# THE IMPACT OF POST-RETIREMENT CAREERS AND EXECUTIVE APPOITMENTS ON JUDICIAL INDEPENDENCE OF CURRENT JUDGES IN KENYA

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# DECLARATION

I, **DINA OYIELA MAJANGA**, 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. Peter Kwengera

# ABSTRACT

*Judges constantly face actions from the Executive that undermine their judicial independence. In the recent years Kenya and the rest of the world have placed measures meant to prevent the Executive from controlling the Judiciary. Such measures include inclusion judicial independence in constitutions and international conventions, secure tenure and creation of institutions that regulate the nomination and confirmation process of Judges. These measures have succeeded in protecting the independence of the Judiciary. The means used by the Executive in attempted to control the Judiciary have however evolved requiring that the protection given to the Judiciary be strengthened as well.*

*This paper focuses on the influence of Executive employment decisions, particularly the appointment of retired judges, on current judges within the Judiciary, as one of the methods employed by the Executive to gain control of the Judiciary. To achieve this, this paper discusses the judge as person as the conceptual underpinning of the study. The paper discusses judicial independence to understand its meaning, its application in Kenya and both recent and past attempts and response by the Judiciary to undermine judicial independence. It also discusses the effect the appointment of retired judges has on decision making of judges within the Judiciary. Lastly it recommends adoption of laws aimed at controlling the employment opportunities of judges. The recommendations are drawn from nations with laws that control the employment options of judges while balancing the right to employment held by retired judges.*

# LIST OF ABBREVIATIONS

| | |
|---|---|
| Attorney General | AJ |
| Chief Executive Officer | CEO |
| Chief Justice | CJ |
| Court of Appeal for Kenya | C.A. K |
| Deputy Chief Justice | DCJ |
| Energy and Petroleum Regulation Authority | EPRA |
| High Court of Kenya | H.A.K |
| Information Communication Technology Association of Kenya | ICTAK |
| Judicial Service Commission | JSC |
| Kenya African National Union | KANU |
| Kenya Forestry Research Institute | KAFRI |
| Kenya People's Union | KPU |

# LIST OF CASES

*Ananga Udat Signh Deo v Ranga Nath Mishra & Ors* (2001), Supreme Court of India.

Azimio La Umoja One Kenya Coalition Party v The President of Kenya & 9 others (Petition E153 of 2023) [2023] KEHC 17926 (KLR) (Constitutional and Human Rights) (29 May 2023) (Ruling).

Ben Chikamai & another v Peter Macithi Muigai & 2 others [2020] eKLR

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Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR

Kaggia & Another v R (1969)

Kassamali Co. v. Kyrtatas Brothers [1968] EA 542:

Katiba Institute & Another V Attorney General & Another [2020] eKLR

Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR.

Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) (Constitutional Petition 203 of 2020) [2021] KEHC 454 (KLR) (Constitutional and Human Rights) (10 June 2021) (Judgment)

Okiya Omtatah Okoiti V President of Kenya & 4 Others [2019] eKLR

Republic V Communications Authority of Kenya; Information Communication Technology Association of Kenya (ICTAK) (Exparte) (Judicial Review Application 21 Of 2020) [2021] KEELRC 7 (KLR) (9 April 2021) (Judgment)

Royal Media Services Ltd v. Attorney General & 2 Others HC Petition No. 346 of 2012.
Stephen Mwai Gachiengo & another v Republic [2000] eKLR.

## LIST OF LEGAL INSTRUMENTS

### INTERNATIONAL INSTRUMENTS

Bangalore Principles of Judicial Conduct

Basic Principles on the Independence of the Judiciary

### FOREGIN INSTRUMENTS

Constitution of India

Ethical Principles for Judges of Canada

### FOREGIN LEGISLATIVE DOCUMENTS

Constituent Assembly Debates of India.

### DOMESTIC LAWS

Commission of Inquiry Act (Act No.5 of 2010)

Constitution of Kenya of 2010

Independence Constitution of 1963

Judicature Act

Public Officer Ethics Act

Public Order Act

State Corporations Act

### DOMESTIC CODES

Mwongozo code of Conduct

Judicial Service Code of Conduct and Ethics

# CHAPTER 1: Introduction

## 1.1 Background

A society functions effectively when there are laws and individuals protect and apply the law.[1] Judges are important to society as they are the main protectors of the law. .While judges are respected by various parties the most important form of respect given to Judges is the respect given by the public. The recognition and confidence of the public affect both the effectiveness and legitimacy of the judges' authority.[2] Public respect is formed through the perception that is held of the Judiciary. This view is primarily formed through the media as most individuals do not interact with the Judiciary directly.[3] Public opinion will vary with the narrative availed to the public by the media reports and will also be affected by the decisions of current and retired judges.[4]

Thus, when making court decisions, judges must ensure that they uphold Judicial independence. Judicial independence is a component of the Constitutional doctrine of Separation of powers.[5] Separation of powers explains the division of powers between different branches of the government with each playing a countervailing role.[6] The doctrine ensures that the Judiciary, and its actors can conduct their responsibilities and duties independently from the Executive and Legislative arms of government.

Judicial independence in Kenya is provided in Article 160 of the 2010 Constitution. Article 160 stipulates the functions of the Judiciary.[7]Besides national laws there are international principles that provide guidance on judicial independence such as the Bangalore principles[8] and the Basic Principles on the Independence of the Judiciary.[9] The Bangalore Principles stipulate ethical conduct to be followed by judges. The principles apply to actions of active judges that would

[1] Widijowati, R,'The Implementation of Progressive Law Against the Defendant Ability to Achieve Substantive Justice' 8(3) *Jurnal Pembaharuan Hukum*,2021,6-9.
[2] Mack J, Anleu R.S and Titton J, 'The Judiciary and the Public: Judicial Perceptions'39 *Adelaide Law Review,*2018 2.
[3] Mack J, Anleu R.S and Titton J, 'The Judiciary and the Public: Judicial Perceptions'39,5.
[4] McCombs M,'The Agenda-Setting of the mass media in the shaping of public opinion' University of Texas at Austin,2,12.
[5] Oluoch E,' Separation of Powers in Kenya; The Judicial Function and Judicial Restraint; Whither Goeth the Law?'35 *Journal of Law and policy Globalization*,2015,95.
[6] Gerangelos P, 'Separation of Powers in the Australian Constitution: Themes and Reflections'29 *Singapore Academy of Law Journal,*2017, 903, 908.
[7] *Constitution of Kenya*,2010.
[8] UNODC, The Bangalore Principles of Judicial Conduct, February 2001
[9] UNGA, Basic Principles on the Independence of the Judiciary, UN A/Res/40/32 and 40/146 29 November 1985

affect the independence of the Judiciary.[10] The Basic Principles on the Independence of the Judiciary speak on security of the tenure of a judge.[11] Security of tenure is an element that ensures the doctrine of Judicial independence. Historically Kenya has failed to cement the element of security of tenure causing failure in the actualization of Judicial independence. This was especially true during the presidential eras of Kenyatta and Moi.

The two leaders inherited a Judicial institution that was founded to serve the colonial government and their interests. With the colonization of Kenya, the British Empire came with the adoption of English law into the protectorate. The judges places in the Court of Appeal(C.A.K) were British due to the Kenyan natives knowledge of English Law.[12] These judges were assigned pursuant to the East African Order in Council and served in the position at the mercy of the crown.[13] Therefore the White judges' loyalty laid with the crown.[14] Rather than changing this perception, the two leaders took the place of the Queen as they treated the Judiciary as an extension of the Executive . To ensure that the loyalty remained, President Kenyatta hired non-kenyan judges on contract to serve in the C.A.K and High Court (HCK).[15] The judges showcased their loyalty to the president by ruling in favour of the government and Kenya African National Union (KANU) in instances where their actions faced scrutiny for bring tyrannical, unconstitutional, or illegal. KANU is a political party, that was prominent during the reigns of President Kenyatta and Moi. During President Kenyatta's tenure the party enjoyed popularity due to the role it played in advocating for the independence of Kenya.[16] During President Moi's tenure KANU was infamous for being the only political party due to one party system.[17] In situations where the judges ruled against the government or exercised independence the Executive punish them. For example in 1969 after People's Union (KPU), the opposition party, was banned and its leaders arrested and detained Chief Justice (CJ) Dalton and Justice G.Farrel lowered Bildad Kaggia, the KPU vice president,

[10] UNODC, Bangalore Principles, Annex 6-8.
[11] Principle 12, Principles on the Independence of the Judiciary.
[12]Oganyo R, 'Justiciability of justice: the role of judicial service commission in Kenya in the decisional independence of judicial officers' Unpublished, University of Nairobi, Nairobi,2014,20.
[13] Githu Muigai, 'Legal Constitutional Reforms to Facilitate Multi- Party Democracy: The Case of Kenya', in J. Oloka Onyango, K. Kibwana and Chris Maina (eds) *Laws & Struggle for Democracy in East Africa* (Claripress, Nairobi, 1996)
[14] Ghai Y and McAuslan P, *Public Law, and Political Change in Kenya; A Study of the Legal Framework of Government from Colonial Times to the Present*, Oxford University Press, London, 1970,173.
[15] Mutua M,' Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23(1) *Human Rights Quarterly,* 2001,99-109
[16] Kimani J,' Kenya's Rocky Road to Independence',10(10) *African Today,*1963,3.
[17] Anyang'Nyongo'o P, 'Africa: The Failure of One-Party Rule' 3(1) *Journal of Democracy,*1992,5-7.

sentence from twelve to six months.[18] The charge against Bildad Kaggia in this case was holding a public meeting without a license as required by Section 5(11)(a)(ii) of the Public Order Act. The magistrate court found that he had deliberately violated the law and thus sentenced him to one-year imprisonment. He appealed to the C.A.K on the grounds that the meeting was not a public meeting and he also appealed against the Sentence the Magistrate court gave. In the C.A.K, the judges stated that there was a lack of premeditated disregard of the law. However, the judge did find that because the meeting was public and without a license, he had committed a crime. The C.A.K judges reduced the sentence from twelve months to six months.[19] President Kenyatta unhappy with this judgment replaced CJ Dalton with Kitili Mwendwa on the day of the ruling and Justice Farrel retired from the bench a few days later.[20]

While President Kenyatta took a more direct approach, President Moi took both direct and indirect methods towards the control of the Judiciary. One indirect way that President Moi used to succeed in controlling the Judiciary was by removing the tenure of Judges. In 1988 President Moi was able to remove the security of tenure for Judges through a constitutional amendment.[21] While the tenure was later reinstated in 1990, due to international and domestic pressure.[22] The removal of the tenure and the method of removal used by the President undermined the independence of the Courts. It showcased far-reaching powers held by the President and the potential consequences of going against his wishes. President Moi further asserted his dominance over the Judiciary in 1997 when he directed the courts not to interfere in internal KANU party matters.

A more direct approach taken by President Moi was the recusal of Justice Scholfield by the CJ Miller due to his disobedience to a directive by President Moi. In 1987 Justice Scholfield, a contractual judge, judged a *habeas corpus* petition filed for Mbaraka Karanja who was killed and buried by the police who did not inform his family. Justice Schofield held that the Director of Criminal Investigation failure to locate and disinter Karanja's body was in contempt. However, after the ruling CJ Miller on the orders of Moi, summoned him and told him to recuse himself .In response, Scholfield asked the CJ to tell President Moi that his interference with the Judiciary was

[18] Kaggia & Another V R (1969)
[19] Kaggia & Another V R (1969)
[20] Mutua M,' Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23(1),109.
[21] Constitutional of Kenya Amendment Act 4 of 1988.
[22] Gathii J,' The dream of Judicial Security of tenure and the reality of Executive involvement in Kenya's Judicial Process',14 *Kenya Human Rights Commission,*1994,13.

improper.[23] After Justice Scholfield recusal from the case he left the country, he stated referring to the Kenyan Judiciary, 'Chief Justice and some judges see it their duty to assist the President and the government'.

In 1992, a similar event occurred when Justice Thomas Mbaluto ruled against the Electoral Commissions, that was KANU dominated, decision to reduce the timeframe needed for nomination of candidates and the management of campaigns prior to the 1992 general elections. The facts of the case were that the Attorney General (AG) Amos Wako through a formal procedure amended the National Assembly and Presidential Elections Act and decreased the time for nomination of candidates despite the disadvantage it would cause to opposition political parties. The judge overruled the amendment and ruled that the action by the AG's was a misuse and abuse of his powers and also held that the Attorney General's actions were illegal.[24] During the delivery of the judgement Justice Mbaluto was interrupted by a call from the then head of the Civil Service and Secretary to the Cabinet Philip Mbitiwho sought to modify the judgment.[25]

An indirect way that President Moi controlled the Judiciary during this period was by controlling the nomination of judges. This allowed President Moi to fire or transfer judges who ruled against the government at the time, leaving only those Judges who ruled in the governments favour able to reach the age of retirement.[26] Additionally, Judges loyal to President Moi received rewards. The rewards included land,[27] promotions within the Judiciary such as the appointment of Benard Chunga who was known as being personally loyal to President Moi in September 1999 to CJ,[28] and appointments to commissions such as the appointment as electoral commission chairman of Zacchaeus Chesoni, former H.C.K judge who was mysteriously cleared of bankruptcy proceedings presumably on Moi's orders.[29]

The Executive control of the Judiciary through appointments continued even during President Kibaki's tenure. In 2009 President Kibaki appointed Justice Ringera as the Director of Kenya Anti-

[23] Mutua M,' Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23(1),110.
[24]Gitobu Imanyara and Hassan Kadir v. The Electoral Commission,
[25] Mutua M,' Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23(1),111.
[26] Adar K,' Assessing democratisation trends in Kenya; A post-modern of the Moi regime' 38(3) *Journal of Commonwealth & Comparative Politics*,2008,105-108.
[27] Southall R,' The Ndungu Report; Land & Graft in Kenya'103 *Review of African Political Economy,*2005,142.
[28] Adar K and Munyae I,' Human Rights Abuse in Kenya Under Daniel Arap Moi,1978-2001' 5(1) *African Studies Quarterly,*2001 12.
[29] Barkan J,' Kenya: Lessons from flawed election' 4(3) *Journal of Democracy*,1993,93.

Corruption Authority. He held this position from 1999. However, due to a declaration by the H.CK that the Authority was unconstitutional in 2000,[30] he lost the position. The Authority was declared unconstitutional as the H.C.K, in the case of *Stephen Gachiengo v Republic,* found issue with the appointment of a Judge to a Commission. The facts of the case of *Stephen Gachiengo v Republic* are that the applicant was charged with counts of abuse in the Chief Magistrate's Court. However, before the hearing, the applicants raised objections related to the Constitution, and the magistrate referred the issues to the H.C.K. One issue was whether the Kenya Anti-corruption Authority was constitutional and contradicted the doctrine of Separation of Powers.[31] The H.C.K rationalised that appointing a judge as the head of the Kenya Anti-corruption Authority conflicted with the Judicial oath he took as an acting judge during the appointment. After the Justice Ringera retired President Kibaki attempted to reappoint him to the Kenya Anti-Corruption Commission, this was however rejected by Parliament.[32]

The introduction of the 2010 Constitution reinstated the judicial independence as it reduced the president's influence on the Judiciary. The most significant alteration is the absence of the President's involvement in appointing of judges and the lack of authority to fire or transfer judges.[33] The reduction of the President's involvement in the selection of Judges was contested in the H.C.K case of *J Harrison Kinyanjui v AG*.[34] This case involved the Judicial Service Commission(JSC) process of selection Chief Justice(CJ) and Deputy Chief Justice(DCJ). The JSC conducted interviews for the position of CJ and DCJ and availed the nominations to the President and the Parliament. The President and Parliament then approved the nominations of Dr Willy Mutunga and Ms. Nancy Baraza for CJ and DCJ respectively. The Claimant however challenged the appointment of the two individuals. The Petitioner argued that the acceptance of the nominations by the Parliament and President was against their legitimate expectation that all the eligible applicants would be availed to the President and Parliament who would consider the Judicial service recommendation but would make the ultimate decision on who would receive the

[30] U.S Department of Stat Diplomacy in Action, Kenya -< https://2009-2017.state.gov/outofdate/bgn/kenya/40620.htm>.
[31] Stephen Mwai Gachiengo & another v Republic [2000] eKLR.
[32] BBC News Channel,' Kenya Corruption fighter rejected', BBC News,17th September 2009-< http://news.bbc.co.uk/1/hi/world/africa/8260385.stm>
[33] Ghai Y, Ghai J, Du Toit L And Miyawa M, 'Constitutional Reforms and Judicial Appointments in Kenya' in Shetreet S and Forsyth C (eds) *Securing Judicial Independence: The role of commissions in selecting judges in the Commonwealth,* Edward Elgar Publishing,2017,100-107.
[34] [2016] eKLR

jobs. The High Court ruled that the President's role in the appointment of the CJ and DCJ is purely facilitative as the head of State. The Court held that the power of approval of the President and the National Assembly must comply with the recommendations of the JSC. The lack of a more assertive role of the President is to protect judicial independence.[35]

Other than ensuring independence in the process of selection of judicial officers the new legal regime also provided for retirement. The age of retirement under the 2010 constitution is seventy years.[36] This change in law has been met with contestation for contradicting Section 9 of the Judicature Act that places the retirement age at Seventy-four years. The C.A.K settled this conflict in *Justice Kalpana H. Rawal v Judicial Service Commission*.[37] In this case the Honourable Justice (as she then was) Kalpana contested the application of Article 167 to judges who were appointed before 2010. She argued that Article 67 of the Independence Constitution backed by Section 9 of the Judicature Act was preserved by Section 7(1) of the Sixth Schedule of the 2010 Constitution, which provides for transition of provisions and laws that existed before the 2010 Constitution.

The C.A.K however held that while section 7 of the Sixth Schedule does allow continued application and enforcement of past laws, its purpose is mainly to prevent a legal vacuum during the transition from one constitution framework to another. Thus, it legitimatizes past laws provided that their application is limited to being consistent with the new constitutional order.[38] The Court further explained that Section 9 of the Judicature Act was not applicable as it was not among the sections that Section 7 of the Sixth Schedule transited into a new Constitutional era and therefore Article 167 of the 2010 Constitution applies to both newly and older appointed judicial officers.

Another feature of the doctrine of independence of the Judiciary is the safeguarding of remuneration. Stated in Article 160(4) of the 2010 Constitution, a judge's compensation and perks cannot be changed in a way that would be detrimental to them..[39] Likewise, a retired judge's retirement benefits cannot be changed to their detriment while they are still an active retired judge.

[35] J Harrison Kinyanjui v Attorney General & another [2016] eKLR Para 5-9,31and 58.
[36] Article 167, *Constitution of Kenya* (2010)
[37] Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR
[38] Kassamali Co. v. Kyrtatas Brothers [1968] EA 542: Royal Media Services Ltd v. Attorney General & 2 Others HC Petition No. 346 of 2012.
[39] Article 160(4), *Constitution of Kenya,*(2010).

Despite this change in the law that aims to protect the Judiciary's independence there are still instances of the Executive attempting to control the Judiciary through a similar reward system as the former President Moi used. The difference is that this system is being applied to both retired Judges and practising Judges through controversial appointments. One way that these appointments occur is through the State Corporation Act. The State Corporation Act empowers the President to appoint anyone they see fit into the Chairperson position.[40] However, there are qualifications under the *Mwongozo* code of governance for State Corporations that candidates of the position of Chairperson should meet.[41] The *Mwongozo* Code creation was initiated by former President Uhuru as a use of his powers under Section 30 of the State Corporations Act that empowers him to create guidelines that improve the operations of state corporations. Mwongozo Code mainly addresses the questions on governance, leadership, and management of public resources within the state corporations.[42]

The legal status of the report was discussed in *Republic v Communication Authority of Kenya*.[43] The facts of this case are that the applicant, the Information Communication Technology Association of Kenya (ICTAK), challenged the respondent's, Communication Authority of Kenya recruitment process for the position of Director General of the Communication Authority of Kenya. The respondent had announced the vacancy for the position setting qualifications that the ICTAK found objective as they went beyond those stipulated in the *Mwongozo* Code. The respondent contested the application arguing that the advertisement complied with statutory provisions and authority was granted by law to set qualification and defended the legality of the recruitment process. are-advertisement of the Director General post as the qualification in the advertisement exceeded the legal requirements in the *Mwongozo* Code. The Employment and Labour Relations Court found that advertising the position by the respondent was unlawful and procedurally unfair. The court found that it violated the credentials set out in the *Mwongozo* code

[40] Section 6, *State Corporations Act* (CHAPTER 446)
[41] Mwongozo The Code of Governance for State Corporations, Public Service Commission, January 2015,55
[42] *State Corporations Act*, Cap 446
[43] Republic V Communications Authority of Kenya; Information Communication Technology Association of Kenya (ICTAK) (Exparte) (Judicial Review Application 21 Of 2020) [2021] KEELRC 7 (KLR) (9 April 2021) (Judgment),

which the court recognised as a statutory document regulating such appointments. The respondent had no authority to alter these qualifications. [44]

The status of the code was also stated by the C.A.K in *Ben Chikamai v Peter Macithi Muigai*.[45] This case revolved around the reappointment of Chikamai as Chief Executive Officer (CEO) of Kenya Forestry Research Institute (KAFRI) a state corporation. The first respondent challenged this on the grounds that it violated the *Mwongozo* code of Governance that allowed for the CEO to hold office for two terms totalling six years. The trial court agreed with the respondent and ordered the removal of Chikamai. Chikamai appealed to the C.A.K. His arguments were centred on the applicability of the *Mwongozo* Code. He argued that the code was not effective at the time of appointment making the reappointment valid.[46] On the place occupied by *Mwongozo* Code the Judges explained that since its implementation the code was designed to complement existing legal framework while also adhering to the constitutional principles.[47] Therefore the *Mwongozo* Code was meant to apply to the Applicant although it came after his appointment as the code was intended to supersede the provisions of the former directive.[48]

The requirements specified by the Mwongozo Code mostly involve requirements about experience, skills, and education.[49] The President, therefore, has the discretion to appoint any applicant, who has met the requirements set forth and provided that the process has followed the constitutional principles set in Articles 10 and 232, as chairperson. The discretion given to the president on appointment of chairperson is extensive and can be prone to political abuse.

Therefore, while the appointment of retired judges may not inherently undermine the independence of the Judiciary it still has an effect that should be carefully monitored. There have been appointments by the President that would be considered as undermining judicial independence. One such an appointment was in 2021 when former President Uhuru Kenyatta appointed Retired Supreme Court Judge Jackton Ojwang' as chair of the Energy and Petroleum Regulatory Authority

[44] Republic V Communications Authority of Kenya; Information Communication Technology Association of Kenya, Para 42.
[45] Ben Chikamai & another v Peter Macithi Muigai & 2 others [2020] eKLR
[46] Ben Chikamai & another v Peter Macithi Muigai, Para 2-16.
[47] Ben Chikamai & another v Peter Macithi Muigai, Para 34.
[48] Ben Chikamai & another v Peter Macithi Muigai, Para 35.
[49] Mwongozo Code of Governance,55-56.

(EPRA).[50] His appointment was based on Article 134 (4)(a) of the Constitution which grants the President the authority to execute additional Executive duties as stipulated by the national legislation or Constitution and the State Corporations Act in which the Chairperson of a Board is appointed by the President.[51]

Another controversial appointment was of retired Lady Justice (Rtd). Mary Muhanji and Hon. Lady Justice Jessie W Lesiit as members of the Commission created in 2023 by President Ruto to inquire into the Shakahola.[52] The Shakahola tragedy refers to the mass death and cruel inhumane actions inflicted upon members and affiliated members of the Good News International Church. These acts were discovered early April 2023 and led to public uproar as to how the incident occurred without early government intervention.[53]

The section of the judges to the commission was one of the arguments presented by Azimio la Umoja One Kenya Coalition Party in its submission to the H.C.K opposing the creation of the Commission.[54] The coalition party argued that the appointment of the two justices was improper. They argued that as chairperson the judge would be working for the President as he would be the one who decides their pay and allowances, which would jeopardise their function as a judge.[55] The applicants argued further that the report of the commission that the Honourable Judge was part of would humiliate the Judiciary and undermine its independence by suggesting the prosecution of some people and then returning to serve as a judge in the system where those individuals would be prosecuted. The Court agreed with the Applicant as it found the action to have undermined judicial independence. The court concluded that the applicants, acting as defenders of the Judiciary, were citizens whose trust and support provided the foundation for the court's authority.

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[50]Ogemba P, 'Retired Judge And Others Get Plum Jobs', The Standard,2021, -< Https://Www.Standardmedia.Co.Ke/Election2017/Article/2001371496/Retired-Justice-Ojwang-To-Head-Energy-Body>

[51] Section 6(1)(A), State Corporations Act CAP 446.

[52] Gazette Notice No.5660 of 4th May 2023.

[53] Kithi M, 'Freshly buried body bearing signs of torture discovered in Shakahola' The Standard, 31st August 2023-< https://www.standardmedia.co.ke/national/article/2001480361/freshly-buried-body-bearing-signs-of-torture-discovered-in-shakahola>; Rédation Africanews,' Kenya: Shakahola cult deaths climb to 303 bodies' africanews,14th June 2023-< https://www.africanews.com/2023/06/14/kenya-shakahola-cult-deaths-climbs-to-303-bodies//>.

[54] Azimio La Umoja One Kenya Coalition Party v The President of Kenya & 9 others (Petition E153 of 2023) [2023] KEHC 17926 (KLR) (Constitutional and Human Rights) (29 May 2023) (Ruling).

[55] Section 7(1), *Commission of Inquiry Act* (Act No.5 of 2010).

Therefore, any action diminishing this trust is perceived as a challenge to the autonomy of the Judiciary. The Court suspended the Commission.

While this study focuses on retired Judges, the ruling of the H.C.K in the case of *Azimio La Umoja One Kenya Coalition Party v The President of Kenya* despite it touching only on the appointment of an active Judge is important as it gives insight to the Judiciary's standing on the appointment of judges into commissions by the Executive . The courts have found issues with the appointment of acting judges to commissions by the President as they found it undermined the independence of the Judiciary, in both post and pre-2010 court decisions. However Kenyan court has not stated its position on the appointment of retired judges and the effect that such appointments may have on judicial independence.

**1.2. Statement of problem.**

Kenyan law allows the president to appoint anyone they see fit to the position of chairperson in Commissions, authorities, and parastatals. In the history of Kenya, the president has chosen at times to appoint judges or retired judges into this position. The court has been clear that appointments of judges into these positions is an action that the Executive should avoid due to the clash that these appointments have with the judicial oath taken by the judges. The appointment of retired judges on the other hand has not been discussed dispute it occurring and having an effect on the independence of current judges. Leaving such a space in the law will result in the Executive using this lacuna in an attempt to control the Judiciary by using the appointments as rewards for the past actions of the retired judges, this does affect the judicial independence of current judges because they would be motivated to decide in favour of the government despite them being wrong. There is need to create regulations that control the appointments of retired judges for the protection of judicial independence.

**1.3. Purpose of Study**

This research holds significance both academically and policy wise. Academically this paper contributes to studying of the regulation of post-retirement opportunities of judicial officers from a legal and psychological perspective in Kenya. Policy-wise the paper demonstrates the importance of placing legal restrictions on the opportunities open to retired judges while still recognising their right to employment.

### 1.4. Hypothesis

This study proves that the appointment of retired judges by the Executive does influence the decisions making of judges. Judges as human being is motivated by career progression possibilities and would be influenced by the appointments of retired judges by the Executive , as they see these appointments as rewards, to decide in the favour of the government. This influence goes against the independence of the Judiciary. Additionally, the study also perceives that the appointments by the Executive affect the public image of the Judiciary thus resulting in further undermining of the independence of the Judiciary.

### 1.5. Aims and Objectives

This research explores the effects of post-retirement recruitment of judges on the independence of the Judiciary and the possible policies that can be adopted to protect the independence. The possible policies considered are drawn from nations that have laws on the limitation of post-retirement employment of Judges.

The research objectives are;

1. To assess the evolution of judicial independence in Kenya throughout history
2. Examine current understanding of judicial independence and suitability for the Kenyan context
3. To investigate the psychological effect of the appointment of retired judges by the Executive on the decision-making of current judges.
4. To examine other nations' policies with regards to control of post-retirement employment of judges, its effect, and their criticisms and consider implementation of similar measures into Kenya.

### 1.6. Research Questions

The study will be driven by the following research questions;

1. What is the history of judicial independence in Kenya?
2. To what extent are judges influence by external factors in their decision-making?
3. What is the current understanding of judicial independence and is it appropriate for the context in which Kenya is in?

4. Does the appointment of retired judges by the Executive have a psychological effect on the independence of current judges?
5. How do the nations with policies that restrict the employment opportunities of retired judges' function and how do they justify the infringement they may have on the right of employment of retired Judges?

### 1.7. Significance of the Study

Failing to recognise the effect of post-retirement job opportunities of Judges on the Separation of powers and specifically on the independence of the Judiciary would entail disregarding the historical context of Executive influence over the Kenyan Judiciary. The regulation of retired judges' employment opportunities allows the Judiciary to defend itself from the influence of the Executive . This would promote the independence of the Judiciary and the rule of law.

### 1.8. Justification of study

The discretion given to select any individual to be a chairperson of a board is a power that seems harmless. However, failure to regulate this power could create an undue influence on judges, who would be influenced by the possibility of them being chosen as chairpersons upon their retirement. This leads to rulings that favour the government and consequently to injustices.

So far, there has been no Kenyan scholarly work on this critique**.** Kenyan Scholarly work and cases after the promulgation of the 2010 Constitution are primarily focused on the Judicial appointment process and the role of the Executive in the process, particularly the President instead.[56]

This study provides information useful to both judicial officers and the Executive in examining the appropriateness of their actions. Additionally, it also helps researchers in the study of Constitutional Law concerning Judicial independence and the doctrine of Separation of powers. it will also help lawmakers who are responsible for ensuring that the rule of law is respected.

### 1.9. Scope and Limitations of Study

This study will cover the appropriateness of the discretion available to the Executive on the appointment of individuals to State corporations, Commissions, authorities, and parastatals and examine the effect on judicial independence when head of the Executive , The President, in appoint retired judges into State corporations, Commissions, authorities, and parastatals .

[56]Sibalukhulu N, 'The Judicial Appointment Process in Kenya and Its Implications for Judicial Independence' Unpublished Mphil Thesis, University of Pretoria, Pretoria, 2012, 30.

The study will be limited to the available data on the effect on the public of retired judges and their place in the Judiciary and public opinion on the interaction between the Executive and Judiciary.

## 1.10. Conceptual Framework

The conceptual framework underpinning the discussion is understanding the judge as a person. This conceptual framework understands a judge as being a person is motivated by factors that influences human beings. The conceptual framework assists in discussing the impact that post retirement judicial decisions affect decisions by judges.

## 1.11. Literature Review

Current literature focuses on the impact that the nominating judges and its impact on judicial independence.[57] Scholar Makau Mutua in his article, explains that the Judiciary has been under attacks from the Executive in attempt to control the judicial arm since independence. He explains that since independence political leaders have recognized the Judiciary's power as an instrument of change and was used to advance politicians' self-interests.[58] One way by that Executive at the time used to control the Judiciary was by ensuring that they had the power to appoint and dismiss judges, effectively controlling judges and eliminating any independence the Judiciary had.[59]

Additionally, Yash Ghai, Jill Cottrell, Linette Toit and Maxwell Miyawa in their article, bring out another way by which the Judiciary was controlled.[60] They explain the Judiciary was controlled by through appointment and removal of judges by the President and through financial dependence.[61] The authors recognise the 2010 Constitution led to major development in the independence of the Judiciary, such as the appointment process. Despite the President's involvement in the appointment process of judges, his authority has significantly waned as the Judicial Service Commission (JSC) has emerged as the predominant force in this regard.[62] The President's role has been diminished to merely appointing the individual recommended by the JSC.

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[57] Nompumelelo S,' The Judicial Appointment Process in Kenya and Its Implications for Judicial Independence' Unpublished MPhil Dissertation, University of Pretoria, Pretoria,2017.
[58] Mutua M,' Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 99-100.
[59] Mutua M, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya',104-107.
[60] Ghai Y, Ghai J, Du Toit L And Miyawa M, 'Constitutional Reforms and Judicial Appointments in Kenya' in Shetreet S and Forsyth C (eds) *Securing Judicial Independence: The role of commissions in selecting judges in the Commonwealth,* Edward Elgar Publishing ,2017,87-91.
[61] Ghai Y *et al*, 'Constitutional Reforms and Judicial Appointments in Kenya', 100.
[62] Ghai Y *et al*, 'Constitutional Reforms and Judicial Appointments in Kenya',102-107

The authors emphasize that the drafters of the constitution intended for this function to be purely ceremonial, indicating that the President has no alternative but to accept the recommendations. Despite this, there have been attempts by the Executive to claim otherwise going so far as to claim that the constitutional reformers intended for the president to be involved had they, not they would not include him.[63] The persistence of the Executive shows that they still intend to control the Judiciary despite judicial independence being regarded as being an critical element to the rule of law and as a means of preventing past events from reoccurring.

While Kenyan literature primary examines the Executives' role in judge selection, Yash Ghai in his article that discuss the place of the constitution in East Africa explain that the constitution within the political order of East Africa as a political tool rather than a fundamental law.[64] He argues that the constitution is frequently manipulated by the political party in power to maintain a grip on power.[65] This manipulative view, according to Ghai, results in a political struggle for power where the constitution is used as a weapon rather than a safeguard for individual rights and separation of power. Ghai further contends that this perspective of the constitution and the law does have implications on institutions independence. His discussion on the influence that this power struggle would have on institutions' independence is applicable to judicial independence. Thus, if the law is viewed as a political tool, the independence of the Judiciary, which is crucial for upholding the rule of law and protecting individual rights can easily be compromised. The Judiciary's role in interpreting and enforcing the law becomes politically charged and the separation of powers between the arms of government can be undermined. This discussion provided by Ghai indicates that legal scholars are aware of the weaponization of law and the lack of law by the Executive . The scholars however have not directly discussed the impact that post retirement careers have on the independence of judges themselves.

### 1.12. Methodology

This study relies on qualitative evidence from mostly secondary sources such as books, articles, case law and reports. It will also use primary sources such as the Constitution of Kenya, the state corporation Act and the Mwongozo report.

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[63] Mbiuki J, 'President has power to hire court judges' The Star, 13 January 2016 -< https://www.the-star.co.ke/opinion/columnists/2016-01-13-president-has-power-to-hire-court-judges/> on 10 February 2023.
[64] Ghai Y,' Constitutions and the Political Order in East Africa' 21(3) *The International and Comparative Law Quaterly,*1972.
[65] Ghai Y,' Constitutions and the Political Order in East Africa' 21(3),13-21.

The study will use a deductive approach with the first two chapters illustrating a premise each and from which a main claim will be derived..

Generally, the methodology of the study will be qualitative. It will take the format of desk-based research.

### 1.13. Definition of terms

**Doctrine of Judicial independence**- Judicial Independence is defined as Judicial authority exercised by the Judicial arm of the government that is protected from the control of any person or authority and is subject to the Constitution and the laws of the Country.

**Separation of Powers-** Constitutional doctrine that explains the difference in powers held by the Arms of government.

**Arms of government-** the Judiciary, Legislature, and Executive .

### 1.14. Chapter breakdown

The first chapter provides an overview of the problem and the reason for the research on the topic. It also gives an overview of the research through research aims objectives and questions. Additionally, it will stipulate the research methodology, scope, and limitations of the study.

The second explores the misconception of judges being able to separate their motivations and biases from cases. The chapter explore the internal and external motivators of human beings. The chapter then attempt to relate the findings of the discussion to Judges and the influence that the decisions of retired judges have on them in acceptance of appointment by the Executive has on current judges.

The third chapter analyses judicial independence as its understood. The chapter attempts to give an understanding of judicial independence and its elements. The chapter then explain the connection between judicial independence and actions of retired judges. The chapter uses literature and cases that discuss retired judges and their relation to judicial independence.

The fourth chapter probes the psychological effects of Executive appointments in judges' decision- making and public perception of the Judiciary. The chapter explores the psychology behind judging with the aim to determine whether decisions by the Executive , especially selection of retired judges into employment, influence current judge's decision-making process.

Additionally, the chapter also delve into nations who have laws restricting post-retirement job opportunities for judges.

The fifth chapter summarizes the findings and the ability of Kenya to implement similar laws. The chapter also provide recommendations.

# CHAPTER 2: Understanding a Judge as a person.

## 2.1 Introduction

Judges' main prerogative is to promote justice. A responsibility they fulfil through the judgements they issue.[66] The judgments they render must be fair and just, this is achieved by adequately applying the laws within their jurisdiction.[67] For the duration of their duties within and out of the court room Judges are viewed as being different from the other civilians.[68] This difference in the societal standing of judges results in high expectations held by society.[69] Judges are expected to be fair when hearing cases this means that they must rid their mind of any biases, opinions or assumptions that would influence their decision-making process. The commitment to fairness is so important that a judge can recuse themselves when there is a strong possibility that their decision will be biased.[70] The commitment to be rid of bias is also showcased in the oath taken by judges. Judicial oaths in both Kenya and America both include the judge promising to be impartial and free from any biases or influences.[71] The expectation held by society are that Judges will apply the law in a manner free from all foibles and biases.[72]

## 2.2 Philosophical understanding of a person

To adequately understand the judge as a person there is need to first decipher what a person is . A human being is considered a primary kind, however this characteristic is not exclusive to a human being as all everything exists as some primary kind, for example organism exist in a kind too.[73] What sets a human being apart however is their ability to view themselves from a first-person perspective. A first-person perspective means that human being is able to think of themselves without the use of any name, description, or demonstration; it is the ability to conceive oneself as from the inside.[74] First person perspective is the understanding of oneself as oneself. It is the beginning of self-consciousness.[75] Therefore being a person requires that one is able to recognise

[66] Stone J, 'The Province and Function of Law' 1946,287-288.
[67] Ferraro F, 'Adjudication and Expectations: Bentham on The Role of Judges '25(2) *Utilitas,*2013 ,141.
[68] Otis L and Reiter E, 'Mediation by Judges: A New Phenomenon in The Transformation Of Justice' 16(1) *Journal on Dispute Resolution* 2006, 351, 365.
[69] Oldfather C, 'Judges as Humans: Interdisciplinary Research and The Problems of Institutional Design' 88(5*) Notre Dame Law Review*,2013,128
[70] United States Constitution Amendment XIV Sectiion1.5.4.5
[71] Third Schedule, *Constitution of Kenya* (2010), United States Code Title 28 Section 458
[72] Oldfather C, 'Judges as Humans: Interdisciplinary Research and The Problems of Institutional Design,'127
[73] Barker L.R,' When does a person begin?' 22(2) *Social Philosophy and policy*,2005,28.
[74] Barker L.R,' Persons and the Metaphysics of Resurrection' 43(3) *Religious Studies,*2007,6.
[75] Barker L.R,' Persons and the Metaphysics of Resurrection',6: Barker L.R,' When does a person begin?',29.

their states of consciousness.[76] The state of self-consciousness of a person significantly affects their self-regulation and in turn the motivation behind their actions.[77] Judges are legally knowledgeable individuals .Therefore, the only distinguishing factor between judges and others is the title and the power they have due to the title they hold. Therefore, judges similar to ordinary people are susceptible to influence and their actions are motivated by their self-consciousness.[78]

Therefore, understanding a judge as a person means recognizing that they too have human inclinations and these inclinations do influence the way they act and write judgements. Through this understanding the law makers and judges will be able to identify and prevent these inherent human qualities of a judge from affecting the Judiciary's public reputation and independence. This understanding is critical especially given the impact that a judges' legal philosophical inclination has on the decisions that they make.

**2.3 Legal philosophy affecting Judgments; Nazi Informer Case**

Seeing judges as machines that are to apply the law ignores that decisions by judges can be affected by their inclinations. Judicial decisions of judges differ depending on the legal philosophy they align with. This is illustrated in the debate between Hart and Fuller.[79]

The debate between the two legal scholars was a reaction to the Nazi informer case. The facts of the Nazi informer case are that in 1944, the defendant, the informer, reported to German authorities the derogative remarks about Hitler she heard her husband make while on leave from German army. She reported the case with the desire to get rid of her husband. The Military Tribunal sentenced the husband to death. After the downfall of the Nazi regime, the wife and the judge who pronounced judgment against the husband were charged under Section 289 of the German Criminal Code of 1871 for illegally depriving another individuasl of their freedom. On appeal to the German court of last resort the judge was acquitted but held the wife as still guilty because of

[76] Higgs P and Gilleard C, 'Interrogating personhood and dementia' 20(8) *Aging & Mental Health,*2016,3-4.
[77] Plant R.W and Richard R.M,' Intrinsic motivation and the effects of self-consciousness, self-awareness, and ego-involvement: An investigation of internal controlling styles' 53(3), *Journal of Personality* 1985,436-437.
[78] Collier C.W,' The use and abuse of humanistic theory. In Law: Reexamining the assumptions of interdisciplinary legal scholarship' 41(2), *The Duke Law Journal*,1991,191- 221.
[79] Lacey N,' Philosophy, political morality Lacey N,' Philosophy, political morality, and history: Explaining the enduring resonance of the Hart-Fuller debate'.

her application Nazi law out of free will violated the moral comps sans innate sense of justice shared by all decent individuals hold on imprisonment or death.[80]

The debate between the two intellectuals is based on their different legal philosophy alinement which informed their arguments on Law and Morality. The two philosophies are Legal positivism and Natural Law and therefore each have a different understanding of law. Legal Positivism understand law to be a matter of social fact, as this is what gives the law its authority.[81] While Naturalist understand law as the precept of reason promulgated for the common good, they hold that laws are only valid when they align with morality.[82] These different understandings of law informed the debate between Hart and Fuller.

Hart identified himself as a positivist and thus disagreed with the German court in his paper ''Positivism and the Separation of Law and Morals''.[83] At the beginning of his paper, Hart explains that while he does acknowledge that there is a relationship between laws and morality.[84]He does not acknowledge that the existence of the legal system is not dependant on whether the law adheres to morality. He explains that the Nazi laws were still laws established under the Reichstag's Enabling Act despite them being immoral. He also criticised the use of the principle of morality by the German court as the use of such a principle to regulate law would mean that at a certain point what is immoral cannot be law and lawful laws would only those that serve to disguise the genuine nature of the issues being faced. This would encourage the worship of values as they would be regarded as the law. Thus, none can be sacrificed or compromised to accommodate another.

Fuller, on the other hand agreed with the Court as he was a Naturalist. As a response to Hart Fuller wrote ''Positivism and Fidelity to Law; A reply to Professor Hart''.[85]Fuller explained that because all Nazi law were anti-moral, they could not be considered law as they lacked inherent sensibility and morality necessary in the legislative procedure which gave them authority. He explains further that law and morality are intertwined as morality is what gives law authority and ensures obedience

[80] *Harvard Law Review, 1951, pp. 1005–7*
[81] Coleman J and Leiter B,' Legal Positivism' Chapter 14 in Patterson D,' A companion to Philosophy of law and legal theory' Blackwell Publishing Lts second edition 244,244,246,249
[82] Smith P,' Feminist Jurisprudence' chapter 18 in above 291
[83] Hart, H.L.A, 'Positivism and the Separation of Law and Morals',71(4). *Harvard Law Review*,1958,613-619.
[84] Hart, H.L.A, 'Positivism and the Separation of Law and Morals', 599-620
[85] Fuller, L.L, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 71(4) Harvard *Law Review*, 1958, 630–672

by the citizens. Additionally, he further disagreed with Hart's position as recognizing Nazi laws as laws would lead to an injustice as none of the Nazi-era perpetrators would be held accountable.

The Hart and Fuller debate showcase different types of decisions a Judge can make depending on the legal philosophy they follow. Consequently, expecting judicial decisions to be completely void of a judge's biases and opinion is wrong and can lead to the dehumanization of the judges despite them their natural human tendencies.[86]

### 2.4 Human Motivation

Human motivation is referring to the incline behind human actions that causes them to desire to achieve positive change in the circumstances they find themselves in.[87] There are different ways that human motivation can be explained, one is change sought and another is by evaluating the different goals for motivation.

#### 2.4.1 Changes Sought

The first method related to change explains that change sought acts as the motivation but differs according to the type sought, and the place sought. Change sought in different places differs per the focus of the aspiration. The different aspirational focus is change one's sense of self, one's social relationships and one's relationship with the material world.[88]

Change in one's sense of self refers to one's identity as a person and how their identity influences the development of personal values and morals. There three types of change in self these are intrapsychic, instrumental and Interpersonal. In intrapsychic change the self is the centre of motivations. Instrumental change pertains to one's relationship with the material world , it encompasses their ability to act, their sensory experiences as they interact with the world and the outcomes of their decisions. Interpersonal change involves shifts in one's social relationships, encompassing feelings on their connections to others, how their interactions with others feel and how they are regarded by others in the social world.[89]

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[86] Frank J, *Courts On Trial: Myth and Reality in American Justice*, Basic Book, NewYork,1985, 147;Alfange D, 'Jeremy Bentham and the codification of law' 58 *Cornell Law Review,*1969,64.

[87] Forbes D, 'Towards a unified model of human motivation' 15(2) *Review of General Psychology*,2011, 3.
Ryan R and Deci E, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' University of Rochester, Contemporary Educational Psychology 25,54-67,200,4 —< http://www.idealibrary.com > on 10 October 2023.

[88] Forbes D, 'Towards a unified model of human motivation',87.

[89] Forbes D, 'Towards a unified model of human motivation',87.

The type of change sought depend on the levels of aspiration. The first level deals with self and is referred to as change in potential. Change in potential refers to the desires a person holds for themselves in terms of what they want to become. The second level deal with the individuals' aspirations in terms of experience, it is referred to as change in process. The third level deals with the outcomes that a person wants to achieve and is referred to as change in outcomes.[90]

The levels of aspiration and focus of aspiration are interdependent as they inform the human motivation and create motivation domains. The domains differ according to the focus and levels of aspiration. Within the first focus intrapsychic is the motivation of Security. Security as a motivation is related to change in potential. Security is the most fundamental intrapsychic motivation as the strive for security which aligns with the necessity for safety, confidence, protection, and personal space. When a person is driven by a sense of security, they pursue reassurance, validation, freedom from anxiety and support. The second domain is identity. The identity domain of motivation involves the strive of human beings to act as themselves through expressing their individuality. Human beings are inherently driven to act autonomously and freely, and when they feel like their freedom is limited they resist such attempts. The third domain is Mastery. Mastery as a motivation strives towards a person realizing their full potential and includes aspirations for control, excellence, perfection and understanding.[91]

Within the instrumental focus of aspiration, the first domain is empowerment. The motivation of empowerment pertains to the individual strive to being equal to the task, capable of doing a task and having the freedom of choice. It explains that individuals typically select task depending on their ability to act competently. The second is Engagement. Engagement as a motivation entails individuals striving to optimise the experiences of activities, they engage in either enjoyable, exciting, or productive. Third is Achievement. This type of motivation pertains to striving to have good results from life activists and outcomes that one would be proud of. It aims for completion, success and pride in a job well done.[92]

In interpersonal focus belonging is the first domain of motivation. Belonging as a motivation refers to an individuals need to relate to the people around them. This type of motivation feeds into the

[90] Forbes D, 'Towards a unified model of human motivation'87.
[91] Forbes D, 'Towards a unified model of human motivation',89-90.
[92] Forbes D, 'Towards a unified model of human motivation',90-92.

desire to belong and connect that human being have as they are social creatures. It is through these connections that people develop ideas and thoughts, the mind and self are products of communication between organisms. These ideas provide motivation. The second domain is Nurturance. Nurturance motivates people to do activities with others to feel good, happy, love, kindness, understanding and cooperation.[93]

### 2.4.2 Self Interest

The second method of understanding human motivation is by evaluating the reasons behind their actions. This method recognises that the type of motivation is dependent on the underlying reasons or objectives that prompt actions. Under this method, motivation is divided into extrinsic and intrinsic. Intrinsic motivation is defined as engaging in an activity for its inherent satisfaction.[94] Intrinsic motivation comes from an inward desire and exists in human nature.[95] Extrinsic motivation refers to doing activities to attain a desired outcome or avoid an undesired outcome.[96]

Self-interest often is used as an extrinsic motivation. A self-interested action is often aimed towards a desired outcome rather than done for its intrinsic value. Self-interested actions lead to immoral acts as they involve pursuing actions to the detriment of others.[97] Self-interest in individuals motivates them to improve their economic standing, this would not apply to judges as their salaries are controlled by law. Self-interest in judges motivates them to improve their prestige, influence, and reputation towards the advancement of their career after retirement from the Judiciary.[98] Therefore when judges notice that the Executive favours retired judges for job postings, they will attempt to foster positive relationships with political actors in hopes of receiving similar treatment.[99]

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[93] Forbes D, 'Towards a unified model of human motivation',92-93.
[94] Ryan R and Deci E, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' University of Rochester, Contemporary Educational Psychology 25,54-67,200,4 —< http://www.idealibrary.com > on 10 October 2023.
[95] Gagné M and Deci E, 'Self-Determination Theory and Work Motivation'26(4) *Journal of Organizational Behavior*,2005, 334; Ryan R and Deci E, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions'4.
[96] Ryan R and Deci E, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions'*7;* Gagné M and Deci E, 'Self-Determination Theory and Work',334.
[97] Freiman C, 'Why be immoral' 13 *Ethical Theory and Moral*,2010, 9 and 22
[98] Arrowood J, 'Judges' Self-Interest and Procedural Rules: Comment on Macey' 23(1) *The Journal of Legal Studies*, 1994,648.
[99] Baum L, 'Judges and Their Audiences: A Perspective on Judicial Behavior',34-35,77-78

## 2.5 Conclusion

A judge within the court system can be identified according to the judgments they make. Litigators are able to categorise judges through analysis, this enables them to anticipate the judge's decision based on the facts of the case. This is possible because judges make decision according to the legal philosophy, they align themselves with. Thus, they are not rid of bias and influence. Following this understanding judges as people are influenced too by human motivation. While judges are to rid themselves from internal biases that may find that their decisions have been influenced by human inclinations such as motivation.

Human motivation such as empowerment, security, and nurturance influence judges to make decision that better their future after retirement from the Judiciary. With the desire to do these judges will take notice of the post career opportunities present, especially those most profitable in terms of remuneration and length of employment. In coming to a decision on this matter they will be influenced by the career paths of their successful predecessors. Therefore, where their seniors have bettered their lives post Judiciary through government appointments, current judges are likely to mimic the actions taken by the seniors to achieve such appointments.

Therefore, when judges notice that the Executive favours retired judges for job postings, they will attempt to foster positive relationships with political actors in hopes of receiving similar treatment.[100] Such aspirations would be detrimental to judicial independence as the Judiciary would be under the control of the Executive .

[100] Baum L, 'Judges and Their Audiences: A Perspective on Judicial Behavior',34-35,77-78

# CHAPTER 3: Unravelling Judicial independence in Kenya.

## 3.1 General understanding of Judicial independence

Judicial independence is derived from the constitutional doctrine of separation of powers. Separations of power doctrine allows for the independence of the Judiciary as a means of safeguarding the rule of law and democracy.

The rule of law means the predominance of the law. It rules out the presence of arbitrariness or extensive discretionary power held by the government.[101] The rule of law ensures supremacy of the law, equality before the law and predominance of the legal spirit. Judicial independence functions to ensure that the rule of law is not destroyed by pollical pressures. Judicial independence insulates judges from political influence which reduces the likelihood that basic protections will fail to be protected.[102] The rule of law and judicial independence are both fundamental principles that uphold the integrity and function of a just legal system. They therefore need to be protected from external pressures.

### 3.1.1 Past Perspectives of Judicial Independence

The doctrine of separation of powers has existed for as long as the idea of different arms of government has. The earliest conceptualization of the doctrine is by Aristotle.[103] Aristotle was among the first writers on separation of power. In his conceptualization he envisioned a separation between the deliberative, the magisterial and judicial powers. His conceptualization is like the current division of powers between the Executive , Judiciary, and Legislature. His idea does fall short as he did not envision a clear distinction of duties between the Legislature and Judiciary. He saw the Judiciary as a delegate of the Legislature.

Aristotle's theory later evolved through Locke to what is considered the conventional conception of separation of power. The classical understanding of separation distinguished the arms of governments by the functions they perform. Locke was a proponent of the division of powers of the government into the different arms, which he called the Legislature, Executive and federative.[104] He reasoned that the separation would prevent the centralization of powers by one

[101] Dicey A.V, *'Introduction to the study of the law of the Constitution'* Liberty Fund,Indianapolis,1915,147-153.
[102] Boies D,'Judicial independence and the rule of law', 22 *Washington University Journal of Law and Policy,*2006,58.
[103] Aristotle, *Politics,* Batoche Books,1999 Chapter 4, IV.
[104] Locke J, '*Second Treatise of Government*' Hackett Publishing Company, Indianapolis,1980,75-81.

person motivated by human greed. He especially favoured the partitioning of power among the Legislature and the Executive and ignored judicial power. Ignoring judicial power has been theorised to be because he did not see the importance and desirability of the judicial power being in separate hands in the achievement of constitutional and liberty harmony.[105]

Recent developments in the theory have witnessed an increase in the importance of the Judiciary. The first of such development is Montesquieu's doctrine of pure separation of powers. Montesquieu is regarded as pioneer of contemporary separation of power.[106] Montesquieu's outline of the doctrine is that the legislative, judicial, and Executive arms powers are to be held by different bodies or persons. He envisioned separation that would protect the different arms of government from arbitrary control that would prevent them from performing their functions.[107] Therefore pure separation of powers encompasses two elements. The first element is institutional separation. Institutional separation is the distinction of personnel and tasks among the branches of government. The second element is separation of power in the abstract or functional separation.[108] Functional separation is a conceptual framework for government functions that involve three distinct functions of government. The institutions established to exercise these powers are bound by the stipulation that no entity or individual should exercise more than one function.Motesquieu's doctrine provides a framework that underpins the imperative of judicial independence by reinforcing the notion that the Judiciary must remain autonomous from undue influence, thereby preserving its vital role in upholding the rule of law and ensuring the integrity of democratic governance.

### 3.1.2 Contemporary Understanding of Judicial Independence.

Despite its popularity the doctrine fails to deliver in practice. The doctrine advocates for a pure separation of powers between the arms, however, this is not achievable. The doctrine fails in practicability because the complete separation of powers among the branches of government is not possible. Modern governments are regarded as living beings, thus the rigid conceptualization of separation of powers would make its functioning impossible, rather than having a pure separation,

[105] Oluoch E,' Separation of Powers in Kenya; The Judicial Function and Judicial Restraint; Whither Goeth the Law?',95.
[106] Britannica,' separation of power' 17 November 2023-< https://www.britannica.com/topic/shogunate >
[107] Montesquieu, C, *Complete Works, vol. 1 The Spirit of Laws*, T. Evans,1748,199-200.
[108] Oluoch E,' Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' 35 *Journal of Law, Policy, and Globalization,*2015,96.

contemporary constitutions aim to equitably distribute power among the three branches of government to facilitate the multi-functionality of political structures.[109] Multi-functionality of political structures refers to the idea that each arm of government has influence, authority and mechanisms that allow them to oversee and balance the powers of the other branches.

To actualize the check and balance function of the arms there is need for independence. For the scope of this research the independence that will be of focus is judicial independence. Having been regarded as not important in the earlier forms of the separation of power doctrine, judicial independence has long been regarded as not important. However, with the popularization of the Montesquieu doctrine of separation it began being an important factor to consider. The Judiciary is regarded as the least powerful among the arms of government.[110] This view changes seventeen years later with Blackstone who noted the vital role that powerful and independent Judiciary has on democracy.[111] Therefore an independent Judiciary occupies an important space in the governance of a country.

The definition of judicial independence is derived from how it is viewed. One common approach is to conceive Judicial independence as autonomy, where judges are perceived as to independent and their decision free from undue influence from external forces.[112] Judicial independence is also viewed by some scholars as a two-dimensional concept.[113] That is judicial independence as institutional and decisional independence. Institutional independence primarily focuses on the autonomy and capability of the Judiciary as a distinct branch of government, capable of resisting encroachments from the Executive and legislative arms.[114] Institutional independence is concerned with the scope of the Judiciary's authority as an institution while relating with the other arms of government and society and its legitimacy as an entity to decide what legal and illegal. Institutional independence exists as both administrative and financial independence. Administrative independence is the Judiciary's ability to handle their administrative affairs without

[109] Oluoch E,' Separation of Powers in Kenya; The Judicial Function and Judicial Restraint; Whither Goeth the Law?',2,96
[110] Ervin S,' Separation of Powers: Judicial independence' 35 *Law & Contemporary Problems,*1970,2.
[111] Blackstone W, *Commentaries on the laws of England Volume I,* Clarendon Press, London,1765,259-260-<https://archive.org/details/BlackstoneVolumeI/page/n274/mode/1up>
[112] Were B.O,' Judicial Independence as a Contemporary Challenge: Perspectives from Kenya' 1(1) *Comparative Law Working Papers ,*2017,367.
[113] Justice Cameron E,' Judicial independence – a substantive component?'23(3) *The Advocate* ,2010,24.
[114]Were B.O,' Judicial Independence as a Contemporary Challenge: Perspectives from Kenya',367.

the intervention of the other arms of government.[115] For the Judiciary to be considered as independent it must be able to handle its operations.[116] Financial independence is the Judiciary's ability to acquire adequate funds so that it may perform its functions adequately.[117] Financial independence requires the Judiciary's involvement in the preparation of the court budget.[118]

Decisional or individual independence relates to the protection of the Judiciary from undue internal and external influences.[119] Decisional independence relates to judges and their ability to decide cases without fearing consequences. Decision independence is based on the understanding of the Judiciary as a neutral third party in conflict resolution.[120] As a neutral party the Judiciary should exercise independence by deciding cases based on the evidence provided and the law applicable. As part of the neutral institution a judge must base their decision on the information availed to them by the litigants, especially in an adversarial justice system, and the legal principles. The judge also must treat the parties equally regardless of their economic or social standing. This is especially significant where one of the litigants is the government. In such situations a judge's independence is important as without it the judge would be controlled by the government leading to injustices. For decisional independence to occur there must be political impartiality of judges from external influences. This means that the courts should not be controlled for partisan gains and judges should be safeguarded form risks that could compromise their impartiality.[121] This can be practically done through security of tenure and protection of judge's remuneration.

Therefore, the existence of judges who are unbiased toward all sides of a dispute, unaffected by political pressure, and part of the judicial branch that has the institutional authority to control the legitimacy of government actions, administer impartial justice, and establish important constitutional and legal principles is what is meant to be understood as judicial independence..[122]

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[115] Section 8*, International Bar Association Minimum Standards on Judicial Independence*, 1982
[116] UNGA, Basic Principles on the Independence of the Judiciary, Principle 1.5.
[117] UNGA, Basic Principles on the Independence of the Judiciary, Principle 7.
[118] Siyo L, 'Judicial Independence in South Africa: A constitutional perspective' unpublished Doctrinal Thesis, University of KwaZulu Natal, Durban,2012,29.
[119] Justice Cameron E,' Judicial independence – a substantive component?',25.
[120] Larkins C,' Judicial independence and Democratization: A theoretical and conceptual analysis,' 44(4) *American Journal of Comparative Law,*1996,608.
[121] Justice Cameron E,' Judicial independence – a substantive component?',25.
[122] Larkins C,' Judicial independence and Democratization: A theoretical and conceptual analysis,' 8.

### 3.2 Judicial Independence in Kenya

#### 3.2.1 Judicial Independence in Kenyan Court Decisions

Within Kenya judicial independence is understood similarly as the autonomy of judges to decide cases impartially free from external influence or political pressures, as explained in the previous section.

The importance of judicial independence and the Doctrine of separation in Kenya is present in several court decisions. One such decision is *Law Society v Attorney General & another*.[123] The case was before the H.C.K and it revolved around the delay of appointment of a C.A.K representative to the JSC. The petitioners in the case contended that the delay caused by the President was unconstitutional and against the constitutional principles of the 2010 Constitution. The respondents however argued that the H.C.K lacked jurisdiction. They argued that the constitutionality of the delay caused by the President was not a matter for the court to decide on due to the doctrine of separation of powers and political accountability owed to the National Assembly by the President.

On whether the President violated the Constitution and the Law in the delayed appointment the H.C.K analysed the Articles and the preamble of the Constitution. The Court analysed that preamble and Article 1 of the Constitution acknowledged the sovereignty of the People of Kenya and the values they uphold and want to reflect in their government. The court also discussed article 2 of the Constitution as a declaration of the Supremacy of the Constitution and the responsibility on every person to uphold and respect the Constitution. The court then discussed that the President as the head of government and state and a state officer is to act in accordance with the Constitution. The President is bound by this obligation as he is considered the servant of the people with his powers derived from the citizen's delegation of authority to him. Therefore, the actions he takes must be justifiable legally as demanded by the essence of the rule of law and democratic governance demanded by the Constitution

H.C.K also expressed the intention of Constitution to separate powers between the different arms in Article 1(3) of the Constitution. The court recognized that the purpose of the different functions of the Judiciary, legislative and Executive arms of government was to create a mechanism that

[123] Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR.

protect the three arms from interference from other arms of government. Therefore, the President's act of delay interfered with the independence of the JSC. The court also acknowledged that the Judiciary as the protector and custodian of the rule of law and the Constitution is to act independently and under the obligation to settle disputes that involve the violation of the Constitution regardless of the Person or Position whose actions are in dispute.

### 3.2.2 Challenges to judicial Independence; Case of Executive Order 1 of 2020

The case of *Law Society v Office of the Attorney General*,[124] shows the significance of judicial independence and the court responses to action by the Executive that purport to undermine its independence. The facts of the case are that on the 14th of January 2020 the Executive Order Number 1 was issued, which reorganized various ministries within the government. However, the issue presented before the H.C.K by the Petitioners was the inclusion of the Judiciary and its tribunals, independent offices and Commissions as institutions under the functions of the ministries. The petitioners argued that such inclusion was unconstitutional and a threat to the independence of these institutions as it attempted to restructure the institutions.

The Respondents argued that the order did not mean that these institutions would be controlled by the ministries on behalf of the president and was not an attempt to restructure the Judiciary. The inclusion was rather a recognition that while separation of powers between the arms of government existed, the distinction is not complete, and the arms ought to coordinate and work together.

The H.C.K in its analysis recognized the Supremacy of the People and the Constitution as the Supreme law of the land. They stated that the president must follow the Constitution and the principles it sets out. The president therefore has set powers under the constitution that guide his actions. One power is the ability to coordinate and direct the functions of ministries and government departments.[125] The H.C.K recognised the Executive Order as a manifestation of this power. However, the court noted that the power is not applicable to other arms of government. Additionally, as the structure of the Judiciary is already set out in the Constitution, the Executive does not have the power to change it with an Executive order.[126]

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[124] Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) (Constitutional Petition 203 of 2020) [2021] KEHC 454 (KLR) (Constitutional and Human Rights) (10 June 2021) (Judgment), 1-7,16-18,8-1-,22.
[125] Article 132(3)(b)*Constitution of Kenya* (2010)
[126] Article 161 and 162*Constitution of Kenya* (2010)

The H.C.K concluded that by including the Judiciary in the Executive order showcased an intention by the President to reorganise, transfer ,direct or coordinate the functions of the Judiciary through the Executive order which offended the doctrine of Separation of powers and judicial independence.[127]

### 3.2.3 Ongoing Executive Challenges to judicial Independence

Judicial independence is recognized in Kenya's Constitution. Despite this there are still instances of the Executive threatening Judicial independence. The Judiciary has protected itself from some of these threats. However there continues to exist a rhetoric within the Executive that promotes control of the Judiciary. One instance of such is the hanging of banners in 2020 in major streets in Nairobi.[128] The banners castigated the then CJ David Maraga and other senior judicial officers. The banner could not be directly linked to the Executive . However, due to the animosity present between the Judiciary and Executive at the time, the banners were thought to be a consequence of Justice Maraga criticism of President Uhuru for not appointing the 41 judges. President Uhuru rejected to appoint the 41 judges in 2019 after the judges were interviewed and recommend for appointment by the JSC.

Another statement made by Former President Uhuru Kenyatta that pushes this ideology further . The statements made by the Former president in 2017 came a day after the Supreme Court annulled the 2017 presidential elections. The statements were 'we shall revisit this thing. We clearly have a problem', referring to the Judiciary, he also stated 'Who even elected you? Were you? We have a problem, and we must fix it'.[129] He also referred to the Judges as crooks and thugs.[130]

There have also been statements made by the current government that raises concern on the respect of the Judiciary within political circles. President Ruto spoke against the Judiciary as using its powers to obstruct the Executive 's development agenda. The statement came after the Judiciary issued conservatory orders related to implementing the Finance Act 2023. Additionally, he also pivoted his anti-corruption campaign towards the Judiciary. He accused judges of being parties in

[127] Law Society of Kenya v Office of the Attorney General & another,40-48.
[128] Ogemba P, 'Uhuru and Maraga war gets dirty as JSC cracks emerge' The Standard newspaper 2020-< https://www.standardmedia.co.ke/the-standard-insider/article/2001374954/uhuru-and-maraga-war-gets-dirty-as-jsc-cracks-emerge > on 27 November 2023.
[129] Al Jazeera, 'Uhuru Kenyatta to Court: 'We shall revisit this" Al Jazeera, 2 September 2017-< https://www.aljazeera.com/news/2017/9/2/uhuru-kenyatta-to-court-we-shall-revisit-this > on 27 November 2023.
[130] Aglionby J, 'Kenya Judges condemn political attacks on Judiciary ahead of vote re-run' Financial times,19 September 2017-< https://www.ft.com/content/242bc5d0-9d48-11e7-8cd4-932067fbf946 > on 27 November 2023.

a broad corruption network.[131] His comments have sparked a reaction from the International Commission of Jurists who viewed the remarks as posing a threat to the rule of law, undermining the doctrine of Separation of power, and potentially eroding public trust in the legal system.

Other than President Ruto, deputy president Gachagua has also made statements aimed at the Judiciary. In response to the H.C.K declaration that the Housing Levy proposed in the Finance Act 2023 is unconstitutional, the Deputy President requested that the judges exercise their judicial discretion and to not sabotage the program.[132] The comment implies that the ruling was influenced by external pressures. This influences the public perception, portraying the decision as obstructing progress rather than upholding the law.

The current government's statements raise concern about the respect for the Judiciary within political circles. President Ruto's accusations of judicial obstructionism and corruption, as well as DP Gachagua's implications that rulings are influenced by external pressures undermine public trust in the Judiciary's impartiality and autonomy.

Other than the use of statements the appointment of retired judges into parastatals, committees and coperations also affect the decision independence of judges. These appointments affect the decisional independence of current judges because it creates prejudice in their mind. Judges are motivated by seeking change and by self-interest.[133], thus motivated by these two judges will make judgments that favour the present government with hope that they are appointed to similar positions as their predecessors after retirement. [134] The appointment of retired judges into positions in parastatals, committees and coperations creates an environment where judicial decisions are made with the aim of receiving a reward.

Other than decisional independence post-retirement job opportunities offered by the Executive also affect the functional independence of the Judiciary. Functional independence involves the Judiciary appearing independent. This appearance involves public opinion. Public opinion on the

[131] International Commission of Jurists, 'Statement on the Presidents' utterances concerning the Judiciary and individuals suspected of corruption' 5th September 2023

[132] Wangari S, ' Gachagua reacts after court declares Housing levy unconstitutional' The Standard,28 November 2023- https://www.standardmedia.co.ke/article/2001486268/gachagua-reacts-after-court-declares-housing-levy-unconstitutional on 28 November 2023.

[133] Shepherd J, 'Measuring maximizing judges: Empirical legal studies, Public Choice theory and Judicial behaviour'33 *Revista Forumul Judecatorilor,*2012,1-4.

[134] Srivastava S, 'Post retirement Appointments & Judges: A blow to the independence of Judiciary, Democracy and the Constitution' 3 *Shimla Law Review,*2020,70-79.

Judiciary's independence depends deeply on how the Judiciary and its actors act. Appointment of retired judges by the Executive to positions causes the public confidence in the Judiciary to diminish. This is because such appointments increase the distrust of the Judiciary as a separate arm of government.

**3.3 Institutional Corruption caused by appointment of retired judges.**

Institutional corruption is a term coined by Dennis Thompson in 1995.[135] He developed the term to explain how external pressures had undermined the integrity of the US congress and rendered it systematically derived from its purpose. The term was later expanded by Lawrence Lessig who describe it as a consequence of a systemic and strategic influence which may be legal, or currently ethical, that erodes institutional efficacy by redirecting it from its original purpose or diminishing its ability to fulfil its purpose to a degree relevant to its mission. This deterioration erodes either the public's trust in that institution or the institution's intrinsic trustworthiness.[136] Lessig's definition acknowledges different consequences of ineffectiveness. It recognises that some deviations of ineffectiveness may affect the institutions' ability to achieve their purpose or even cause the achievement of its purpose impossible. The definition highlights one specific impact of loss of effectiveness that being loss of institutional trust.

Both Thompson and Lessig conceptualization of the term institutional corruption were developed as a means to address the corruption that was present in the US congress. While Thompson's definition was specifically done for the US Congress, Lessig's account of institutional corruption has been applied to numerous private or public institutions. This application to private or public institutions has met with criticism, some scholars have interpreted the concept's difference as limiting its application to institutions with obligatory purposes, making it less applicable in a fiduciary context. [137]Obligatory purposes are objectives that institutions are required to engage with to prevent harming others. However, even within fiduciary context obligatory purposes are present. Within fiduciary institutions they include individuals or organizations (agents) who act on behalf of others (principals) by wielding discretion over vital resources that belong to the

[135] Thompson T,' Mediated Corruption; The case of the Keating five' 87(2) *American Political Review,*1993,369.
[136] Lessig L,' 'Institutional corruption'' defined' 41(3) *Journal of law, medicine, and ethics,*2013 553-555
[137] Newhouse M.E,' Institutional Corruption: A Fiduciary Theory' 23(3) *Cornell Journal of law and Public Policy*,2014, 555-556,562-569,570-578.

principals. Fiduciaries must adhere to purposes established by principals. Institutional corruption occurs when systematic and strategic influence cause fiduciaries these breach these commitments.

The Judiciary are fiduciaries as judicial power is a form of public trust. Judges act as agents of the people as they decide cases according to the laws such as the Constitution which reflects the public's values and principles. This is especially true in Kenya's case as the 2010 Constitution was a result of a successful referendum. The Judiciary's obligatory purpose is to decide cases independently and according to the Constitution and the Laws. Judicial independence requires that judges form decisions based on Law. Post retirement jobs availed to retired judges weaken the ability of the Judiciary to fulfil its obligatory purpose because it affects their independence. Post retirement jobs result in the loss of public trust and corrupts the institutions inherent trustworthiness. The public's trust in an institution is established in comparison to other institutions. An institution is viewed as trustworthy when people compare it to others, relying on media information and the conduct of its members to shape opinions towards institutions.[138] Judicial independence requires that the Judiciary is not only independent legally but also appears to be independent. Post retirement jobs given to retired judges raises questions as to why a specific judge was selected and the reason behind the appointment.[139] Resulting in undermining the independence of the Judiciary as the appointments can be viewed as rewards.[140] Institutional corruption results in an institution appearing untrustworthy despite the actions done being legal.

### 3.4 Conclusion

Judicial independence is a crucial element of separation of power and the overall functioning of the arms of government. Through various periods of its development, it has been regarded as still worth protecting and fighting for. This view of judicial independence is also held within Kenya as decisions of the court demonstrate. Despite this, the Judiciary's independence has been a target of attacks by the Executive . This is especially true in instances when the Judiciary rules against the government. The Executive  has thus taken different approaches towards 'disciplining' the Judiciary. Among the different routes is the inducement of public doubt through the appointment

[138] Gibson J and Nelson M,' The legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto'10 *Annual Review of Law and Social Science,*2014,201,215-216.
[139] Malik L, 'Post retirement assignments of the Supreme Court judges in India: A critical analysis' in Khurshid S, Malik L(eds) *The Supreme Courts and the Constitution; An Indian Discourse,* Wolters Kliwer, India, 2020,134.
[140] Srivastava S, 'Post retirement Appointments & Judges: A blow to the independence of Judiciary, Democracy and the Constitution',74.

of retired judges. Appointment of retired judges by the Executive induce doubt in the public as it makes them question the reason behind the appointments. This doubt causes judicial independence, functional and decisional, to be undermined.

# CHAPTER 4: Examining the Impact; The Psychological Effects of Executive Appointments on Judicial Decision-Making and Public View

## 4.1 Judge's reasoning

### 4.1.1 Introduction

Judicial decisions are understood to be the product of a judges reasoning based on the legal principles, Law, and their application to the facts of the dispute before them.[141] This analysis is based on the understanding that Judges due to their independence remain unaffected by external and internal pressures that exist. This thought however ignores the fact that a judge is a person and is thus influenced by human motivation. Lack of this recognition leads to lack of law to regulate the influence that human motivation has on judges. To fully understand the influence that external and internal pressures have on a judge an understanding of Judging is required. Such an analysis will assist in identifying the nuanced interplay between a judge's decision-making process and the influences they encounter.

### 4.1.2 Decision Making process.

The process of making decisions that a judge undergoes is more advanced than the process an ordinary person goes through. The advancement is due to the judge's experience and training.[142] A judges reasoning is similar to that of lawyers and law student due to the similar training these parties undergo. A judge first has to undergo formal training to be knowledgeable in the law. Such training is done in a law school where a student is taught legal reasoning, philosophy, literature, economics, and social sciences.[143] While philosophy, literature, legal reasoning ,economics, and social sciences can be taught to a student, however legal reasoning it is not easily understood by all students. Legal reasoning refers to the ability to apply the best legal rule while thinking beyond the precise circumstances of the present case and to consider the underlying principles and rules that guide the legal system.[144] To grasp legal reasoning requires a student to look at the domino effect of a legal decision on other cases.

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[141] Sivakumar, S. "Judgment or Judicial Opinion: How to Read and Analyse." 58(3)*Journal of the Indian Law Institute*, 2016,285.
[142] Frederick S,'Is there a psychology of judging' John F. Kennedy School of Government-Harvard University, Faculty Working paper series,2007,6-7,20-21.
[143] Frederick S,'Is there a psychology of judging' J,7-8.
[144] Frederick S,'Is there a psychology of judging',11.

Legal reasoning is a way of reasoning that goes beyond ordinary reasoning as it is supported by ordinary methods of reasoning such as forming arguments from precedents, reasoning form rules and reliance on authority. [145] Rather than legal reasoning being different from ordinary reasoning, it is a second step in reasoning employed by lawyers and judges.[146]

During decision making everyone engages is the ordinary or first order reasoning. [147] First order reasoning involves making the best decisions for the circumstances present before them. This is where ordinary people typically stop and make their final decision. Judges however go through a second order reasoning. Second order reasoning requires looking further than the present consequences. Second order reasoning is what sets apart legal reasoning from ordinary reasoning. Thus, judges will apply legal reasoning and consider the consequences that their decision will have on other cases.[148] They search and apply law that might result in injustice presently but will result in justice in future cases.

Legal reasoning is important for judges especially as their decisions form law. Therefore, if judicial behaviour deviates from legal reasoning steps need to be taken to regulate the unlawful behaviour. Judges' political attitudes, psychological make up and social-psychological setting do influence their decision making.[149] Political scientists explain that these affect a judge, especially those in superior courts due to the increased influence that their decision has.[150] Thus judges in superior courts are likely to rule while being influence by their personal policy preferences, for example. Other than these factors judges can also be influenced by social norms. Social norms in this context include interjudge or intercourt comparison.[151] Interjudge and intercourt comparison involves the judge deciding their judgements after considering the actions taken by other judges and courts.

Additionally external factors such as occupational stress affect their job performance, decision making quality and job success. Occupational stress refers to work related burn out that occurs due

[145] Frederick S,'Is there a psychology of judging',8.
[146] Frederick S,'Is there a psychology of judging',8-9.
[147] Frederick S,'Is there a psychology of judging',10.
[148] Frederick S,'Is there a psychology of judging',10.
[149] Mitchell G, 'Evaluating Judges' in Klein D and Mitchell G(eds) *The psychology of judicial decision making*, 2020,223.
[150] Mitchell G, 'Evaluating Judges', 224.
[151] Mitchell G, 'Evaluating Judges',225.

to overworking and workplace inequality.[152] The job appointments of retired judges by the Executive have a considerable impact on a judge's decision-making process as they create a scenario where the judges are influenced by the prospect of future employment opportunities as rewards from the Executive . Such an influence affects their independence.

There are nations which have noticed the impact that the appointment of retired judges by the Executive has on current judges. These countries have placed or are proposing to place restrictions on post retirement jobs available to judges. Thus, in examining how Kenya should tackle the problem it faces there is need to learn from those who have already placed laws or have had discussion of post retirement jobs of judges.

### 4.2 Comparative analysis of Indian and Canadian laws on jobs of retired judges

The comparative analysis of India and Canada will examine the legal restrictions in both nations and the reason behind their inclusion. An analysis of Indian law is important to the study as both nations have a history of judicial control by the Executive .[153] In addition Kenya, Canada and India as former British colonies inherited common law and thus have similar laws and legal procedures.[154]

#### 4.2.1 India

The issue of Executive appointment of retired judges has been a topic of discussion in India. The Indian constitution provides that a Supreme Court judge concludes their tenure upon reaching the age of sixty-five years while judges of the H.C.K retire at the age of sixty-two years.[155] There have however been attempts to change the age of retirement for both courts, the recent news on this development is that the Bar Council of India passed a resolution which changed the age of retirement for Supreme Judges from sixty-five years to sixty-seven years and H.C.K judges change from sixty-two years to sixty-five years.[156] Additionally India also has laws concerning retired

[152] Miller M, Edwards C, Reichert J and Bornstein B,' An examination of outcomes predicted by the model of judicial stress'102(3) *Judicature* 2017

[153] Garg B.L, 'Problem of the Separation of Judiciary in India' 25(3/4) *The Indian Journal of Political Science,*1964,333-338.

[154] Hind R," 'We have no colonies"- Similarities within the British Imperial Experience'26(1) *Comparative studies in Society and History* ,1984,4-5,8.

[155] Article 124 and 217, *Constitution of India* (1950)

[156] Msthur A, 'Bar Council passes unanimous resolution to raise judges' retirement age' India Today, 15 September 2022-< https://www.indiatoday.in/law/story/bar-council-unanimous-resolution-increased-retirement-ages-supreme-court-high-court-judges-2000539-2022-09-15> on 5 December 2023

judges. Article 124(7) of the Constitution of India prohibits former judges of the Supreme Court to advocate or act in nay court or before any authority within India.

These provisions, age of retirement and article 124(7) of the India Constitution, are a result of a debates that occurred during the drafting of the Indian Constitution in May 1949.[157] The Constituent Assembly debated on the provision that concerned India's future Supreme Court. They debated on two matters which were after retirement careers and the age of retirement . The drafters considered the two matters intertwined as an early retirement especially without the guarantee of pension would tempt judges into post-retirement careers. On the age of retirement, the Assembly suggested that the age of retirement for Supreme court judges be sixty-five years. On post-retirement careers they proposed that no person who held offices as a judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

On the age of retirement there are those that advocated for an increase of the age of retirement of Supreme court judges to sixty-eight years.[158] They argued that the retirement being sixty-five will result in depriving India of the service of fit and able judges. The other camp supported the reduction of the age to sixty. This camp argued that the age of sixty gave judges adequate time to earn from the government and should retire and contribute to the society in an honorary role. The third camp proposed the abandonment of any retirement age of judges. This camp advocated for the institution of life-term appointment like America' judicial structure. This camp argued that appointments without term limits would ensure the absolute independence of the Judiciary and the guarantee of pension will obviate retired judge's need to return to practice or pursue occupations incongruent with a judicial mindset or at odds with judicial independence. However, the drafters did not favour the suggestions.

On the second provision related to retired judges, the drafters proposed to ban ex-judges from only pleading or acting in any court or before any authority within India. There were various objections to the suggestion. One group recommended that the scope of the ban be expanded. [159] They suggested an overarching prohibition on retired Supreme Court and High Court judges from holding any Executive office under the Government of India or any unit. They held that such a

[157] Garg H, 'Post Retirement Appointment of Judges in India' 11(2) *Nirma University Law Journal,* 2022,117-120.
[158] Constituent Assembly Debates, 24 May 1949-<https://www.constitutionofindia.net/debates/24-may-1949/>
[159] Constituent Assembly Debates, 24 May 1949,8.90.68-<https://www.constitutionofindia.net/debates/24-may-1949/>

blanket ban would prevent any attempts by the Executive to lure judges with greater prestige in their retirement years. Within the same group some proposed that the blanket ban to apply to positions that provided financial compensation. Retired judges would be allowed to work for the government provided they did not financially gain from the work.[160] This suggestion was supported by retired judges. Sen, a retired judge, was part of this bunch as he recognised the judicial promiscuity that would occur if a retired judge joined the Executive . Retired judge Chand also supported this suggestion.[161]

The second group of objections proposed restricting the scope of the prohibition. This cluster recognised that the complete prohibition on retirement opportunities for judges was impractical as retired judges might be the most suitable candidates to hold positions in commissions.[162] They agreed with the second argument of the first cluster that the ban should prevent retired judges from holding offices of profit without the president's approval. This cluster's aim was to prevent retired judges from taking positions in private entities and depriving future judges from any opportunity to 'sell justice', that is deciding in favour of another and then joining them.

The last cluster suggested eliminating the suggested restriction on post retirement opportunities.[163] This cluster reasoned that controlling what a judge with enough ability and capacity can and cannot do as being unjustified.

The drafters settled with prohibiting judges from appearing before courts within India. However, the limits of pleading before any authority were not expounded on.[164] The provision can be interpreted in a broad or narrow manner.[165] Broadly the provision can be understood as prohibiting former judges from appearing as counsels in courts, this would ban retired judges from working as lawyers. A narrow approach interprets the word acting in the provision as having a wide application. Acting goes far beyond pleading as lawyers. Acting can entail presiding over a tribunal

[160]Garg H, 'Post Retirement Appointment of Judges in India',118.
[161] Dam S,' Active after sunset: The politics of judicial retirement in India' 51(1) *Federal law review,* 2023,37.
[162] Constituent Assembly Debates, 24 May 1949,8.90.106,8.90.66 -<https://www.constitutionofindia.net/debates/24-may-1949/>
[163] Constituent Assembly Debates, 24 May 1949, 8.80.103 -<https://www.constitutionofindia.net/debates/24-may-1949/>
[164] Article 124(7), *Constitution of India* (1950)
[165] Dam S,' Active after sunset: The politics of judicial retirement in India',43.

or a commission of inquiry in courts or court-like forums. This understanding manifests an image that the provision prohibits retired judges from taking opportunities where they act judge like.

The Supreme court of India has interpreted Article 124(7) in the case of *Ananga Udaya Sign Deo v Ranga Nath Mishra*.[166] The main issue in this case was the approval of the appointment of a retired Supreme court judge as a member of the Parliament. This nomination was contested on the grounds that the nomination was beyond the powers granted by constitution, under article 124(7). The Supreme Court disagreed with this argument and interpreted the provision broadly. The Supreme Court stated that the use of plead or act in article 124(7) as only barring a retired judge from practicing before any authority and applying to functioning or performance of a member of council of states or the house of people.

This interpretation by the Supreme court has been meet with criticism. Scholars explain that this interpretation does not amplify the true intention of the Legislature. The Legislature's objective as presented by the first and second clusters was to shield judges from any potential temptation, and these post-retirement commitments are *prima facie* a temptation.[167] Appointment of retired judges has been with numerous critics. One group view the judge accepting the appointment as being a 'sell out'. They alleged that such appointments are rewards given to judges for delivering decisions that favour the administration. This opinion was held of Retired CJ Gogoi who retired in mid-November 2019 and received an invitation from Modi government to the Upper house of the Parliament, he accepted the invitation. The invitation was seen as a product of the CJ misuse of the public office for personal profit. Another group view the appointments as harming the independence of the Judiciary. This group does not concern itself with the integrity of the judge but rather the result of the acceptance of the appointment on judicial independence.[168]

While the law in India does not prohibit judges from post-retirement jobs there has been a movement among the judges themselves. Judges who view post-retirement jobs as rewards and having a negative impact of judicial independence of the Judiciary affirmed their commitment to judicial independence by pledging to decline government positions during retirement. Several

[166] *Ananga Udat Signh Deo v Ranga Nath Mishra & Ors* (2001), Supreme Court of India.
[167] Srivastava S, 'Post retirement Appointments & Judges: A blow to the independence of Judiciary, Democracy and the Constitution', 80; Constituent Assembly Debates, 24 May 1949-<https://www.constitutionofindia.net/debates/24-may-1949/>
[168] Dam S,' Active after sunset: The politics of judicial retirement in India',33.

Supreme Courts judges such as SH Kapadia, RM Lodha, Jasti Chelameswar have taken this approach.[169] Another practice used by judges occasionally is the reversion of their decision to accept post-retirement jobs. This has been done by Judge AK Sikiri who accepted a nomination by the Modi administration to be part of the London based Commonwealth Secretariat Arbitral Tribunal. He later withdrew his consent after public outrage.[170] Such actions taken by retired judges and practicing judges will gradually influence the decisions made by other judges. It will also create a culture of rejecting government appointments despite the law allowing it.

### 4.2.2 Canada

Other than India Canada also has laws that regulate post judicial careers of judges. The introduction of such restrictive law was due to the increased public opinion that judges should refrain from accepting any post-retirement jobs.[171] Consequently there had been suggestions to review the Ethical Principles that guide judges to include a provision that would regulate retired judges' careers. This suggestion was implemented in the 2019 draft of the Ethical Principles for Judges. The draft in the Context section of the document stated that the principles would apply to retired judges.[172] The suggestion was then implemented to the 2021 revised edition of the Ethical Principles of judges. Under the Principle a judge when planning their career post the Judiciary is to consider the implication that their choices will have on the public confidence in the Judiciary. Retired judges are also prevented from appearing before a court or tribunal in Canada.[173] The provision restricts physical appearance and the signing of legal documents that would be subject to proceedings before a court or tribunal. [174] This application is broader that the restriction of appearance within Indian Law.

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[169] Express Web Desk,' Post- retirement plans: Won't seek any employment from government says Justice Chelameswar' The Indian Express, 7 April 2018 -< https://indianexpress.com/article/india/post-retirement-plans-wont-seek-any-employment-from-govt-says-justice-chelameswar-5127957/ > on 6 December 2023;Krishnadas Rajagopal, 'Will Reject Post-Retirement Jobs, says Justice Kurian Joseph', The Hindu, 10 April 2018 -<https://www.indiatoday.in/india/story/justice-ak-sikri-narendra-modi-govt-posting commonwealthtribunal-alok-verma-1430122-2019-01-13>. > on 6 December 2023.

[170] Aneesha Mathur, 'Justice AK Sikri Turns Down Modi Government Offer After Controversy', India Today, 14 January2019-<https://www.indiatoday.in/india/story/justice-ak-sikri-narendra-modi-govt-posting-commonwealthtribunal-alok-verma-1430122-2019-01-13 > on 6 December 2023.

[171] Harries K,' Canadian want limits on post-retirement work for judges, survey finds' CBC News 16 August 2019- < https://www.cbc.ca/news/politics/judges-post-retirement-1.5248512 >

[172] Principle 10, Ethical Principles for Judges 2019 (Draft).

[173] Principle 5.E.1, Ethical Principles for Judges, 2021.

[174] Principle 5.E.2, Ethical Principles for Judges, 2021.

### 4.3 Lessons for Kenya.

While the laws in both India and Canada do not explicitly prohibit retired judges from accepting post-retirement jobs from the Executive , they do recognise the implications that such decisions may have on judges and judicial independence. Observing this they discourage judges from accepting such opportunities. Within India the recognition of the negative effects of such appointments have led judges to declare their position publicly as a way of restoring the public trust in the independence of the Judiciary.

Currently Kenya has no laws governing the post retirement jobs of judges. This lacuna has resulted in the Executive and retired judges taking advantage of the lack of regulation, subsequently leading to the endangerment of judicial independence.

From the analysis of both Canada and India, they are lessons that Kenya can learn. The first pertains to judges. From the discussion on India the support for the creating of regulation of post retirement job of judges are judges themselves. Judges such as SH Kapadia, RM Lodha, Jasti Chelameswar in the absence of the regulation have made public promises to not take advantage of the lack of law and have publicly condemned those judges who take up appointments by the Executive . Thus, Kenyan judges should make it a tradition within the Judiciary that post retirement judges will not accept appointments by the Executive . The judges can create this culture as they await legislation that would regulate post retirement jobs. Establishment of the culture within the Judiciary is important due to the long process involved in policy formulation and the influence that political interest has on its success.[175]

Another lesson from the two countries that Kenya can adopt is the introduction of regulation. Both India and Canada either have regulations or aspire to have regulations. Currently within Kenya there has not been a discussion on post retirement appointments of retired judges by the government and its effect on judicial independence. The lack of discussion means that there lack any aspirations for its inclusion into the law. However, upon its introduction into law, policymakers would have to consider the frequency that the appointments occur and the level of endangerment it has on judicial independence. Consideration of these factors will guide them towards either a

[175] Onyango G,' Legislative Policymaking in Kenya', *Governing Kenya: Public Policy in Theory and Practice,*2021,68.

constitutional amendment by the Legislature or a revision of the Judicial code of conduct by the Judicial Service Commission.[176]




[176] Section 83, The Judicial Code of Conduct and Ethics,2018; Article 94(3) *Constitution of Kenya,*2010.

# CHAPTER 5: Recommendations

## 5.1. Introduction

The appointment of retired judges by the Executive does affect judicial independence as it influences both the public confidence in the impartiality and integrity of the Judiciary and influences judges' decision making as they the appointments as rewards to retired judges for judgements that favoured the government.

Kenya currently does not have laws that regulate post-judicial careers. This has left a lacuna in the law that allows the Executive to use appointments of retried judges leading to undermining judicial independence. Currently the Kenyan Judiciary and Legislature have not considered means of filling the lacuna and have thus left the Executive 's power of appointment unregulated.

## 5.2 Recommendations

### 5.2.1 Amendment to the Constitution

One legal recommendation is passing of a Constitutional amendment that restricts post-judicial careers available. The 2010 Constitution has been acclaimed as a forward-thinking document that compares favourably with the South African Constitution due its significant push towards Constitutionalism.[177] The 2010 Constitution was promulgated through a referendum and thus represents the genuine thoughts and wants of Kenyans as it provided the best opportunity for the Country to build good governance and sustainable economic progress while distancing itself from colonial power. The drafters of the Constitution were influenced by history of abuse of power of politicians, abuse of independent institutions by the Executive and the disrespect of the freedoms and rights of the People. Article 160 of the Constitution is a provision that protects the Judiciary from external and internal pressures that would undermine its independence as was done in the past. The drafters included the Article having understood and appreciated the importance of the doctrine of Separation of powers. They intended that the Legislature and Executive would not undertake any action that would undermine judicial independence and the doctrine of separation of powers.

The appointments of retired judges by the Executive are classified as an external influence as it affects the public's view on the Judiciary and affects judges' decision making. Judicial

[177] Kempe R.H,' Bringing in the Future in Kenya: Beyond the 2010 Constitution' 7(2) *Insight on* Africa,2015,92-93.

appointments to Executive committee may communicate to the public that the Executive is the employer of the Judiciary. A constitutional amendment to reflect the restrictions on retired judges' appointments in Kenya would be an appreciation of the reason behind the inclusion of the independence of the Judiciary by the drafter and Kenyans.

Constitutional amendments are regulated by Chapter sixteen of the Constitution. For a matter to be considered as an amendment it must relate to the national values and principles ,supremacy of the Constitution, sovereignty of the people ,the territory of Kenya, the bill of rights, term of office of president, the independence of the Judiciary and other independent offices, functions of the Parliament, objects, principles and structure of devolved government and the provision of chapter Sixteen.[178] An amendment on the restriction of post judicial careers is related to the independent of the Judiciary, the national values and principles of governance and sovereignty of the people. Thus, an amendment that governs post judicial careers is a matter eligible to result in an amendment.

Post judicial careers affect judicial independence as it affects the public view of the Judiciary as the institution will fail to appear independent. It also affects decisional independence of the judges as post judicial appointments seem like rewards. Judges may be influenced to decide in favour of the government to obtain similar appointments. Judges as human beings are influenced by self-interest factors, and some are influenced by self-interested factors such as career progression.

Post judicial appointments undermine the sovereignty of Kenyans. Sovereignty of the people is a concept developed by John Locke as a retaliation of the manifestation of despotic exercise of state authority[179] Locke explained that while the people through the social contract have entrusted state power with the Legislature, their sovereignty is not lost. Due to necessity individuals possess the right to nullify the social contract, alter or remove their representatives within the state's power and the right to rebel. Therefore, sovereignty of the people recognizes that while the Executive and Legislature do make decision those decision must align with the wants and opinions of the public. In Kenya the constitution recognises that all sovereignty power belongs to Kenyans.[180] The sovereignty of the people in the Kenyan context manifests in the assurance to the people that the

[178] Article 255, *Constitution of Kenya* (2010)
[179]Tătar G.R and Moișı A, 'The Concept of Sovereignty'24 *Journal of Public Administration, Finance and Law*,2022,296.
[180] Article 1, *Constitution of Kenya* (2010)

parliament, Legislature, national Executive , the Judiciary, and independent tribunal shall perform their functions.[181] Appointments of retired judges by the Executive undermine the sovereignty of the people as it affects the function of the Judiciary.

Under the 2010 Constitution the rule of law is recognised as a national principle and value.[182] The appointment of retired judges undermined the principle of the rule of law. The rule of law refers to a society where the law is superior and applies to all members of the society equally, the rule of law ensures that the law is predictable and stable.[183] For the rule of law to thrive it requires an independent Judiciary which can ensure that all those who disobey the law are treated equally.[184] The appointment of retired judges affect judicial independence and consequently undermines the rule of law. The rule of law in Kenya as a principle informs all state organs, offices interpretation and application of any law, therefore when deciding on whom to appoint the Executive is to consider whether the action contradicts the rule of law.

Post judicial appointment affect both the independence of the Judiciary, sovereignty of the people and the national values and principles. Thus, it is a matter that can cause an amendment. Having fulfilled the requirement that, the matter must fit into anyone of the matters the amendment can occur via a referendum.[185]

An amendment that restricts the post-judicial careers available. This will protect the judicial independence, the sovereignty of the people and will be an adherence to the national values and principles.

**5.2.2 Reform in Judicial code of conduct**

Other than constitutional amendments the judicial code of conduct can be reviewed to include limits to post judicial careers. In Kenya judges conduct is guided by the Judicial Service Code of Conduct and Ethics. The Code was formulated by the Judicial Service Commission pursuant to Section 5(1) of the Public Officer Ethics Act. Among the objects of the code is that it provides guidance to assist judges, judicial officers and judicial staff in establishing and maintain high standards of judicial and personal conduct.[186] The code formation is founded on the principle of

[181] Article 1(3), *Constitution of Kenya* (2010)
[182] Article 10, *Constitution of Kenya* (2010)
[183] Stein R, 'Rule of law: What Does it Mean' 18(2) *Minnesota Journal of International Law,*2009,302.
[184] Stein R, 'Rule of law: What Does it Mean' ,302.
[185] Article 255 *Constitution of Kenya* (2010)
[186] Section 3*, Judicial Service Code of Conduct and Ethics* (2020)

public confidence in the judicial system, the moral authority and integrity of the Judiciary and the fundamental principle that the independence of the Judiciary is safeguarded.[187] Therefore the primary focus of the code is to regulate actors within the Judiciary to ensure that the independence of the Judiciary is protected.

While the code does protect judicial independence it is only applicable to judges of superior courts, judicial officer, and judicial staff.[188] The narrow application to individuals who are currently within the Judiciary ignores the implications that retired judges' action have on judicial independence.

The act in its provision limits the action of judges currently within the system. While the code does not explicitly forbit judges from post judicial careers it does require that judges to uphold and maintains the independence of the Judiciary when performing their duties, to not accept any gifts, benefits or anything that would compromise the judge's independence, integrity, or impartiality.[189] As the code applies to current judges these obligation would not extend to them post-retirement and retired judges need not consider them. This leads to retired judges making decisions without thinking of the repercussions it may have on the independence of the Judiciary. Additionally, the lack of inclusion of retired judges leaves citizens without a legal avenue to question the actions.

Other than the reformation of the judicial code of conduct there also needs to be a review of the judges and magistrates understanding of judicial independence and an expansion in thought as to what can affect judicial independence even after retirement from the Judiciary. Such training will rehash the importance of judicial independence and educate them on the different actions that could affect independence even after retirement. These trainings will create a culture within the Judiciary which will be cemented by the inclusion of restriction of post judicial career in law.

Thus, the Judicial Service code of conduct and ethics should be amended to include retired judges as people the code would apply to.

### 5.3 Conclusion

The lacuna left by the lack of regulation of post judicial careers especially careers that involve absorption into the Executive branch leave the Judiciary at harm as such appointments affect the judicial independence. To combat this the recommendations, focus on the change of law and

[187] Section 4, *Judicial Service Code of Conduct and Ethics* (2020)
[188] Section 5, *Judicial Service Code of Conduct and Ethics* (2020)
[189] Section 11(3), *Judicial Service Code of Conduct and Ethics* (2020)

change of culture as within the law there are provision that protect the independence of the Judiciary. However, they need to be more specific and cater to this evident problem.

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