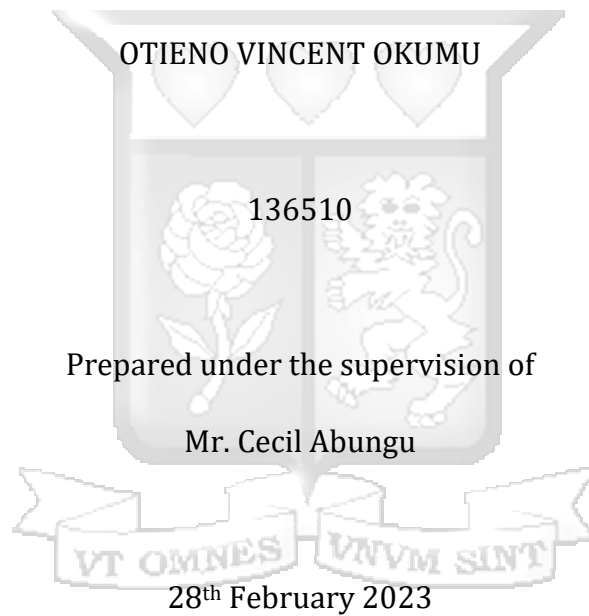


**EXPLORING THE CONSTITUTIONALITY OF THE WHOLE HOUSE METHOD FOR
ENSURING EXECUTIVE ACCOUNTABILITY BY THE LEGISLATURE IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

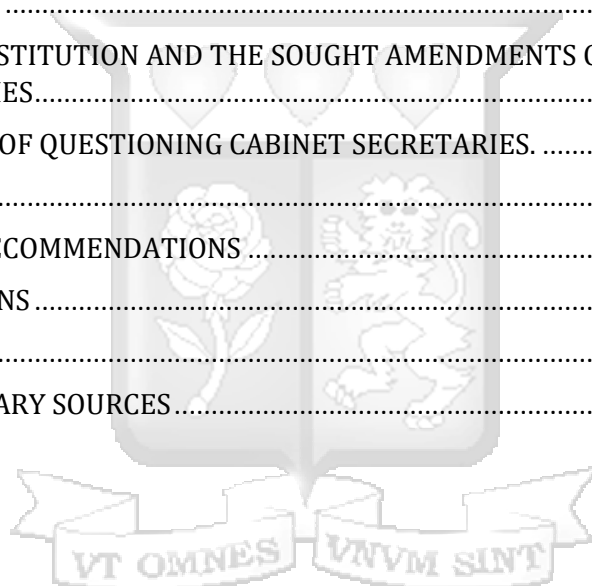


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I would also like to thank my family and close friends, for their constant love and support. Finally and most importantly, I deeply appreciate God for grace and health.



DECLARATION

I, OTIENO VINCENT OKUMU, do hereby declare that this research is my original work and that to the best of my knowledge and belief. It has o 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.

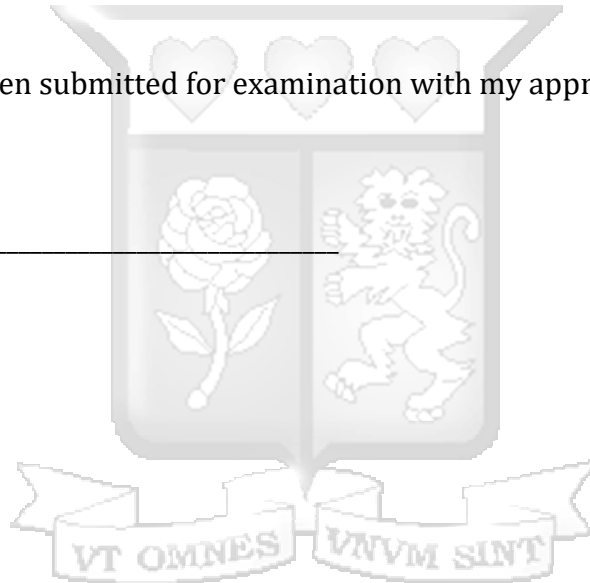
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This dissertation has been submitted for examination with my approval as Supervisor.

Signed: _____

Mr. Cecil Abungu



ABSTRACT

Parliamentary oversight is a constitutional principle articulated under Article 153 of the Constitution of Kenya. There are two accepted ways of doing this; the Cabinet Secretaries can appear before committees or, they can appear before the whole house. Over the years Kenya has used both methods to ensure executive accountability. The practice post-independence till 2013 has been to have them appear before the whole house, however, the post-2013 practice till 2022 has been to have them appear before committees as provided for under Article 153(3). The current regime has however changed this by changing the Standing Orders to allow Cabinet Secretaries to appear before the whole house, and this presents the legal question this paper shall address, whether having Cabinet Secretaries appearing before the whole house is constitutional. Findings from this research will show that the method that is supposed to be used is to appear before committees. This conclusion was arrived at by looking at what separation of powers entails, drawing inspiration from the United States and looking at the intention of the drafters of the Constitution. Consequently, the study recommends that our political leaders should strive to follow the law and that the judiciary should correct the executive and the legislature on this act. The main method of research used is desk-based.



LIST OF ABBREVIATIONS, CASES, AND LEGAL INSTRUMENTS

I. LIST OF ABBREVIATIONS

1. CIC- The Commission for the Implementation of the Constitution.
2. CKRC- Constitution of Kenya Review Commission.
3. CS- Cabinet Secretaries.

II. CASES

1. *Council of Governors v Attorney General and 7 others* (2019) eKLR.
2. *Judicial Service Commission v Speaker of the National Assembly* (2014) eKLR.
3. *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another* (2017) eKLR.
4. *Kilbourn v Thompson* (1881), The Supreme Court of the United States.
5. *Marbury v Madison* (1803), The Supreme Court of the United States.
6. *Martin Nyaga Wambora and the County Government of Embu v Speaker, County Assembly of Embu & 4 others* (2014) eKLR.
7. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2012) eKLR.
8. *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* (2011) eKLR.
9. *Peter Ouma Onyango v Mats Karlsson* (2021) eKLR.

III. LEGAL INSTRUMENTS

1. *Constitution of Kenya* (2010).
2. *Constitution of Kenya* (1963).
3. *Constitution of the United States* (1787).
4. *The Declaration of the Rights of Man and of the Citizen* (1789).
5. *The National Assembly Standing Orders* (2013 and 2018).
6. *The National Assembly, Communication on Chief Administrative Secretaries* (No. 57 of 2019).
7. *The Senate Standing Orders* (2022).

1.0: INTRODUCTION

1.1: BACKGROUND

Kenya is a democratic state.¹ Within democratic states, those who govern are responsible to the people that they govern. The source of the governing power comes from the votes cast by the electorate and the willingness of the majority in the electorate to place their lives and well-being on the leaders they voted for.² Therefore, in Kenya all elected leaders are an embodiment of popular will, however for purposes of this paper, we shall focus on the legislature as representing the said popular will.³ One of the main functions of the legislature is to legislate and scrutinize government action and their implementation of programs,⁴ for a justification where the same is explained and criticism where they are unexplained. This act is commonly referred to as, '*parliamentary oversight*'. Which is defined as 'how parliament and parliamentarians, on behalf of the people, hold the government/executive (more so Cabinet Secretaries, who will also be referred to as ministers in this paper) accountable between elections'.⁵

This can be done in two ways, either by summoning the Cabinet Secretaries (CS) to appear before committees or by summoning them to appear before the whole house, to answer questions regarding their ministries.⁶ The effect of this is that, during the regime's reign, it influences public opinion regarding the government and in the future, it sways the electoral vote either for or against the ruling government in the next election. Whether the two methods can be used together is a question of preference. For example, the Bomas Draft

¹ Preamble, *Constitution of Kenya* (2010).

² Article 1(2) and 1(3), *Constitution of Kenya* (2010).

³ Article 94(1), *Constitution of Kenya* (2010).

⁴ Article 95(5) and 96(4), *Constitution of Kenya* (2010).

⁵ Duri J, Angelino F, Ferri C, Villeneuve J, 'Overview of the Parliamentary oversight tools and mechanisms', *Transparency International*, 2002, 1 <https://knowledgehub.transparency.org/assets/uploads/kproducts/Overview-of-parliamentary-oversight-tools-and-mechanisms-2022-final.pdf> on 24 September 2022.

⁶ Congress Research Service Reports , A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 7.

foresaw them being used together,⁷ and so did a proposal by United States Senator Walter Mondale, as will be discussed later in the paper.⁸

In 2010, Kenya passed a new constitution,⁹ which maintained the same presidential system of governance that pre-existed it but did away with the parliamentary feature of ministers being Members of parliament.¹⁰ Typically, in a presidential system of governance an elected head of state, usually the president, leads an arm of the government, the executive, separately from the other arms of government i.e. the judiciary and legislature.¹¹ The two other arms of government also have their leaders and personnel. This was a step away from the former system of governance which as already stated had a parliamentary feature. One of the major characteristics of this form of governance is that the different arms work alongside each other but independently and at least theoretically, they should not interfere with one another.¹² The advantage of this is that the different arms of government can scrutinize each other because of their independence, through a system of checks and balances.¹³ This paper, however, as implied earlier will focus on the legislative scrutiny of the executives' policies and decisions. The legislature in this paper encompasses both the Senate and the National Assembly.¹⁴

This change to a pure presidential system brought about major changes in how the government was structured. Among the changes was the shift from ministers, as they were known then, being nominated from elected members of parliament and serving two arms of government,¹⁵ to a requirement that a CS cannot be a member of the legislature.¹⁶ This meant

⁷ Article 179(7), *The Draft Constitution of Kenya* (2004).

⁸ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 13.

⁹ *The Constitution of Kenya* (2010).

¹⁰ Ghai J C and Ghai Y P, 'Cabinet Secretaries: Role, appointments and tenure' Katiba Institute, 2018 [Katiba Institute](#) on 22 August 2022.

¹¹ Mettenheim K, *Presidential institutions and democratic politics; comparing regional and national contexts*, John Hopkins University Press, New York, 1997, 2-15.

¹² Kavanagh A, *Philosophical Foundations of Constitutional law*, online ed, Oxford University Press, London, 2016, 221-239.

¹³ Kavanagh, *Philosophical foundations of constitutional law*, 221-239.

¹⁴ Chapter 8, *Constitution of Kenya* (2010).

¹⁵ Twelfth Parliament- (third session) *The National Assembly, Communication on Chief Administrative Secretaries* (No. 57 of 2019), The Kenyan Parliament website.

¹⁶ Ghai J C and Ghai Y P, 'Cabinet Secretaries: Role, appointments and tenure' Katiba Institute, 2018 [Katiba Institute](#) on 22 August 2022.

that the appointed CSs would no longer be sitting during parliamentary sessions as members of the House and hence they could not answer questions directly from the House. However, they still are expected to be accountable to the executive and the constitution envisaged the same through appearing before committees, as a system of ensuring accountability to the legislature.¹⁷

Kenya holds its elections after every five years,¹⁸ bringing about new leaders who have their own new and personal views, from the previous leaders, which motivate their different policies. Despite this, they still find laws and structures in place, some of which need to be changed to accommodate the new regimes' policies. From this emerges the problem that this paper seeks to address, regarding the accountability of the executive to the legislature, more so to do with CSs appearing before the legislature for parliamentary oversight. Since the passing of the new Constitution in 2010, the Standing Orders¹⁹ for both houses have articulated clearly that, no person other than members who have been elected as representatives, the clerks and officers of parliament are to be present whenever the house is in session.²⁰ This supported by other provisions in the Standing Orders restricted the questioning of the CSs by the whole house and meant that they were to appear before various committees of the legislature to answer questions regarding their ministries.²¹

However, in 2022 Kenya conducted an election bringing about a new regime, which sought to and has altered sections 253 and 248 of the respective Standing Orders, and now has its CSs appearing before the whole house to answer the said questions.²² It did so in the following ways; The Addendum to the National Assembly Standing Orders added a subsection to section 25A which designed a place in the chamber for CSs to answer questions

¹⁷ Article 153(3) *Constitution of Kenya* (2010).

¹⁸ Article 136(2), *Constitution of Kenya* (2010).

¹⁹ Are the rules and regulations that govern the conduct of House businesses and provide for establishment of various offices and their mandates.

²⁰ Standing Order 253, *The National Assembly Standing orders 5th Edition* (2013) and Standing Order 248, *The Senate Standing orders* (2022).

²¹ Standing Order 216 (5) (e), *The National Assembly Standing orders* (2018) and Standing Order 228(4), *The Senate Standing orders* (2022).

²² Njoki Kihiru, 'Kenya Kwanza To Seek Amendment Of Standing Orders To Enable CSs Be Interrogated By MPs – President-Elect Ruto' Capital news, 17 August 2022 [Kenya Kwanza to seek amendment of standing orders to enable CSs be interrogated by MPs - President-elect Ruto](https://www.capitalfm.co.ke/news/kenya-kwanza-to-seek-amendment-of-standing-orders-to-enable-cs-be-interrogated-by-mps-president-elect-ruto) » [Capital News \(capitalfm.co.ke\)](https://www.capitalfm.co.ke/news/kenya-kwanza-to-seek-amendment-of-standing-orders-to-enable-cs-be-interrogated-by-mps-president-elect-ruto) on 17 August 2022.

concerning their ministries,²³ and for the Senate, CSs were added to Subsection 2 as one of the groups of people who Standing Order 248(1) shall not apply to. This has been criticized by the members of the opposition in the country stating that the same would be a violation of the constitution and the will of the people.²⁴ This was the same stance taken in 2014 by The Commission for the Implementation of the Constitution (CIC) when a similar action was to be taken.²⁵ The Commission stated that the same would be a violation of the separation of power doctrine envisaged by the Constitution. The Constitution, the supreme law of the land, states that CSs shall appear before committees of the Senate or National Assembly to answer questions regarding their ministries,²⁶ but the current regime has veered away from this and although unsuccessful the 2014 regime also sought the same. This presents the legal problem that this paper seeks to address.

1.2: PROBLEM STATEMENT

Parliament must establish a culture of scrupulousness and more efficient procedures for maintaining accountability, and it must be at the centre of the system of policing the executive. The recent amendments to the Standing Orders of the two houses provide for CSs to appear before the whole house to answer questions regarding their ministries. However, some have viewed this as unconstitutional based on Article 153(3) of the Constitution stating that CSs should appear only before committees. Both systems of ensuring accountability of the executive to the legislature are being applied all over the world and both serve their purpose. In fact, Kenya as a nation has a history that utilised both systems. This study therefore intends to examine whether the recent amendments to the Standing Orders providing that CSs should appear before the whole house to answer questions regarding their ministries violates the Constitution and the doctrine of the separation of powers as espoused in the 2010 Constitution.

²³ Amended Standing Order 25A, *Addendum to the National Assembly Standing Orders* (2023).

²⁴ Sammy Waweru, 'Raila: Why I'm against having Cabinet Secretaries appearing before Parliament' PD news, 10th January 2023, [Raila: Why I'm against having Cabinet Secretaries appearing before Parliament – Nairobi News \(nation.africa\)](#) on 10 January 2023.

²⁵ Commission for the Implementation of the Constitution (CIC), 'CIC Press statement on the Violation of the Constitution by Parliament' on 2 October 2014.

²⁶ Article 153(3), *Constitution of Kenya* (2010).

1.3: RESEARCH OBJECTIVES

1. To understand what separation of powers entails, its evolution and different understandings over time intending to find out which one of them is applicable in Kenya.
2. To investigate how the United States of America as a model constitutional-presidential system question their Cabinet Secretaries.
3. To understand the oversight role of the legislature over the executive as accorded to it by the Constitution and how the Constitution envisioned it to be exercised.

1.4: RESEARCH QUESTIONS

1. a) What is the meaning and what are the objectives of separation of powers?
b) Which theories have been brought forward generally regarding the separation of powers between the different arms of government?
c) How is the theory of separation of powers applied in Kenya?
2. a) How is the United States of America practising separation of powers?
b) How does the United States of America question their Cabinet Secretaries and why they have stuck with the committee method of questioning?
3. a) What role does the legislature play in overseeing the executive?
b) From a historical perspective how is the legislature supposed to question the Cabinet Secretaries?
c) Which method of questioning is the legislature supposed to use in its supervisory role, committee or the whole house?

1.5: HYPOTHESIS

As stated earlier there are two major ways of questioning CSs by the legislature. Presently it is by questioning by the whole house, which was also used in the country prior to 2013. Before it was done by the CSs appearing before committees. Both have their advantages and

disadvantages,²⁷ but the main objection brought forward by persons and groups objecting to the whole-house method is that it will interfere with the separation of powers and hence it is unconstitutional.²⁸ It is true that the whole-house method was easier in Kenya,²⁹ and is easier in other countries because of the presence of CSs in the house as members.³⁰ But this is no longer the case, furthermore, the Constitution under Article 153(3) provides that CSs 'shall' appear before committees, this is a mandatory requirement. Altering this using the Standing Orders is just using a backdoor to violate the Constitution. Therefore, my hypothesis is that the questioning of CSs on matters pertaining to their ministries by the whole house is unconstitutional and it does interfere with the separation of powers between the two arms of government as was envisioned by its drafters.

1.6: JUSTIFICATION

The ruling party has gone back to the pre-2013 way of questioning CSs regarding their ministries, by using the whole house. Whereas this may still ensure the executive's accountability to the legislature, it violates the supreme law of the land and the separation of powers that it envisions. Conflicting views on the interpretation of Article 153(3) on the constitutionality of this act is what has brought about the need to research this. This will have an implication on the country as it will seek to curb a method that can be used to violate the Constitution. This study would be useful in so far as it would give clarity to the representatives in both houses by delving into the matter from a historical and present view while looking at its' constitutionality and implications. Persons that would benefit from this paper include thought leaders who have differing views on this, CSs who would be directly affected by the amendment and elected representatives in the houses who will vote for the amendments and question the CSs.

²⁷ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 15-28.

²⁸ Sammy Waweru, 'Raila: Why I'm against having Cabinet Secretaries appearing before Parliament' PD news, 10th January 2023, < [Raila: Why I'm against having Cabinet Secretaries appearing before Parliament – Nairobi News \(nation.africa\)](#)> on 10 January 2023.

²⁹ Twelfth Parliament- (third session) The National Assembly, Communication on Chief Administrative Secretaries (No. 57 of 2019), The Kenyan Parliament website.

³⁰ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 2-4.

1.7: CONCEPTUAL FRAMEWORK

SUPREMACY OF THE CONSTITUTION OF KENYA 2010

The Constitution clearly outlines that it is the supreme law of the land binding all persons and State Organs at all levels of government.³¹ Furthermore, it is clearly stated that any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission that goes against the Constitution is also invalid.³² Constitutional supremacy prevents the accumulation of all powers, legislative, executive and judiciary, on the same hand, whether of one, a few, or many, and whether hereditary, self-appointment or elective, may justly be pronounced the very definition of anarchy.

The starting point of interpreting the Constitution is Article 259 which underlines the principles that underpin the document. It outlines that the Constitution should be interpreted in a way that promotes its purposes, values and principles.³³ Article 260 then gives us specific words and what they should be held to mean when interpreting the Constitution. Hence, where one has consulted Article 260 and lacks the specified meaning of a word, they are to look at the principles as enshrined under Article 259.³⁴ Therefore, Article 153(3) of the Constitution should be interpreted in a manner that, promotes the purpose, values and principles of the constitution, advances the rule of law, permits the development of law and contributes to good governance.³⁵

One of the principles of the Kenyan constitution is the separation of powers and functions between the different arms of government,³⁶ and this was the essence of CSs not being Members of parliament and the requirement for them to appear before committees as per Article 153.³⁷ The Bomas draft, which the 2010 Constitution was majorly drawn from provided that ' a minister shall attend before parliament, or a committee of parliament, when required to do so, and shall answer any questions concerning a matter assigned to that

³¹ Article 2 (1), *Constitution of Kenya* (2010).

³² Article 2 (4), *Constitution of Kenya* (2010).

³³ Article 259(1), *Constitution of Kenya* (2010).

³⁴ *Council of Governors v Attorney General and 7 others* (2019) eKLR.

³⁵ Article 259(1), *Constitution of Kenya* (2010).

³⁶ Article 174 (i), *Constitution of Kenya* (2010).

³⁷ Communication from the Chair (No. 57 of 2019) On the Accountability of the Executive to the parliament and the place of the Chief Administrative Secretaries in responding to question in the National Assembly, 3-5.

minister'.³⁸ Under that we see that both 'parliament' and 'committee of parliament' were provided for, however, the former was removed and the latter retained in the 2010 draft and later in the Constitution itself, meaning that committee in this instance was to be a group of Members of Parliament appointed by the house in which they sit to undertake detailed work on its behalf and report back to the house on completion of said activity. Furthermore, in 2014, there was a proposal for CSs to appear before a Committee on General Oversight, which was basically the whole house, as a way of being accountable to the legislature, this was said to be untenable and contravening the separation of powers doctrine.³⁹ Therefore, it is clear to see that indeed the Constitution envisaged for CSs to appear before committees, with the meaning already defined above. The act of having CSs appearing before the whole house will therefore be inconsistent with the spirit of the Constitution and both of these actions will therefore be void to the extent of the said inconsistency.

1.8: LITERATURE REVIEW

Most of the literature that I have come across so far on the questioning of CSs on matters relating to their ministries mostly touches on the disadvantages and advantages of either of the two methods. They are also based on comparative analysis between different countries using different methods.⁴⁰ Thought leaders in the country have also touched on the matter with some proposing it⁴¹ and some opposing it.⁴² As stated earlier, in the past after passing the 2010 constitution, parliament sought to take this route and the same was opposed by the CIC claiming that changing the Standing Orders would be a back door method for violating the Constitution. I, therefore, expect that my study will be unique in so far as it will give direction to the country on how CSs should be questioned by the legislature. This paper shall

³⁸ Article 179(7), *The Draft Constitution of Kenya* (2004).

³⁹ Communication from the Chair (No. 57 of 2019) On the Accountability of the Executive to the parliament and the place of the Chief Administrative Secretaries in responding to question in the National Assembly, 6.

⁴⁰ See for example; Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015.

⁴¹ See for example; the majority leaders' in the senate comments, < [Citizen TV Kenya on Twitter: "We will be revising the standing orders to provide for Cabinet Secretaries to appear before the committees of the House. A committee of the entire House responding to specific issues - Aaron Cheruiyot, Majority Leader - Senate https://t.co/98TCX30oYj" / Twitter](https://t.co/98TCX30oYj)>.

⁴² See for example; the opposition leader comments', Sammy Waweru, 'Raila: Why I'm against having Cabinet Secretaries appearing before Parliament' PD news, 10th January 2023, < [Raila: Why I'm against having Cabinet Secretaries appearing before Parliament – Nairobi News \(nation.africa\)](https://www.nation.africa)> on 10 January 2023.

therefore rely on two general topics to reach its conclusion, separation of powers and the supervisory role of the legislature over the executive through questioning of ministers.

1.8.1: ON SEPARATION OF POWERS

'Every community in which a separation of powers and a security of rights is not provided for wants a constitution.'⁴³ This was the French way of stating that separation of powers should be at the core of every nation's government. Elijah Oluoch discusses the separation of powers in a theoretical context. He states that the doctrine is not expressly provided for in modern constitutions but they account for it by spelling out the different offices and functions of different arms of government.⁴⁴ This can be seen for example in the Kenyan wording of the Constitution on how it has outlined the various arms and their functions.

Over the years there has been an evolution of how we understand the doctrine of separation of powers, this has brought about many theories on the topic, which various writers have discussed. Aristotle wrote about the distinction of the deliberative, magisterial and judicial powers which in modern-day governments are the legislature, judiciary and the executive.⁴⁵ However, his view on the separation of powers did not differentiate the functions of the legislature and the judiciary and he considered the latter to be under the former.⁴⁶ John Locke also wrote on the separation of powers and claimed that the three arms of government should be completely distinct from one another and should not interfere with one another's functions.⁴⁷ He was for the separation of power from a functional point of view and an office-based point of view.⁴⁸ Montesquieu is one of the earliest writers and is among the first persons to talk on the pure doctrine of separation of powers, his justification for this he claims is the avoidance of tyranny.⁴⁹ Others have joined the debate and also given their reasons for the separation of powers, close to Montesquieu's as curbing the abuse of power,⁵⁰

⁴³ Article 16, *The Declaration of the Rights of Man and of the Citizen* (1789).

⁴⁴ Oluoch E, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?' 35 *Journal of Law, Policy and Globalization* 1, 2015, 95.

⁴⁵ Aristotle, *Politics Book IV*, Harvard University Press, 1932, Chapter 14.

⁴⁶ Aristotle, *Politics Book IV*, Harvard University Press, 1932, Chapter 14.

⁴⁷ Locke J, *The second treatise of civil government*, 1960, Chapter XII.

⁴⁸ Locke J, *The second treatise of civil government*, 1960, Chapter XII.

⁴⁹ Montesquieu, *The spirit of the laws*, Book XI, 1748, Chapter VI.

⁵⁰ Kavanagh, *Philosophical foundations of constitutional law*, 222.

while others it is to ensure efficiency.⁵¹ Therefore, the separation of powers can be said to constitute three elements; institutional, functional and personnel.⁵² Institutional and personnel can be said to be providing for the same thing, that no one person can be part of more than one arm of government at the same time. Under the functional element, none of the arms of government is to perform the functions of the other.⁵³

The elements of institutions and personnel do not seem to be troublesome in modern governments as people have accepted the holding of one-office-one-person. It is the second element of functions that seems to be troublesome. Many writers have claimed that the same is not practicable and that exclusive separation of functions and institutions is untenable.⁵⁴ That the strict separation of powers would lead to non-collaboration between the arms which could have the effect of government breakdown.⁵⁵ The solution to this writers say is the balance between the powers of the government and the provision for checks and balances between the arms.⁵⁶ Kavanagh also states that a complete separation of powers would undermine the system of checks and balances,⁵⁷ he claims that separation can be absolute or partial, with partial separation allowing for inter-connection.⁵⁸ Writers have however had challenges to point out whether the concept of checks and balances is part of or a violation of the principle of separation of powers,⁵⁹ Kavanagh combines the two in a reformulated view of the separation of powers through a joint enterprise of governing.⁶⁰

⁵¹ N. Barber, 'Prelude to the Separation of Powers' 59 *Cambridge Law Journal*, 2001.

⁵² Kavanagh, *Philosophical foundations of constitutional law*, 225.

⁵³ Kavanagh, *Philosophical foundations of constitutional law*, 221-239.

⁵⁴ Oluoch E, 'Separation of Powers in Kenya' 4; V. Nourse, 'The Vertical Separation of Powers' 49 *Duke Law Journal* 3, 1999 477.

⁵⁵ Bilchitz D and Landau DE, *The evolution of the separation of powers in the global south and global north*, Edward Elgar Pub, 2018, 2.

⁵⁶ Kavanagh, *Philosophical foundations of constitutional law*, 222.

⁵⁷ Kavanagh, *Philosophical foundations of constitutional law*, 223.

⁵⁸ Kavanagh, *Philosophical foundations of constitutional law*, 221-239.

⁵⁹ Marshall G, *Constitutional Theory*, 2ed, Oxford: Clarendon Press, Oxford, 1971, 103.

⁶⁰ Kavanagh, *Philosophical foundations of constitutional law*, 223-224.

1.8.2: ON THE OVERSIGHT ROLE OF THE EXECUTIVE THROUGH QUESTIONING OF MINISTERS

Separation of powers is not that division of labour alone, it is supplemented by supervision.⁶¹ Endicott states that the purpose of separation of powers cannot only be to avoid tyranny, rather it's to create two particular branches of government; the legislature and judiciary, to which the executive will be accountable.⁶² The desideratum of interaction⁶³ as presented by Kavanagh allows for this supervisory role where the same is the work of that particular arm,⁶⁴ which is the case of the executive in this discussion. This is to avoid the abuse of power and judicial overreach. CIC in their press statement however emphasizes the importance of distinguishing oversight from supervision.⁶⁵ They claim that the role of the legislature is to oversee the executive which according to them is different from supervision. From my understanding, they interpreted oversight as the legislature being involved in the executive business while overseeing does not have the involvement aspect.

In Kenya, this oversight role is accorded to the parliament and the same is divided into three; exclusive oversight by the national assembly, oversight by the two chambers of parliament and special oversight by the senate.⁶⁶ This, therefore, means that both houses can question the CSs, the method to be used is the problem. Just like the current opposition leader, CIC in 2014 in its report stated that the questioning of CSs by the whole house was a move back to the old system of question period which was a contravention of the constitution as it would be indulging the executive in the legislative business.⁶⁷ This is seen mostly by the house already being majorly from the ruling party which forms the executive as well as the speaker being from the executive.

⁶¹ Bilchitz D *et al*, *The evolution of the separation of powers in the global south and global north*, 2.

⁶² Endicott T, *Administrative Law*, Oxford University Press, England, 2011.

⁶³ A conception of the separation of powers which accommodates the interaction and interdependence between the different branches of government.

⁶⁴ Kavanagh, *Philosophical foundations of constitutional law*, 237.

⁶⁵ Commission for the Implementation of the Constitution (CIC), 'CIC Press statement on the Violation of the Constitution by Parliament' on 2 October 2014.

⁶⁶ Bosire M C, Part II The Relationship Between the Legislature and the Executive, 4 Kenya's Budding Bicameralism and Legislative–Executive Relations, Oxford Constitutions of the World, 2016, 116.

⁶⁷ Commission for the Implementation of the Constitution (CIC), 'CIC Press statement on the Violation of the Constitution by Parliament' on 2 October 2014.

1.8.3: CONTRIBUTION

As stated earlier, this paper was motivated by the ongoing debate on the constitutionality of CSs appearing before the whole house for accountability of their ministries. The paper shall seek to offer a solution to this by looking at the topic from a point of view of the separation of powers coupled with the supervisory role of the legislature. The paper shall be unique in so far as it would delve deeper into the insights given by CIC on the constitutionality of the whole-house question method.

1.9: CHAPTER BREAKDOWN

Chapter one of this paper forms the research proposal of this study. It gives the foundation of why the researcher picked this topic and sets the problem statement. It outlines the research objectives which guide the research questions both of which will guide the next chapters. It gives the hypothesis, justification, conceptual framework and literature review all of which will guide the writer throughout the project.

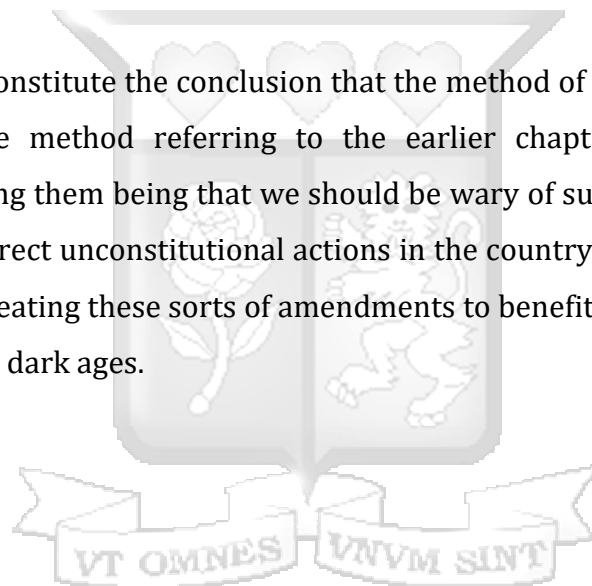
Chapter two will exclusively look at the different theories of separation of powers; the pure view (that powers and functions of the different arms of government are to be exclusive) and the reformulated view (that the different arms of government should work hand-in-hand for good governance). The chapter will then proceed to claim that even though presidential systems have a strict separation of powers, the reformulated view is more practical and is applicable in most governments and, therefore should be applied in the country in regards to this. However, the reformulated view does not provide for what the current regime is doing. The chapter will then look at how the doctrine is practised in the country presently. This will lay the basis of ministerial responsibility and accountability in chapter four.

Chapter three will then delve into how the USA practices separation of powers. It will then look at the method of questioning members of the cabinet in the USA. The chapter will do so by looking at the former topic as provided for in the Constitution and the latter shall be looked at from a historical point of view. Initially, just like Kenya, they were using the whole house method, however, this was changed. Whereas some proposals have been forwarded over the years to revert to the whole-house method of questioning Cabinet Members in the said jurisdiction, they have not been successful. The chapter will then look at why the

proposals are said to have failed in the USA and pose the question of whether Kenya, having almost similar governance structures and history in this topic should stick to the same.

Chapter four will then be dedicated solely to looking at the oversight function of the legislature over the executive as will be pointed out in chapter two. It will give an in-depth view of the method of questioning ministers in the past, 'question time', since independence and the change this has undergone over the years, why this was so and the effect it has had on governance. It will then delve into the different methods that can be used to enable the same; 'committee route' or 'whole house route'. It will finally question which one of them was envisaged to be used by the drafters of the Constitution, taking note of historical occurrences.

Chapter five will then constitute the conclusion that the method of questioning that is to be used is the committee method referring to the earlier chapters. It will then make recommendations among them being that we should be wary of such amendments and the steps to be taken to correct unconstitutional actions in the country. That over the years we have seen politicians creating these sorts of amendments to benefit the people but they end up taking us back to the dark ages.



2.0: THE THEORY OF SEPARATION OF POWERS AND ITS APPLICABILITY IN KENYA

2.1: INTRODUCTION

This chapter will seek to study the concept of separation of powers because this was the major point of contention with those who were opposed to the whole-house method of questioning CSs. To do so, it will begin by giving a general meaning of the term and its objectives. It will then look at how it emerged, its nature, purpose and modern manifestations of the doctrine. Thereafter, it shall look at how the same has been practised in Kenya, more so how the country practised it under the repealed Constitution (pre-2010) and how this contributed to a solid practice of the doctrine, at least in theory, post-2010.

2.2: MEANING OF SEPARATION OF POWERS AND ITS OBJECTIVES

*'Constant experience shows us that every man invested with power is apt to abuse it and carry his authority as far as it will go. To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power.'*⁶⁸ This was the justification given by Montesquieu on why separation of powers is important and what it entails. Simply put, separation of powers entails the division of governmental functions among several branches of government to avoid any one branch obstructing the operations of the others.⁶⁹ Many reasons have been brought forward as to why this doctrine should be upheld. From the above statement, we can say that the doctrine exists to prevent the abuse of power by making it difficult for a single group of persons to dominate government activity. Recall Lord Atkin's quote, that *'power tends to corrupt and absolute power tends to corrupt absolutely.'* The doctrine also ensures that government action has input from different groups each of which helps to check each other. Additionally, it pushes for particular substantive values such as the liberty of various institutions and persons. It is for these reasons and various writings and sayings of authors that the doctrine is not an end in itself and is there to ensure that other fundamentals of governance are met.⁷⁰ Other writers have stated that the doctrine should be upheld, to ensure efficiency, and to allow the arm of government best suited to

⁶⁸ Phillips HO and Jackson Paul, *O. Hood Phillips Constitutional and Administrative Law*, Sweet & Maxwell, London. 1987, 13.

⁶⁹ Omondi J W, 'Separation of power in the contemporary Kenya' Academia.edu, 1.

⁷⁰ David Landau et al, *The evolution of the separation of powers in the global south and global north*, 2.

perform a task to perform it without interference.⁷¹ Therefore, separation of powers can be defined to mean, the division of the legislative, executive and judicial functions of government among separate and independent bodies and serves the function of limiting abuse of power by a particular person or organ.

2.3: THE EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWERS

2.3.1: ARISTOTLE AND LOCKE'S SEPARATION OF POWERS

The doctrine is seen to be first coined by Aristotle in classical Greece.⁷² He was of the view that there should be a distinction in the deliberative, magisterial and judicial powers of government. These three are what are the modern-day legislative, executive and judicial arms of government.⁷³ However, his conception did not have a clear separation between the different arms as he considered the judiciary to be under the legislature. Later on, John Locke stated that for a person who is making the law to also be vested with the power to execute them would amount to a grave mistake, for they would make laws that favour only them.⁷⁴ Locke states that executives will always come and go and because of that there is a need to have an arm of government that will ensure continuity of laws that already exist and those that will come into existence.⁷⁵ That was him articulating the different functions that the executive and legislature play. This was highlighted in the previous chapter that incoming regimes always find laws in place and at times they may seek to change them, at times it is warranted while at times it is not. One weakness that is seen in Locke's work is that he made no mention of judicial power, which caused Dr. Peter Laslett to conclude that Locke lacked a theory on the significance and desirability of relocating these powers into different hands to protect liberty and constitutional harmony.⁷⁶

2.3.2: MONTESQUIEU ON SEPARATION OF POWERS

Apart from the two very important thinkers discussed in the previous paragraph, it is Baron Montesquieu who had the most significant influence on the doctrine of separation of powers

⁷¹ N. Barber, 'Prelude to the Separation of Powers,' 59.

⁷² Aristotle, *Politics* Book IV, Harvard University Press, 1932, Chapter 14.

⁷³ Oluoch E, 'Separation of Powers in Kenya', 1.

⁷⁴ J Locke, *The second treatise of civil government*, para 143.

⁷⁵ J Locke, *The second treatise of civil government*, para 144.

⁷⁶ P Laslett, *Introduction to John Locke; Two treatises of government*, Cambridge University Press, New York, 1967, 132-133.

and presented it from a *'pure view'* perspective.⁷⁷ His justification for complete separation was that, the persons who were holding office needed to have complete liberty in their actions.⁷⁸ That in the instance both legislative and executive powers are united in one person, there can be no liberty and it would be the same in the instance that, judicial power is held by the two other branches of government. Hence Montesquieu's doctrine of pure separation of power is seen to have three major principles.⁷⁹ The first is a formal distinction of the legislature, executive and judiciary, commonly referred to as *trias politica*. The second principle is the principle of separation of personnel that, no one person is to be part of two different arms of government. Lastly, none of the different arms should do the work of the other to avoid interference between them (separation of functions). This conception was seen as early as 1881 in the USA when the court stated, *'it is essential to the successful working of this system that the persons entrusted with power in any one of these three branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.'*⁸⁰

2.3.3: MODERN CONCEPTIONS OF THE THEORY

In the previous chapter, I briefly mentioned the fact that the separation of function elements is problematic. Kavanagh states that this is so because of two reasons; firstly, the *'one branch-one function view'* and the *'separation of confinement view'* (no interference between the functions of the different arms) provide points of criticism.⁸¹ Both views are problematic because the different arms perform multiple functions and in most modern governments all three branches perform all the three roles. A solution to this is to relax the strict separation and allow for the performance of the other functions to a certain degree with its main function in mind, this is termed to be the core function approach.⁸² The separation of confinement is problematic because of the interdependence between the arms, for example, the courts have to define what *'reasonable care'* within legislation means. This Joseph Raz

⁷⁷ Oluoch E, 'Separation of Powers in Kenya', 2.

⁷⁸ C. Montesquieu, *The Spirit of the Laws*, 1748.

⁷⁹ Omondi J W, 'Separation of power in the contemporary Kenya' Academia.edu, 1.

⁸⁰ *Kilbourn v Thompson* (1881), The Supreme Court of the United States.

⁸¹ Kavanagh, *Philosophical foundations of constitutional law*, 225.

⁸² Barendt E, 'Is there a UK Constitution?' 17 *Oxford Journal of Legal Studies* 1, 1997, 17.

calls it '*directed powers*' which still aids in maintaining the division of power and labour between the different arms.⁸³

It is because of these shortcomings that Kavanagh calls for a more reasonable conception of the doctrine, one which would still distinguish the three arms of government and allow for them to interact. The different arms even though performing similar functions at times, the method of performing the said similar function is what will differentiate the arms of government from each other, that separation in thought is what is important. Apart from this, various new conceptions have brought about the principle of checks and balance as a supplement to the doctrine, requiring each organ to check the other for them to perform functions within their specified mandate. The system of checks and balance has been seen to be a separate addition to the previous three elements within Montesquieu's views and it is used to show that there can be no complete separation of powers. Hence Christoph Mollers views the doctrine as a two-sided exercise (division of labour and a system of checks and balance).⁸⁴ Madison contended that it was not sufficient to mark, with precision, the boundaries of these departments of government, and to trust the parchment barriers against the encroaching spirit of power. To avert the risk of abuse of power we must contrive the interior structure of the government so that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.⁸⁵

Therefore, readers must understand that a pure division of powers in terms of governmental structures and activities has never been accomplished in reality. In fact, is not desirable. Several writers have stated that this strict separation of the different arms of government would lead to government disjuncture and in the long run failure of the same.⁸⁶ This shows that for the different arms to properly perform their roles they must take into account the role of the other branches. Hence other varieties of the doctrine have been brought forward for example the theory of balanced government, mixed government and the concept of

⁸³ Raz J, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford University Press, Oxford, 1994, 249.

⁸⁴ Mollers C, *The Three Branches: A Comparative Model of Separation of Powers*, online ed, Oxford University Press, Oxford, 2013, 10.

⁸⁵ Madison J, The Federalist Number 47, 30th January 1788, < [The Federalist Number 47, \[30 January\] 1788 \(archives.gov\)](https://www.archives.gov/federalist/papers/madison/47)>, on 20th February 2023.

⁸⁶ See for example Mollers C, *The Three Branches*, 8.

checks and balance, when put together, Oluoch says they produce ‘the multi-functionality of political structures.’⁸⁷

A further addition to the concept of separation of powers in modern-day governments is the inclusion of the ‘fourth branch’ of government into the system of checks and balance.⁸⁸ This would include independent commissions, for example in Kenya the Independent Electoral and Boundaries Commission (IEBC) and well as Kenya National Commission on Human Rights (KNCHR). Persons always wondered whether the same would have been covered in the previous conception of separation of powers and hence termed the doctrine as being archaic.⁸⁹ The Court of Appeal in upholding this principle stated that *‘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 prevent organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers that 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.’*⁹⁰ Having understood how the doctrine came to be and its evolution over time, the next section shall now address how it has been manifested in Kenya.

2.3: HOW KENYA HAS PRACTISED THE DOCTRINE

Although it is by no means universal, the doctrine is a widely accepted set of standards in most liberal constitutional democracies. In terms of governance, a Constitution can be described as the body of legislation that aims to allocate, define, and restrict the use of state authority to ensure that it is used for the purposes for which it was created and according to its intended methods.⁹¹ Many instances in the Constitution can demonstrate the doctrine of separation of powers even though in some it is not expressly provided for. An example of an express provision is through the division of functions between different levels of government

⁸⁷ Oluoch E, ‘Separation of Powers in Kenya’, 2.

⁸⁸ David Landau et al, *The evolution of the separation of powers in the global south and global north*, 25.

⁸⁹ Strauss P, ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’ 84 *Columbia Law Review* 573, 1984, 581.

⁹⁰ *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2012) eKLR.

⁹¹ Kangu JM, ‘The Social Contractarian Conceptualisation of the Theory and Institution of Governance’, 1 *Moi University Law Journal* 1, 2007, 21.

as provided for under Article 174(i) of the current Constitution, whereas an implied example is by providing for the different functions of the different arms of government. That these arms have been entrusted with the people's sovereign power.⁹²

2.3.1: SEPARATION OF POWERS PRE-2010

It is however important to note that, The Independence Constitution did not push for the separation of powers and the regime at the time ensured all power was concentrated to the executive.⁹³ This was majorly because of the collapse of the 'Majimbo' form of government, which would have decentralized power from the executive, that was intended during the drafting of the document.⁹⁴ But the same is seen to have collapsed because of a lack of political will. It led to KANU, the ruling party, having a firm grip on all the arms of government eliminating any independent thinking and/ or action that would have been present at the time.⁹⁵ This minimized the checks and balances on the executive by other institutions.

The same made it very easy for the Constitution to be amended anytime there was a shift in power for the executive to take full control.⁹⁶ The Constitution provided that the executive, more so the presidency was above all other institutions. Under this, the element of separation of personnel was mostly not present as for one to serve as president he was also be representing the people in parliament. Similarly, for one to serve as a Minister in the state, they had to be a Member of parliament. This also gave the president more power as Ministerial positions were used to award those who were seen to be loyal to the president. This raised questions of which office would these two elected members serve effectively,⁹⁷ as it is well known that one cannot serve two masters. The elected ministers were appointed and removed from office at the president's will, without anyone checking the president's

⁹² Article 1 (3), *Constitution of Kenya* (2010).

⁹³ Ojwang JB, 'The Constitutional development in Kenya: Institutional adaptation and social change' 35 *Cambridge University Press* 1, 1990, 41.

⁹⁴ Omondi J W, 'Separation of power in the contemporary Kenya', 2.

⁹⁵ Chapter 2, *Constitution of Kenya* (1964).

⁹⁶ Gathitu KA, '*Separation of powers under the 2010 constitution: an analysis of the emerging tensions between parliament and the judiciary*' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2012, 21.

⁹⁷ Omondi J W, 'Separation of power in the contemporary Kenya', 3-6.

actions.⁹⁸ These presented the troubles the doctrine of separation of powers faced during that time.

The Judiciary was provided for under Chapter 4 of the Constitution of Kenya 1964. Whereas Judges were appointed by the president after advice from the Judicial Service Commission, corruption was at an all-time high as independence of the Judiciary was not provided for in the legislation. The Chief Justice had no deputy and hence was free to exercise personal loyalty to the executive. This was highlighted in the case of a former Director of intelligence, Stephen Mwangi Murithi,⁹⁹ where it was stated that public servants, including judges, in independence Kenya held their positions in government at the pleasure of the President. This is provided for under Article 25(1) of the Independence constitution which provided that, unless otherwise stated by the document or any other legislation, any person holding a public office shall do so at the president's pleasure.¹⁰⁰

2.3.2: SEPARATION OF POWERS POST-2010

This however changed when the Constitution of Kenya 2010 came into operation. It clearly outlined all the powers and functions of the different arms placing none of them above another. This was a clear indication of how the practice of the doctrine has evolved. No single arm of government would supersede the other, but each of them is to be independent of one another, free from control but existing in harmony. The 2010 Constitution has approached the separation of powers in two main ways, vertically and horizontally.¹⁰¹ This power has been distributed vertically among the several governmental tiers, which include the national government and county governments.¹⁰² It is expected that these two levels of government, although distinct, are to conduct their activities based on cooperation and consultation. The Fourth Schedule of the Constitution provides for functions assigned to the different levels of government. The national government is then further split horizontally into the traditional three arms of the government, legislature, judiciary and executive, with the legislature being

⁹⁸ Throup DW, *'Daniel Arap Moi and one-party rule (1978-1991)'* in The Oxford Handbook of Kenyan Politics, Oxford University Press, Oxford, 2020, 57-67.

⁹⁹ *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] eKLR.

¹⁰⁰ Article 25(1), *Constitution of Kenya* (1963).

¹⁰¹ Omondi J W, 'Separation of power in the contemporary Kenya', 5.

¹⁰² Article 6, *Constitution of Kenya* (2010).

bicameral, the National Assembly and Senate. Both the National Assembly and the Senate perform the functions of legislation, oversight and representation. The Senate represents the counties while the National Assembly represents constituencies and special interests. One can also claim that the independent commissions as mentioned above also fall here.

By virtue of the judicial body having both interpretation and judicial review powers, which allows the courts to review the exercise of executive powers and decisions of parliament, they are seen to be the watchdogs of the Constitution.¹⁰³ This limits even parliamentary supremacy, which provides that legislative authority is derived from the people and at the national level is exercised by parliament.¹⁰⁴ We must however note that this has been limited through various ways; constitutional supremacy, sovereignty of the people, restriction of constitutional amendments and judicial intervention.¹⁰⁵ The Kenyan courts have also recognized this in the Wambora case¹⁰⁶ this was said, *'This court is acutely aware that the three arms of government, that is to say, the Executive, the Legislature and the Judiciary have their respective mandates clearly set out in the Constitution and that, as far as possible, each arm of Government must desist from encroaching on the functions of the other arms of government. In fact, the court's position has always been that it can only interfere with the exercise of the Executive and the Legislature's mandates if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of the constitution.'*

Additionally, among the changes made to limit the executive power is to check how the CSs are appointed and dismissed as well as their appointment from outside of parliament. Even though this solved the problem the country faced with the separation of powers, it brought about the issue of how the executive would carry out its executive oversight role. Different methods of carrying out the same have been forwarded and practised since the passing of the Constitution. They will be addressed in chapter four, highlighting why they were used at

¹⁰³ Article 47, *Constitution of Kenya* (2010).

¹⁰⁴ Article 94(1), *Constitution of Kenya* (2010).

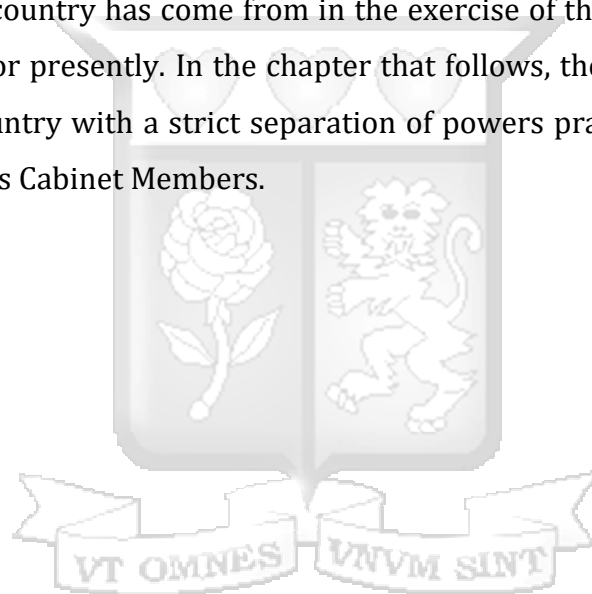
¹⁰⁵ Gathitu A, 'Separation of powers under the 2010 constitution: an analysis of the emerging tensions between parliament and the judiciary' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2012, 34.

¹⁰⁶ *Martin Nyaga Wambora and the County Government of Embu v Speaker, County Assembly of Embu & 4 others* (2014) eKLR.

that time and the reasons why the same was changed. It would also address whether CSs appearing before the whole house is violating the intention of the Constitutional drafters and whether it interferes with this doctrine of separation of powers. By the CSs appearing before the whole house, will it amount to encroaching on the legislative functions as stated in the Wambora case?

2.4: CONCLUSION

This chapter had set out to understand what the separation of power entails. It has done so by looking at its evolution over time and then went ahead and looked at how the same was provided for and practised in the two Constitutions of the land. In doing so, this chapter has highlighted where the country has come from in the exercise of the doctrine and what the constitution provides for presently. In the chapter that follows, the study will look at how the USA as a model country with a strict separation of powers practices the doctrine, and then how it questions its Cabinet Members.



3.0: COMPARATIVE ANALYSIS WITH THE UNITED STATES OF AMERICA AS A MODEL PRESIDENTIAL SYSTEM

3.1: INTRODUCTION

The government of The United States of America just like Kenya is run by a presidential democracy.¹⁰⁷ Additionally, just like in Kenya, in the early years, Cabinet Members would appear before the House of Representatives and the Senate to advise on treaties and advise on pending legislation.¹⁰⁸ However, over time this was done away with as stronger notions of separation of powers emerged in the country and since then and even presently they use the committee version of questioning their members of cabinet. Many versions of a presidential question time have been suggested to be used in one or both congressional chambers in the 19th and 20th centuries but none of them have gone through in either of the houses. This chapter shall therefore look at how the USA practices the doctrine of separation of powers followed by looking at the proposals of question periods made in the USA and why they have stuck with the committee method over the years.

3.2: HOW THE UNITED STATES OF AMERICA HAS PRACTISED SEPARATION OF POWERS

The USA is seen to be the model for how the doctrine of separation of powers is to be applied.¹⁰⁹ Having in mind liberty James Madison had the following to say about the separation of powers in the USA as provided for in its Constitution, ' *The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.*'¹¹⁰ In the paper, Madison is seen to be an advocate for how the Constitution brought to life the doctrine and was also of the view that complete separation of power was not achievable nor desirable.

Just like in other democratic states, the federal executive power is vested in the President and the executive, the legislative power in the Congress (Senate and House of

¹⁰⁷ 'List of countries by system of government', in Wikipedia, 23rd November 2023, < [List of countries by system of government - Wikipedia](#)>, on 1st December 2023.

¹⁰⁸ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 2-4.

¹⁰⁹ Phillips HO et al, *O. Hood Phillips Constitutional and Administrative Law*, 13.

¹¹⁰ Madison J, The Federalist Number 47, 30th January 1788, < [The Federalist Number 47, \[30 January\] 1788 \(archives.gov\)](#)>, on 20th February 2023.

Representatives)¹¹¹ and federal Judicial power in the Supreme Court and any other court so established.¹¹² Whereas the President and his/her cabinet are not members of the Congress and hence cannot vote in legislative matters, the Vice-president is seen to preside over the Senate, neither of them is however responsible to the Congress. The President holds the seat for a fixed term of four years and he may not necessarily originate from the same party as the majority in either House of Congress.¹¹³ Neither the president nor the Cabinet can initiate a bill, but they may recommend legislation through a message to Congress.¹¹⁴

The system of checks and balance is seen in this jurisdiction through the following ways; the President might negotiate treaties, and the same will only be permitted if two-thirds of the Congress allows for the same.¹¹⁵ Furthermore, the Senate might refuse to confirm the appointment of judges made by the president, but once they are appointed they are independent from both offices and may serve for life if they are not impeached.¹¹⁶ Additionally, whereas the judges are allowed to attend and participate in deliberations of Congress, they cannot vote. Although not expressly provided for, it can be implied that the Supreme Court has the power of judicial review.¹¹⁷ The President also has the power to Veto legislation passed by Congress his veto might be overridden if two-thirds of both houses vote against it. Whereas the President is not answerable to Congress, he however can also be impeached for treason, bribery, or other high crimes and misdemeanours.¹¹⁸ To conclude this, the Supreme Court of America held that it has the power to declare that the acts of Congress and the President are unconstitutional if they conflict with the Constitution.¹¹⁹ These are just examples of how the doctrine of separation of powers has been provided for in the USA Constitution and what authors and judges have said about the same. Having this

¹¹¹ Article 1, Constitution of the United States of America (1787).

¹¹² Article 4, *Constitution of the United States of America* (1787).

¹¹³ Article 2, *Constitution of the United States of America* (1787).

¹¹⁴ Bradley AW, Ewing KD and Knight CJS, *Constitutional & Administrative law*, Pearson Education Limited, United Kingdom, 2011, 91.

¹¹⁵ Article 3, *Constitution of the United States of America* (1787).

¹¹⁶ Phillips HO et al, *O. Hood Phillips Constitutional and Administrative Law*, 14.

¹¹⁷ Article 1, Constitution of the United States of America (1787).

¹¹⁸ Article 2(4), *Constitution of the United States of America* (1787).

¹¹⁹ *Marbury v Madison* (1803) The Supreme Court of the United States.

in mind, more so on how the Cabinet interacts with the two houses, we shall not address why this is so.

3.3: HOW THE USA BEEN QUESTIONING THEIR CABINET SECRETARIES

3.3.1: APPEARANCE BEFORE THE WHOLE HOUSE PRACTISE

In the First Congress, the President and even the Cabinet members would appear before the Congress to seek and give advice on matters of policy.¹²⁰ In this first Congress, the Cabinet members appeared 14 times and 8 times before the Senate and the House respectively, delivering written messages.¹²¹ The Second Congress however seemed not to favour this practice. This is highlighted when the House in concurring with the leader of the forces at the time James Maddison opposed the summoning of the Secretaries of War and Secretaries of Treasury termed the act to be of 'embarrassing and perplexing consequences'.¹²² This followed after St. Clair's Indian expedition was defeated. Such efforts of summoning members of the Cabinet were really limited till the Civil War.

3.3.2: THE PROPOSALS

i) The George Pendelton proposal

During the Civil War however, the first of several bills that would allow USA Cabinet members to appear on the floor of both the House and the Senate and debate on matters affecting their specific departments was introduced by George Pendleton.¹²³ In the proposed bill the cabinet members were to be available for two days a week to answer questions brought forward by members of the legislature and respective committees of the arm of government. Whereas the bill was referred to, reported and debated it was never voted for at that time. This made Mr. Pendleton to again present the bill in 1881.¹²⁴ It was referred to a select bipartisan committee which reported on the same on the floor of the house stating

¹²⁰ Maclay W, *Sketches of debate of the first senate of the United States*, 1 ed, Harrisburg; Lane S. Hart, Pennsylvania, 125-129.

¹²¹ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 7. 10.

¹²² House debate, *Annals of Congress*, vol. 3, Nov. 13, 14, 19, and 20, 1792, 673-694, 696-701, 703-708, 711-712.

¹²³ U.S. Congress, Senate, Principal Officer of Each Department Occupying a Seat on the House and Senate Floor, report to accompany S. 227, 46th Cong, 3rd sess., S.Rept. 837 Washington: 1881, p. 8.

¹²⁴ U.S. Congress, Senate, Principal Officer of Each Department Occupying a Seat on the House and Senate Floor, report to accompany S. 227, 46th Cong., 3rd sess., S.Rept. 837 Washington: 1881, p. 8.

that such a method of questioning would only result in the good of the country as all would be involved in the different aspects of running the government. However, once again the bill was not voted for even though it received a huge amount of support from senior senators.¹²⁵

ii) The William Howard Taft Proposal

In 1912, President William Howard Taft in his third message to Congress on the state of the Union offered the second major proposal for question period. He stated *'I do not think I am mistaken in saying that the presence of the members of the cabinet on the floor of each House would greatly contribute to the passage of beneficial legislation. Nor would this in any degree deprive either the legislative or the executive branch of the independence that which separation of the two branches was intended to promote. It would only facilitate their cooperation in the public interest.'*¹²⁶ He was of the view that his Cabinet members should appear before both houses and engage in debate relating to their departments but that they should not vote. However, as his term was almost ending this proposal was not acted upon.¹²⁷

iii) The Estes Kefauver proposal

The Kefauver proposal was introduced by Estes Kefauver in 1943. His proposal was termed as 'question and report' and was to apply to both cabinet members and officers of independent agencies.¹²⁸ Under this proposal, the officials would appear before both houses twice a month to respond to questions. The process would start with responses to written questions submitted before such sessions followed by oral questions, equally divided between the minority and majority parties. This received support from both scholars and the press.¹²⁹ It was even acted upon in the same year when Secretary of State Hull addressed a joint meeting of the House and the Senate followed by a General appearing before a Library of Congress to report on the conduct of war and answer questions. These successful meetings between executive branch officials and Congress aided the proposal to institutionalize such

¹²⁵ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 11.

¹²⁶ "Message of the President," House debate, Congressional Record, vol. 49, part 1 Jan. 3 1913, 946.

¹²⁷ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 11

¹²⁸ House of Representatives, 78th Congress, 1st session, 327.

¹²⁹ See for example the press excerpts in Kefauver's extension of remarks in Congressional Record, vol. 90, part 1 Jan. 19, 1944, A303-5.

contact. The proposal however met its demise when executive leaders were concerned about legislative micro-management of the executive coupled with leaders of Congress worried about increased partnership. Hence the judiciary committee to which the bill was referred never conducted hearings nor reported on it.¹³⁰

iv) The Walter Mondale proposal

In the 93rd and 94th Congress Walter Mondale brought forward resolutions that would allow for question and reporting periods on a weekly basis.¹³¹ This was to use not more than two hours of the house sittings. The proposal also introduced radio and television coverage of the said sittings which would be guided by the Committee on Rules and Administration Guidelines. The same received support from the subcommittee of the House International Relations Committee. In the 94th Congress, the Special Subcommittee on Investigations conducted a series of hearings on 'Congress and Foreign Policy' and concluded that, *'relations between the executive and legislative branches need urgent attention and improvement, lest existing frictions seriously impair the attainment of U.S. foreign policy objectives.'*¹³² To avoid this, the committee recommended a question time period that would facilitate the flow of information between the two arms of government. However, just like the other proposals, no further actions were taken of the same.

v) Other proposals

Other proposals include those of Sam Gejdenson in 1990,¹³³ President Carter¹³⁴ and President Clinton¹³⁵ which sought almost the same circumstances as the other proposals did; a limited specified time for questions, questions submitted in writing followed by oral questions among others. Aspiring presidential Candidate John McCain during his campaign also stated that he would ask Congress to allow him to appear before the House and answer

¹³⁰ See for example, see House of Representatives, 80th Cong, 1st session, 28 March 1947, 17.

¹³¹ U.S. Congress, Joint Committee on the Organization of the Congress, Organization of Congress, 89th Cong, 1st session, Washington, 24 May 1965, 443-444.

¹³² U.S. Congress, House Committee on International Relations, Special Subcommittee on Investigations, Congress and Foreign Policy, Committee Print, 94th Congress, 2nd session, Washington, 1.

¹³³ Burger TJ, 'British-Style 'Question Period' Would Let All Members Grill Administration Officials,' 13 December 1990, 5.

¹³⁴ Sundquist J, *The Decline and Resurgence of Congress*, Washington, D.C, The Brookings Institution, 1981, 467.

¹³⁵ McGrory M, 'Let Congress Ask Questions of Clinton,' Buffalo News, 15 February 1993, 18.

questions.¹³⁶ Although he did not become president by referring to his statement that, ‘ *as the Prime Minister of Great Britain appears regularly before the House of Commons* ’ it has been assumed that his system would have been almost like the one in the British parliament.¹³⁷

3.4: WHY THE PROPOSALS HAVE FAILED

Apart from the administrative reasons stated above on why each of the proposals to have a whole house method of questioning CSs did not go through in this jurisdiction, thought-leaders have also presented some thoughts on some problems that could arise if the same happened. This can also be said to be the reason the same failed, in this section we shall discuss them.

First, the whole-house method is seen as being problematic for presidential systems on structural, constitutional and institutional grounds. To begin with, on structural grounds, the president is neither a member of Congress nor is he reliant on the said body for governing power.¹³⁸ However, in parliamentary systems that majorly use the whole house method of questioning, members such as the Prime Minister are seen to derive their power from the majority in the legislature and hence the office is somehow intertwined with the legislature more so being accountable to the persons that chose him. Additionally, Ministers in parliamentary systems are drawn from the legislature, something that does not happen in presidential systems like the USA.¹³⁹ If a departmental minister is drawn from Congress they are required to resign their position, hence the nature of questioning of the two differing forms of governance has to be different.¹⁴⁰

Furthermore, political scientist Hugh Hecl states that ‘ *question periods are unlikely to clarify the fundamental choice as to which party is more fit to govern* ’. This is because even though the politics in a presidential system might be organized into parties, party cohesion in the legislative arm of government is not necessary to maintain control of the executive. After all,

¹³⁶ John McCain, “Prepared Remarks” (speech, Greater Columbus Convention Centre, Columbus on 15th May 2008).

¹³⁷ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 14.

¹³⁸ Bradshaw K and Ping D, ‘Parliament and Congress’, 68 *Cambridge University Press* 2, 2014, 369-371.

¹³⁹ Article 1, Section 6, Constitution of the United States of America, 1789.

¹⁴⁰ Acheson D, ‘A Citizen Looks at Congress,’ 51 *Cambridge University Press* 4, New York; Harper and Brothers, 1957, 81.

we do not have a clear opposition and government party. On constitutional grounds, the doctrine of separation of power seems to prohibit the appearance of the President and the members of his cabinet before the legislature.¹⁴¹

Rejecting the appearance of Cabinet Members on the floor of the legislature on institutional grounds, Hugo Hecló had the following to say, *'A question period, that included Cabinet officials, would compromise the integrity of the floor of the House as a forum for debate among the people's elected Representatives. The floors of the House and the Senate are the embodiment of a master idea, government by discussion which can be legitimately carried out only by the elected Representatives of the people. The floor of the Congress is no place for unelected Presidential appointees to be sharing in the debate.'*¹⁴² Robert Michel also had the following to say, *'proponents of the Question Period might argue that the House already questions administration officials in committee, so what difference would it be if we questioned them on the floor? My answer is that the floor of the House of Representatives is a special place. Each Member on the floor is equal to every other member. But to have an administration official come to the floor to answer questions alters the chemistry of the place. The kind of question period we are being asked to consider could transform it from a meeting place of equals to an interrogation room.'*¹⁴³

3.5: CONCLUSION

This Chapter sought to show that the USA is a country with a model separation of powers practise and that even though in the past it has had pressure to revert to the whole house method of questioning its Cabinet Ministers, it has not done so. It has done so by looking at provisions of the law in the country and the different proposals of whole-house question method presented to Congress. Kenya as a nation has a similar system of governance and has had similar back and forth on the appropriate method of questioning its CSs, taking lessons from a model government would it be right for Kenya to stick to the committee method of

¹⁴¹ Congress Research Service Reports, A parliamentary-style Question Period; Proposals and Issues for Congress 27th May 2015, 23-24.

¹⁴² U.S. Congress, 'House Committee on Rules, Congressional Question Period for Members of the President's Cabinet,' 121.

¹⁴³ U.S. Congress, 'House Committee on Rules, Congressional Question Period for Members of the President's Cabinet,' 69.

questioning just like the USA? That is the question that this paper shall seek to answer in the next chapter.



4.0: UNDERSTANDING LEGISLATIVE OVERSIGHT AND HOW IT SHOULD BE CONDUCTED IN KENYA

4.1: INTRODUCTION

Having dealt with what separation of powers means, what it entails, how it is practised in the country and having seen that the USA opted to retain the committee method, this chapter shall seek to find out the appropriate method of questioning CSs to be in line with the Constitution and the principles that it provides. The chapter shall begin by looking at what legislative oversight entails, its objectives and functions among other things. After understanding what legislative oversight is, the chapter shall then delve into how we as a country are meant to question our CSs in the bid to ensure legislative accountability. This shall be done by looking at the subject from a historical point of view.

4.2: LEGISLATIVE OVERSIGHT

Controlling the executive administration is considered by Harris to be one of the most important functions of the legislature, a body of elected people representatives in modern democracies.¹⁴⁴ The question at this point is always that of, who rules the rulers.¹⁴⁵ Rockman stated that there is a fear that democratic practices will disappear with time because of administrative discretion which is becoming excessive.¹⁴⁶ Hence controlling the executive is warranted to guarantee the success of representative government by establishing a chain of responsibility through the body that represents popular sovereignty. The irreducible core is representativeness, not effectiveness. The objectives of legislative oversight have been forwarded by MacMahon to include; verifying administrative compliance with what the statute intended, assessing execution in light of legislative goals, preventing waste and dishonesty by executive members and protecting against insensitive and unresponsive administration.¹⁴⁷ Official reports have added the function of, acting as a public representative by overseeing and regulating agency-clientele group relations. The problem

¹⁴⁴ Harris JP, 'Legislative Control of Administration: Some Comparisons of American and European Practice' 10 *Western Political Quarterly* 2, 1957, 466.

¹⁴⁵ Ogul MS, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision*, 1976, University of Pittsburgh Press, 2.

¹⁴⁶ Rockman BA, *Legislative-Executive Relations and Legislative Oversight*, 1984, Washington University, 414.

¹⁴⁷ MacMahon AW, 'Congressional Oversight of Administration: The Power of the Purse,' 58 *Political Science Quarterly* 3, 1943, 162-163

with these objectives comes in when clarifying what some words mean, for example, 'waste'. Additionally, how can one be sure of legislative intent? Judging intent will always be problematic to the extent Rockman states that it is more of a battle cry than a standard.¹⁴⁸ To remedy this, Hyneman states that law-making bodies have to state their intent clearly, something which they struggle to do.¹⁴⁹ This however we must note is always difficult to do in collective bodies as they do not have the clarity of a single mind. Furthermore, in most cases they lack continuity hence laws are always made with the mood of the present members, who are at times strategically located and lack independent thinking.

Although over the years there has been consensus on what the justification and objectives of oversight are, it has been problematic to find a precise definition of the term. Whereas some are inclusive some focus on a narrow selection of activities. An example of inclusive focus, which implies that legislative oversight can be done numerous and unexpectedly is that given by Ogul. He defines the term to mean, behaviour by legislators and their staffs, individually or collectively, which results in an impact, intended or not, on bureaucratic behaviour.¹⁵⁰ A narrow definition is given by Schick who gives it an after-the-fact definition as being an investigatory activity by Congressional committees after an administrative action.¹⁵¹ A definition between the two extremes is that it encompasses all activities undertaken by the legislature to influence administrative behaviours, during programme implementation and afterwards.¹⁵² These diverse definitions are all warranted as everyone has their own perception of what oversight entails. All three definitions highlight one thing, there must be a formal review of the executive at times before and at times after the fact.

Oversight can either be done, formally or informally. Furthermore, we must consider how much oversight is to take place as well as the quality of the practice. In the latter question, Rockman states that if political governance/factors, such as the question this paper

¹⁴⁸ Rockman BA, *Legislative-Executive Relations and Legislative Oversight*, 416.

¹⁴⁹ Hyneman CS, *Bureaucracy in a Democracy-Bureaucracy in a Democracy*, Cambridge University Press, New York, 1950, 88.

¹⁵⁰ Ogul MS, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision*, 11.

¹⁵¹ Schick A, 'Congress and the Details of Administration' 36 *Public Administration Review* 5, 1976, 125.

¹⁵² Lyons W and Thomas LW, 'Oversight in State Legislatures: Structural-Attitudinal Interaction' 10 *American Politics Quarterly* 10, 1982, 118.

addresses, it would be hard to involve quality decisions and judgments.¹⁵³ Ogul while speaking on the same states that politics in the quality of legislative-executive oversight is considered as far from normal.¹⁵⁴ But we must note that political factors tend to stimulate irregular intervals of oversight that are not sustained, hence effective and sustained oversight must rest upon political factors. The paradox is that only political factors can motivate irregular oversight, while sustained oversight is by non-political factors but only political factors can motivate oversight at all.¹⁵⁵

How is oversight then to be done? It is done in many different ways and the broader the definition the broader the methods to be used. It is unclear whether the practice is both independent and dependent.¹⁵⁶ As a dependent variable it can be affected by, the cultural relationship of different arms of government, structural opportunities availed, and motivations for carrying out oversight. Similarly, as an independent variable, it is affected by things such as executive behaviour. Having this in mind, how then was it to be conducted in Kenya?

4.3: HOW SHOULD LEGISLATIVE OVERSIGHT BE CONDUCTED IN KENYA? FROM A HISTORICAL POINT OF VIEW

As already stated, Kenya has used different methods of questioning CSs over the years since attaining independence. Similarly, several proposals to change the method of questioning CSs have been brought forward and in various instances, they have just fallen short. What this shows is that the questioning of the members of the executive is important as it ensures executive accountability to the legislature, the place of contention is how we should do it. This section of this chapter shall therefore delve into how the same has been done over the years. In the quest to find out how the Legislature should be questioning the CSs, this chapter shall look at the following important times; the post-colonial parliament (1964-2002), the Constitution amending process (2002-2008), the 2010 constitution, the sought amendment

¹⁵³ Rockman BA, *Legislative-Executive Relations and Legislative Oversight*, 419.

¹⁵⁴ Ogul MS, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision*, 419.

¹⁵⁵ Rockman BA, *Legislative-Executive Relations and Legislative Oversight*, 422.

¹⁵⁶ Rockman BA, *Legislative-Executive Relations and Legislative Oversight*, 419-422.

of 2014 and finally the present state of the same. In the end, the section and the chapter as a whole would seek to answer what method the constitutional drafters sought to use.

4.3.1: POST-COLONIAL WAY OF QUESTIONING MINISTERS AND THE CONSTITUTIONAL AMENDING PROCESS

The independence constitution provided for the questioning of ministers, who were also Members of parliament at that time, on the floor of the house, in what was popularly known as 'Question time.'¹⁵⁷ By the ministers also being Members of Parliament, there was no separation of powers, more so to do with personnel as well as their functions. This also meant that both the person forwarding the question and the person answering the question was present in the house and any further questions that were asked could either, be answered there and then or appropriate undertakings were made during the said sitting.

This method was loved by both the members of the house and the normal citizens who would watch the sittings and see if their representatives were really putting their interest forward and hence would play a significant role in the next election influence.¹⁵⁸ However, this practice was brought to an end when the people of Kenya called for complete independence of governmental organs specifically that Ministers should not be part of the National Assembly. This was said would not only ensure separation of powers but also enable the election of persons with sufficient skills to serve in different ministries and that Cabinet Ministers would no longer be burdened with constituency business that has the potential of conflicting with national interest.¹⁵⁹ In the commentary part of the final draft of the Constitution of Kenya Review Commission(CKRC), it was stated that, to ensure accountability Deputy Ministers would be expected to play an active role in the National Assembly and Ministers would be required to appear before the National Assembly to explain major policies and to answer questions when they were called upon.¹⁶⁰ However, in their recommendations, only the latter part was included, stating that they would not be

¹⁵⁷ Chapter 2 Part ii, *Constitution of Kenya* (1964).

¹⁵⁸ Twelfth Parliament- (third session) The National Assembly, Communication on Chief Administrative Secretaries (No. 57 of 2019), The Kenyan Parliament website.

¹⁵⁹ Lumumba PLO and Franceschi L, *Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 494.

¹⁶⁰ Constitution of Kenya Review Commission (CKRC), The final Report of the Constitution of Kenya Review Commission, 10 February 2005, 199.

Members of Parliament but would be required to attend parliamentary proceedings as ex-officio members.¹⁶¹ Fast forward a month later, the Draft Constitution of Kenya 2004 provided that ‘ *a Minister shall attend before Parliament, or a committee of Parliament, when required to do so, and shall answer any question concerning a matter assigned to that Minister.*’¹⁶² Why this was changed, is not clear however, we see that the two options were available in the draft even though it did not go through. What this shows us is that if the intention was for the CSs to appear before the whole house the present constitution could have easily stated that directly and this was raised by the CIC in their statement.

4.3.2: THE 2010 CONSTITUTION AND THE SOUGHT AMENDMENTS OF QUESTIONING CABINET SECRETARIES

After many push and pulls that we underwent as a country, on the 27th of August 2010, a new Constitution was birthed. Which as stated earlier introduced a presidential system of governance, that brought about a shift in the country’s governance structure and the operations of the legislature. The shift was majorly highlighted in the relationship between the legislature and the executive because, for the first time in history, no member of the executive was to take part in legislative debates and other house affairs by virtue of being a Member of Parliament. This in essence crippled the idea of Question time that existed previously thereon and brought about the aspect of using committee sittings that would question the CSs and report to the house after, as provided for under Section 153(3) of The Constitution of Kenya 2010. Even though the question period continued after the passing of the 2010 Constitution, it is the eleventh Parliament which was the first to implement this new method of questioning CSs in committees. ¹⁶³

i) Statements

The 11th and 12th Parliaments sought various methods to bring back the popular question time, and this section shall deal with the said proposed amendments. The first of such amendments was made by the 11th parliament which proposed a system referred to as

¹⁶¹ Constitution of Kenya Review Commission (CKRC), The final Report of the Constitution of Kenya Review Commission, 10 February 2005, 202.

¹⁶² Article 170(6), *Draft Constitution of Kenya* (2004).

¹⁶³ Twelfth Parliament- (third session) The National Assembly, Communication on Chief Administrative Secretaries (No. 57 of 2019), The Kenyan Parliament website.

'Statements'.¹⁶⁴ Under this system, statements were directed to Chairpersons of relevant Committees, who would redirect them to the relevant CS and their response would be read out to the whole house by the chairperson of said committee.¹⁶⁵ This method faced various challenges among them being that heads of departmental committees could not speak precisely on executive matters as well as make any undertakings for an arm of government that they are not part of. Furthermore, follow-up questions which serve the purpose of clarifying a particular stance could not be asked in this system of executive oversight.

ii) Committee on General Oversight and Cabinet Secretaries Reporting Time

In light of the challenges of 'Statements' and upon recommendations of the Procedure and House Rules Committee, the House made further considerations of Article 153 intending to ensure proper accountability by the executive to the parliament. The result of this was the establishment of a Committee on General Oversight and the introduction of Cabinet Secretaries Reporting Time.¹⁶⁶ The Committee on General Oversight provided that the Whole House would form a Committee chaired by either the Speaker or the Deputy Speaker and the CSs would answer questions then. The second solution did not change the House to a committee but provided for CSs to answer questions on the floor of the House. In essence, both of these solutions were to allow CSs to appear before the House and report on anything under their mandate. As is clear to see what led to the downfall of these methods of questioning was the fact that in essence, the CSs would be in a sitting of the full house of Parliament.

The main opponents of this suggestion were the CSs who claimed that the said change would add a new burden to their already burdensome work. The then Information Cabinet Secretary Fred Matiangi stated, *'we are concerned about the time we will be required to spend in Parliament. We don't have a problem coming before committees of the House, but I think our*

¹⁶⁴ Mukuna TE, 'Horizontal Accountability of the Executive to the Legislature in Africa: A case study of Kenya' *Research Gate*, 2016, 12.

¹⁶⁵ Twelfth Parliament- (third session) The National Assembly, Communication on Chief Administrative Secretaries (No. 57 of 2019), The Kenyan Parliament website,5.

¹⁶⁶ Twelfth Parliament- (third session) The National Assembly, Communication on Chief Administrative Secretaries (No. 57 of 2019), The Kenyan Parliament website,6.

*concern is the amount of time we are going to spend in the House.*¹⁶⁷ They were then joined by CIC, who went as far as filing a petition before the High Court.¹⁶⁸ They stated that Members of Parliament, by creating a committee of General Oversight and requiring CSs to appear before them on Tuesday was contravening the Constitution and hence was illegal as it defeated the wishes of Kenyans. They argued that CSs are only to appear before committees which would then report to the House. Furthermore, they claimed that such an amendment could only be made by amending the Constitution and not the Standing orders. In their claim, they stated that the unilateral requirement placed on the CSs to attend the National Assembly every Tuesday, without providing them with a hearing or opportunity to participate in the matter, clearly infringes against their right to prompt, efficient, legal, reasonable, and procedurally fair administrative activity.

An additional group to voice concerns about the method were lawyers, with prominent members of the profession leading; Law Society of Kenya Chairman Eric Mutuma and East Africa Law Society President Aggrey Mwamu.¹⁶⁹ The latter termed the practice as being micro-management and not oversight and the former stated that it would bring confusion and inefficiency into the practice of oversight. This can be linked to the fact highlighted by the CIC that after appearing before the General Oversight Committee, the members would then turn into a plenary and consider a report from themselves. Hence the speaker at the time issued a ruling staying the provisions of the Committee on General Oversight and allowed for CSs to appear before Committees to answer questions relating to their ministries.¹⁷⁰ The Procedure and House Rules Committee was then tasked with finding a solution to ensure executive accountability and uphold the separation of powers doctrine.

¹⁶⁷ 'CIC backs Cabinet Secretaries in war with Parliament' Business Daily, 2 October 2014 [CIC backs Cabinet secretaries in war with Parliament - Business Daily \(businessdailyafrica.com\)](http://www.businessdailyafrica.com) on 2 October 2014.

¹⁶⁸ Luchell I, Commission for the implementation of the Constitution seeks to Block grilling of Cabinet Secretaries The standard, [Commission for the Implementation of the Constitution seeks to block grilling of Cabinet Secretaries - The Standard \(standardmedia.co.ke\)](http://www.standardmedia.co.ke).

¹⁶⁹ 'Lawyers defend CIC on parliament summons to Cabinet Secretaries' 6 October 2014, Nation, [Lawyers defend CIC on Parliament summons to cabinet secretaries | Nation](http://www.nation.co.ke) on 6 October 2014.

¹⁷⁰ Twelfth Parliament- (third session) The National Assembly, Communication on Chief Administrative Secretaries (No. 57 of 2019), The Kenyan Parliament website,6.

In the 12th parliament, the Committee then brought about proposals that led to the introduction of 'Questions'.¹⁷¹ This time, however, the questions were introduced in a manner that was in line with the Constitution and linked the questions to issues of the public. Under this, the member would read their questions on the floor of the house which would be recorded in the Hansard and then the responsible CS would appear before the Committee to answer the said question. This is the practice that has gone on, till when the current regime took over. How then should the questioning be conducted?

4.4: THE PROPER WAY OF QUESTIONING CABINET SECRETARIES.

Drawing from the discussions this paper has brought up thus far and one final point that will be brought out in this section. The author shall seek to give the correct method that should be used to question CSs in the country. As seen from how the country practices the theory of separation of powers, it is clear that there should be no interference with the workings of another body. If the CSs are to be allowed to appear before the whole house, then it would mean that they would be indulging in house debates concerning their ministries. The follow-up questions will for sure spark a debate which is not a function of the CS. This shuts down the arguments that they will not be voting like the Judges do in Congress. We must note that the function of judges in that house is only advisory and not that of offering responses back and forth trying to figure out if an executive action was right or not, it is simply to advise on legislation. Furthermore, Robert Michel adds a very important point to this discussion. That the floor of the house is a place where people meet to discuss as equals. That by allowing for the whole-house questioning method, it would create an imbalance. It must be noted that whereas he states that the imbalance will be on one side, that Members of Parliament will have excess power as compared to the CSs, we must also acknowledge that the CSs can also treat the members as their subordinates. This is easy to do because we see that at times Members of the executive amass too much power. Furthermore, with the ruling party also having the majority in the house, how are we to be sure that the questioning will not be biased?

¹⁷¹ Part IX, 4th edition National Assembly Standing Orders (2013).

At this juncture it is important to ask the question, why is it that after such a robust opposition in the period of statements, the Committee of General Oversight and CSs reporting time, the same problem raises its head again years down the line and this time succeeds? The answer to this question was highlighted by Rockman, and it is the role that politics play in the legislature's oversight role. It is important to note that, whereas the 2014 proposals were made by Members of Parliament, the 2023 proposal was made by the sitting president, whose party is also the majority in both houses hence votes in favour of a proposal easily go through. However, the fact remains that, the method of questioning as provided for in the Constitution should be by committees. This is because of two main reasons.

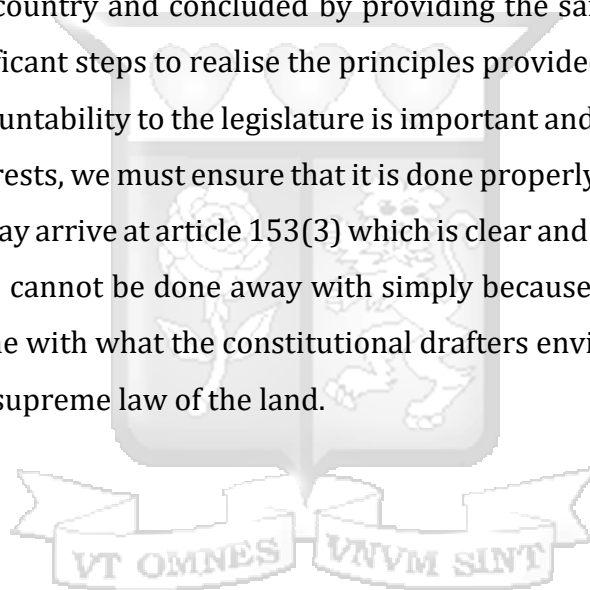
The first is that of, the intention of the constitutional drafters. As stated earlier the intention of what a law should provide for is what should be looked at the most in interpreting the law. The drafters at first had provided for both methods of questioning the CSs however after a while the whole-house method was removed from the provision and only the committee method was retained. Maybe it is for the same reasons that the USA maintained the same method, that the complexities of summoning non-members of parliament are too tasking to be by-passed, and if they as a model country saw it fit to question their cabinet Members in that way, why should we not follow?

The second reason is because of the use of the word 'shall' in Article 153(3) of the Constitution. The discussion of the meaning to be allocated to the word 'shall' has been had on several occasions since the passing of the Constitution. To begin with, it has been held that whether a provision of law is mandatory or simply directionary depends upon the intent of the legislature and not the words which cloth the said provision. That the intention of the drafters of laws is not only seen from the phrases but must also be taken from its nature, design and consequences which would follow from construing it in one way and not the other. We have seen that the intention of the drafters was for CSs to appear before committees and the consequences are that a vital principle of the constitution, separation of powers, will be violated. Judge John Mativo of the High Court division was of the view that whenever the word 'shall' is used in a statutory provision it implies that it is a command with

a compulsory meaning hence it denotes an obligation.¹⁷² This is further supported by the Longman Dictionary providing that the word is to be used to express a command or exhortation or what is legally mandatory.¹⁷³ Therefore, it implies a mandatory command/mandate and not a permissive request. Hence the correct practice is for the CSs to appear before committees of the house and for this to change one has to go for a referendum.¹⁷⁴

4.4: CONCLUSION

The last chapter of this study set out to give the appropriate way of questioning CSs. It has done so by looking at what legislative oversight entails, it then looked at the history of questioning CSs in the country and concluded by providing the said appropriate way. The country has taken significant steps to realise the principles provided for in the Constitution. Whereas executive accountability to the legislature is important and may be used to advance public and political interests, we must ensure that it is done properly. The many changes that were made so that we may arrive at article 153(3) which is clear and in line with the principle of separation of powers cannot be done away with simply because of political interest. We must strive to stay in line with what the constitutional drafters envisioned and not use back doors to go against the supreme law of the land.



¹⁷² *Peter Ouma Onyango v Mats Karlsson* (2021) eKLR.

¹⁷³ Longman Dictionary, 6th ed.

¹⁷⁴ Article 255(h), *Constitution of Kenya* (2010).

5.0: CONCLUSION AND RECOMMENDATIONS

5.1: RECOMMENDATIONS

The Judiciary's main function is to interpret the laws of a country. In Kenya, matters of Constitutional application are left in the hands of the High Court of Kenya. More so the powers to determine whether any law is inconsistent with or in contravention of the Constitution.¹⁷⁵In the Wambora case, the court further asserted its stance on this and stated that, when it comes to matters of Constitutional interpretation, it has jurisdiction over said matter because no one should be above the Constitution and the law. This also to the organs that are created by the Constitution. In an instance that any person in power or organ of the Constitution does anything that goes against the Constitution, the court can intervene notwithstanding the doctrine of separation of powers. However, having these provisions of the law is not helpful if we as the citizens of Kenya are not ready and vigilant to act on our rights as provided for in the Constitution. We are the ones who should be vigilant and ensure that the arms of government are adhering to the provided-for laws, and if it is not so, we are to file a case before the courts. We must note that whereas some laws are presented as being beneficial for the nation they are there to serve a specific few. Therefore, this is a recommendation to all citizens of the nation to be vigilant and ensure that the laws of the country are followed and to the Judicial arm to ensure that whenever such a case is brought before them, the cases are ruled on according to the laws of the land.

To the political class, more so the proposers of the whole-house method, the Constitution has provided for a path that an intended practice which is contrary to what is provided for in the Constitution is to be actualised. If the view you hold is that the said method of questioning CSs would be more beneficial than the one provided for in the Constitution, then have a referendum for the same and do not use a back door to violate the provisions of the Supreme law of the land. As leaders, you should lead by example, if you are breaking the rules, then why should normal citizens follow them? However, in calling for an amendment, you must also take into account other facts that might be affected by the said amendment. One specifically highlighted within this paper is that of separation of powers. The question of the effect of taking such an action is very important, what would be the dynamics of such

¹⁷⁵ Article 165 (3)(d)(ii), *Constitution of Kenya* (2010).

a practice and will the benefits of the said method outweigh the other? Furthermore, we must also take lessons from thriving political nations, yes they might have flaws in their systems but again do they outweigh the positives? If the answer is leaning towards more positives, then it would be more beneficial if we follow their ways and if the negatives outweigh the positives then one is allowed to look for their way. Therefore, whereas the method might be favourable to us as a country we must seek to ensure that we follow our positive rules to the letter.

5:2: CONCLUSION

At the beginning of this paper, the author set out to determine the correct method of questioning CSs in the country, acknowledging the importance of legislative oversight as well as other principles of our constitution. The paper has gone through different stages to reach its conclusion, mainly through doing desk research. It began by defining what separation of powers is and looked at how it is practised in Kenya and the USA. Using this background, the study shows that the two countries have incorporated modern forms of separation of powers in their practice. The study then looked at the method of questioning Members of the Cabinet in the USA and figured out that whereas it might be possible to use the whole-house method of questioning members of a cabinet in a presidential system, there are barriers in place that will not allow for the same. The study then finished by looking at what legislative oversight entails and how it has been practised in Kenya, through all this the study concluded that it would be desirable for the committee method to be used in Kenya because that is what the drafters of the Constitution had in mind, the mandatory requirement by the Constitution as the supreme law of the land and also by taking lessons from the USA.

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