

**A CRITICAL ANALYSIS OF THE INDEPENDENCE AND IMPARTIALITY OF
THE COURTS MARTIAL**

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Declaration

I, SANDRA NICOLE MUTHONI BUCHA, 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 in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

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

Signed:.....

Dr. Luis Franceschi

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DEDICATION

To human rights defenders – may your voices never be silenced, not even by yourselves.

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LIST OF LEGAL INSTRUMENTS

A. International Instruments

The International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

The Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

Non-binding international instruments:

Bangalore Principles of Judicial Conduct

International Bar Association, Minimum Standards of Judicial Independence

International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioner's guide No. 1

The Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration)

The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct

Universal Charter of the Judge

United Nations Basic Principles on Independence of the Judiciary

United Nations Draft Principles Governing the Administration of Justice through Military Tribunals

United Nations Draft Universal Declaration on the Independence of Justice

B. Regional Conventions

Organisation of African Unity, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982)

Non-binding regional instruments:

African Commission on Human and Peoples' Rights Resolution on the Right to Recourse and Fair Trial

The Legal Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government as agreed by law ministers and endorsed by the Commonwealth heads of government meeting, Abuja, Nigeria, 2003

C. Domestic legislation

The Constitution of Kenya 2010

The Kenya Defence Forces Act

Judicial Services Act

LIST OF CASES

A. Domestic cases

Kenya

Moses Wamalwa Mukamari v John O. Makali & 3 Others Civil Suit No. 42 of 2012

Peter M Kariuki v Attorney General [2014] eKLR

R v Makadara Chief Magistrate & 3 Others Ex-Parte Wilberofrce Nyamboga Mariaria [2017] eKLR.

Canada

R v Généreux [1992] 1 SCR 259

Valente v Queen [1985] 2 SCR 704

United Kingdom

R v Sussex Justices ex parte McCarthy [1924] 1 KB 256

Sirros v Moore [1975] QB 118

B. Regional cases

African Commission on Human and Peoples' Rights

Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria, ACmHPR Comm. 218/98, 14 Annual Activity Report

Constitutional Rights Project (in respect of Akamu and Others) v Nigeria, ACmHPR Comm. 60/91, 13 Annual Activity Report

Gunme and others v Cameroon, ACmHPR Comm. 266/03, 26 Annual Activity Report (2009)

Lawyers for Human Rights v Swaziland, ACmHPR Comm. No. 251/2002, 18 Annual Activity Report (2005)

Malawi African Association and Others v Mauritania, ACmHPR Comm. 54/91, 61/91, 98/93, 164 – 196/97, 13 Annual Activity Report (2000)

Media Rights Agenda and Others v Nigeria ACmHPR Comm. 105/93, 128/94, 130/94, 152/96, 12 Annual Activity Report

European Court of Human Rights

Daktaras v Lithuania, ECtHR Judgement of 10 October 2000

Incal v Turkey, ECtHR Judgement of 9 June 1998

Kyprianou v Cyprus, ECtHR Judgment of 15 December 2005

Micallef v Malta, ECtHR Judgment of 15 October 2009

Morice v France, ECtHR Judgment of 23 April 2015

Nicholas v Cyprus, ECtHR Judgment of 9 January 2018

Padovani v Italy, ECtHR Judgment of 26 February 1993

Tierce and Others v San Marino, ECtHR Judgment of 25 July 2000

Inter-American Court of Human Rights

Castillo Petruzzi et al. v Peru, IACtHR Case Judgment of 30 May 1999 (Merits, Reparations and Cost)

Inter-American Commission of Human Rights

Guy Malari v Haiti, IACmHR Case No. 12.355 (2002), para. 74.

C. International cases

United Nations Human Rights Committee

Arvo O. Karttunen v Finland, CCPR Comm. No. 387/1989 (23 October 1992)

Barry Stephen Haward v Norway, CCPR Comm. No. 451/1991 (15 July 1994)

M Gonzalez del Rio v Peru CCPR Comm. No. 263/1987 (28 October 1992)

Madani v Algeria, CCPR Comm. No. 1172/2003 (28 March 2007)

Olá Bahamonde v Equatorial Guinea, CCPR Comm. No. 468/1991 (20 October 1993)

LIST OF ABBREVIATIONS

ACmHPR	African Commission on Human and People's Rights
CCPR	Covenant on Civil and Political Rights
ECtHR	European Court of Human Rights
GC	General Comment
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
KDF	Kenya Defence Forces
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNTS	United Nations Treaty Series

ABSTRACT

The right to fair trial encompasses a bundle of other rights, most notably the right to an independent and impartial tribunal. The two concepts of independence and impartiality have been taken to be one but, in actuality, there are two distinct concepts. The objective of this study was to decipher the meaning of the requirement of independence and impartiality of a tribunal and analyse the same as is applicable to military courts, before examining the compliance of Kenyan courts martial with the requirement.

This study began by conceptualising the rule of law as the principle underpinning the right to fair trial and consequently, the right to an independent and impartial tribunal. An independent and impartial judiciary and the rule of law are intrinsically linked - the principal role of an independent judiciary is to uphold the rule of law while the key link to fostering and establishing the rule of law is ensuring an independent judiciary.¹

This study further elaborated the terms ‘independence’ and ‘impartiality’ before analyzing the constituent elements of each component of the requirement of independence and impartiality. Thereafter, this study examined the compliance of the courts martial with the requirement of independence and impartiality of a tribunal. It was found that the courts martial lack sufficient guarantees for independence and impartiality and therefore cannot be said to be independent and impartial. This study concluded by recommending that the KDF Act be amended to secure guarantees of independence and impartiality of the courts martial in the law.

¹ Kelly W, ‘An independent judiciary: The core of the rule of law’ presented at the International Centre for Criminal Justice Reform and Criminal Justice Policy in Vancouver, Canada, 2002, 2.

CHAPTER ONE

1.1 Background of the study

A constituent of the right to fair trial relates to the character of the tribunal before which a defendant is tried.² International human rights law reflects the fundamental precept of the rule of law that trial should be by an independent and impartial tribunal that is established by law and is jurisdictionally competent to hear a case.³ The United Nations Human Rights Committee in General Comment 32 has stated that the aforementioned requirement applies in the same manner to military courts. However, there is dissimilarity over the meaning of independence and impartiality, with the two concepts often being taken to be one as opposed to two distinct concepts, each with its own meaning. Moreover, the interaction of the Defence Forces with the executive arm of government brings into question the independence and impartiality of courts martial. The requirement of independence and impartiality is further complicated when military courts have jurisdiction to try civilians.

In order to analyse the full effect of trials in military courts, the study will analyse the meaning of independence and impartiality as propounded by General Comment 32, various authors as well as international and regional instruments and courts. As it stands, the International Convention on Civil and Political Rights (ICCPR) and authors such as Louise Doswald-Beck have identified a two-pronged standard to judicial independence and impartiality. An analysis of the same will identify the threshold of independence and impartiality of a tribunal which will be used to determine whether the Kenyan courts martial are indeed independent and impartial.

1.2 Statement of the problem

The right to a fair trial, as guaranteed in various international and regional human rights instruments, is a key pillar of any judicial system worldwide. Encased in the right to a fair trial is a bundle of other rights, such as the right to a competent, independent and impartial tribunal.

² Marks S and Clapham A, *International human rights lexicon*, Oxford University Press, Oxford, 2005, 154.

³ Marks and Clapham, *International human rights lexicon*, 154.

Despite being two concepts, independence and impartiality have been taken to mean one thing and varying interpretations of the requirement have been rendered. In addition, many questions abound over the independence and impartiality of military courts as they are tribunals exercising a judicial function but mainly serving persons under the executive arm of government. This dissertation consequently seeks to decipher the meaning of independence and impartiality in so far as military courts are concerned and to determine whether or not the Kenyan courts martial are indeed independent and impartial.

1.3 Purpose of the study

To analyse the meaning of impartiality and independence within the context of military courts and thereafter to find out whether the Kenyan courts martial meet the threshold of independence and impartiality of a tribunal.

1.4 Hypothesis

The Kenyan courts martial do not meet the threshold of independence and impartiality of a tribunal.

1.5 Research questions

- i. What is the meaning of the terms ‘independence’ and ‘impartiality’?
- ii. Do the above terms apply to courts martial in the same manner as ordinary civil courts?
- iii. Do the Kenyan courts martial meet the threshold of independence and impartiality?

1.6 Justification of the study

While military courts are recognised in the Constitution as part of the courts comprising the justice system in Kenya, little is known about how such courts function. Part of the questions raised whenever there is mention of the courts martial is whether such courts are independent and impartial, given that they seem to operate under the executive arm of government despite

being judicial organs. This study thus seeks to determine whether, by their very nature, constitution and function, courts martial are independent and impartial tribunals.

1.7 Limitation of the study

This study does not examine summary disciplinary proceedings but rather constricts itself to trials conducted by courts martial.

1.8 Definition of terms

Military court

A military court is a court that is responsible for the trial and punishment of an offence against military law. This term means the same as, and has been used interchangeably with, military tribunal and court martial.

Independence and impartiality are other key terms in this study. However, they are defined and elaborated in Chapter Three.

1.9 Chapter summary

Chapter 1: Introduction

This is the introduction of the study. This chapter provides the definition of key words used in the dissertation, in addition to generally mapping out the study and outlining its justification.

Chapter 2: The Rule of Law

This chapter introduces the doctrine of the rule of law as the bedrock on which the legal requirements of independence and impartiality of a tribunal are hinged. It further outlines the precepts of the rule of law, a critique of the doctrine and the link between it and the dual requirement of independence and impartiality.

Chapter 3: Judicial Independence and Impartiality: Meaning and Elements

Chapter 3 provides the meaning of the terms ‘independence’ and ‘impartiality’ through an examination of the legal texts that outline and elaborate the dual requirement. It breaks down the two concepts into their constituent elements and establishes the threshold to which the independence and impartiality of an ordinary civil tribunal must be weighed against. This chapter further examines whether the standard of independence and impartiality as applies to ordinary civil courts is also applicable to military courts.

Chapter 4: Compliance of the Courts Martial with the Independence and Impartiality Requirement: Analysis, Conclusion and Recommendations

This chapter locates the courts martial in the structure of courts in Kenya and outlines the general structure of the courts martial. It goes on to apply the test of independence and impartiality to the courts martial before giving providing a conclusion and recommendations.

CHAPTER TWO

CONCEPTUALIZING THE RULE OF LAW

2.1 Introduction

“The greatness of any nation lies in its fidelity to the Constitution...and adherence to the rule of law.”

Maraga CJ, Chief Justice of Kenya

The rule of law is the most important political ideal today yet there is much confusion about what it means and how it works.⁴ Brian Tamanaha writes that disagreement exists about what the rule of law means amongst casual users of the phrase, government officials and theorists.⁵ Thus, the danger of such rampant uncertainty is that the rule of law may devolve into an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments.⁶

Although credit for coining the term ‘rule of law’ is usually given to Professor A.V. Dicey, it is widely accepted that he did not invent the idea behind it.⁷ Thomas Bingham has traced the idea back to Aristotle,⁸ who quipped that, “...the rule of law is preferable to that of any individual”.⁹ The concept of the rule of law can further be traced back to John Locke who acknowledged that “all the power the government has, being only for the good of the society, ought not to be arbitrary and at pleasure; so it ought to be exercised by established and

⁴ Tamanaha B, *On the Rule of Law History and Politics*, Cambridge University Press, New York, 2004, 1.

⁵ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 114.

⁶ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 114.

⁷ Bingham T, *The Rule of Law*, Penguin Books, London, 2011, 3.

⁸ Bingham T, *The Rule of Law*, 3.

⁹ Aristotle, *Politics Book III*, 1286,78.

promulgated laws in order that both the people may know their duty and be safe and secure within the limits of the law; and the rulers too kept within their bounds.”¹⁰

According to Brunella Casalini, the formalistic conception of the rule of law recognises the existence of general rules, the coherent, stable application of law, the non-retroactivity of law, and the separation between the organ responsible for the production of legislation and administration as an intrinsic value of the legal system.¹¹ The existence of a legal system endowed with such characteristics is said to make the actions and behaviours of rulers predictable and therefore increasing the freedom of the citizen, freeing him or her from the fear and insecurity that come from living under an arbitrary government.¹² The role of the rule of law, according to the formalistic conception of it put forth by Casalini, is thus purely negative.¹³ It minimizes the dangers deriving from the arbitrary exercise of political power.¹⁴

2.2 The Diceyan conception of the rule of law

Dicey gave three meanings to the rule of law.¹⁵ Of the first, he wrote that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner, before the ordinary courts of the land.¹⁶ Lord Bingham explained this to mean that if anyone is to be punished, it must be for a proven breach of the established law of the land.¹⁷ Bingham adds that the said breach must be one established before the ordinary courts of the land, not a tribunal of members picked to do the government’s bidding and consequently lacking the independence and impartiality which are expected of judges.¹⁸

¹⁰ Locke J, *Second Treaties of Government*, 1821, 47; as quoted in Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’ in Costa P, Zolo D (eds), *The rule of law: History, theory and criticism* Springer, Dordrecht, 2007, 214.

¹¹ Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’, 214.

¹² Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’, 214.

¹³ Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’, 214.

¹⁴ Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’, 214.

¹⁵ Bingham T, *The rule of law*, 3.

¹⁶ Dicey A, *An introduction to the study of the law of the constitution*, 188; as quoted in Bingham, *The Rule of Law*, 3.

¹⁷ Bingham T, *The rule of law*, 3.

¹⁸ Bingham T, *The rule of law*, 4.

Dicey explained the second meaning of the rule of law as being that every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary courts.¹⁹ The principle of the rule of law demands more than the mere equality of all before the law; it imposes the submission of everyone to the same laws administered by same courts.²⁰ Dicey thus splits the liberal doctrine of the uniqueness of legal status into two principles: that law should be the same for all and so should the jurisdiction.²¹ Therefore, no one is above the law and all are subject to the same law administered in the same courts.²²

The third meaning of rule of law, as deciphered by Dicey, remains largely controversial. Dicey explained, “We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before courts; whereas [in] many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution”.²³ Dicey’s explanation has been understood to mean that the fundamental rights of the individual are protected by the ordinary remedies of the common law provided by the ordinary courts, rather than by a Constitution.²⁴ However, this principle is not a general one, but rather a special principle, applying specifically to English institutions.²⁵ Consequently, Dicey does not treat this third aspect of the rule of law as a principle, unlike the others, and omits to stress its normative valence.²⁶ The third aspect of the rule of law is therefore not presented as a principle but as a ‘formula’ clarifying that the laws are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.²⁷

¹⁹ Dicey A, *An introduction to the study of the law of the constitution*, 188; as quoted in Bingham, *The Rule of Law*, 4.

²⁰ Santoro E, ‘The rule of law and the “liberties of the English”’: The interpretation of Albert Venn Dicey’ in Costa P, Zolo D (eds), *The rule of law: History, theory and criticism* Springer, Dordrecht, 2007, 164.

²¹ Santoro E, ‘The rule of law and the “liberties of the English”’: The interpretation of Albert Venn Dicey’, 164.

²² Bingham T, *The rule of law*, 4.

²³ Dicey A, *An introduction to the study of the law of the constitution*, 195; as quoted in Bingham, *The Rule of Law*, 4.

²⁴ Dicey A, *Introduction to the study of the law of the constitution*, 10ed, Macmillan, London, 1961, 203.

²⁵ Beaulac S, ‘The rule of law in international law today’ in Palombella G and Walker N, *Relocating the rule of law*, Hart Publishing, Oxford, 2009, 199.

²⁶ Santoro E, ‘The rule of law and the “liberties of the English”’: The interpretation of Albert Venn Dicey’, 164.

²⁷ Dicey A, *An introduction to the study of the law of the constitution*, 121.

The Diceyan conception of the rule of law is not without criticism. Dicey, for one, concentrated on the situation and circumstances prevailing in the United Kingdom (UK) at the time of his writing.²⁸ For instance, the unique history of running government on the wheels of a largely unwritten constitution could have driven the UK to a constitutional scheme whereby ordinary courts, rather than the constitution, are at the heart of the rule of law.²⁹ Thus, Dicey's focus on the ordinary courts of the land as the bedrock of the rule of law could not realistically apply, for instance, to the developing countries of Africa, where the courts are largely out of reach for the poor and ignorant.³⁰ In addition, Dicey's conception has been criticised for favouring judicial legislation that makes the law less, and not more, certain.³¹ Dicey has also been criticised for having a narrow conception of state power with the judicial branch being the passive branch of government in the sense that its operation depended primarily on mobilisation of the law by private citizens whose mobilisation, in turn, remains largely dependent on their power to hire legal services and partly on the executive branch of government, especially the police and other security agencies.³²

2.3 Hayek's contribution to the rule of law

Half a century after Dicey, Hayek pressed a more sophisticated case for the rule of law.³³ According to Hayek, all rule of law systems possess three attributes: generality, equality and certainty.³⁴ Generality requires that the law be set out in advance in abstract terms not aimed at any particular individual.³⁵ The law thus applies, without exception, to everyone whose conduct falls within the prescribed conditions of application,³⁶ effectively considering all

²⁸ Ambani J, Mbondeniyi M, *The new constitutional law of Kenya: Principles, government and human rights*, Claripress Limited, Nairobi, 2012, 50.

²⁹ Ojwang J, *Constitutional development in Kenya: Institutional adaptation and social change*, ACTS Press, Nairobi, 1990, 9.

³⁰ Ojwang J, *Constitutional development in Kenya: Institutional adaptation and social change*, 9.

³¹ Gutto B, 'The rule of law, democracy and human rights: Whither Africa?' *East African Journal of Peace and Human Rights* 1 (1996), 130.

³² Gutto B, 'The rule of law, democracy and human rights: Whither Africa?', 130.

³³ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 65.

³⁴ Hayek F, *The political idea of the rule of law*, National Bank of Egypt Printing Press, Cairo, 1955, 34.

³⁵ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 66.

³⁶ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 66.

subjects collectively and all actions in the abstract and not any individual nor any specific action.³⁷ Hayek notes that the separation of powers between the legislature and judiciary is virtually mandated by the attribute of generality for it is only through such that the law can be set out in abstract terms in advance of its application to any particular individual.³⁸ Therefore, legislative and judicial separation is an integral part of the rule of law.³⁹ Equality requires that the laws apply to everyone without making arbitrary distinctions among people.⁴⁰ Where distinctions exist, they must be approved by a majority of the people inside as well as outside the group targeted for differential treatment in order to be legitimate.⁴¹ Certainty, on the other hand, requires that those who are subject to the law be able to predict reliably what rules will be interpreted and applied.⁴²

2.4 Precepts of the rule of law

Bingham advances eight precepts of the rule of law. However, the precept upon which this dissertation is hinged upon is the seventh precept, which provides that adjudicative procedures provided by the state should be fair.⁴³ He goes on to explain that the right to a fair trial is a cardinal requirement of the rule of law.⁴⁴ The right to fair trial is a right to be enjoyed, obviously and pre-eminently, in a criminal trial, but it also extends beyond a criminal trial.⁴⁵ Fairness means fairness to both sides, not just one.⁴⁶ Consequently, the procedure followed in a given trial must give a fair opportunity for the prosecutor or claimant to prove their case, as also to the defendant to rebut it.⁴⁷ A trial is not fair if the procedural dice are loaded in favour of one side or the other; that is, if there is no equality of arms.⁴⁸ Bingham further notes that fairness is

³⁷ Rousseau J, *On the social contract*, 1762, 212-217.

³⁸ Hayek F, *The constitution of liberty*, Chicago University Press, Chicago, 1960, 210 – 212.

³⁹ Hayek F, *The constitution of liberty*, 210 - 212.

⁴⁰ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 66.

⁴¹ Hayek F, *The constitution of liberty*, 207 - 208.

⁴² Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 66.

⁴³ Bingham T, *The Rule of Law*, 90.

⁴⁴ Bingham T, *The Rule of Law*, 90.

⁴⁵ Bingham T, *The Rule of Law*, 90.

⁴⁶ Bingham T, *The Rule of Law*, 90.

⁴⁷ Bingham T, *The Rule of Law*, 90.

⁴⁸ Bingham T, *The Rule of Law*, 90.

a constantly evolving concept.⁴⁹ Therefore, a time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all, and in retrospect, most legal systems operating today will be judged to be defective in respects not yet recognised.⁵⁰

2.5 Judicial independence and impartiality as tenets of the rule of law

Essential to the rule of law in any land is an independent judiciary - judges not under the thumb of other branches of government, and therefore equipped to administer the law impartially.⁵¹ The division of the government into separate compartments, with the application of law entrusted to an independent judiciary, promotes liberty by preventing the accumulation of total power in any single institution.⁵² Montesquieu argues that were judicial power joined with the legislative, the life and liberty of the subject would be subject to arbitrary control as the judge would be the legislator.⁵³ On the other hand, were judicial power joined to executive power, the judge might behave with violence and oppression.⁵⁴ Allocating the application of law to an independent judiciary ensures that a consummately legal institution is available to check the legality of governmental action.⁵⁵ However, judicial independence can be shattered if the society law exists to serve does not take care to assure its preservation.⁵⁶ Bingham explains that the guarantee of the independence of judicial decision-makers is essential to their integrity.⁵⁷ Further, Bruce Fein and Burt Neuborne, two US legal scholars, in a co-authored essay quipped that judicial independence strengthens ordered liberty, domestic tranquillity, the

⁴⁹ Bingham T, *The Rule of Law*, 90.

⁵⁰ Bingham T, *The Rule of Law*, 91.

⁵¹ Ginsburg R, Hartnett M, Williams W, *My Own Words*, Simon & Schuster, New York, 2016, 215.

⁵² Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 35.

⁵³ Pangle T, *Montesquieu's philosophy of liberalism: A commentary on the spirit of the laws*, Chicago University Press, Chicago, 1989, 162.

⁵⁴ Pangle T, *Montesquieu's Philosophy of Liberalism: A Commentary on the Spirit of the Laws*, 162.

⁵⁵ Tamanaha B, *On the Rule of Law: History, Politics, Theory*, 35.

⁵⁶ Ginsburg *et al*, *My Own Words*, 215.

⁵⁷ Bingham T, *The Rule of Law*, 91.

rule of law and democratic ideals.⁵⁸ It would thus be folly to squander this priceless constitutional gift to placate the clamours of benighted partisan politics.⁵⁹

The principle of judicial independence calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups as well as their own colleagues, particularly those senior to them.⁶⁰ Thus, the central idea behind an independent judiciary is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests and persecutive inclinations upon the judiciary.⁶¹ Decision-makers must therefore be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.⁶²

Closely allied to the requirement of independence is the requirement that a decision-maker be impartial.⁶³ This means that the decision-maker, to the greatest extent possible, should approach the issues at hand with an open mind, ready to respond to the legal and factual merits of the case.⁶⁴ A decision-maker who is truly independent of all influences extraneous to the case to be decided is likely to be impartial, but may nonetheless be subject to personal predilections or prejudices which may pervert his or her judgment.⁶⁵ As judges and other decision-makers are human beings, they are inevitably, to some extent, the product of their own upbringing, experience and background.⁶⁶ Thus, the mind which they bring to the decision of issues cannot be a blank canvas.⁶⁷ Only the professional ability of judges, whose thought remains closed like a monologue within the courts is relied upon for the rational reconstruction

⁵⁸ Fein B, Neuborne B 'Why should we care about independent and accountable judges?' 84 *Journal of the American Judicature Society*, 2 (2000), 4.

⁵⁹ Fein B, Neuborne B 'Why should we care about independent and accountable judges?', 4.

⁶⁰ Bingham T, *The rule of law*, 92.

⁶¹ Shklar J, 'Political theory and the rule of law' in Hutcheson A, Monahan P (eds), *The rule of law: Ideal or ideology*, Carswell, Toronto, 1987, 5.

⁶² Bingham T, *The rule of law*, 92.

⁶³ Bingham T, *The rule of law*, 92.

⁶⁴ Bingham T, *The rule of law*, 92.

⁶⁵ Bingham T, *The rule of law*, 92.

⁶⁶ Bingham T, *The rule of law*, 92.

⁶⁷ Bingham T, *The rule of law*, 92.

of the law.⁶⁸ In applying the law, the judge must act according to criteria of impartiality and neutrality, without engaging in judgments tied to some subjective conception of justice.⁶⁹ When the judge goes beyond the strict application of the norm, he transforms the rule of law into the ‘rule of men’, allocating himself an arbitrary power.⁷⁰ However, judges should seek to alert themselves to, and so neutralise, any extraneous considerations which might bias their judgement, and if they are conscious of bias, or of matters which might give rise to an appearance of bias, they must decline to make the decision in question.⁷¹

2.6 Military justice and the rule of law

A military justice system could be judged to be either fair trial compliant or non-fair trial compliant. Without any doubt, a non-fair trial compliant military justice system undermines the rule of law in many ways.⁷² Ronald Naluwairo writes that such a justice system can lead to the encroachment and usurpation of the jurisdiction of ordinary courts.⁷³ Further, a fair trial non-compliant military justice system can result in military tribunals disrespecting, defying and circumventing decisions of ordinary courts which amounts to gross violation of the rule of law.⁷⁴ It is a cardinal requirement for ensuring the rule of law that all organs and agencies of the state including the army and military tribunals strictly abide by the judgments and orders of the judiciary, even when they do not agree with them.⁷⁵ Moreover, a fair trial non-compliant military justice system can have serious implications for the protection, respect and enjoyment

⁶⁸ Habermas J, *Between facts and norms: Contribution to a discourse theory of law and democracy*, The MIT Press, Cambridge, 1996, 222.

⁶⁹ Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’, 214.

⁷⁰ Casalini B, ‘Popular sovereignty, the rule of law and the “rule of judges” in the United States’, 214.

⁷¹ Bingham T, *The rule of law*, 93.

⁷² Naluwairo R, ‘Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda’s military justice system’ Unpublished LLD Thesis, University of London, November 2011, 222.

⁷³ Naluwairo R, ‘Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda’s military justice system’, 222.

⁷⁴ Naluwairo R, ‘Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda’s military justice system’ 222.

⁷⁵ Naluwairo R, ‘Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda’s military justice system’, 222.

of individual human rights and fundamental freedoms.⁷⁶ Naluwairo emphasises that the rule of law is a dynamic concept that is essentially concerned with, and entails, the protection and respect of fundamental human rights and freedoms.⁷⁷ Thus, the fact of non-compliance with the right to a fair trial is in itself a violation of the fundamental human rights considered key in administering justice in a democratic society.⁷⁸ In addition, a fair trial non-compliant military justice system can also be easily manipulated to violate and abuse all other human rights and freedoms.⁷⁹ On the other hand, Naluwairo submits that a fair trial compliant military justice system (that is, a system with competent, independent and impartial tribunals) would have adequate checks and balances to prevent and ensure that military tribunals do not deliberately exceed their mandates by encroaching on the jurisdiction of ordinary courts.⁸⁰

2.7 Conclusion

The function of any judicial system is to uphold the rule of law.⁸¹ To be able to do that, the system must have power to try and decide cases brought before the courts according to the established law.⁸²

The rule of law serves numerous ends.⁸³ The nature of judicial decisions, as a result of the rule of law, becomes subjected to the law and is legitimised exclusively by such subjection.⁸⁴ The

⁷⁶ Naluwairo R, 'Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda's military justice system', 224.

⁷⁷ Naluwairo R, 'Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda's military justice system', 224.

⁷⁸ Naluwairo R, 'Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda's military justice system', 224.

⁷⁹ Naluwairo R, 'Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda's military justice system', 224.

⁸⁰ Naluwairo R, 'Military justice, human rights and the law: An appraisal of the right to fair trial in Uganda's military justice system', 222.

⁸¹ *R v Makadara Chief Magistrate & 3 Others Ex-Parte Wilberofrce Nyamboga Mariaria* [2017] eKLR.

⁸² *R v Makadara Chief Magistrate & 3 Others Ex-Parte Wilberofrce Nyamboga Mariaria*.

⁸³ Ambani J, Mbondenyei M, *The new constitutional law of Kenya: Principles, government and human rights*, 57.

⁸⁴ Ferrajoli L, 'The past and the future of the rule of law' in Costa P, Zolo D (eds), *The rule of law: History, theory and criticism* Springer, Dordrecht, 2007, 327.

rule of law also grounds the whole combination of guarantees – from legal certainty to equality before the law and freedom against arbitrariness, from the independence and impartiality of judges to the burden of proof being on the prosecutor, and to the rights of the defendant.⁸⁵ Therefore, the rule of law is a concept that should be employed to safeguard and advance the political and civil rights of the individual in a free society.⁸⁶

⁸⁵ Ferrajoli L, ‘The past and the future of the rule of law’, 327.

⁸⁶ Ambani J, Mbondenyei M, *The new constitutional law of Kenya: Principles, government and human rights*, 57.

CHAPTER THREE

JUDICIAL INDEPENDENCE AND IMPARTIALITY: MEANING AND ELEMENTS

3.1 Introduction

The previous chapter sought to elaborate the meaning of the principle of the rule of law and in doing so set out an important precept of the rule of law – fair adjudicative processes. At the heart of fair adjudicative processes is independent and impartial tribunals. Consequently, the existence of independent and impartial tribunals is at the heart of a state that prides itself in adhering to the rule of law. As Brian Dickson, former Chief Justice of the Supreme Court of Canada once explained:⁸⁷

The tradition of law which we share is a living thing, built by lawyers and judges imbued with a love of individual freedom and a dedication to justice for all, according to the law...it is only where the law is interpreted by an independent judiciary with vision, a sense of purpose and profound sensitivity to society's values that the rule of law is safe.

The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law.⁸⁸ Thus, the key link to fostering and establishing the rule of law is ensuring an independent judiciary and providing the environment for a fair and equitable legal system where an independent judiciary can flourish.⁸⁹

As judicial independence is integral to the rule of law, which is a necessary presupposition for the protection of individual rights, it follows that judicial independence is integral to the assertion of human rights,⁹⁰ key among them the right to fair hearing. The right to an independent and impartial tribunal is an essential tenet of a fair adjudicative process. As part

⁸⁷ <http://www.lawlessons.ca/sites/default/files/handouts/Handout-4-4-2.pdf> on 4 February 2018.

⁸⁸ Kelly W, 'An independent judiciary: The core of the rule of law' presented at the International Centre for Criminal Justice Reform and Criminal Justice Policy in Vancouver, Canada, 2002, 2.

⁸⁹ Kelly W, 'An independent judiciary: The core of the rule of law', 20.

⁹⁰ Warren M, 'Does judicial independence matter?', presented at University of Melbourne Law School 27 May 2010.

of the bundle of rights that constitute the right to fair hearing, Article 50 of the Constitution requires that a dispute be resolved by an independent and impartial tribunal.

The Universal Declaration on Human Rights, adopted by the United Nations General Assembly in 1948, further recognizes that everyone is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal in so far as the determination of a criminal charge is concerned. This requirement is also enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).⁹¹ The United Nations Human Rights Committee (HRC), in elaborating Article 14 of the ICCPR, stated unequivocally that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.⁹² Although the ICCPR provides for the right to an independent and impartial tribunal, it does not elaborate upon the content, nature and scope of this right.⁹³ However, what is clear is that, as the HRC has emphasised, it cannot be left to the sole discretion of domestic law to determine the essential content of the guarantees contained in the right to a fair trial, which includes the right to an independent and impartial tribunal.⁹⁴

Glancing at the regional legal framework, Article 7 (1) of the African Charter on Human and Peoples' Rights (Banjul Charter) guarantees the right to have one's cause heard, a right which encompasses the right to be tried within a reasonable time by an impartial court or tribunal. The African Commission on Human and Peoples' Commission Rights has to wit asserted that Article 7 should be considered non-derogable as it provides minimum protection to citizens.⁹⁵

Despite consensus on the non-derogable and illimitable status of the above provisions, there is dissimilarity over the meaning of judicial independence and impartiality. This chapter thus

⁹¹ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (ratified by Kenya in 1972).

⁹² *M Gonzalez del Rio v Peru* CCPR Comm. No. 263/1987 (28 October 1992) ¶ 5.2.

⁹³ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal' 12 African Human Rights Law Journal (2012), 450.

⁹⁴ CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, 1.

⁹⁵ *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, ACmHPR Comm. 218/98, 14 Activity Report, para. 7.

seeks to provide the meaning of independence and impartiality of a tribunal, detailing the elements of each, and to analyse the application of the same to military tribunals.

3.2 Judicial Independence

The right to an independent tribunal is perhaps the most important guarantee in ensuring a fair trial and possibly the most important canon in the administration of justice in any democratic society.⁹⁶ It is a major prerequisite for access to justice without which justice remains illusory.⁹⁷ Only an independent tribunal is able to render justice impartially on the basis of law.⁹⁸ In addition, the right to an independent tribunal is critical in the realisation of the rule of law. The right is further indispensable in the protection of other human rights and fundamental freedoms.⁹⁹ Consequently, the right to an independent tribunal occupies a central place in international human rights law; its centrality being reflected in the fact that, along with the right to a competent and impartial tribunal, it is an absolute right, meaning that it is not subject to any exceptions.¹⁰⁰

An independent judiciary is the cornerstone of democracy.¹⁰¹ The principle of the independence of the judiciary is underpinned by several international instruments.¹⁰² However, the protection of the right to an independent tribunal in treaties is not so much for the benefit of the persons who exercise judicial power but rather to ensure that the persons who hold judicial office uphold the rule of law and the rights and freedoms of accused persons without

⁹⁶ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 451.

⁹⁷ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 451.

⁹⁸ Office of the High Commissioner for Human Rights, *Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers*, 2003, 115.

⁹⁹ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 451.

¹⁰⁰ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 451.

¹⁰¹ Franceschi L, 'Why is parliament involved in the judiciary saga?' available at <https://www.nation.co.ke/oped/blogs/dot9/Why-is-Parliament-involved-in-Judiciary-saga/1959700-1973340-w67hvr/index.html> accessed 23 January 2018.

¹⁰² Franceschi L, 'Why is parliament involved in the judiciary saga?'.

fear and interference.¹⁰³ The Commonwealth (Latimer House) Principles on the Three Branches of Government similarly emphasise that an independent and impartial tribunal, and by extension an honest and competent judiciary, is integral to upholding the rule of law, engendering public confidence and dispensing justice.¹⁰⁴

Judicial independence is an important principle that has classically been taken to mean that judges should be free from executive interference.¹⁰⁵ However, in modern times, the concept has correctly been understood to require judges to be free from outside pressure, notwithstanding its source.¹⁰⁶ Thus, the definition of judicial independence can no longer be restricted to the prohibition of state interference with the judiciary as non-state actors such as the media and multinational corporations could also pose a threat to judicial independence.¹⁰⁷

The requirement of independence refers, in particular, to: the procedure and qualifications for the appointment of judges; guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and legislature.¹⁰⁸ Therefore, independence refers to the individual judges (individual independence) and the judiciary as a whole (institutional independence).¹⁰⁹

¹⁰³ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 451.

¹⁰⁴ Article VI, Commonwealth principles on the accountability of and the relationship between the three branches of government as agreed by law ministers and endorsed by the Commonwealth heads of government meeting, Abuja, Nigeria, 2003.

¹⁰⁵ Ambani J, Mbondenye M, *The new constitutional law of Kenya: Principles, government and human rights*, Claripress Limited, 2012, 71.

¹⁰⁶ Ambani J, Mbondenye M, *The new constitutional law of Kenya: Principles, government and human rights*, 71.

¹⁰⁷ Ambani J, Mbondenye M, *The new constitutional law of Kenya: Principles, government and human rights*, 71.

¹⁰⁸ *CCPR General Comment 32*, 5.

¹⁰⁹ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 2007, 17.

The rationale behind the principle of judicial independence is to protect individuals against abuses of power.¹¹⁰ The independence of the judge is indispensable to impartial justice under the law.¹¹¹ International law consequently imposes a positive obligation on States to take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making.¹¹² This obligation has been echoed by the United Nations, which requires the State to guarantee independence of the judiciary.¹¹³ Article 26 of the Banjul Charter places an obligation on States to guarantee the independence of courts. In interpreting this provision, the African Commission on Human and People's Rights has stated the establishment of a court, by a State, that is controlled by the executive would constitute a breach of the Article 26 obligation.¹¹⁴ The Commission has further called on African countries to repeal all legislation that is inconsistent with principles of judicial independence, to refrain from taking actions that could threaten the independence and security of judges as well as magistrates, and to incorporate universal principles of judicial independence in their legal systems.¹¹⁵ The Basic Principles of the Independence of the Judiciary further calls on States to guarantee the independence of the Judiciary through national law. Thus, the constitution, laws and policies of a country must ensure that the system is truly independent from other branches of the State.¹¹⁶ Entities within a State, whether governmental or not, also have a duty to respect and observe the independence of the judiciary.¹¹⁷ Judges themselves, in the Universal Charter of the Judge, have stated that all institutions and authorities, whether national or international, must respect, protect and defend the independence of the judiciary and its officials.¹¹⁸

¹¹⁰ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 4.

¹¹¹ Art 1, *Universal Charter of the Judge*, 17 November 1999.

¹¹² *Concluding observations of the Human Rights Committee, Slovakia*, CCPR/C/79 Add. 79 (4 August 1997), para. 18.

¹¹³ Principle 1, *Basic Principles on Independence of the Judiciary*, 1985.

¹¹⁴ *Malawi African Association and Others v Mauritania*, ACmHPR Comm. 54/91, 61/91, 98/93, 164 – 196/97, 13 Annual Activity Report (2000).

¹¹⁵ African Commission on Human and Peoples' Rights, *Resolution on the right to recourse and fair trial*, 1996.

¹¹⁶ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 4.

¹¹⁷ Principle 1, *Basic Principles on Independence of the Judiciary*.

¹¹⁸ Art 1, *Universal Charter of the Judge*.

The value of judicial independence is not limited to the protection of the citizen from power-abuse, it also feeds into the general quality of governance and of the interplays of the different organs of government.¹¹⁹ This principle has found expression in the Bangalore Principles of Judicial Conduct, which were adopted by the Judicial Group on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights, as:

A judiciary of undisputed integrity is the bedrock institution for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark against any encroachments on rights and freedoms under the law.¹²⁰

In addition, Lord Lloyd of Hampstead further stated that if laws are to be interpreted and impartially applied, it is important that the judiciary should enjoy an independent status and be free from the political pressures engendered by association with either the executive or even the legislature itself.¹²¹

Judicial independence can be broadly categorized into institutional and individual (decisional) independence. These two categories and their elements will be discussed below.

3.2.1 Institutional Independence

The notion of institutional independence means that the judiciary ought to be independent of the other branches of government.¹²² Other branches of government have a correlative duty to respect and abide by the judgments and decisions of the judiciary.¹²³ Further, institutional independence requires that the judiciary have exclusive jurisdiction over all issues of judicial nature as well as the requisite authority to decide whether an issue before it is of judicial

¹¹⁹ Ojwang J, *Ascendant Judiciary in East Africa*, Strathmore University Press, Nairobi, 2013, 120.

¹²⁰ Bangalore Principles of Judicial Conduct, March 2007 edition.

¹²¹ Lloyd D, *The Idea of Law*, Penguin Books, London, 1973, 256 – 257.

¹²² International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 21.

¹²³ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 21.

nature.¹²⁴ As a corollary, judicial decisions cannot be changed by a non-judicial authority, except for cases of mitigation or commutation of sentences and persons.¹²⁵ Writing particularly on the judiciary and the legislature, Judge Cristi Danilet notes that institutional independence constitutes a safeguard against disagreements over rulings by other institutions and their potential refusal to comply with them.¹²⁶ Such independence is essential for upholding the rule of law and human rights.¹²⁷

Elements of institutional independence

An empowered judiciary is one that is independent from any form of interference from either state or non-state actors.¹²⁸ However, complete independence, especially from government, would be extremely difficult because the operation of the judiciary is a government responsibility, hence the reason it is considered to be one of the three arms.¹²⁹ Nonetheless, there are certain elements which, if present, would give a strong indication that the judiciary is independent.¹³⁰ These are:

¹²⁴ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 22.

¹²⁵ UN Basic Principles, principles 3 and 4.

¹²⁶ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 21.

¹²⁷ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 21.

¹²⁸ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 73.

¹²⁹ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 73.

¹³⁰ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 73.

i. Mode of appointing judges

In many countries, problems with judicial independence begin with the appointment of judges.¹³¹ Frequently, the process is politicized or dominated by the executive, a majority party in the legislature, or the judicial hierarchy.¹³² However, judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process.¹³³ Such a process should ensure, among other things: equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.¹³⁴ Influence by the executive branch over appointments, promotions or transfer policy is incompatible with the principle of judicial independence.¹³⁵

ii. Security of tenure

Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause.¹³⁶ The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures) stipulate that a judge should have a constitutionally guaranteed tenure until a mandatory retirement age or the expiry of a fixed term of office.¹³⁷ The Implementation Measures further place a duty on the state to provide a full complement of judges to discharge the work of the judiciary.¹³⁸ The UN Basic Principles on the Independence of the Judiciary provide that the term of office of judges,

¹³¹ Ambani, J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 73.

¹³² US Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality*, 2002, 39.

¹³³ Principle IV (a), *Commonwealth (Latimer House) Principles on the Three Branches of Government*, 2003.

¹³⁴ Principle IV (a), *Commonwealth Principles on the Three Branches of Government*.

¹³⁵ *Gunme and others v Cameroon*, ACmHPR Comm. 266/03, 26 Annual Activity Report (2009), para. 209.

¹³⁶ Ambani, J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 74.

¹³⁷ The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, 22 January 2010, 14.

¹³⁸ The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, 14.

conditions of service and retirement age shall be adequately secured by law.¹³⁹ Principle 18 further stipulates that judges shall be subject to removal or suspension only for reasons of incapacity or behavior that renders them unfit to discharge their duties.¹⁴⁰ The International Bar Association's Minimum Standards of Judicial Independence adds criminal acts and physical as well as mental incapacity to the grounds for dismissal of a judge.¹⁴¹

It is universally accepted that when judges can be easily or arbitrarily removed from office, they are much more vulnerable to internal or external pressures in consideration of cases.¹⁴² Security of tenure therefore means that only in exceptional circumstances that are prescribed by law may a judge be removed from office.¹⁴³ However, a law that confers powers on the head of state to appoint and remove judges threatens the security of tenure of judges and greatly undermines the independence of the judiciary.¹⁴⁴

iii. Financial security/independence

A judge may compromise justice for fear of reduction of their salary.¹⁴⁵ On the other hand, the judiciary may not be able to pursue justice effectively if its finances are controlled by another entity.¹⁴⁶ Consequently, arrangements for the protection of remuneration must be in place and adequate resources should be provided for the judicial system to operate effectively without undue constraints which may hamper the independence sought.¹⁴⁷ The salaries and pensions of judges should be adequate, commensurate with status, dignity and responsibilities of their

¹³⁹ Principle 11, UN Basic Principles on the Independence of the Judiciary.

¹⁴⁰ Principle 11, UN Basic Principles on the Independence of the Judiciary.

¹⁴¹ Article 30, International Bar Association, Minimum Standards of Judicial Independence.

¹⁴² US Agency for International Development, *Guidance for promoting judicial independence and impartiality*, 39.

¹⁴³ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 74.

¹⁴⁴ *Lawyers for Human Rights v Swaziland*, ACmHPR Comm. No. 251/2002, 18 Annual Activity Report (2005), para. 58.

¹⁴⁵ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 74.

¹⁴⁶ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 74.

¹⁴⁷ Principle IV (c) and (d), *Commonwealth Principles on the Three Branches of Government*.

office and should not be altered to their disadvantage after their appointment.¹⁴⁸ In addition, the budget of the judiciary should be established in collaboration with the judiciary, care being taken that neither the executive nor the legislative is able to exert any pressure or influence on the judiciary while setting its budget.¹⁴⁹

iv. *Structure of government*

The structural relationship between the judiciary and the rest of the government inevitably makes judges more or less vulnerable to interference.¹⁵⁰ There are two common architectural models that either undermine or enhance judicial independence.¹⁵¹ One the one hand is a judiciary which is dependent on an executive department, usually the Ministry of Justice, for administrative and budgetary functions; while on the other is a judiciary which is separate branch of government and has the same degree of self-government and budgetary control over its operations as the executive branch has over its operations.¹⁵² The former system establishes a dependent judiciary while the latter is likely to install judicial independence and autonomy.¹⁵³ The Bangalore Principles of Judicial Conduct stipulate that a judge must not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.¹⁵⁴ The African Commission on Human and Peoples' Rights held that the doctrine of separation of powers requires that the three pillars of government to exercise power independently; thus, the judiciary must be seen to be independent from the executive and parliament.¹⁵⁵ The Commission has further found that a situation where the functions and competencies of the

¹⁴⁸ The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, 14.

¹⁴⁹ The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, 17.

¹⁵⁰ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 74.

¹⁵¹ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 75.

¹⁵² Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 75.

¹⁵³ Ambani J, Mbondenyi M, *The new constitutional law of Kenya: Principles, government and human rights*, 75.

¹⁵⁴ Principle 1.3, Bangalore Principles of Judicial Conduct.

¹⁵⁵ *Gunme and others v Cameroon*, ACmHPR Comm. 266/03, 26 Annual Activity Report (2009), para. 211.

judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.¹⁵⁶

3.2.2 Individual (Decisional) Independence

While it constitutes a vital safeguard, institutional independence is not sufficient for the right to a fair trial.¹⁵⁷ Unless individual judges are free from unwarranted interferences when they decide a particular case, the individual right to receive a fair trial is violated.¹⁵⁸ Individual independence denotes that judges have both a right and a duty to decide cases before them according to the law, free from fear of reprisals of any kind.¹⁵⁹ Put in other words, judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers and decisions.¹⁶⁰

In safeguarding decisional independence, the Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration) provides that in the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors.¹⁶¹ Consequently, any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.¹⁶² Understandably, if

¹⁵⁶ *Olá Bahamonde v Equatorial Guinea*, CCPR Comm. No. 468/1991 (20 October 1993), para. 9.4.

¹⁵⁷ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 23.

¹⁵⁸ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 23.

¹⁵⁹ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 24.

¹⁶⁰ Visram A, 'Role and responsibility of the Courts under the Constitution of Kenya 2010', presented at the Judges Colloquium 2011.

¹⁶¹ The Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration), 3.

¹⁶² The Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration), 3.

judges were to be sued as a result of their judgement then they would be over-cautious and fear the consequences of their actions thus hindering the effective dispensation of justice.¹⁶³

Lord Denning aptly captured the rationale behind decisional independence in *Sirros v Moore* by stating:¹⁶⁴

Every judge of the courts of this land from the highest to the lowest should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure “that they may be free in thought and independent in judgment”, it applies to every judge, whatsoever his rank. Each should be protected from his liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself, “If I do this will I be liable in damages?” So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action.¹⁶⁵

The decisional independence of judges is guaranteed under Article 160 (5) of the Constitution, which provides that a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. The question as to whether a judicial officer can be sued in personal capacity for an act or omission in the lawful performance of a judicial function was addressed¹⁶⁶ in *Moses Wamalwa Mukamari v John O. Makali & 3 Others*.¹⁶⁷ Gikonyo J opined:

The protection offered to judicial officers in Article 160 (5) of the Constitution is inherent in the independence of the judiciary as a state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity because allowing the officer to be sued and appear in his personal capacity in a suit based on what he did in the lawful performance of a judicial function will already have blown away the very constitutional cover for the officer’s fallibility provided under Article 160 (5) of the Constitution.

¹⁶³ Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014, 480.

¹⁶⁴ Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, 480.

¹⁶⁵ [1975] QB 118 at 136.

¹⁶⁶ Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, 481.

¹⁶⁷ Civil suit no. 42 of 2012 [2012] eKLR.

Justice Gikonyo went on to outline that Article 160 (5) is not a means to avoid public scrutiny and answerability of the judicial officers but it is rather aimed at enhancing judicious actions free from extraneous factors such as fear, favour or subservience.¹⁶⁸

3.3 Judicial Impartiality

The right to a fair trial requires judges to be impartial.¹⁶⁹ The right to be tried by an impartial tribunal implies that judges (or jurors) have no interest or stake in a particular case and do not hold pre-formed opinions about it or the parties.¹⁷⁰ Thus, cases must only be decided “on the basis of facts and in accordance with the law, without any restriction”.¹⁷¹ To this end, the State, other institutions and private parties have an obligation to refrain from putting pressure on or inducing judges to rule in a certain way and judges have a correlative duty to conduct themselves impartially.¹⁷²

The UN Basic Principles on the Independence of the Judiciary spell out this requirement by the words “judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”.¹⁷³ The Council of Europe has reiterated this principle, by asserting that judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.¹⁷⁴ For its part, the Inter-American Commission on Human Rights has noted that an impartial tribunal is one of the core elements of the minimum guarantees in the administration of justice.¹⁷⁵ Further, the Human Rights

¹⁶⁸ Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, 481.

¹⁶⁹ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner’s guide No. 1*, 27.

¹⁷⁰ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner’s guide No. 1*, 27.

¹⁷¹ Principle 2, UN Basic Principles on the Independence of the Judiciary.

¹⁷² International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner’s guide No. 1*, 27.

¹⁷³ Principle 8, UN Basic Principles on the Independence of the Judiciary.

¹⁷⁴ Council of Europe, Recommendation No. R (94) principle I.2.d.

¹⁷⁵ *Guy Malari v Haiti*, IACmHR Case No. 12.355 (2002), para. 74.

Committee, has explained that impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.¹⁷⁶ The Committee has also pointed out that the right to an impartial tribunal is closely bound up with the procedural guarantees conferred on the defence.¹⁷⁷

The requirement of impartiality has two aspects.¹⁷⁸ First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other (actual or subjective impartiality).¹⁷⁹ Second, the tribunal must also appear to a reasonable observer to be impartial (apparent or objective impartiality).¹⁸⁰ These two aspects will be further discussed below:

3.3.1 Actual and apparent impartiality (subjective and objective impartiality)

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties.¹⁸¹ However, there are cases in which this bias will not be manifest but only apparent.¹⁸² That is the reason why the impartiality of courts must be examined from a subjective as well as an objective perspective.¹⁸³

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa contain detailed criteria to determine the impartiality of a tribunal and specific cases in which impartiality would be undermined. The Principles outline that impartiality could be determined on the basis of three factors: whether the position of the judicial officer allows him or her to play a crucial role in the proceedings; whether the judicial officer may have expressed an

¹⁷⁶ *Arvo O. Karttunen v Finland*, CCPR Comm. No. 387/1989 (23 October 1992).

¹⁷⁷ *Barry Stephen Haward v Norway*, CCPR Comm. No. 451/1991 (15 July 1994).

¹⁷⁸ *CCPR General Comment 32*, 5.

¹⁷⁹ *CCPR General Comment 32*, 6.

¹⁸⁰ *CCPR General Comment 32*, 6.

¹⁸¹ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 28.

¹⁸² International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 28.

¹⁸³ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 28.

opinion which would influence the decision-making; and whether the judicial officer would have to rule on an action taken in a prior capacity.¹⁸⁴ Consequently, the impartiality of a judicial body would be undermined, among other instances, when: a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party; a judicial officer secretly participated in the investigation of a case; and a judicial officer has some connection with the case or a party to the case.¹⁸⁵ If any of these circumstances present themselves, a judicial officer is under an obligation to step down.¹⁸⁶

The European Court of Human Rights makes a distinction between endeavouring to ascertain the personal conviction of a given judge in a given case, and determining whether the judge offered guarantees sufficient enough to exclude any legitimate doubt in this respect.¹⁸⁷ The first of these concepts is called subjective impartiality while the latter is referred to as objective impartiality.¹⁸⁸ Thus, trial will be unfair not only if the judge is not impartial but also if he or she is not perceived to be impartial.¹⁸⁹

The European Court of Human Rights has a long line of jurisprudence in which these two requirements of impartiality are defined.¹⁹⁰ According to the Court, a judge or tribunal will only be impartial if it passes the subjective and objective tests.¹⁹¹ The subjective test “consists in seeking to determine the personal conviction of a particular judge in a given case”.¹⁹² This entails that “no member of the tribunal should hold any personal prejudice or bias.”¹⁹³ Personal impartiality is presumed unless there is evidence to the contrary.¹⁹⁴ Determining objective impartiality, on the other hand, requires ascertaining whether the tribunal itself and, among

¹⁸⁴ Article 5, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

¹⁸⁵ Article 5, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

¹⁸⁶ Article 5, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

¹⁸⁷ *Piersack v Belgium*, ECtHR Judgement of 1 October 1982, para. 30.

¹⁸⁸ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner’s guide No. 1*, 28.

¹⁸⁹ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner’s guide No. 1*, 28.

¹⁹⁰ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner’s guide No. 1*, 28.

¹⁹¹ *Tierce and Others v San Marino*, ECtHR Judgement of 25 July 2000, para. 75.

¹⁹² *Tierce and Others v San Marino*, para. 75.

¹⁹³ *Tierce and Others v San Marino*, para. 75.

¹⁹⁴ *Daktaras v Lithuania*, ECtHR Judgment of 10 October 2000, para. 30.

other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of impartiality.¹⁹⁵ It must thus be determined whether, apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality.¹⁹⁶ The objective test mainly concerns hierarchical or other links between the judge and other protagonists in the proceedings or the exercise of different functions within the judicial process by the same person.¹⁹⁷ It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.¹⁹⁸ Under the Court's jurisprudence, if either test fails, a trial will be deemed unfair.¹⁹⁹

The concept of impartiality creates a correlative duty for judges to step down from cases in which they think they will not be able to impart justice impartially or when their actual impartiality may be compromised.²⁰⁰ In these cases, they should not expect the parties to a case to challenge their impartiality but should excuse themselves and abstain from sitting in the case.²⁰¹ To this effect, the European Court of Human Rights has established the principle that "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw".²⁰²

The Bangalore Principles of Judicial Conduct include impartiality as one of the fundamental values inherent in the judicial function. Principle 2.5 provides detailed guidelines as to the cases in which judges should disqualify themselves from a case. These include, but are not limited to, instances where:

- (i) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

¹⁹⁵ *Nicholas v Cyprus*, ECtHR Judgment of 9 January 2018, para. 49.

¹⁹⁶ *Nicholas v Cyprus*, ECtHR Judgment of 9 January 2018, para. 52.

¹⁹⁷ *Kyprianou v Cyprus*, ECtHR Judgment of 15 December 2005, para. 121.

¹⁹⁸ *Morice v France*, ECtHR Judgment of 23 April 2015, para. 77.

¹⁹⁹ International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioner's guide No. 1*, 28.

²⁰⁰ Dr. Alsheban A, 'Judicial impartiality and independence of the judiciary (comparative study)' 22 *International Organisation of Scientific Research Journal of Humanities and Social Sciences*, 5 (2017), 37.

²⁰¹ Dr. Alsheban A, 'Judicial impartiality and independence of the judiciary (comparative study)', 37.

²⁰² *Micallef v Malta*, ECtHR Judgment of 15 October 2009, para. 98.

- (ii) The judge previously served as a lawyer or was a material witness in the matter in controversy; or
- (iii) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy.

3.4 Applicability of the requirement of independence and impartiality to military courts

Having clarified in the foregoing part the meaning of judicial independence and impartiality, as well as their categories and constituent elements as applicable to civilian courts, this part of the dissertation seeks to determine whether the same meaning of independence and impartiality can be attributed to military courts.

The United Nations Human Rights Committee has unequivocally stated that the requirement of independence and impartiality applies to all courts and tribunals, whether ordinary or specialised, civilian or military.²⁰³ The Committee further stated that the dual requirement cannot be modified or limited because of the military character of the court concerned.²⁰⁴ Addressing the military courts of law, the African Commission opined that the critical factor in determining the independence and impartiality of a military tribunal was whether the process was fair, just and impartial.²⁰⁵ The Commission further stated that military tribunals must be subject to the same requirements of fairness, openness and justice, independence and due process as any other tribunal.²⁰⁶ Thus, what would cause offence is failure to observe basic or fundamental standards that would ensure fairness.²⁰⁷ It is thus clear that in the administration of justice, military courts must comply with the requirement of an independent and impartial tribunal.²⁰⁸

²⁰³ *CCPR General Comment 32*, 6.

²⁰⁴ *CCPR General Comment 32*, 6.

²⁰⁵ *Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v Nigeria*, ACmHPR Comm. 218/98, decision adopted during the 29 Ordinary Session, 23 April – 7 May 2001.

²⁰⁶ *Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v Nigeria*.

²⁰⁷ *Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v Nigeria*.

²⁰⁸ Naluwairo, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 450.

Having established that the requirement of independence and impartiality applies in equal measure to military courts, the question that should then be asked concerns the indicia of independence and impartiality of military courts.

3.4.1 Indicia of independence

The Draft Principles Governing the Administration of Justice Through Military Courts (the Draft Principles) provides the most authoritative guidelines on the independence of military courts. The indicia of independence of such courts, as provided in the Draft Principles, will be discussed below:

Mode of appointing personnel

Principle 13, while not mentioning the process of selection or appointment of judges, emphasises that judges called to sit in military courts should be competent, having undergone the same legal training as that required of professional judges. The underlying rationale is that the legal competence and ethical standards of military judges who are fully aware of their duties and responsibilities form an intrinsic part of their independence.²⁰⁹ The African Commission on Human and Peoples' Rights has reiterated that the selection of military serving officers with little or no knowledge of law as members of a military tribunal runs contrary to the independence of the judiciary.²¹⁰

Security of tenure

Security of tenure, as has been explained in the preceding part, entails providing judges with guaranteed terms in office, dismissing them only upon attainment of a mandatory retirement age or on serious grounds of misconduct or incompetence.²¹¹ European jurisprudence on

²⁰⁹ Principle 13, Draft Principles Governing the Administration of Justice Through Military Courts.

²¹⁰ *Media Rights Agenda and Others v Nigeria* ACmHPR Comm. 105/93, 128/94, 130/94, 152/96, decision adopted during the 24 Ordinary Session, para 60.

²¹¹ Principle 12, Basic Principles on the Independence of the Judiciary.

security of tenure as applicable to military courts provides that a specified term of office that is subject to renewal casts questions on the independence of judges.²¹²

Financial security/independence

The essence of financial security as a condition for securing independence of a tribunal is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.²¹³ Applying this to military courts means that the salaries, allowances and other remunerations and benefits of military judges must not depend on the grace or favour of the executive nor on the military hierarchy.²¹⁴ The Supreme Court of Canada found that a prohibition on pegging an officer's performance as a member of a military court or as a military trial judge from being used to determine his qualifications for rate of pay was a sufficient guarantee of financial security.²¹⁵

Structure of government

The Draft Principles assert that the establishment of military tribunals must respect the principle of separation of powers.²¹⁶ The Draft Principles elaborate that the principle of separation of powers goes hand in hand with the requirement of statutory guarantees of avoiding any interference by the executive or military in the administration of justice.²¹⁷ They further place a duty on all governmental and other institutions to respect and observe the independence of military courts.²¹⁸

²¹² *Incal v Turkey*, ECtHR Judgement of 9 June 1998, para. 68.

²¹³ *Valente v Queen* [1985] 2 SCR 704.

²¹⁴ Naluwairo, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 456.

²¹⁵ *R v Généreux* [1992] 1 SCR 259.

²¹⁶ Principle 1, Draft Principles Governing the Administration of Justice Through Military Courts.

²¹⁷ Principle 1, Draft Principles Governing the Administration of Justice Through Military Courts.

²¹⁸ Principle 1, Draft Principles Governing the Administration of Justice Through Military Courts.

3.4.2 Indicia of impartiality

The African Commission on Human and Peoples' Rights recognised that the composition of a tribunal may create an appearance of lack of impartiality.²¹⁹ Thus, a tribunal must appear to reasonable observers to be impartial, in line with the maxim 'justice must not only be done, but should manifestly and undoubtedly be seen to be done.'²²⁰ Impartiality when it comes to military courts is a rather complex matter.²²¹ Parties to a trial in a military court have good reason to view the military judge as an officer who is capable of being "a judge in his own cause" in any case involving the armed forces as an institution.²²² However, the presence of a civilian judge in the composition of military courts serves to meet the requisite threshold of impartiality.²²³

3.5 Conclusion

This chapter sought to clarify the meaning of independence and impartiality of a tribunal. While independence and impartiality are closely linked, the two concepts have distinct meanings.²²⁴ In general terms, independence refers to the autonomy of a given judge or tribunal to decide cases by applying the law to the facts.²²⁵ Impartiality, on the other hand, denotes the state of mind of a judge or a tribunal towards a case and the parties to it.²²⁶

This chapter further listed and elaborated the categories of independence and impartiality, those of the former being institutional and decisional independence while those of the latter being actual and apparent (subjective and objective) impartiality. It was then established that guarantees of one category of independence and impartiality are not sufficient to declare a

²¹⁹ *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, ACmHPR Comm. 60/91, 13 Activity Report, para 14.

²²⁰ Dictum by Lord Hewart in *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256, 259 as quoted in Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 458.

²²¹ Principle 13, Draft Principles Governing the Administration of Justice Through Military Courts.

²²² Principle 13, Draft Principles Governing the Administration of Justice Through Military Courts.

²²³ Principle 13, Draft Principles Governing the Administration of Justice Through Military Courts.

²²⁴ Dr. Alsheban A, 'Judicial impartiality and independence of the judiciary (comparative study)', 39.

²²⁵ Dr. Alsheban A, 'Judicial impartiality and independence of the judiciary (comparative study)', 39.

²²⁶ Dr. Alsheban A, 'Judicial impartiality and independence of the judiciary (comparative study)', 39.

tribunal independent and impartial. A tribunal will only be held to be independent and impartial if it satisfies the tests for institutional and decisional independence as well as subjective and objective impartiality.

Perhaps the most imperative research question answered in this chapter concerned the applicability of the requirement of independence and impartiality to military courts. It was established, through an examination of General Comment 32 as well as the Draft Principles Governing the Administration of Justice Through Military Courts and case law, that the dual requirement of an independent and impartial tribunal applies to military courts in the same manner as it does to ordinary civil courts.

The next chapter will consequently seek to determine whether the Kenyan courts martial meet the standard of an independent and impartial tribunal.

CHAPTER FOUR

COMPLIANCE OF THE COURTS MARTIAL WITH THE REQUIREMENT OF INDEPENDENCE AND IMPARTIALITY: ANALYSIS, CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

The right to an independent and impartial tribunal is an important tenet of the right to a fair trial, applying not only to ordinary civil courts but also to military courts and tribunals. The previous chapter sought to elaborate the concepts of independence and impartiality as well as their applicability to military courts. It was subsequently concluded that the principles of independence and impartiality apply in their entirety to military courts. Consequently, a military court ought to meet the institutional and decisional elements of independence as well as those of objective and subjective impartiality for it to be deemed to be truly independent and impartial. This chapter subsequently seeks to analyse the guarantees of independence and impartiality of the courts martial in Kenya in order to determine whether the Kenyan courts martial have met the threshold of institutional and individual independence as well as objective and subjective impartiality.

4.2 The Kenyan Court System

Any analysis of the courts martial must first begin with tracing their place within the Kenyan judicial system. The 2010 Constitution classifies courts into two categories: superior courts and subordinate courts.²²⁷ Superior courts consist of the Supreme Court, the Court of Appeal, the High Court and other courts with the status of the High Court with competence to hear and determine disputes relating to employment and labour relations as well as the environment and the use and occupation of, and title to, land.²²⁸

²²⁷ Article 162, *Constitution of Kenya* (2010).

²²⁸ Article 162 (1) and (2), *Constitution of Kenya* (2010).

On the other hand, subordinate courts include the Magistrates courts, Kadhis courts, Courts Martial as well as any other court or local tribunal as may be established by an Act of Parliament.²²⁹ The jurisdiction, powers and functions of subordinate courts are prescribed by legislation.²³⁰ Nonetheless, subordinate courts are precluded from engaging in Constitutional interpretation, which is solely the mandate of superior courts.²³¹ However, Parliament may enact legislation to give original jurisdiction, in appropriate cases, to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.²³²

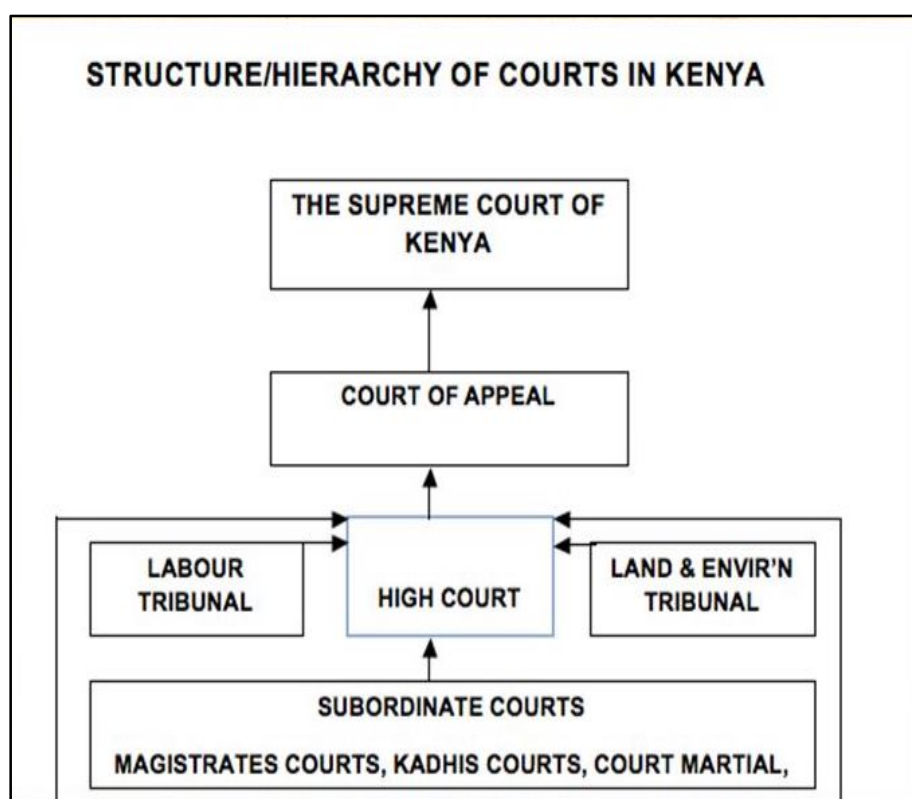


Figure 1

²²⁹ Article 162 (4), *Constitution of Kenya* (2010).

²³⁰ Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, 500.

²³¹ Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, 500.

²³² Article 23 (2), *Constitution of Kenya* (2010); Franceschi L and Lumumba P, *The constitution of Kenya, 2010: An introductory commentary*, 500.

4.3 Structure and Jurisdiction of Courts Martial

The Constitution leaves room for the operation of courts martial, which are tribunals established to try military personnel who commit the offences provided for under the Kenya Defence Forces Act of 2012 (KDF Act).²³³ A court martial consists of a Judge Advocate, who is the presiding officer; at least five other members, appointed by the Defence Court-martial Administrator, if an officer is being tried; and at not less than three other members in any case.²³⁴ The KDF Act requires that at least one such member be of equivalent rank as the accused person (where the accused person is an officer) and the lowest ranking officer in the Defence Forces who is available at the time when the accused person is a service member.²³⁵

In addition, the Act limits the personal jurisdiction of the courts martial to any person subject to the Act for any offence under the Act.²³⁶ The Act lists a rather broad class of persons who are subject to it. This list encompasses: members of the regular forces, members of the reserve forces including the auxiliary reserve force, alleged spies of the enemy, persons in civil custody suspected of committing service crimes, persons serving or attached to the Defence Forces in another country pursuant to a treaty or agreement signed by Kenya, persons accompanying a unit of the Defence Forces that is on active service and persons attending a Defence Forces Institution.²³⁷ The Act also extends its scope to civilians who accompany a unit of the Defence Forces that is either outside Kenya or on operations against the enemy, and have consented in writing to such accompanying.²³⁸

Similar to its jurisdiction over persons, the courts martial has a wide array of service offences over which it exercises jurisdiction over. These offences can be broadly classified into categories, which include: treachery, cowardice and offences arising out of service; offences relating to the disobedience of orders; insubordination; and offences concerning courts martial and other authorities.²³⁹ Courts martial have jurisdiction to try civilian offences, provided that

²³³ Ambani J, Mbondenyei M, *The new constitutional law of Kenya: Principles, government and human rights*, 149.

²³⁴ Section 160 (1), *KDF Act* (Act No. 25 of 2012).

²³⁵ Section 160 (3), *KDF Act* (Act No. 25 of 2012).

²³⁶ Section 162 (3), *KDF Act* (Act No. 25 of 2012).

²³⁷ Section 4, *KDF Act* (Act No. 25 of 2012).

²³⁸ Section 5 (1), *KDF Act* (Act No. 25 of 2012).

²³⁹ Part VI, *KDF Act* (Act No. 25 of 2012).

they were committed by the aforementioned persons who are subject to the Act.²⁴⁰ In addition, courts martial also have sentencing powers for civil offences.²⁴¹ However, a court martial is precluded from exercising its jurisdiction on a civilian, who though subject to the KDF Act, has been charged with an offence under the Sexual Offences Act.²⁴²

4.4 Analysis of the independence and impartiality of the courts martial

The evaluation of the independence and impartiality of the courts martial must first begin with a distinction between the trial of military personnel and that of civilians,²⁴³ given the jurisdiction of the courts martial.

Military personnel are typically tried by a court martial for breaches of military discipline and criminal offences.²⁴⁴ The distinction between the two types of offences depends on the nature of the prohibited act and the penalty²⁴⁵ attributed to it. The resultant import of such a distinction is that disciplinary offences are, more often than not, not protected by fair trial provisions, including the right to an independent and impartial tribunal.²⁴⁶ On the other hand, if the offence in question is criminal in nature, then the trial of military personnel must conform to fair trial requirements.²⁴⁷

Regarding the trial of civilians, the United Nations Human Rights Committee has asserted that the ICCPR, in contemplation of the right to a fair trial, does not prohibit the trial of civilians in military courts but requires that such trials be in full conformity with fair trial guarantees.²⁴⁸ Doswald-Beck gives two reasons behind the reasoning of the Human Rights Committee. First, that civilians tried before military courts would not be in the same situation as those before

²⁴⁰ Section 133 (1), *KDF Act* (Act No. 25 of 2012).

²⁴¹ Section 133, *KDF Act* (Act No. 25 of 2012).

²⁴² Section 55 (1), *KDF Act* (Act No. 25 of 2012).

²⁴³ Doswald-Beck L, *Human rights in times of conflict and terrorism*, Oxford University Press, New York, 2011, 337.

²⁴⁴ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 337.

²⁴⁵ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 337.

²⁴⁶ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 338.

²⁴⁷ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 338.

²⁴⁸ *CCPR General Comment 32*, 6.

civilian courts, consequently leading to inequality before the courts.²⁴⁹ Secondly, the objective impartiality would not be present when a military court has jurisdiction to try a civilian for acts against the armed forces.²⁵⁰ The Inter-American Court has been the most straightforward in denouncing the use of military tribunals to try civilians,²⁵¹ citing that when a military court takes over jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal and, *a fortiori*, their right to due process have been violated.²⁵² This position has been reiterated by the African Commission on Human and Peoples' Rights, which affirmed that military tribunals should not, in any circumstances whatsoever, have jurisdiction over civilians.²⁵³

4.4.1 Institutional independence

In the context of military justice, institutional independence requires that military tribunals be free from interference, especially from the executive and the military hierarchical command with respect to matters that relate to their judicial function.²⁵⁴ The following analysis of institutional independence takes into consideration the jurisdiction of courts martial to try both military personnel and civilians.

Appointment of members of the courts martial

The Draft Principles Governing the Administration of Justice Through Military Tribunals provides that the organisation and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings, from initial investigation to trial.²⁵⁵ Consequently, the persons selected to perform the functions of judges in military courts must display integrity and competence and show

²⁴⁹ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 341.

²⁵⁰ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 342.

²⁵¹ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 340.

²⁵² *Castillo Petruzzi et al. v Peru*, IACtHR Judgment of 30 May 1999 (Merits, Reparations and Cost), para. 130.

²⁵³ *Media Rights Agenda v Nigeria*, para. 62.

²⁵⁴ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 452.

²⁵⁵ Principle 13, Draft Principles Governing the Administration of Justice Through Military Tribunals, Commission on Human Rights of the Economic and Social Council, UN Doc E/CN.4/2006/58.

proof of the necessary legal training and qualifications.²⁵⁶ In addition, military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy.²⁵⁷ Moreover, one of the most important prerequisites for ensuring the institutional independence of military tribunals is that the authority that appoints members of a tribunal must not be the same one that appoints prosecutors.²⁵⁸

Regarding membership of the courts martial, the Chief Justice bears the duty of appointing the Judge Advocate.²⁵⁹ The KDF Act stipulates that the Judge Advocate at each court martial shall be a magistrate or an advocate of at least a ten-year standing.²⁶⁰ The criteria for appointment of a magistrate is derived from Section 32 of the Judicial Service Act,²⁶¹ which provides that a person shall not be qualified to be appointed as a magistrate unless the person:

- (a) Is an advocate of the High Court of Kenya;
- (b) Has high moral character, integrity and impartiality;
- (c) Has demonstrable management skills;
- (d) Has proficiency in computer applications; and
- (e) Has no pending complaints from the Advocates Commission or the Disciplinary Committee.

The Judicial Service Commission is tasked with the appointment, discipline and removal of Magistrates.²⁶² It does so through the constitution of a committee or panel,²⁶³ whose conduct and procedure is outlined in the Third Schedule of the Judicial Service Act.²⁶⁴ Hence, there are clear criteria concerning the appointment of Judge Advocates as well as procedure regarding their discipline and removal.

²⁵⁶ Principle 13, Draft Principles Governing the Administration of Justice Through Military Tribunals.

²⁵⁷ Principle 13, Draft Principles Governing the Administration of Justice Through Military Tribunals.

²⁵⁸ Principle 13, Draft Principles Governing the Administration of Justice Through Military Tribunals.

²⁵⁹ Section 165 (b), *KDF Act* (Act No. 25 of 2012).

²⁶⁰ Section 165, *KDF Act* (Act No. 25 of 2012).

²⁶¹ Act No. 1 of 2011 (revised 2012).

²⁶² Section 32 (1), *Judicial Service Act* (Act No. 1 of 2011).

²⁶³ Section 32 (1) *Judicial Service Act* (Act No. 1 of 2011).

²⁶⁴ Section 32 (3), *Judicial Service Act* (Act No. 1 of 2011).

Regarding members of the Defence Forces who also constitute the courts martial, the KDF Act provides that such members shall be ‘so qualified and not ineligible under Section 164’.²⁶⁵ Section 164 subsequently bars a convening officer from being part of the court martial which they themselves convene. This Section further prohibits a commanding officer and an investigating officer from being members of the court martial that tries the particular accused person. The KDF Act thus does not outline the criteria for appointment of members of the Defence Forces to courts martial, other than their position in the Force. This is an insufficient guarantee of independence of such officials, and the courts martial at large, as they are still subject to the military hierarchy.

In a bid to distinguish the functions and operation of the members of a court martial from the prosecutorial authority, the KDF Act provides for the independent office of the Director of Military Prosecutions.²⁶⁶ The Director is appointed by the Defence Council,²⁶⁷ in keeping with the following criteria: The Director should be an officer not below the rank of Lieutenant Colonel and should be an advocate of the High Court of Kenya of not less than ten years standing.²⁶⁸ The Act further delineates the functions of the Director of Military Prosecutions, which include the exercise of prosecutorial powers against persons subject to the Act at a court martial for the offences falling under the jurisdiction of the court martial.²⁶⁹ To safeguard the independence of this office, the KDF Act provides that the Director of Military Prosecutions does not require the consent of any person or authority for prosecutions and the exercise of the functions and powers conferred shall not be under the direction or control of any person or authority.²⁷⁰ The fact that members of courts martial are distinguished from the prosecutorial authority suffices as an adequate safeguard of the institutional independence of courts martial.

²⁶⁵ Section 160 (2), *KDF Act* (Act No. 25 of 2012).

²⁶⁶ Section 213, *KDF Act* (Act No. 25 of 2012).

²⁶⁷ Section 213 (1), *KDF Act* (Act No. 25 of 2012).

²⁶⁸ Section 213 (2), *KDF Act* (Act No. 25 of 2012).

²⁶⁹ Section 213 (3), *KDF Act* (Act No. 25 of 2012).

²⁷⁰ Section 213 (5), *KDF Act* (Act No. 25 of 2012).

Security of tenure

As was established in the previous chapter, security of tenure means tenure - whether until the age of retirement, for a fixed term or for a specific adjudicative task - that is secure from interference from the executive or other appointing authority in a discretionary manner.²⁷¹ The question of security of tenure is most relevant for Judge Advocates.²⁷² In addition, it is not enough that the instruments of appointment of the members of courts martial and the Judge Advocate stipulate their tenure - the right to an independent and impartial tribunal requires that their tenure as persons who exercise judicial power to be adequately secured by law.²⁷³ For members of the regular Defence Forces serving in the courts martial, the retirement age is set at sixty-four.²⁷⁴ On the other hand, the retirement age of a Judge Advocate, as prescribed by the Judicial Service Act, is set at the mandatory retirement age of public officers.²⁷⁵ However, a Judge Advocate may also elect to retire at any time upon attaining fifty five years of age.²⁷⁶ Regarding removal of members of a court martial, the Judicial Service Commission is mandated to establish a committee or panel for the purposes of discipline or removal of a Judge Advocate.²⁷⁷ The committee or panel is required to follow an established procedure, as has been outlined in the Third Schedule of the Judicial Service Act.

It can thus be concluded that members of the courts martial enjoy security of tenure as military officers and the Judge Advocate as a magistrate. However, such a conclusion would be incongruent with the requirement that security of tenure must be in respect of judicial office and not by virtue of assuming military office.²⁷⁸ The security of tenure of members of courts martial as military officers cannot guarantee independence as they remain subject to military

²⁷¹ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 462.

²⁷² Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 462.

²⁷³ Naluwairo, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 463.

²⁷⁴ Section 243 (1), *KDF Act* (Act No. 25 of 2012).

²⁷⁵ Section 25 (1), *Judicial Service Act* (Act No. 1 of 2011).

²⁷⁶ Section 25 (2), *Judicial Service Act* (Act No. 1 of 2011).

²⁷⁷ Section 32 (1), *Judicial Service Act* (Act No. 1 of 2011).

²⁷⁸ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 463.

discipline and dependent on the military chain of command for promotions and other benefits.²⁷⁹

Financial security

Financial security is an important consideration for both Judge Advocates and other members of the courts martial. The requirement of financial security as an indicium of independence will not be satisfied if the executive is in a position to reward or punish the conduct of members of the court martial and the Judge Advocate by the granting or withholding of benefits.²⁸⁰

The Defence Council is mandated to determine the salaries of members of the Defence Forces.²⁸¹ Such determination is premised on the advice of the Salaries and Remuneration Commission.²⁸² The Defence Council is also responsible for the promotion and transfer of members of the Defence Forces.²⁸³ It is worthwhile to note that the President may remove, retire or redeploy the Chief of the Defence Forces and any Service Commander, who make up part of the Defence Council, at any time before the expiry of their term of office.²⁸⁴ The KDF Act further provides that funds of the Defence Forces consist of money allocated by Parliament; money or assets accruing to the Defence Forces; and money from other sources provided for or donated to the Defence Forces.²⁸⁵ The National Assembly is tasked with allocation of the above-mentioned funds to the Defence Forces.²⁸⁶

On the other hand, the Constitution provides that the remuneration and benefits payable to judges shall be charged on the Consolidated Fund.²⁸⁷ The Constitution further stipulates that such remuneration and benefits shall not be varied to the disadvantage of a judge.²⁸⁸ It can thus

²⁷⁹ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 463.

²⁸⁰ *R v Généreux*, para. 58.

²⁸¹ Section 29 (2), *KDF Act* (Act No. 25 of 2012).

²⁸² Section 29 (2), *KDF Act* (Act No. 25 of 2012).

²⁸³ Section 28 (2), *KDF Act* (Act No. 25 of 2012).

²⁸⁴ Section 26, *KDF Act* (Act No. 25 of 2012).

²⁸⁵ Section 285 (1), *KDF Act* (Act No. 25 of 2012).

²⁸⁶ Section 286 (1), *KDF Act* (Act No. 25 of 2012).

²⁸⁷ Article 160 (3), *Constitution of Kenya* (2010); see also Section 26 (1), *Judicial Services Act* (No. 1 of 2011).

²⁸⁸ Article 160 (4), *Constitution of Kenya* (2010).

be concluded that the remuneration and benefits of the Judge Advocate are secured in law by virtue of the Judge Advocate's qualification as a magistrate. However, there is insufficient information to conclude that other members of courts martial enjoy financial security.

4.4.2 Decisional independence

Military tribunals must not only be self-governing as regards their administrative and operational matters, but they must also be independent in their decision-making.²⁸⁹ Their decisions, like those of ordinary civil courts, should never be subjected to revision by a non-judicial establishment.²⁹⁰ The KDF Act guarantees the decisional independence of members of the courts martial by stipulating that they shall not be liable for any criminal or civil proceedings as well as administrative sanctions for anything done, omitted, reported or said in good faith in the exercise or purported exercise of a power or in the performance of a duty or function.²⁹¹ In addition, decisions of the courts martial are only subject to appellate review by the High Court and other superior courts on matters concerning the conviction, sentence or both.²⁹²

4.4.3 Impartiality

The threshold that a tribunal has to meet in order to be deemed impartial encompasses both subjective and objective impartiality, as was explained in the previous chapter. By its very nature, the subjective test depends on each particular case.²⁹³ Thus, an assessment of the courts martial impartiality from a subjective lens will not constitute part of the analysis of their impartiality. Suffice it to emphasise that, however subjectively impartial a tribunal is, it cannot

²⁸⁹ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 452.

²⁹⁰ Principle 4, Basic Principles on the Independence of the Judiciary.

²⁹¹ Section 166, *KDF Act* (Act No. 25 of 2012).

²⁹² Section 168 (1), *KDF Act* (Act No. 25 of 2012).

²⁹³ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 466.

comply with the right to an impartial tribunal if, from an objective point of view, it cannot be said to be impartial.²⁹⁴

As members of the military are members of the executive, it will normally be difficult to conclude that military tribunals are independent, especially if they are given jurisdiction to try civilians accused of serious crimes such as terrorism and treason.²⁹⁵ Nonetheless, the KDF Act contains certain guarantees of impartiality of the courts martial. The Act bars a convening officer from being a member of a court martial which the officer himself or herself convenes.²⁹⁶ The Act further bars an accused's commanding officer and investigating officer(s) from being members of the court martial which tries the accused.²⁹⁷

Regarding the trial of civilians, the Human Rights Committee has noted that such trial should be exceptional, being permitted only where a State Party (to the ICCPR) can show that resorting to such trials is necessary and justified by objective and serious reasons and where – with regard to the specific class of individuals and offences at issue – the regular civilian courts are unable to undertake the trials.²⁹⁸ The African Commission on Human and People's Rights has reiterated this, adding that very often, military tribunals are an extension of the executive and are consequently not intended to try civilians.²⁹⁹ Nonetheless, military tribunals are not negated by the mere fact of being presided over by military officials; the critical factor is whether the process was just, fair and impartial.³⁰⁰

The KDF Act limits the jurisdiction of courts martial over civilians to only those who accompanying the Defence Forces and have expressed consent to be tried by a court martial. In addition, recognising the primacy of civil courts, courts martial have no jurisdiction over civilian offences.³⁰¹ The presence of a Judge Advocates and their role introduces a semblance

²⁹⁴ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 466.

²⁹⁵ Doswald-Beck L, *Human rights in times of conflict and terrorism*, 337.

²⁹⁶ Section 164 (1), *KDF Act* (Act No. 25 of 2012).

²⁹⁷ Section 164 (2), *KDF Act* (Act No. 25 of 2012).

²⁹⁸ *Madani v Algeria*, CCPR Comm. No. 1172/2003 (28 March 2007), para. 8.7.

²⁹⁹ *Gunme and others v Cameroon*, ACmHPR Comm. 266/03, decision adopted during the 45 Ordinary Session, para. 127.

³⁰⁰ *Civil Liberties Organisation and Others v Nigeria*, para. 27.

³⁰¹ Section 268, *KDF Act* (Act No. 25 of 2012).

of impartiality in the trial of civilians by courts martial. Judge Advocates only serve to give directions and rulings on questions of law, procedure or practice and any resultant ruling or direction shall be binding on the court martial.³⁰² The Court of Appeal has reiterated the role of the Judge Advocate, emphasising that it is a heavy one which is meant to ensure that trials in the court martial meet the standards of fairness of a trial, underscored by impartiality.³⁰³

The requirement of impartiality is premised on the principle of administration of justice that requires that justice must not only be done, but must be manifestly and undoubtedly be seen to be done.³⁰⁴ Reiterating the position of the African Commission that the composition of a tribunal can create the appearance of lack of impartiality.³⁰⁵ This study arrives at the conclusion that the composition of courts martial, particularly where civilian offenders are concerned, creates the appearance of impartiality. However, this impartiality could be threatened as a result of insufficient guarantees of independence, as was noted by Ronald Naluwairo.

4.5 Conclusion and Recommendations

Conclusion

The right to an independent and impartial tribunal constitutes one of the most important guarantees for ensuring a fair trial in a democratic society.³⁰⁶ Through the various objective standards it sets, it ensures that justice is not only done, but is also manifestly seen to be done.³⁰⁷ However, this is not the case for Kenyan courts martial. These military courts have not met the standards for ensuring an independent and impartial tribunal as they do not meet the threshold for institutional independence. There are insufficient guarantees pertaining to the appointment of members of the courts martial who are also members of the Defence Forces as well as their

³⁰² Section 175, *KDF Act* (Act No. 25 of 2012).

³⁰³ *Peter M Kariuki v Attorney General* [2014] eKLR.

³⁰⁴ *R v Sussex ex parte McCarthy*.

³⁰⁵ *Constitutional Rights Project and Others v Nigeria*, para. 14.

³⁰⁶ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 466.

³⁰⁷ Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal', 466.

and security of tenure. Regarding the former, there is no criteria for appointment of members of the Defence Forces as judicial officers in courts martial other than their membership of the Defence Forces. As a result, such members of the courts martial remain subject to the military hierarchy and this has an adverse effect on the institutional independence of courts martial. In addition, such members of the courts martial enjoy security of tenure as military officials as opposed to judicial officials. This buttresses the conclusion that devoid of such protection, they remain dependent on the military chain of command for promotion and other benefits. Similar to lack of appointment criteria, the lack of financial security weakens the institutional independence of the courts martial as judicial tribunals. Consequently, while there exist sufficient guarantees for other standards of independence, such as decisional independence, the courts martial cannot be said to be independent and impartial as the structure, function and operation of such courts does not meet the collective standards of independence and impartiality of a tribunal.

Recommendations

A primary recommendation is to delve into further research pertaining to military justice in Kenya. Aside from that, however, the KDF Act should be amended to include the criteria for appointment of members of the Defence Forces as members of courts martial, in addition to their rank in the Defence Forces. The Act should further provide a specific tenure for such officials as well as the grounds and procedure for their removal. However, it is not enough that the Act be amended. While having sufficient guarantees of independence is important, these guarantees encased in the law ought to be implemented in order for independence and impartiality to be realised. A further recommendation would thus be that there be established a task force that will be under the Judicial Service Commission to examine the guarantees of independence and impartiality of courts martial as provided by the law and in practice and to further recommend measures which can be taken to realise the independence and impartiality of such courts. Regarding impartiality, while the presence of a Judge Advocate is meant to act as guarantee for the impartiality of a military tribunal, the absence of crucial safeguards of independence may weaken the impartiality of military courts. An amendment of the KDF Act to reflect the above recommendations on institutional independence would greatly bolster the impartiality of the courts martial, even without amending their jurisdiction over civilians.

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