

**LECTURE NOTES**

**SEPARATION OF POWERS: THE LEGISLATURE**

**BY**



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## SEPARATION OF POWERS: THE LEGISLATURE

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*“The accumulation of all powers, Legislative, Executive and the Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may just be pronounced the very definition of tyranny.”*

**“Ambition must be made to counteract ambition”**

**Madison, Federalist, 5.1.**

### 1.0 INTRODUCTION

Of paramount importance in any studies of socio-political nature, theorizing on government, governance, the state and its modes of operation, is the study of the separation of powers between the Legislature, Executive and the Judiciary in our constitution. These, like the three stones that support a cooking pot in our African symbolism, are the three basic organs of the state. If they function in harmony, the common good of a people is well pursued and achieved.

#### **Definitions:**

There are three branches created by the constitution, each with a particular function.

#### **A. (i) Executive:**

- The administrative branch of government. Headed by an executive President who is deputed by a vice president, and the Ministers who form the Cabinet, Civil Servants, Armed forces and Police.
- Their main responsibility is to initiate policies, veto powers over bills, appointment of judges and other officials, make treaties, supervise and monitor implementation of what parliament has passed, as well as holding the power of commander in chief of the military.
- Sections 23 to 29 of the Constitution of Kenya outlines the roles and powers vested upon the executive.

**(ii) Legislature (Lawmakers)**

- Essentially called parliament, Assembly, or Congress.
- Comprises of people's representatives.
- Passes Laws, undertakes deliberative functions on matters of national concerns.
- Oversight functions of government, supervises expenditure, trains and nurtures future leaders and can as well impeach the president.
- Mandate set out in sections 30, 31, 32, 33 and 46 of the Constitution of Kenya

**(iii) Judiciary**

- Enforcers of the Law.
- Comprises of judges, magistrates, Kadhis, tribunals and all other organs of interpreting law.
- Has power to try cases and judge matters between individuals, groups and other organs.

**B. Separation of powers**

The doctrine of separation of powers is based on the constitutional dictum that "one shall not be judge in ones own case" or that "one must not be party, prosecutor and arbiter at the same time." It is on this basis that the institution of government of the Republic of Kenya is divided into three arms namely, the Executive, Judiciary and Legislature. It is undesirable for any one arm to perform the functions of another either directly or indirectly. In order to maintain this separation of powers, each arm of government and its facets must be and remain completely free and independent of the other(s).

Overlap of powers often creates ambiguities. To avoid interference of one organ with another and ensure independence of each organ to carry out its function, it was found

necessary to demarcate the organs into distinct entities with distinct power holders. This concept is derived from the works of **Baron Charles de Montesquieu**.

➤ Power can be separated horizontally and vertically.

**Horizontally:** Where power is divided between different institutions (Courts, Parliament, and Presidency)

**Vertical separation:** Divides power between the central government and the national government as in the American system.

To understand this concept better, it is necessary to compare and contrast different systems of parliamentary systems.

#### **(a) British Parliamentary System**

Comprises of 2 houses of legislative:

➤ **The Upper House (House of Lords)**

- Traditionally made of British nobility like dukes, earls, barons and bishops. It serves a judicial function, but as a legislative body, it is ineffectual for it can only delay but not veto bills issued by the lower house.

➤ **Lower House (House of Commons)**

- Consists of Members of Parliament under 'majority rule' where majority party makes all laws. The Executive power is vested on the Prime Minister voted by majority.

#### **(b) French Parliamentary System**

Has a powerful President who appoints the Prime Minister. The Assembly is highly limited to legislate on topics specifically spelled out in the constitution.

#### **(c) American Parliamentary system**

Exercises rigid Separation of powers.

From the above we can define the British system as operating on principle of fusion of powers while the American system has contrast of powers.

## 2.0 THEORY AND PRACTICE OF SEPARATION OF POWERS

Why do we need separation of powers?

- Separation of powers has the basic motive of preventing tyrannical rule. **Clement Walkers**, a member of Long Parliament in 1648 saw it as the only way to protect the ruled from the rulers.
- Ensure people are the ultimate rulers, not individual whims. “To avoid continual heart burnings between king and people” as **John Trenchard** said in 1698 on realizing that it is certain that every man will act for his own interest, a fact foreseen by **Merchamont Nedham** who, writing under Cromwell’s protectorate 1656, urged separation of Legislative and Executive powers to “different hands.”
- Prevent a single political party with a huge majority from arrogance.
- Enhance political liberty
- Guard against: Passionate partiality, absurd judgments, avaricious and ambitious self-serving behaviour by governors and the inefficient performance of functions. John Adam’s thoughts on Government (see ch.4, no. 5).
- Ensure stability, defence and independence of state organs.

### 2.1 Historical Background of Separation of Powers

From the first steps of man from cave to civilization, it was realized that power had to be invested on particular capable people. These in turn had to act in the best interests of the *Vox Populi* and measures had to be put in place to ensure this.

As far back as Aristotle in ancient Greece we can find theorists advocating for this.

- **Aristotle** favoured a mixed government comprised of Monarchy, aristocracy and democracy.
- The term 'Separation of power' was first proposed by **James Harrington** in his Oceana (1656).
- However, it was **John Locke** who in Civil Government's second treatise (1690) that documented separation of powers into an executive and legislative.
- **Montesquieu** in his canonical spirit of the Laws (1748) expanded on the works of Locke, finally adding Judiciary to come up with the tripartite form of separation of powers we have today.
- **Madison** in the federalist No.51 saw the way to double security against oppression horizontally (between levels of government) and vertically (within each level of government).

### 3.0 THE KENYAN LEGISLATURE

- Parliament is Kenya's central political institution.
- The powers and duties are expressly conferred upon parliament by the constitution of Kenya.
- As such, Parliament in Kenya discharges its constitutional mandate pursuant to section 30 of the Constitution of Kenya that states:

*"The Legislative power of the republic shall vest in the parliament of Kenya, which shall consist of the President and the National Assembly".*

#### **History: Race from Westminster to the Kenyan Bunge**

The history of parliament in Kenya is an example of a steady progress from colonial autocracy to true democracy

- Prior to 1907 Kenya was under British parliament as a colony with white appointees to serve the crown in what was known as the East Africa protectorate. The Governor had the Legislative Council (LEGCO) which had powers to make ordinances, review death sentences and draft legislation.

- **1901:** An Indian, Allibhai Mullah Jeevanjee becomes first non-white nominated to leg co.
- **1923:** Devonshire White paper incorporates Arabs and Indians.
- **1944:** First African representative appointed to leg co (Eliud Mathu) by then there were 40 leg co members but no African.
- **1948:** Leg co moves closer to being a parliament when Mr. W. R. Horne is appointed First speaker. Political Movements are formed by Kenya's, most conspicuously Kenya African Study Union (KASU) that was to later change into Kenya African Union (KAU).
- **1954:** 16<sup>th</sup> Feb. Sir Evelyn Baring, the then Colonial Governor, opened parliament Buildings at City Square.
- **1956:** Under Legislative Council (African Representation) ordinance, Kenya is divided into 8 electoral areas.
- **1957:** Africans elected 8 representatives to leg co, but the representatives ironically refused to co-operate with the British. These were Godfrey Mate, Tom Mboya, Daniel Moi, Masinde Muliro, Nzau Muimi, Jaramogi Odinga, Laurence Oguda and Ronald Ngala.
- Under the new Lennox-Boyd constitution, 6 more Africans were added to make 14 African leg co members. There were 14 Europeans, 3 Asians and 1 Arab.
- **1960:** Jan-Feb: First Lancaster conference. Africans allowed forming parties. Kenya African National Union (KANU) formed.
- **1961:** General elections with Africans allowed to vote. KANU emerged majority party but refuses to form the government to pressurize for the release of Jomo Kenyatta from jail. Kenya African Democratic Union (KADU) formed to counter KANU.
- **1962:** 2<sup>nd</sup> Lancaster conference. A new constitution formed that has 2 houses. The senate and the House of Representatives.
- **1963:** (May) Elections are portrayed as a referendum between federalism (Majimbo) favoured by KADU, and nationalism favoured by KANU.
- **1964:** KADU dissolve to join KANU. Parliament still advisory in its role; though it is ideologically very vibrant.

- **1966:** 'Little general election' when constitution amended to declare seats by break away Kenya People's Union vacant.
- **1967:** Constitution amended, abolishing the bicameral legislature into a unicameral house- The National Assembly.
- **1969:** K.P.U. banned. KANU wins the general election and Kenya becomes a one party state though not constitutionally entrenched. Parliament vibrant with intellectualism on economic matters rather than radicalism.
- **1982:** Constitutional amendment making Kenya a one party state.
- **1991:** Section 2A repealed bringing back multi partyism.
- **1992:** Multi party elections. KANU wins.
- **2002:** Parliament fully changing from an advisory body to a policy formulating body.

**Note:** The advent of multi-party politics in 1992 no doubt has expanded the democratic space and increasingly contributed to the separation of power between the legislature and the executive.

### **3.1 COMPOSITION OF PARLIAMENT.**

The current constitution deals with composition, election and nominations of members of the National Assembly in sections 31, 32 and 33. There are 224 members, 210 elected, 12 nominated, and 2 ex-officio members namely the Attorney General and the Speaker.

The 12 nominated members of parliament are selected on the basis of individual (or is it coalition) party strength in the House. In theory, due consideration is given to members representing special interests.

The number has however remained constant despite the country's changed fortunes in the social-political and economic arena over the years.



In Kenya, the executive forms the government of the day and often has the majority of members of parliament. This way, the executive holds some degree of influence in the nominated members' performance in the House. This ultimately has a negative on the separation of powers.

### **3.2 FUNCTIONS OF PARLIAMENT**

The powers and duties vested upon parliament by the constitution of Kenya are:

- (a) The making of Laws.
- (b) The approval of all taxation, borrowing, and expenditure by the Government. Parliament approves the budget through the appropriations Bill, the Finance Bill and the Supplementary Appropriations Bill.
- (c) The election of a President, whenever a vacancy in the office occurs otherwise than as the result of the dissolution of Parliament.
- (d) The termination of a President's appointment by a resolution of "no confidence."
- (e) The regulation of its own procedure, subject only to the express provisions of the constitution.

The supremacy of the institution of parliament empowers the members to exercise the oversight function vested on it through questions, motions, private notice, demand for ministerial statement, and policy changes.

Parliament also has other roles such as:

- Glue Kenyans together despite ethno-religious and economic differences. Parliament is the most representative state organ and by formulation laws it had the latent function of reconciling our differences and uniting us under law.
- Weather political storms.

- Training and nurturing future leaders: Visits by school groups, training staff, internship programme like the one in collaboration with State University of New York, resource centre and materials e.g. library and publications.

## **The Law Making Process**

Section 46 of the Constitution of Kenya consummates the process of Law-making by stating that:

*(1) "Subject to this constitution, the legislative power of parliament shall be exercisable by Bills passed by the National Assembly."*

*(2) "When a Bill has been passed by the National Assembly, it shall be presented to the president for his assent."*

### **A Bill**

- Is a proposed legislation
- It is first read by the clerk and not debated. It then goes to departmental committees, processed, then taken to second reading where it is debated.
- Laws emanate from the government (public) bills through the Attorney General.
- Private Bills are brought by back benchers who have to first move a motion seeking leave to bring the Bill.

### **3.3 PARLIAMENTARY COMMITTEES**

Parliamentary committees play a pivotal role in all key parliamentary functions. A great deal of legislative work has been achieved through parliamentary standing and select committees. This perhaps explains why committees have become a central part to parliament's effectiveness in achieving its mandate.

The procedure of the House provides for the formation of four kinds of committees.

- Committees of Whole House,

- Standing Committees,
- Ad hoc Select Committees, and
- Departmental Committees.

**(a) Committees of the Whole House**

- (i) Committee of the Whole House on Committee stage of a Bill. On a bill being given a second Reading, it stands committed to this committee of the Whole House, unless the House, unless the House resolves to commit it to an *Ad hoc* Select Committee.
- (ii) Committee of the Whole House on the Budget.  
Deliberates on the Annual Supplementary estimates of government expenditure when laid before the House and after the budget speech by the Minister for Finance. There are such committees.

- The committee of ways and means: Deliberates on the processes suggested by the Minister for Finance to raise funds to foot the budget for the particular fiscal year.
- Committee of Supply: Deliberates on the distribution of funds to be raised in the committee of ways and means to various Ministers and Departments.

**(b) Standing Committees**

Otherwise referred to as sessional committees

- They consist of a minimum of five and a maximum of twenty members.
- These are nominated by the House Business committee and appointed by the House on a motion by the leader of Government Business.
- The lifespan of the membership to these committees coincides with that of a session.

They are:

- **House Business Committee**
  - It prepares and manages the programme of the business of the House on a weekly basis.
  
- **Public Accounts Committee (PAC)**
  - This scrutinizes reports on Central Government expenditure and fund accounts as prepared by the controller and Auditor-General.
  
- **Public Investments Committee (PIC):**
  - It examines reports by the Auditor-General (Corporations) on accounts of State Corporations.
  
- **Speaker's Committee**
  - Concerned with the welfare of members and staff of the National Assembly.
  
- **Standing Orders Committee**
  - Examines matters relating to and makes periodic reviews of the Standing Orders as necessary.
  
- **Liaison Committee**
  - Examines and Co-ordinates matters relating to operations of the Departmental Committees.
  
- **Powers and privileges Committee**
  - Deals with issues regarding privileges of the House, members and Staff.

**(c) Ad Hoc Select Committees**

- They are investigative.
- They are appointed by the House as and when need arises to investigate, study and make recommendations on certain specific issues. E.g. the committee investigating the death of Dr. Robert Ouko.

#### **(d) Departmental Committees**

There are 8 departmental committees dealing with Ministries. They investigate into activities and administration of ministries or departments under their respective portfolios.

- (i) Committee A: Committee on Agriculture, Lands and Natural Resources.
- (ii) Committee B: Committee on Energy, Communications and Public Works.
- (iii) Committee C: Committee on Education, Research and Technology.
- (iv) Committee D: Committee on Health, Housing, Labour and Social Welfare.
- (v) Committee E: Committee on Administration, National Security and Local Authorities.
- (vi) Committee F: Committee on Finance, Planning and Trade.
- (vii) Committee G: Committee on Administration of Justice and Legal Affairs.
- (viii) Committee H: Committee on Defence and Foreign Relations.

**Note:** Committees are formed to effectively deal with tasks expeditiously because the Government can't handle all tasks in raw forms. They can hire experts, travel, advice, get into details and subsequently present findings to the parliament and advice them accordingly. They also help mobilize public opinion.

#### **4.0 PARLIAMENTARY SUPREMACY**

From the above overview of functions of parliament, we can see the immense powers the legislature enjoys. This leads us to the concept of parliamentary supremacy.

If the theory of separation brings to the fore the notion that the powers of the government is largely that of making, executing and enforcing laws, then we can concur with **John Locke** that Legislative supremacy is a foregone conclusion "and all other powers in any members or parts of the society (are) derived from and subordinate to it"

Powers and privileges offered to members of the Legislature and the immunities therein separates them from the Executive and judiciary as Legislators have no need for a

constitutional tribunal to call them to account except "Public Sentiment" as **Chipman** says. The Legislature can trespass on other branches to gather information if doing so furthers the welfare of society, but by whose standards do we set the need for such trespass? Legislature itself!

The need for greater parliamentary supremacy is the driving force behind the calls for a parliamentary mode of Legislation so as to conform to the democratic Legislation by elected representative of the people. This is because though the current constitution seems to elevate the legislative above other branches, it also specifically denigrates the powers of the judiciary, under sec. 58 and 59 that give the Executive (President) powers to prologue and/or dissolve parliament.

#### **4.1 DO WE REALLY HAVE SEPARATION OF POWERS?**

##### **(a) Evidence there is no Separation.**

The following are some examples that there is overlap of powers between the three branches of Government. For the purpose of this study, we will concentrate on the Legislature and the Executive.

- The President (Executive) has to assent whatever parliament (Legislature) has passed. This gives him veto powers.
- The approval of the Budget (Appropriation Bill, Finance Bill and the supplementary Appropriations Bill) by parliament means that parliament (Legislature) has to authorize taxation measures proposed by the Executive.
- The President (Executive) has power under sections 58 and 59 of the Constitution of Kenya to convene, prologue and dissolve parliament at his own pleasure. It can and has been used as a secret weapon. This has borne heavily on the parliamentary calendar, hence the frequent recurrence of various bills in the house, seeking to de-link parliament from executive interference.

- Sec. 48 of the Constitution of Kenya empowers a Minister (Executive) to have authority over parliament (Legislature) by limiting the extent of bills and motions by invoking the clause that: *“without the authority of the president through the Minister.”*
- Part of the Executive sits in Legislature (President plus the Ministers)
- The Executive (President) appoints the Attorney General.
- Currently, drafting of bills is done by the Attorney-General chambers.

**To quote:** Saulo Busolo in a paper presented to the Constitution of Kenya Review Commission stated thus,

*“Many tasks labeled Legislative in character have become Executive in Locus”*

## **4.2 EVIDENCE OF SEPARATION**

Two examples stand out as milestones towards separation of powers with respect to the legislature. These are:

### **(a) Parliamentary Service Commission (PSC)**

- The Amendment of Section 45 of the constitution of Kenya to create the Parliamentary Service Commission removed the clerk of the National Assembly from being an officer in the Public Service to an Officer in the Parliamentary Service.
- The creation of the PSC gave Parliament increased independence anchored in the perception that the basic roles and functions of Parliamentarians would be more appropriately served and actualized when completely divorced from the Executive.
- Parliament can hire and fire its own staff without external interference.

### **(b) Powers, Privileges and Immunities of National Assembly**

- Provision of privileges and powers to members of parliament Act offers them immunities and to any witnesses summon to appear before a parliamentary Committee during an inquiry.

### **4.3 IS TRUE SEPARATION A REAL CONSTITUTIONAL POSSIBILITY?**

As seen from the British model, separation can be middle way hence a fusion of powers, or like the American model, very distinctly separated. The practical application of separation of powers has been a continuous debate. Some schools of thought have argued that true separation of powers isn't possible due to inherent disadvantages associated with its concept such as:

- (i) The government is rendered toothless for it can't formulate executive and sustain certain critical and coherent policies.
- (ii) Can lead to absence or failure of leadership.
- (iii) Can create confrontation and stalemates.
- (iv) By dividing the executive from the legislative, power is separated from responsibility, diminishing the status of and the corresponding accountability of the executive.
- (v) Strict separation of powers is outdated and impossible in the modern complexities in political ideologies which propagate for overlap of certain powers. E.g. Legislature needs to assume some judicio-executive powers to investigate wrong doings in government, or courts make laws in their interpretations of constitution and statutes.
- (vi) Fusion vs. total separation of powers are ideal types/models with no empirical references in time or space i.e. How separate is separate? You can't measure!
- (vii) If a different party controls the executive and another the legislature, a total impasse can occur if they don't have consensus in philosophical, economic and political ideologies.



- (viii) Unless carefully designed executive can be dismissed by legislature as happened to President Kasarubu and Prime Minister Lumumba in Congo, throwing a country into chaos.

## **5.0 ELECTORAL PROCESS IN KENYA**

The Legislature draws itself from the people through elections. Kenya uses a parliamentary democracy system where decisions are made on behalf of the citizens through elected representatives, as opposed to direct participatory democracy.

Kenya's first-past-the post plurality method of election in single member constituencies has been defaulted. Base support of parties tends to be Balkanised hence results in discrepancies such as one party can have more votes than an opponent party in an area yet have fewer seats. The electoral results in Kenya thus have unequal representation of women, youth and regions.

An example is the 1997 General Elections where a party that received 38.6% of the votes obtained 51.0% representation in parliament (107 seats). Under a proportional representation system with a threshold of 10,000 votes, the party should have won only 81 seats.

The executive has also been known to interfere with elections and thus the composition of legislature. The major issue has been the control of registration of voters through issuance of ID cards and passports. Delays in issuance of these documents keeps many eligible voters out of the voter register. The irregular voter registration process coupled with a rigid voting system also locks out registered voters.

## **6.0 CONCLUSIONS**

Though there exists a modicum of separation of powers in the Kenyan Government, more separation is being discussed especially with the emphasis on Legislature. This is one of the major bones of contention in the Constitutional Review in Kenya, and also

world wide for example the change the Constitution movement in USA as well as frequent calls for change in Britain. Though fusion of powers forces various branches to be more powerful, finding the right balance with total separation is good.

Some militaries receive their Commander in Chief from the Executive so an understanding of the role of parliament in relation to the Executive will possibly stop the tendency in Africa of the military intervening to assume power through *coups* and attempting to silence vital organs of the state.

The end results of separation of powers include security both of state and other branches of government, accountability, efficiency, development and capacity for change, liberty and freedom for all branches of Government to dispense their roles and mandates.

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