Separation of power in Kenya: analysis of the relations between judiciary and the executive

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Abstract: The separation of powers doctrine is a fundamental principle of law that maintains that all three organs of government remain separate. This requires that the judiciary, the executive and the legislature all remain distinct from each other to ensure that the different arms of government do not encroach upon each other. The rationale of the separation of powers is often elided with the rationale of checks and balances and with the rationale of the dispersal of power generally in a constitutional system. The subject is divided into two substantive parts. The first part analyses the origin, nature, purpose and major modern manifestation of the doctrine of separation of powers. The second part focuses on how the doctrine operated in Kenya under the repealed constitution (pre-2010) and how it has contributed to a solid and sustained constitutional system post 2010. The relationship between the executive and the judiciary forms the crux of the second part with judicial independence as a common theme.

Keywords: separation of powers; executive; judiciary; legislature; checks and balances; judicial independence; judicial activism; judicial restraint.


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1 Introduction

The crux of the concept of separation of powers is the mutual relations between the three organs of the government namely legislature, executive and judiciary (Singh, 1996). The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a
separation of three main spheres of government stated above. Within the constitutional framework the meaning of the terms legislative, executive and judicial authority are of importance. Legislative authority is the power to make, amend and repeal rules of law. Executive authority on the other hand refers to the power to execute and enforce rules of law. While judicial authority is the power where there is a dispute, to determine what the law is and how it should be applied in the disputes.

### 1.1 Origin

The origin of the principle of separation of powers can be traced back to the period of Aristotle and Plato. Aristotle for the first time in man’s history divided government functions into three categories which were deliberative, magisterial and judicial (Singh, 1996). This is referred to as the Aristotlean theory of separation of powers. His formulation, however did not envisage the clear separation of functions between the legislature and the judiciary, for he considered the judiciary as a delegate of the former.

Later, Locke came up with what is referenced as the Lockian theory of separation of powers. He categorised the powers of the government into three parts: continuous executive power, discontinuous legislative power and federative power. Continuous executive power refers to the executive and the judicial power, discontinuous legislative power relates to the rule making power while the federative power signifies the power regulating the foreign affairs (Massey, 1995).

As the 17th century drew to a close, Locke strongly warned against the concentration of state powers in few hands. He stated that where state power is entrusted with a few persons, the liberty and security of the citizenry often rests in imminent danger (Locke, 2012). As a philosopher, he however did not envisage an independent judiciary and his assertion that “there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate” is indicative of the fact that he did not believe in independence and equality as key attributes of separation of powers (Mbondenyi and Ambani, 2012).

It has also been argued that he did not have a theory of the importance and desirability of the reposition of these powers in separate hands in order to preserve liberty and constitutional harmony [Laslett, (1960), p.132].

The modern day doctrine of separation of powers is often credited to the French jurist, Montesquieu. Many have argued that is he and not Locke who should be called the father of the doctrine. He has had the greatest influence on the emergence of the pure doctrine of separation of powers.

He based his exposition on the British Constitution. In the pertinent chapter of his well celebrated work, L’Esprit des Lois (1748), where he purported to describe the British constitutional system of the 18th century so that it might serve as an example to France of a political dispensation founded on liberty, which according to him, was the supreme objective of a political society. He deduced that the UK Constitution had a discernable executive, a legislature and a judiciary. This tripartite division of functions, he argued was a common feature of governments.

In its purest form, Montesquieu’s concept of separation of powers may infer to at least three different things. Firstly, that the same persons should be part of more than one arm of government, for example cabinet secretaries should not be members of parliament. Secondly, one organ should not interfere with the work of the other; the judiciary should...
be independent of the executive and lastly one arm of government should not perform the functions of the other (Mbondenyi and Ambani, 2012; Wade and Phillips, 1977).

In general therefore the organisation, personnel and tasks of the three different branches of the state machinery ought to be kept entirely separate.

1.2 Nature and purpose

The separation of powers doctrine is a fundamental principle of law that maintains that all three organs of government remain separate. This requires that the judiciary, the executive and the legislature all remain distinct from each other to ensure that the different arms of government do not encroach upon each other (Greenfeld, 2012).

There exists at least two elements of pure separation of powers; Institutional separation of powers which has been explained as the demand for separation which would extend only to the three institutions of government and their personnel; it would have no further implications and functional separation or separation of powers in the abstract (Finnis, 1967–1970).

A strict adherence to the separation of powers theory demands that one branch of government must not perform the functions of another branch (Vile, 1967). Separation of powers in the abstract has been explained as signifying a conceptual system of government functions in which there are three functions or powers of government – legislative, executive and judicial – and the institutions set up to exercise these powers or functions are subject to the overriding requirement that no person or body should exercise more than one such function [Finnis, (1967–1970), p.168].

The cast iron doctrine of separation of powers has therefore come to signify organic separation as well as separation of functions, that is, that one branch of government should not usurp functions belonging to another branch. This view was espoused by the US Supreme Court as early as 1881 in where it stated that:

“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.” [Kilbourn v. Thompson, (1881), p.190]

In practice however, separation of powers in its purest form is impracticable (Oluoch, 2015) A pure separation of powers in terms of institutions and functions of government has never been achieved, nor is it desirable. Dixon stated in relation to the distinction between the three governmental powers that, “it is one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government and the practical and political consequences of an inflexible application of their delimitation” [Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan, (1931), p.91].

Over the years separation of powers as a doctrine has served various purposes ensuring that governments operate and serve the people as expected. Where state power is entrusted with a few persons, the liberty and security of the citizenry often rests in imminent danger (Locke, 2012). In what is considered as the context of separation of powers, Locke stressed the need for the division of powers of the government and averred that:
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“It may be too great a temptation to human frailty, apt to grasp 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 execute themselves from obedience to the laws they make and suit the law, both in its making and execution, to their private advantage and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government.” (Locke, 2012)

Montesquieu’s basic outline of the doctrine is captured in his exposition that when the legislative and executive powers are united in the same person, there can be no liberty; so also will it be, if the judicial power is not separated from the legislative and executive.

“Were it combined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, be it of the nobles or the people, to exercise those three powers, that of implementing the public resolutions, and that of adjudicating the causes of individuals.” (Montesquieu, 1949)

Separation of powers is considered a key component of political liberty. 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 (Vile, 1998).

Separation of powers also plays a key role albeit indirectly in the quality of legislation passed by the parliament to govern its people. Locke fronted the idea that oppressive laws are less likely if the lawmakers are ordinary citizens and have to bear the burden of the laws they make themselves. This in part makes up the Lockean justification for separation of powers.

He stated that “the legislative power is put into the hands of diverse persons who duly assembled, have … a power to make laws, which when they have done, being separated again, they are themselves subject to the laws, they have made; which is a new and near tie upon them, to take care, that they make them for the public good” (Locke, 2012).

Consequently, it is crucial that lawmakers have no power to control the application or the execution of the law; they should not be able to make prosecutorial decisions or participate in adjudication. Members of the legislature should not be part of executive or judiciary.

The separation of powers doctrine most importantly entails the principle of checks and balances where each branch of government is entrusted with special powers designed to keep a check on the exercise of the functions of others (Labuschagne, 2004). This ensures that the arms of government do not overstep their mandate at the expense of the rule of law and the wellbeing of the citizens.

It allows other branches of government a measure of intrusion into another branch’s functions (Barber, 2001). The legislature for example, checks the executive through reserving the power to impeach a President, while the executive on the other hand checks the legislature through presidential assent to make a bill law. The judiciary on its part checks the executive and legislature through its power of review. Conversely the executive and legislature check the judiciary through determining the appointment of the members of the judiciary (Seedorf and Sibanda, 2008).

The general notion behind the doctrine of separation of powers is that a concentration of too much power in a single entity will lead to the abuse of power (O’Regan, 2005).
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The doctrine of separation of powers has come a long way; from being non-existent in practice under the repealed constitution to being the backbone upon which the arms of government are rooted on. Before 2010 the judiciary was not independent of the executive as the president could appoint judges without consulting the judicial service commission and judges did not enjoy security of tenure. This has now changed as the commission plays a key role in the appointment and removal of judges and magistrates from office.

2.1 Under the 1963 Constitution: pre 2010

The constitution provided for the three conventional arms of government, the executive, legislature and judiciary. However the tripartite was an unequal with the executive, more specifically the presidency having more power than the other arms of government. This was occasioned by several amendments to the constitution vesting most of the state power on the executive.

The judiciary in Kenya has been progressively viewed as subservient to the executive, an upholder of state power and a poor protector of citizens’ rights (Oseko, 2011). It was purposely designed to serve the interests of the government of the day. This assignment of a narrow role to the judiciary was achieved through the establishment of constitutional rules that enabled the executive to control the Judiciary, rules which remained in place until the promulgation of a radically different constitution in August 2010 (The Judiciary, 2012–2016).

The fact that the country was for a long time under an authoritarian regime during Moi’s presidency did not help. He ruled with an iron fist using his powers to ensure that the other arms of the government bend to his will. Pro government electoral candidates were rigged in as members of parliament and judges appointed to superior courts to play a puppet like role for the presidency. Moi’s government had just two years before it deleted from the old constitution the provisions guaranteeing security of tenure of judges which seriously undermined personal independence of the judges [Constitutional of Kenya (Amendment) Act, Act No. 4 of 1988].

To say that judiciary independence was elusive during this dark period in Kenya’s history is an understatement. Simply put there was no judiciary independence in practice. The main shortcomings of the constitutional at that time was it failed to explicitly provide for the independence of the judiciary in the same way it did for the other two arms of the government (Mbondonyi and Ambani, 2012).

The constitution vested executive authority of the state on the president (Section 23, Subsection 1, 1963 Constitution of Kenya). Similarly the power to legislate was reserved for parliament (Section 30). The lack of a corresponding provision for the judiciary inevitably meant that the Constitution had failed to set a foundation on which judicial independence could be built on (Mitullah et al., 2005).

Although the independence constitution granted the judiciary some measure of formal independence, it was treated as a government department and not as an equal and independent arm of government. Indeed, the formal grants of independence were later removed through constitutional amendments. As a result, the judiciary lost institutional autonomy and became a handmaiden of the executive (The Judiciary, 2012–2016).
Pre 2010, the judiciary faced a constitutional onslaught from the executive. Its credibility and independence was weakened by the fact that the president could appoint judges without the involvement of the Judicial Service Commission. This provision came into full force during Mwai Kibaki’s presidency where he appointed 40 judges in just five years.

The overweening influences of the executive created an enfeebled judiciary, an arm of government strikingly reluctant to play its classical role in the defence and upholding of the constitutional principle of separation of powers.

There had been efforts to delink the judiciary from the executive with very little success. The judiciary was part of the public service and a department under the attorney general’s office (Oseko, 2011). In 1985, the Waruhiu Committee noted that the judiciary was being treated as an appendix of the government instead of a distinct arm, thus compromising the doctrine of separation of powers and eroding the independence of the judiciary, so did the Kotut Committee (Report of the Civil Service Review Committee, 1979–1980).

Most of the recommendation put across by this committee could not be affected because it was President Moi who established these committees and drew the list of the issues to be investigated and separation of powers as envisioned by Montesquieu was not part of his agenda. This did not change until 8 May 1995, President Moi published in the Kenya Gazette a Legal Notice delinking the judiciary from the Civil Service (Kenya Gazette Supplement, Legal Notice No. 3 of 1995).

However, a closer look at the legal notice reveals that the judiciary was delinked from the civil service minimally and only with regard to terms and conditions of service. It did not include the larger aspect of institutional independence that requires stronger financial independence, in terms of budgeting and allocation of funds to cater for the newly delinked services, relatively free from interference and control of parliament and executive. This was a cosmetic reprieve that did not go to the root of, or solve, the problem of lack of institutional independence (Oseko, 2011).

In theory, the repealed constitution had set out to ensure that a system of checks and balances existed between the three arms of government. In practice, however it failed to deliver failing short of the threshold it had. The legislature lacked the requisite independence and power to check the executive (Mbondenyi and Ambani, 2012). The president had the power to commence the sessions of parliament as opposed to the speaker (Section 58, Repealed Constitution of Kenya). The power to prorogue and dissolve parliament also lay with the president (Section 59, Repealed Constitution of Kenya). This meant that the August house could not act independent of the presidency.

The constitution did however provide the parliament with the power to impeach the president through a vote of no confidence. Such a verdict would however result to the termination of the life of parliament (Section 59, Subsection 3). The power to impeach the president gave as much as it took away from parliament. As a result the executive could violate fundamental rights and liberties without fear of action taken against him by the parliament. Most members of parliament could not risk going back to the ballot; a return to parliament was not guaranteed.

2.2 Under the Constitution of Kenya 2010

The Constitution of Kenya provided a perfect opportunity for the judiciary to de-link from the executive. Through its architectural design the constitution evinces separation of
power. Thus Article 1(3) provides that the sovereign power, which by Article 1(1) belongs to the people, is delegated to state organs, namely, parliament and legislative assemblies in the county governments, the national executive and the executive structures in the county governments, and the judiciary and independent tribunals, which all should perform their functions in accordance with the constitution.

Article 94(1) then vests legislative power at the national level in parliament, while Article 185(1) vests such power in the devolved government in the county assembly. A notable outcome of the deliberate effort made during the formulation of the constitution to tame the overbearing executive which characterised the first four decades of Kenya’s post-independence period, is the omission by the constitution to expressly vest executive authority at the national level in either the president or the cabinet, although the traditional executive functions such as foreign affairs, provision of public services, maintenance of law and order and defence are expressly vested in the president by Articles 131 and 132. This is unlike executive authority at the county level which is expressly vested in and exercisable by the county executive by dint of Article 179(1).

It is also noteworthy that apart from the listed functions, Article 132(4)(a) provides that the president may only exercise such other executive function provided in the ‘constitution or in national legislation’. This was seemingly intended to constrict the traditional notion of executive authority as the residue of state authority after legislative and judicial functions have been assigned.

The constitution provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution (Article 159, Sub-article 1). The constitution also expressly provides for judicial independence. It states that “in the exercise of judicial authority, the judiciary, as constituted by Article 161, shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority” (Article 160, Sub-article 1). This provision ensures that the judiciary is independent if the executive. In complete contrast to the situation before 2010 the president has no control over the judiciary.

The president however plays a key role in the appointment of the chief justice and the deputy chief justice. The president shall appoint the chief justice and the deputy chief justice in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly. He or she also appoints all other judges, in accordance with the recommendation of the Judicial Service Commission (Article 166, Sub-article 1).

A judge may be removed from office through a motion initiated by the Judicial Service Commission or through a petition of by person to the Judicial Service Commission. The president only appoints the tribunal that will listen and determine the case against the judge (Article 168). These provisions takes the judiciary out of the control of the executive and enables it play its role of ‘checking’ the other arms of government.

The constitution has clearly put up measures to ensure judicial independence. In the context of this constitutional architecture it is not surprising that courts in Kenya had to address the question about the extent to which they could adjudicate over the exercise of power by the other branches of government in several disputes which arose after the promulgation of the Constitution of Kenya in 2010. This issue, in the Kenyan context, went to the core of the relationship between the constitutional principles of separation of powers and supremacy of the constitution.
2.2.1 Judicial activism in Kenya

There exist neither acceptable nor clear definitions of judicial activism. An expanded role of judiciary challenges the traditional notions of separation of powers (Pieterse, 2004). Inevitably, therefore, courts in new constitutional democracies are required to involve themselves in areas that were the traditional domain of the other branches of government.

When judges substitute the constitutional interpretation of the other governmental branches that cannot clearly be said to be unconstitutional with that of their own, the judges are engaging in judicial activism (Kmiec, 2004). Another definition of judicial activism is when a court fails to follow precedent in its own prior decisions.

Judicial activism is also used to describe decisions of judges who digress from applying established canons of interpretation and not to apply them at all (Kmiec, 2004). Judicial activism is also used to describe when a judge with an ulterior motive moulds and manipulates his interpretation of the constitution to fit his political or moral point of view. However the difficulty with this description of judicial activism is establishing evidence of an ulterior motive which is not easy (Kmiec, 2004).

Although judicial activism is a phrase widely used to criticise court decisions, the use of the term is varied (Roach, 2001).

Under the new democratic constitution judges are exercising considerable influence in their country’s politics than ever before. As a result, courts have been perceived in some quarters as getting too powerful. This is because they are seen to have overreached their function and usurped the roles of the other branches of government. This has led to the labelling of some of the new courts as being ‘activist’.

The increased judicial role some argue presents the danger of the judiciary becoming involved in traditionally executive functions which poses a threat to the doctrine of separation of powers (Sang, 2013). Proponents of judicial activism opine that in most countries with new constitutional order, the new constitutions were enacted as a result of the loss of confidence by the people in the elected arms of government. Therefore, naturally, in the new constitutions of these countries it becomes incumbent upon the judiciary to rectify the wrongs of the old order (Ginsburg, 2003).

In Kenya judges who are considered as judicial activist are not influenced by status quo, powerful executive and majority tyranny; they are best suited to play the role of checks and balances on the executive and parliament.

2.2.2 Judicial restraint

Judicial restraint is a theory of judicial interpretation that requires judges to limit the exercise of their own power, and to hesitate to strike down laws and interfere with the actions of other arms of government unless they are obviously unconstitutional (Oluoch, 2015).

The extent to which a court may intervene in the functions of other organs is a questions that has not been exhaustively been answered.

The constitution has given rise to debate about the extent to which courts may intervene in the conduct of the affairs of other arms of government, spawned by accusations by other branches of government, especially the legislature that the judiciary is exceeding its mandate by interfering in the affairs of the other arms of government. An attempt to determine to what extent the judicial arm may intervene as such must directly
interrogate the theoretical nature of the judicial function, and the judicial function in the context of the Constitution of Kenya.

The authority of the judiciary to determine the constitutionality of the conduct of other branches of government was asserted by the Supreme Court of Kenya in where it stated, “parliament must operate under the constitution which is the supreme law of the land … if parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the constitution” [The Speaker of the Senate and Another v the Attorney General and Others, (2013), para. 58].

The High Court has also stated that an unconstitutional exercise of executive and legislative power cannot be shielded from judicial scrutiny by dint of the doctrine of separation of powers or in the name of parliamentary immunity or privilege. The court added that this is because all sovereign power belongs to the people of Kenya and is to be exercised only in accordance with the constitution (Constitution of Kenya 2010, Article 1). Moreover, the Constitution of Kenya provides that state organs should perform their functions in accordance with the constitution (Article 1, Sub-article 3). The high court has accordingly held that it has jurisdiction to entertain a petition against any arm of government, but as to what lengths it can actually go in doing so, is a second level of inquiry based on the circumstances of each case (Frank Mulisa Makola v. Felix G. Mbiuki and four others, 2013).

In post 2010 Kenya, the judiciary has come under attack from the legislature and the executive both claiming that the judiciary is ‘interfering’ with their work. There are efforts within parliament to introduce a constitutional amendment bill to prohibit courts from interfering with matters that are pending considerations or procedures before the parliament. Some members of parliament claim that the judiciary should desist from interfering with its activities because of the deference they owe to them. They argue that they represent the voice of the people who elected them thus commanding a higher authority than the non-elected judges (Ghai, 2015).

The criticism is clearly rooted on the doctrine of separation of powers. As discussed above Baron Montesquieu opined that the concentration of power in one institution would lead to tyranny. This has been invoked the parliamentarians in condemning the judiciary for its interference.

The judiciary however has argued that it is imperative to supplement the doctrine of separation of powers with the concept of ‘checks and balances’ so that one arm of the government should be able to stop another from abusing its power.

3 Conclusions

The doctrine of separation of powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary. French Philosopher Baron Montesquieu is widely considered the ‘father’ of the doctrine of separation of powers and his sentiments in this regard have attained sanctity.

Many contemporary jurists are however questioning the relevance of Montesquieu’s sentiments on separation of powers to our times. He lived at a time where there was no modern conception of democracy and the role played by the state limited and they were few limitations to the powers of the executive.
In Kenya, it is vital that we turn to the constitution which was overwhelmingly approved by the majority of the populace to discern the constitutional basis of the relationship between the three arms of the government. Kenya is not a majoritarian or parliamentary democracy where courts are traditionally the courts owe deference to the National Assembly but a constitutional democracy. The people have made the constitution the supreme law of the country as reflecting people’s sovereignty (Article 2). The constitution not merely distribute and limit state power among the arms of the government and other institutions, but it also sets out the values, principles and procedures that must be conformed to and within which the arms of government must exercise their powers.

The constitution of Kenya 2010 provides for the separation of powers at two levels. Vertically through devolution which provides for the national government and the county governments. This was an effort by the framers of the constitution to bring power and public services close to the people. The three arms of government which have been discussed in this work make up the horizontal level. This is the more conventional form of separation of powers.

One of most important concepts born out of the doctrine of separation of powers in the constitution is judicial independence. The judiciary has undergone a process of de-linking from the executive. Judicial independence in Kenya has traversed a long and winded path riddled with challenges and opportunities. The promulgation of the Constitution of Kenya in 2010 marked a new dawn; one that came with renewed hope that the judiciary will now be able to serve the Kenyan people upholding the values and principles enshrined in the constitution.

References


Kilbourn v. Thompson (1881).


The Speaker of the Senate and Another v. the Attorney General and Others (2013).

Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan (1931).

