BALANCE OF POWER IN KENYA: ANALYSING THE CONTRIBUTION OF THE ODPP.

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Declaration

I, ANTONY MIANO, 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: .....

Purity Kibugi.

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ABSTRACT

The 2010 constitution of Kenya provides for independent institutions which play an important role in the balance of power among the different branches of government. Their major responsibilities as provided for by article 249 of the constitution includes the protection of the sovereignty of the people and ensuring that all state organs observe democratic values and principles. This research shall focus on the Office of the Director of Public Prosecution. It is understood that the purpose of the ODPP is to conduct public prosecutions. This is a shift made to make public prosecutions independent from the AG, who is also a member of the executive by the fact of being the legal adviser to the executive. The ODPP is expected therefore to carry out fair and independent public prosecutions. This research will seek to find out whether the ODPP has, since its commissioning, discharged its duties in an independent manner. It will further explore cases where its independence has been hindered and what can be done to prevent it in future circumstances. The research will use the theory of separation of powers as well as institutional independence, and qualitative research methodology consulting primary and secondary sources of information.

DEDICATION.

To God and my family without whom I would not have been here to write this dissertation.

ACKNOWLEDGEMENT.

I must profess my profound gratitude to my supervisor, Purity Kibugi who has been the most patient and understanding supervisor one could have.

List of Abbreviations.

ACECA Anti-Corruption and Economic Crimes Act

AG Attorney General

CPC Criminal Procedure Code

DCI Director of Criminal Investigations

DPP Director of public prosecution

IFMIS Integrated Financial Management System

IGP Inspector General of Police

JKIA Jomo Kenyatta International Airport

KACC Kenya Anti-Corruption Commission

KNCHR Kenya National Commission on Human Rights

KVDA Kerio Valley Development Authority

NARC National Rainbow Coalition

NCPB National Cereals and Produce Board

NYS National Youth Service

KACC Kenya Anti-Corruption Commission

ODPP Office of the Director of public prosecution

SOP Separation of Powers.

List of legal instruments

Constitution of Kenya (2010).

Constitution of Kenya (1963).

Criminal Procedure Code (No. 27 of 2015).

The Ethics in Government Act 581 28 USC.

Office of the Director of Public Prosecution Act (No. 2 of 2013).

The Judiciary Act 28 USC.

Constitution of the United States of America (1788).

List of Cases.

Buckley v Attorney General [1950] Irish High Court.

Entick v Carrington (1765) England and Wales High court.

Jimmy Wanjigi v Inspector General of police & 3 others (2017) eKLR.

Leonard v. Douglas (1963) United States Court of Appeals, District of Columbia Circuit.

Mc Grain v. Dougherty (1927), The Supreme Court of the United States.

Miguna Miguna v Cabinet Secretary, Ministry of interior and others (2018) eKLR.

Morrison v. Olson (1988), Supreme Court of the United States.

Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2012), Civil Appeal No. 290 of 2012.

Powell v. Katzenbach (1965), United States Court of Appeals, District of Columbia Circuit.

XA General Insurance Ltd & Ors v Lord Advocate & Ors 2011 UK Supreme Court.

Young v. United States ex rel. Vuitton et Fils SA (1987), Supreme Court of the United States.

Youngstown Co v Sawyer (1952) US Supreme Court.

United States v. Poindexter (2007), United States Court of Appeals, Fourth Circuit.

United States v. San Jacinto Tin Co. (1888), Supreme Court of the United States.

CHAPTER ONE: INTRODUCTION TO RESEARCH.

1.1 Background to the study.

The balance of power is required by the principle of separation of powers, which acknowledges that no arm of government should usurp the powers of the other. This principle is defined in the black's law dictionary as the division of governmental authority into three branches of government; executive, judiciary and legislature each with its own functions.[1] Montesquieu, who is credited for elaborating the modern doctrine of separation of powers argued that the rationale was to avoid concentration of political power in one institution.[2] If one arm of government had the powers to legislate, execute and adjudicate the law, it would lead to tyrannical abuse of power.

In Kenya the previous constitutional dispensation gave the executive unfettered powers that were used to exercise considerable influence over the judiciary and the legislature. That is why Kenya had been described by some, as a presidential absolutist state.[3] The first amendment to the 1963 constitution gave the president absolute discretion in the appointment of the Attorney General.[4] The AG was the chief public prosecutor. He was also a member of the cabinet, an ex officio member of parliament and the chief legal advisor to the government. It was clear that the AG had overlapping roles in government which required him to lean towards the interest of the government and jeopardize his independence as public prosecutor. An AG under the previous constitution could only perform their duties if his independence was guaranteed, which could not be clear if his appointment was done by the head of state. Due to the AG's various roles there was always a perception that he was biased towards the state; A perception reinforced by the fact that the AG failed to prosecute any high-level government officials for corruption.[5] Critics questioned the criteria used to merit the prosecution of certain cases and not others.[6]

Kenya's 'history is replete with examples of prosecutions conducted for reasons other than public interest, thus amounting to political witch-hunts and in some cases to settle personal

[1] Brayan Carner, Black's Law Dictionary (9th ed, West Publishing Company 2009) 45.
[2] Baron Montesquieu, The Spirit of Laws (1748).
[3] Onalo PL, 'An African appraisal: Constitution- making in Kenya', 2004, Trans Africa Press Publishers, 141.
[4] Ojwang JB, The Constitutional development in Kenya: Institutional adaptation and social change (1990), 41.
[5] PLO Lumumba & Luis G Franceschi, 'The Constitution of Kenya 2010: A Commentary,' 2014, Strathmore University Press, 500.
[6] Open Society initiative for Eastern Africa, 'Kenya; justice sector and rule of law' , March 2011, 138.

scores;[7] the Anglo-leasing scandal that rocked the country in the early years of the NARC government is testament to selective prosecution. The Anglo-leasing scandal had started off as a project for procuring passports, when the cost was inflated by corrupt government officials to include various other procurements and was awarded to a firm, without the necessary due diligence being conducted. This amounted to gross misconduct by public officials and resulted to a massive loss of public funds. The Kenyan Anti-corruption commission conducted investigations and recommended the prosecution of certain public officers.[8] The AG declined to prosecute stating that the KACC had failed to prove that specific offences were committed by public officers, the KACC later reiterated that it had forwarded watertight cases.[9] Years later no public officer was ever charged.

The concentration of such power under the AG played a key role in the constitutional drafters concluding that, there was a need to create an independent constitutional office that would solely deal with public prosecutions and its independence would be firmly anchored in the constitution. Such an independent institution would contribute to the balance of power by removing the control of public prosecutions from the executive. Moreover, its independence would allow it to hold the executive accountable if need be. This was the rationale for the establishment of the office director of public prosecution. The ODPP is responsible for instituting cases on behalf of the state. The Director of Public Prosecutions according to the 2010 constitution, can institute criminal proceedings against any person without prior consent of any authority. The DPP is also not subject to any authority in exercising his functions.[10] He shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

The ODPP is among the independent commissions and offices that were conceived to act as institutional checks and balances against abuse of power by state officials. The role of these institutions was to transform Kenya into a transparent and accountable society that knows

[7] ICJ Kenya, 'The Office of the Attorney General in East Africa: Protecting Public Interest through Independent Prosecution and Quality Legal Advice', in Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives, 2007, 21.
[8] Mugonyi D. & Barasa L., 'Furious Ringera Tells Attorney-General – Files are Complete', Daily Nation, 20 October 2006.
[9] Mugonyi D. & Barasa L., 'Furious Ringera Tells Attorney-General – Files are Complete', Daily Nation, 20 October 2006.
[10] Article 157 (10) Constitution of Kenya 2010.

how to regulate and balance the exercise of public power.[11] Moreover, public prosecutors have a special role in representing the public interest within the criminal justice system, they therefore ought to be assured of their independence. This research paper shall seek to analyse the office of the ODPP as a checks and balances institution and whether the existing legal gaps fully assure the independence of the ODPP; where there legal gaps what amendments could be made to fully protect the independence of the ODPP.

1.2 Statement of the problem

The ODPP is an independent body whose objective is to conduct public prosecutions. To achieve its mandate the ODPP is expected to carry out fair and independent public prosecutions without undue influence from other branches of government, especially the executive; hence contributing to the balance of power in Kenya.

However, in certain instances the ODPP has failed to conduct itself in an independent manner. This research paper shall scrutinize those instances, with the aim of identifying the legal gaps in the legislative framework that could be amended to prevent the hinderance of the independence of the ODPP in future circumstances consequently achieving the balance of power.

1.3 Statement of objectives.

This study shall investigate the objectives that follow:

1. To determine whether the existing legal framework protects fully assures the independence of the ODPP.
2. Where there existing legal gaps what further actions need to be taken to prevent obstruction of prosecutorial independence.
3. To examine the correlation between prosecutorial independence and the balance of power.

[11] Franceschi L, 'What's happening to the constitutional commissions?' Daily Nation 10 September 2013 https://www.nation.co.ke/oped/blogs/outsidethebox/Whats-happening-to-the-Constitutional-Commissions/634-1926374-format-xhtml-xwheotz/index.html on 10 September 2013.

1.4 Hypothesis

There is a significant correlation between prosecutorial independence and the balance of power in Kenya. The ODPP has failed in its obligation to prosecute all its cases, especially high-level corruption cases, in an independent manner partly due to existing legal gaps in the legislative framework; hence it has not contributed to the balance of power.

1.5 Research questions

1. Whether the existing legal framework fully assures and protects the independence of the ODPP?
2. If there are existing legal gaps what further actions need to be taken to prevent obstruction of prosecutorial independence?
3. What is the correlation between prosecutorial independence and the balance of power?

1.6 Justifications of study

The previous constitutional dispensation gave prosecutorial powers to the Attorney General who was also a member of the cabinet, an ex officio member of parliament and the chief legal advisor to the government. The AG's independence as a prosecutor was jeopardized by his overlapping roles within government. There was therefore a need for an independent prosecutorial office that would limit possible abuse of power by the arms of government, hence contributing to achieving the balance of power. This led to the creation of the ODPP. It is imperative that the ODPP carry out its mandate independently as prescribed in the constitution and ODPP act. This study seeks to find out whether the ODPP has performed its functions in an independent manner and analyse its contribution to the balance of power.

1.7 Literature review.

In *Montesquieu's Spirit of Laws*, the principle of separation of powers is derived as a means for a government to provide the greatest possible liberty to its citizens. Montesquieu describes political liberty to mean a tranquillity of mind arising from the opinion each person has of his safety.[12] Liberty would therefore entail living under laws that protect us from harm while leaving us free to do as much as possible, and enable us to feel the greatest possible confidence that if we obey those laws, the power of the state will not be directed against us.[13]

Montesquieu argues that experience shows that every man bestowed with power tends to abuse it and it is neccesary from the very nature of things, that power bestowed be a check to power.[14] To achieve this, there must be a separation of powers of government between the executive, legilature and judiciary. If different bodies were to execise various powers it would be possible to check the others from abusing their powers. In contrast if the same institutions held several powers void of any checks and balances, it would lead to tyrannical abuse of power. Montesquieu also argues that it is important that the different branches of government act independently from each other in order to effectively check each other.

In *Federalist paper no.47, James Madison* expounds on the idea of separation of powers in the American constitution. Like the other federalist papers, no. 47 was also advocating for the ratification of the constitution of United States of America. One of the criticisms of the constitution was that the separation and independence of the branches of government were not sufficiently defined in the constitution. Madison like Montesquieu acknowleged that too much power can not be held by one branch of government by stating, Too much power in one branch of government "is the very definition of tyranny.[15]

He however disputed that the American constitution did not clearly define the independence and separate powers of the branches of government. Advancing Montesquieu assertions on the British constitution he argued that the branches of government could not be totally distinct if they were to act together as a whole.[16] He took examples from the British constitution like,

[12] Baron Montesquieu, The Spirit of Laws (1748).
[13] Bok Hilary, Baron de Montesquieu, Charles-Louis de Secondat, The Stanford Encyclopedia of Philosophy, Dec 19, 2018, https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=montesquieu on 30, september 2019.
[14] Baron Montesquieu, The Spirit of Laws (1748).
[15] James Madison, Federalist No. 47, 1788.
[16] James Madison, Federalist No. 47, 1788.

the English king acts in a legislative capacity when he enters into treaties with foreign sovereigns: once treaties are signed they have the force of legislative acts. Another example used is the fact that the judicial branch, acts in an advisory capacity to the executive branch. Madison concludes by stating that the separation of powers was a sacred maxim of free government but each branch of government could not be kept totally separate and distinct rather, the objective is to give each constitutional control over the other to provide checks and balances.[17]

In *The constitution of Kenya : a commentary by P.L.O. Lumumba and Luis Franceschi* they elucidate on the principle of separation of powers within the constitution of Kenya. They assert that the 2010 constitution separates power vertically and horizontally. Horizontal separation of powers means that the roles of each arm of government is distinct while simultaneously acting as a check against the other.[18] Vertical separation of powers entails the distribution of power between the national and county governments.[19] Each level of government has distinct functions that they must perform. There some functons that are exclusively performed by one while others need a coordinative effort.

The 2010 constitution also limits the power of the President to prevent abuses of power as witnessed during the previous constitutional dispensation. The President's actions are now subject to the constitution and established checks and balances provided by the other arms of government.[20] For example; all Presidential appointees to various commissions must be approved by parliament.

In *Kenya Justice Sector and the Rule of Law* published by the Open Society Initiative for Eastern Africa and authored by Patricia Kameri Mbote and Migai Akech; the main objective was to assess the effectiveness, accountability and legitimacy of Kenya's justice sector and suggest policy and legislative improvements. In acheiving their objective they assess the rationale for the need for the creation of the ODPP. Prosecutorial powers in the previous constitution was vested on the AG. This was power was often abused with criminal proceedings brought against individuals without any lawful justification. A Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in

[17] James Madison, Federalist No. 47, 1788.
[18] PLO Lumumba & Luis G Franceschi, 'The Constitution of Kenya 2010: A Commentary,' 2014, Strathmore University Press, 19.
[19] PLO Lumumba & Luis G Franceschi, 'The Constitution of Kenya 2010: , 19.
[20] PLO Lumumba & Luis G Franceschi, 'The Constitution of Kenya 2010: , 20.

2009 stated that the Attorney General is considered to be not just complicit in, but absolutely indispensable to, a system which has institutionalised impunity in Kenya.[21]

The report further asserts that the 2010 constitution seeks to enhance the independence of the justice system which would result in improving the effectiveness of the justice sytem;[22] this was the rationale for the creation of the ODPP. And to prevent the abuse of the power by the ODPP, the 2010 constitution requires that its exercise shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

In *the status and role of prosecutors guide by the United Nations Office on Drugs and Crime together with the International Association of Prosecutors* provides for essential requirements that will ensure effective and independent prosecution in the criminal justice system. It also emphasizes the centrality of the prosecution within the criminal justice system as it bears both a responsibility to the state as well as its citizens.[23] A lack of independence by the prosecutorial organ in the criminal justice system jeopardizes the criminal justice system.

1.8 Research Methodology.

This study is primarily based on secondary sources to realise the objectives of the research. The study incorporates materials such as books, published open source articles, case law, statute law, journal articles and institutional publications among other authoritative texts.

1.9 Limitations of the study

The major limitation of this study is that many of the cases that would fall under case studies in this research are still ongoing. The research can only do a conclusive case study on cases that have been determined. These cases were only recently instituted because the appointment of a new DPP in March 2018 brought with it a new spirited fight against high level corruption. Many state officers have since been arrested and charged for corruption.

[21] Open Society initiative for Eastern Africa, 'Kenya; justice sector and rule of law' , March 2011, 14.
[22] Open Society initiative for Eastern Africa, 14.
[23] The status and role of prosecutors , United Nations Office on Drugs and Crime and International Association of Prosecutors, December 2014.

1.10 Chapter Breakdown.

Chapter one introduces the research by giving a clear insight into the intention of the study. It shall consist of the background of the problem, statement of the problem, statement of the objective, hypothesis, research questions, literature review, justification of the study, limitations of the study and chapter breakdown.

Chapter two shall focus on the theory of separation of powers, and its application in the Kenyan constitution.

Chapter three will analyze case law. The objective will be to determine whether the ODPP has performed its duties in an independent manner. The data shall be interpreted with its effects in achieving the balance of power.

Chapter four shall be a comparative study with the U.S.A. seeking to anlayse the effect of prosecutorial independence in achieving a balance of power.

Chapter five shall give a conclusion of the study. It shall also give recommendations on actions that may be taken to uphold and strengthen the independence of the ODPP.

CHAPTER 2: THE THEORY OF SEPARATION OF POWERS.

2.1 The Pure View.

Black's Law Dictionary defines separation of powers as the division of governmental authority into three branches of government; the legislature, executive, and judiciary each with its own duties .[24] According to Ian Loveland's writings on the British system of government, the main objective of the doctrine of separation of powers is to create three discrete elements of government.[25] The first element is legislation; this is where one arm of the government is responsible for creating the laws of the land. The second element is execution. This is the role of the executive arm of government. As per Dicey's argument , the executive tend to exceed the powers given to them by the legislature; therefore the courts, the third element, act as remedy against this.[26] If the executive does not adhere to the laws enacted by the legislature citizens can move to the courts as a remedy. In determining the matter, the courts have a limited law-making power in developing common law. This threefold division is illustrated in *Entick v Carrington*.[27]

2.2 John Locke's view on separation of powers.

John Locke one of the most influential political philosophers of the modern era advanced the doctrine of separation of powers in his book, Two Treatises of Government.[28] According to Locke there are three elements necessary for a civil society. They include an established law, a non-partisan body that will settle disputes and a body to execute such judgements. To facilitate these elements the government needed to have different branches, a strong legislature and an executive that does not usurp power from the legislature.[29] Locke's theory on separation of powers favoured limited government and is well illustrated in the early UK model, that limited the monarchs powers by separating the legislative and executive powers.[30]

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[24] Brayan Carner, Black's Law Dictionary (9th ed, West Publishing Company 2009) 45.
[25] Ian Loveland, Constitutional Law, Administrative Law, And Human Rights: A Critical Introduction, 7th edition, Oxford University Press, Oxford, 2012, 5.
[26] Ian Loveland, Constitutional Law, Administrative Law, And Human Rights: A Critical Introduction, 5.
[27] *Entick v Carrington* (1765) England and Wales High court.
[28] John Locke, Two Treatises of Government, Peter Laslett Edition, Cambridge University Press, 1988.
[29] Spark Notes, _Two Treatises of Government' (2014) http://www.sparknotes.com/philosophy/johnlocke/section2.rhtml accessed on 11/11/2019.
[30] Spark Notes, _Two Treatises of Government' (2014) http://www.sparknotes.com/philosophy/johnlocke/section2.rhtml accessed on 11/11/2019.

Locke's theory is greatly influenced by the social contract theory. He argued that because of the danger of human bias and self-interest, the absence of impartial judges and the lack of an executive power those living in the state of nature enter into a social contract and set up a civil government.[31] Therefore, the role of the government is to exercise their powers in accordance with the law as well as the execution of judgments made by impartial judges.[32]

2.3 Montesquieu's view on separation of powers.

Montesquieu, the main proponent of the modern doctrine of separation of powers, advanced the theory in his work De L'Esprit des Lois (the spirit of laws) to the point of making it a grand constitutional principle.[33] He argued for a strict separation among the branches of government; the legislature, executive and judiciary with the objective being to protect the liberty of its citizens.[34] Montesquieu also emphasised on the need of an independent judiciary. He argued that, if one arm of government had the powers to legislate, execute and adjudicate the law, it would lead to tyrannical abuse of power.

Montesquieu's theory on the separation of powers could be summarised by these principles[35]:

a. The principle of trias politica, which simply requires a formal distinction to be made between the legislative, executive and judiciary components of the state authority.

b. The principle of separation of personnel. This requires that a person serving in the one organ of state authority is disqualified from serving in any of the others.

c. The principle of the separation of functions that states every organ of state authority be entrusted with its appropriate functions only.

d. The principle of checks and balance. This requires that each organ of state authority be entrusted with special powers designed to keep a check on the exercise of functions by the others.

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[31] John Locke, Two Treatises of Government, 326.

[32] David.D, Christopher Roederer and Darrel Moellendorf Jurisprudence, South African Journal on Human Rights, 2004, 78, https://www.tib.eu/en/search/id/BLSE%3ARN169014371/Christopher-Roederer-and-Darrel-Moellendorf-Jurisprudence/ on 11/11/2019.

[33] Baron Montesquieu, The Spirit of Laws (1748).

[34] David Pollard, Neil Parpworth and David Hughes, Constitutional and Administrative Law: Text with Materials 4th edn, Oxford University Press, Oxford, 2007, 45.

[35] Professor Vile, Constitutionalism and the Separation of Powers, 2nd Edn Indianapolis Liberty Fund, Indianapolis 1998, 13.

However, Montesquieu's theory on separation of powers brings about many reservations regarding its application in contemporary times. Most of the criticism is levelled at Montesquieu's insistence on the strictness of the separation. The arms of government require a certain level of coordination; some intermixture of functions is both necessary and desirable.[36]

2.4 Criticisms of the Pure Doctrine.

Aileen Kavanagh argues that Montesquieu's theory is the pure view of the theory of separation of powers. The criticism of the pure view is that it has two major ambiguities concerning what the theory requires. Firstly, the word 'powers could refer to either institutions or the legal authority to perform certain actions. Alternatively it could mean the functions of the executive, legislature or judiciary.[37] Secondly 'separation' could vary by degree, it could be absolute or partial.[38] Therefore, the term separation of powers could be used to describe a wide range of ideas, not all of which are compatible; a scheme of interlocking checks and balances ; a triad of mutually exclusive functions; a prohibition on plural office-holding; the isolation, immunity, or independence of one branch of government from interference from another.

To navigate between these ideas, it is important to fully grasp the pure view doctrine of SOP. Maurice Vile articulates that the pure doctrine requires that the government have three branches of government each with its respective function, i.e. executive, legislature and judiciary; each branch must be confined to its function and not allowed to interfere with the other. There should also be a separation of persons which will allow the branches to act as checks and balances against tyranny.[39] A strict separation along the functional lines of government bodies lies at the heart of the pure doctrine. However, the pure doctrine has never been used in its extreme form but rather it acts as a benchmark with which alternative theories of separation of powers are assessed.[40]

Two of the main components of the pure doctrine include the separation of institutions and functions. The functional separation means a one branch – one function rule. In any modern state this view is difficult to implement. The executive does have a significant role in terms of

[36] C. Mollers, The Three Branches: A Comparative Model of Separation of Powers Oxford University Press, Oxford 2013, 8.
[37] Professor Vile, Constitutionalism and the Separation of Powers, 12.
[38] C. Munro, Studies in Constitutional Law, 2nd edition, Oxford University Press, Oxford, 2005, 307.
[39] M. J. C. Vile, Constitutionalism and the Separation of Powers, 97.
[40] M. J. C. Vile, Constitutionalism and the Separation of Powers, 97.

legislation in that they do create primary legislation through policy making, its role is therefore multifunctional.[41]

The courts also exercise some legislative power. The courts exercise legislative powers when creating rules governing the procedures of the court; in settling disputes courts decide the necessary requirements of legal rules, this can be viewed as a legislative function although in a limited manner. [42] The courts in some jurisdiction have the power to strike down legislation from both the executive and legislature based on its constitutionality. Therefore, the view that the courts function is just to apply the law is false.

The one branch – one function rule is unsustainable as all the branches of government exercise all three functions but to some degree. For efficiency and organisation all three branches need to carry out all these functions.[43] The pure doctrine does not capture the complex intricacies of a modern state while advancing the one branch – one function rule. A solution would be to relax the strictness of the 'one' requirement. Each branch would have a primary role but would be allowed to perform other functions as a periphery to its primary role. This degree of multifunctionality would ease its application in a modern state.[44]

The second component of the pure doctrine is the separation of the institutions. This is where each branch of government is confined to the exercise of of a single function and encroaching the functions of other branches would be ultra vires.[45] It is incorrect to say that the branches of government should confine themselves to a single function if by that it is means that they make their decisions in isolation from the actions and decisions of the other arms of government.[46] As Aharon Barak put it, the branches of government are not 'latifundia that have no connection between them:"[47] In order to carry out their functions, each arm of government must take account of the role and responsibilities of the other arms. Therefore, this view fails to consider the certain level of interaction and interdependence needed for the branches of government to carry out their respective functions.

[41] W. B. Gwyn, 'The Indeterminacy of the Separation of Powers in the Age of the Framers', 30 (2), William & Mary Law Review, 1989, 266.
[42] R. Dworkin, A Matter of Principle, Harvard University Press, Cambridge, 1985, 48
[43] T. Endicott, Administrative Law, 2nd edition, Oxford University Press, Oxford, 2011, 15.
[44] Aileen Kavanagh, Philosophical Foundations of Constitutional Law, Dyzanhaus & Thorburn edition, Oxford University Press, Oxford, 2015, 226.
[45]Aileen Kavanagh, Philosophical Foundations of Constitutional Law, 226
[46] Aileen Kavanagh, Philosophical Foundations of Constitutional Law, 229
[47] A. Barak, The Judge in a Democracy, Princeton University Press, Princeton, 2006, 36.

The pure doctrine is not in application in any contemporary state however, this does not mean that states should discount the principle of separation of powers as it is integral for any democracy. Instead the flaws of the pure doctrine should inform a new doctrine of separation of powers for contemporary states.

2.5 Separation of Powers ; The Reconstructed View.

The objective of this theory is to avoid tyrannical abuse of power. Montesquieu warned that every man that was interested in power was bound to abuse it.[48] Therefore, the powers of the government were to be divided among the branches to ensure no single body was too powerful and to maintain checks and balances. Even in modern times this is still the main objective of the doctrine.[49] It is obvious that if the objective is to avoid tyranny, the powers of government should be dispersed to a variety of bodies; similarly, if the objective is to ensure checks and balances, we can put them in place. However, there must be a correlation between the institution and the task assigned to them. Rather than just a negative justification which is to avoid concentration of power there must be a positive justification for allocating powers to a certain branch.[50]

By nature, governing requires a multiplicity of tasks.[51] Every state needs a body to execute and initiate policy decisions; a deliberative and representative body that creates the general rules of the community; an independent body that resolves disputes with regard to the rules and their application.[52] The point of the theory of SOP is not just to disperse power randomly but its objective is to create two bodies the judiciary and the legislature, that are able to hold the executive accountable as they are separate from the latter.[53] This understanding of the theory is thus motivated by two main factors; to allocate power and assign tasks to those bodies best suited to carry them out; to put mechanisms in place to correct for potential abuse of power and jurisdictional overreach.

To understand which tasks are to be assigned to which institution we must relate the various tasks to to the appropriate decision-making processes and the values which the various

[48] Baron Montesquieu, The Spirit of Laws (1748).
[49] R. Albert, Presidential Values in Parliamentary Democracies, 8 (2), International Journal of constitutional law, 2010, 207.
[50] Aileen Kavanagh, Philosophical Foundations of Constitutional Law, 230.
[51] L. Green, The Duty to Govern, 13 (3-4), Legal Theory, 2007, 165.
[52] H. L. A. Hart, The Concept of Law, 3rd edition, Oxford: Clarendon Press, 2012.
[53] T. Endicott, Administrative Law, 42.

institutional roles are meant to serve.[54] For example, in order to have a legislative body that can make clear and general rules for the society, the body needs to be structured in a way that it can deliberate, enact or change the law for various reasons. Additionally, their connection to the electorate gives them legitimacy and makes the legislators accountable to them. Similarly, in order to have an effective adjudicative body to solve disputes the body must be independent from any third parties; the rules must be applied fairly to the dispute in question.[55]

This differs from the pure doctrine in that, rather than a 'one branch – one function rule' this approach proposes that each organ performs a different institutional role. Institutional roles encompass several different functions; separate institutions can share powers and functions while performing different roles in governance.[56] For example, courts do have a legislative power however, there powers are limited to filing gaps in already existing legal frameworks. There exists an overlap sometimes in the law-making duties both branches carry out. Some legislative law-making is incremental and interstitial, and some judicial law making can have wide-ranging effects.[57] Nonetheless, both arms of government are subjected to different institutional constraints that inform their scope and limits of their constitutional roles.[58]

To prevent abuse of power, it is important to supplement it with institutional checks and balances. James Madison in the federalist papers argued that the first task of implementing SOP was to divide powers among the branches of government; the harder task is putting up practical security to protect each branch from interreference by the other.[59] The government must be structured in way that its constituent parts are given the powers to prevent interference in its function. Checks and balances protect the separation and ensure the branches of government do not overstep their mandate. Therefore, in this view the separation of powers doctrine is two sided;[60] identifying the valuable role each institution can play and structuring checks and balances.

These principles are underpinned by a deeper virtue, the joint enterprise of governing. There must exist a deeper value of coordinated institutional effort between the branches of

[54] D. Kyritsis, Principles, Policies and the Power of Courts, 20 (4), Canadian Journal of Law and Jurisprudence, 2007, 19.
[55] R. Ekins, 'Statutory Interpretation and the Separation of Powers; draft working paper (on file with author), at 8
[56]D. Kyritsis, Principles, Policies and the Power of Courts, 31
[57] A. Kavanagh, The Idea of a Living Constitution, 16 (1), Canadian Journal of Law and Jurisprudence, 2003, 55.
[58] J. Raz, 'The Authority and Interpretation of Constitutions, Cambridge University Press, Cambridge, 1998, 153.
[59] J. Madison, Federalist paper 'No. 48'
[60] D. Kyritsis, Principles, Policies and the Power of Courts, 19.

government for effective governance.[61] Branches of government are not solitary entities that perform one function but are rather parts of a joint enterprise each with their own part to play.

In Youngstown Co v Sawyer, the US supreme court stated that, while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government; it enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[62] One branch cannot perform all the tasks of governance rather, each branch of government makes a substantial contribution to the mutual enterprise. The legislature may enact the law, but the courts decide what the rules mean and require cases through filing gaps in the legal framework and instilling statutory provisions into the broader legal framework.[63]

The central point of the joint enterprise is inter-institutional comity.[64] This is the respect one great organ of the state owes to the other.[65] This involves a leeway requirement and a mutual support requirement. Comity requires each arm give the other arms leeway to perform their own tasks and functions (the leeway requirement). They should respect the jurisdiction of other arms and be aware to the fact that other arms may be better placed to carry out a certain duties.[66] In XA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland) the UK supreme court stated that, both the legislature and the courts must recognize that each arm has their own specific function in the constitution, and that each must respect the sphere of action of the other.[67] Branches of government should also practice self-restraint where appropriate and not exceed their jurisdiction and undermining another branch.

Branches of government are also required to show mutual support by implementing and interpreting the decisions of other branches in a way which respects the underlying substantive and institutional choices.[68] One of Madison's central insights was that we should not think of the legislative, executive, and judicial power as entirely unconnected with each other.[69]

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[61] D. Kyritsis, Principles, Policies and the Power of Courts, 19.
[62] *Youngstown Co v Sawyer* (1952) US Supreme Court.
[63] Aileen Kavanagh, Philosophical Foundations of Constitutional Law, 235.
[64] Jeff A. King, Institutional Approaches to Judicial Restraint, 28 (3), Oxford Journal of Legal Studies, 2008, 428.
[65] *Buckley v Attorney General* [1950] Irish High Court.
[66] Aileen Kavanagh, Philosophical Foundations of Constitutional Law, 235.
[67] *XA General Insurance Ltd & Ors v Lord Advocate & Ors* 2011 UK Supreme Court.
[68] *XA General Insurance Ltd & Ors v Lord Advocate & Ors* 2011 UK Supreme Court.
[69] J. Madison, Federalist papers 'No. 48'.

Instead of conceptualizing the branches of government as isolated or compartmentalized bodies with high walls between them, the argument advanced by the reconstructed view emphasizes on the necessary interdependence, interaction, and interconnections between the branches.

2.6 Separation of powers in Kenya.

The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others,[70] recognizing the principle of checks and balances stated as follows:

"It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a per-commitment in our constitutional edifice. However, separation of power does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function."

The 2010 Constitution uses a two-pronged approach with respect to the concept of separation of powers.[71] State power is applied both horizontally and vertically. Vertically, state power is divided to infuse the two levels of government namely both the national government and county government.[72] The two levels of governments are interdependent and distinct and ought to conduct their mutual relations based on cooperation and consultation. However, the constitution has put in place safeguards to resolve any conflicts that may arise between the county and national governments.[73] The Fourth Schedule of the 2010 Constitution provides for the functions of the two levels of government.

Horizontally state power at the national government level has been divided among the three main arms of government executive, legislature and the judiciary.[74]

Each institution has its distinct duties and is not allowed to impinge on the functions of the other arm of government.

[70] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2012), Civil Appeal No. 290 of 2012.
[71] Prof Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla, Human Rights, Separation of Power and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States, (Konrad Adenauer Stiftung 2012)12.
[72] Constitution of Kenya, Article 1 (4).
[73] Chapter 11 of the Constitution of Kenya 2010.
[74] Constitution of Kenya, Article 1(3) (a) (b) (c).

CHAPTER 3: A CASE STUDY OF PROSECUTORIAL INDEPENDENCE IN KENYA

3.1 Legal Provisions Guaranteeing the Independence of the ODPP

Prior to the 2010 constitution, the attorney general was the chief prosecutor in Kenya. He was also a member of the cabinet, an ex officio member of parliament and the chief legal advisor to the government. It was clear that the AG had overlapping roles in government which required him to lean towards the interest of the government and jeopardize his independence as public prosecutor. An AG under the previous constitution could only perform their duties if his independence was guaranteed, which could not be clear if his appointment was done by the head of state. Due to the AG's various roles there was always a perception that he was biased towards the state; A perception reinforced by the fact that the AG failed to prosecute any high-level government officials for corruption.[75] Therefore, with the 2010 constitution the ODPP was introduced with his independence guaranteed by the constitution as well as other statutes.

3.2 Constitution of Kenya 2010.

Article 157 of the constitution establishes the Office of the Director of Public Prosecution.[76] The provisions of the article illuminate the independence of the ODPP. These are ;

a) **The DPP is appointed by the President but must be approved by the national assembly.**

This is different from the 1963 constitution, where the chief prosecutor (the AG) was appointed by the President.[77]

b) **Removal of the director from office.**

The chief prosecutor of any jurisdiction needs security against arbitrary removal of office. Unlike the 1963 constitution, the 2010 constitution provides for an independent process for the dismissal of the DPP which involves filing a petition with the Public Service Commission.[78]

[75] PLO Lumumba & Luis G Franceschi, *'The Constitution of Kenya 2010: A Commentary,'* Strathmore University Press, Nairobi, 2014, 500.
[76] Article 157, *Constitution of Kenya* (2010).
[77] Article 189, *Constitution of Kenya* (1963).
[78] Article 158, *Constitution of Kenya* (2010).

c) **Tenure of Office.**

To further the independence of the ODPP, the tenure of the DPP must be guaranteed.[79] This prevents the DPP's actions being influenced by any factors other than the principles prescribed in the constitution.[80]

d) **Qualifications for appointment as DPP.**

The qualifications of the DPP is the same as a Judge of the high court.[81] This requirement ensures that the DPP is an individual with the necessary expertise to ensure proper governance and management of the ODPP.

e) **The DPP does not need consent to institute criminal proceedings.**

This provision protects the independence of the prosecution and the powers that come with it. The mandate of the ODPP is not subject to any person or office. [82]

3.3 Criminal Procedure Code (CPC 2012).

The CPC empowers the DPP with certain powers that include, Nolle Prosequi.[83] This power allows the DPP to relieve an individual of the charges they are facing in court. For accountability this power is subject to many limitations. For example, a discharge is not the same as an acquittal therefore, the principle of double jeopardy does not apply here. Subsequent proceeding can be levelled against the individual again.

3.4 Office of the Director of Public Prosecution Act (ODPP Act) 2013.

In furtherance of article 157 and 158 of the constitution the ODPP act was enacted in 2013. The guiding principles of the ODPP include the rules of natural justice; the need to serve the cause of justice, prevent abuse of the legal process and public interest; protection of the sovereignty of the people; secure the observance of democratic values and principles; and promotion of constitutionalism.[84]

[79] Article 158, *Constitution of Kenya* (2010).
[80] Section 4, *Office of the Director of Public Prosecution Act* (No. 2 of 2013).
[81] Article 157 *Constitution of Kenya* (2010).
[82] Article 158 *Constitution of Kenya* (2010).
[83] Section 82 *Criminal Procedure Code* (No. 27 of 2015).
[84] Section 4, Office of the Director of Public Prosecution Act (No. 2 of 2013).

The act goes further in validating the prosecutorial independence outlined in the constitution. The provisions outline the appointment and removal procedure of the DPP;[85] powers of the DPP;[86] independence of the DPP[87] and protection from personal liability.[88]

3.5 Case Studies.

Since 2013, the ODPP has filed over 508 corruption cases involving 1,462 accused , with the total amount of money involved estimated at Sh60 billion.[89] The ODPP has prosecuted numerous public officials for abuse of office, in corruption case that involve billions of shillings.

3.5.1 The National Youth Service.

The first NYS scandal entailed a massive network of conspiracy that worked to defraud the National Youth Service by using various companies and public officials that led to the loss of Ksh 791,385,000. It was a well ochestrated scheme whose principle aim was to syphon money from NYS based on forged documents for the supply of goods and services.[90] The loss of Ksh 791,385,000 was done with the aid of a procurement process that was not authorised by the ministerial tender committee. The payment vouchers used in this dealings were approved despite the fact that there were glaring inconsistencies such as the lack of authentic documents that supported the transaction and proper analysis to detect discrepancies where for example, zeros were added to the final figure.[91]

Investigative agencies obtained evidence that revealed that the procurement system (IFMIS) is impenetrable. This goes to show that the perpetrators of the breach of the IFMIS system as well as the fraud with respect to the illegal processing of and honouring payments was done intentionally, to benefit themselves desite the fact that they bore a fiduciary duty of care to protect the publics funds.

This actions were tantamount to offences under the ACECA and the Public Finance Management act.[92] This network to defraud the NYS was aided by public officials who played

[85] Section 8,9, Office of the Director of Public Prosecution Act (No. 2 of 2013).
[86] Section 5(2 a), Office of the Director of Public Prosecution Act (No. 2 of 2013).
[87] Section 6, Office of the Director of Public Prosecution Act (No. 2 of 2013).
[88] Section 15, Office of the Director of Public Prosecution Act (No. 2 of 2013).
[89] Ibrahim Oruko, 'We have filed over 500 cases on graft, says DPP Haji' Daily Nation, 22 June 2018 - < https://www.nation.co.ke/news/Over-500-graft-cases-filed/1056-4624912-gryv6pz/index.html> on 25 November 2019.
[90] EACC investigation and Analysis Report on the Findings of the NYS Scandal, Ongeri N, 2016.
[91] EACC investigation and Analysis Report on the Findings of the NYS Scandal, Ongeri N, 2016.
[92] EACC investigation and Analysis Report on the Findings of the NYS Scandal, Ongeri N, 2016.

different roles. The suspects of the NYS scandal were arrested and charged between August and November 2016. However, 23 of them were discharged for lack of evidence.

The second NYS scandal was quite similar to the first. In 2018 an alleged 9 billion of public funds was lost through fictitious tender and procurement processes that were institgated by both public officials and private persons.[93] Over 51 suspects were charged in connection to the theft of public funds.[94] These cases are still pending in court.

3.5.2 National Cereals and Produce Board.

Investigations into NCPB in 2018 revealed that, officials at the parastatal were purchasing maize from unregistered farmers and brokers who had not been veted to suplly maize. It was reported that some unethical businessmen were smuggling in maize from another country and selling it to the cereals board; this resulted in genuine farmers missing out on the oportunity to sell their produce to the cereals board as the businessmen were favoured by the board.[95]

NCPB is mandated to purchase maize only from farmers that are registered. The list of registered farmers is circulated to all the silos and depots. Some time in 2018, the NCPB headquaters in Nairobi noticed that the queues for maize delivery were not reducing and there was an outcry from farmers who were on the queues.[96]

This resulted in the cabinet secretary for agriculture issuing a directive for fresh vetting for all maize deliveries. Purchases of the maize in Nakuru were stopped due to reported attempts to manipulate the weighbridge. An audit of the entire exercise revealed that there had been suspect deliveries by certain individuals to the NCPB depots.[97] It later emerged that individuals who were not registered farmers had colluded with NCPB officials to provide them with large quantities of maize at the disadvantage of regular farmers.[98] These individuals supplied the boaard with maize using vetting forms where they indicated fake acreage of land

[93] Star Reporter, 'List of suspects linked to Sh 9bn NYS Scandal' The Star, 28 May 2018, - < https://www.the-star.co.ke/news/2018-05-28-list-of-suspects-linked-to-sh9bn-nys-scandal/ > on 25 November 2019.
[94] Sam Kiplagat, 'NYS graft trial starts with four suspects on the run' Business Daily, 29 October 2018, - <https://www.businessdailyafrica.com/economy/NYS-graft-trial-starts-with-four-suspects-on-the-run/3946234-4826918-9j67j7/index.html> on 25 November 2019.
[95] EACC investigation and Analysis Report on the Findings of the NCPB Scandal by Nechesa R. 2018.
[96] EACC investigation and Analysis Report on the Findings of the NCPB Scandal by Nechesa R. 2018.
[97] EACC investigation and Analysis Report on the Findings of the NCPB Scandal by Nechesa R. 2018.
[98] EACC investigation and Analysis Report on the Findings of the NCPB Scandal by Nechesa R. 2018.

in various sub-locations. These suspects were arrested and charged in December 2018.[99] The cases are still pending before court.

3.5.3 Arror and Kimwarer Dams.

The objective of the multipurpose projects was to produce electricity through the development of hydro-electric power plants; expansion of the area under irrigation to support the country's food security; the production and distribution of potable water for both domestic and livestock consumption.[100] The two multi-purpose dams were supposed to cost between Sh63 billion and Sh38 billion for Arror and Sh28 billion for Kimwarer.[101]

The contract for the construction of the dams was given to an Italian firm, Cooperative Muratoi Cementisti Di Ravenna. The firm was also given the contract to construct the Itare dam in Meru. Therefore the firm had three contracts in Kenya: Kimwarer, Arror and Itare dams construction, all totaling about Sh150 billion ($1.5 billion).[102] When questioned by the DCI the former Attorney General, Prof Githu Muigai said that he had advised Cabinet Secretary Rotich against entering into a contract with CMC Ravenna.[103] The former AG stated that the Italian company had not been scrutinised comprehensively to be awarded the contract; his pleas were ignored.

There was also alot of suspect behaviour with regards to the financing of the project for example, the Treasury entered into the facility contract in Euros while the commercial contracts were in US dollars, which resulted into a loss due to the exchange rates. An insurance premium of Sh11 billion was paid upfront yet a government guarantee would be sufficient enough at no cost to taxpayers; An additional Sh4.6 billion was borrowed in besides the principle amount to pay interest in advance during the period for construction, which had

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[99] Citizen Reporter, 'NCPB officials among 11 charged over maize scandal, freed on Ksh.5M bond' Citizen Digital, 13 December 2018,- < https://citizentv.co.ke/news/ncpb-officials-among-11-charged-over-maize-scandal-freed-on-ksh-5m-bond-223253/ > on 25 November 2019.

[100] - <http://cmcgruppo.com/cmc/en/project/kithino-multipurpose-dam-project/> on 25 November 2019.

[101] Dauti Kahura, 'Lies, Dam Lies, and Intrigues: The Arror and Kimwarer Dams Saga' The Elephant, 11 April 2019 - <https://www.theelephant.info/features/2019/04/11/lies-dam-lies-and-intrigues-the-arror-and-kimwarer-dams-saga/> on 25 November 2019.

[102] Dauti Kahura, 'Lies, Dam Lies, and Intrigues: The Arror and Kimwarer Dams Saga' The Elephant, 11 April 2019 - <https://www.theelephant.info/features/2019/04/11/lies-dam-lies-and-intrigues-the-arror-and-kimwarer-dams-saga/> on 25 November 2019.

[103] Dauti Kahura, 'Lies, Dam Lies, and Intrigues: The Arror and Kimwarer Dams Saga' The Elephant, 11 April 2019 - <https://www.theelephant.info/features/2019/04/11/lies-dam-lies-and-intrigues-the-arror-and-kimwarer-dams-saga/> on 25 November 2019.

not yet commenced. This means that the government borrowed a loan to pay off the interest of another loan.

By the time CMC di Ravenna filed for bankruptcy, the treasury had paid Sh15 billion as down payment for only half of the work at Itare Dam in Meru County, which had been valued at Sh38 billion. By January 2019 Sh19 billion had so far been paid as advance payment, commitment fee, insurance and other costs, yet no work began. In July 2019 27 public officials involved in the scandal were arrested and charged in court. The cases are still pending.

The above cases are characterized by significant abuse of power and rampant corruption. Before the creation of the ODPP corruption was aided by the absence of effective accountability mechanisms against government ministers[104] or selective exercise of prosecutorial power.[105] The ODPP has since its inception renewed the fight against abuse of power by public officials. Since 2013, the Office of the Director of Public Prosecutions has filed over 508 corruption cases involving 1,462 accused , with the total amount of money involved estimated at Sh60 billion.[106]

However, critics question the resolve of the ODPP in the renewed fight against abuse of power as to date, not a single Kenyan public official charged with graft has been convicted.[107] Nearly all mega-corruption scandals remain unsolved, and over 95 corruption cases are currently pending. A recent Africog report, lists several arrests and court appearances of people accused of corruption and whose cases have been crumbling.[108]

Critics have questioned the independence of the ODPP in certain cases which are claimed to be politically motivated.

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[104] Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' 18(1) *Indiana Journal of Global Legal Studies*, 2011, 362.
[105] Migai Akech, 'Abuse of Power and Corruption in Kenya: , 362.
[106] Ibrahim Oruko, 'We have filed over 500 cases on graft, says DPP Haji' Daily Nation, 22 June 2018 - < https://www.nation.co.ke/news/Over-500-graft-cases-filed/1056-4624912-gryv6pz/index.html> on 25 November 2019.
[107] Pauline Mpungu, 'Kenya's corruption crackdown: New era, or political theatre?' Aljazeera 27 June 2019 - <https://www.aljazeera.com/ajimpact/kenyas-corruption-crackdown-era-political-theater-190726154554617.html> on 25 November 2019.
[108] African Centre for Open Governance, 'State Capture: Inside Kenya's inability to fight corruption', May 2019, 34.

3.5.4 The Deportation of Miguna Miguna.

On 2nd February 2018 , Miguna Miguna was arrested in his house in Runda estate for undisclosed reasons.[109] Miguna's lawyers moved to the High Court and Miguna was granted a cash bail of Kshs 50,000. He was to appear in court on 5 th February 2018; the police however declined to release Miguna as ordered by the Court presided by Justice Wakiaga.[110] The police however declined to release him. Miguna's lawyers went back to the High Court on 5th February 2018 morning before Justice Luka Kimaru who issued a second order.

The police declined to release him and Justice Kimaru issued a third order directing the Inspector General of Police; Joseph Boinnet and the Director of Criminal Investigations; Mr George Kinoti to personally appear in court to show cause why they shouldn't be punished for contempt.[111] A total of 5 orders were issued by courts of law that required Miguna Miguna be presented in front of them to take plea; before his citizenship was ilegally revoked and he was deported on 6th February 2018.[112]

Upon confirmation that Miguna had been removed from Kenya, Justice Kimaru issued a sixth order directing the IGP and the DCI to swear affidavits in regard to the circumstances under which they handed Miguna over to the Director of Immigration in violation of the court orders. Further, Justice Kimaru ordered the IGP and DCI to swear affidavits to show cause why they should not be punished for contempt of court orders. He directed them to appear in court in person on 15th February 2018 . On 15th February 2018 the IGP, the DCI and the Director of Immigration failed to appear in court as ordered. Nevertheless, Justice Kimaru issued a seventh order nullifying the declaration issued on 6th February 2018 by Dr. Fred Matiang'i, in respect of Miguna's citizenship.[113]

On 26th March 2018, Miguna Miguna arrived at JKIA.[114] The passport control officials asked Miguna to produce his travel document upon which Miguna presented his Kenyan National

[109] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 2.
[110] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 2.
[111] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 2.
[112] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 3.
[113] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 3.
[114] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 5.

Identity Card; the officials insisted that the Kenyan ID was not a travel document.[115] He was later detained at the Airport. Miguna's lawyers moved to court and obtained the ninth order from Justice R.E. Aburili for Miguna to be released forthwith and appear in court the next day before the duty judge.[116] The officers declined to receive the orders. In the tenth series of orders given by the courts Justice Odunga ordered that the receipients of the order not to remove Miguna from the jurisdiction of the court and release him unconditionally forthwith to appear in court the following day.[117] Miguna Miguna was again deported from the country in violation of the courts orders.

Since the initial arrest of Miguna Miguna on 2nd February 2018, the courts issued at least ten court orders requiring Miguna to be produced in court to be dealt with in accordance with the law. All the orders were flagrantly disregarded and disobeyed by the respondents who ironically are senior state officers in charge of enforcement and maintenance of law and order in the country. The KNCHR declared that the contemnors be declared unfit to hold office.[118]

In addition to the flagrant disobedience of court orders, the rights of Miguna Miguna as an arrested person were violated as he was kept in custody for more than 24 hours contrary to the law.[119] In *Miguna Miguna v Cabinet Secretary, Ministry of interior and others* the court stated that Miguna Miguna's right to be accorded due process of law was violated.[120]

Also, the state was not able to justify their actions against Miguna. The court stated it was incomprehensible that a state can deport its own citizen to another country without regard to the constitution and the law.[121] The state had reason to act as it did, it was under a constitutional obligation to follow the law and not act at whims in complete disregard of the constitution and the law.[122]

[115]Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 5.
[116] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 7.
[117] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 8.
[118] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 14.
[119] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 14.
[120] *Miguna Miguna v Cabinet Secretary, Ministry of interior and others* (2018) eKLR.
[121] *Miguna Miguna v Cabinet Secretary, Ministry of interior and others* (2018) eKLR.
[122] *Miguna Miguna v Cabinet Secretary, Ministry of interior and others* (2018) eKLR.

Justice Chacha Mwita further added;[123]

" *There cannot be worse violation of human rights and fundamental freedoms in the current constitutional dispensation than the Petitioner was subjected to. Holding a human being in a toilet and in total disregard of his human rights and fundamental freedoms is the worst violation of the person's dignity. Even where one is perceived a criminal, he must be subjected to due process. The conditions the petitioner was subjected to amounted to torture and inhuman and degrading treatment that are absolutely outlawed by our Bill of Rights. Torture does not have to be physical alone. Mental and psychological harassment too amounts to torture*."

3.5.5 Jimmy Wanjigi.

Jimmy Wanjigi a known National Super Alliance supporter and financier[124] was charged on in a Nyeri court for possession of unregistered firearms. This was due to a raid that was conducted on Jimmy Wanjigi's house in 16th of October, 2017.[125] During the raid the police claimed to have retreived several unregistered firearms. [126]

The high court in determining the case quashed the charges and summons which had been issued against the businessman in Nyeri, after finding that the case against him was done out of sinister motives.[127] The court ruled that the Inspector General of Police and Director of Public Prosecutions (DPP), had abused their office by preferring charges against Wanjigi away from where the crime had been allegedly committed.[128]

The court futher stated, that the first and second respondents (DPP and IG) have been found to have acted in abuse of the court process and in bad faith and were motivated by extraneous factors in the decisions made to charge and summon the applicant, the applicant is entitled to the orders sought to quash the summons and charges.[129] The court also ruled that the police

[123] *Miguna Miguna v Cabinet Secretary, Ministry of interior and others* (2018) eKLR.
[124] Fred Mukinda, 'Jimi Wanjigi: Jubilee is persecuting me over Nasa support' Daily Nation, 18 October 2017 - <https://www.nation.co.ke/news/Jimi-Wanjigi-speaks-out-on-72-hour-siege/1056-4144934-9anev2/index.html> on 25 November 2019.
[125] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.
[126] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.
[127] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.
[128] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.
[129] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.

have no mandate to confiscate the holder's firearm without lawful cause as was the case here; all the firearms that were confiscated were registered and issued with certificates.[130]

[130] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.

CHAPTER 4: COMPARATIVE STUDY WITH U.S.A.

4.1 Office of the Attorney General.

The first Congress of the United States of America created the office of Attorney General in the Judiciary Act of 1789 to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned.[131] Congress failed to provide a specific statement of the general duties of the attorney general, or to define the scope of the Attorney General's authority.[132] The court tried to solve this by noting the lack of expressed powers, analogized the Attorney General's implied powers to those common law powers of his British counterpart.[133] The Office of the Attorney General of the USA has changed considerably since its inception.[134] This is due partly to the growth of the nation and partly as a result of governmental activism.[135] The department of justice was established in 1870, the Attorney General became the head of the department.[136] His role expanded beyond lawyer, advisor, and Cabinet member to include administrative and investigative duties.[137] In a tripartite system of government, this amalgam of different roles results in the Attorney General serving "three masters" - the President, the Congress, and the Judiciary.[138]

The Attorney General is responsive to all three branches of government in fulfilling his various responsibilities. As the chief law enforcement officer of the nation, the Attorney General enables the President to fulfill his obligation to faithfully execute the laws of the United States.[139] In his role as legal counsellor, he serves the President by giving advice and opinions when requested.[140] He also offers his opinion on pending legislation when requested to testify before congressional committees.[141] Immense statutory law relies on the Department of Justice for its administration as well as enforcement. The Attorney General serves the

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[131] Section 20, *Judiciary Act* 28 USC.
[132] *United States v. San Jacinto Tin Co.* (1888), Supreme Court of the United States.
[133] *United States v. San Jacinto Tin Co*. (1888), Supreme Court of the United States.
[134] Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility - The Ethical Challenge in Serving Three Master' 23(2), *The John Marshall Law Review,* 1990, 231.
[135] Griffin B. Bell, 'The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many' 46(6), *Fordham Law Review,* 1978, 1050.
[136] Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility, 232.
[137]Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility, 232.
[138] Griffin B. Bell, 'The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many', 1050.
[139] Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility, 232.
[140] Section 35, *Judiciary Act* 28 USC.
[141] Robert E. Palmer, 'The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General' 11(2), *Pepperdine Law Review*, 1984, 350.

Judiciary primarily in his role as attorney for the government.[142] As an attorney, he is an officer of the court and subject to the court's direction in certain aspects of litigation. In serving three masters, the Attorney General naturally encounters conflicts of interest. His office is atypical because it requires the Attorney General to navigate between and within the separation of powers.[143]

4.2 Competing Government Interests.

In serving three masters, the Attorney General naturally encounters conflicts of interest. His office is atypical because it requires the Attorney General to navigate between and within the separation of powers. He is a member of the executive department serving at the pleasure of the President. He is appointed by the President, with Senate confirmation, and can be dismissed by the President without cause.[144] At the same time, he is accountable to the Congress and subject to congressional legislation.[145] He is also link between the White House and the courts, the Attorney General's position is "quasi-judicial."[146]

He is political officer charged with legal duties. What sets him apart from other executive department heads is that along with attending to vast administrative burdens, the Attorney General must perform as a lawyer with the special professional obligations that attach.[147] He must act consistently with the President's policies but not let political considerations or "inappropriate and improper, though not necessarily illegal" influences sway his legal judgment.[148]

In Leonard v. Douglas, a case in which a First Assistant to an Assistant Attorney General sought to retain his position after a change in administrations, the court stated:

The Attorney General is not only the chief law officer of the Government of the United States for law enforcement purposes; he is a member of the Cabinet and must be available to advise the President as counsellor on matters involving policy as well as law. . .Methods of law

[142] Robert E. Palmer, 'The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General' 11(2), *Pepperdine Law Review*, 1984, 350.
[143] Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility , 232.
[144] Biden, 'Balancing Law and Politics: Senate Oversight of the Attorney General Office' 23(3), Marshall Law Review, 1990, 151.
[145] *Mc Grain v. Dougherty* (1927), The Supreme Court of the United States.
[146] Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility, 233.
[147] Biden, 'Balancing Law and Politics: Senate Oversight of the Attorney General Office' 23(3), Marshall Law Review, 1990, 154.
[148] Paula K. Maguire, 'The Attorney General: Political Loyalty v. Professional Responsibility, 234.

enforcement may appropriately be influenced by a choice among several possible courses of action, all of which may be deemed to be within law. Legal competence. . .is not the only qualification for one holding high office with policy making responsibility. . .In his own responsibility also the Assistant Attorney General needs as his First Assistant someone in whom he can confide, and to whom he can turn with trust in his judgment as well as his legal ability.[149]

It is argued that the President and the Attorney General need to have a close relationship.[150] First, the President, vested with the authority of the electorate, has the right to see that his political agenda is carried out. Because it is ethically and politically inappropriate for the President to become involved in individual lawsuits,[151] and because the Attorney General has broad discretion in prosecution and litigation matters,[152] the President must have confidence in the decisions the At torney General makes in such matters. But he cannot undermine the integrity with which the law is enforced tell the legal officers of the government what to do or not to do in a particular case.

However, the Attorney General's loyalty should rest with the government of the United States. As chief law enforcement officer, his ultimate duty demands fidelity to the Constitution and not to the President.[153] The Attorney General owes his loyalty to the public interest. The Attorney general should be cognisant that loyalty to the executive office obscures legal judgment to the point where legal advocacy becomes political advocacy. The implication is that private interests displace the public interest and, as such, are beyond the scope of the Attorney General's professional responsibilities.[154]

4.3 Independent counsels.

In Morrison v. Olson,[155] the United States Supreme Court upheld the constitutionality of the independent counsel provision of the Ethics in Government Act. The Ethics in Government Act was passed to conserve and advanced the accountability and integrity of state officials

[149] *Leonard v. Douglas* (1963) United States Court of Appeals, District of Columbia Circuit.
[150] Griffin B. Bell, 'The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many', 1053.
[151] Griffin B. Bell, 'The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many' 46(6), *Fordham Law Review,* 1978, 791.
[152] *Powell v. Katzenbach* (1965), United States Court of Appeals, District of Columbia Circuit.
[153] Robert E. Palmer, 'The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General', 352.
[154] Joel L. Fleishman, Lance Liebman, Mark H. Moore, *Public duties : The Moral obligations of government officials*, Havard University Press, Cambridge, 1982, 52.
[155] *Morrison v. Olson* (1988), Supreme Court of the United States.

and of the institutions of the Federal Government and to revitalize the constitutional separation of powers between the arms of government. [156] This doubt stems from the dual nature of the role of Attorney General, who is both the state's chief law enforcement officer and the Executive arm's highest ranking counsel on legal matters. Moreover, the legislators were concerned with bias on the part of the Attorney General, who is often a long-time friend of or confidante to the President.[157] When allegations arise of illegal actions on the part of Executive Branch officials, these interests compete and, it was believed, may prevent a dispassionate and thorough investigation by the Department of Justice.

The abuses of the Nixon Administration in the Watergate scandal demonstrated the veracity of this thesis and provided Congress with the political support necessary to legislate preventive measures. On several occasions in American history, special prosecutors had been appointed to investigate alleged criminal misconduct by high-level Federal Government officials. For example, the whiskey ring scandal of the Grant Administration[158] and the Teapot Dome scandal of the Harding Administration,[159] the most substantial interest in the creation of a permanent mechanism arose in the wake of the Watergate scandal.

The public first became aware of the Watergate scandal in late 1972. In the Spring of 1973, the Senate Judiciary Committee explored the need for a special prosecutor to investigate scattered reports of illegal actions by members of President Nixon's Administration. In response, President Nixon made a commitment to appoint such an investigator, and on May 25, 1973, Attorney General Elliot Richardson chose Archibald Cox to perform this task. When in the course of his investigation, Mr. Cox insisted that the President release accounts of presidential conversations, the President ordered him removed.[160]

After this firing, President Nixon argued that the investigation could be handled by the Department of Justice. But, the Judiciary Committees of the Senate and the House of Representatives held extensive hearings on legislation to require the appointment of a temporary special prosecutor. Faced with an enormous public outcry over the Cox firing and the rising probability of congressional action demanding such an appointment, President Nixon appointed Leon Jaworski as special prosecutor. In the spring of 1974, the

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[156] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 79(3), Journal of Criminal Law and Criminology, 1988, 954.
[157] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 954.
[158]- < https://www.britannica.com/topic/Whiskey-Ring> on 25 November 2019.
[159] - <https://www.britannica.com/event/Teapot-Dome-Scandal> on 25 November 2019.
[160] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 954.

Subcommittee on Separation of Powers of the Senate Judiciary Committee held hearings on proposed ways of removing political considerations from the administration of justice. Among the major conclusions drawn by the Subcommittee from these initial hearings was that, the watergate scandal has clearly shown that the justice department has difficulty in investigating and prosecuting cases that involve high ranking public officials especially of the executive; an independent prosecutor is more likely to be politically non partisan and act in the intrest of justice.[161]

The independent counsel provision, applies only to high ranking officials of the executive arm, including the president, vice-president, and the cabinet.[162] The attorney general is required to conduct a preliminary investigation upon receipt of information suggesting that an included executive official has committed a serious federal crime.[163] Only information sufficient to constitute grounds to investigate is required to warrant the appointment of an independent counsel.[164] In establishing whether such grounds exist, the AG shall consider only the specificity and the credibility of the information received.[165] If, the outcome of the preliminary investigation reveals that there is sufficient grounds to believe that further investigation is warranted, the AG applies to a Special Division of the Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel.[166] Conversely, if the AG concludes that there are sufficient grounds to warrant further investigation, the case is terminated.

Although a decision not to continue the investigation is not subject to judicial review,[167] the AG is required upon such a determination to present the Special Division with a summary of the outcome of the preliminary investigation.[168] An appointment of an independent counsel may also be requested by members of Congress. The Attorney General must then determine whether such an appointment is necessary and if not, he must submit a report stating the reasons why the appointment is not necessary as well as addressing all the issues in respect to the congressional request.[169]

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[161] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 79(3), 954.
[162] Section 591(b), *The Ethics in Government Act* 581 28 USC.
[163] Section 591 (a), *The Ethics in Government Act* 581 28 USC.
[164] Section 591 (a), *The Ethics in Government Act* 581 28 USC.
[165] Section 591 (d)(1)(A), *The Ethics in Government Act* 581 28 USC.
[166] Section 592 (c)(1)(A), *The Ethics in Government Act* 581 28 USC.
[167] Section 592(f), *The Ethics in Government Act* 581 28 USC.
[168] Section 592(b)(2), *The Ethics in Government Act* 581 28 USC.
[169] Section 5 9 2 (g)(3), *The Ethics in Government Act* 581 28 USC.

Upon appointment, the independent counsel receives the full investigative and prosecutorial powers of the Department of Justice,[170] whose policies respecting enforcement of the criminal laws he or she must follow except where not possible.[171] In addition to this broad endowment of prosecutorial power, further specific powers are conferred upon the independent counsel by the Act.[172] The Attorney General's decision to remove the counsel for good cause[173] is subject to judicial review.[174] The independent counsel may be reinstated or granted other appropriate relief by order of the court.

Congress retains oversight jurisdiction with respect to the official conduct of any independent counsel and as such an independent counsel has the duty to cooperate with the exercise of such oversight jurisdiction.[175] The independent counsel must advise the House of Representatives of any substantial and credible information he or she receives which may constitute grounds for an impeachment of an Executive officer.[176] Congress also retains supervisory authority over the conduct of the Attorney General, who must provide upon congressional request information regarding any case arising under the independent counsel provision.

4.4 Independent Counsels and Prosecutorial Abuse.

The majority opinion of Morrison v Olson did not consider the potential for prosecutorial abuse under the Act, despite the fact that such abuses had been a major argument against the validity of the independent counsel.[177] Thus, one of the difficult, fundamental determinations underlying the case-whether the assurance of impartial law enforcement envisioned by the Act is desirable in light of the unfairness to individuals that inevitably occurs because of the fervor of prosecution by an independent counsel-is left unreviewed by the majority's opinion.[178]

Despite the Morrison Court's approach, the Court had recognized in a recent case that persons who become the targets of prolonged criminal investigations, even if ultimately exonerated,

[170] Section 594(a), *The Ethics in Government Act* 581 28 USC.
[171] Section 594(a), *The Ethics in Government Act* 581 28 USC.
[172] Section 594(a), *The Ethics in Government Act* 581 28 USC.
[173] Section 596(a)(1), *The Ethics in Government Act* 581 28 USC.
[174] Section 596(a)(3), *The Ethics in Government Act* 581 28 USC.
[175] Section 595(a)(1), *The Ethics in Government Act* 581 28 USC.
[176] Section 595(c), *The Ethics in Government Act* 581 28 USC.
[177] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 79(3), 984.
[178] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 954.

are subjected to extreme financial, emotional, and reputational burdens.[179] Although a defendant may be acquitted, the immersion in to a criminal investigation as well as the adjudication process is a masssive disturbance to your normal life.[180]

The abuses which occur under the independent counsel law generally do not rise to the level of due process violations,[181] which may occur once a criminal indictment has been obtained and a formal, judicial proceeding begun. Rather, such abuses have occurred before an independent counsel's investigation has produced sufficient grounds to warrant an indictment.[182] Although the courts have acknowledged authority to guard against abuses of the former type, a prosecutor still exercises wide discretion over a variety of matters which are not, and properly should not be, subject to judicial review.[183]

The exercise of prosecutorial discretion takes placce within a network of checks and balances.[184] A federal prosecutor is answerable to a superior, with the President as the final authority, who is answerable to the people.[185] Furthermore, in the course of an investigation, a United States Attorney must consider the interests of other prosecutors, of law enforcement officials, and of officials outside of the Department of Justice.[186] It was the complete absence of this system of institutional safeguards in the office of independent counsel which caused three former Attorneys General to submit an amicus curiae brief in support of the decision of the Court of Appeals:

"The checks and balances protect against the risks that are endemic in any government and not the dangers of corruption or gross abuse, which are rare, but the everyday danger that a prosecutor will become too close to a case and lose perspective. The most admirable and dedicated prosecutor may exaggerate the importance of a case and underestimate its potential to interfere with other important government interests and with the lives of the individuals affected."[187]

[179] *Young v. United States ex rel. Vuitton et Fils SA* (1987), Supreme Court of the United States.
[180] *Young v. United States ex rel. Vuitton et Fils SA* (1987), Supreme Court of the United States.
[181] Fifth and Fourteenth amendments of the Constitution of The United States.
[182] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 985.
[183] *Wayte v. United States* (1985) Supreme Court of the United States.
[184] *Morrison v. Olson* (1988), Supreme Court of the United States.
[185] *Morrison v. Olson* (1988), Supreme Court of the United States.
[186] *Morrison v. Olson* (1988), Supreme Court of the United States.
[187] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 984.

Justice Scalia in his dissenting opinion warned that such abusive prosecutorial tactics would be possible.[188] Similar questionable tactics have been employed by independent counsels in other investigations. These tactics can be argued to be the result of the absence of accountability. For example, in the most highly publicized independent counsel investigation, that of Oliver North, John Poindexter, and Albert Hakim by Lawrence Walsh, questions have been raised regarding the possible use of North's testimony before Congress against him in a judicial proceeding.[189] The three defendants were compelled to testify before Congress regarding their roles in the Iran-Contra scandal. Defense lawyers in the case have argued that Walsh, his staff, and the grand jury which brought the charges may have been tainted by the evidence disclosed at the congressional hearings, so that, in effect, the government compelled North and others to testify against themselves, thereby violating their privilege against self-incrimination under the fifth amendment.[190] Although a panel of the Court of Appeals for the District of Columbia recently ruled against North and his co-defendants' interlocutory motion to dismiss, it based its holding on the limitation of an appellate court's jurisdiction to final decisions of the district courts.[191] Thus, the court allowed that the appellants may ultimately be correct in their assertion that if the grand jury's probable cause determination was 'tainted' by the use of immunized testimony, dismissal of the indictment will be required to remedy the harm.[192] In any event, Walsh's ability to pursue the case without violating the fifth amendment rights of the defendants is unresolved.

[188] *Morrison v. Olson* (1988), Supreme Court of the United States.
[189] Donald A. Daugherty, 'The Separation of Powers and Abuses in Prosecutorial Discretion', 990.
[190] Fifth amendment to the Constitution of The United States.
[191] *United States v. Poindexter* (2007), United States Court of Appeals, Fourth Circuit.
[192] *United States v. Poindexter* (2007), United States Court of Appeals, Fourth Circuit.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.

5.1 CONCLUSION.

The objective of this research paper was to answer the following questions:

1. Whether the existing legal framework fully assures and protects the independence of the ODPP?
2. If there are existing legal gaps what further actions need to be taken to prevent obstruction of prosecutorial independence?
3. What is the correlation between prosecutorial independence and the balance of power?

The creation of the ODPP was necessary because the previous constitutional dispensation gave the executive unfettered powers that were used to exercise considerable influence over the judiciary and the legislature.[193] The AG was the chief public prosecutor. He was also a member of the cabinet, an ex officio member of parliament and the chief legal advisor to the government. It was clear that the AG had overlapping roles in government which required him to lean towards the interest of the government and jeopardize his independence as public prosecutor. A perception reinforced by the fact that the AG failed to prosecute any high-level government officials for corruption.[194]

There was a need to create an independent constitutional office that would solely deal with public prosecutions and its independence would be firmly anchored in the constitution. Such an independent institution would contribute to the balance of power by removing the control of public prosecutions from the executive. Moreover, its independence would allow it to hold the executive accountable if need be. This was the rationale for the establishment of the Office director of Public Prosecution.

This research paper has established that the ODPP has failed to prosecute all its cases in an independent manner. In the cases of Miguna Miguna and Jimmy Wanjigi the ODPP acted in a manner that brings to question its independence from the executive. This two cases happened

[193] Onalo PL, 'An African appraisal: Constitution- making in Kenya', 141.
[194] PLO Lumumba & Luis G Franceschi, 'The Constitution of Kenya 2010: A Commentary,' 2014, Strathmore University Press, 500.

at the height of the 2017 general elections. The two cases were used by the government to gain an unfair advantage against its opponents. The cases invloved the violation of certain rights held by both individuals and the ODPP was at centre of it.

Kenya National Commission on Human Rights, recommended that the public officers involved in the Miguna Miguna deportation be declared unfit to hold office.[195] In the case of Jimmy Wanjigi, the court stated, that the DPP and IG have been found to have acted in abuse of the court process and in bad faith and were motivated by extraneous factors in the decisions made to charge and summon Jimmy Wanjigi.[196]

In assessing the contribution of the ODPP to the balance of power in Kenya, a parallel example is drawn to the United States. This is the contribution of the independent counsel to the balance of power in the USA. The appointment of an independent counsel in the USA has contributed to the balance of power. President Nixon was forced to resign or face impeachment based on the findings of the independent counsel. Other examples where the office contributed to the balance of power include: The Iran Contra scandal and the investigation into Russian hacking of the 2016 American election.

It has been concluded that the ODPP has failed to prosecute all its cases in an independent manner. The ODPP's contribution to the balance of power is affected by its lack of impartiality. However in analysing the extent of the ODPP's contribution to the balance of power, it is difficult to ascertain fully as most cases are still pending; as the appointment of a new DPP in March 2018 brought with it a new spirited fight against high level corruption. Many state officers have since been arrested and charged for corruption.

I therefore find that my hypothesis was correct. However, a full determination cannot be made until most of the cases are concluded. My hypothesis stated that, 'the ODPP has failed in its obligation to prosecute all its cases, especially high-level corruption cases, in an independent manner, hence it has not contributed to the balance of power'. In the case studies given in chapter 3, the lack of prosecutorial independence shows that the ODPP has failed to contribute to the balance power.

[195] Kenya National Commission on Human Rights, Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna, April 2019, 14.
[196] *Jimmy Wanjigi v Inspector General of police & 3* others (2017) eKLR.

5.2 Recommendations.

5.2.1 Appointment of an Independent Counsel.

To navigate the question of whether the Attorney General is independent enough to prosecute the executive for abuse of power, the USA introduced the office of the independent counsel through a provision of the Ethics in Government Act independent counsel. The officer is appointed after investigations by the department of justice deduce that there is a prima facie case. Although the provision is open for abuse for political gain as explained in Justice Scalia's dissenting opinion in Morrison v Olson; in various instances since its inception it has been used effectively to curb abuse of power. For example, President's Nixon watergate scandal, President's Reagan Iran Contra scandal and The investigation into Russia meddling into the 2016 American presidential election.

Kenya can introduce legislation regarding the appointment of an independent prosecutor. The jurisdiction of the independent counsel can be limited to abuses of power by members of the executive. The need for appointment of an independent counsel could be ascertained by the ODPP. The jurisdiction of the independent counsel with regards to the matter being investigated should have no limits. This is to enable the counsel to unearth other abuses of power the public officials could be up to.

5.2.2 Appointment of the ODPP.

Article 157 of the constitution establishes the Office of the Director of Public Prosecution.[197] It further states, the Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.[198] The National assembly has been criticised for failing in its oversight duty. There exists a pattern of unchallenged abuse of executive power is widespread and cannot be justified on any constitutional grounds; Parliament through its actions has ceded authority to lockstep party loyalty.[199] The failure of the National Assembly in its oversight role, prevents proper vetting of the apointments made by the executive. This affects the credibility of the ODPP.

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[197] Article 157, *Constitution of Kenya* (2010).
[198] Article 157, *Constitution of Kenya* (2010).
[199] Tony Watima, '*Parliament has failed its oversight role'* The Standard, on 9 December 2016, -<https://www.standardmedia.co.ke/article/2000226257/parliament-has-failed-its-oversight-role>, 25 November 2019.

This power should be stripped from the President. The appointment process of the DPP should be designated to the Public Service Commission. The commission would be responsible of vetting the candidates for the position and forwading the appointee to the President for appointment. This would remove the President from the vetting process; also show independence from the executive.

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