



Independence versus Accountability: A Case study of the Judiciary in Kenya with a
Comparative Analysis of India and Colombia.

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Abstract

Democracies around the world are built on the doctrine of separation of powers where constitutions envisage each arm of the government being independent of the others. The Constitution of Kenya 2010 created a robust judiciary that has been at the forefront defending the new constitutional order. Over time, there has been an increase of constitutional and human rights matters thus earning the judiciary in Kenya a unlikely enemy, the executive. While studying this relationship and that of the Judiciary and Legislature, this paper will seek to find loopholes in the nature of their relationship while comparing with the Supreme Court of India and the Constitutional Court of Colombia in a bid to seal such loopholes and prevent the growing phenomenon of Judicial Overreach.

In this paper, it is established that the judiciaries of the three comparators all function as independent institutions. What is in question is to what level these judiciaries are accountable under the constitutions giving them breath. The paper also takes a look at the constitutions giving rise to the three judiciaries and how the judiciaries in the comparators have succeeded in keeping the other arms of government under check.

The paper then looks at institutional conflicts between the judiciaries in the respective comparators and the other arms of government. Safeguards against such conflict is also discussed even as the paper takes a drift that whereas there are benefits of independence of the judiciary, there could be traces of judicial overreach that are equally a threat to democracy. The constitutions of Kenya, Colombia and India have all been designed to provide for separation of powers. This without a doubt creates independent branches of government. The judgements given by these judiciaries is where the lines are drawn. This together with how accountable a judicial body is.

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Introduction

While two heads are better than one in the normal day to day endeavors of the average man, the governmental institutions, taking the forms of these heads, seem to be leaning more towards the opinion of each head being better off working independent of the other heads, especially the head that is the judiciary. In an ideal world, the judiciary passes judgments, administers justice to the public, appoints, vets, corrects and unseats judicial officers, among other functions, absolutely free from influences and coercions from the legislative and executive arms of governments. The question that looms over most democracies however, Kenya not being left out, is ‘is this really the case on ground?’ This paper seeks to provide an answer to that question.

In Kenya, just as in other democracies, the judiciary is ideally an independent arm of the government responsible for administering justice and ensuring the constitution is well kept and followed to the latter. This paper seeks to find out if that is really the case as is on ground. It looks into the extent of independence of the Kenyan judiciary from other arms of the government, making a comparative analysis using the judiciaries of Colombia and India. It begins by examining the existence of judicial independence in the said democracies, looking into constitutional provisions for judicial independence in Kenya, Colombia and India. It goes ahead to look at the application of the provisions for independence in the democracies under study by examining some judicial judgments against the executive and legislative arms of their respective governments. This part of the study aims at establishing whether the democracies in question appreciate and respect judicial independence, and whether their judiciaries are bold enough to maximize on the independence accorded to them in as far as making court rulings against other arms of the government is concerned.

The paper also appreciates that for as long as two heads are at par with each other, some friction is more often than not bound to occur. The legislative and executive arms of the government may sometimes feel the pinch of the much freedom accorded to the judiciary, to the extent of the judiciary making bold and non-interfered with judgments against them. In such cases, it is only natural that the legislature and executive feel the need to show their claws. In this regard, the paper looks into cases where the executive and the legislature of the democracies in question overstep their mandate against their respective judiciaries. This takes the form of the legislature and executive either ignoring some court order made against them, or making some unconstitutional moves for their selfish gains, and ignoring a recoiling order from the courts. The paper also studies the instances where the judiciaries of the democracies in question put their feet down to counter cases of overreach by the other arms of the government. More to this, the paper seeks to find administrative measures that have been put in place in the democracies in question with the intent of safeguarding judicial independence.

It is vital never to forget that there are two sides of every coin. As the paper emphasizes on the importance of judicial independence and transformative constitutions, it is careful not to overlook the other side of this coin; judicial overreach. In the high of enjoying constitutionally accorded freedoms, it is very easy for judiciaries to go overboard in exercising their freedoms. The paper seeks to strike a balance between these two possibilities and actual happenings. It studies some cases where the judiciaries in question overstep their mandates, and recommends some tactics, that can be applicable in Kenya, for controlling the same, to ensure that every arm of government is operating within its constitutional mandate.

CHAPTER ONE: THE JUDICIARY AS AN INDEPENDENT INSTITUTION

1.1 Independence of the Judiciary

The chapter deals with judicial authority, independence of the judiciary, judicial officers, appointment and removal from office, court hierarchy, the judicial service commission and an establishment of the judiciary fund. These functions are supposed to guarantee Independence of the judiciary in Kenya.

Independence of the judiciary is a measure of democracy and any constitution that guarantees judicial independence is celebrated as transformative as an emerging democracy. This is the case with the Constitution of Kenya (COK) promulgated on August 27th, 2010. Chapter 10 (Articles 159- 173) of the COK establishes Judicial authority and legal system in Kenya.

For independence to be achieved, judges have to be empowered to decide their cases in accordance to the law and not according to their own whims or the will of the political arms of government¹. This empowerment can only come from the constitution. Independence of the judiciary goes beyond the Judiciary as an institution. Individual judges have to be independent and this includes the judge's substantive and personal independence². The constitution of Kenya 2010 guarantees Independence of the Judiciary.

Turning to other jurisdictions, Article 228 of the Colombian Constitution³ guarantees judicial Independence. The constitution makes it clear that the decisions of the judiciary are independent and that judges are bound by the rule of law. The wording of Article 230 is strong towards granting institutional and individual independence of judges. The Colombian

¹ Collett, Teresa Stanton and Collett, Teresa Stanton, Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments. Loyola University Chicago Law Journal, Forthcoming, U of St. Thomas Legal Studies Research Paper No. 09-15, Available at SSRN: <https://ssrn.com/abstract=1444583>

² Ibid, note 1.

³ Colombia's constitution of 1991 with amendments through 2015, constituteproject.org.

constitution can be compared to the Kenyan one in relation to the circumstances under which they were enacted in the respective jurisdictions. Both are transformative with the aim of dealing with the excesses of the executive arms of government and the politics of the state. Both share a common history in that they seek to protect fundamental rights from arbitrary regimes. They are built to protect the people from the excesses of the state.

Similarly, Article 50 of the Constitution of India⁴ establishes the Independence of the Judiciary. It mandates the state to take steps to separate the judiciary from the executive. The wording is very strong in establishing an independent institution within the constitution. The Constitution of India (COI) goes further to establish the National Judicial Appointments Commission (NJAC). This body has the supervisory role over the judiciary in India. Perhaps in a bid to declare their independence the framers of the Indian constitution went overboard and made the NJAC a powerful institution which cannot be questioned or have its decisions invalidated on the grounds of any vacancy in their constitution⁵. The Judiciary in India has functional Independence.

Looking at Kenya and the two comparators, it is clear that all seek to have the judiciary as independent institutions. This points towards a common desire to have judges work without interference. The big question then would be, independence from whom? At Independence, the executive arm of government was the main threat to Independence of the Judiciary. Section 172 (1) of the Kenyan Independence constitution gave the power to appoint the Chief Justice to the Governor General. He was to act with the advice of the Prime Minister who had to consult the presidents of the regional assemblies as they had to advice if they had any

⁴ Constitution of India, as on 9th September, 2020.

⁵ Article 124 A (2) of the constitution of India, as on 9th September, 2020.

reservation on whom they did not want appointed. The Governor General also had the power to appoint puisne judges with the advice of the Judicial Service Commission. Clearly the executive had much control of the judiciary and this trend was carried on in subsequent constitutions of Kenya until the promulgation of the 2010 constitution.

Independence of the Judiciary starts with the appointment process of judges, if it is a process free of interference from the legislature and executive, then it is a step in the right direction. It is common practice that whoever has the power to hire has the power to fire thus bringing the issue of tenure of judges into consideration. A judge can only be independent when he has security of tenure and this is an aspect that was missing from Kenya's Independence constitution. Subsequent amendments saw the president retain the power to hire and dismiss judges. Courts were weakened in this model as it was difficult to give judgement against the state excesses that were characteristic of the Moi⁶ regime that spanned 24 years.

1.2 Independence versus accountability

With Independence comes the need for accountability. In simple terms, accountability stems from the idea of an institution being answerable for her actions. Accountability of the judiciary is realized in two ways, internally and externally. Internal accountability occurs when the institution has its own internal mechanisms of self-policing⁷. This is where the judiciary is its own watchdog. For this to work, the judiciary has to be driven by a strict adherence to the rule of law and the constitution. Judges take responsibility for their own actions and are accountable to one another in their dispensations of justice and in their internal administration. The hierarchy of

⁶ President Daniel Toroitich Arap Moi was Kenya's second president who ruled from August 1978 to December 2002. His rule was characterized with human rights abuses and fights for multiparty democracy.

⁷ Gathii, James Thuo, The Kenyan Judiciary's Accountability to Parliament and to Independent Commissions: 2010-2016 (2016). published in JUDICIAL ACCOUNTABILITY IN THE NEW CONSTITUTIONAL ORDER, J. Ghai (ed.), ICJ Kenya, (2016), Available at SSRN: <https://ssrn.com/abstract=3314222>

the court systems guarantee accountability in adjudication of cases. Appeals from lower to superior courts grants this. External accountability on the other hand occurs when other branches of government have oversight roles over the judiciary. Such authority is limited to non-judicial functions such as finances. There is a thin line between such accountability and lack of independence.

The COK 2010 establishes the Judiciary fund⁸ which seeks to give the judiciary financial independence over its administrative functions. For purposes of accountability, budgetary estimates are supposed to be approved by parliament and being a transitional clause in the constitution, parliament is required to enact legislation to provide for the regulation of the fund. The judiciary budget was a major source of conflict during the tenure of retired Chief Justice David Maraga⁹ as the executive through parliament kept reducing the judiciary budget. Financial independence is thus very important to the judiciary towards achieving administration and functional independence.

The judiciary is also accountable to the people. This enhances public confidence in the judiciary. For this accountability to occur, the people should have a channel of instituting proceedings against the judiciary when disgruntled. In a democracy, people want to be heard. This avenue should however be checked to sift genuine grievances from those of people seeking to settle personal scores or political interests. There has to be a balance between accountability and independence. Accountability follows from the concept that all the three arms of government

⁸ Article 173, Constitution of Kenya 2010

⁹ David Maraga was the 14th Chief Justice of Kenya (second Chief Justice under the constitution of Kenya, 2010). He served from October 2016 to January, 2021.

have to be accountable to each other as the system of checks and balances is the hallmark of democratic governance.

Accountability just like independence starts with the appointment of judges.

Appointment of judges in India and Kenya are functions of independent bodies specifically established to play oversight roles over the judiciary. This plays a big role in giving judges an opportunity to serve without fear. Secondly, judges have a security of tenure. This means that they can't be arbitrarily dismissed from office. Article 233 of Colombia's constitution provides for the tenure of judges. On this, the three jurisdictions follow a similar pattern.

In Colombia, the appointment of the judges of the Constitutional Court of Colombia (CCC) follows a pattern that is way different from Kenya. Two courts, the Supreme Court and the administrative court each nominate 9 members to congress for appointment, the president also nominates 9 members. Congress then proceeds to appoint nine out of the 27 names forwarded to them¹⁰. The appointments have to be proportional from each cadre. This model can either be viewed as independent or not. One view is that it follows a self-selection model whereby the judges of the two courts nominate fellow judges, on the other hand having the executive nominate is seen as intrusive to the judiciary.

Finally, the confirmation by congress seems misplaced in my view as it gives one arm of government an upper hand in the operational autonomy of the other. However, this is such a dynamic way of coming up with judges that it doesn't seem to follow any pattern in the region. Judicial appointments are political, at least in Kenya and Colombia. In Kenya, the president is supposed to gazette from a list sent from the JSC after a public interview. Judges are human and

¹⁰ Everaldo Lamprea (2010) "When Accountability Meets Judicial Independence: A Case Study of the Colombian Constitutional Court's Nominations," *Global Jurist*: Vol. 10: Iss. 1 (Advances), Article 7

sometimes a look at a judge's career history may be able to give an impression of one who is independent from state interference and one who is not. Colombia is not different; party politics influence the appointments in the administrative and Supreme Court. To balance between independence and accountability, different countries use different approaches.

1.3 Role of independent institutions in enhancing accountability.

Article 171 of the COK 2010 establishes the Judicial Service Commission (JSC) which is the body with an oversight role over the Judiciary. The main function of the JSC is the promotion and facilitation of the independence and accountability of the Judiciary and the effective and transparent administration of justice¹¹. The JSC takes lead in the appointment of judges, work conditions including remuneration, handling complaints against judicial officers and other staff of the judiciary. The membership of the JSC is drawn from across the public service to ensure fairness in their core functions. The JSC is headed by the Chief Justice who is the chair of the commission, one judge each elected from the supreme court, court of appeal, high court, two representatives from the magistrate's court (a male and a female representative), the Attorney General, two advocates (a male and a female representative) drawn from the Law Society of Kenya (LSK)¹², one person nominated by the Public Service Commission and one man and one woman appointed by the president with the approval of the National Assembly to represent the public. The chief registrar¹³ of the judiciary is the secretary to the commission. The members of the commission with the exception of the CJ hold office for a period of five years

¹¹ Article 172(1) of the Constitution of Kenya, 2010

¹² Law Society of Kenya is the umbrella organization that exists to regulate legal practice in Kenya.

¹³ The Chief Registrar is the administrative head of the judiciary, a position always filled by a judge of the High Court.

upon which they are eligible for nomination for a further five years. Structurally the JSC is built to function independently of influence from the legislature or the executive.

Article 124 A of the Constitution of India establishes the National Judicial Appointment Commission (NJAC). The JSC of Kenya is quite similar to the NJAC which consists of the Chief Justice of India, two senior judges of the supreme court, union minister in charge of law and justice, two eminent persons to be appointed by a committee. This committee consists of the Prime Minister, the CJ of India, leader of opposition in the house of the people or the leader of the single largest party in the house of the people. The eminent person is nominated from a special category of people defined as someone from the scheduled castes, scheduled tribes, other backward classes, minorities or women. The functions of the NJAC are defined in Article 124 B of the Constitution of India. These functions include recommendation of persons for appointment as judges, transfer of judges and ensuring that those recommended are of ability and integrity.

The Indian and Kenyan system have incorporated judicial independence and accountability in their constitutional texts. This is not the case with Colombia. The judiciary in Colombia lacks institutions that can be compared to the Kenyan or Indian ones. “The judiciary in Colombia has been perceived as neither Independent nor accountable¹⁴”. This was a conclusion made after a Robbins Collection symposium held in 2017 on judicial independence and accountability in Latin America. Perhaps the most literal attack on the Colombian judiciary took place in 1985 when the Palace of justice was taken over by militias of the M-19. The attack was so violent that it led to the killing of all the judges present in the court on that day. This event

¹⁴ Alvaro Pereira <https://www.law.berkeley.edu/research/the-robbins-collection/judicial-independence-and-accountability-in-colombia-a-brief-contextual-reflection/>.

prompted a clamor for a new constitution that gave birth to the constitution of 1991. The main feature of this court is the establishment of a system of bringing cases of abuse of fundamental rights, the constitutional court that is separate from the Supreme Court and other judicial bodies.

Independent bodies are the face of independence and accountability of the judiciary. The judiciary of Colombia then becomes an interesting body to put on the spotlight as it has been headlines with the establishment and the mode of operations of the constitutional court. Not to be underestimated, this court is considered a prominent court together with the leading constitutional courts of the global south such as the Indian Supreme court and the South African constitutional court¹⁵.

In summary, internal accountability is as important as external accountability. It is these functions that increase public confidence in the judiciary for people are satisfied when the systems put in place function to hold individual judges accountable for their actions be it in the exercise of their duties or general conduct of judges. External accountability comes in when there are institutions that have a supervisory role over the judiciary as demonstrated in the constitutions of Kenya and India. As to whether these institutions play the intended roles or not is the subject of the next section.

1.4 Breaking the barriers of accountability.

Whereas the judiciary is supposed to be accountable under the principle of checks and balances, accountability without interfering with independence of the judiciary is elusive. Any measures to increase accountability of the Judiciary in Kenya has been met with opposition as

¹⁵ González, D. (2020). Explaining the Institutional Role of the Colombian Constitutional Court. In T. Ginsburg & A. Huq (Eds.), *From Parchment to Practice: Implementing New Constitutions* (Comparative Constitutional Law and Policy, pp. 189-207). Cambridge: Cambridge University Press. doi:10.1017/9781108767859.011

stakeholders decry an interference with judicial functions. Accountability is seen as the necessary corrective to the excesses of judicial Independence, judicial ambition and self-indulgence¹⁶. Being a transformative constitution, the COK 2010 made the judiciary a strong and independent institution. The end result is an empowered judiciary willing to take on any institution as they uphold the rule of law and the fair administration of justice. This has put the judiciary on the spotlight. The result has been a backlash from the political elite which consists of those in government and those in the opposition depending on the kinds of judgements delivered from the court. Some of these judgements have been seen as an abuse of independence, some even termed acts of judicial overreach. These stem mainly from Judicial Review. By checking the executive and legislature, Judicial Review has a risk of replacing the rule of law with the rule of judges¹⁷. When exercising Judicial Review functions judges are sometimes seen to overstep their mandate and this becomes the bone of contention.

Judicial overreach is simply the rule of judges, when judges overstep their mandate and override legislative and executive functions. The debate is new in Kenya as judges mark their territory on judicial independence and stopping the executive and legislative branch if their actions do not meet the constitutional threshold. The judiciary in Kenya has stopped huge infrastructural projects¹⁸, ordered a repeat presidential election¹⁹, stopped executive

¹⁶ Ibid, note 1

¹⁷ Aziz, Sahar F., Independence Without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy (March 21, 2015). 120 Penn State L. Rev. 101 (2016), Texas A&M University School of Law Legal Studies Research Paper No. 16-07, Available at SSRN: <https://ssrn.com/abstract=2583238>

¹⁸ Communist Party of Kenya v Nairobi Metropolitan Services and 3 others; National Environment Management Authority and another (Interested Parties) 2022 eKLR <http://kenyalaw.org/caselaw/cases/view/230251/>

¹⁹ Raila Amolo Odinga & Another v The Independent Electoral Boundaries Commission and 2 others (2017) eKLR <http://kenyalaw.org/caselaw/cases/view/140716/>

appointments²⁰, declared executive orders unconstitutional²¹ and even termed parliament's composition as unconstitutional²². In a recent advisory opinion to the President, the Chief Justice of Kenya advised the president to dissolve parliament²³.

When it comes to judicial overreach, the Supreme Court of India is a court to study. In 2007, two Indian Supreme Court judges, A. K Mathur and Markandey Katju made some weighty remarks on the power of the judiciary while delivering a judgement. They were of the opinion that if the judiciary did not exercise restraint and continued to overstretch their limits there was bound to be a reaction from politicians and others²⁴. According to the judges, these actions were to have the effect of politicians stepping in to clip the powers and even the independence of the judiciary. This observation had its root in the fact that some judges were seen as trying to perform executive or legislative functions, acts they termed as unconstitutional as judges were not allowed to cross their limits or take over the functions of other state organs. If these statements are anything to go by, then India was already grappling with challenges that are emerging in Kenya today.

The statements by the two judges were rebutted and carried no legal implications but then their points had been made. In seeking to promote the independence of the judiciary, it is fundamental that one does not lose balance and end up in the realms of overreach. A bold

²⁰ Katiba Institute & another v Attorney General & another; Julius Karangi & 128 others (interested parties) 2021 eKLR. <http://kenyalaw.org/caselaw/cases/view/212831/>

²¹ Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested party) 2020 eKLR <http://kenyalaw.org/caselaw/cases/view/199540/>

²² Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR <http://kenyalaw.org/caselaw/cases/view/202549/>

²³ Chief Justice's advice to the President pursuant to Article 261(7) of the Constitution. <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>

²⁴ Sharma, S. (2008). Myth of Judicial Overreach. *Economic and Political Weekly*, 43(10), 15–18. <http://www.jstor.org/stable/40277222>

judiciary is the dream of every democratic population thus the rule of law should not be replaced with the rule of judges. In the next chapter, this research delves into decisions where the judiciary may have gone beyond their mandate and the effects of such decisions to the rule of law.

CHAPTER TWO: THE JUDICIARY IN A TRANSFORMATIVE CONSTITUTION

A constitution is transformative if it can be used as a tool for achieving positive change widely within a society²⁵. As mentioned in the first chapter, a transformative constitution gives room for judicial independence. With the assurance of a completely independent judiciary, the society can count on the judiciary to give timely and fair judgments and justice, causing positive changes in the society at large, thanks to transformative constitutionalism. This chapter explores, comparatively, the extent to which the constitutions of Kenya, India and Colombia are transformative by shedding light on the level of independence enjoyed by judiciaries of the said nations respectively. To arrive at a conclusion on the same, this chapter shall approach the question of the independence of these judiciaries by looking at some past judgments, by the said judiciaries on their respective executive and legislative bodies, which most vividly and simply show the extents of freedom with which the said judiciaries pass judgments against their legislatures and executives. It shall then close by exploring how each of the said nations' constitutions protects judicial independence in the respective nations.

2.1 Judgments against the Executive

2.1.1 Judgment against the Kenyan Executive

On the 30th of March, 2020, the Law Society of Kenya (LSK) made a petition at the High Court of Kenya, in Nairobi, against the Inspector General of the National Police Service and Fred Matiang'i²⁶. The petition held that the then announced curfew order²⁷ was not constitutional, had no legal effect and was not reasonable due to the nature and timing of most

²⁵Gebeye, A. (2021). A New Account from Kenya. Transformative Constitutionalism and the Basic Structure Doctrine. <http://www.iconnectblog.com/2021/05/transformative-constitutionalism-and-the-basic-structure-doctrine-a-new-account-from-kenya/>

²⁶ Fred Matiang'i is the Cabinet Secretary for Interior Security in Kenya

²⁷ The curfew order of March 27th 2020 after initial reports of COVID 19 cases in Kenya

Kenyans' nature of work, as a larger population of Kenyans depend on their daily wages, work between 5am and 6pm, and it would be impossible to get to their homes by the 7pm curfew requirement. It also held that the police force used excess force to enforce the curfew on citizens. It sought the doing away with the curfew order as a measure to control the spread of COVID 19 and justice against the police force for using unnecessary excess force on the citizens. The ruling was that the curfew was constitutional, therefore nothing on its terms was bound to be changed, and that the use of unreasonable force by the police was a question of the implementation of the curfew order, and shall be dealt with separately. The ruling, however, made exemptions for late working hours for essential workers²⁸, and particularly noted that the use of unnecessary force by the police is unconstitutional²⁹.

2.1.2 Judgment against the Indian Executive

Moving on to India, in 1968, December 11th, a former Sub Inspector of the Delhi Police Force named Shri Sardari Lal made a petition at the Delhi High Court against the Union of India and others about his dismissal from service in the police force. The petition held that Mr. Sardari had a clean record during his service, and had been given steady promotion in ranks over the time of his service, showing that there was no misconduct on his part. That notwithstanding, on the 14th of April, 1967, Mr. Sardari was served with a notice of dismissal, abruptly releasing him from duty. The ruling held that, according to the Indian constitution³⁰, every worker in a public service office remains in office for as long as the president wills. In accordance with this provision, Mr. Sardari's petition was declared without merit and was therefore dismissed. It is

²⁸ Workers who work in critical sectors considered essential for the running of the country, eg health workers

²⁹ Creative Commons. (2020). Petition 120 of 2020 (COVID 025). National Council for Law Reporting (Kenya Law). <http://kenyalaw.org/caselaw/cases/view/193192/>

³⁰ Article 310 of the Indian Constitution

important to keep in mind that courts in India are forbidden by law from trespassing any area of operation of the executive body, in accordance to the rule of power separation³¹

2.1.3 Judgment against the Colombian Executive

Finally, shifting our focus on Colombia, on the 22nd of September, 2020, the Supreme Court of Colombia ruled against the Colombian Mobile Anti-Riot Squadron (ESMAD) on the issue of the police force being extremely forceful on civilians. There had been anti-government riots and the police became unreasonably forceful in controlling the riots. The Supreme Court ordered the police to make a public apology and ordered the executive to put in place an outside monitoring body for the police force, as well as incorporate the neutrality rule of the executive³².

In conclusion, as noted in the above cases, all the above discussed judiciaries are keen to go by their respective constitutions in giving judgments. However, unlike the Kenyan and Colombian judiciaries, the Indian judiciary seems to be pressed by the law of the land and the constitution to refrain from directly making directive orders to the executive, making it rather difficult to achieve absolute judicial independence. In the case of Kenya, the judiciary acknowledges the mishaps in the conduct of a part of the executive. Although it does not address the mishap in the judgment in question, it provides an opening for addressing it in another judgment, should a different petition be made to specifically address the said mishap. This provision expresses the independence of the Kenyan judiciary. Finally, the judiciary of Colombia out rightly expresses its absolute independence by directly ordering the executive to make

³¹ Anand, A. (2021). Courts shouldn't step into executive's domain: Supreme Court. The Times of India. <https://timesofindia.indiatimes.com/articleshowprint/84426606.cms>

³² Media Defence. (2020). Colombian Supreme Court Clarifies Rules Around Protection of Human Rights During Social Protests. Media Defence. <https://www.mediadefence.org/news/colombian-supreme-court-clarifies-rules-around-protection-of-human-rights-during-social-protests/>

amends in its dealing with the civilians and publicly apologizing for mishandling civilians and violating their right to freedom from demeaning treatment. The above discussions lead to a conclusion that unlike in the past where judicial arms of government shied away from pronouncing themselves against the executive arm, there is an emerging practice in the comparators where the executive can be stopped.

2.2 Judgments against the Legislature

2.2.1 Judgment against the Kenyan Legislature

On the 18th of July 2019, the Senate filed a petition at the high court of Kenya in Nairobi against the National Assembly addressing the degree of the legislative functions of the National Assembly. The petition held that the National Assembly had made a habit of overlooking the legislative function of the Senate, of passing or not passing bills forwarded to the Senate by the National Assembly. The Senate specifically pointed out that between the years 2017 and 2019 the National Assembly had passed a total of twenty-three Acts without having forwarded them to the Senate for their consideration. In addition to that, the National Assembly forwarded fifteen acts to the Senate without following the proper channel as spelt out in Article 110 (3) of the COK³³. According to Article 110 (3)³⁴, before any of the above-mentioned houses considers a bill for passing, the speakers of both houses should agree on the question of whether the bill concerns a county or not, and if it does, whether it is a special bill or an ordinary bill.

The ruling ascertained that the National Assembly failed to act according to the provisions of the constitution. The court therefore ordered the National Assembly to do what is

³³ Creative Commons. (2019). Petition 284 & 353 of 2019 (Consolidated). National Council for Law Reporting (Kenya Law). <http://kenyalaw.org/caselaw/cases/view/202549/>

³⁴ Article 110 (3) of the Constitution of Kenya.

constitutionally expected of them within ninety days from the day of the ruling. The court also nullified all that the National Assembly had passed unconstitutionally.

2.2.2 Judgment against the Indian Legislature

Writ Petition No. 797 of 2021 was filed by Ashish Shelar and others against the Maharashtra Legislative Assembly and another at the Supreme Court of India. The petition was filed after unusual occurrences at the Maharashtra legislative house during the Monsoon session of the 5th of July 2021. The petitioners had just been elected into the Maharashtra Legislative Assembly from different constituencies, and they belonged to the opposition party. During the legislative session, members from the ruling party made steady efforts to silence the petitioners by blocking them from airing their views. The petitioners, in reaction, confronted the chairman of the session in a disrespectful manner, an action they later apologized for. A resolution was tabled in the house for corrective action against the petitioners for contempt of the house, but again the petitioners were not given an opportunity to defend themselves. The petition held that the Maharashtra treated the petitioners unfairly in both the Maharashtra session and during the corrective action resolution sitting. It also sought the reversal of the corrective measures taken against the petitioners for contempt of the house

The Supreme Court declared that the petitioners are part of the legislative house and have the right to enjoy every freedom that comes with the membership. It ruled every corrective action taken against the petitioners unreasonable and unconstitutional, thus reversing them all³⁵.

³⁵ WRIT PETITION (CIVIL) NO.797 OF 2021. 16505_2021_33_1501_33046_Judgement_28-Jan-2022.pdf

2.2.3 Judgment against the Colombian Legislature

In the year 2013, the Legislature of Colombia attempted to review the existing rights to information access within the boundaries of the country. This review was based on the intention to protect the cyber and terrestrial security of the country as well as the relationships between the country and other countries. The highest court of the land, however, ruled that the above said reasons for reviewing the right to access information, by themselves, are not enough to bar the public from accessing information. It went on to state that the international right to access of information applies even in Colombia³⁶.

In conclusion, from the above case studies, it is safe to say that judicial independence is absolute and effective in Kenya, India and Colombia if we base the conclusion on the judgments the respective judiciaries have made against their land's legislative bodies. The judiciary of Kenya out rightly nullifies every unconstitutional action of the land's National Assembly and gives an order to the National Assembly to comply with the constitution within a specified amount of time. In the same manner, the judiciary of India nullifies unconstitutional actions of the Legislative Assembly against some members of the legislative assembly, ordering them to correct their actions and do as the constitution dictates within a stipulated amount of time. In Colombia, a similar situation is evident where the judiciary out rightly denies the legislature the provision for unlawfully withholding information as it is not in line with the provisions of the constitution. For all these judgments to be passed, there has to be a strong backing from the constitution, allowing the judiciary the voice and space to make bold judgments against another body of the government. These provisions are what make the constitution transformative as they

³⁶ Maclean, E. (2014). Case Watch: Colombia Says No to Blanket Limits on the Right to Information. Open Society Justice Initiative. <https://www.justiceinitiative.org/voices/case-watch-colombia-says-no-blanket-limits-right-information#:~:text=Case%20Watch%3A%20Colombia%20Says%20No%20to%20Blanket%20Limits%20on%20the%20Right%20to%20Information>

allow for sober, lawful, fair, constitutional and uninfluenced judgments, ensuring a legally safe society and nation at large.

2.3 Constitutional Safeguards of Judicial Independence

Judicial independence is the state of the judicial body of a country having the power and freedom to make decisions on the dispensation of justice and the day to day running of the body without interference or influence from any external body or individual³⁷. It is vital that a country's constitution gives provisions for judicial independence, thus binding everyone in the country by law to refrain from interfering with the decisions and running of the judiciary, irrespective of the office they occupy within the country. In the efforts to achieve judicial independence, we keep in mind that taking care of the interests of judges is as vital as taking care of their official and judicial working conditions, as they constitute the most important part of the judicial fraternity³⁸. These interests include their appointment, remunerations and benefits, and job security among others, as this section shall explore. This section looks at the provisions in the Kenyan, Indian and Colombian constitutions, respectively, for the protection of lawful interests of the judicial body and ensuring judicial security and independence.

³⁷ Mudbidri, I. A. (2021). Independence of the Indian Judiciary: as demonstrated in relevant rulings. Pleadings. <https://blog.ipleaders.in/independence-indian-judiciary-demonstrated-relevant-rulings/#:~:text=Independence%20of%20judiciary%20means%2C%20the,basic%20structure%20of%20the%20Constitution.>

³⁸ Mudbidri, I. A. (2021). Independence of the Indian Judiciary: as demonstrated in relevant rulings. Pleadings. <https://blog.ipleaders.in/independence-indian-judiciary-demonstrated-relevant-rulings/#:~:text=Independence%20of%20judiciary%20means%2C%20the,basic%20structure%20of%20the%20Constitution.>

2.3.1 Constitutional Safeguards for Judicial Independence in Kenya

Article 160 of the COK provides for the following³⁹;

The judiciary of Kenya is answerable only to the law and the constitution of the land, and not to any other individual or authority. This provision ensures that no individual or authority is in a position to undermine or question the activities or decisions of the judiciary.

For as long as there is someone occupying the office of a judge of any of the superior courts, the office in question shall not be done away with. This provision caters for the job security of the judge in question. Also, judges' salaries and benefits are catered for by the Consolidated Fund of the Judiciary.

The salaries, benefits and pensions of judges are not to be altered to inconvenience any judge in their entire lifetime, both during and after service in their respective office. Provisions three and four cater for the remuneration security of judges.

Should a judicial worker perform their lawful task in good faith, and with respect to the constitution, they are not to be questioned by any individual or authority pertaining the performance of the said task. This provision ensures that judges perform their constitutional duties without fear of confrontation from any individual or entity.

2.3.2 Constitutional Safeguards for Judicial Independence in India

The COI provides for the following safeguards;

Judges are to work from the time of appointment by the president until they attain the age of sixty-five, unless they resign for one reason or another or the president passes an order of

³⁹ Article 160 of COK

removal from office of the said judge, under advisement by an address from each House of Parliament, that has the support of not less than two thirds of the members of each house, proving that the judge has misbehaved or is incapable of doing what is constitutionally expected of them. This provision ensures fairness in removal from office of a judge.

Judges are entitled to salaries that are regulated by the Parliament in accordance with the Second Schedule, which is the containment for the monetary privileges and allowances of holders of high offices of the Government of India, inclusive of judges. These salaries and privileges are protected by law from any alterations, to inconvenience judges both during and after their time of service. These provisions ensure security from any malicious manipulation against the judges targeting their salaries any other benefits of service.

2.3.3 Constitutional Safeguards for Judicial Independence in Colombia

The Constitution of Colombia provides for the following with regard to safeguards for judicial independence;

Judges are answerable only to the rule of law in their judicial verdicts. This provision frees judicial verdicts from external influences and personal feelings as verdicts are made to align with constitutional and legal provisions and requirements.

The election of magistrates to serve in the Supreme Court of Justice and the Council of State is done using the equilibrium criteria as stipulated by law, where a public notice of vacancies is made and a list of ten eligible individual is generated by the Judicial Government Council and administered by the Judicial Branch. The Supreme Court and Council of State decide the style of voting, with respect to the equilibrium criteria. On the other hand, the Constitutional Court judges are elected by the Senate of the Republic, from a compiled list of

eligible people generated by the President of the Republic, the Council State and the Supreme Court of Justice. These provisions eliminate the possibility of unmerited election, non-election or appointment into office of the judges as there are many people involved in the election and appointment processes of judges.

The Supreme Court of Justice enjoys the power to come up with its own regulations of how to carry out its activities. This is also the case with the Constitutional Court. These provisions free the judiciary from being bound to carry out their tasks in any other manner dictated on it by an individual or entity to suit the interests of the said individual or entity.

To conclude the chapter, I draw an observation from the above case studies that judicial independence is achievable but, at the same time, quite difficult to hit its mark. The Kenyan judiciary is protected by the constitution from malicious encroachment from external bodies, even of the government. Similarly, the Colombian constitution strongly protects its judiciary from such encroachment by giving it much freedom to operate without interference from external bodies. These two judiciaries are seen to exercise their freedom as they pass judgment on the other bodies of their respective governments. They do it with confidence, backed up by their constitutions. On the other hand, the constitution of India has a number of provisions that work towards building confidence within the judiciary but vaguely protects it from functional interference from other arms of the government. This observation leads me to conclude that even though judicial independence is possible, some nations still have some ground to cover before totally achieving it. In the same way, transformative constitutions are achievable, but some constitutions are further from the mark of trans-formativeness than others.

CHAPTER THREE: INSTITUTIONAL CONFLICT BETWEEN THE JUDICIARY AND OTHER ARMS OF GOVERNMENT

As noted in chapter two, judicial independence, as a product of a transformative constitution, and constitutionalism, is attainable, but at the same time a high hill to climb for many democracies in the world. Sometimes, irrespective of the protective provisions for the judiciary in constitutions, the executive and legislative arms of government still find a way of violating the freedoms and rights of the judiciary. Bound within the boundary of the Kenyan, Indian and Colombian democracies, respectively, this chapter shall explore the conflict between the judiciary and the executive and legislative arms of government. It shall survey specific instances where the executive and legislative arms of government have overreached the independence of the judiciary, and how the respective judiciaries responded to the overreaching acts of the other arms of government. It shall then shed light on the administrative safeguards to the judicial independence of the above-mentioned democracies.

3.1 Acts of Overreach of the Executive against the Judiciary

3.1.1 Acts of Overreach of the Executive against the Judiciary in Kenya

In 2019, the Judicial Service Commission (JSC) performed its legal duty of recommending for appointment forty judges and presented the forty-one names to the president for appointment and swearing in. The constitution provides that any individual, including the president, that, for one reason or another, feels that any of the suggested individuals is not fit for appointment as a judge, should raise the matter before the JSC, at the recruitment stage, for deliberations⁴⁰. At the time, there was no such expression. Interestingly, the president of the

⁴⁰ Article 166 of the COK

Republic of Kenya failed to carry on with the appointment and swearing in of the judges for a period of two years, after which he omitted six names from the list of proposed individuals for unclear reasons, causing both emotional and psychological unrest among the judges that were awaiting appointment⁴¹. Despite several moves by the judiciary to correct the anomaly, the Presidents totally refused and even defied court orders to do the same⁴². The Chief Justice, Hon David Maraga addressed the president publicly urging him to honor his oath to the constitution and swear in the judges, the Attorney General held a separate press briefing and rebutted the Chief Justice's remarks.

3.1.2 Acts of Overreach of the Executive against the Judiciary in India

On the 20th of September 2021, the Upper House of the Indian Parliament passed three bills with the aim of regulating the farming sector in India. The bills were the following;

- i. The Essential Commodities (Amendment) Act, 2020.
- ii. The Farmers' Produce Trade and Commerce (Promotion & Facilitation) Act 2020 ("Produce Trade and Commerce Act")
- iii. The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act 2020 ("Agreement on Price Assurance Act").

I shall focus on the 'Produce Trade and Commerce Act' as there sprouted a lot of controversy around it due to the overlapping it would allow in as far as the jurisdictions of the executive and judiciary is concerned. The most controversial provision of the act states that farmers' disputes are to be heard and settled by Sub Division Magistrates

⁴¹ Mutunga, W. (2021). Mr President, in the Name of the Constitution, Swear in the Judges. Elephant. <https://www.theelephant.info/op-eds/2021/06/09/mr-president-in-the-name-of-the-constitution-swear-in-the-judges/>

⁴² Agutu, N. (2020). Judiciary vs Executive. The Star. <https://www.the-star.co.ke/authors/scooper/>

(SDMs). This provision shifts legal jurisdictions from the judiciary to the executive. The provision clearly overlooks the separation of power directive of the constitution and amounts to overreach against the Judiciary⁴³. In response to this overreach, the Senior Advocate and Chairman of the Bar Council of Delhi, Ramesh Gupta, wrote a letter and addressed it to the Prime Minister of India, Narendra Modi, citing that cases being heard by SDMs is unconstitutional as SMDs are not part of the judiciary. He also requested that the executive not only pay attention to, but also honor the constitutional provision of separation of power among the three arms of government⁴⁴.

3.1.3 Acts of Overreach of the Executive against the Judiciary in Colombia

During the tenure of Colombia's former president Alvaro Uribe, the Supreme Court, led by Justice Velasquez, was conducting an investigation on executive officials, especially those close to the president, and including the president himself. The investigation sought to expose any dealings of the officials in question with the notorious Latin-American paramilitary groups that were disrupting the peace of Colombia at the time. To the surprise of many, former president Uribe kept making phone calls to Justice Velasquez trying to find out the proceedings of the investigations. The numerous phone calls to the magistrate from the highest office of the land inflicted a lot of political pressure on the magistrate and surmounted to executive overreach against the judiciary. Upon Justice Velasquez exposing the kind of pressure the president was putting him under, the Supreme Court stood up for the magistrate and ordered for the investigation of the president, on account of the interference of justice by the president⁴⁵.

⁴³ Pavani, M. (2020). Farm Laws: Farming towards an Executive Overreach of the Judiciary. The Leaflet; Constitution First. <https://theleaflet.in/farm-laws-farming-towards-an-executive-overreach-of-the-judiciary/>

⁴⁴ Bar Council of Delhi's Letter. <https://theleaflet.in/wp-content/uploads/2020/12/Bar-Council-Delhi-Letter.pdf>

⁴⁵ Human Rights Watch. (2007). Colombia: Uribe Must Respect Judicial Independence. The Human Rights Watch. <https://www.hrw.org/news/2007/10/08/colombia-uribe-must-respect-judicial-independence>

3.2 Acts of Overreach of the Legislature against the Judiciary

3.2.1. Acts of Overreach of the Legislature against the Judiciary in Kenya

The Kenyan Constitution is somewhat different in the way it handles the public funds and its expenditure. First, the Kenyan judiciary does not explicitly guarantee the judiciary independence on specifically certain terms. The Kenyan Judiciary answers to the legislature in regard to its public fund expenditure⁴⁶. The relationship between the judiciary and the legislature is believed to be that of mutual respect and understanding, and they rely on the interdependent nature of the arms of the government to co-exist in peace, without any squabbles.

The Kenyan judiciary has the responsibility of managing funds that are used in independent commissions such as Commission on Administrative Justice. It also controls the funds used by independent state officers like the budget controller. The Kenyan Parliament finds it relevant to control the judiciary budget, and enable the judiciary to be accountable in the process. The parliament discusses different elements of the budget and decides the amount of money that should be allocated to the different aspects of the judiciary, ensuring that all the funds are accounted for. Former chief Justice Willy Mutunga was once summoned to explain some financial inappropriateness seen in the judiciary, but because he believes in the judiciary independence, he refused to honor the summons⁴⁷. The chief registrar at the time, Gladys Shollei, honored the summons, showing that even within the judiciary, this particular law is controversial, and faces disputes among members.

⁴⁶ Gathii, J. T. (2016). The Kenyan Judiciary's Accountability to Parliament and to Independent Commissions: 2010-2016

⁴⁷ Gathii, J. T. (2016). The Kenyan Judiciary's Accountability to Parliament and to Independent Commissions: 2010-2016

The judiciary fund is a kitty that has been stipulated in the constitution to advocate for the independence of the Kenyan courts as well as the court officials. Currently, the legislature in Kenya is responsible for the judicial budget, which does not promote the aspect of independence. The Judiciary fund has been promoted and according to Chief Justice Martha Koome, the kitty could be operational as soon as 1st July 2022⁴⁸. According to the constitution (2010), Article 173 states that a kitty known as the ‘Judiciary Fund’ must be established under the Chief registrar of the Judiciary, who will have the responsibility of ensuring the fund is used responsibly and as constitutionally acceptable⁴⁹.

3.2.2 Acts of Overreach of the Legislature against the Judiciary in India

Almost every country has followed the United States constitution to ensure judicial independence from the other arms of the government. It is necessary for a country to have a free judiciary to assure the people of a free democratic society, where the law is applied and interpreted as per the constitution without interference from the legislature or any other government sector⁵⁰. India, in as much as it is reliant on a Euro-American style of constitution, it has to follow some of the rules of the OECD development center.

Traditionally, the legislature in OECD countries has the responsibility to ensure that public expenditures and revenue rising are done correctly, thus has to authorize them. The parliament is responsible for the country’s budget and must ensure the budget is done with utmost care and responsibility⁵¹. However, the center also advocates for judicial independence. As such, the Indian judiciary is independent of the two other governmental branches. Even

⁴⁸ Wakaya, J. (2022). *Kenya: Judiciary Fund to Be Operationalized By July 1*.

⁴⁹ Kenya, L. O. (2013). *The constitution of Kenya: 2010*. Chief Registrar of the Judiciary.

⁵⁰ Vaidya, N., & Raghuvanshi, R. S. (2010). *Independence of Judiciary-An Indian Experience*.

⁵¹ OECD. (2019). *Budgeting and Public Expenditures in OECD Countries 2019*

though the legislature has the mandate to prevail over the entire budget that concern the government, the judiciary has been left out of the equation to ensure that it provides free and fair justice without the influence from the other arms.

The Indian government has paved way for the judicial independence in a few ways. The president is the only one who can appoint judges and even then, it is after consultations with high judicial authorities. This ensures that the president does not appoint anyone in a biased way. Financially, the salaries and allowances given to judges are made through the Consolidated Fund of India⁵². This means that the legislature has no chance of interfering with the finances affecting the judges or any other members of the judiciary. Basically, the legislature has no way of controlling the judicial budget, which preserves the autonomy of the judiciary, allowing it to perform its functions effectively with minimal interference.

3.2.3. Acts of Overreach of the Legislature against the Judiciary in Columbia

Like most countries, the Colombian Parliament has budgetary responsibilities as stipulated in the constitution. In Columbia, the judiciary has developed over the past two decades or so to have a firm grip in the country's processes and procedures. In fact, it has managed to have secured a place in the political arena. As such, it has a voice before the people, and what is done to it and for it must be known to the people.

Budgets are very crucial to the wellbeing of a country. It allows the government to plan and execute different projects. Columbia is one country that has given the government powers to limit the budget of the legislature and the judiciary. The executive has a significant amount of

52 Arora, S. (2021). Independence of the Judiciary in India. *IJLMH*, 4(2),

power in relation to the budget approval, although it does not have the power to alter any part of it⁵³. The powers of the executive in relation to the budget is increased through the legislature.

The Colombian government has an independent judicial system which is vocal and politically centered. As such, there is a minimal chance of it being biased in any way. However, it has not been given the authority to determine the judiciary budget, but has the responsibility to implement it as stated by the budget made by the legislature and approved by the executive⁵⁴. Having the executive and the legislature have a say in the budget, eases the pressure on the judiciary, and assures it a fair placement.

3.3. Administrative Safeguards to Judicial Independence

Judicial independence is key to the wellbeing of any country. Without judicial independence, a country is bound to turn into chaos, as the law will be followed in line with involvement of other parties. This might lead to bias and unfair law implementations which would affect the countries in question⁵⁵. Ensuring judicial independence assures the people of a democratic government that will always consider their rights to equality. Different countries have different ways to ensure judicial independence as explained using the case of Kenya, India, and Columbia.

3.3.1. Administrative Safeguards to Judicial Independence in Kenya

In Kenya, the constitution does not explicitly state what judicial independence in the country entails. It is not clear why the constitution does not specifically state this fact, but it could be because it values the respectful interdependence nature of the three arms of the

53 Hommes, R. (1998). Evolution and rationality of budget institutions in Colombia. In *Colombia*

54 Smit, J. V. Z. (2016). *Judicial Independence in Latin America: The Implications of Tenure and Appointment Processes*.

55 OSCE. (2018). *Safeguards for judicial independence in administrative justice discussed at OSCE/ODIHR expert meeting*

Government. However, even though it is not stated specifically by the constitution, there are some aspects that assure the Judiciary of its independence.

First, it is recognized as an arm of the government. This means that it has power vested in it by the constitution to implement the laws of Kenya. The law implementation and application is independent from the other arms of the government, which also exercise independence in order to work effectively⁵⁶. Second, judges can only be dismissed in line with the constitution. As such, the other arms of the government cannot invoke the termination of a judge or court official unless with clear reason for the action⁵⁷. Third, the judges are expected to swear allegiance to adhere to the constitution faithfully at all time before they are allowed into office.

The independence of the judiciary is also guaranteed through the use of a judge's consolidated fund. Even though the legislature is responsible for the budget of the judiciary, there is a reservation on how the funds are spent exactly and when, and this is governed by the Chief registrar of the judiciary⁵⁸. Allowing the judiciary to have a say in their expenditure sends a message that they are independent and cannot be intimidated by any other sectors of the government.

3.3.2. Administrative Safeguards to Judicial Independence in India

According to Arora⁵⁹, the wellbeing of a country is embedded on the independence of the judiciary. Judicial independence is necessary to protect the rights of every citizen and also for the sake of allowing the law to prevail. Like the Kenyan constitution, the Indian constitution does

⁵⁶ Atika School. (2022). *Describe five ways through which independence of the judiciary is guaranteed in Kenya*

⁵⁷ Atika School. (2022). *Describe five ways through which independence of the judiciary is guaranteed in Kenya*

⁵⁸ Atika School. (2022). *Describe five ways through which independence of the judiciary is guaranteed in Kenya*

⁵⁹ Arora, S. (2021). Independence of the Judiciary in India. *IJLMH*, 4(2),

not declare the independence of the judiciary explicitly. Instead, there are some provisions in the constitutions that suggest the relevance of and independent judicial system.

First, the Indian constitution states the powers of all sections of the government but makes sure to distinguish the power of the judiciary. The constitution does not have a distinct separation of powers between the executive and the legislature. However, there is a clear separation when it comes to the judiciary⁶⁰. Being a federal government, one would expect that the judiciary follows similar patterns. However, despite having separate levels of government and separate legislature, there is one judiciary, which means it is independent of the states and union powers. The centralized judiciary encompasses the whole system and has subordinate courts, high courts, and supreme courts. This is pretty similar to what is in Nigeria.

Finally, the position of high court and Supreme Court judges express the independence of the judiciary. These judges must take an oath that binds them to be truthful and perform their duties faithfully without bias. The judges are only appointed by the president, but he has to ensure that he consults high judicial authorities before making a decision⁶¹. The judges' salary and allowances or other forms of income come through the Consolidated Fund of India, which means they are not dependent on other arms of the government⁶². This allows the judges to do their work effectively and the citizens can be comfortable knowing that the judiciary is not influenced by external forces.

⁶⁰ Arora, S. (2021). Independence of the Judiciary in India. *IJLMH*, 4(2),

⁶¹ Arora, S. (2021). Independence of the Judiciary in India. *IJLMH*, 4(2),

⁶² Arora, S. (2021). Independence of the Judiciary in India. *IJLMH*, 4(2),

3.3.3. Administrative Safeguards to Judicial Independence in Colombia

Like most other countries, Colombia has wanted to achieve judicial independence in several instances. The country experienced a lot of tension between the executive and judicial branches over the years⁶³. The judicial instability paved way to an unstable economy and political system. Former President Juan Manuel Santos understood the weakness of the country was from the poor judicial system in place, which made him launch some measures to ensure its ultimate independence⁶⁴. The New York City Bar Association recently showed concern in regards to the Colombian Judiciary's independence especially after former President Alvaro Uribe was charged with witness tampering⁶⁵. Even after he was found guilty, protests were made by his supporters who did not feel like it was just to have him under held under house arrest.

The Colombian Judicial system is compromised by the fact that it is politicized. There are many politicians' that politicize the rulings made by the judiciary, without a concern of how it will reflect on them or the people they serve, let alone the international world⁶⁶. The case of Uribe clearly shows how politics interferes with the judiciary in Colombia. When the former president was arrested and sentenced, his supporters brought in elements of politics in attempt to prompt his release, without considering the mistakes he had made.

The Colombian government is still trying to find ways to give the judiciary enough powers to be independent. The country has always had a weak judiciary and a significantly strong executive, which in some way could seem like dictatorship⁶⁷. The president had ultimate powers and could even single handedly appoint the judges. Most Latin American countries have

63 Kutner, J. (2011). How Colombia's President Santos made peace with the judiciary

64 Kutner, J. (2011). How Colombia's President Santos made peace with the judiciary

65 New York City Bar Committee. (2018). *Guarantees of Judicial Independence in Colombia*.

66 Pereira, A. (2018). *Judicial Independence and Accountability in Colombia: A Brief Contextual Reflection*

67 Pereira, A. (2018). *Judicial Independence and Accountability in Colombia: A Brief Contextual Reflection*

a problem similar to Columbia, which is probably the reason for the instability in the countries.

The judiciary system of Colombia cannot be described as independent because of its politicized nature, although the country is working on it.

CHAPTER FOUR: JUDICIAL OVERREACH

As discussed earlier in chapter two, having a judiciary that is perfectly independent though ideal is rather farfetched, in the sense that it is difficult to achieve regardless of the constitutional provisions provided. These provisions are evident in the constitutions of Kenya and Colombia, and to some extent, that of India, as discussed in chapter two. The chapter reaches this conclusion after carrying out a case study on some judgments against other arms of Kenya's, Colombia's and India's governments. It goes further to scan the respective countries' constitutions for provisions that protect the independence of their respective judiciaries. With this in mind, it is only noble to acknowledge that too much of anything can be poisonous. In the course of enjoying constitutional freedoms, it is possible for judiciaries to overstep their mandate. This chapter shall look at such possibilities and happenings despite the limitation of defining judicial overreach given the understanding that it is the duty of judges to state what the law is⁶⁸. It shall keep its boundaries around Kenya and India as in the previous chapters, and scan for instances where the judiciaries of these democracies have overstepped their mandate. It is noteworthy that Colombia has been within the boundaries of this research throughout the earlier chapters. This chapter leaves Colombia out since in the judicial overreach study pool Colombia has no relevant cases. The chapter shall go further to suggest some strategies of curbing judicial overreach by exploring both internal and external possibilities that could work to achieve the same.

4.1 Judicial Overreach in Kenya

In 2018, the Magistrates and Judges Vetting Board of Kenya found some magistrates unsuitable to continue holding office, ordering their removal, with no provision for a court

⁶⁸ Marbury v. Madison 5 US 137 (1803)

hearing addressing the same. The Board is, by law, responsible for vetting and determining the eligibility to serve, of judicial officers in Kenya⁶⁹. The sixth schedule to the COK provides for an ouster clause that, in section 23(2) strips off the power to oppose the Board's decisions, on removing judges from their terms of service in the judicial board, from the Judicial Service Commission⁷⁰. This clause, however does not say anything about opposing the Board's decision on magistrates' holding or removal from office. This exclusion therefore gives the JSC the allowance to counter magistrates' removal from office by the Board. The affected magistrates made a petition at the high court concerning the Board's order, where the High Court ruled that the court had nothing to say about the Board's decision and that by law it could not interfere with the decisions of the board.

Judicial overreach is evident here on the part of both the Board and the Commission colluding to remove from office magistrates and denying the magistrates their right to a fair court hearing before removal from office. This case is of interest in this research thesis as it stands out to show judicial overreach even within the judicial body, in that the said overreach affects members of the judiciary!

4.2 Judicial Overreach in India

In 2016, the Madras High Court of India made a ruling that the National Anthem of India was to be played in movie cinema halls before and after films, during which there was to be no movement inside the halls and people in the halls were to stand in respect to the National

⁶⁹ Ikamari, B. (2021). Civil Appeal 457, 458, 466, & 475 (Consolidated) of 2018. *Kenya Law*. <http://kenyalaw.org/caselaw/cases/view/221239/>

⁷⁰ Ikamari, B. (2021). Civil Appeal 457, 458, 466, & 475 (Consolidated) of 2018. *Kenya Law*. <http://kenyalaw.org/caselaw/cases/view/221239/>

Anthem, and sing along to it⁷¹. This ruling was made as a measure of patriotism amongst the people living in India. It also affected schools as it ruled that when the National Anthem is being sung every student or pupil should stand at attention and sing along as a sign of patriotism.

This ruling by the High Court comes off as an overreach as it does not take into account that not everyone living in India shares similar religious beliefs. Seeing that the Indian National Anthem is a prayer made to an unclear deity⁷², it is improper to force everyone to sing along to it as different people subscribe to different religious beliefs. Moreover, not everyone in India speaks the Bengali language, which is the language that the anthem is sang in. To add on to that, singing any country's National Anthem does not necessarily show that the singer is patriotic to the country in question⁷³, thus punishing someone for not being patriotic just because they did not sing the National Anthem is rather unfair. Finally, the Indian judiciary overstepped its mandate in this case as the court made a ruling and treated it as law, a function that by law is vested on the legislative arm of the government, the making of new laws⁷⁴. This case is of interest to this thesis as it touches on the overreach of the judiciary against citizens, and on very sensitive social matters like lingual, ethnic and religious differences.

Another instance of judicial overreach in India with similar characteristics as the case earlier discussed is the 2020 High Court ruling on the ban of all firecrackers during festivities.

⁷¹ Mustafa, F. (2022). A Case of Judicial Overreach. *The Tribune*.
<https://www.tribuneindia.com/news/archive/comment/a-case-of-judicial-overreach-446639>

⁷² Vasudev, V. (2013). Wanted: A more inspiring anthem than Jana Gana Mana. Firstpost.
<https://www.firstpost.com/living/wanted-a-more-inspiring-anthem-than-jana-gana-mana-1038655.html#:~:text=Our%20variety%20is%20certainly%20unique,was%2C%20and%20remains%20a%20prayer.>

⁷³ Culver, S. (2021). Column: The False Patriotism of a Required National Anthem. *The Huntington News*.
<https://huntnewsnu.com/66046/sports/column-the-false-patriotism-of-a-required-national-anthem/>

⁷⁴ Kairali. (2022). Judges And Law Making. Legal Service India E-Journal.
<https://www.legalserviceindia.com/legal/article-2142-judges-and-law-making.html#:~:text=Even%20though%20legislature%20and%20the,a%20law%20on%20their%20own.>

This ruling was made from a point of good intentions as it was to preserve the environment from the gaseous pollution as a result of firecracker explosions⁷⁵. However, it is not within the jurisdiction of the judiciary to issue bans on citizens⁷⁶, therefore we see the Indian judiciary overstepping its mandate once more and issuing directives that are, by law, to be issued by a different arm of government. This case is of interest to this thesis as it shares similar characteristics in nature with the national anthem case.

4.3 Institutional Changes to Tackle Judicial Overreach

It is important to appreciate that there are existing measures for curbing judicial overreach already put in place. A good example is the different levels of courts that have varying jurisdictions and powers. Higher level courts are able to act as checks for the lower-level courts should need arise. This is evident in cases of appeals where unsatisfied complainants or defendants are allowed to file for appeals within a specified amount of time, as was the case in the above discussed judicial overreach case, in Kenya, of 2018. In 2021 the complainants filed an appeal at the Court of Appeal where the court ruled that the ruling at the High Court on the relieving from work of the magistrates without trial was unconstitutional and should be revised⁷⁷.

Despite there already being measures put in place to curb judicial overreach, it is unfortunate that judicial overreach still occurs. This paper suggests few strategies that I believe may help counter judicial overreach in Kenya. First, some good functioning internal judicial disciplinary procedures should go a long way in ensuring that judges or other judicial officers

⁷⁵ Franklin, A. (2022). Are fireworks bad for the environment? Science Focus. <https://www.sciencefocus.com/planet-earth/are-fireworks-bad-for-the-environment/>

⁷⁶ Bhatia, G. (2018). The Meesha Judgment: Book Bans and the Supreme Court's Dangerous Grandstanding. Indian Constitutional Law and Philosophy. <https://indconlawphil.wordpress.com/2018/09/05/the-meesha-judgment-book-bans-and-the-supreme-courts-dangerous-grandstanding/>

⁷⁷ Ikamari, B. (2021). Civil Appeal 457, 458, 466, & 475 (Consolidated) of 2018. Kenya Law.

that overstep their mandate are punished fairly and accordingly. This measure can also be applicable in as far as external bodies are concerned. However, with external bodies, it is vital that a clear and very critical line be drawn between judicial disciplinary action and other entities overstepping against the judiciary. Disciplinary measures are effective as judicial officers will know that they have something to lose should they carry themselves in professionally unacceptable ways.

Also, Kenya could adopt a different approach to the appointment of judges. In Kenya, judges are appointed by the president following the recommendation of the Judicial Service Commission and approval of the National Assembly⁷⁸. This essentially means that judges are appointed by an individual, a factor that may encourage an allegiance to the said individual rather than to the administration of justice to the public. It may also mean that judges, pledging allegiance to the executive, may overstep their mandate without worrying about any consequences. The Ethiopian model of appointing judges is the inverse of the Kenyan model. In Ethiopia, top judges are recommended for appointment by the prime minister to the House of People's representatives, who in turn appoints the judges⁷⁹. In this model, we see an individual recommend a candidate for appointment and a group of people doing the actual appointment. This counter any feelings of indebtedness as it was an appointment arrived at by a whole panel rather than individual. I strongly suggest that the Kenyan model of appointing judges be modified to emulate the Ethiopian one as it is a more promising measure in as far as curbing judicial overreach is concerned.

⁷⁸ Article 166 of COK, 2010

⁷⁹ Aneme, G. A. (2010). Introduction to the Ethiopian Legal System and Legal Research. GlobaLex. <https://www.nyulawglobal.org/globalex/Ethiopia.html#thejudiciary>

CONCLUSION

As democracies try to achieve independence of the judiciary, it is evident that they are aware of the possibilities of the judiciaries going overboard. For this reason, democracies lay down accountability tactics to ensure that judicial independence does not trickle down to overreach. This paper has examined the balance between judicial independence and overreach, having confined its focus within Kenya, Colombia and India. It started by looking at the constitutional provisions in the said democracies for judicial independence, concluding that Kenya and India have notable provisions for judicial independence in their constitutions, unlike Colombia, whose judiciary is considered neither independent nor accountable. Unlike Colombia, Kenya and India have independent institutions that enhance judicial accountability in as far as the appointment, punishment and removal from office of judges as need may arise. These are the Judicial Service Commission (JSC) in Kenya and the National Judicial Appointment Commission (NJAC) in India.

The paper has gotten more specific in its study by going ahead to looking into the extent of the freedom enjoyed by the said judiciaries. It has used the approach of the judgments the judiciaries have made against other arms of the government without fear, intimidation and coercion. The Kenyan and Colombian judiciaries are seen to actually enjoy their constitutional freedoms as they make fair judgments against the other arms of the government without fear of infringement. This is not entirely the case when it comes to the Indian judiciary as in India, the constitution forbids the judiciary from interfering with the executive, a directive that may in turn interfere with the rulings of the judiciary against the executive. After having looked at the judgments made against other government arms, the paper goes ahead to study the constitutional provisions for judicial freedoms in each of the said democracies. The findings are that, in Kenya,

the judiciary is only answerable to the law and constitution, therefore cannot be questioned for as long as it follows the constitution. The Kenyan constitution also protects the job security, salaries and benefits of judges. In India, the constitution provides for fair removal from office of judges, alongside job security, and protects judges' salaries and benefits. In Colombia, the judiciary is also answerable only to the rule of law, enjoys the right of coming up with its own regulations and the right to a fair and transparent appointment into office.

Even though judiciaries enjoy constitutional freedoms from interference by other arms of government, friction between the said government arms still exist. The paper has taken a step further to look into instances where the executive and legislative arms of the government have overstepped against the judiciary, vis a vis respective judiciaries pushing back within their constitutional rights and freedoms. This part of the study found each of the said judiciaries to be quite defiant in issuing and standing up for justice. The paper further studies the existing administrative measures in each of the democracies under study to protect judicial independence, finding a number of similarities between those in India and Kenya, like the use of Consolidated Funds for the running of the respective judiciaries, judges taking oaths of office upon appointment and clearly defined judicial powers and mandates. An additional one in Kenya is the fact that judges are only dismissed from office constitutionally. Interestingly, there lacks any in Colombia, even though Colombia's government in making efforts towards imposing some.

With the great emphasis on the protection of judicial overreach, the paper has kept in mind that it is possible for the judiciary to also overstep its mandate in the frenzy of enjoying its freedoms. The paper has looked into cases where the respective judiciaries have overstepped their mandates, finding in Kenya, an inconsistency between a High Court ruling and the constitution, and in India, the judiciary issuing bans and assuming law making responsibilities.

Commendably, there were no cases in Colombia. The paper therefore has suggested some measures of curbing judicial overreach in Kenya, which are the adoption of the judges appointing model of Ethiopia and the setting up of an internal judiciary disciplinary body. From the study above, it is safe to conclude that judicial independence is achievable with the existence of constitutional provisions and administrative efforts geared towards achieving the same. At the same time, a line needs be drawn between independence and overreach by the imposition of both internal and external measures for curbing judicial overreach.

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