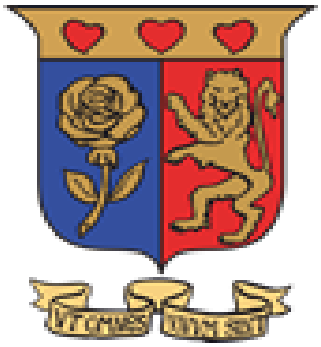

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An Inquiry into the Limits of Judicial Intervention in the Impeachment Process of Governors in Kenya

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

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Contents

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Declaration

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

Signed: .....

Date: .....

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

Signed: .....

Dr.J Osogo Ambani

Abstract

Article 181 (2) of the 2010 Constitution of Kenya instructs Parliament to enact a law highlighting the process of impeachment of a country governor. This has been done through the County Government Act. Section 33, recognises the County Assembly and the Senate as the bodies responsible for this process. However, the Constitution fails to address at what point courts of law can intervene in this process in an instance where a fundamental right or freedom has been violated. While this is important in a constitutional democracy, courts' ability to intervene in the impeachment process of governors at any point may unduly interfere with governors' delivery of their constitutional mandate. Such an unregulated intervention creates confusion between the role of courts of law in the impeachment process, on the one hand; and that of the County Assembly and the Senate, on the other. It is not clear which role should be discharged first. The Supreme Court has failed to provide a solution to this problem when presented with it in Justus Kariuki Mate & another v Martin Nyaga Wambora & another. This study therefore seeks to address this confusion through analysis of judicial decisions and then suggest a way forward.

Key words: impeachment of governors, judicial intervention, human rights, separation of powers

List of abbreviations

MP Member of Parliament

List of cases

Kenya

Martin Nyaga Wambora v Speaker of the Senate and 6 others (2014)

Trusted Society of Human Rights and others v Attorney General and others (2012)

Judicial Service Commission v. Speaker of the National Assembly and 8 others (2014)

Speaker of the Senate and another v Attorney General and others (2013)

Justus Kariuki Mate & another v Martin Nyaga Wambora & another (2017)

Republic v Kenya Cricket Association ex parte Maurice Odumbe (2006)

Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others (2015)

Judicial Service Commission v Mbalu Mutava & another (2015)

Martin Nyaga Wambora v County Assembly of Embu & 37 others (2015)

Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others (2015)

U.S.A

Marbury v Madison (1803)

Nigeria

Hon. Muyiwa InakoJu & Others v Hon Abraham Adeolu Adeleke (2007)

Malaysia

Kanda v Government of the Federation of Malaya (1962)

South Africa

Doctors for Life International v Speaker of the National Assembly and others (2006)

List of statues

County Government Act (2012)

List of legal instruments

Constitution of Kenya (2010)

Constitution of Nigeria (1999)

CHAPTER 1

1. INTRODUCTION

1.1. Background

The doctrine of separation of powers is not expressly provided for in the Constitution of Kenya 2010 (hereinafter referred to as the Constitution);[1] however, it is realized through the clear set out functions of each arm of government. These three arms of government being the executive, the judiciary and the legislature. Each of these branches have distinct functions which are to be performed separately and free from interference.[2] The executive performs administrative functions, the judiciary has the power to interpret the constitution and the power of judicial review while the legislature has the power to make laws. However, in as much as they are required to function independently a system of checks and balances are placed in order to limit these bodies from abusing their power.[3]

The Constitution provides for these checks and balances. For example, the judiciary has the power to the power to analyze and criticize the decisions of the executive and the legislature through judicial review.[4] P.L.O Lumumba defined judicial review as the power by which judges analyze public law functions and they intervene as a matter of discretion to quash or prevent unlawful, unreasonable or unfair decisions.[5] He further notes that the aspect of review includes re-examining of a decision made by an authority with the possibility of altering or amending where necessary.[6] Thus, in addition to preventing abuse of power it also helps in enhance accountability and efficiency in performance of functions. Furthermore, through judicial review rights and interests of individuals are safeguarded by ensuring that the executive and the legislature keep within their assigned limits.[7] This was emphasized by Wade and Forsyth who pointed out that ensuring bodies do not act ultra vires is the basis of judicial review. [8] Therefore, in as much as judicial review is encouraged, the courts should also ensure that they also do not overstep and disrupt the orderly functions of

[1] *Constitution of Kenya* (2010).
[2] Masinde M, 'Separation of power in Kenya: analysis of the relations between judiciary and the executive' 5 *Int. J. Human Rights and Constitutional Studies* 1, 2017,2.
[3] Carrol A, *Constitutional and administrative law*, Longman Publishers, 2007, 39.
[4] Article 47(3), *Constitution of Kenya* (2010).
[5] P.L.O Lumumba, '*Judicial Review in Kenya'*, Law Africa, 2nd edition, 2006,3.
[6] P.L.O Lumumba & P. O Kaluma, '*Judicial Review of Administrative Actions in Kenya*,' Jomo Kenyatta Foundation,2007,1.
[7] Migai Akech, '*Administrative Law: The politics of Judicial Review'*, Strathmore University Press,2016,411.
[8] Wade and Forsyth, '*Administrative Law'*, Oxford University Press, 10 ed, 2009,3.

either the executive and the legislature. This would defeat the rationale behind the doctrine of separation of powers because if it oversteps the organs will not be performing their functions independently.

Another way in which the constitution provides for checks is through impeachment. The legislature checks the executive through having the power to impeach the President[9], Deputy President[10] and Governors.[11] Charles Kanjama described impeachment as the 'first formal decision to commit a senior member of the executive to trial over charges stemming from violation of a country's laws, and whose end product may include removal or other disciplinary sanction.'[12] Thus is seen as a legal remedy for abuse of office power. This paper shall focus on the power the legislature has to impeach governors in Kenya.

Governors were introduced in Kenya after the promulgation of the Constitution in 2010. This is when Kenya adopted a devolved system of governance. Devolution is described as a system of multilevel government whereby the Constitution creates two distinct and interdependent levels; the national level and the county level. [13] Power is thus distributed at both levels in a manner that ensures accountability to the central government.[14] The county government is further divided into two; county executive and county assembly with the county assembly comprising of members who are directly voted for by people of each ward constituting of a single member of constituency. [15] The county government on the other hand includes the county governor, deputy governor and members appointed by the county governor with approval of the assembly.[16] Both organs of the county government have their separate functions as separation of powers also exist at this level. However, sometimes they are required to work together in order to achieve efficient outcomes. An example of this is when it comes to the impeachment process of governors as the County Assembly and the Senate must work together.

[9] Article 145, *Constitution of Kenya* (2010).
[10] Article 150(b), *Constitution of Kenya* (2010).
[11] Article 181, *Constitution of Kenya* (2010).
[12] https://www.standardmedia.co.ke/article/2000104776/n-a on 21 February 2019.
[13] Kangu J, '*Constitutional Law of Kenya on Devolution*,' Strathmore University Press, 2015,10.
[14] Kangu J, '*Constitutional Law of Kenya on Devolution*,' Strathmore University Press, 2015,14.
[15] Article 177(1), *Constitution of Kenya* (2010).
[16] Article 179, *Constitution of Kenya* (2010).

When it comes to the impeachment of governors, the County Government Act[17] outlines the process while Article 181 of the Constitution lists the grounds for removal.[18] Nevertheless, even with these laws in place, the impeachment of governors tends to be a problematic process. This is because the governors who face impeachment tend to involve the courts where they feel that their human rights have been violated. As a result, this dissertation will seek to address at what point the court can intervene in the impeachment process of governors. This is a point of debate as there is no clarity as to which point the courts can intervene. In most instances the courts have their opinion on when they can intervene and so do the legislature. For example, a Member of Parliament of Kieni County, Kanini Kega, noted that 'courts should not make decisions reserved for other independent arms of government'[19] and further claimed that courts are failing the country by overstepping their powers. Thus insinuating that the courts should let the legislature perform its function of checking the executive without disruption. This was also the view of the appellants in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*, the Speaker and the Clerk of the County Assembly. [20] They submitted that the courts "must wait for parliament to complete its processes, before intervening and testing the constitutionality of a legislative body's actions or omissions." [21]

This study recognizes that the courts have the power to intervene in parliamentary processes especially when fundamental human rights are at stake. For example, the Constitution of Kenya, grants court the power to enforce fundamental rights and freedoms,[22] and this shall be the case even when it comes to the impeachment process of a governor. However, I will seek to examine at what point the judiciary should intervene in the impeachment process. Should they wait for the process to be complete as stated by the appellants in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*? or can they intervene at any point as the process is still ongoing?

[17] Section 33, *County Government Act* (2012).
[18] Article 181, *Constitution of Kenya* (2010).
[19] https://www.standardmedia.co.ke/article/2000215743/leaders-tell-courts-to-keep-off-governor-nderitu-gachagua-impeachment 20 February 2019.

[20] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 29.
[21] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 33.
[22] Article 259, *Constitution of Kenya* (2010).

1.2. Statement of the problem

Section 33 of the County Government Act provides for the removal by impeachment of a county governor. According to this section, this is a process reserved for the County Assembly and the Senate. However, the judiciary is known to intervene in this process from time to time. Therefore, the problem this dissertation seeks to address is the point at which the courts should intervene in the impeachment process of governors in Kenya.

1.3. Hypothesis

1. The doctrine of separation of powers entails that each arm of government performs its function without the interference of the other branches with the exceptions of checks and balances.
2. While the interference by the courts in the impeachment process of governors may enforce human rights for aggrieved persons it may also interfere in the orderly function of the County Assembly and the Senate.
3. A synchronized approach of the impeachment process between the County Assembly and the judiciary will ensure efficiency.

1.4. Research questions

1. Whether the court's intervention in the impeachment process of governors through judicial review goes against the doctrine of separation of powers?
2. Whether the courts interference in the impeachment of governors disrupts the orderly function of the County Assembly and Senate?
3. Whether human rights for aggrieved parties are enforced more when the courts intervene in legislative functions?

1.5. Justification for Research

This paper recognizes that the courts have power to intervene in the legislative processes at any given point due to their inherent power of judicial review. However, I seek to address the issue as to what point the courts should intervene in the impeachment process of governors so as to enhance justice and efficiency and prevent the violation of fundamental human rights such as the right to fair administrative action. This is an issue that is prevailing to date as there is often confusion between the orders made from both the courts and the Senate and County Assembly.

1.6. Scope of Limitations of the Study

The study recognizes that there have not been various impeachment processes in Kenya that have made it until the convening of the special siting of the senate. In addition to that this study shall be limited to the Kenyan jurisdiction.

1.7. Definition of Terms

Separation of powers – each arm of government should perform their functions independently without interference from the others with the exceptions of checks and balances to maintain public good.

Judicial Review – the power by which the judges analyze public law functions and they intervene as a matter of discretion to quash or prevent unlawful, unreasonable or unfair decisions.

Impeachment – first formal decision to commit a senior member of the Executive to trial over charges stemming from violation of a country's laws, and whose end product may include removal or other disciplinary sanction

Devolution - a system of multilevel government under which the constitution creates two distinct and independent levels of government.

2. Conceptual Framework

The issue as to whether the control of the integral decisions of Parliament which are areas of legislative competence, are subject to examination by the Judiciary is a heated issue.[23] It has led to a huge debate as the courts have the jurisdiction to hear matters in reference to violation of petitioners constitutional rights.[24] The doctrine of separation of powers is a based on legal principles that shed light on the roles of each of the arms of government. It shall be discussed briefly below.

[23] *Martin Nyaga Wambora and the County Government of Embu v Speaker of County Assembly of Embu & 4 others* (2014) eKLR.
[24] Article 165(3), *Constitution of Kenya*.

2.1 **Doctrine of Separation of Powers**

Montesquieu, a French philosopher, in Spirit of Laws also known as "De L'Esprit des Lois" suggested a pure separation of powers system. According to him, power should divide amongst all branches equally so as to prevent concentration of power at one arm of government which would eventually lead to tyranny. Each branch of government has a part to play and if too much power is concentrated in one branch then there are chances that the power they possess will be misused and abused. He further notes that where the judiciary and the executive are united in the same person there can be no liberty as they might behave with oppression and violence as they would be the judge and the legislator.[25] This depicts the need for a system of pure separation of powers with each branch having clearly set roles, this consequently leads to no arm of government feeling pressured or bombarded with work which in turn strengthens each authority.

Montesquieu idea on the pure theory of separation of powers was later developed by Van der Vyer who noted that this doctrine consists of four principles.[26] The first principle is the principle of trais politica which requires there to be a formal distinction between the legislature, judiciary and the executive. Secondly is the principles of personnel which notes that the same people are not allowed to serve more than one branch at the same time. The third principle is that there should be separation of functions in order to avoid interference and conflict between the three bodies and lastly the principles of checks and balances which requires the organs to be entrusted with powers which are designed to serve as checks.

Sir William Blackstone also discussed the doctrine of separation of powers by describing a tyrannical government as one where "the right of making and enforcing the law is vested in the same man or body of men and whosoever these two powers are united together there can be no liberty."[27] James Madison agreed with Blackstone as he noted in the Federalist papers that accumulation of all powers in the same hands is the definition of tyranny, regardless of whether elected, self-appointed or hereditary.[28] Thus alluding that the main aim of this theory

[25] Montesquieu, '*The Spirit of Laws; Of the laws which establish political liberty, with regard to the constitution*', Book XI,1748,173.
[26] Van der Vyver JD, 'Political Power Constraints in the American Constitution' *South African Law Journal ,1987.*
[27] William Blackstone, Commentaries on the Laws of England, *Clarendon Press*, 1765, 14.
[28] James Madison, '*Federalist Paper NO 47: The particular structure of the New Government and the Distribution of Power Among Its Different Parts*,' 1788.

is to prevent tyranny and advocates for equality of each arm of government so that none is above the other enabling them to perform their independent functions.

3. Research Design

3.1. Research Design and Methodology

This paper shall take a qualitative research approach as the nature of the study involves the assessment of the current law in place. Most of the material will be drawn from the Constitution, Acts of Parliament and case law. Chapter one will introduce the topic of discussion and help layout a foundation of what the dissertation shall discuss.

Chapter two will discuss the concept of separation of powers. This shall be done by reference to secondary sources of information derived from scholarly articles, journals and textbooks where appropriate. Furthermore, in chapter three will focus on the Kenyan context. I will relate the discussion had in chapter two on the doctrine of separation of powers to the Kenyan context and highlight how power is divided between the three arms of government. Thereafter, I shall go into the impeachment process in Kenya and give instances of governors who have been impeached and point out any faults in that process. This chapter shall require thorough research and reference to secondary sources of information as well.

Lastly, chapter 4 shall conclude the dissertation by proving or disproving my hypothesis as well as providing recommendations and possible solutions to the problem.

3.2. Limitations of study

The study recognizes that there few governors who have been impeached. In addition to that this study shall be limited to the Kenyan jurisdiction.

3.3. Chapter Breakdown

The objectives of the dissertation shall be seen within four chapters. Chapter one will lay the foundation of the study by providing a background to the problem. Chapter two is an in-depth discussion on the concept of separation of powers touching on exterior and interior separation of powers and relating the concept to Kenya. Chapter three will then discuss the impeachment process in Kenya using an example of governors that have been impeached. It

shall also discuss the challenges of impeachment of governs in Kenya. Lastly in chapter four I will conclude by answering the research questions and approve or disprove my hypothesis. Thereafter, I will provide recommendations.

3.4. **Duration of the study**

This study shall take approximately one year to be complete.

CHAPTER 2

2. CONCEPTUAL FRAMEWORK

2.1. Introduction

As stated in chapter one of this dissertation, the problem I seek to address is what point the courts can intervene in the impeachment process of governors. This dissertation recognizes that there are instances in which the courts can legally interfere in legislative processes, including the impeachment process of governors. However, if they intervene as the impeachment process is ongoing the very essence of the separation of powers will be defeated. Additionally, the judiciary would seem to hold too much power and would be overreaching. On the other hand, if they restrain from intervening in the process due to the principles of separation of powers, fundamental human rights such as the right to fair administrative action may be violated as argued by the petitioner in *Martin Nyaga Wambora and the County Government of Embu v Speaker of County Assembly of Embu & 4 others*.[29]

With this, Chapter two argues that there are three branches of government; the judiciary , the legislature and the executive.[30] Ideally, these branches should operate independently without intrusion from the other branches. However, this chapter also recognizes that they are some instances where interference is permissible through the system of checks and balances. Therefore, seeks to answer the first hypothesis of the dissertation that states 'The doctrine of separation of powers entails that each arm of government performs its function without the interference of the other branches with the exceptions of checks and balances.' I shall do this by first defining the doctrine of separation of powers which shall be divided into two parts; exterior and interior separation of powers. Thereafter, this chapter shall discuss the critics of the doctrine which shall feed into the exception being the system of checks and balances. I will also discuss the challenges of the impeachment process. Additionally, throughout this chapter I shall relate the principles of separation of powers to Kenyan situation as well as how checks and balances apply in our jurisdiction.

[29] *Martin Nyaga Wambora and the County Government of Embu v Speaker of County Assembly of Embu & 4 others* (2014) eKLR.
[30] Chapter 15, *Constitution of Kenya* (2010).

2.2. **The Doctrine of Separation of Powers**

Separation of powers is a doctrine that assumes that absolute power tends to corrupt and that concentration of power in one arm of government tends to corrupt absolutely.[31] James Madison attested to this when he noted that power of all three branches are accumulated in the same hands is 'the very definition of tyranny'.[32] Thus, the very essence of this doctrine is to eliminate abuse of power by having independent branches with unique functions. In *Loving v United States* the courts shed light on another importance of separating powers amongst branches and noted that it aims to hold each branch accountable. [33]

2.2.1. **External Separation of Powers**

The external separation of powers adheres to the formalist approach and stresses that each branch should remain as distinct and separate from each other as possible. This idea has been expressed by various scholars and philosophers. For instance, John Locke, in 'Two Treaties of the Government' argues that human beings were once in a state of nature "wherein all the power and jurisdiction is reciprocal, no one having more than another." [34] However, he notes that the liberty man had was 'very uncertain and was constantly exposed to the invasion by others'.[35] As a result, man agreed to give up some of his rights in exchange for protection by the state. This agreement is what Locke termed the 'social contract'. Despite having a social contract, he notes that man is weak by nature and, therefore, if all the power that the social contract has entrusted the state with is left in one man or a few hands, such power will be abused. For this reason, Locke concludes that power should be divided into three branches, namely; the executive, the legislature and the federative. This is to avoid a situation where the same persons who have law-making power also have in their hands the power to execute laws.[36]

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[31] Lord Atkin letter to Bishop Creighton.
https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence on 11 September, 2019.
[32] Madison J, *Federalist Paper 47: The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, 1788.
[33] "Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." See further: *Loving V. United States* (1996), The Court of Appeal for Armed Forces.
[34] Chapter II, John Locke, '*Second Treatise on civil government'*, 1960.
[35] Chapter IX, John Locke, '*Second Treatise on civil government'*, 1960.
[36] Chapter IX, John Locke, '*Second Treatise on civil government'*, 1960.

Locke further contributed to this doctrine by giving a deeper understanding of the functions of each branch while analyzing the effect of concentrated power with regards to one's freedom. According to Locke, the legislature is supreme and the other are two subordinate.[37] He states that the legislature has the power to make laws for the good of its citizens and avoid making arbitrary laws. Additionally, the legislature must also follow the laws they enact to the latter. They are not exceptional, thus confining the them within the limits of the law in order to prevents an instance where they may be tempted to abuse the power they hold.[38]

Furthermore, Locke illustrates that separating the functions of the creators of the law from the executors would lessen the temptation to abuse power. He is famous for stating that "it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage ."[39] If the lawmakers had the power to execute the laws they make it would be contrary to the aim of the law which is to protects the interest for the good of society. Therefore, the executive body is established in order to execute the laws made by the legislature. The last body Locke speaks of is the federative which he describes as the body that manages the security and interest of the public.[40]

Baron de La Brède et de Montesquieu in 'The Spirit of the Laws', advances Locke's view further. Montesquieu envisioned a government made up of the executive, legislature and the judiciary and according to him the pure separation of powers of these three bodies aimed to protect fundamental human rights and liberties.[41] As stated by Locke, the legislature is the body that enacts laws , the executive 'establishes the public security' and lastly the judiciary that has the authority to punish criminals and solve disputes between individuals accordingly.[42] In Montesquieu's view it is necessary to separate the functions of these three bodies as he recalls from experience that "that every man invested with power is apt to abuse

[37] J Locke, '*Second treatise of civil government'* (1690) ch xiii, 149.
[38] J Locke, '*Second treatise of civil government'* (1690) ch xi, 137.
[39] J Locke, '*Second treatise of civil government'* (1690) ch xii, 143.
[40] J Locke, '*Second treatise of civil government'* (1690) ch xii, 147.
[41] Ambani J and Mbondenyi M, '*The New Constitutional Law of Kenya: Principles, Government &Human Rights'*, Claripress LTD Nairobi, 2012,60.
[42] B Montesquieu, '*The spirit of Laws'*, 1949, XI,4.

it, and to carry his authority as far as it will go."[43] Thus, where the powers of both the legislature and the executive are vested in one person there can be 'no liberty'. Additionally, where the power of the judiciary is vested in the legislature there would be arbitrary control and if joined in the executive there would be oppression.[44] Therefore, no liberty can exists here as well. From Montesquieu's idea of dispersing power, it is evident that this structure was for the greater good and aimed to minimize the opportunities of people in government to abuse the power handed to them.

Additionally, Van der Vyver, adds on to Montesquieu view by simplifying the doctrine of separation of powers into four principles which are as follows:

i) The first principle is known as *trais polita* which requires proper distinction between the three independent branches;
ii) The second principle is the principle of the separation of personnel which demands that the same people should not serve in more than one arm of government at a time;
iii) The third dictates that the functions of the three arms should separate in order to avoid interference from the other branches; and
iv) The last principle is of checks and balances where each organ is delegated a special function to serve as a check on the functions of the other branches to come up with an equilibrium.[45]

The first three principles expressed by Van der Vvyer are referred to as 'a pure separation of powers' by Maurice Vile in his book 'Constitutionalism and the Separation of Powers'. He conveys these three principles by stating that;

> "It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and

[43] B Montesquieu, '*The spirit of Laws*', 1949, XI,6.
[44] B Montesquieu, '*The spirit of Laws'*, 1949, XI,6.
[45] Van der Vyver JD, 'Political Power Constraints in the American Constitution' *South African Law Journal* (1987).

distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State." [46]

However, in as much as complete separation of powers is advocated for, it has been the subject of critiques. Scholars such as Wade and Bradley have argued that it is impossible to have a version of pure separation of powers both in practice and in theory.[47] In addition, Ambani and Mbondenyi have also argued that rigid separation of powers would be 'subversive of the efficiency of government' and as a result would lead to its collapse.[48] Aileen Kavanagh, also criticized the 'separation as confinement' view and notes that it fails to take into account the 'interactive and interdependent nature' of each branch when carrying out its function.[49] As a result of these critiques Vile argues that an exception must be made to this rigid approach and suggested a mutual supervision between the branches of government through checks and balances. [50]

2.2.2. **Checks and Balances**

James Madison expressed the idea of checks and balances in the Federalist Paper 51.[51] He notes that each arm of government should be empowered and have a will of its own but at the same time checks and balances must be put into place to prevent one branch of government from usurping the other. Furthermore, he adds that each department should have "the necessary constitutional means and personal motives to resist encroachments of the others." [52] From this, it is safe to say that Madison's idea revolved around empowering each arm of government in order to counteract manipulation from the other branches. This is supported by his famous quote ' ambition must be made to counteract ambition.'[53] Thus, the ambitions of leaders in government will eventually even out and none will be more powerful than the other.

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[46] Vile J, '*Constitutionalism and the Separation of Powers'*, 2 ed, Liberty Fund Inc, 14.
[47] ECS Wade & AW Bradley, '*Constitutional Law'*, 1970,25.
[48] Ambani J and Mbondenyi M, '*The New Constitutional Law of Kenya: Principles, Government &Human Rights*', 64.
[49] Kavanagh A, 'The Constitutional Separation of Powers', *Oxford University Press*, 2015,228.
[50] Vile J, '*Constitutionalism and the Separation of Power*s', 18.
[51] Madison J, *'Federalist Papers Number 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*,' 1788.
[52] Madison J, '*Federalist Papers Number 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*,' 1788.
[53] Madison J, '*Federalist Papers Number 51'*, 7.

In our Kenyan context, the legislature checks on the executive through the power of impeachment. They have the power to impeach the President[54], Deputy President[55] and the Governor.[56] The executive on the other hand checks the legislature through for example presidential assent of bills.[57] The judiciary has the power to check on both the executive and legislative functions through judicial review.[58] Nwabueze defined judicial review as 'the power of the court to declare a governmental measure either contrary to or in accordance with the constitution or the governing law, with the effect of rendering the measure invalid and void or vindicating its validity.'[59] This principle was further affirmed in the landmark case *Marbury v Madison*[60] whereby the United States of America (USA) Supreme Court confirmed the power of the court by noting that they have the ability to declare legislative and executive acts unconstitutional for the purposes of constitutional consistency. This highlights that the court has the power to assess the legitimacy and effectiveness of the legislative and executive's decisions in order to safeguard the principles of the constitution. Hence, viewed as the guardians of the rule of law.[61]

The courts have further exercised their power to check the legislature in the following instances. The High Court in *Trusted Society of Human Rights and others v Attorney General and others*,[62] highlighted their interpretative role in determining the constitutionality of all governmental actions. Additionally, in the case of *Judicial Service Commission v. Speaker of the National Assembly and 8 others,*[63] the High Court noted that if any constitutional organ fails to act in accordance with the constitution they are empowered to determine whether their actions are inconsistent with the constitution. Another instance where the court recognized its power to review decisions is in *International Legal Consultancy Group v The*

[54] Article 145, *Constitution of Kenya* (2010).
[55] Article 150, *Constitution of Kenya* (2010).
[56] Article 181, *Constitution of Kenya* (2010).
[57] Article 115, *Constitution of Kenya* (2010).
[58] Article 47 (3), *Constitution of Kenya* (2010).
[59] Nwabueze BO, "Judicialism in Commonwealth Africa: The role of the courts in government", *St. Martin's Press, New York*,1997.
[60] *Marbury v Madison* (1803), The Supreme Court of United States.
[61] Ochiel J Duley, "the Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case would be decided differently today", 2015. http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/ on 18 February 2019.
[62] *Trusted Society of Human Rights and others v Attorney General and others* (2012), eKLR para 64.
[63] *Judicial Service Commission v. Speaker of the National Assembly and 8 others* (2014), eKLR, para 121.

Senate and another [64] where the High Court was clear in giving its recommendations on what should be legislated and relied on the fact that due to constitutional supremacy they have a special responsibility to enforce rights under the constitution. Lastly, the Supreme Court in *Speaker of the Senate and another v Attorney General and others*[65] decision asserted that it is sometimes called to be an ultimate judge of right or wrong in instances of conflict of the constitution. This was later affirmed by J.B Ojwang when he noted that the court has the 'power to pronounce legality with final voice.'[66]

With the promulgation of the 2010 Constitution, the judiciary gained independence and is no longer subject to the control or direction of any person or authority.[67] Nonetheless, the President plays a vital role in the appointment of the Chief Justice, Deputy Chief Justice and other judges as he appoints them according to the recommendations of the Judicial Service Commission.[68] Therefore, the executive in does check the judiciary in this manner.

It is necessary that these checks and balances are in place as 'men are not angels' and if they were 'no government would be necessary'.[69] In addition to these ways in which the three arms of branches check each other, Madison suggested another approach whereby within the arm of government power is divided further so as to create additional accountability. He illustrates this using an example of the legislature and notes that it should be divided into different branches, and give them different functions and ensure that they are not connected with each other as such, these small branches of the legislature will then check on each other bringing about efficiency as power is divided.

2.2.3. **Internal separation of Powers**

Following from the discussion above on checks and balances, Madison argues that further dividing the branches into other branches creates efficiency.[70] He notes that different branches of government 'will control each other and at the same time will be controlled by

[64] *International Legal Consultancy Group v The Senate and another* (2014) eKLR para 63.
[65] *Speaker of the Senate and another v Attorney General and others* (2013) eKLR para 64.
[66] Ojwang J.B '*Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order'*,2013, 39.
[67] Article 160 (1), *Constitution of Kenya* (2010).
[68] Article 166, *Constitution of Kenya* (2010).
[69] Madison J, '*Federalist Papers Number 51'*, 10.
[70] Madison J, '*Federalist Papers Number 51'*, 7.

itself.'[71] By this, Madison is referring to devolution. When the legislative branch is divided into two; the County Assembly and the Senate each performing distinct functions but at the same time checking that the other is not abusing power it places them at constant war with each other.[72] This confusion then distracts them from abusing power and instead places the other in check.[73] Though this system the rights of the people will be guarded as power will not be abused if each branch keeps the other in check. Thus, achieving a balance and as a result the principles of the doctrine of separation of powers are achieved.

2.3.**Conclusion**

This chapter has argued that the very essence of the separation of powers doctrine is to prevent concentration of power in the hands of one arm of government which tends to lead to abuse. Furthermore, I have argued that in as much as the bodies of government are to perform their functions independently, they must check on each other to ensure that none acts ultra vires. Another important aspect this chapter has discussed is accountability for the actions each branch takes. This chapter also highlights the two forms of separation of powers being the exterior and the interior approach. The exterior approach being the separation of the functions of the three main branches and interior being the separation of the devolved government.

In reference to the hypothesis this chapter sought to address, it is evident through the discussions on the doctrine of separation of powers that each arm of government ought to perform its function without the interference of the other branches with the exceptions of checks and balances.

[71] Madison J, 'Federalist Papers Number 51', 7.
[72] https://www.youtube.com/watch?v=Sw2LQUouUho on 30 June 2019.
[73] https://www.youtube.com/watch?v=Sw2LQUouUho on 30 June 2019.

CHAPTER 3

3. IMPEACHMENT OF GOVERNORS IN KENYA

3.1. Introduction

Kenya's road to devolution was a bumpy and murky one. The fight for devolution goes back to the post- independent period where the then Constitution of 1963, also known as the *Majimbo Constitution,* created a federal system with three levels of government. These were the national, regional and the local governments.[74] This created a decentralized system of government. However, when Jomo Kenyatta came into power, his regime amended the constitution by consolidating power in the office of the president.[75] As a result of this, power began to be abused.

Unfortunately, this continued during Moi's era. In 1982, Kenya became a one-party state and through administrative mechanisms the local government was weakened and presidential power was strengthened further.[76] Consequently, Kenyans grew tired of this tyrannical period and began to protest and fight for constitutional review. During this period, it was established that the only way in which the issue of oppression would be solved was by reintroducing a decentralized system. This was captured in the objects and purposes of the Constitution of Kenya Review Act where they planned on achieving eleven goals with devolution being one of them.[77] Thereafter, the 2010 Constitution was introduced.

This Constitution from the onset recognized devolution as it notes that the sovereign power of the people is exercised at the national and county level.[78] The principle of checks and balances apply at both levels with the aim of reducing corruption and enhancing efficiency.[79] Furthermore, the distribution of power was expected to bring citizens closer to government and further enable development by empowering the previously marginalized groups.[80] This is reflected in the objects and principles of devolution in the current constitution.[81]

Chapter two discusses separation of powers as a key concept in preventing misuse of power by ensuring that each organ performs its functions without intrusion. The exception to this

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[74] Kangu J, '*Constitutional Law of Kenya on Devolution*', Strathmore University Press, Nairobi, 2015,73.
[75] Kangu J, '*Constitutional Law of Kenya on Devolution*', 74.
[76] Kangu J, '*Constitutional Law of Kenya on Devolution'*, 83.
[77] Section 4, *Constitutional of Kenya Review Act,* Chapter 3A,2008.
[78] Article 1 (4), *Constitution of Kenya* (2010).
[79] Cheesman N, Lynch G, Willis J, 'Decentralization in Kenya: The governance of governors', 4 *Journal of Modern African Studies* 1, 2016, 6.
[80] Cheesman N, Lynch G, Willis J, 'Decentralization in Kenya: The governance of governors', 3.
[81] Article 174, *Constitution of Kenya* (2010).

rule being checks and balances.[82] This Chapter shall borrow from the discussions in chapter two in order to analyze the hypothesis that it shall seek to prove or disprove. The hypothesis states that the interference by the courts in the impeachment process of governors may enforce human rights for aggrieved persons however it may also interfere in the orderly function of the County Assembly and the Senate.

I shall do this by briefly stating the process of impeachment of a governor in Kenya. Thereafter I shall focus on the impeachment of the Embu Governor Martin Nyaga Wambora as my case study to illustrate how the courts intervention can be problematic. I shall then discuss some challenges of the impeachment process and after discuss the effects of the courts intervention while the process is ongoing verses the effect of the court abstaining from the process until it is complete. Lastly, I shall conclude this chapter with my findings.

3.2. **Impeachment process of Governors in Kenya**

The Constitution provides for grounds to which a county governor may be impeached. He or she may be impeached if found to have grossly violated the Constitution or any other law, if there are serious reasons to believe that he/she has committed a crime under national or International law, if the governor abuses his or her position of office or gross misconduct and if he or she has a physical or mental incapacity that prohibits them from performing functions of a county governor.[83]

The County Government Act, on the other hand lays out the procedure for the impeachment of governors. The first step is for a member of the county assembly to notify the speaker through a motion to remove a governor under the grounds stipulated above. This motion must be supported by at least a third of all members.[84] Thereafter, if the motion is supported the next step is for the Speaker of the County Assembly to inform the Speaker of the Senate of the resolution within two days.[85] During this period, the governor is allowed to continue performing his functions as usual pending the outcomes of the proceedings.[86] After receiving the notice of a resolution from the Speaker of the County Assembly, the Speaker of the Senate shall convene a meeting to hear the charges against the governor and through a

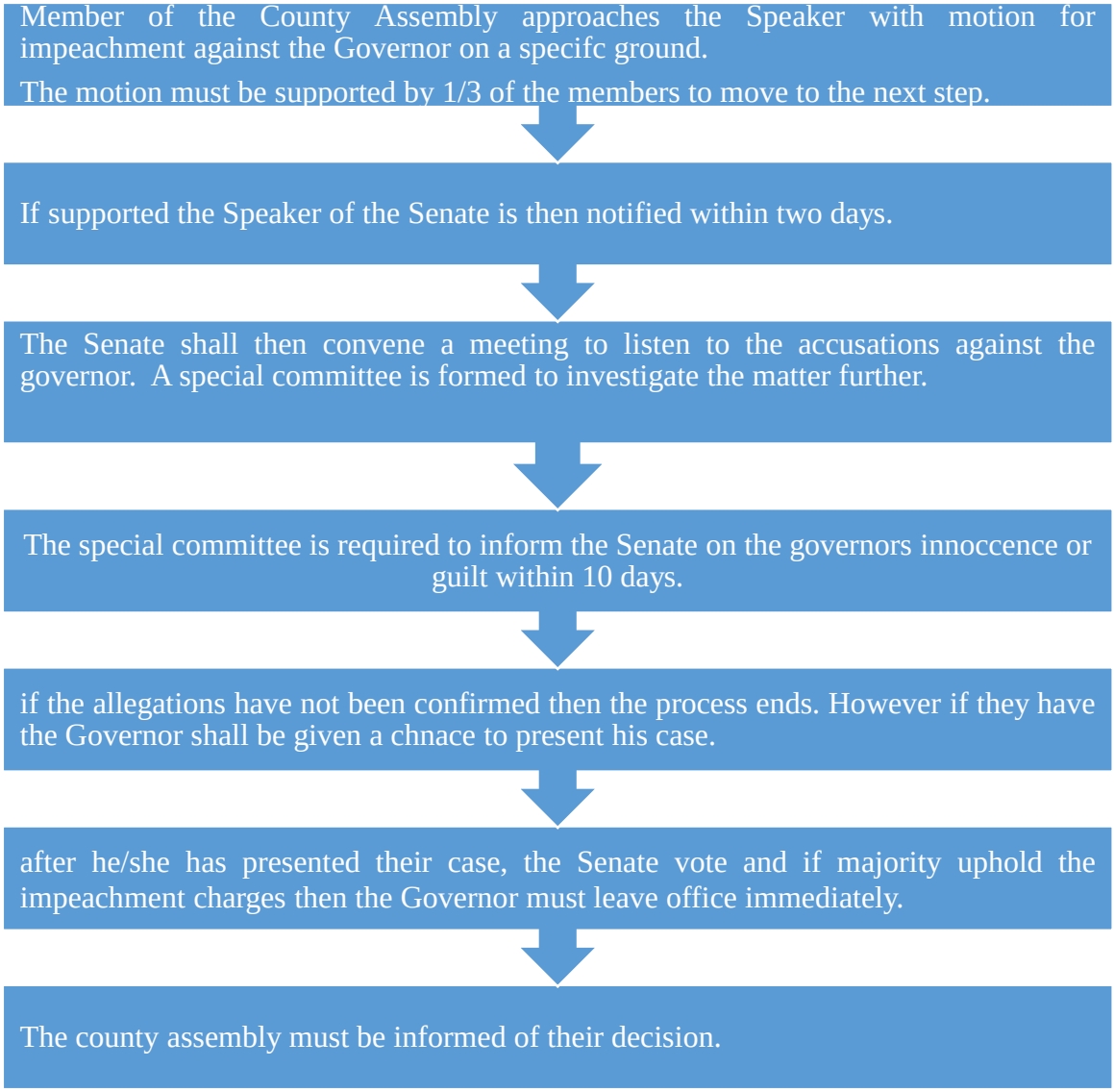
[82] *Council of Governors & 3 others v Senate & 53 others* (2015) eKLR.
[83] Section 181(1), *County Government Act* (2012).
[84] Section 33 (1), *County Government Act* (2012).
[85] Section 33 (2) (a), *County Government Act* (2012).
[86] Section 33 (2) (b), *County Government Act* (2012).

resolution they may appoint a special committee that comprises of eleven members to investigate the matter further.[87] This must be done within seven days. Afterwards, the special committee is required to update the Senate on whether the allegations against the governor have been proven within a period of ten days.[88] During the investigations, the governor has the right to appear before the special committee and present his/ her case.[89]

The results of the investigations are then presented to the Senate and if the allegations have not been confirmed then the proceedings end, however if they have been confirmed then the Governor shall be provided an opportunity to be heard and they shall vote on the impeachment charges.[90] If majority vote to uphold the impeachment charges then the Governor must leave his office immediately,[91] but if the Senate does not have majority vote then the Speaker of the Senate is then to notify the Speaker of the County Assembly of the outcome.[92] The matter can only be re-introduced after a period of three months has lapsed.

The process is illustrated below in form of a diagram.

[87] Section 33 (3), *County Government Act* (2012).
[88] Section 33 (4), *County Government Act* (2012).
[89] Section 33 (5), *County Government Act* (2012).
[90] Section 33(6), *County Government Act* (2012).
[91] Section 33 (7), *County Government Act* (2012).
[92] Section 33(8), *County Government Act* (2012).



3.3. **Impeachment of Governors in Kenya**

In as much as the position of a governor is relatively new, there has been several impeachment attempts. The most problematic one being the impeachment of Martin Wambora the Embu County Governor. His impeachment went on from the year 2014 and ended in 2017. For this reason he has been referred to as the 'master of survival'[93] and the man with 9 lives.[94]

[93] Online: Kiplagat S, 'Martin Wambora, the master of survival' Daily Nation, 30 January 2019. https://www.nation.co.ke/news/Wambora-the-master-of-survival/1056-4958152-utq2ni/index.html on 8 November, 2019.

[94] Online: Orinde H, 'Embu Governor Wambora beats Kivuti in do-or-die petition' Standard, 17 August 2018. https://www.standardmedia.co.ke/article/2001292306/embu-governor-wambora-beats-kivuti-in-do-or-die-petition on 8 November 2019.

As stated above, in 2014, the case of *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (Hereinafter Wambora I)[95], Mr. Wambora sought to challenge the validity and constitutionality of the impeachment process against him as he faced charges of gross violation of the Constitution. Subsequently, the Kerugoya High Court, granted conservatory orders restraining the Speaker of the Senate from proceeding with the ongoing impeachment process.[96] The court's ruling however fell on deaf ears as the Senate carried on with the motion to impeach the governor and they conclusively voted for the removal of Mr. Wambora. Nonetheless, the Governor argued that the impeachment was unconstitutional as it was contrary to the rules of natural justice i.e. his right to fair administrative action and went against the orders of the court.

In response to Wambora's allegations, the County Assembly reminded the court that one of the object of devolution was to "promote democratic and accountable exercise of power"[97] and that this therefore placed the Governor in a position where he is subject to oversight and scrutiny by both the County Assembly and the Senate in order to promote efficiency and make sure the interests of the people are met.[98] In addition to that they maintained the position that it is not the role of the court to review the County Assembly's actions and that 'no organ should interfere with the core functions of another'. [99] Another important point brought out by the Respondents in this case is that according to section 181 of the Constitution and section 33 of the County Government Act the jurisdiction to move a motion for impeachment of a governor vests with the County Assembly and the steps as prescribed in both the Constitution and the County Government Act must be followed through without any interference by the courts as they are not mentioned in this process. They argued that this was in line with the concept of separation of powers and should thus be respected. They proceeded by borrowing from the dicta in *Marbury v Madison* and noted that the role of the court is to decide on matters in relation to individuals rights and not to investigate into how the Senate and County Assembly have performed their duties.[100] Therefore, it was their view that the court should maintain a supervisory role and not intervene in the process of impeachment as they do not have jurisdiction to govern it. Nevertheless, the court was of the

[95] (2014) eKLR.
[96] *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR, para 7.
[97] Article 174(a), *Constitution of Kenya* (2010).
[98] *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR, para 21.
[99] *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR, para 28.
[100] *Marbury v Madison* (1803), The Supreme Court of the United States.

opinion that the impeachment process was null and void since it occurred while disobeying court orders and as a result the Governor was restored to office.

In the year 2015, in the case of *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (hereinafter Wambora II) [101] , Mr. Wambora rushed to court again after the second impeachment motion commenced arguing that he was entitled to participate in the process of his removal and that he was denied this opportunity. Hence, he claimed that his rights during this second impeachment were infringed upon making the impeachment unconstitutional once again. In response to the Governors claim the Respondents relied on the principle of separation of powers noting that each arm of government must allow the other to perform their function without intrusion. Additionally, the Respondents also relied on the case of *Doctors for Life International v Speaker of the National Assembly and others (hereinafter Doctors for Life case)* where it was argued that "the courts should strive to achieve a balance between their role as guardians of the constitution and rule of law including any obligations that parliament is required to fulfill in respect to the passage of laws, on one hand and respect which they are required to accord to other branches required by the principles of separation of powers." [102] Therefore, still stand by their position in *Wambora I* where they argued that they have the sole jurisdiction during the impeachment process and should be able to conduct it wholly without any interface. In conclusion, the court recognized that they have the power to review and check that actions of County Assembly and the Senate are in compliance with the Constitution and that they have the power to quash an impeachment proceedings if it occurs contrary to the Constitution.[103] They continued by stating that there are clear steps to be followed provided by the County Government Act in the removal of governors and that they are allowed to intervene where matters of constitutional violation arises. Therefore, they concluded that the impeachment process was conducted according to the law and no constitutional violation arose as he was provided an opportunity to appear before the special committee and present his case however he didn't show up.

[101] *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (2015) eKLR.
[102] *Doctors for Life International v Speaker of the National Assembly and others* (2006), The Constitutional Court of South Africa.
[103] *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (2015) eKLR, para 241.

Mr. Wambora dissatisfied with the judgement of the High Court appealed to the Court of Appeal of Nyeri in the case of *Martin Nyaga Wambora v County Assembly of Embu & 37 others (hereinafter Wambora III).* [104] He argued on four grounds ; principle of stare decisis, the threshold for the removal of Governors under section 181 of the Constitution, public participation in the impeachment process and lake of fair hearing and bias of the Senate's proceedings.[105] The appellants sustained their previous argument in the High Court noting that the process of impeachment was one preserved for the County Assembly and the Senate thus, the courts intervention is uncalled for unless a constitutional provision has been violated. While taking into consideration all arguments brought before it, the Court of Appeal came to the conclusion that the judgement of the High Court does not stand as it failed to take into account various issues brought before it.

In 2017, in the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another (hereinafter IV)* , [106] the Speaker and the Clerk of the County Assembly approached the Supreme Court with the aim of challenging the Court of Appeals decision. The main argument the appellants brought before the court was that it can only interfere upon the conclusion where the constitutionality of the outcome can be questioned and to investigate if due process was followed and interference in between would be contrary to the separation of powers.[107] However, the Supreme Court stated that they "will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another".[108] Thus, the Supreme Court prioritized the principles of separation of powers as it alluded that they should not interfere with the work of another arm of government.

Furthermore, the Supreme Court did not provide their position on what point the courts can intervene during the impeachment process of governors. However, they concluded by formulating the following principles;

[104] *Martin Nyaga Wambora v County Assembly of Embu & 37 others* (2015) eKLR.
[105] *Martin Nyaga Wambora v County Assembly of Embu & 37 others* (2015) eKLR, para 8.
[106] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR.
[107] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 33.
[108] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 61.

"*a) each arm of Government has an obligation to recognize the independence of other arms of Government;*

(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

(e) in the performance of the respective functions, every arm of Government is subject to the law"[109]

Thus, leaving the question unanswered. The Supreme Court did not solve the issue because as seen in point (d) above the courts can intervene 'in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case'. Therefore, the Supreme Court left other courts with the discretion to decide on whether and when to intervene in the impeachment process.

From the case above, it is evident that the matter of judicial intervention in parliamentary proceedings, especially with reference to the impeachment process of governors, is a grey area. Another similar situation arose with the impeachment of the Murang'a County Governor Mwangi wa Iria was accused of misappropriating funds and failing to account for the county's debt.[110] In the year 2015, the Muranga Governor received notice of the motion for his removal, however, he did not respond or appear before the County Assembly and thus the motion was moved and put to vote.[111] He then petitioned the court to put a stop to the impeachment proceeding and grant conservatory orders.[112] As this was ongoing, the special committee was formed and investigations begun.[113] The petitioners relied on *Wambora I* and argues that the court has jurisdiction to intervene as long as there is a violation of the Constitution. Similarly, the Senate of Muranga reasoned as the Senate of

[109] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 63.
[110] Online: Mwaura M, 'Muranga County Governor Mwangi wa Iria IMPEACHED' Daily Nation, 22 October 2015.
https://ilakenya.org/muranga-county-governor-mwangi-wa-iria-impeached/ on 10 November 2019.
[111] *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others* (2015) eKLR, para 6.
[112] *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others* (2015) eKLR, para 27.
[113] *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others* (2015) eKLR, para 8.

Embu did in Wambora's impeachment and argued that the drafters of the Constitution intended for the impeachment of Governors to be kept outside the judicial realm and that approaching the courts was left as a result in the instance of an appeal.[114] The High Court agreed with this line of thought and noted that judicial interference would not be appropriate as the Constitution is supreme and we should respect it.[115] As a result of the ruling, the Senate proceeded to impeach the Governor however the Senate found no fault on the Governor side thus he continues to remain in office.[116]

3.4. **Challenges Faced in Impeaching Governors**

As illustrated through the two instances above, it is often left to the court to decide on whether it should intervene or not. However, this is not the ideal situation. In as much as it is the judiciary's mandate is to interpret the law, protect the constitution and ensure justice is done to all, they are not above the law.[117] Giving them the sole power to decide on when they should intervene in a process that ideally does not involve them could be interpreted as them acting ultra vires. This is one of the challenges faced in the impeaching of governors.

Other challenges often experienced during this process that often contributes to the confusion on judicial intervention is that the Senate and the County Assembly are very powerful. The Constitution grants them the power to impeach the President[118] and the Deputy President[119] while the County Government Act gives them power to impeach County Governors.[120] This is not entirely a bad thing as the President, Deputy President and Governors actions need to be checked as it is an objective of devolution.[121] The issue however, is the impeachment process can be a political process. For example, an impeachment proceeding may start as a result of malice towards a governor , a misunderstanding or even issues such as political rivalry.[122] Hence, impeachment proceedings may at times lack objectivity. As a result, governors often spend their time trying to impress them rather than perform their constitutional duty due to the fear of their

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[114] *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others* (2015) eKLR, para 35.
[115] *Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others* (2015) eKLR, para 63.
[116] Online: Muchiri M, 'Senate Rules on Governor Mwangi wa Iria Impeachment' ,7 November 2015. https://www.kenyans.co.ke/news/senate-rules-governor-mwangi-wa-iria-impeachment on 10 November 2019.
[117] Article 2(1), *Constitution of Kenya* (2010).
[118] Article 145, *Constitution of Kenya* (2010).
[119] Article 150(2), *Constitution of Kenya* (2010).
[120] Section 33, *County Government Act* (2012).
[121] Article 174(i), *Constitution of Kenya* (2010).
[122] Muchungi S, 'Impeachment in the Kenyan Legal Context', Unpublished LLM Thesis, University of Nairobi, Nairobi,2017/2018, 23.

removal. [123] The Embu governor, Mr. Wambora, has highlighted this very issue as he once said that 'governors are at the mercy of the MCA's'. [124] He further emphasized this point by stating that Governors 'should not be living in fear of being impeached'.[125]

The Supreme Court of Nigeria expounds on this in their ruling of *Hon. Muyiwa InakoJu & Others v Hon Abraham Adeolu Adeleke.*[126] The Court stated that it is unfair for section 188 of the Nigerian Constitution to be invoked simply because the Governor is not liked. Furthermore, the Supreme Court of Nigeria emphasized that impeachment of a governor is a serious 'political weapon' and should not be used haphazardly. [127] In addition to this, the Court also reminded the parties that at the end of the day the governors are still human and are bound to make mistakes. The Kerugoya High Court borrowed from the Supreme Court of Nigeria to drive the point that the removal of a governor through impeachment should not be taken lightly and should not be used to fuel ulterior motives.[128]

Another challenge is that the grounds stipulated in article 181 of the constitution are not clear.[129] By using the term "clear" I am referring to the fact that the terms used when discussing the grounds for impeachment are not defined. This is often an area of dispute when a motion to impeach a governor is raised. For example, the grounds of impeachment are ; "gross violation of the Constitution, serious reasons to believe a crime has been committed under national or international law, abuse of office or for gross misconduct, physical or mental incapacity to perform their function."[130] It is not clear what amounts to 'gross violation' and 'gross misconduct'. There are no laws that help clarify what amounts to gross violation or misconduct and therefore it is left to the court to interpret. Furthermore, it is left to the County Assembly and Senate to determine the threshold. This was emphasized

[123] Online: Fwamba F, 'Fwamba NC Fwamba: We must streamline Law on Impeachment', Kenya Today, 10 May 2014.
https://www.kenya-today.com/news/fwamba-impeachment-law-in-kenya on 20 November 2019.
[124]Online: Kimonye K, 'MCAs misusing powers to impeach Governors – Wambora', Citizen, 6 November 2016.
https://citizentv.co.ke/news/mcas-misusing-powers-to-impeach-governors-wambora-105073/ on 20 November 2019.
[125] Online: Kimonye K, 'MCAs misusing powers to impeach Governors – Wambora', Citizen, 6 November 2016.
https://citizentv.co.ke/news/mcas-misusing-powers-to-impeach-governors-wambora-105073/ on 20 November 2019.
[126] *Hon. Muyiwa InakoJu & Others v Hon Abraham Adeolu Adeleke* (2007), Supreme Court of Nigeria.
[127] *Hon. Muyiwa InakoJu & Others v Hon Abraham Adeolu Adeleke* (2007), Supreme Court of Nigeria.
[128] *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* (2014) eKLR, para 255.
[129] Article 181, *Constitution of Kenya* (2010).
[130] Article 181 (1), *Constitution of Kenya* (2010).

by Cottrell Ghai. She stated that there is often no standard of proof to be applied when discussions on grounds for impeachment are brought up.[131]

This is an issue because without clarity a governor can be impeached on either ground as the County Assembly and the Senate determine the threshold. This makes it harder to challenge as they have the mandate to deal with the impeachment process. Furthermore, leaving the definition of gross misconduct and gross violation in the hands of the Senate and the County Assembly contributes further to the confusion as the definitions may vary on case to case basis.

Lastly, the Governor being impeached has the right to appear before the special committee and present their case. This is an important step as every person has a right to be heard.[132] Lord Denning opined that the right to fair hearing should be accompanied by the right of the accused to know the case being made against him.[133] Therefore the governor has the right to challenge and contradict the evidence before the court or any appropriate body.Most impeachment proceedings are often challenges by the governors in the case because they were denied the right to be heard. The court has a duty to intervene in processes that don't involve it especially when constitutional rights are violated.[134] In *Judicial Service Commission v Mbalu Mutava & another* the right to be heard was recognized not only as a rule of natural justice but as a constitutional principle.[135] Thus, in the instance the right to be heard is violated the courts must step in as seen in *Wambora I* .[136] If the Senate and County Assembly followed the correct procedure to impeach

The challenges stated above contribute to the reasons as to why the court intervenes in the impeachment proceedings. If there are rights that the aggrieved party is denied it is the courts duty to step in and protect them in order to provide justice for all. Additionally, if a motion of impeachment starts out of malice, the court has a duty to step in and rectify it. They cannot

[131] Yash Pal Ghai,' president broke the law: now what?' https://www.the-star.co.ke/news/2014/02/14/trying-to-understand-impeachment-process_c895960on 21 February 2019.
[132] Article 50(1), *Constitution of Kenya* (2010).
[133] *Kanda v Government of the Federation of Malaya* (1962), the Court of Appeal of Malaysia.
[134] Article 165(3)(b), *Constitution of Kenya* (2010).
[135] *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR.
[136] *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* (2014) eKLR.

just sit back and watch unconstitutional matters happen before its eyes.[137] Therefore, in it is evident that judicial intervention enforces human rights for aggrieved parties.

3.5. **Analysis**

As discussed in chapter 2 of this paper, the essence of checks and balances is to hold the arms of government accountable. Through judicial review the judiciary keeps the legislature in check. However, parliamentarians are of the view that judicial restraint should apply and they should desist from interfering in their functions as it goes against the doctrine of separation of powers. The judiciary has responded in some instances and given reasons for their intervention. For example in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* , the High Court determined that as long as the Constitution has granted jurisdiction to intervene in a matter where there has been failure to respect the fundamental rights and abide by orders with constitutional underpinnings they can intrude.[138] However, they proceed to take note that they must proceed with caution and exercise restraint so as to only intervene where appropriate. This is important because if the court where to interfere with parliamentary proceedings such as impeachment of governors haphazardly then the legislative arm would be constantly defending itself to the judiciary which in the end defeats the principles of separation of powers Montesquieu propounded.

3.6.**Conclusion**

This chapter through the use of Wambora's case sought to demonstrate the prevailing issue on court intervention in the impeachment process of governors. It also sought to portray that the intervention of the courts is considered overstepping and to some extent undermines the legislative authority. Lastly, through the Wambora case it was evident that the courts intervention in the impeachment process of governors lengthens the process as he was in and out of court from the year 2014-2017. This is not the ideal situation as mentioned above. The doctrine of separation of powers dictates that the organs ought not to interfere with the independent functions of the other bodies unless through checks and balances.

[137] Masinde M, 'Separation of power in Kenya: Analysis of the relations between judiciary and the executive', 5 *Int J. Human Rights and Constitutional Studies* 1, 2017, 40.
[138] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* (2015) eKLR, para 172.

Furthermore, through illustrating the challenges when impeaching governor's aspects such as clarity and failure to follow due process often forces the courts to intervene. Thus, if such situations could be avoided and the legislature performs its functions as it ought to the court would wait to be approached after the process is complete on the basis of appealing the decision of the Senate. Thus, it is evident that a synchronized approach should be adopted and the procedure for impeachment should clearly state as to when intervention of the courts should take place. However, if fundamental human rights are violated, it should not be expected of the courts to sit back and watch as they are the guardians of the constitution.[139]

[139] Ochiel J Duley, "the Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case would be decided differently today", 2015. http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/ on 18 February 2019.

CHAPTER 4

4. CONCLUSIONS AND RECOMMENDATIONS

The doctrine of separation of powers demands for each organ to perform their functions without interface with the exception of checks and balances. Thus, the branches relate with each other through checks and balances. However, once in a while conflict may occur between the branches due to over supervising the role of the other branch as illustrated in *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*. With this case, it is evident that there are conflicting views as to when the court can intervene in the impeachment process of governors.

This chapter will give a summary of the findings, conclusions and some recommendations with reference to the hypothesis and research questions at the beginning of the study.

4.1. Restating the problem

This dissertation recognized that section 33 of the County Government Act provides for the removal by impeachment of a county governor. Under the same section, it is expressly stated that the impeachment process is one that is reserved for the County Assembly and the Senate. The issue therefore arises with the intervention of the courts in the ongoing impeachment of a governor.

4.2. Restating the Hypothesis and Problem Questions

The questions I sought to answer through my research were the following. My first question was whether the court's intervention in the impeachment process of governors through judicial review goes against the doctrine of separation of powers? The second question was whether the courts interference in the impeachment of governors disrupts the orderly function of the County Assembly and Senate? Lastly was whether human rights for aggrieved parties are enforced more when the courts intervene in legislative functions?

These questions were guided by three hypotheses of this study. The first hypothesis stated that the doctrine of separation of powers entails that each arm of government performs its function without the interference of the other branches with the exceptions of checks and balances. The second hypothesis was that while the interference by the courts in the impeachment process of governors may enforce human rights for aggrieved persons it may also interfere in the orderly function of the County Assembly and the Senate. The last

hypothesis being that a synchronized approach of the impeachment process between the County Assembly and the judiciary will ensure efficiency.

4.3. **Findings and Conclusions**

This section shall deal with the findings of the dissertation through responding to the questions above.

4.3.1. **The intervention of the courts does not go against separation of powers**

This question concerned whether the court's intervention in the impeachment process of governors through judicial review goes against the doctrine of separation of powers. In response to this question, chapter two of the study discussed thoroughly the doctrine of separation of powers and its principles. The aim of this was to portray that judicial intervention by the power to review judicial decisions is not going against separation of powers but rather the courts performing its duty on checking the legislature. This helps hold them accountable for their decisions and actions as discovered in chapter two.

Thus also affirming my hypothesis that the doctrine of separation of powers entails that each arm of government performs its function without the interference of the other branches with the exceptions of checks and balances.

4.3.2. **The courts intervention disrupts the orderly function of the County Assembly and the Senate**

The question answered was whether the courts interference in the impeachment of governors disrupts the orderly function of the County Assembly and Senate. Chapter three of this study using the *Wambora* case illustrated that court intervention could frustrate the role of the County Assembly and Senate during impeachment. This was shown through the length the process of the impeachment of governor Wambora took. Additionally, the aspect of the County Assembly and the Senate explaining to the courts on why they decided to act in a particular way also disrupts their function. This therefore affirms my hypothesis stating that a synchronized approach of the impeachment process between the County Assembly and the judiciary will ensure efficiency.

4.3.3. **Rights of aggrieved parties are enforced through judicial intervention**

The last question this study sought to answer was whether human rights for aggrieved parties are enforced more when the courts intervene in legislative functions. After the discussions in chapter three on the impeachment process in Kenya it is true that human rights are enforced more when courts intervene. The case study of Wambora illustrates this. After he approached the court in 2014 he was then given a chance to appear before the special committee of the Senate and defend himself. This is after arguing that his right to fair administrative action was denied. Thus affirming that through the intervention of the court, human rights are enforced. This would not be the case if the courts waited for the impeachment process to be complete before intervening as the rights of the aggrieved party would have already been violated. This then defeats the purpose of the law and the justice system. Therefore, the courts should be allowed to intervene in the ongoing impeachment process especially instances where human rights are violated.

4.4.**Recommendations**

This section shall focus on recommendations based on the discussions from the findings above. One of the changes that could be made in order to make the process more efficient and less problematic is to make clear the grounds for impeachment. This is a rather obvious solution given the explanations in chapter 3 on how differently terms such as 'gross violation' and 'gross misconduct' can be interpreted. Therefore, fewer impeachment processes would be challenged in court if interpretation section on what amounts to gross violation or gross misconduct was in the County Government Act. In addition to that, the courts would not need to interfere in the procedure if all aspects of the process are crystal clear.

Another way in which the battle between the judiciary and the legislative branch would decrease is if application of the impeachment procedure was stricter. By this I am referring to where a governor is given the chance to appear before the Senatorial special committee but instead would rather go to court to challenge the proceeding altogether. This can be illustrated in *Wambora I* where instead presenting his case before the special committee he rushed to court to get a conservatory order. If the correct procedure was followed, governors will be heard and the Senate would disapprove of the impeachment as seen in the case of the governor of Makueni, Kivutha Kibwana. This would reduce the confusion caused through the back and forth experienced during these proceedings between the judiciary and the

legislature. Therefore, a complementarity system between the courts and the Senate would solve the present issue of the court interfering in the impeachment process. It would entail the governor first approaching the Senatorial committee for any issues he/she has and wants to be resolved before approaching the courts.

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