Journal of Law and Ethics

Volume 3, 2018

A peer-reviewed publication of the
Centre for Jurisprudence & Constitutional Studies
Kabarak University School of Law

Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa

Walter Khobe Ochieng*

Abstract

The Kenyan Constitution, 2010 and the 1996 South African Constitution prescribe eligibility criteria for appointment into public office. The courts in both countries have been vested with the role of policing the boundaries of constitutionality of the exercise of power by the other arms of government. This mandates courts to ascertain whether an appointment by the executive branch meets the constitutionally prescribed threshold. The power of judicial review of appointments by the executive branch has brought the question of separation of powers between the judiciary and the executive into sharp relief. This paper discusses the separation and intertwining of powers between these two branches of government in the context of their respective roles in public appointments.

1.0 Introduction

A core assumption of traditional constitutional thought is that constitutional issues are only a relatively small subset of all political issues. This is undergirded by

* LLM (University of Pretoria); LLB (Moi University), PGD (Kenya School of Law) Lecturer, Department of Public Law, Moi University, School of Law and an Advocate of the High Court of Kenya. An earlier version of this paper was presented at the Second Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA) 17-19 September 2014, I thank the participants for their comments and suggestions on improvement of this paper.

an understanding that the legislature should be given the leeway to make policy.[1] However, the *leitmotif* of new constitutions, particularly in developing and post-authoritarian countries, eschews this limited conception of what constitutions do.[2] As Kim Lane Scheppele has noted, citizens of these countries tend to adopt "thick" constitutions, with large amount of material –socio-economic rights provisions, elaborate accountability principles, among others- that are normally left to ordinary legislation under traditional constitutional thought.[3] They also tend to regulate certain items in great detail.[4] This characteristic brings almost all issues of governance within the remit of constitutional problems.

Despite criticisms of these thick conception of constitutions as containing material unsuited for constitutional law,[5] their logic is understandable. Constitutions in developing countries are thoroughly transformative documents by necessity; no developing country wants to stay as it is.[6] There is a need to transform not merely society and the economy, but politics as well. The ordinary political order is generally viewed as flawed. Thick constitutionalisation is, thus, a signal that ordinary politics will not do as a solution to the country's problems.[7] To lay a solid foundation for promoting credible and effective governance, therefore, requires accountability mechanisms and institutions to be constitutionalised.[8]These mechanisms and institutions are designed to control and constrain government in order to prevent both anarchy and arbitrariness. This informs the high number

[1] *See* K L Scheppele, "Democracy by Judiciary: Or, Why Courts can be More Democratic than Parliaments", in A Czamota, *et al* (eds.) *Rethinking the Rule of Law after Communism,* Budapest, Central European University Press (2005), pp 37-38.

[2] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eklr Advisory Opinion No. 2 of 2012 para 54.

[3] *See* Scheppele, *Supra* note 1, pp 37-38.

[4] K Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society", 38 *American Journal of Comparative Law* (1990), p 773.

[5] *See, e. g.,* M Kugler, & H Rosenthal, *"Checks and Balances: An Assessment of the Institutional Separation of Political Powers in Colombia",* in A Alesina, *Institutional Reforms: The Case of Colombia,* Cambridge, MIT Press (2005), pp 75-76. One is therefore mindful of the advice of K C Wheare, *Modern Constitutions,* Oxford, Oxford University Press (1966), pp 33–34, that a constitution should contain 'the very minimum, and that minimum [should] be rules of law'. Or, as Chief Justice Marshall put it in the celebrated United States' case of *McCulloch v Maryland*, 4 Wheat 316, 407 (1819), a constitution by its very nature requires that only its 'great outlines' be marked and its 'important objects' designated, and that it not descend into the 'prolixity of a legal code'.

[6] *See* C Sunstein, *Designing Democracy: What Constitutions Do,* Oxford, Oxford University Press (2001) p 68.

[7] *See* Scheppele, *supra* note 1, pp 37-38.

[8] C Fombad, "The Constitution as a Source of Accountability: The Role of Constitutionalism", 2 *Speculum Juris* (2010) p 57.

of bodies (courts, constitutional commissions, among others) given constitutional control power in such new constitutions.[9]

At the centre of the transformative agenda of the Constitution of Kenya, 2010 is the entrenchment of principles on leadership and integrity that require consideration of ethical conduct of appointees to determine suitability of appointees for public office.[10] This is aimed at ameliorating the defects in the system of governance in the old dispensation which was deficient in terms of accountability principles and institutions.[11] Corruption in public service during the post-colonial era had become endemic thus compromising on service delivery.[12] The leadership and integrity provisions were, therefore, entrenched into the constitution with the hope that this would aid in checking the runaway bad governance and corruption in the country.

In 1994, South Africa emerged from a racially divided and oppressive past which disrespected human rights and the most basic tenets of the rule of law. Most state institutions had little or no credibility, were profoundly distrusted by the majority of the people and were not accountable in any credible manner, either to courts or to one another.[13] The negotiators of the 1996 Constitution, motivated by the need to transform South Africa from an intensely oppressive state into an open and democratic society, imposed ethical substantive constraint on the powers of the executive branch in appointments of persons into designated offices.

---

[9] *See, e. g.,* C S Elmendorf, "Advisory Counterparts to Constitutional Courts", 56 *Duke Law Journal* (2007) p 953; T Pegram, "Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996-2001", 51 *Journal of Latin American Studies* (2008), pp 51-82.

[10] Chapter six of the Constitution of Kenya, 2010 and made applicable to public officers through Leadership and Integrity Act, No. 19 of 2012. At section 52, the Act states that "pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers." See also *Evans Misati James & 8 others v Independent Electoral and Boundaries Commission & 2 others*, [2012] eKLR Petition 327 & 328 of 2012 para 55.

[11] P Wanyande, *et al* "Governance Issues in Kenya: An Overview", in P Wanyande, *et al* (eds.) *Governance and Transition Politics in Kenya,* Nairobi, Nairobi University Press (2007) p 2.

[12] Wanyande, *et al Ibid* pp 1-20; K Kibwana, *et al The Anatomy of Corruption in Kenya: Legal, Political and Socio-economic Perspectives,* Nairobi, Clarion (1996); P K Kidombo, *Targeting Corruption: The Booming Business*, Nairobi, Sino Printers and Publishers (2006); E M Mwenzwa, "Corruption in the Utilization of Constituencies Development Fund: Implications and Remedies", in E G Ontita, *et al* (eds.) *Themes in Contemporary Community Development in Africa: A Multi-disciplinary Perspective*, Pau, Delizon International Publishers (2013), pp 214-230.

[13] P de Vos, "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy", in D Chirwa, & L Nijzink, (eds.) *Accountable Government in Africa: Perspectives from Public Law and Political Studies,* New York, United Nations University Press (2012), p 160.

The constitutionalisation of ethical values in both constitutions was born out of the need to ensure accountability to the public in service delivery. The aim of this endeavour is to cushion the public against malpractices especially by public officials in cahoots with individuals and institutions in the private sector. Governmental ethics obliges public officers to make objective and impartial decisions with unqualified integrity and honesty in order to bring honour and pride to the offices held. This is an attempt to institutionalise democratic ideals within the Kenyan and South African polity. In order to streamline the processes of appointment into public office, the Constitution of Kenya envisages that selection into public office should uphold the principles of personal integrity, competence and suitability.[14] The South African Constitution captures the same concern by providing that appointees to designated offices must be "fit and proper" for the job.[15]

Both the constitution of Kenya and South Africa grant courts powers to determine whether anything said to be done under the authority of the constitution or any other law is inconsistent with or in contravention of the constitution.[16] This gives constitutional *imprimatur* to the courts to ensure that appointments to public office conform to the values and principles on public appointments. The expansive judicial role under these constitutions is in sync with these constitutions' transformative vision for the Kenyan and South African societies. In essence, these constitutions attempt to create an ongoing, controlled, evolution by laying a legal architecture in which social, economic and political transformation could take place in a post-liberal democracy. It is this vision of a controlled evolution that the courts have deemed to confer upon them the sweeping jurisdiction to intervene in the domain of other arms of government.[17]

The marked rise of judicial power and influence has meant that there are few issues of political life in Kenya and South Africa with which the judiciary is not in some way involved.[18] It has been argued that courts in the two countries have

[14] Article 73(2) (a) of the Constitution of Kenya.

[15] For example, Section 174 (1) of the South African Constitution stipulates that appointees into judicial office must be fit and proper persons.

[16] Article 165(3)(d)(iii) of the Constitution of Kenya and Section 172 of the Constitution of South Africa.

[17] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others* [2013] eKLR Advisory Opinion Reference 2 of 2013 para 53. See also *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 100.

[18] X N Iraki, "Bloated Wage Bill: Finally, Kenya's Moment of Truth", 18th March 2014 *Standard* notes in this regard 'A careful analysis of the framers of the Constitution shows they were mostly lawyers with one

expanded their role in ways that intrude into domains textually committed to other branches of government.[19] Judicial oversight over the democratically elected branches of government: the executive and the legislature, has always raised concern of supplanting the choices of the people made through political processes with a juristocracy. In the Kenyan and South African context, the judicial enforcement of the principles on eligibility for public appointments have heightened concerns about the authority of judicial review and the counter-majoritarian consequences of constitutional challenge.[20]

The intervention by courts in questions of the legality of public appointments suggests a useful prism through which to view the expansion of judicial power and what it portends for separation of powers between the judiciary and the executive in Kenya and South Africa. The balancing of the competing obligations to forge a constitutional order that honours the intention of the framers and the anxiety not to be seen to usurp the mandate of the executive branch has seen the courts develop various strategic mechanisms for taming undue judicial interference with other arms of government. This paper investigates these strategies, which in essence are of judicial deference, as deployed by courts when faced with questions of eligibility of appointees into public office. The question posed in this critique is how judicial deference as a function of respect for separation of powers fits with the constitutional imperative that the courts should advance the transformative vision of the constitution.

2.0 Constitutionalisation of Governmental Ethics

From independence by African countries in the 1960s, the continent has been characterized by the degradation of governmental structures along with

---

major objective: to ensure there shall never be another all-powerful President. But they seemed not sure of the replacement. They distributed power so much that no one seems to have any power except the courts.' http://www.standardmedia.co.ke/?articleID=2000107160&story_title=bloated-wage-bill-finally-kenya-s-moment-of-truth Last visited 1 May 2014. See also Pius Langa, "Transformative Constitutionalism" (2006)3 *Stellenbosch Law Review* 351.

[19] C Kanjama, "Legislative Autonomy Extends to Court Orders, This is Why", *Standard* 8th December 2013 . http://www.standardmedia.co.ke/mobile/?articleID=2000099627&story_title=legislative-autonomy-extends-to-court-orders-this-is-why Last visited 1 May 2014. See also Jacob Zuma "Judiciary must respect separation of powers" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=264525&sn=Detail&pid=71616 Last visited 1 May 2014.

[20] A M Bickel, *The Least Dangerous Branch*: *The Supreme Court at the Bar of Politics* 2nd ed New Haven, Yale University Press (1986), pp 16-17.

corruption, repression and human rights abuses.[21] Since the 1990s, most African countries have embarked on a process of democratization marked by the quest to tame runaway abuses of power and strengthen governance systems through the enactment of new constitutions.[22] The contemporary surge in constitution making across the African continent has been motivated by the need to solve several problems, of both society and state. Yash Ghai argues that "[i]n particular they aim to promote values and framework of nation building as well as to restructure the state."[23] Constitutionalisation of ethical values has emerged as one of the options put forth as an attempt to put a break to a past plagued by mismanagement, misappropriation, nepotism and tribalism, abuse of power and impunity.[24]

The Constitution of Kenya entrenches principles of leadership and integrity in attempt to engender a political system in which governance is conferred on persons who believe in the common good of the people. To break away from the vicious circle of lack of integrity and unchecked powers, the framers of the constitution have laid out the characteristics of leadership under the new constitutional dispensation. [25] Integrity involves leaders consistently behaving in an honest, ethical and professional manner, promoting and advocating the highest standards of personal, professional and institutional behaviour during their tenure.[26] Leaders who fail to uphold this standard risk being removed from their leadership positions, while appointing authorities must be satisfied that prospective holders of public office meet the test of integrity. It aims to make the government accountable to the people – the source of all sovereign power. Public officials are to be in office to serve the people, observe high standards of integrity and avoid corruption and favouritism.[27]

---

[21] E Ahmed, & K Appiagyei-Atua, "Human Rights in Africa-A New Perspective on Linking the Past to the Present," 41 *McGill Law Journal*, (1995-1996) p 822.

[22] L G Franceschi, *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective,* Cambridge, Cambridge Scholars Publishing, (2014), pp 121-122.

[23] Y Ghai, "Chimera of Constitutionalism: State, Economy, and Society in Africa" in S Deva, (ed) *Law and (In)equalities –Contemporary Perspectives,* Lucknow, Eastern Book Company (2010), p 327.

[24] P L O Lumumba, & LG Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary,* Nairobi, Strathmore University Press (2014), pp 297-298.

[25] Constitution of Kenya Review Commission (CKRC), *Final Draft*, Nairobi, Government Printers (2005), p 217.

[26] See generally K Obura, "Towards a Corruption Free Kenya: Demystifying the Concept of Corruption for the Post-2010 Anti-Corruption Agenda" in MK Mbondenyi, *et al* (eds) *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal*, Pretoria, Pretoria University Law Press, (2015), p.239.

[27] Y P Ghai, & J C Ghai, *Kenya's Constitution: An Instrument for Change*, Nairobi, Katiba Institute (2011), p iii.

While not elaborate as the Kenyan scheme, South Africa's Constitution also regulates ethical conduct of public officials and demands that this should be one of the criteria for assessing the suitability of a candidate for designated public offices. Explicitly, the constitution demands that judicial appointments must take into account the consideration as to whether the candidate is "fit and proper".[28] Mokgoro notes that this provision and the open criteria with which the Judicial Service Commission is expected to carry out its functions is integral to the objective of transformation of South Africa's judiciary from its apartheid legacies.[29] A similar scheme is envisaged for the appointment of the National Director of Public Prosecutions (National Director). Section 179 of the South African Constitution requires the enactment of national legislation to ensure that the National Director is appropriately qualified.[30] This has been effected through sections 9 and 10 of the National Prosecuting Authority Act which requires that the National Director must be a person fit and proper for the job with due regard to his experience, conscientiousness and integrity.[31] Thus a legislative scheme complements and beefs up the constitutional demands for consideration of ethics in public appointments in the South African context.

3.0 Judicial Enforcement of Governmental Ethics and Separation of Powers

The modern understanding of separation of powers is based on a "trinity of branches" whose status stems from the constitution. Each one of the three branches is limited in its authority and powers. None of them is omnipotent. The legislative, the executive, and the judicial branch have no authority beyond that granted to them in and by the constitution. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and is not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check

[28] Section 174(1) of the Constitution of South Africa.

[29] Y Mokgoro, "Judicial Appointments", http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf Last visited 1 May 2014.

[30] Section 179(4) of the Constitution of South Africa.

[31] Act No 32 of 1998.

to the others and no single group of people will be able to control the machinery of the State.[32]

The importance of the principle of separation of powers is in the very connection between the branches and in the limitations they place on each other.[33] Indeed, the three branches are equal; each has its own unique character, and their equality is reflected even in those characters. Each one's unique character is balanced out by the others'. In this way, the internal harmony of the system is ensured. No branch has total power. The branches are connected and intertwined with each other. The modern principle of separation of powers is based on the concept of reciprocal relations between the different branches of power such that each branch checks and balances the other branches. The meaning of this modern principle is threefold: first, each branch of government has a function that is its major function. Its nucleus should not be impinged upon. Second, each branch should perform its function according to its outlook and its discretion. Third, balancing and review between the three branches is needed.

Separation of powers does not mean the absolutism of each branch within its zone. The principle of checks that characterizes the modern separation of powers is at work, according to which the judicial branch has the final authority, in cases of dispute, to determine the bounds of authority and the legality of the activity of the other branches. When the judiciary determines that the executive branch deviated from its authority or exercised it illegally and thus invalidates the action, it does not infringe upon executive authority and it does not violate the principle of separation of powers. On the contrary, the ones who violated the principle of separation of powers are those who deviated from their authority or acted illegally. A court that invalidates these actions preserves this principle and restores the balance that has been upset.[34]

Judicial review of executive power is an important requirement of constitutionalism in Africa because of a widespread recognition of a powerful executive branch in Africa.[35] An unrestrained executive branch would result in

[32] M J C Vile, Constitutionalism and the Separation of Power, Oxford, Clarendon Press (1967), p 14; however it should be noted that there exists a continuum of different models of systems of government and often times members of one branch can also sit in another branch. For example, in parliamentary systems of government, cabinet ministers are both members of the executive and the legislative branches of government.

[33] A Sajò, *Limiting Government: An Introduction to Constitutionalism,* Budapest, Central European University Press (1999), p 35.

[34] *M. v. Home Office* [1992] Q.B. 270, 314.

[35] E Nwauche, "Judicial Review of the Exercise of Presidential Power in Africa", 16 *University of Botswana Law Journal* (2013), p 3.

arbitrary exercise of power since courts would defer to their unfettered exercise of discretion. Whenever the executive branch exceeds the authority given to it, or if it exercises that authority unlawfully, the judiciary must exercise the power of review given to it by the constitution and statutes. The judiciary should use this power to determine the consequences of the executive's actions. Indeed, when the judiciary reviews the acts of the executive branch, it operates within the framework of its classic role in separation of powers and in accordance with its role of maintaining the rule of law. Rule of law implies that every person who has authority must exercise it lawfully, and if authority has been exercised unlawfully, it must be subject to judicial review.[36]

The area of judicial review of governmental ethics raises the question of separation of powers in a particularly stark fashion because of the traditional assumption that when it comes to appointments, the question of who gets appointed is a matter for the unfettered discretion of the executive branch. The assumptions here have much to do with the fact that the discretionary powers are direct descendants of what were once considered to be unreviewable or non-justiciable executive prerogatives.[37] To borrow from Gerhart Anschütz, Weimar's most distinguished constitutional lawyer, it might seem that in these areas, "public law stops short".[38] Put differently, the question of who should hold public office is a highly political area of official decision-making where some argue that the *writ* of the rule of law does not run, even though very important issues of governance are affected by these decisions. The idea that some areas of official decision-making can be sealed off from the rule of law is in tension with the idea of constitutionalism.[39]

The executive branch derives its powers from the constitution and statutes. Therefore, in making appointments into public service, the executive must act within the framework of the constitution and statutes. Constitutionalisation of governmental ethics implies certain standards into the exercise of public power of appointment vested in the executive branch. Judicial review ensures that courts are able to ensure fidelity to these standards.[40] Critics view this phenomenon as

---

[36] A Barak, *The Judge in a Democracy,* Princeton, Princeton University Press (2006), p 241.

[37] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

[38] Quoted by David Dyzenhaus in D Dyzenhaus, "Baker: The Unity of Public Law?", in D Dyzenhaus, (ed) *The Unity of Public Law,* Oxford, Hart Publishing (2004), p 2.

[39] J Waldron, "The Core of the Case Against Judicial Review", 115 *Yale Law Journal* (2006) p 1354.

[40] J Limbach, "The Role of the Federal Constitution Court," 53 *South Methodist University Law Review* (2000) p 429.

an increase in judicial power relative to the powers of the executive branch. This change, however, is merely a side effect of an attempt to entrench good governance into the polity of a state. The purpose of this development is not to increase the power of courts in a democracy but rather to increase the protection of the citizenry's interest in good governance. It is informed by the reality that democracy is based on the simultaneous existence of both the rule of the majority and the rule of values that characterize democracy.

Whenever issues of judicial enforcement of governmental ethics have arisen in Kenya and South Africa, the executive branch has argued that once the executive has decided upon the appointment, there is no basis for judicial intervention. The executive, it has been argued, balances various considerations, and after it has decided to make an appointment, courts should not intervene to supplant the executive's discretion with its own discretion. [41] This assertion by the executive branch in both countries raises several questions. What if the executive branch of government acts illegally? What if the executive branch deviates from the authority which the constitution grants it? What if the executive branch makes illegal use of its constitutionally assigned authority? The solution to these problems lies in the concept of checks that one branch has over another. In this context, it is important to emphasize that the principle of separation of powers does not mean that each branch may deviate from its authority or exercise it illegally without the other branches being allowed to intervene. Separation of powers means that each branch is independent within its zone, so long as it acts according to the law. It is not a license for the branches to violate the law.

Adjudication of governmental ethics must be flexible and take into account the needs of a modern democracy. A "monist" approach to authority should be prevented. While courts should recognize the interweaving between the branches in fulfilling the constitution's intent, judges must take care not to impinge on the essence of appointments as a function of the executive branch. It is also important to note that the executive branch of government should discharge the appointive function according to its own perspective and discretion without intervention from the judicial branch. Therefore, courts should not invalidate a decision by the executive branch that falls within the zone of legality, just because the court would have chosen a different person.[42] The choice between candidates is the function of

[41] See generally J Okoth, "The Leadership and Integrity Chapter of the 2010 Constitution of Kenya: The Elusive Threshold" in MK Mbondenyi, *et al* (eds) *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal,* Pretoria, Pretoria University Law Press, (2015) p. 275.

[42] *The State ex rel. The Attorney General v Porter* 1Ala. 688; 1840 WL 243 (ALA.).

the executive branch, and there is no room for judicial intervention in that decision. According to the principle of separation of powers, if the executive branch operates within the framework of its authority, the judiciary should not intervene and should not change that decision. The authority to execute belongs to the executive branch, not the judiciary. The judiciary may not replace the discretion of the executive on whom to appoint with its own judicial discretion. Despite this recognition of the appointive power as a function of the executive branch, the principle of separation of powers recognises the need for checks and balances between the three branches. In the absence of checks and balances, the executive branch is likely to accumulate power in a way that is harmful to the aspirations of the constitution.[43]

4.0 Deference in Adjudication of Governmental Ethics as a Stratagem for Respect of Institutional Comity

Traditional constitutionalism has long viewed judicial power with suspicion.[44] Indeed, this notion underlies Bickel's "counter-majoritarian" difficulty - judicial review can be "undemocratic" because it "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it".[45] These views also stress the inferior institutional capacities of courts to formulate policy and to check executive power.[46] Deep hostility to judges, means that delegation of power to judiciaries is viewed as a necessary evil. Since statutes do not interpret, apply, or enforce themselves, political rulers need courts; and judicial authority has been made more palatable through separation of powers doctrines. These doctrines seek to distinguish the political function (legislating and administering) from the judicial function (the resolution of legal disputes by a judge through application of the legislator's law). However, acceptance of judicial review means rejection of executive and legislative sovereignty and separation of powers means "checks and balances" among co-equal branches of government.

---

[43] G O'Donnell, "Horizontal Accountability in New Democracies", in A Schedler, *et al.* (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Boulder, CO, Lynne Rienner (1999), pp 29–51.

[44] *See* Waldron s*upra* note 38 pp 1346, 1406; J H Ely, *Democracy and Distrust: A Theory of Judicial Review* Cambridge, Harvard University Press, (1980) p 87.

[45] *See* Bickel, *supra* note 20, pp 16-17.

[46] *See* A Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation,* Cambridge, Harvard University Press (2006), p 230; G R Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* Chicago, Chicago University Press (1991), pp 15-21; L Fuller, "The Forms and Limits of Adjudication", 92 *Harvard Law Review* (1978), pp 394-95 (arguing that courts are poorly suited to deal with complex, polycentric problems because of constraints on their institutional capacities).

The concept of judicial deference has been adopted to advance the argument that other arms of government have been bestowed upon a legitimate authority and thus deserve the leeway to implement their policies. Further, that most of the substance of the decisions made by other branches of government are not appropriate for judicial decision-making, particularly because of the polycentricism of the task and consequence.[47] Lastly, that courts lack the requisite expertise on the issues that are up for consideration. Judicial deference therefore implies that the judiciary must appreciate the legitimate and constitutionally-ordained province of the co-equal arms of government and accord their interpretations of fact and law due respect. This is the approach that Kenya's Court of Appeal and the Constitutional Court of South Africa have endorsed as the ideal judicial approach in adjudication of cases for eligibility of appointment into public office.

The Kenyan Court of Appeal rendered judgment in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (Mumo Matemu)*[48] where the Appellant appealed against the decision of the High Court which had upheld a petition questioning the constitutionality of his appointment by the President as the Chairperson of the Ethics and Anti-Corruption Commission. The Appellant's appointment had followed clearance by the National Assembly which did not make recommendations relating to his unfitness or unsuitability for the position as against the constitutional threshold of integrity. Following the appointment, the High Court was moved by the 1st Respondent to issue a declaration that among other things, the process and manner in which the Appellant had been appointed was unconstitutional.

The 1st Respondent contended that every person who was interested in the Chairmanship of the Commission had to meet the threshold set out in the Leadership and Integrity Chapter of the Constitution. It was its case that although the formalities for the appointment of the Chairperson were followed, the person who was appointed did not meet the criteria laid down in the Constitution. The 1st Respondent alleged corrupt dealings by the Appellant in the past when he held several senior positions at the Agricultural Finance Corporation (AFC). It questioned his integrity by stating that the Appellant swore an affidavit with false information on the amount of money that a company known as Rift Valley Agricultural Contractors Limited owed AFC, and secondly, that as Legal Officer at AFC, he

[47] Fuller, *Ibid*, pp 394-95 (arguing that courts are poorly suited to deal with complex, polycentric problems because of constraints on their institutional capacities).

[48] [2013] eKLR Civil Appeal 290 of 2012.

approved certain loans which had not been properly secured, and whose proceeds were paid out in fraudulent and unclear circumstances. The 1st Respondent further claimed that some of these allegations were the subject of criminal investigations by the Police and the Criminal Investigations Department but the investigations had never been completed. The 1st Respondent pointed out to the Court that the criminal investigations file was still open with a recommendation that the Appellant be interviewed. The 1st Respondent added that during the Appellant's tenure as Legal Officer at AFC, the company's governance record was characterized by mismanagement, dubious writing off of debts and loss of billions of shillings of tax payers' money.[49]

The Court of Appeal upheld the appeal reasoning that the High Court had failed to observe the limits of its mandate under the separation of powers doctrine. The Court of Appeal underscored the need for judicial deference in the following terms:

> It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.[50]

The general architecture of the *Mumo Matemu* court's approach on deference is that courts should leave it to the other branches of government to make decisions on eligibility for appointment into public office.

In *Democratic Alliance v President of South Africa and Others (Democratic Alliance)*[51]the South African Constitutional Court was similarly called upon to address itself to the question of governmental ethics. The Court gave judgment on the question as to whether the appointment of Mr Simelane as the National Director of Public Prosecutions (NDPP) by the President of the Republic was constitutionally valid. In an application brought by the Democratic Alliance, the North Gauteng High Court had held that the President's decision was indeed valid, but the Supreme Court of Appeal set aside the decision as having been irrational.

---

[49] *Mumo Matemu* paras 2-6.
[50] *Mumo Matemu* para 49.
[51] 2013 (1) SA 248 (CC).

The Minister for Justice and Constitutional Development (Minister) sought to appeal against this decision.[52]

Mr Simelane had given evidence before the Ginwala Commission of Enquiry concerning the conduct of the then NDPP, Mr Vusi Pikoli. The Report of the Ginwala Enquiry had severely criticised Mr Simelane's approach to and evidence before that Enquiry and the Public Service Commission (PSC) had recommended that disciplinary proceedings be instituted against him. The Minister rejected the recommendations of the PSC and advised the President to ignore the findings of the Enquiry and Mr Simelane's evidence before the Enquiry in the process of appointing Mr Simelane as NDPP. The President did not take these matters into account in making his decision to appoint Mr Simelane.[53]

In a unanimous judgment (subject to a qualification by Zondo AJ in relation to one paragraph of the judgment),[54] Yacoob ADCJ evaluated Mr Simelane's evidence at the Ginwala Enquiry and concluded that the evidence was contradictory and, on its face, indicative of Mr Simelane's dishonesty and raised serious questions about Mr Simelane's conscientiousness, integrity and credibility. The failure to take this into account would, absent acceptable reasons for not doing so, not be rationally related to the achievement of the purpose of appointing a person of conscientiousness and integrity as NDPP. The Constitutional Court held further that the reasons the Minister had provided for withholding this evidence from the President was insufficient. The Court held that the failure by the President to take into account this evidence without more was irrational in the sense of not being rationally related to and inconsistent with the purpose of appointing, as NDPP a fit and proper person with due regard to his conscientiousness and integrity. This led the Court to nullify Mr Simelane's appointment.

The *Mumo Matemu* court fleshed out its notion of deference to the executive branch as hinged on: First, an approach that judicial review should be a review of the process of appointment and not a substantive review. Second, that the appropriate standard of review of appointment process is that of means-end rationality and not a reasonableness review. On the other hand, the *Democratic Alliance* court expressed the opinion that both the decision and the process must be rational. On the appropriate standard of review, both courts are reading from

[52] *Democratic Alliance* para 1.

[53] *Democratic Alliance* para 4.

[54] Democratic Alliance paras 96-101. Zondo, AJ expresses the view that a statutory body such as the PSC is required to observe the *audi alteram partem* rule to a person facing allegations such as those Mr. Simalane faced.

the same page that the ideal standard of review should be a means-end rationality analysis. Thus, the courts part ways as to whether review entails a review of both the decision and the process. The subsequent sections of the paper will interrogate these two claims as propounded by the *Mumo Matemu* and the *Democratic Alliance* courts. The preferred approach being advanced in this paper is an approach where the courts remain involved in the resolution of the disputed eligibility issue in the form of setting the normative parameters within which any resolution must occur. This is based on the understanding that in transforming the juridical basis of the state, the normative logic of the constitutions of both countries limits executive and legislative sovereignty by recognizing substantive constraints and empowering the courts to enforce these constraints. A theory of judicial review hinged on an untamed deference gives the executive leeway to whittle away the normative values of governmental ethics without any meaningful check.

4.1 Judicial Review as a Process and not Substantive Review

The *Mumo Matemu* court justified the need for deference as motivated by the need for comity with other branches of government. Towards this deference lite approach, the court endorsed a procedural conception of review. It observed that:

> [w]e further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature's decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.[55]

A process-based review often leads to a 'box-ticking' methodology of review. This whittles away the power of the court to assert its view of the state and society envisaged by the Constitution.

To its credit, the *Democratic Alliance* court avoided the folly of the distinction between process and substance review. The court embraced an approach that it is mandated to review both the process and the decision. It reasoned as follows:

[55] *Mumo Matemu* para 61.

> The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.[56]

Kenya's post-colonial and apartheid South Africa's history of strong authoritarian executive branch justifies strong oversight from the other arms of government. Thus the constitutions of both countries embody significant limitations on the exercise of majoritarian political power. The question arises as to whether the courts can serve as a restraining influence on excessive consolidation of political power by the ruling elite. This becomes nuanced in the case of Kenya and South Africa, where the legislative oversight is not functioning as it should due to the dominance by the ruling party[57] and the ever looming possibility of members of parliament being compromised.[58]

Where legislative oversight is malfunctioning, the courts are left as the sole check on the prospect of relapse to unilateral executive power. Thus if the courts restrict themselves to intervene only on a narrow procedural limitation on governmental power, then the executive is afforded wide latitude for non-conformity to the values and principles that underlie the constitution. In such instances, as David Landau has argued in reference to Columbia, any judicial intervention has to draw upon a more deep-rooted conception of the reconstituted constitutional state after authoritarianism: "[t]he public sees the Court, rather than the legislature, as the best embodiment of the transformative project of the ...constitution."[59] Thus,

---

[56] *Democratic Alliance* para 36; See also Z Yacoob "Separation of Powers in a Democratic South Africa: An Evolving Process" Paper Presented at the Second Stellenbosch Annual Seminar on Constitutionalism in Africa 17-19 September 2014 where he states thus: "But it is now settled that every decision by every public functionary in the legislature, the executive, .the public administration (indeed all organs of state) and the judiciary must comply with the rationality requirement.... Both the process by which the decision is made and the decision itself must be rational."

[57] S Choudhry, "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy", 2 *Constitutional Court Review* (2009) p 1.

[58] Kenya's parliamentarians have been accused of engaging in 'oversight banditry' where members of parliament demand bribes and favours from state officials who are subject of inquiry by parliament. See P A Nyong'o, "Parliament's reputation at stake due to upsurge of 'oversight banditry'", https://www.standardmedia.co.ke/mobile/?articleID=2000108162&story_title=parliament-s-reputation-at-stake-due-to-upsurge-of-oversight-banditry Last visited 1 May 2014.

[59] D Landau, "Political Institutions and Judicial Role in Constitutional Law", 51 *Harvard Inter-*

the courts assert themselves as the guardian of a popularly accepted constitutional order to restrain the momentary desires of popular majorities, in favour of the pre-commitment to values and principles embodied in the constitution.[60]

In the context of constitutional adjudication, the litigation of questions of governmental ethics provided the courts with the opportunity to reassert the structural underpinnings of the constitution. Instead, the *Mumo Matemu* court retreated to a formalistic account of the Constitution as envisaging only procedural scrutiny of the other arms of government. The *Mumo Matemu* court notes that:

> In sum, this Court agrees with the High Court's dicta that procedural propriety cannot be based on mechanical compliance with procedural hoops. In our view, however, the applicable general principle is that there must be a showing that there were substantive defects in that procedure, or significant omissions as to render it unconstitutional. Absent such showing, or arbitrariness or absence of debate altogether, a judicial determination on the quality of the debate or its outcome is to overstep the demarcated boundaries of our constitutional enterprise. In our view, to conclude, as the High Court did, that there was no substantive debate is to cross the boundary.[61]

In short, the deference accorded to the other branches of government privileges their dealings against scrutiny by endorsing a limited procedural conception of review that falls substantially short of the broader constitutional vision.

The *Mumo Matemu* court failed to devise doctrines that may counteract the pernicious effects of corruption in public life and transform Kenya's governance system into the ideal envisaged by the Constitution. The court failed despite structural authority from the country's history and the text of the Constitution. The constitution is explicit in the demand for transparency and accountability in governance.[62] Central to the desired democratic restoration was the idea of constraint in the exercise of state authority. Authoritarian rule allowed the direct translation of political power into raw exercise of arbitrary and repressive governmental conduct. In response, the democratic revival envisaged in the Constitution sought both to restore limited government and to enshrine the primacy of a rule of law.[63]

---

national Law Journal (2010), p 344.

[60] S Holmes, "Pre-commitment and the Paradox of Democracy", in J Elster, & R Slagstad, (eds) *Constitutionalism and Democracy* Cambridge, Cambridge University Press (1988), p 231.

[61] *Mumo Matemu* para 75.

[62] Article 10 and chapter 6 of the Constitution of Kenya.

[63] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*, *supra* note 17 para. 146.

The critical question to be asked is the role to be played by courts in the country during the country's re-construction in the aftermath of authoritarian rule. This should take into account the fact that Kenyan legal culture is highly formalistic and boasts of a strong positivist commitment to the application of the law as the command of the sovereign, not as reflecting normative aspirational claims.[64]The new constitutional order that emerged in 2010 was aspirational; a hope that state authority could be wrestled from elites that had ruined the country's post-independence structure. The *Mumo Matemu* court's approach fails to appreciate this by making the argument that courts are only qualified to undertake a procedural review. To the court, claims of procedural infirmities are the archetypal issues for judicial resolution. Courts have thus to defer to the other arms of government on substance, not process, due to the need to give the democratically elected branches of government latitude to discharge their mandate. This is underscored by the following observation:

> For the avoidance of doubt, we also reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently.[65]

The insistence that courts cannot perform substantive review has little logical or conceptual grounding. It seems to be tied to a limited understanding of the proper role of the courts, and their reluctance explicitly to propound a normative vision that other branches of governance should adhere to in order to further the transformative project of the constitution. Unlike in policymaking which may require polycentric, informal efforts to further information and balance a range of options, the same problems do not arise with appointments.

The entrenchment of justiciable principles of governmental ethics has placed the courts in a difficult position. The courts bear the burden of being the guardians of the constitution which demands that the value of democracy and the principle of separation of powers be respected. Judicial deference in the *Mumo Matemu* incarnation requires reviewing courts to exercise restraint. However, it is the paper's position that courts should develop a pragmatic and functional approach that

[64] M Mutua, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya", 23 *Human Rights Quarterly* (2001) pp 96-97.

[65] *Mumo Matemu* para 77.

provides an overarching or unifying theory for review of the substantive decisions of all manner of discharge of functions by other branches of government.

The limited scope of judicial review powers that the *Mumo Matemu* court claimed and the fear not to appear to interfere more broadly in the exercise of political power by other branches of government is largely contributed to by failure to break from Kenya's jurisprudential attachment to the Westminster tradition of parliamentary supremacy thus the concept of narrow procedural review of government action.[66]For all inherited traditions of Westminster, Kenya operates under a transformative written constitution which embodies certain articulated values and principles which must be upheld. A court cognisant of this will appreciate that a substantive doctrine of protection of the values and principles of the constitution mandates the court to break away from the relatively deferential role the *Mumo Matemu* court has carved for courts. The courts must have teeth if they are to serve as the guardians of constitutionalism. It is only in this way that courts can serve as bulwarks against excessive majoritarianism that threatens to overwhelm fragile state institutions. A substantive approach to review has the potential to provide a structural lever that accords the courts a deeper doctrinal foundation for discharging the role of being the custodian of the constitution. With respect to public appointments, it is essential for the courts, as the ultimate custodian of the constitution to enforce substantive constitutional principles and values, thus the court should assess whether an appointee meets the constitutionally stipulated threshold.

The jurisprudence advanced by the *Mumo Matemu* court creates the potential for the courts to abdicate their constitutional and judicial authority by relying on the pretext of adhering to the doctrine of separation of powers to claim inability to intrude into the domain of the executive. The problem with this jurisprudence is that it deals and is focused on the procedural aspects in relation to the manner of appointments rather than the interdependence of the process with the substantive nature of the principles of leadership and integrity. The interdependence of the procedural *vis-a-vis* the substantive aspects in analysing the manner in which public

[66] The courts' jurisprudence has been influenced by the conception of the proper remit of administrative law judicial review. Under this doctrine, there is a boundary of administrative discretion beyond which judicial supervision should not cross. Lord Brightman cautioned as follows in Chief Constable of the *North Wales Police v Evans* [1982] 3 All ER 141 at 154. 'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will . . . under the guise of preventing the abuse of power, be itself guilty of usurping power.'

appointments are made could have provided a deeper insight on the adherence to the constitutional dictates on upholding integrity for public officials. The rule of law requires the judiciary to scrutinize the weighing process by the appointing authority and ensure that the appointment decision complies with both the formal and substantive requirements of the constitution. This approach acknowledges that the judiciary has a proper role to play in ensuring that executive decisions comply substantively with the rule of law, and this is not discharged by confining judicial review to a scrutiny of the process.

The procedural conception of review, which is the "formal conception" of judicial authority, is limited in its application because it does not go far enough to address the significance of judicial review. This is evident with the argument of the court in *Mumo Matemu* that courts cannot interfere with a decision simply because it disagrees with it or that it considers that the power was exercised inappropriately. The approach by the court is of great concern, because it is the courts that have been empowered to declare invalid any law or conduct which is inconsistent with the values and principles of the constitution. It is the courts that have to examine and review government conduct and evaluate it against the ethos and principles envisaged in the constitution. The relegation of substantive review to the domain of the executive undermines the values of the constitution. It relaxes the rules of constitutional interpretation and does not adequately address the courts' role in the maintenance of constitutional values and principles. It is incumbent upon courts to be decisive in matters of integrity and not let its adjudicative authority to whittle and thus fail to reconstruct the state and Kenyan society. It is the paper's position, that the *Mumo Matemu* court voluntarily abdicated its judicial function in total disregard of judicial independence and the distribution of state authority between itself and the executive.

Paine has argued that a constitution serves as the normative lodestar for the body politic.[67] At the core of the constitutional entrenchment of principles of leadership and integrity is a thick substantive idea: a set of principles that are both full of content and strongly foundational, respect for which is a prerequisite to the legitimacy of public office. Judicial review underscores enforcement of principles loaded with normative content. In fact it is arguable that these principles cannot mean anything and everything to any person and accord to every view. This is a matter of substance; it is recognition of a foundational norm of eligibility threshold that must be beyond debate. It is only when we recognise this fact that we can recognise that

[67] T Paine, *The Rights of Man,* Chicago, The University of Chicago Press (1988), p 29.

certain people meet the constitutional standard and others do not. The question as to eligibility is not answerable in procedural terms, but in substantive terms, by finding out whether the appointees actually meet the constitutional standards. The standards of fundamental-legal rightness cannot be left undecided, courts have to be authorised to decide and to construe from time to time the content of the constitution. The executive cannot be left to set standards for itself.

The Constitution of Kenya like that of South Africa institutes a culture of justification.[68] Its promulgation marked the substitution of a "culture of justification" for the old dispensation's "culture of authority".[69] Henceforth, no government official or body would be allowed to justify its own actions merely with reference to its own position within a hierarchical command structure.[70] Every state organ can now be called upon to justify its decisions with reference to reasons that are viewed as cogent in the light of democratic norms and values. The idea of law as justification demonstrates that courts can play a vital role in building a democratic culture of justification is helpful as to where to draw the line between legitimate exercises of the judicial review power, and the judicial usurpation of the legislative and/or executive function.

In developing the conception of a culture of justification, Mureinik has argued that it is not the function of judges to substitute their own views on substantive policy issues for those of state organs, but that they should rather inquire into the soundness of the process that went into the decision. That he did not, however, cling to a narrow conception of what counts as procedural grounds is evident from the following passage:

> It is suggested that a… decision cannot be taken to be justifiable unless (a) the decision maker has considered all the serious objections to the decision taken and has answers which plausibly meet them; (b) the decision maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and (c) there is a rational connection between premises and conclusion – between the information (evidence and argument) before the decision maker and the decision taken.[71]

---

[68] *Samura Engineering Limited & 10 others v Kenya Revenue Authority* [2012] eKLR Petition 54 of 2011 para 77.

[69] See E Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights", 10 *South African Journal on Human Rights* 10 (1994); See also D Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture", 14 *South African Journal on Human Rights* (1998).

[70] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others*, *supra* note 17, para 146.

[71] Mureinik, *supra* note 69, p 41.

Mureinik did not, in other words, advocate a value-neutral constitutional jurisprudence that is based upon a rigid separation between process and substance. He recognised that an inquiry into the soundness of the process that went into decisions requires judges to address certain substantive issues, for instance whether the reasons given for the decision are plausible, and whether such reasons in fact support the conclusion of the decision-maker.[72]

To say that a court should abstain from substituting its own views on substantive policy issues for the considered and rational decisions of the executive branch, does not therefore amount to an argument for the abdication of the power of judicial review in questions of substantive value. It is rather an acknowledgement that decision-makers are better equipped than judges to make certain decisions, and that their decisions should be respected, provided that they have considered all relevant factors and can justify their decisions with reference to plausible reasons. According to Allan, "[d]eference is not due to a… decision merely on the ground of its source or 'pedigree', but only in the sense (and to the extent) that it is supported by reasons that can withstand proper scrutiny."[73] Therefore, as the South African Constitutional Court has pointed out "[t]o pass constitutional muster....., the president's decision..... must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."[74] This analytical framework is appropriate for the reason that courts weigh substantive aspects of the executive's conduct. The framework goes against the formalistic approach that has been adopted by the *Mumo Matemu* court.

It is noteworthy that rationality review envisages substantive review. Rationality is an objective standard and embodies the possibility of the co-existence of more than one view. It has to be determined within the context of the constitutional scheme that confers the discretion. Seen in this context, it is almost impossible to determine rationality without at the same time considering the substance of the decision. The court may not substitute its own decision for that of the executive, but this is not the same as saying that the court should completely leave the weighing of competing values to the executive without at least satisfying

[72] See L Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories", 89 *Yale Law Journal* (1980) for a critique of process based theory along these lines.

[73] T R S Allan, "Common Law Reason and the Limits of Judicial Deference", in D Dyzenhaus, (ed) *The Unity of Public Law,* Oxford, Hart Publishing (2004), p 288.

[74] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) para 62.

itself that due weight has been accorded to relevant interests and factors.[75] Hence, it is misleading for the *Mumo Matemu* court to endorse a rationality standard of review and yet characterise judicial review as concerning only the decision-making and not the decision itself.

The Kenyan and the South African constitutions have been described as transformative in that they embody a certain vision of the society they seek to construct.[76] This requires positive action by all branches of government toward the attainment of that vision. This transformative duty- the duty to work toward the achievement of the constitutional vision of society –imposes obligations on the courts. Courts must in the outcome they generate in their judgments and their reasoning or judicial method work towards the achievement of the society envisaged in the constitution.[77] One core promise of the society envisaged in both constitutions is the enhancement of accountability and adherence to integrity standards by public officials. This envisages a substantive rather than only procedural conception adherence to constitutional dictates. That means that state institutions should act in such a way that only persons who satisfy the integrity criteria occupy public office. These constitutions clearly posit the ideal- which is that public officials must be ethical. In order for that ideal to be attained, the executive must only select persons who meet the constitutional threshold.

However, that cannot be all that these constitutions requires. Integrity and accountability are in the thick sense envisaged by these constitutions a value system or a culture – a way of doing things. Thus a procedural understanding of the conception of integrity is an empty shell – it is the structure for integrity without the necessary content of accountability culture/practice. The transformative accountability ethos of these constitutions requires not only the creation of processes but also the fostering and maintenance of substantive principles of integrity. The duty to work toward the achievement of this conception of substantive values of integrity as a transformative goal rests on all state agencies, including the courts. The courts must therefore in terms of the outcomes they generate in their judgments and in the manner, in which those judgments are arrived at, be sensitive

[75] See *R (Daly) v Secretary of State for Home Department* [2001] 2 AC 532 p 547 per Lord Steyn.

[76] K Klare "Legal Culture and Transformative Constitutionalism", 14 *South African Journal of Human Rights* (1998), p 146.

[77] D Brand, "Judicial Deference and Democracy in Socio-Economic Rights cases in South Africa", 3 *Stellenbosch Law Review* (2011), pp 614, 622; See also K Klare "Self-Realisation, Human Rights, and Separation of Powers: A Democracy -Seeking Approach", 26 *Stellenbosch Law Review* (2015), p 445; D Moseneke "Separation of Powers, Democratic Ethos and Judicial Function" 24 *South African Journal on Human Rights* (2008), p 341- 351.

to the impact that their work might have on the achievement of this substantive conception of accountability.

4.2 Means-End Rationality instead of Reasonableness as Standard of Review

In enacting new constitutions, Kenyans and South Africans made an unambiguous choice to bring into being constitutional states in which the constitution is supreme.[78] The idea of the constitutional state presupposes judicial intervention and remedy when constitutional guarantees are desecrated. These constitutions speak directly to exercise of executive powers and the normative nature of governmental ethics in several provisions.[79] Moreover, the idea of constitutionalism is bolstered in both countries by the entrenchment of the rule of law as a national principle and value of governance of the Republic.[80] The rule of law embodies the principle of legality as a fundamental principle in both constitutions and it means that the executive and the legislature may only discharge their functions in accordance with the law.[81] The constitutional principle of legality therefore confers upon courts grounds to intrude upon what may at first blush seem to be areas reserved for the co-equal arms of government. This means that the political questions doctrine is inapplicable when questioning whether the legislature or the executive has discharged only powers and functions vested in them and in the manner prescribed by law. Thus all actions must be undertaken within the four corners of a lawful authorisation. Thus the exercise of public power is subject to the discipline of the rule of law.

The twin principles of rule of law and supremacy of the constitution are the basis for assertion of jurisdictional competence for courts to question the legality of the acts of other arms of government. Arbitrariness, by its very nature, is dissonant with these core concepts of constitutionalism. Despite this firm normative foundation for judicial intervention, the question has arisen as to what becomes the appropriate test for judicial determination of non-arbitrariness in the area of public appointments?

---

[78] Article 2 of the Constitution of Kenya and Section 2 of the Constitution of South Africa.

[79] Article 10 and chapter six of the Constitution of Kenya and Sections 174 and 179 of the Constitution of South Africa.

[80] Article 10 of the Constitution of Kenya and Section 1 of the Constitution of South Africa.

[81] *Albert Lukoru Loduna & 2 others v Judicial Service Commission & 3 others* [2012]eKLR Petition 480 of 2012 para 23; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 32.

The *Mumo Matemu* court informed by the anxiety that courts should not appear to be "second-guessing" the other branches of government has rendered itself thus:

> In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya. Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases.[82]

By this formulation, the *Mumo Matemu* court appears anxious to allow the executive wide latitude in appointments as is evident from emphasise that courts should not substitute their own judgment for that of the appointing authority.

The court in the *Democratic Alliance* case also emphasized that the choice of standard of review is to be informed with the need for courts to avoid intruding in to the exclusive terrain of the executive in order to avoid breaching the separation of powers doctrine.[83] The court highlighted this concern as follows:

> I must next address a contention that this Court's upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large.[84]

The *Democratic Alliance* court pushes this point further and argues that:

> It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries".[85]

---

[82] *Mumo Matemu* para 54.
[83] *Democratic Alliance* para 32.
[84] *Democratic Alliance* para 41.
[85] *Democratic Alliance* para 42.

The court in effect points out that the suitability of the rationality standard stems from the fact that the test is a relatively weak standard, which leaves a wide discretion to the President to choose a suitably qualified head of the NPA – as long as he does not act in a completely irrational manner.

That deference to other branches of government is the determinant factor in the choice of the ideal standard of review is evident when the *Mumo Matemu* court argues that:

> The question then becomes, what is the standard or the test of the review? It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches.[86]

Although the *Mumo Matemu* court acknowledges that questions of integrity should be subjected to an exacting review in some circumstances, it nevertheless endorses a deferential approach as the overall analytical framework that courts should apply when reviewing appointments.

The *Mumo Matemu* court develops precise doctrinal mooring for assessing whether the executive operates within the confines of the constitution by suggesting that:

> It is therefore our considered view, that the superior court below misapplied the doctrine of separation of powers in its standard of review. We are of the view that had the court applied the rationality test in light of the principle of separation of powers, its analysis no less its result would have been different. We note here that the rationality test is a judicial standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding.[87]

Justice Yacoob justifies this approach in the *Democratic Alliance* case as follows:

[86] *Mumo Matemu* para 56.
[87] *Mumo Matemu* para 58.

> It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.[88]

Rationality review envisages that a court may invalidate a rule or action because it is not rationally related to a legitimate purpose.[89] The court should be ready to set aside a decision which has failed to give adequate weight to integrity. Such failure to give due weight to integrity would indeed be irrational. The *Mumo Matemu* and *Democratic Alliance* courts in endorsing the rationality standard rejected the reasonableness test. A decision is unreasonable when it "will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it".[90] Means-end rationality, therefore, forms part of reasonableness. Reasonableness amounts to a higher standard of review than rationality –it involves a stricter scrutiny.[91]

The rational relations standard of review provides a wide swath of governmental power without judicial intrusion.[92] Moreover, the standard begins with "a strong presumption of validity" for governmental decision-making.[93] The restrictive rationality review which has often been used in review of policy objectives which are properly the domain of parliament is ill suited as the standard for checking executive conduct in the context of appointments.

---

[88] *Democratic Alliance* para 44.

[89] I M Rautenbach, "Means-End Rationality in Constitutional Court Judgments", 4 *TSAR* (2010), p 770.

[90] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* (2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC) para 48.

[91] *Minister of Health v New Clicks South Africa (Pty) Ltd* (2006) 1 BCLR 1 (CC), 2006 2 SA 311 (CC) para 108.

[92] S Issacharoff, "The Democratic Risk to Democratic Transitions", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324861. (Last visited 1 May 2014)

[93] *Heller v. Doe*, 509 U.S. 312, 319 (1993).

The *Mumo Matemu* and the *Democratic Alliance* courts failed to adopt a more rigorous standard of scrutiny that is commensurate to the centrality of governmental ethics in governance. The courts must accept that the judicial branch has a proper role to play in ensuring the executive's compliance with the rule of law, and this role cannot be properly discharged without some encroachment into executive autonomy. After all, constitutionalism imposes some limits on the exercise of constitutional powers and acknowledges that the judiciary will have to interfere with executive decisions on merit in some cases. This calls for a more vigorous scrutiny to give effect to the rule of law. It is important to note that unlike in cases that involve broad policy decisions involving prioritisation and allocation of resources, for instance enforcement of social and economic rights claims, there is no principled justification to accord the executive a wide margin of discretion in scrutiny of eligibility for appointment.

Reasonableness means that one identifies the relevant considerations and then balances them according to their weight.[94] Indeed, reasonableness is an evaluative process, not a descriptive process. It is not a concept that is defined by deductive logic. It is not merely rationality. A decision is reasonable if it was made by weighing the necessary considerations, including fundamental values in a constitution.[95] The standard of reasonableness can be adopted to determine the relevant balance in reviewing the exercise of public appointments and whether the same upholds the principles of government ethics.[96] The Supreme Court of Israel has used the standard of reasonableness to hold that a minister and deputy minister indicted for serious offenses were obliged to resign;[97] indeed, it would have been unreasonable not to dismiss them. Similarly, the Supreme Court of Israel used the reasonableness standard to hold that a person with a significant criminal past cannot be appointed as director-general of a government ministry.[98]

Aharon Barak has justified this approach by the Supreme Court of Israel as follows:

---

[94] M Atienza, "On the Reasonable in Law," 3 *Ratio Juris* (1990) p 148.

[95] J Jowell, "Courts and the Administration in Britain: Standards, Principles and Rights," 22 *Israel Law Review* 419 (1988) p 419; J Jowell & A Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law," *Public Law* (1987) pp 370–71.

[96] See Barak *supra* note 36 p 250.

[97] H.C. 2533/97, *Movement for Quality Government v. Government of Israel*, 51(3) P.D. 46; H.C. 4267/93, *Amitai—Citizens for Proper Administration & Integrity v. Prime Minister of Israel*, 47(5) P.D. 441.

[98] H.C. 6163/92, *Eisenberg v. Minister of Housing,* 47(2) P.D. 229.

> Those same individuals who supported the use of the reasonableness test in the context of human rights strongly criticized its use in the government ethics context. I understand this criticism, but I disagree. It is appropriate to use the reasonableness test in reviewing executive actions, including issues of government ethics. Naturally, in countries where there is self-restraint in government, there may be no need to develop the principle of reasonableness in government ethics. But in countries where this self-restraint is lacking—and the concept of "it is not done" is insufficiently developed—it is proper to extend the principle of reasonableness to all government actions. I do not see any possibility of restricting reasonableness to one field. If the principle of reasonableness should be applied in protecting the freedom of the individual, it should also be applied to other kinds of protections involving government activity. Consistent application of this principle can strengthen public confidence in the government, which is fundamental to government's operation.[99]

Moreover, review of questions of governmental ethics on a reasonableness standard should not be a big deal in most common law jurisdictions. After all, Wednesbury unreasonableness as a ground for judicial review of executive discretion has been around since 1948, when Lord Greene MR said that, besides the traditional grounds for finding that there had been an abuse of discretion, an act of discretion is also unreasonable and thus invalid when it is "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[100]

The paper's position is that courts must be searching in their interrogation of the integrity of an appointee. The quest for a more stringent standard of review is aimed at a more effective regime for the enforcement of the integrity principles. The envisaged system is judge-empowering in that courts can declare one ineligible for public appointment. This is informed by the central role played by courts in ensuring that the executive discretion cannot be exercised in a way that undermines the principles and values of governmental ethics. It emphasises that in judicial review of executive decisions, the court should require the decision-maker to accord due weight to integrity consideration and the judicial review is not confined to whether integrity considerations have been taken into account but also how they are taken into account. The proposed test requires the reviewing court to assess the balance that the decision maker has struck *vis-a-vis* the issues of integrity, not merely whether it is within the range of rational decisions. The court must also pay attention to the relative weight accorded to the questions of integrity by the appointing authority. The approach advanced is therefore more interventionist.

[99] Barak *supra* note 36 p 251.

[100] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228–9.

5.0 Conclusion

The Kenyan and South African constitutions envisage a dialogic conception of constitutional democracy. The three branches of government are constituted as distinct entities, but they are also interdependent and interrelated. The branches of government should, therefore, engage with each other in a manner which is open and respectful of the institutional strength and weaknesses of each other. Conceptually, the transformation project is a product of partnership between the courts and other arms of the government. What becomes important in assessing the task of courts when faced with invocation of the doctrine of separation of powers should, therefore, be on how a court works within the confines of the doctrine to promote a better dialogue between the arms of government.[101] "Third wave" constitutions assign to courts in nascent democracies a central role in the creation and maintenance of a democratic order.[102] The courts serve the purpose of ensuring the constitutional pedigree of the actions of the new political order, thus should not be encumbered with contestation over the source of authority for judicial review and the concern over counter-majoritarianism.[103]

The argument canvassed in the paper is that enforcement of governmental ethics is hindered by excessive deference to the executive by the judiciary. The argument is also envisaged in the realization that judicial deference reflects a conception of democracy at odds with the constitutional vision of a thick or empowered democracy[104] and therefore works against the construction of that constitutional vision of democracy –that is both a limited and an inappropriate response to the problem of democratic illegitimacy of review in public appointments cases.

The courts must be cognizant of the prevailing political atmosphere for appointments and the *Mumo Matemu* and *Democratic Alliance* courts should have

[101] D M Davis, "The Relationship Between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers?", 15 Potchefstroom Electronic Law Journal (2012), p 638; See also S Ngcobo "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers", 22(1) *Stellenbosch Law Review* (2011), p 37-49.

[102] *Speaker of the Senate & Another v Hon. Attorney-General & Another & 3 Others*, *Supra* note 17 para. 62.

[103] S Issacharoff, "Constitutional Courts and Democratic Hedging", 99 *The Georgetown Law Journal* (2011), pp 961- 964.

[104] See D Brand, "Writing the Law Democratically: A Reply to Theunis Roux", in S Woolman, & M Bishop, (eds) *Constitutional Conversations*, Pretoria, Pretoria University Law Press(2008), p 97; T Roux, "Democracy", in S Woolman, T Roux, & M Bishop, (eds) *Constitutional Law of South Africa* 2nd ed. Cape Town, Juta & Co. (2006).

seen the need to be activist as the conditions of weakened legislative oversight warrant interventionist review. The courts must develop a thick construct of constitutional review to check executive power. It makes sense and would be productive under Kenya and South Africa's institutional framework for courts to infuse the spirit of the constitution into the appointment framework. A well-functioning legislature is probably the best option for checking executive action because of its democratic legitimacy. In these optimal conditions, an overly activist judiciary may be detrimental to the development of the political system. But where, as in Kenya and South Africa, a very weak oversight legislative oversight exists, a judiciary equipped with a modicum of democratic legitimacy may be the institution best-equipped to take on oversight functions. A very active judiciary, in other words, may be perverse under optimal conditions of legislative behaviour but desirable as second-best where, as in Kenya or South Africa, the legislature does not function well.[105]

Deference, therefore, undermines the widest possible powers that the court has in the enforcement of constitutional duties. It limits the essence of judicial review which is essential for the independence of the courts.[106] The strategy of deference amounts to a failure to the transformative duty on courts. This comes about because, the strategy of deference embodies a conception of separation of powers that is at odds with the checks and balances envisaged in the constitution. The argument advanced in the paper is that modern/transformative judicial review cannot always be adequately understood if seen through the traditional categories of the separation of powers. Courts do more than can be fitted into the domain allowed to courts exercising judicial function. Much of what courts do in "transformational societies" involves spreading the values set out in the constitution throughout their state and society.[107] It is this understanding that has informed Robertson's argument that constitutions are more than mere founding documents laying down the law of the land, but increasingly have become statements of the values and principles a society seeks to embody.[108] Judges, in turn, should see it as their mission to transform those values into political practice and push for state and society to live up to the ideals of the Constitution.

[105] See D Landau, & J D Lopez-Murcia, "Political Institutions and Judicial Role: An Approach in Context, The Case of the Colombian Constitutional Court", 119 *Viversitas* (2009), p 55.

[106] N Ntlama, "The 'Deference' of Judicial Authority to the State", 33 *Obiter* (2012), p 143.

[107] D Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review,* Princeton (NJ), Princeton University Press (2010), p 1.

[108] *Ibid.*