

Taming the Peerless: Judicial Accountability and Independence in Kenya's Supreme Court; Perspectives from India and South Africa.

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Abstract

In the current dispensation of the justice system across the world, the concept of judicial independence as complete non-interference in activities of the court is ebbing away. Not for India. There, through a skewed and gradual interpretation of the constitution, the Supreme Court has stone walled itself from public scrutiny, parliamentary oversight and executive interference. On the other hand, Kenya and South Africa are treading a different path. Judicial accountability for them is as important as judicial independence. The challenge comes in striking a balance between the two concepts.

Not only do the conventional problems like budgetary cuts and executive pressure through legislation and political banter persist, there are emerging challenges like wide spread propaganda and misinformation that create mistrust in judges and the court as an institution. These need to be tackled as well. In Kenya, the apex court has been fashioned into an arena of settling political scores exposing it to unwarranted attacks from disgruntled politicians and their supporters. Solutions are needed for apex courts to fulfil the duty of accounting to the people without throwing their independence to the dogs. This study explores some of these challenges and proposes solutions where available.

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Central European University; may you, in the words of Emerson, continue being an ‘opener of doors’ for many more deserving souls across the globe.

1. Chapter 1

A. Introduction

Judicial independence and accountability are popularly discussed subjects. It is a difficult task to convince a reader that new perspectives can be tackled in a study. However, in this era of uncensored social media and judicialized politics, there are new challenges. It is also possible to find un-assessed challenges specific to the Supreme Court of Kenya which is the main subject of this investigation. Emerging challenges for Kenya are technology related and politically motivated. The high rate of access to information through social media has made possible the spread of propaganda and misinformation (*fake news*). Some of which, it is feared, is government backed.

Recent events following the nullification of the August 2017 Presidential elections by the Supreme Court of Kenya in *Raila Amollo Odinga v. Independent Electoral and Boundaries Commission and 2 others*,¹ have prompted a new look at the methods and procedures of judicial accountability viz a viz judicial independence. A raft of attacks by the President,² the deputy President, politicians aligned to the ruling party and the public at large were levelled at the Supreme Court of Kenya after it delivered its ruling.³ Whether the constitution, statutes, policy and institutional framework available in Kenya is adequate to entrench accountability and still sustain independence of the Supreme Court is a matter contemplation.

¹ [2017] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/140478/>

² Waweru Titus, 'President Uhuru Kenyatta Threatens to "deal with" Judiciary If Re-Elected' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001253379/President-uhuru-kenyatta-threatens-to-deal-with-judiciary-if-re-elected>> accessed 2 December 2018.

³ 'Jubilee Supporters Stage Protests' (*Daily Nation*) <<https://www.nation.co.ke/news/politics/Jubilee-supporters-city-demo/1064-4102524-p0grf3/index.html>> accessed 2 December 2018.

B. Background of the Study

The Supreme Court of Kenya, the Supreme Court of India and the Constitutional Court of South Africa are the highest judicial institutions in these countries. They set the pace for other courts as their jurisprudence is final and binding on all courts below them.⁴ Their decisions are also meant to bind state authority in general since they have a final say on the constitutionality or otherwise of certain state actions.

In order to contextualize the requirement for independence and the source of disputes when it comes to accountability, it is important to have a look at the jurisdiction of the three courts. The competence of the Supreme Court of Kenya relates to original jurisdiction in Presidential election disputes;⁵ and validity of ‘a declaration of a state of emergency, extension of a state of emergency or validity of laws enacted or action taken during a state of emergency.’⁶ Its appellate jurisdiction relates to construal or application of the constitution;⁷ and to any matter certified to be of general public importance either by the Court of Appeal or the Supreme Court.⁸ It may also give advisory opinions on matters relating to county government.⁹ On the other hand, the Supreme Court of India has original jurisdiction in disputes between ‘the government of India and one or more states’; between States;¹⁰ and on constitutionality of statutes.¹¹ It has appellate jurisdiction in civil and criminal matters involving a substantial question of law certified to be of general public

⁴ Constitution of Kenya 2010, article 163(7); Constitution of India, article 141; Constitution of South Africa, section 167(5).

⁵ Constitution of Kenya 2010, article 163(3)(a).

⁶ Constitution of Kenya, article 58(5).

⁷ Constitution of Kenya 2010, article 163(4)(a).

⁸ Constitution of Kenya 2010, article 163(4)(b).

⁹ Constitution of Kenya 2010, article 163(6).

¹⁰ Constitution of India, article 131.

¹¹ Constitution of India, article 131A.

importance.¹² It may also give advisory opinions when consulted by the President of India.¹³ Like the Supreme Court of Kenya, it has exclusive jurisdiction in matters relating to the election of the President and the deputy President.¹⁴

The Constitutional Court of South Africa has original jurisdiction in constitutional matters and appellate jurisdiction in any other matter which it may certify as having issues of law that are of general public importance.¹⁵ Under section 172 (2) (a) of the South African constitution, an order by the Supreme Court of Appeals or High Court invalidating an Act of Parliament, a provincial Act or action of the President has to be confirmed by the Constitutional Court for it to take effect.¹⁶

In order to perform their functions without fear or favour, the apex courts are guaranteed *independence* from the other branches of government.¹⁷ Special for Kenya, nuances of *accountability* run through its constitution which requires all State organs, State officers and public officers to adhere to the national values and principles of governance.¹⁸ Accountability and transparency are some of the values and principles of governance outlined in the Kenyan constitution.¹⁹ Judges are classified as State officers under Article 260 of the Constitution of Kenya 2010 (Kenyan constitution) and therefore they are bound by the principle of accountability.

Yet there is no clear-cut procedure of how to hold the apex courts to account. As it were, decisions of these courts are not appealable and may (very rarely) be reviewed by the same court. The

¹² Constitution of India, articles 132-134.

¹³ Constitution of India, article 143.

¹⁴ Constitution of India, article 71

¹⁵ Constitution of South Africa, section 167 (3) and (4).

¹⁶ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] Constitutional Court of South Africa CCT 31/99.; L Berat, 'The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 3 International Journal of Constitutional Law 39, 60.

¹⁷ Constitution of Kenya, Article 161; Constitution of South Africa, section 165; Constitution of India, article 50.

¹⁸ Constitution of Kenya, Article 10 (1).

¹⁹ Constitution of Kenya, Article 10(2)(c).

constitutionally guaranteed judicial independence is protected by difficult amendment procedures like that of Kenya which requires a referendum.²⁰ Furthermore, the constitutional review powers held by the top courts place them in a position to decide on legislation or constitutional amendments that would touch on their independence.²¹ This study evaluates the interplay between judicial accountability and independence in the Supreme Court of Kenya with comparisons from the Supreme Court of India and the Constitutional Court of South Africa.

C. Statement of the Problem

Kenya's Supreme Court is a relatively new institution having been established in 2010 under article 163 of the Constitution and operationalized on 23 June, 2011 by the Supreme Court Act.²² It finds itself in an environment where the judiciary has historically been cast in a derogatory image.²³ In retrospect, Kenya's judiciary has been exposed to manipulation and control by the executive arm of government.²⁴ Previously, judicial appointments were made by the President; and the constitution was once amended to remove security of tenure for judges exposing them to full executive control.²⁵ Even though the same was re-introduced in 1990,²⁶ it left a ghastly precedent on the fate of judges if they did not dance to the tune of the executive.

Corruption was so prevalent that regime change in 2003 saw formation of the Integrity and Anti-Corruption Committee of the Judiciary (the Ringera Committee) which conducted a 'radical

²⁰ Constitution of Kenya 2010, Article 255(1)(g)

²¹ Supreme Court Advocates on Record Association v. Union of India (2015) SC.

²² Supreme Court Act No. 7 of 2011.

²³ Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review' (2010) 9 <https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf>.

²⁴ Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (12th edn, ICJ Kenya 2016) ix <https://icj-kenya.org/jdownloads/Publications/ICJ_Judiciary_Watch_ed_12_final_complete_for_web.pdf>.

²⁵ Constitution of Kenya (Amendment) Act No. 4 of 1988; Nelly Kamunde-Aquino, 'Kenya's Constitutional History' 3 <<https://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140821%20BP%20Kenyas%20Constitutional%20History.pdf>> accessed 29 November 2018.

²⁶ Constitution of Kenya (Amendment) Act No. 2 of 1990; *ibid* 5.

surgery of the judiciary’ in the semblance of holding judges and magistrates accountable for their past actions.²⁷ The Ringera Committee published a report implicating almost half the number of the then serving judges and magistrates in corruption.²⁸ Unfortunately, their names were published in the media without notice and they were given a two weeks ultimatum to either resign or face criminal prosecution. The radical surgery was severely criticized for failure to follow due process and for undermining the security of tenure of the judges implicated in the report.²⁹

Judicial accountability was further fueled by the persistent call for judicial reforms that crystallized after the post-election violence of 2007/2008. The violence is believed to have occurred partly because a section of the discontented politicians declined to take their grievances to court on the basis that the courts were not independent and could not dispense justice.³⁰ So bad was the situation that the Committee of Experts involved in the 2010 constitution making process in Kenya insisted on vetting of existing judges and magistrates in order to restore the eroded public confidence in the judiciary.³¹ Section 23 of the sixth schedule of the Kenyan Constitution therefore envisioned establishment of a vetting board. This came to pass when the Judges and Magistrates Vetting Board was set up in 2011. It conducted its cleansing job in 2012.³² The process was viewed as enhancing judicial accountability enshrined under articles 10 and 159 of the Kenyan constitution.³³

²⁷ Aaron Ringera, ‘Corruption in the Judiciary’ (Washington DC, 25 April 2007) 12 <http://eacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf> accessed 10 October 2018.

²⁸ *ibid.*

²⁹ International Commission of Jurists, ‘Kenya: Judicial Independence, Corruption and Reform’ (International Commission of Jurists 2005) 19 <https://www.icj.org/wp-content/uploads/2012/04/kenya_judicial_independence_report_2005.pdf> accessed 19 October 2018.

³⁰ Petition No. 3 of 2016 Law Society of Kenya v. The Attorney General & another [2016] Para 198. Available at <http://kenyalaw.org/caselaw/cases/view/122379/> .

³¹ Committee of Experts on Constitutional Review (n 20) 9.

³² Vetting of Judges and Magistrates Act (Cap. 8B, Laws of Kenya)

³³ Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others [2014] eKLR para 196. Available at <http://kenyalaw.org/caselaw/cases/view/103263/> .

The reasons for judicial accountability are therefore glaring. In the same vein, the need for independence of the highest court is undebatable. Striking a balance between judicial accountability and independence is a tricky discourse. The study is valuable and timely because it comes in the wake of a bruising affront on the Supreme Court of Kenya by the ruling regime; and by dissatisfied politicians. Sustained misinformation and propaganda from anonymous sources continue to spread on social media tainting the image of Supreme Court judges.

Petitions for removal of Supreme Court judges including the Chief Justice and the Deputy Chief Justice, who were on the majority side of the ruling, were presented to the Judicial Service Commission (JSC).³⁴ At present, five out of seven of the Supreme Court judges have cases to answer before JSC after petitions were filed against them in March, 2019 following decision of a gubernatorial petition.³⁵ Furthermore, there have been continued cuts into the judiciary's budget from 2014³⁶ to the current 2018/2019 financial year which have affected judiciary administration and infrastructural development.³⁷ The recent 2018 move by the President to classify the JSC as a subset of the State Law Office headed by the Attorney General,³⁸ and the attempt by the Kenyan

³⁴ Lilian Kwamboka, 'MP Ngunjiri Wambugu Files Petition Seeking to Oust CJ Maraga' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001254517/mp-ngunjiri-wambugu-files-petition-seeking-to-oust-cj-maraga>> accessed 2 December 2018.

³⁵ Judicial Service Commission, 'Judicial Service Commission Status Report on Matters Discipline' (*the Judiciary of Kenya*, 13 March 2019) <<https://www.judiciary.go.ke/judicial-service-commission-status-report-on-matters-discipline/>> accessed 20 March 2019.

³⁶ Judiciary of Kenya, 'Judiciary and the Administration of Justice Annual Report 2016-2017' (Judiciary of Kenya 2017) 6443 <http://kenyalaw.org/kenya_gazette/gazette/volume/MTY3MA--/Vol.CXIX-No.187> accessed 4 February 2019.

³⁷ Shikhutuli Namusyule and Lilian Mueni, 'Impact of Judiciary Budget Cut – The Judiciary of Kenya' <<https://www.judiciary.go.ke/impact-of-judiciary-budget-cut/>> accessed 4 February 2019.

³⁸ 'Executive-Order-No-1-June-2018.Pdf' 66 <<http://www.kilimo.go.ke/wp-content/uploads/2018/06/Executive-Order-No-1-June-2018.pdf>> accessed 4 February 2019.

President and Parliament to vet judges elected to the JSC by their peers,³⁹ are further alarming situations that may gnaw at judicial independence.

There has also been public arrest (within the precincts of the court and in the course of her duties) and institution of criminal proceedings against the Deputy Chief Justice on past tax related issues in what may be seen as a retaliatory scheme by the ruling government to demean and embarrass the judge.⁴⁰ Institution of charges against the Deputy Chief Justice on issues that are civil in nature; and that should have been raised during her recruitment into office are suspect. Even though such actions against the violation of the law by judges enhance judicial accountability,⁴¹ they might be misused to undermine independence of judges if not employed properly. With hindsight on the 2003 radical surgery in Kenya, and as observed by the American Bar Association, judicial accountability can easily be politized and weaponized against the judiciary.⁴² The study explores how accountability ought to be utilized to check the exercise of power by the apex courts without eroding independence of judges.

D. Justification of the Case Study Selection and the Comparative Methodology Used

By virtue of the common denominator as former British colonies and members of the Commonwealth, Kenya, India and South Africa all have common law legal systems. This means the decisions of the courts are part of the law; and the decisions of the apex courts are binding on

³⁹ Law Society of Kenya & another v. National Assembly of the Republic of Kenya & 3 others [2018] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/157657/> accessed 4 February 2019.

⁴⁰ *Philomena Mbete Mwilu v Director of Public Prosecution & 4 others* [2018] eKLR (High Court of Kenya). Timothy Makokha, 'Deputy CJ Philomena Mwilu Arrested' *The Standard* (Nairobi, 28 August 2018) <<https://www.standardmedia.co.ke/article/2001293696/deputy-chief-justice-philomena-mwilu-arrested-over-alleged-graft>> accessed 22 March 2019.

⁴¹ William P Marshall, 'Judicial Accountability in a Time of Legal Realism' (2006) 56 Case Western Reserve Law Review 936, 937.

⁴² Alfred P. Carlton, Jr., 'Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary.' (American Bar Association 2003) 12 <<https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf>> accessed 3 December 2018.

all other courts. These countries face different problems that require an independent judiciary to ensure implementation of the law. For instance, whereas Kenya continues to be plagued with grand corruption and divisions along ethnic lines, South Africa is still struggling to recover from the scourge of apartheid that caused racial stratification; while India faces divisions based on the caste system.⁴³

South Africa's Constitutional Court is a noble destination for comparison with the Supreme Court of Kenya. For starters, both courts were mooted and established in environments when public confidence in the judiciary had waned. Whereas what plagued the Kenyan courts was corruption, the South African courts faced mistrust for their involvement in enforcing the apartheid system.⁴⁴ Previously, judges in both Kenya and South Africa were appointed by the President of the Republic.⁴⁵ As such, Kenya's Supreme Court may have a few lessons to learn from South Africa's Constitutional Court on how it managed to gain and maintain public trust and confidence.

Both South Africa and Kenya have since embraced the involvement of commissions in appointment of apex court judges by establishment of a body that shares a similar name in both countries, the Judicial Service Commission.⁴⁶ Composition and competence of the JSC is however different in the two countries as will be gleaned from the proceeding discussion under chapter 3. A peek at the jurisprudence of the Supreme Court of Kenya indicates that the Court has been consulting the jurisprudence of the South African Constitutional Court and the Supreme Court of

⁴³ Anashri Pillay, 'Protecting Judicial Independence Through Appointments Processes: A Review of the Indian and South African Experiences' (2017) 1 Indian Law Review 283, 286.

⁴⁴ Hugh Corder, 'Judicial Authority in a Changing South Africa' in Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds), *Independence, Accountability, and the Judiciary* (The British Institute of International and Comparative Law 2006) 194.

⁴⁵ Catherine Jenkins and Max Du Plessis (eds), *Law, Nation-Building & Transformation: The South African Experience in Perspective* (Intersentia 2014) 201.

⁴⁶ Constitution of Kenya 2010, Article 172; Constitution of South Africa, section 178.

India for insight on interpretation of different constitutional principles.⁴⁷ As a young Court that has been in operation for only seven years, this borrowing is bound to continue for sometime before the court establishes its own sufficient jurisprudence. The Constitutional Court of South Africa has been in operation for almost 24 years now and has had its mark on setting the discourse of South Africa's jurisprudence.

With regard to India, The Supreme Court is 69 years old having been established on 26 January 1950 when the Constitution of India 1949 came into effect. Just like Kenya and South Africa, Article 124(2) of the Constitution of India contemplates selection of judges of the Supreme Court based on *consultation* between the Chief Justice and the President. This has however been construed differently by the Supreme Court of India which has cited independence to imply isolation of the court from other branches of government. India is therefore a suitable comparison when it comes to discussion of judicial independence especially through the appointment process. Problems presented by the Indian scenario in relation to accountability also present a good subject for comparison.

On the statutory platform, Kenya has operated on Indian statutes relating to land, probate and administration for the better part of its independent life. Some of the laws relating to land were only consolidated and repealed in 2012 after adoption of the constitution in 2010.⁴⁸ On the basis of the similarity in constitutional provisions, statutory borrowing and jurisdictional competence, the Indian Supreme Court has been selected on the *most similar case* logic.

⁴⁷ See for instance the cases of *Gladys Boss Shollei v JSC & another* (2018) eKLR; *Communications Authority of Kenya & 5 others v. Royal Media Services & 5 others* (2014); *Judges & Magistrates Vetting Board & 2 others v. Center for Human Rights & Democracy & 11 others*; *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others* (2015) eKLR; *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

⁴⁸ See for example the Indian Transfer of Property Act, 1882 (Repealed by Land Registration Act No. 3 of 2012); Hindu Marriage and Divorce Act, (Cap 157) (Repealed by Marriage Act, No. 4 of 2014).

There are further differences that remain prevalent in the three countries. For instance, whereas the Constitutional Court of South Africa has original jurisdiction in constitutional issues, Kenya's Supreme Court only has appellate jurisdiction and the issue must concern matters that are certified to be of general public importance. The political climates in which the two courts operate are also different thus calling for different interactive tactics between the courts and other branches of government. In the final analysis, whereas Kenya's constitution expressly requires the judiciary to be accountable to the people, the constitutions of India and South Africa have no such provisions. The minor jurisdictional differences between the South African Constitutional Court and the Kenyan Supreme Court notwithstanding, the principle of case selection employed with regard to the two apex courts is the *most similar case* logic.

E. Research objectives

The mandate placed on the Supreme Court of Kenya to 'assert the supremacy of the Constitution and the sovereignty of the people' and to authoritatively and impartially interpret the constitution,⁴⁹ especially after expiry of the term of the Commission on the Implementation of the Constitution, places it in the cross-fire with both the legislature and the executive. The Supreme Court of Kenya is the final arbiter in constitutional matters obligated to check the excesses of executive power, review constitutionality of legislation, ensure realization of the rule of law, of justice, yet it has no guardian or defender of its own.

Questions might therefore arise as to how and to whom the Supreme Court should account in order to avoid interference with its independence. The research delves into aspects of judicial accountability and their impact on judicial independence in the three apex courts. It looks at how

⁴⁹ Supreme Court Act no. 7 of 2011, section 3.

the three courts have fallen prey of unorthodox means of accountability and the effect the same has caused on their independence. Investigation is made on how the methods of accountability contemplated in the constitutions, statutes, policy or developed through jurisprudence, can be utilized without eroding independence of the judges.

F. Research questions

1. What is the effect of judicialization of politics on judicial independence?
2. How has judicial independence and accountability been enhanced through the appointment process in the three apex courts?
3. To what extent has implementation of judicial accountability undermined judicial independence in the three apex courts?
4. How does the administrative power of the Chief Justice undermine decisional independence in the three top courts?
5. How can the three top courts deal with misinformation and spread of propaganda to maintain their independence?

G. Hypothesis

The current policy framework is not adequate to insulate the Supreme Court of Kenya from political interference.

The prevalence of misinformation and the judicialization of politics affects the independence of Kenya's Supreme Court.

H. Theoretical Framework

The conventional theory underlying the entire discussion is legal realism which proposes that law is what judges say it is.⁵⁰ Flowing from the times of *Marbury v Madison*,⁵¹ to the current constitutional competences granted to the top courts to review the constitutionality of legislation, it remains true to this day that ‘it is the province and duty of the judiciary to say what the law is.’⁵² Given that the philosophical leanings of judges may influence the development, interpretation and application of the law, the judges must be accountable. Similarly, since they are involved in interpretation and application of legislation and executive action that may sometimes not conform to public majority opinion, the judges must be guaranteed independence to do so candidly.

The theoretical approaches adopted in discussing the interplay between accountability and independence include aspects of political accountability; decisional accountability; selection process among other. These theories bring to bear some emerging challenges that have to be curbed in order to enhance judicial independence. Such emerging challenges include attacks on the top courts through misinformation and judicialization of politics.

I. Research Methodology

Secondary research suffices for this kind of investigation. Information is drawn from both primary and secondary sources. Primary sources comprise constitutions of the countries chosen for study, statutes, draft bills, treaties, international regulations and case law. Secondary sources include books, journal articles, policy documents, reports, conference papers, theses and internet sources.

⁵⁰ Michael Steven Green, ‘Legal Realism as Theory of Law’ (2005) 46 William and Mary Law Review 1917, 1919.

⁵¹ *Marbury v. Madison*, 5 U.S (Cranch) 137 (1803).

⁵² András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (First edition, Oxford University Press 2017) 328.

J. Scope of the Study

Judicial accountability and independence run through the entire spectrum of the judiciary. From the court clerks, secretaries, executive officers, magistrates to judges. This study however focusses on the apex courts of the countries under comparison. That is, the Supreme Court of India, the Supreme Court of Kenya and the Constitutional Court of South Africa. Decisions of apex courts have binding force over other courts. These courts have a final say on interpreting the law. In the judicial structure, they are the least accountable courts as their decisions are not appealable. As such, they may present difficulty in implementing decisional accountability.

K. Chapter Breakdown

This study is divided into four chapters. The present chapter helps in introducing the themes to be investigated, the countries chosen for comparison and the competences of the three top courts. Chapter two lays the basis for the study by analyzing the theoretical and legal framework for the themes being discussed. The third chapter examines the different approaches to judicial accountability and independence in relation to the three top courts. Challenges and strengths of each type of accountability are discussed. The fourth and final chapter touches on challenges facing judicial accountability and independence identified in the course of the study; and attempts to suggest solutions to the same.

2. Chapter 2 – The Theoretical and Legal Framework for Accountability and Independence.

A. Introduction

Some commentators opine that judicial independence and accountability claw at each other,⁵³ while others maintain that they complement each other.⁵⁴ Pimentel for instance pointed out the belief that ‘any effort to strengthen judicial independence makes it difficult to hold judges accountable, and that any accountability initiative undermines judicial independence’;⁵⁵ The challenge lies in structuring an institutional, legal and policy system that secures both accountability and independence in workable measure.⁵⁶ An assessment of the laws and institutional arrangement of the three countries will show great importance accorded to judicial independence. It will also show the requirement for accountability and the regulatory channels applied. The reality however will reveal that the robust legal and institutional arrangement for Kenya has not shielded Supreme Court judges from political pressure, which may affect their independence.

⁵³ Francesco Contini and Richard Mohr, *Judicial Evaluation: Traditions, Innovations and Proposals for Measuring the Quality of Court Performance* (2011) 50.

⁵⁴ Anita Nyanjong and Ochiel J. Dudley, ‘Rethinking Judicial Independence and Accountability under a Transformative Constitution: Kenya Post-2010’, *Judicial Accountability in the New Constitutional Order* (12th edn, ICJ Kenya 2016) 11 <https://icj-kenya.org/jdownloads/Publications/ICJ_Judiciary_Watch_ed_12_final_complete_for_web.pdf> accessed 19 October 2018.

⁵⁵ David Pimentel, ‘Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand’ 33 *33*, 157.

⁵⁶ Bellur N. Srikrishna, *Part IV Separation of Powers, Ch.20 Judicial Independence*, vol 1 (Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta eds, Oxford University Press 2016) 352–53 <<http://oxcon.oupplaw.com/view/10.1093/law/9780198704898.001.0001/law-9780198704898-chapter-20>> accessed 30 November 2018.

B. Judicial Accountability

Jackson defines accountability as the necessity for judges to be answerable for their pronouncements and conduct.⁵⁷ Requirements for judicial accountability are embedded in the law. India's constitution having been adopted in 1948 when accountability was an un-inspiring topic to be equated to independence lacks specific reference to judicial accountability. However, development of international rules within bodies where India, South Africa and Kenya are members has progressively raised the importance of accountability. For instance, the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence require development of a code of ethics and conduct as a measure of accountability for judges.⁵⁸ Paragraph ten of the preambular section of the Bangalore Principles of Judicial Conduct, 2002 requires judges to be 'accountable for their conduct to appropriate institutions established to maintain judicial standards'. India's Supreme Court has however maintained a jurisprudential streak that leans towards independence, not giving way to adequate accountability.

The South African constitution is also conservative when it comes to accountability. It mentions at section 165 (6) that the Chief Justice oversee formulation of norms and standards to guide the exercise of judicial functions.⁵⁹ The norms and standards were developed and gazetted in 2014.⁶⁰ Complementary to this, the Chief Justice of South Africa has since taken initiative to give yearly sessions of judicial accountability which started in November 2018.⁶¹ Moving away from the

⁵⁷ Jeffrey D Jackson, 'Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System' (2006) 34 The Berkeley Electronic Press 125, 132.

⁵⁸ Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence 2003 7, 14.

⁵⁹ See also section (2) of the Superior Courts Act 10 of 2013 2017 29, 5.

⁶⁰ 'Annual Performance Plan for 2017/2018' 17 <<https://www.judiciary.org.za/index.php/documents/annual-performance-plans?download=188:annual-performance-plan-2017-18>> accessed 17 March 2018.

⁶¹ Mogoeng Mogoeng, 'The Judicial Accountability Session' (Judicial Accountability Session, 23 November 2018) <https://www.judiciary.org.za/images/chief_justice_2017/Judicial_Accountability_Session_Speech_as_at_10h00_23_November_2018.pdf> accessed 17 March 2018.

traditional accountability mechanisms where judiciary would provide information requested through cabinet ministers to Parliament, the Chief Justice now gives an annual report on the status of the judiciary in a bid to directly account to the nation.⁶² This, Chief Justice Mogoeng has observed, is ‘aimed at enhancing transparency, accountability in the expeditious delivery of justice and the public confidence in the Judiciary’.⁶³ With regard to Kenya, the Chief Justice is mandated to give an annual report on the status of the judiciary to the nation. The report must be published in the Kenya Gazette and be sent to both the senate and National Assembly for discussion and approval.⁶⁴ Here lies a clear line of judicial accountability to the people, and to Parliament.

India is currently pursuing mechanisms of accountability under a project captioned ‘Development and Enforcement of Performance Standards to Enhance Accountability of the Higher Judiciary in India’. This was authorised by the Department of Justice, Ministry of Law and Justice, Government of India.⁶⁵

Flowing from the competencies of the courts outlined under chapter 1 above, one would agree with Kosař that judicial power is no longer minimalist.⁶⁶ Apex court judges wield immense powers. In the present context, they have ruled on the constitutionality of the constitution;⁶⁷ they have nullified Presidential election results and barred incumbents from exercising full powers;⁶⁸

⁶² The South African Judiciary, ‘Judiciary Annual Report 2017/2018’ (The South African Judiciary) 8 <<https://www.judiciary.org.za/index.php/documents/annual-reports>> accessed 22 March 2018.

⁶³ Mogoeng Mogoeng (n 61) 5.

⁶⁴ Judicial Service Act 2011 (No 1 of 2011).

⁶⁵ Medha Srivastava, Shalini Seetharam and Sumathi Chandrashekar, ‘Development and Enforcement of Performance Standards to Enhance Accountability of the Higher Judiciary in India’ (Vidhi Centre for Legal Policy 2017) <<http://doj.gov.in/sites/default/files/document%282%29.pdf>> accessed 30 November 2018.

⁶⁶ David Kosař, ‘The Least Accountable Branch’ (2013) 11 International Journal of Constitutional Law 234, 234.

⁶⁷ Supreme Court of South Africa on Constitutionality or otherwise of the draft constitution.

⁶⁸ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2017) Presidential Petition No. 1 of 2017 eKLR (Supreme Court of Kenya).

and they have interpreted the law to place themselves on an un-reproachable pedestal.⁶⁹ They thus must account for the exercise of such immense powers.

An observation by Prempeh that unchecked judicial independence may produce overly powerful Chief Justices who may undermine the decisional independence of their peers or skew the justice system through suspect case assignments is also germane.⁷⁰ Some highlights confirming Prempeh's fears are evident. As will be discussed further under chapter 3 on administrative accountability, the opaque system of India's Supreme Court case assignment process has raised dissatisfaction both on the Bench and at the Bar. Four senior-most judges of the Supreme Court of India have protested publicly against the power of the Chief Justice to single handedly allocate Supreme Court cases.⁷¹

In May 2016, the then Chief Justice of Kenya, Willy Mutunga, acting on his own motion, varied Justice Njoki Ndungú's stay orders and changed a hearing date of the case relating to retirement of two Supreme Court Judges.⁷² A five judge bench of the Supreme Court was divided on the issue as to whether the Chief Justice can cite administrative powers to encroach on the decisional discretion of another Supreme Court judge, one judge recusing himself. Accountability is even more heightened in apex courts of common law legal systems where judicial precedence forms part of binding law. Accountability of judges for this 'legislative function', it has been argued, enhances the legitimacy of judge made law.⁷³

⁶⁹ *Supreme Court Advocates-on-Record - Association and another vs Union of India* (Supreme Court of India).

⁷⁰ H Kwasi Prempeh, 'African Judges, in Their Own Cause: Reconstituting Independent Courts in Contemporary Africa' (2006) 4 *International Journal of Constitutional Law* 592, 603.

⁷¹ 'Loya Case the Tipping Point, Four SC Judges Say Democracy Is in Danger' (*The Wire*) <<https://thewire.in/law/sc-justices-hold-historic-press-conference-triggered-judge-loya-case>> accessed 17 March 2019.

⁷² *Kalpana H Rawal & 2 others v Judicial Service Commission & 3 others* [2016] eKLR (Supreme Court of Kenya).

⁷³ Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Elgar 2008) 59.; Jessica Boast, "Is Little to Be Gained by Lamenting the Past? Assessing the Extent to Which Addressing the Past Legacy of the South African and Kenyan Judiciaries, by Means of Transitional Justice

C. Judicial Independence

Arguments for judicial independence are often wrapped around the rule of law which is built on the principle of separation of powers.⁷⁴ As the organ tasked with checking arbitrary use of executive and political power, it is necessary that the judiciary enjoys some measure of independence.⁷⁵ The necessity for judicial independence is underscored by article 160 of the Kenyan constitution which requires that the exercise of judicial authority be guided only by the constitution and the law and ‘not subject to control or direction of any person or authority’. This concurs with the definition allotted to judicial independence by authors.⁷⁶ Indeed, Lubet observed that in their decision-making process, judges ought to be concerned only with the merits of the case and not be influenced by other considerations.⁷⁷ Jackson however posited that some of the influences on judges are welcome since they promote judicial accountability.⁷⁸

For Kenya, the establishment of the JSC under article 171 of the constitution with the Chief Justice serving as the chairperson was meant to get rid of direct exercise of executive power over the judiciary.⁷⁹ The Judiciary Fund contemplated under article 173 of the Kenyan constitution was intended to give the judiciary some autonomy over its own budget and insulate it from executive influence through the budgetary process.

Mechanisms, Has Contributed to Achieving the Objectives of Judicial Reform in Both These Countries” (University of Cape Town 2013) 18 <<https://core.ac.uk/download/pdf/29053835.pdf>> accessed 19 October 2018.

⁷⁴ Walter Khobe Ochieng, ‘The State of Judicial Independence in Kenya - Reflections from the 2017 Presidential Election Petitions’ in James Gondi (ed), *Reflections on the 2017 Elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya* (2018) 6
<https://www.academia.edu/38309160/The_State_of_Judicial_Independence_in_Kenya_-_Reflections_from_the_2017_Presidential_Election_Petitions_> accessed 15 March 2019.

⁷⁵ Anthony W Bradley, KD Ewing and Christopher Knight, *Constitutional and Administrative Law* (Sixteenth edition, Pearson 2015) 93.

⁷⁶ See for instance Jackson (n 57) 129–130.; Ochieng (n 74) 6.

⁷⁷ Steven Lubet, ‘Judicial Discipline and Judicial Independence’ (1998) 61 *Law and Contemporary Problems* 59, 61.

⁷⁸ Jackson (n 57) 131.

⁷⁹ Margaret Kobia and Obuya Bagaka, ‘Separation of Powers in Kenya’s Devolved Administrative System: Opportunities and Challenges’ 14, 14–15.

The 1985 United Nations (UN) Basic Principles on the Independence of the Judiciary also set out general requirements to guide member States of the UN when it comes to judicial independence. These include non-interference in the judicial process; clear and meritorious selection processes; guarded conditions of service & security of tenure; and well-defined procedures of discipline, suspension or removal of judges. The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence also advocate for preservation of judicial independence through an objective appointment process; adequate and sustainable funding; and training of judicial officers.⁸⁰ The Bangalore Principles also insist on judicial independence.

India's Supreme Court is the comparator that has consistently laid emphasis on the independence of the judiciary. When Parliament attempted to wield its constitutional amending power to limit the court's jurisdiction during Indira Gandhi's emergency rule, the court saw a threat to its independence and maintained in its jurisprudence that judicial independence forms part of the 'basic structure' of the Indian constitution.⁸¹ As it were, no amendments are allowed to the constitution that would change its basic structure.⁸² For South Africa, when President Zuma sought to extend the term of Chief Justice Sandile Ngcobo, the Constitutional Court found the enabling statute unconstitutional.⁸³ This made sure that any Chief Justice in office would perform their duties independently without conforming to executive pressure in the hope of extension of their term in office.

⁸⁰ Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence 11–12.

⁸¹ *S.P. Gupta vs. Union of India & Another* [1981] Supp. SCC 87. 408; 'Financial Autonomy of the Judiciary' 4.

⁸² *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

⁸³ *Justice Alliance v President of the Republic of South Africa* 2011 (5) SA 388 (Constitutional Court of South Africa).

D. Conclusion

Emerging from the discussion, it is evident that the requirement for judicial independence and accountability is entrenched in the law and is supported by court action and public opinion. Whether the actual operation of the system in the three countries allows full realization of these principles is what follows as a discussion on approaches under chapter 3.

For a relatively new court that finds itself in a State that is the process of transition to liberal democracy, the Supreme Court of Kenya ought to employ different tactics of survival. As observed by Pimentel, methods of balancing judicial accountability and independence in established democracies may not be well suited for judiciaries in transiting democracies.⁸⁴ The historical aspects of the judiciary, the culture of the citizenry, past and current political dynamics and constitutional protections availed to the Supreme Court are some of the aspects to be considered when developing models of judicial accountability in order to enhance independence.

⁸⁴ Pimentel (n 55) 155.

3. Chapter 3 -Approaches to Judicial Accountability and their Effect on Judicial Independence

A. Accountability through the Process of Selection of Judges.

Judicial accountability roots for a transparent appointment process that is based on merit. Under section 174 of the Constitution of South Africa, appointments of the Chief Justice and Deputy Chief Justice in South Africa are made by the President of the Republic ‘*after consulting*’ the Judicial Service Commission and leadership of parties represented in the National Assembly. The words emphasized have been interpreted in practice to give precedence to the President’s nominee, with the JSC only acting as a confirming house.⁸⁵ It would otherwise not be comprehensible how the current Chief Justice, Mogoeng Mogoeng passed through the cracks as President Zuma’s appointee with his stark record of favouring rape perpetrators.⁸⁶ In Kenya, the autonomy lies with the JSC to recommend one person to the President of the Republic for appointment to the position of Chief Justice or Deputy Chief Justice. An attempt by the National Assembly to amend the Judicial Service Act to have three names forwarded to the President out of which he could choose one, was declared unconstitutional by a five-judge bench of the High Court.⁸⁷

Appointment of other judges of the Constitutional Court of South Africa are also made by the President after consultations with the Chief Justice and leadership of the parties represented in the National Assembly.⁸⁸ The appointment of the other judges of the Constitutional Court is made from a list of three or four names more than those required to fill the vacancies on the

⁸⁵ Richard Calland, ‘A Chief Justice Who Doesn’t Write Appointed by a President Who Doesn’t Read’, *The Zuma Years: South Africa’s Changing Face of Power* (Zebra Press 2014) <<http://www.theconmag.co.za/2013/09/02/a-chief-justice-who-doesnt-write-appointed-by-a-President-who-doesnt-read/>> accessed 19 March 2019.

⁸⁶ Ilham Rawoot, ‘Mogoeng’s Shocking Child Rape Rulings’ (*The M&G Online*) <<https://mg.co.za/article/2011-09-02-mogoengs-shocking-child-rape-rulings/>> accessed 19 March 2019.

⁸⁷ *Law Society of Kenya v Attorney General & another* [2016] High Court of Kenya Petition No 3 of 2016, eKLR 67.

⁸⁸ Constitution of South Africa, section 174 (4); Catherine Jenkins and Max Du Plessis (n 45) 204.

Constitutional Court.⁸⁹ Giving leverage to the President to appoint only one person from a list of names, and the involvement of political party leaders, exposes the appointment process to political influence. This would limit independence as those minded of ascending to the constitutional court would limit their abrasions with political parties, more so the majority African National Congress Party (ANC). The Collegium process in India does not give a chance to direct political interference unless the Chief Justice and the senior most judges happen to be politically influenced.

Kenya seems to be doing well given the insistence on transparency by the public and the civil society. Names of all applicant are published and everyone who meets the minimum qualification of the criteria for qualification as judge of the Supreme Court of Kenya outlined under article 166 (2) and (3) of the constitution has to be shortlisted for interview.⁹⁰ Summary disqualification by JSC of applicants who met the minimum constitutional requirements without giving reasons has been held to be unconstitutional.⁹¹ Interviews are lively streamed by public media. The Kenyan scenario leaves the ball completely in the hands of the JSC with the President having no leverage but to rubberstamp the decision of the JSC.

With regard to Supreme Court Judges appointments in India, initially, in the 1977 case of *Union of India v. Sankalchand Himatlal Sheth and another*,⁹² (which involved transfer of a judge rather than appointment), the Supreme Court of India defined *consultation* as contemplated under article 124 of the constitution of India to mean ‘a conference between the Chief Justice and the President in order to reach a correct or satisfactory solution’.⁹³ However, later in 1993, the Supreme Court

⁸⁹ Constitution of South Africa, section 174 (6).

⁹⁰ *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] High Court of Kenya Petition No. 314 of 2016, eKLR 85–87.

⁹¹ *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* (n 89).

⁹² AIR 1977 SC 2328; (1977)4 SCC 193.

⁹³ Bellur N. Srikrishna (n 56) 353.

interpreted *consultation* to mean *concurrence* between the Chief Justice and the President of Republic.⁹⁴ The Court advised afterwards (in 1998) that selection of Supreme Court Justices would be through the *collegium* method whereby the Chief Justice together with four other senior judges would recommend a binding list of name(s) to the President for appointment.⁹⁵ The collegium method has been criticized for being elitist, opaque and reeking of unaccountability.⁹⁶ South Africa's requirement for racial and national balance and the requirements for consultation with political parties would injure the pure merit criterion.

i. Judicial Service Commission in South Africa and Kenya

Appointment by judicial nominating committees have been hailed as an emerging solution to political interference with the judiciary.⁹⁷ Corder observed that during the constitution making process in South Africa, the suggestion by the then government to have judges appointed solely by the executive was refuted by the Democratic Party. This led to the establishment of a Judicial Service Commission which would be tasked with selection and dismissal of judges.⁹⁸ Membership of the South African JSC as outlined under article 178 of the Constitution of South Africa includes:

- the Chief Justice; a judge of the Supreme Court of Appeals; a Judge President; the Minister of Justice; two practicing advocates; two practicing attorneys; a professor of law; six persons designated by the National Assembly; four permanent delegates to the National Council of Provinces; and four persons designated by the President.

⁹⁴ Supreme Court Advocates-on-Record Association v. Union of India (1993) 4 SC 441; Center for Law and Policy Research, 'Recasting the Judicial Appointments Debate: Constitutional Amendment (120th Amendment) Bill, 2013 and Judicial Appointments Commissioner Bill, 2013' 1 <http://www.nja.nic.in/P-950_Reading_Material_5-NOV-15/3.Judicial%20Appointments%20Debate.pdf> accessed 3 December 2018.

⁹⁵ Advisory Opinion of Supreme Court in Special Reference No. 1 of 1998, Re: (1998) 7 SCC 729; *ibid*.

⁹⁶ Bellur N. Srikrishna (n 56) 356.

⁹⁷ Mark Tushnet, 'Judicial Accountability in Comparative Perspective', *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 63.

⁹⁸ Hugh Corder (n 44) 195.

What is evident is that the South African JSC is not dominated by members of the Bench but rather appears to be dominated by non-lawyers. However, Corder maintains that majority of members of JSC are drawn from the legal profession.⁹⁹ The Kenyan JSC on the other hand is dominated by members of the Bench who form five out of the eleven members. As outlined under article 171 of the Kenyan constitution, representatives from the judiciary include the Chief Justice, one judge of the Supreme Court elected by peers, one judge of the Court of Appeal also elected by peers, one judge of the High Court and one magistrate elected by the association of judges and magistrates. The legal fraternity is represented by two advocates elected by members of the Law Society of Kenya. The government is represented by the Attorney General while the public service is represented by one person nominated by the Public Service Commission. The larger citizenry is represented by two lay persons who are nominated by the President. The arrangement results in the majority of members being drawn from the legal profession.

Whereas South Africa's JSC risks domination by politically aligned appointees who may front interests of political interests and undermine judicial independence, Kenya's Bench dominated JSC may fall prey of faction alignment in the system to protect the interests of the judiciary thus affecting accountability. There were assertions that after being headed by a Chief Justice who was 'an outsider', judges and magistrates preferred a member of the Bench to take over the mantle;¹⁰⁰ this would indeed influence the stance taken by their representatives in the JSC. Suffice it to say that all three recruits to the Supreme Court in 2016 were drawn from the Bench.

⁹⁹ *ibid* 198.

¹⁰⁰ George Kegoro, 'Factors Likely to Determine Selection of CJ' *Daily Nation* (Nairobi, 31 July 2016) <<https://www.nation.co.ke/news/Factors-likely-to-determine-selection-of-CJ/1056-3323554-1bd2py/index.html>> accessed 22 March 2019.; Walter Khobe Ochieng, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (12th edn, ICJ Kenya 2016) 56.

When it comes to judicial independence however, and considering that these commissions are involved in discipline and dismissal of judges, the International Commission of Jurists has argued that they should be dominated by members of the Bench so as to maintain independence and impartiality.¹⁰¹ This resonates with the holding of the Fifth Section of the European Court of Human Rights (ECtHR) in *Oleksandr Volkov v. Ukraine* that independence and impartiality will be strongly evident in disciplinary proceedings where judges compose at least half of the membership of the tribunal including the chair with a casting vote.¹⁰² This position has since been confirmed by the Grand Chamber of the ECtHR in *Denisov v. Ukraine*.¹⁰³

An attempt to introduce a judicial commission through a constitutional amendment to Article 124 of the Constitution of India was declared unconstitutional by the Indian Supreme Court in 2015.¹⁰⁴ In the same breath, the National Judicial Appointments Commission Act, 2014 which would have accorded the executive a major role in appointing judges was also declared unconstitutional. It was viewed as an infringement by the executive on the independence of the judiciary thus going against the basic structure of the constitution.¹⁰⁵ A plea for review of the Supreme Court's decision was filed and amid delays,¹⁰⁶ the same was struck out for having been filed late (470 days after judgment) and for lack of merit.¹⁰⁷

¹⁰¹ *Judicial Accountability: A Practitioner's Guide* (International Commission of Jurists 2016) 35 <<https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>> accessed 23 March 2019.

¹⁰² *Oleksandr Volkov v Ukraine* [2013] European Court of Human Rights App. No. 21722/11 [109].

¹⁰³ *Denisov v Ukraine* [2018] European Court of Human Rights App. No. 76639/11.

¹⁰⁴ *Supreme Court Advocates-on-Record - Association and another vs Union of India* (n 69).

¹⁰⁵ Pillay (n 43) 283.

¹⁰⁶ 'NJAC Review: SC Refuses Specific Date for Hearing Plea' *The Economic Times* (16 January 2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/njac-review-sc-refuses-specific-date-for-hearing-plea/articleshow/62525672.cms>> accessed 15 March 2019.

¹⁰⁷ Live Law News Network, 'SC Dismisses Review Petition Against NJAC Judgment [Read Order]' (1 December 2018) <<https://www.livelaw.in/sc-dismisses-review-petition-against-njac-judgment/>> accessed 15 March 2019.

B. Discipline and Removal of Judges

Judicial discipline and removal hinged on the content of decisions of judges, according to Tushnet, poses a higher risk to independence. This is because if ‘a judge were to know that she could be removed from her position relatively easily, simply because political actors disagreed with her rulings on the merits of cases that came before her,’ she would be ‘minimally independent’ and ‘maximally accountable’ to the political arm.¹⁰⁸ The International Commission of Jurists has put it aptly,

(T)he judiciary is emphatically not bound to adopt only those decisions with which a majority of society may agree, nor should individual judges be at any risk of removal simply because a majority of society may disagree with particular judgments.¹⁰⁹

In this regard, Lubet indicated that judicial independence is seriously jeopardized when judges face punishment on the basis of the content of their judgments.¹¹⁰ Tushnet suggested a twofold solution to this kind of political accountability; providing ‘precise grounds for discipline or removal’ and placing ‘the decision within the control of the judiciary itself’.¹¹¹

Under article 124 (4) of the Constitution of India, a judge may only be removed by a 2/3 majority in both houses of Parliament. This has been criticized for being tedious and ineffective hence lacking in accountability.¹¹² In South Africa, besides a finding by the Judicial Service Commission that the affected judge is incapacitated or has been involved in gross misconduct, the National Assembly must decide by a 2/3 majority as well.¹¹³

¹⁰⁸ Mark Tushnet (n 96) 66.

¹⁰⁹ *Judicial Accountability: A Practitioner’s Guide* (n 100) 15.

¹¹⁰ Lubet (n 77) 59.

¹¹¹ Mark Tushnet (n 96) 66.

¹¹² Sukriti Yagyasen, ‘Judicial Accountability in India’ (2016) 3 78, 79.

¹¹³ Constitution of South Africa, section 177 (1).

The Kenyan scenario does not involve Parliament. Upon a finding by the Judicial Service Commission that the impugned judge has a case to answer, the President of the Republic is mandated to constitute a tribunal envisioned under article 168 of the Kenyan Constitution to conduct an inquiry and make a binding recommendation to the President. The first Deputy Chief Justice was forced to resign after such a tribunal set up by the President recommended her removal because of conduct that was deemed unbecoming for a person of her stature.¹¹⁴ In 2015, three judges of the Supreme Court of Kenya penned a letter to the JSC warning that they would down their tools in solidarity with two of their colleagues if the JSC maintained 70 years as the retirement age for all judges.¹¹⁵ When a petition seeking their removal on grounds of insubordination was filed with JSC, they were reprimanded rather than recommended for removal.¹¹⁶ Presently, the JSC made a recommendation on 20th March, 2019 to the President to constitute a tribunal to inquire into, and make recommendation on removal of Justice JB. Ojwang for alleged misconduct.¹¹⁷

Therefore, whereas the South African and Indian setups do not involve the executive arm, the Kenyan one has Presidential involvement but with safeguards coming from first review by the JSC. Involvement of Parliament in India and South Africa may be explained by their Parliamentary systems of government as opposed to Kenya's Presidential system of government.

The Latimer House Guidelines provide that removal of judges be limited to inability to perform duties and serious misconduct; and that disciplinary procedures be devoid of public admonition of

¹¹⁴ 'Kenyan Judge Baraza Resigns Following Gun Inquiry' (18 October 2012) <<https://www.bbc.com/news/world-africa-19997773>> accessed 22 March 2019.

¹¹⁵ George Kegoro, 'Justice Ojwang's Lonely Walk to the End of an Eventful Career' *The Standard* (24 March 2019) <<https://www.standardmedia.co.ke/article/2001317941/justice-ojwang-s-lonely-walk-to-the-end-of-an-eventful-career>> accessed 25 March 2019.

¹¹⁶ *ibid.*

¹¹⁷ Judicial Service Commission, 'Judicial Service Commission Press Statement on Petitions Against Judges of Superior Courts' (*The Judiciary of Kenya*, 20 March 2019) <<https://www.judiciary.go.ke/judicial-service-commission-press-statement-on-petitions-against-judges-of-superior-courts/>> accessed 20 March 2019.

judges.¹¹⁸ Kenya's JSC may have to reconsider the place of public admonition in the course of the disciplinary process. In the press statement released on 20th March, 2019, specific parts read as follows:

...(T)he petition detailed instances which the Petitioners believed constituted grounds of misconduct, impropriety, conflict of interest and breach of judicial code of conduct on the part of the Hon Judge, particularly in sitting (with other judges of the Supreme Court) on application in **Supreme Court Misc Application No. 49 of 2014, Town Council of Awendo = Vs= Nelson Oduor Onyango and Others** despite being conflicted and being closely associated with the County Government of Migori and the Governor Hon. Okoth Obado. Regrettably, the Hon Judge, despite notice being served upon him refused to attend the hearing.

It bears noticing that such a tone and public expression of preliminary investigation may have an impact on the judge's reputation and ruins public confidence in him. Even if the tribunal eventually clears the judge of the accusations, his image would still remain smudged in the eyes of the public and of his peers. Of note is the highlight that the judge refused to attend hearing despite notice being served upon him. Waiver of his right to appear in person before the JSC ought not be a matter of public admonition since the judge's request to appear through his legal representative was declined.¹¹⁹ As it were, the Judicial Service Act under Rule 10 of the Second Schedule provides that '(t)he judge whose conduct is subject of the investigation shall have the right to be present during all of the proceedings that relate to them and shall be entitled to legal representation by counsel.' Under rule 15 of the same Schedule, '(t)he judge duly served may elect not to attend in person or by counsel or at all...' It is therefore incomprehensible why the JSC chose to adopt

¹¹⁸ Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence 14–15.

¹¹⁹ Nyambega Gisesa, 'Judge Ojwang' Refuses to Appear Before JSC' *Daily Nation* (19 March 2019) <<https://www.nation.co.ke/news/Judge-Ojwang--refuses-to-appear-before-JSC-over-bribe/1056-5031404-f1qa0ez/>> accessed 23 March 2019.

such communication in its press statement to the public that is not enlightened about the procedure before JSC; and to the detriment of the judge's standing.

Since the conclusion of the August 2017 general elections in Kenya, multiple petitions have been filed at the JSC against Supreme Court Judges, all related to their decisions and conduct concerning the August 2017 general elections. Two petitions filed by politicians aligned to the incumbent president's political party were dismissed by the JSC for lack of merit.¹²⁰ Another one against four judges of the Supreme Court was filed by disgruntled political candidates on 8th March, 2019 following judgment of the Supreme Court in a gubernatorial election.¹²¹ The petition implicates the judges for 'alleged gross misconduct, misbehaviour and incompetence, breach of the constitution and oath of office' and seeks their removal. It has since been accepted by JSC and served on the affected judges who are expected to reply within 14 days.¹²² The most recent one on related grounds was filed against the Chief Justice on 13th March 2019 and has also since been accepted and served on him for his response within 14 days.¹²³

Ochieng, commenting on the attempted removal of Supreme Court Judges immediately after they nullified the Presidential elections opined that the same is an open assault on the decisional independence of the Supreme Court as it is meant to scare judges into submission.¹²⁴ With the current trajectory, Five out of the seven face disciplinary action albeit politically related. The state of affairs is bound to impact negatively on the independence of the Supreme Court. The petitions

¹²⁰ Everlyne Kwamboka, 'JSC Dismisses Allegations Filed against Supreme Court Judges' *The Standard* (Nairobi, 28 January 2018) <<https://www.standardmedia.co.ke/article/2001267501/jsc-throws-out-cases-against-top-judges>> accessed 13 March 2019.

¹²¹ Walter Menya, 'Bribes Storm Rocks Four Top Court Judges' *Daily Nation* (Nairobi, 10 March 2019) <<https://www.nation.co.ke/news/Damning-petition--details-bribery-claims-against-top-judges/1056-5017332-10vbfowz/>> accessed 13 March 2019.

¹²² Judicial Service Commission (n 35).

¹²³ Judicial Service Commission (n 116).

¹²⁴ Ochieng (n 74) 12.

filed against the judges are knee jerk reactions by disappointed parties who lost in election petitions.

Petitions for removal or discipline of judges may be filed. But they should be filed under deserving circumstances and not as political maneuvers to curtail judicial independence in the guise of accountability. Lubet identifies some elements of a judge's decision that can warrant sanctions aimed at enforcing decisional accountability. These include: - a recurring routine of uncorrected legal error that points towards professional incompetence; a grave error or misruling resulting to serious effects on parties involved; lack of good faith/malice or deliberate disregard of the law; and abdication of judicial function.¹²⁵

C. Administrative Accountability

Administrative accountability in the top courts would relate to the Chief Justice's need for autonomy in agenda setting, strategy formulation and management, versus the constitutional requirement for accountability and transparency.

i. Allocation of Cases

The Constitutional Court of South Africa consists of eleven judges and is duly constituted to hear a matter when at least eight judges sit.¹²⁶ Kenya's Supreme Court consists of seven judges and quorum to hear a matter is at least five judges. For both South Africa and Kenya, the norm is for all judges to hear all cases unless they are unable to do so for good reason. This provides little chance for the Chief Justice to interfere in the course of individual cases as s/he cannot allocate specific cases to specific judges.

¹²⁵ Lubet (n 77) 73–4.

¹²⁶ Constitution of South Africa, section 167 (1) and (2).

India however has a different ball game. The Supreme Court of India started off with eight judges as the maximum number but now consists of 31 judges as at the 2011 amendment to the constitution.¹²⁷ The Indian constitution allows increase in the number of Supreme Court judges through statute. The Chief Justice is the ‘master of the roaster’ in that he alone has the prerogative to constitute benches and allocate cases as he deems fit. A petition filed to have this system changed for being subjective, opaque and unaccountable was declined by the Supreme Court (a bench of three, with the Chief Justice sitting).¹²⁸

Vesting the power and discretion to constitute benches and allocate cases solely in the Chief Justice without any guiding principles is ruinous to both accountability of the Chief Justice and independence of the other judges. This is because the Chief Justice might assign cases according to the philosophical leanings of judges in order to guarantee certain outcomes. A judge’s career on the court, which may be determined by the type of cases that the judge hears, rests in the hands of the Chief Justice. This may provide fodder for influence of the judge’s independence by the Chief Justice. There have been complaints about the impugned system in that ‘important cases’ are assigned to particular judges with the Chief Justice presiding in almost all of them.¹²⁹

A unique and somewhat unprecedented occurrence in the Supreme Court of Kenya was in October 2017 when the Chief Justice gave directions for hearing of an application to stop repeat Presidential elections but the following day, the Supreme Court could not raise quorum to hear the matter.¹³⁰ On the contrary, the Court of Appeal was able to raise quorum on the same day in the evening

¹²⁷Constitution of India, Article 124.

¹²⁸ *Shanti Bhushan Vs Supreme Court of India through its Registrar and another* [2018] Supreme Court of India Writ Petition (Civil) No. 789 of 2018.

¹²⁹ Manu Sebastian, ‘Master of Roster Case- Summary of Judgment’ (6 July 2018) <<https://www.livelaw.in/master-of-roster-case-summary-of-judgment/>> accessed 25 March 2019.

¹³⁰ Sam Kiplagat, ‘Judiciary Put in Tough Spot over Quorum Hitch’ *Daily Nation* (29 October 2017) <<https://www.nation.co.ke/news/Supreme-Court-Quorum-hitch-ELECTION/1056-4160358-auoxeb/index.html>> accessed 25 March 2019.

(7.30pm) to set aside orders issued by the High Court which would have affected the election.¹³¹

The questions that have been lingering and that remain unanswered relate to how the highest court in the country could fail to raise quorum to hear a crucial matter relating Presidential elections, an issue over which it has exclusive jurisdiction.

ii. Monitoring and Evaluation of Court Performance

Flowing from the above discussion under chapter two on judicial accountability, it is evident that the judiciaries of both Kenya and South Africa have since formulated methods of monitoring court performance, while India is still mooting the possibility of monitoring performance of judges. To measure the performance of judges based on case clearance, as has often been done, might affect the quality of judgments by focusing on quantity rather than quality. The South African Chief Justice seems to insist on quantity as he encouraged judicial officers to deliver short complete judgments and not necessarily ‘scholarly and reportable judgments’.¹³² This does not seem to be sound advice, more so in a common law legal system where jurisprudence of the top courts is binding on lower courts. Decisional accountability is measured through the quality of reasoning and scholarship of a judgment.

D. Decisional Accountability versus Independence

Lubet observed that decisional independence is a judge’s shield to his freedom of conscience and not a guarantee of ‘uniformly appropriate’ decisions that comply with the popular will.¹³³ Adherence to precedent and statute in legal decisions is expected of all judges; and their decisions are supposed to be founded on strong legal reasoning, correct factual and evidentiary analysis.¹³⁴

¹³¹ *ibid.*

¹³² Mogoeng Mogoeng (n 61) 12.

¹³³ Lubet (n 77) 67.

¹³⁴ *Judicial Accountability: A Practitioner’s Guide* (n 100) 15.

Given that their decisions are not appealable, it is paramount that the apex courts adhere to statutory provisions, established principles of law, and to their own precedent. The Constitutional interpretation of Article 124 of the constitution of India by the Supreme Court of India to engrain the collegium method of appointment is but a surprising one that lacks accountability.

Accountability to the law also demands that judges should obey the law just like any other person. As such, contravention of the law would call for censure and this is not to affect judicial independence.¹³⁵ As it were, the Deputy Chief Justice of Kenya is currently facing criminal charges filed against her related to tax issues that occurred some time before she joined the Supreme Court.¹³⁶

E. Academic Criticism

Another form of decisional accountability cited by Griffen is academic criticism.¹³⁷ This played out majorly after the Supreme Court of Kenya disallowed an affidavit by the Respondents in the 2013 Presidential election petition on the ground that it had been filed out of time.¹³⁸ The ruling was highly admonished for being in contravention of the provisions of article 159 (2)(d) of the Kenyan Constitution which requires that access to justice supersede undue regard to procedural technicalities. The final judgment thereafter was cited as being bad precedent with little jurisprudential value.¹³⁹ Griffen however had doubts as to whether academic criticism has much

¹³⁵ Lubet (n 77) 36.

¹³⁶ *Philomena Mbete Mwilu v Director of Public Prosecution & 4 others* (n 40).

¹³⁷ Wendell Griffen, 'Comment: Judicial Accountability and Discipline' (1998) 61 *Law and Contemporary Problems* 75, 75.; Anita Nyanjong and Ochiel J. Dudley (n 54) 10–11.

¹³⁸ *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR (Supreme Court of Kenya).

¹³⁹ Benard Sanga, 'Jurists Fault Supreme Court Ruling on Presidential Petition' *The Standard* (Nairobi, 6 September 2013) <<https://www.standardmedia.co.ke/article/2000092900/jurists-fault-supreme-court-ruling-on-Presidential-petition>> accessed 20 March 2019.

influence on judge's independence.¹⁴⁰ It is a good and sober way of expressing disagreement with court decisions as judges themselves may get to read the academic publications which may widen their scope when judging further related disputes.

F. Media Criticism, Propaganda and Political Comments

Speech is protected. Freedom of the media is protected. Objective public criticism of the courts is encouraged under the Latimer House Guidelines as a 'means of ensuring accountability'. The Supreme Court of Kenya has a very transparent mechanism of handling cases. Media is allowed into the hearings and live streaming is allowed. The public can follow proceedings in the comfort of their homes. Everything is conducted in open court except deliberation by judges which is of course confidential. As such, criticism and discussions are based on observation rather than rumors.

India on the other hand has a problem. It was not until 2018 in the case of *Swapnil Tripathi and another v. Supreme Court of India*, that the Supreme Court allowed live streaming and framed guidelines to regulate the same.¹⁴¹ Even then, only a select number of cases can be streamed; and the parties involved in the dispute must give consent. The Court retains the discretion to decline or allow the live streaming. This might be a tactic for the court to stream specific cases of public interest as a means of gaining favour in the eyes of the public rather than ensure its own accountability.

¹⁴⁰ Griffen (n 136) 75.

¹⁴¹ *Swapnil Tripathi and another vs Supreme Court of India* (Supreme Court of India).

i. Propaganda and Misinformation

Whereas objective media criticism bolsters judicial accountability, wide spread organized misinformation and propaganda through social media and other platforms aimed at degrading individual judges of the Supreme Court as happened in Kenya after nullification of the Presidential election is a great threat to judicial independence.¹⁴² The anonymity associated with the said misinformation makes it difficult to counter.

The Supreme Court has not found an adequate solution to counter misinformation or what is mostly referred to as ‘fake news’. Sitting pretty and waiting for the truth to prevail over falsity without actively fighting the false news will be a major undoing to the judiciary. The same way Lowenstein suggested that democracy must become militant and fight fascism for the sake of democracy’s own survival,¹⁴³ judiciary must fight misinformation and propaganda for the sake of retaining its own legitimacy and independence. The Office of the Registrar of the Judiciary and the Office of the Chief Justice ought to find a way of frequently disseminating information to counter any falsity against the Supreme Court and individual judges. The misinformation builds severe mistrust within the public and widens the gap between the Supreme Court and the public. When the time comes for the Court to turn to the public for support when its independence is attacked, it will find an adversary rather than an ally.

ii. Political Criticism

A sustained onslaught of political outbursts on the Supreme Court as happened in 2013 by the opposition and 2017/2018 by the ruling regime should raise eyebrows. Although speech and

¹⁴² Ochieng (n 74) 8.

¹⁴³ Karl Lowenstein, ‘Militant Democracy and Fundamental Rights, I.’ (1937) 31 American Political Science Review 417, 428.

expression are protected and constitutionally guaranteed, continued excesses should elicit some form of restraint. After all, there are avenues of complaint and discipline if one feels dissatisfied by the conduct of Supreme Court judges. It ought not be forgotten that political attacks on judges for issuing decisions that politicians do not agree with undermine judicial independence.¹⁴⁴ Limiting speech in order to safeguard judicial independence is however a very delicate matter that requires further consideration and deliberation.

Similar criticism and threats from the ANC to the Constitutional Court of South Africa intensified in 2011 when the Court invalidated legislation creating an anti-corruption institution;¹⁴⁵ and the statute that gave former President Zuma the authority to extend the term of the Chief Justice as being unconstitutional.¹⁴⁶ Chief Justice Mogoeng however sought the audience of the executive in 2015 when the unfounded criticism was overwhelming and when court orders were repeatedly disobeyed.¹⁴⁷ The result of the meeting was that both parties undertook to exercise care and respect towards each other as independent institutions of government. Perhaps, Kenya's Chief Justice could borrow a leaf from the unprecedented move by the South African Chief Justice.

G. Legislative Reaction

Legislative reactions sparked by conduct or decisions of the apex courts may also affect judicial independence. For instance, the above discussed attempts at amending the Judicial Service Act of Kenya to increase Presidential influence in the appointment process is a case in point. After nullification of the 2017 Presidential election, Parliament made an inroad on the autonomy of the Supreme Court's judicial function in anticipation of another Presidential election petition after the

¹⁴⁴ Marshall (n 41) 937.

¹⁴⁵ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (Constitutional Court of South Africa).

¹⁴⁶ *Justice Alliance v President of the Republic of South Africa* 2011 (5) SA 388 (Constitutional Court of South Africa).

¹⁴⁷ Linette Du Toit, 'Assessing the Performance of South Africa's Constitution' 34, 25.

repeat election. This took the form of enactment of the Elections Laws (Amendment) Act, 2017 which limited circumstances under which a Presidential election may be nullified by the Supreme Court.¹⁴⁸ Even though the specific provision in question was later declared unconstitutional by the High Court,¹⁴⁹ the declaration came after the repeat elections and petitions filed thereafter were done and dusted.

An attempt by Parliament to limit judicial intervention in electoral issues in India through an amendment to the constitution via the Constitution (Thirty-ninth Amendment) Act, 1975 was declared unconstitutional by the Supreme Court of India.¹⁵⁰ Suffice it to say that the contested constitutional amendment came after the High Court had found Prime Minister Indira Gandhi guilty of corrupt practices and disqualified her from holding office for six years.¹⁵¹ The effect of legislative prevalence over judicial decisions is erosion of judicial independence of judges.¹⁵² It would be more productive to cultivate a culture of compliance rather than political retaliation through legislation. As noted by Stacia, one of the main reasons that has boosted South Africa's Constitutional Court's legitimacy and independence is the respect and compliance accorded to its decisions by the Mandela regime.¹⁵³ The challenge brought by the criticism and attack during Zuma's administration were met by a different technique of survival; dialogue. The opposite is true for Kenya's Supreme Court.

¹⁴⁸Election Laws (Amendment) Act, 2017, S 9. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2017/ElectionLaws_Amendment_ActNo34of2017.pdf

¹⁴⁹ *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR (High Court of Kenya).

¹⁵⁰ *Indira Nehru Gandhi vs Shri Raj Narain & Another* (Supreme Court of India).

¹⁵¹ *ibid.*; Ochieng (n 74) 26.

¹⁵² Ochieng (n 74) 12.

¹⁵³ Stacia L Haynie, 'Courts and Revolution: Independence and Legitimacy in the New Republic of South Africa' (1997) 19 *The Justice System Journal* 167, 175.

H. Budgetary Control and Salaries

In relation to budget control and salaries, Tushnet argues that an international norm advocating for protection of judicial salaries is emerging as targeted reduction of judges' salaries gnaw at their independence.¹⁵⁴ Remuneration of Kenyan judges while in office and after retirement is protected under Article 161 of the Kenyan Constitution. The same position applies for India and South Africa as well.¹⁵⁵ Tenure is equally protected. The problem with funding lays in the operational budgets.

Last year, the Chief Justice of South Africa complained that the judiciary is 'acutely underfunded' making it unable to run its programs sufficiently.¹⁵⁶ India's situation is equally problematic.¹⁵⁷ The backlog of cases in the Supreme Court of India, nearly 60,000 now, is partly blamed on the measly funds allocated to the judiciary, which cannot sufficiently cover administrative costs.¹⁵⁸ The same problem has confronted Kenya's judiciary despite the adoption of the Judiciary Fund Act which was hoped would give the judiciary autonomy over its budget. Since 2014, the judiciary of Kenya has experienced budgetary cuts with major inroads coming in 2017/2018 after the Supreme Court nullified the Presidential elections.¹⁵⁹ The Chief Justice of Kenya cautioned that the budgetary cuts and inadequate funding for the judiciary would cripple projects aimed at improving access to justice.¹⁶⁰

¹⁵⁴ Mark Tushnet (n 96) 61.

¹⁵⁵ Constitution of India, Article 112; Constitution of South Africa, section 176.

¹⁵⁶ Mogoeng Mogoeng (n 61) 15.

¹⁵⁷ India Legal, 'Budget Allocation in Judiciary: Financially Strangled' (*India Legal*, 26 May 2018) <<http://www.indialegallive.com/special-story/budget-allocation-in-judiciary-financially-strangled-49117>> accessed 18 March 2019.

¹⁵⁸ *ibid.*

¹⁵⁹ Walter Menya, 'CS Raids Judiciary Coffers to Pay for Presidential Poll - Daily Nation' *Daily Nation* (Nairobi, 1 October 2017) <<https://www.nation.co.ke/news/Treasury-CS-raids-Judiciary-coffers-to-fund-election/1056-4119008-e5wt/ec/index.html>> accessed 18 March 2019.

¹⁶⁰ Judiciary of Kenya (n 36) v.; Vincent Ngéthe, 'Budget Cuts Hit Kenya's Judiciary – But There's No "Global Funding Target"' (*Africa Check*, 16 August 2018) <<https://africacheck.org/reports/budget-cuts-hit-kenyas-judiciary-but-theres-no-global-funding-target/>> accessed 18 March 2019.

The budgetary cuts, mostly politically charged, seem to confirm former Zimbabwean Chief Justice's fears that judicial independence shall always be threatened if control of the judicial budget remains out of the ambit of the judiciary.¹⁶¹ In all the three countries, the judiciary plays a part in estimating its own budget. However, the allocation of funds is a 'political decision'.¹⁶² Perhaps, to place some restraints on the political process of ascertaining yearly judicial funding, the Judiciary Fund Act should be amended to provide for a minimum share of the national budget that must always go to the judiciary. In the 2016/2017 Annual Report of the Judiciary, the Chief Justice of Kenya advocated for a minimum of 2.5% of the national budget. Better still, this can be included on the agenda of the constitutional amendments currently being mooted in Kenya.

¹⁶¹ Godfrey G. Chidyausiku, 'Modern Challenges to the Independence of the Judiciary' (Conference and annual General Meeting of the Southern African Chief Justice's Forum, Johannesburg, August 2010) 12 <https://www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf> accessed 18 March 2019.

¹⁶² Vincent Ngéthe (n 159).

4. Chapter 4 - Conclusion and Recommendations.

Brown and Waller have observed that the South African Constitutional Court was created as a compromise between the minority apartheid regime and the majority incoming forces to ensure that the agreed compromises would be implemented even after transition.¹⁶³ As such it was able to handle politically charged issues during the constitution making process without undermining its institutional legitimacy. However, they opine that after transition, the Court gradually avoided weighing in directly on politically heightened issues and focused its efforts on human rights protection.¹⁶⁴ This, Brown and Waller observe, was a strategic move to maintain its legitimacy by avoiding friction with the ruling and increasingly dominant ANC. Indeed, the court has adopted a restrictive interpretation of what amounts to constitutional issues capable of its audience;¹⁶⁵ yet it has survived and gained international reputation as a strong institution.¹⁶⁶ Its success and achievement of high standards has also been linked to executive and legislative support that have boosted its independence.¹⁶⁷

India's Supreme Court made sure it adopts a survivalist tactic by upholding Indira's win during the tumultuous emergency rule in 1975; but at the same time maintaining its relevance and independence by declaring limitations on jurisdiction of courts in electoral matters unconstitutional.¹⁶⁸ Like Kenya's Supreme Court, its competence in Presidential electoral matters places it in a direct possible conflict with politicians.

¹⁶³ Nathan J Brown and Julian G Waller, 'Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges' (2016) 14 International Journal of Constitutional Law 817, 830.

¹⁶⁴ *ibid* 831.

¹⁶⁵ Berat (n 13) 63.

¹⁶⁶ Brown and Waller (n 162) 817.; András Jakab, Arthur Dyèvre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 560.

¹⁶⁷ Jakab, Dyèvre and Itzcovich (n 165) 564.

¹⁶⁸ *Indira Nehru Gandhi vs Shri Raj Narain & Another* (n 149).

Unlike South Africa's Constitutional Court, Kenya's Supreme Court is not very lucky when it comes to politically charged issues. Its jurisdictional mandate on elections places it in the center of politics. Ochieng has pointed out that the 'judicialization of Kenyan politics' has had a negative impact on safeguarding the constitutionally and statutorily guaranteed independence of the judiciary.¹⁶⁹ As it were, the bulk of the afflictions of the Supreme Court are elections related.

In order to manage the situation in Kenya, it would be prudent to limit second tier appeals to the Supreme Court in gubernatorial, senatorial and National Assembly elections. Presently, even though the Kenyan constitution and the Elections Act 2011 do not provide for automatic appeals to the Supreme Court in non-Presidential electoral disputes, the Supreme Court assumed jurisdiction in several cases after the 2013 general elections.¹⁷⁰ By 2017, appeals to the Supreme Court were of right. The Court thus placed itself in this political quagmire, but a statutory amendment to the Elections Act can save it from some of the judicialized politics and safeguard its independence.

Prempeh opined that solutions ought to be 'home grown and socially rooted'.¹⁷¹ A home grown solution for Kenya would be for the Supreme Court to bridge the gap between itself and the people. Extensive backing among the people can be a strong bar against executive interference with the Court's independence. Indeed, given that the judiciary is accountable to the people, they must be made aware of the justice system and the role of the Supreme Court. Only then will they appreciate the importance of standing up for the courts when the executive or politicians make blatant attacks on the court. Justice Ginsburg of the United States Supreme Court has previously stated that the

¹⁶⁹ Ochieng (n 74) 6.

¹⁷⁰ Collins Odote and Linda Musumba (eds), *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections and Emerging Jurisprudence* (International Development Law Organization and Judiciary Training Institute 2016) 42.

¹⁷¹ Prempeh (n 70) 396.

insulation of the judiciary from control by the presidency and congress has been achieved by the American peoples' values that frown upon interference with judicial independence.¹⁷² Perhaps, with a little more insight, it will be the masses admonishing politicians against judicial interference rather than forlorn press conferences by the Chief Justice.¹⁷³

In Jackson's view, accountability should be embedded in the selection system since it enhances public confidence and respect for the judiciary.¹⁷⁴ However, from the interpretational tangent taken by the Supreme Court of India of what consultation entails, it emerges that manipulation of the system is not only a monopoly of the political branches of government, but also of the judiciary. By virtue of this interpretation, the judiciary has total and unconstrained control and power over its own operation. This is not a desirable feature in the current world wave of judicial accountability. Much as judicial independence is urged, Kenya must be vigilant to avoid an eventuality like that of India. Nor should it ever go the South African way of the JSC being a confirming house for Presidential appointees as judges. Kenya's appointment process is laudable.

Misinformation and spread of propaganda, is a new phenomenon that was not contemplated by the framers of the Kenyan Constitution. However, just the same way the world is struggling to device ways to fight the rising wave of populism, the Kenyan judiciary must find its own solution. As already suggested, a starting point would be for the Office of the Chief Justice and the Office of the Registrar of the Judiciary to actively counter the misinformation with correct material. Granted,

¹⁷² Ruth Ginsburg, 'Judicial Independence: The Situation of the U.S. Federal Judiciary' (2006) 85 Nebraska Law Review 3 <<http://digitalcommons.unl.edu/nlr/vol85/iss1/2>> accessed 15 March 2019.

¹⁷³ 'CJ Maraga Condemns Attack on Judiciary, Warns Politicians Making Inciting Remarks' *The Standard* (Nairobi, 19 September 2017) <<https://www.standardmedia.co.ke/article/2001255022/cj-maraga-condemns-attack-on-judiciary-warns-politicians-making-inciting-remarks>> accessed 18 March 2019.

¹⁷⁴ Jackson (n 57) 132.

the Chief Justice gives annual reports on the status of the judiciary which are publicly available. These however are not by any chance adequate compared to active daily propaganda.

Political banter and assault on the Supreme Court has become the order of the day in Kenya. Given its constitutional mandate and competences, its interaction with political issues is here to stay. Rather than the confrontational attitude of lashing out warnings through press conferences, perhaps, a move such as that adopted by Chief Justice Mogoeng in 2015 might help build respect and rapport between the court and the other arms of government.

Budgetary cuts seem to be the default fallback for the executive and Parliament to express displeasure with the judiciary. Although a cut of the administrative budget does not immediately and directly affect judge's independence, the culminative effect is negative and it ends up affecting the independence of the lead administrator, the Chief Justice. It is not easy to head an institution that is constantly short of funds; whose structural infrastructure is dilapidated and employees are constantly dissatisfied by the working conditions. The temptation to comply with the system so as to improve the conditions of the judiciary would be very high. It is high time statute provided for allocation of a specific percentage of the national budget to judiciary.

Five judges of the Supreme Court currently face petitions for removal based on the way they decided certain cases in the recent past. Often, the judges retain counsel for legal representation. The services of counsel do not come cheaply. Yet judges who stand accused have to carter for the costs of representation with no possibility of recovering the same even after they are cleared of the accusations. Given that judges are not allowed to supplement their earnings from other activities due to the high risk of conflict of interest, their salaries, their main source of livelihood, are strained to carter for legal costs. As constitutionally required, impugned judges would be on half pay during the pendency of proceedings by a tribunal appointed by the President. Such exposes the judges to

manipulation and conformism with the system to avoid a disciplinary process that would milk them dry. The foggy privilege to granted to decisional independence in view of the current petitions for removal makes the situation even worse. A judge's legal costs for cases that ensue from performance of their duties ought to be covered by the State.

After the Supreme Court of Kenya failed to make a clear determination relating to the administrative competence of the Chief Justice on decisions and orders granted by a single judge of the Supreme Court, decisional independence of the judges remain at stake. The same may be elucidated through statute or by a full bench of the Supreme Court.

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