preventing unity among indigenous communities. This manipulation created deep-seated mistrust and fostered ethnic rivalry, which continues to resonate in modern Kenyan politics.<sup>116</sup> Kenya's political parties reflect the same as they remain weak, predominantly ethnic-based and lack central ideology. This ethnopolitical dynamic prompted the constitutional drafters to establish a presidential election requirement mandating that a candidate must win over half of the votes cast in at least half of the forty-seven counties.<sup>117</sup> While intended to promote inclusivity, this provision has resulted in the formation of ethnic coalitions of convenience that have the ability to trample on legislative independence through ethnic kingpin directives.<sup>118</sup>

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<sup>114</sup> Mwangi P, 'Highlights of the Report of the Building Bridges Initiative Task Force, 2020, 8.

<sup>115</sup> Linz J, 'The Perils of Presidentialism' 1 *The Johns Hopkins University Press* 1, 1990, 18.

<sup>116</sup> <https://theconversation.com/kenyas-politicians-continue-to-use-ethnicity-to-divide-and-rule-60-years-after-independence-207930> on 19 July 2023.

<sup>117</sup> Article 138, *Constitution of Kenya*, (2010).

<sup>118</sup> Moehler D, 'Critical Citizens and Submissive Subjects: Election Losers and Winners in Africa' 39 *Cambridge University Press* 2, 2009, 21.

## 4.3 RESTRICTIVE SOLUTIONS

### 4.3.1 Symbolic Restrictions

Symbolic neutrality involves implementing governance measures aimed at fostering impartiality, particularly in multicultural or pluralistic societies.<sup>119</sup> This concept is often shaped by the actions of previous regimes and the subsequent desire to promote unity by avoiding politically divisive actions.<sup>120</sup> Therefore, in the spirit of fostering national unity and addressing historical divisions, presidents are frequently expected to distance themselves from active political party roles, thereby fully embracing their duties as impartial heads of state.<sup>121</sup> Such an approach has been observed both in historical and modern contexts, notably in South Africa.

#### a) South African Scenario

In the 1990s, South Africa underwent a profound transformation, transitioning from the oppressive apartheid regime, rooted in parliamentary subordination, to a constitutional democracy founded on democratic values, social justice, and fundamental human rights. Nelson Mandela assumed office as South Africa's first democratically elected president, carrying a vision of uniting the nation and ushering in a new era of governance. In line with this vision, Mandela stepped down as the President of the African National Congress (ANC), predominantly a black party, and handed over leadership to Thabo Mbeki.<sup>122</sup> Mandela embraced the principle of symbolic neutrality, having been influenced by the conditions upon his ascension to power, and dedicated himself to national responsibilities while distancing himself from active divisive politics of races.<sup>123</sup>

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<sup>119</sup> Habermas J, *'The Inclusion of the Other,'* 3 ed, MIT Press, Cambridge, Canada, 2000, 200-210.

<sup>120</sup> Habermas J, *'The Inclusion of the Other,'* 3 ed, MIT Press, Cambridge, Canada, 2000, 28.

<sup>121</sup> Botha H, 'The Current State of Democracy in South Africa' *48 Law and Politics in Africa, Asia and Latin America* 3, 2015, 8.

<sup>122</sup> Beresford A, 'Nelson Mandela and the Politics of South Africa's Unfinished Liberation' *41 Review of African Political Economy* 140, 3014, 21.

<sup>123</sup> Staff Reporter, Mandela distances himself from ANC race, Mail and Guardian News, 18 November 2007  
<https://mg.co.za/article/2007-11-18-mandela-distances-himself-from-anc-race/>

However, critics argue that the principle lacks enforceability and the absence of clear legal guidelines within the principle has created it to be an unsustainable political principle.<sup>124</sup> This has been evident in South Africa, where the concept of symbolic neutrality, a pillar value of the Mandela administration, has faded over time, allowing presidents to hold dual roles and continue engaging in partisan politics.<sup>125</sup> This unpredictable shift has led to a highly centralized style of leadership within the ruling ANC, where executive leaders dominate legislative decision-making through party directives.<sup>126</sup> Adherence to Leninist principles in the modern ANC, such as centralism and the need for absolute party discipline, has contributed to the concentration of power and subordination of the legislature leaving it compromised.<sup>127</sup>

### 4.3.2 Legislative Restriction

To enhance enforceability within the framework of symbolic neutrality, legal mechanisms have been codified to monitor and regulate individual behaviour, thereby preventing abuse of power. These legal provisions also promote stability and predictability, fostering public trust in governance.<sup>128</sup>

#### a) Indonesian Scenario

Before analysing the key provisions under the Indonesian Constitution and relevant statutory law, the question that lingers is 'Why Indonesia?' Out of 195 recognized countries, what makes Indonesia a compelling case to study? Firstly, Indonesia's remarkable ethnic diversity parallels Kenya's diverse population.<sup>129</sup> Secondly, Indonesia's history of political transformation and struggle for democracy provides a rich backdrop for analysis. Indonesia's transition from an authoritarian regime under Suharto to a more democratic system in the late 1990s is particularly noteworthy. This shift, known as the Reform Era, resulted in significant constitutional and statutory amendments and decentralization of power.<sup>130</sup> This can offer relevant insights for Kenya, a country

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<sup>124</sup> Habermas J, *The Inclusion of the Other*, 3 ed, MIT Press, Cambridge, Canada, 2000, 56.

<sup>125</sup> Beresford A, 'Nelson Mandela and the Politics of South Africa's Unfinished Liberation' 41 *Review of African Political Economy* 140, 2014, 21.

<sup>126</sup> Modood T, *Multiculturalism: A Civic Idea*, Polity Press Publishers, Cambridge, 2007, 19.

<sup>127</sup> Lodge T, 'Political Corruption in South Africa' 97 *Oxford University Press* 387, 1998, 30.

<sup>128</sup> Williston S, 'Written and Unwritten Law' 17 *American Bar Association Journal* 1, 1931, 18.

<sup>129</sup> Kenya National Bureau of Statistics (KNBS) Report, 22 March 2013, 1.

<sup>130</sup> Schwarz A, 'Indonesia after Suharto' 76 *Council on Foreign Relations* 4, 1997, 20.

still grappling with challenges of executive overreach, political centralization, and the need for greater inclusivity in governance.<sup>131</sup> Finally, Indonesia is an ideal benchmark for Kenya due to its political landscape, characterized by a multi-party system rather than the traditional two-party dominance,<sup>132</sup> which mirrors Kenya's similarly diverse party organizations.<sup>133</sup>

In Indonesia, the President is required to uphold impartiality and prioritize national governance throughout their tenure.<sup>134</sup> This obligation highlights the emphasis on national interests over party affiliations. To codify this symbolic neutrality principle, electoral laws explicitly prohibit the President from holding leadership roles within political parties, ensuring a clear separation of executive power from party politics.<sup>135</sup> These provisions are designed to safeguard impartial governance and prevent legislative capture, in a country trying to escape executive tyranny. For example, upon assuming to presidency, Joko Widodo (Jokowi) adhered to this framework by officially cutting ties with his political party, *Partai Demokrasi Indonesia Perjuangan* (PDI-P).<sup>136</sup>

However, the rapid political ascent of Gibran Rakabuming Raka, son of former Indonesian President Joko Widodo, has sparked concerns about the health of democracy in Indonesia. Gibran's swift transition from businessman to Mayor of Surakarta, followed by his nomination as Vice President alongside President-elect Prabowo Subianto, highlights the growing influence of political dynasties. Critics argue that despite Presidents relinquishing their party positions, they still wield uncontrollable power within party decisions. This trend undermines democratic principles, creating a shift toward semi-authoritarianism. Consequently, democratic institutions are still at risk of being manipulated through partisan directives from Presidents and the potential for complete legislative capture is looming on the horizon.<sup>137</sup>

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<sup>131</sup> Mutua M, Justice under siege: The Rule of law and judicial subservience in Kenya, 1 *John Hopkins University Press*, 23, 2001, 20.

<sup>132</sup> Lev D, 'Political Parties in Indonesia' 8 *Cambridge University Press* 1, 2018, 55.

<sup>133</sup> Office of Registrar of Political Parties (ORPP) Annual Report, 6 June 2023, 15.

<sup>134</sup> Article 4, *Constitution of the Republic of Indonesia*, 1945.

<sup>135</sup> Article 6(1), *General Election of President and Vice President Act*, (Act No. 42 of 2008).

<sup>136</sup> Mietzner M, 'Reinventing Asian Populism: Jokowi's Rise, Democracy and Political Contestation in Indonesia' 2015, 19.

<sup>137</sup> Yuniarni S, 'Unity in Diversity: Indonesia's Six Largest Ethnic Groups' *Jakarta Globe* 16 July 2016, 1.

<https://jakartaglobe.id/culture/unity-diversity-indonesias-six-largest-ethnic-groups>

## 4.4 INCLUSIVE SOLUTIONS

### a) Switzerland Scenario

Before analysing the key aspects of Switzerland's governance model, one might ask, "Why Switzerland?" The answer lies in several unique factors that make Switzerland's governance system particularly compelling for comparative analysis in Kenya's context. Firstly, Switzerland's strong emphasis on inclusivity and political stability in a multilingual and multicultural society parallels Kenya's diverse ethnic landscape.<sup>138</sup> By studying Switzerland's consociation democracy, Kenya can glean valuable insights into fostering inclusivity and cohesion in a similarly pluralistic society. Lastly, Switzerland's unique collective presidency and proportional representation system stand in stark contrast to Kenya's winner-takes-all electoral model.

Switzerland's system of *Konkordanzdemokratie*, often translated as "consociation democracy," represents a distinctive approach to governance characterized by the inclusion of all major political parties in the executive.<sup>139</sup> Switzerland's executive branch is represented by the Federal Council, a unique collective presidency consisting of seven members elected by the Federal Assembly. These members are drawn from major political parties to reflect the country's political diversity, adhering to the principle of proportionality. Unlike systems with a singular head of state, the Federal Council operates as a collegial body, with the presidency rotating annually among its members.<sup>140</sup> Decision-making within the Council is rooted in consensus, ensuring that policies are shaped by broad agreement rather than by the dominance of a single party or ideology.<sup>141</sup> This structure promotes inclusivity and mitigates the risk of political polarization, aligning with the overarching principle of *Konkordanzdemokratie*.<sup>142</sup>

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<sup>138</sup> Swiss Federal Statistical Office, *Diversity and Coexistence*, 2023, 1.

<sup>139</sup> Lehmbruch G, 'Consociation Democracy and Corporatism in Switzerland' 23 *Oxford University Press* 2, 1993, 43.

<sup>140</sup> Article 176, *Federal Constitution of the Swiss Confederation* (1999).

<sup>141</sup> Barry B, 'Political Accommodation and Consociation Democracy' 5 *Cambridge University Press* 4, 1975, 47

<sup>142</sup> Lijphart A, 'Consociation Democracy' 21 *The Johns Hopkins University Press* 2, 1969, 25.

The Swiss model has been lauded for its ability to maintain inclusivity and prevent the concentration of power by a single person which results in legislative subordination. By involving multiple parties in executive decision-making, the system strengthens democratic principles of representation and participation.<sup>143</sup> Switzerland remains a relevant benchmark for studying the balance between inclusivity and efficiency in democratic governance. Its distinctive approach offers valuable insights for pluralistic societies grappling with issues of representation and political stability.

#### 4.5 CONCLUSION

In conclusion, this chapter has explored various approaches to addressing executive overreach in Kenya, particularly in the context of political party influence. Through a comparative analysis of different countries, including South Africa, Indonesia, and Switzerland, it has become evident that both restrictive and inclusive strategies play crucial roles in enhancing legislative independence and promoting balanced governance. While Kenya faces significant challenges stemming from its political party dynamics, the examples highlighted in this chapter offer valuable lessons on how to mitigate executive overreach, strengthen democratic principles, and foster a more inclusive and accountable governance system.



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<sup>143</sup> Lijphart A, 'Consociation Democracy' 21 *The Johns Hopkins University Press* 2, 1969, 25.

## **CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS**

### **5.1 INTRODUCTION**

The objective of this study was to examine the germane issue of executive overreach under the guise of political party affiliation. Kenya, often hailed as the pride of Africa is at a critical juncture in its development and must address this concern. Failing to curb executive overreach could lead the country down a path similar to Shakespeare's *Macbeth*, where unchecked concentration of power ultimately leads to ruin. To prevent such an outcome, it is crucial to implement recommendations that bridge the gap between political party tyranny and political party discipline. By adopting a system that strikes a balance between party discipline and affiliation, Kenya can safeguard its democracy and strengthen its governance processes. The following recommendations aim to protect the country's political structure and promote sustainable growth and accountability.

### **5.2 STATUTORY REVOCATION**

The first recommendation involves codifying legal limits on political parties, specifically by abolishing the provision that exempts the president and members of the executive from being classified as state officers in the context of political party leadership.<sup>144</sup> This legal loophole has allowed the executive to exert disproportionate control over political parties consequently undermining the independence of elected officials in the legislature.<sup>145</sup> By closing this gap, a balance can be achieved between maintaining party discipline and ensuring elected representatives are independent and hold the executive accountable. However, as highlighted by the former Deputy President, the issue of executive overreach controlling the legislature is deeply entrenched in Kenyan politics and has become its characteristic.<sup>146</sup> Therefore, reforming this provision cannot stand alone. To fully dismantle the culture of executive dominance, a broader, more comprehensive approach must be adopted.

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<sup>144</sup> Section 12, *Political Parties Act* (Act No 11 of 2011).

<sup>145</sup> Seligman L, 'The Presidential Office and the President as Party Leader' 21 *Duke University School of Law* 4, 1956, 14.

<sup>146</sup> Kinyanjui M, 'Gachagua's tipping point: What does the law say about impeaching a Deputy President?' *Citizen Digital*, 25 September 2024 on <https://www.citizen.digital/news/gachaguas-tipping-point-what-does-the-law-say-about-impeaching-a-deputy-president-n350192> 25 September 2024.

### 5.3 STRENGTHENING THE BICAMERAL SYSTEM

Following the general trend of former British colonies, Kenya has established an American-style structure of the legislature.<sup>147</sup> However, despite having a bicameral system, the Kenyan Senate, though similar in name, operates quite differently. The American Senate holds broad legislative powers, with the ability to draft, amend, and pass laws on a wide range of issues, including national matters. It also plays a critical role in approving presidential appointments to the executive branch, offering significant oversight over executive actions.<sup>148</sup> In contrast, Kenya's Senate is primarily tasked with considering laws that affect counties, limiting its influence over broader national issues.<sup>149</sup> Furthermore, the Senate's oversight powers over government affairs are more restricted compared to the American Senate, which actively monitors and checks the executive through hearings, investigations, and other means.

For executive overreach to be effectively curtailed in Kenya, the Senate must be empowered to exercise greater oversight over national governance. Expanding its role to include broader legislative functions and more comprehensive supervisory powers would enable the Senate to play a crucial part in balancing executive power, ensuring a more robust separation of powers, and fostering greater accountability within the government.<sup>150</sup> However, as demonstrated throughout the study, the executive has consistently undermined legislative assemblies, and the same could happen to the Senate. Therefore, addressing executive overreach in the legislative sphere necessitates additional decisive measures.

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<sup>147</sup> Ghai Y and Ghai J, 'Ethnicity, Nationhood and Pluralism' 1 *Katiba Institute* 1 2010, 12.

<sup>148</sup> Article 1, Section 3, United States of America *Constitution*, (1787).

<sup>149</sup> Article 94, *Constitution of Kenya*, (2010).

<sup>150</sup> Ghai Y and Ghai J, 'Ethnicity, Nationhood and Pluralism' 1 *Katiba Institute* 1 2010, 12.

## **5.4 INSTITUTIONALIZING POLITICAL PARTIES**

Institutionalizing political parties refers to the process by which parties become more structured, stable, and enduring within a political system. This process involves the establishment of formal rules, organizational frameworks, and internal mechanisms that ensure parties can operate effectively over time.<sup>151</sup> Institutionalized political parties typically feature clear leadership structures, well-defined party platforms, and standardized procedures for selecting candidates and making decisions. They also promote intra-party democracy, allowing party members to actively engage in decision-making processes, including leadership selection, policy formulation, and the overall direction of the party. These parties are less reliant on charismatic leaders or individual politicians and instead focus on sustaining long-term organizational stability. The institutionalization of political parties enhances political stability by making these parties central players in the legislative process, electoral campaigns, and the political system at large.<sup>152</sup>

In countries like Kenya, institutionalizing political parties can reduce the influence of individuals or specific interest groups, fostering a more transparent and equitable political environment. This process promotes stronger party discipline, broader member participation, and a more consistent legislative agenda. By embedding intra-party democracy, institutionalized parties help ensure diverse voices are heard, encourage accountability, and improve the quality of governance. Furthermore, this institutionalization protects the independence of elected officials from external pressures, contributing to a more democratic and balanced political system.

## **5.5 QUASI-PARLIAMENTARY SYSTEM**

Kenya's constitutional review process unfolded in two distinct phases: the first was under the Constitution of Kenya Review Commission (CKRC) and culminated with an unsuccessful referendum.<sup>153</sup> The second phase was under the Committee of Experts (CoE) which concluded

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<sup>151</sup> Otele O, 'Party Institutionalization in Africa: Kenya's 2013 Elections in Comparative Perspective' 42 *The African Review: A Journal of African Politics, Development and International* 1, 2024, 31.

<sup>152</sup> Otele O, 'Party Institutionalization in Africa: Kenya's 2013 Elections in Comparative Perspective' 42 *The African Review: A Journal of African Politics, Development and International* 1, 2024, 43.

<sup>153</sup> Report of the Constitution of Kenya Review Commission, Civic Constitutional Forum Reports, 20th March 2003, 109.

with the successful referendum.<sup>154</sup> Throughout this nearly two-decade-long process, debates over the structure of the national executive and the legislature proved to be the most contentious of all the constitutional review issues. The era of the imperial presidency fostered deep public resentment toward an overly powerful executive. Similarly, the historical dominance of the executive in the legislature and its control over legislative affairs sparked calls for the removal of the executive from parliament. These sentiments likely contributed to the advocacy for a presidential system of government.<sup>155</sup> However, Kenya's parliamentary culture, deeply rooted in reverence for the executive and subordination of legislative functions, persists. Removing the executive from the legislature has not entirely dismantled this entrenched culture. A purely American-style presidential system was not the primary aspiration of the constitutional reforms. Instead, the people sought an accountable executive and an independent legislature.<sup>156</sup>

A viable alternative to address executive overreach could be the adoption of a quasi-parliamentary system, where the executive is directly accountable to the legislature through hearings, investigations, and other means. Unlike presidential systems, where the executive operates independently, this system ensures accountability by requiring the cabinet to maintain the confidence of the parliamentary majority to remain in office. This approach fosters legislative oversight and responsiveness to public scrutiny, reducing the risks of executive overreach through political party control.<sup>157</sup> However, this cannot be the ultimate solution, as seen in South Africa, where a similar approach has been adopted, yet executive overreach persists.<sup>158</sup> Therefore, while it is a significant step toward curbing executive overreach, it cannot be the final measure.

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<sup>154</sup> Committee of Experts Report, Final Report of the Committee of Experts on Constitutional Review, 11th October 2010, 16.

<sup>155</sup> Committee of Experts Report, Final Report of the Committee of Experts on Constitutional Review, 11th October 2010, 16.

<sup>156</sup> Hassan M, 'Executive–Legislative Relations, Party Defections, and Lower-Level Administrative Unit Proliferation: Evidence From Kenya' 22 *Journal of Contemporary African Studies* 3, 2014, 319.

<sup>157</sup> Gichohi M, 'Executive Dominance through Constitutional Bargaining' in Arriola LR (ed) *Democratic Backsliding in Africa*, Oxford University Press, 2023, 137.

<sup>158</sup> Beresford A, 'Nelson Mandela and the Politics of South Africa's Unfinished Liberation' 41 *Review of African Political Economy* 140, 2014, 21.

## 5.6 CONSOCIATION DEMOCRACY

Kenyan politics operates on a "winner-takes-all" framework, an arrangement that tends to make democratic politics a zero-sum game consequently marginalizing the opposition and creating a vulnerability to co-option by the executive.<sup>159</sup> Throughout this study, it has been evident that legislators often succumb to party control or executive directives to secure inclusion in government. However, consociation democracy provides important lessons on promoting inclusivity. This is a governance model designed to manage deeply divided societies through power-sharing and inclusivity and consequently prevent the exclusionary practices often associated with winner-takes-all politics which results in legislators aligning with the executives.<sup>160</sup> This can be achieved through a carefully designed system of governance that balances the interests of diverse groups.

Elements of consociation democracy were evident in Kenya under the Grand Coalition Government (GCG) of 2007, which contributed to a vibrant and independent National Assembly. A pivotal moment during the 10<sup>th</sup> Parliament occurred when the legislative branch challenged executive directives after the then-President failed to follow statutory procedures and overstepped his powers by appointing the Chief Justice (CJ) without consulting the Prime Minister.<sup>161</sup> Given that this occurred in an unusual scenario with an inclusive system of governance, it offers valuable insights into how consociation democracy can strengthen legislative independence.<sup>162</sup>

## 5.7 CONCLUSION

At the heart of this study, it aimed to analyse the constitutional and statutory framework governing political parties in comparison to the doctrine of separation of powers. The findings reveal that the current legal framework is flawed, with political party affiliation often compromising the independence of the legislature. The research also examined the contemporary impact of political

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<sup>159</sup> Linz J, 'The Perils of Presidentialism' 1 *The Johns Hopkins University Press* 1, 1990, 4.

<sup>160</sup> Linz J, 'The Perils of Presidentialism' 1 *The Johns Hopkins University Press* 1, 1990, 8.

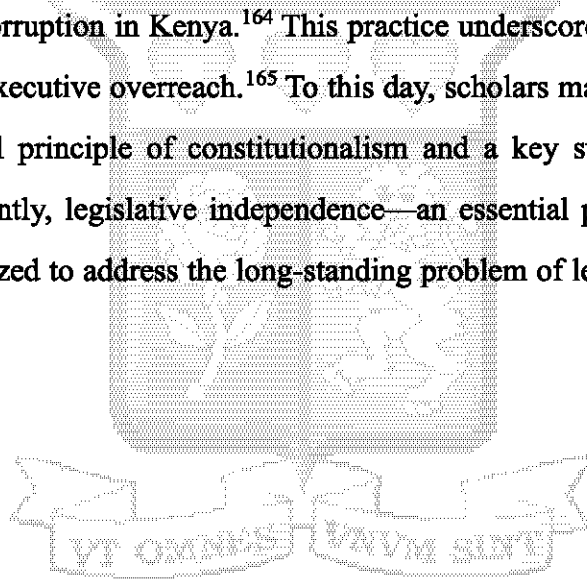
<sup>161</sup> Marende K, 'Communication from the Chair on Constitutionality of Nomination of certain Constitutional Office Holders, 3rd February 2011, 3.

<sup>162</sup> Section 4(2), *National Accord and Reconciliation Act* (Act No. 4 of 2008).

party affiliation on the legislative arm, showing that the executive continues to use party loyalty to extend its influence over the legislature.

In conclusion, this study has met its objectives by offering valuable lessons for Kenya to improve its governance system. The findings emphasize that legal provisions alone are not enough, and effective implementation of inclusive systems is crucial to promote accountability and prevent the concentration of power in any one branch of government.

Constant experience shows us that every man entrusted with power is prone to abuse it, extending his authority as far as it will go.<sup>163</sup> Political elites often prioritize their interests, as evidenced by the rampant growth of corruption in Kenya.<sup>164</sup> This practice underscores the necessity for robust mechanisms to prevent executive overreach.<sup>165</sup> To this day, scholars maintain that the division of powers is a fundamental principle of constitutionalism and a key standard for constitutional governance.<sup>166</sup> Consequently, legislative independence—an essential pillar of the separation of powers—must be prioritized to address the long-standing problem of legislative subordination in Africa.<sup>167</sup>



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<sup>163</sup> Vile M, 'Constitutionalism and the Separation of Powers: The New Separation of Powers: A Theory of the Modern State' Powers' Oxford University Press, 2009, 18.

<sup>164</sup> Ethics and Anti-Corruption Commission Research Report No. 15 of December 2023, 22.

<sup>165</sup> Vile M, 'Constitutionalism and the Separation of Powers: The New Separation of Powers: A Theory of the Modern State' Powers' Oxford University Press, 2009, 18.

<sup>166</sup> Vile M, 'Constitutionalism and the Separation of Powers: The New Separation of Powers: A Theory of the Modern State' Powers' Oxford University Press, 2009, 18.

<sup>167</sup> Albert R, 'Presidential Values in Parliamentary Democracies' 8 *International Journal of Constitutional Law* 1, 2010, 207.

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