An Inquiry into the Limits of judicial Intervention in the Impeachment Process of Governors in Kenya

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Abstract

Article 181(2) of the 2010 Constitution of Kenya instructs Parliament to enact a law highlighting the process of impeachment of a county governor. This has been realised through the County Government Act, Section 33. Section 33 recognises the County Assembly and the Senate as the bodies responsible for this process. However, the County Government Act fails to address at what point the courts can intervene in the impeachment process of governors. This is often a problematic issue as the doctrine of separation of powers requires each arm of government to perform their functions independently. Nonetheless, Kenyan courts have the duty to protect aggrieved parties whenever their rights are threatened. However, the point at which they can intervene is not stated under any law and this creates confusion between the role of courts of law in the impeachment process, on the one hand, and that of the County Assembly and the Senate, on the other. It is not clear which role should be discharged first. This paper, therefore, seeks to address this confusion through a critique of the Wambora case, a case that was appealed up to the Supreme Court. The paper also suggests a complimentary system whereby the Senate, County Assembly and the courts can work in harmony, and, do away with the confusion.

Key Words: Impeachment, County Government Act, judicial review and separation of powers

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I. Introduction

The Constitution of Kenya 2010 (hereinafter referred to as the Constitution) provides for the doctrine of separation of powers. Article 1(3) delegates sovereign power to three state organs: the legislature, executive and judiciary.[1] Each of these branches has distinct functions which are to be performed separately and free from interference.[2] Generally, the executive performs administrative functions, the judiciary has the power to interpret the Constitution[3] and the power of judicial review[4] while the legislature has the power to make laws[5] and oversee the role of the executive.[6]

However, in as much as these branches are required to function independently, a system of checks and balances has been put in place in order to limit them from abusing their powers.[7] The Constitution provides for these checks and balances. For example, the judiciary has the power to review the decisions of the executive and the legislature through judicial review.[8] The Constitutional justification and development of the concept of judicial review was outlined in the case of *Marbury v Madison.*[9] In this case, Marshall CJ stated that 'it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule'.[10]

If a law is contrary to the Constitution, it can and must be overturned by the courts. The principle from *Marbury v Madison*[11] can be applied to administrative decisions; whether it be the Constitution or the enabling legislation granting powers to the administrative decision maker, it can be set aside and a new decision ordered.[12]

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1 Article 1(3), *Constitution of Kenya* (2010).

2 Masinde M, 'Separation of power in Kenya: analysis of the relations between judiciary and the executive' 5 *International Journal of Human Rights and Constitutional Studies* 1, 2017, 2.

3 Article 163(4)(a), *Constitution of Kenya* (2010).

4 Article 47(3)(a), *Constitution of Kenya* (2010).

5 Article 94 (5), *Constitution of Kenya* (2010).

6 Article 95(5), *Constitution of Kenya* (2010).

7 Carrol A, *Constitutional and administrative law*, Longman Publishers, 2007, 39.

8 Article 47(3), *Constitution of Kenya* (2010).

9 *Marbury v Madison* (1803), The Supreme Court of the United States.

10 *Marbury v Madison* (1803), The Supreme Court of the United States.

11 *Marbury v Madison* (1803), The Supreme Court of the United States.

12 Freckelto A, 'Judicial Review of Administrative Decisions – General Principles' in Dickie M (ed), *Administrative Decision-Making in Australian Migration Law*, The Australian National University Press, 2015, 166.

In *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others,* judicial review was defined as 'the means through which the courts supervise the actions or decisions of administrative bodies or tribunals'.[13] In line with this, PLO Lumumba defines judicial review as the power by which judges analyse public law functions and through which they intervene as a matter of discretion to quash or prevent unlawful, unreasonable or unfair decisions.[14] In a similar vein, he further notes that the aspect of review includes re-examining of decision made by an authority with the possibility of altering or amending it where necessary.[15] Thus, in addition to preventing abuse of power, it might be rightly said that judicial review helps enhance accountability.[16]

Through judicial review, the rights and interests of citizens are safeguarded by ensuring that the executive and the legislature keep within their assigned limits.[17] This was emphasised by Wade and Forsyth who pointed out that ensuring that the three main branches of government do not act *ultra vires* is the basis of judicial review.[18] However, in as much as judicial review is encouraged, the courts should also ensure that they also do not overstep and disrupt the orderly functioning of the executive or the legislature. This would defeat the rationale behind the doctrine of separation of powers by disabling the arms from performing their functions independently and punctually.

Another way in which the Constitution provides for checks and balances is through the impeachment processes. The legislature checks the executive through its power to impeach the president,[19] the deputy president[20] and the county governors.[21] Charles Kanjama applauds impeachment as a formal decision to try a member of government for any violations of the laws of the country and, if found guilty, the end result is removal from office or being subjected to other disciplinary actions.[22] Thus, impeachment is a legal remedy for abuse of public office power.

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13 *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others* (2018) eKLR.

14 P.L.O Lumumba, '*Judicial Review in Kenya*', Law Africa, 2ed edition, 2006, 3.

15 P.L.O Lumumba & P.O Kaluma, '*Judicial Review of Administrative Actions in Kenya*,' Jomo Kenyatta Foundation, 2007, 1.

16 Craig P, *'Accountability and Judicial Review in the UK and EU: Central Precepts'*, Oxford University Press, Oxford, 1st ed, 2013, 183.

17 Migai Akech, '*Administrative Law: The politics of Judicial Review'*, Strathmore University Press, Nairobi, 2016, 411.

18 Wade and Forsyth, '*Administrative Law'*, Oxford University Press, Oxford, 10th ed, 2009, 3.

19 Article 145, *Constitution of Kenya* (2010).

20 Article 150(b), *Constitution of Kenya* (2010).

21 Article 181, *Constitution of Kenya* (2010).

22 Kanjama C, 'Senate sealed Wambora fate but he may not be out just yet', Standard Digital, 16 February 2014 https://www.standardmedia.co.ke/article/2000104776/n-a on 21 February 2019.

With regard to impeachment, this paper focuses on the power bestowed on the legislature to impeach governors in Kenya. Governors were introduced in Kenya after the promulgation of the 2010 Constitution of Kenya.[23] With this new constitutional dispensation, Kenya adopted a devolved system of governance where power is distributed at the county and national levels of government.[24] The county governor is the chief executive at the county level.[25] Some of the functions that they perform include representing the county in national and international events, submitting the county plans and policies to the county assembly for approval and assenting to county bills into laws.[26]

In an instance where the county governor falls short of performing their duties as required by law or in an instance where they misuse their power, they may be removed from office by the county assembly and the senate by way of impeachment.[27] The County Government Act outlines the process through which the impeachment of a governor should be conducted.[28] Nevertheless, the impeachment of a governor tends to be a problematic process. This is because the governors who face impeachment tend to involve the courts when they feel that their fundamental rights and freedoms are violated or simply threatened. This is not an issue, as Article 165(2)(b) gives the High Court the power to determine whether a fundamental right or freedom has been infringed.[29] However, an issue arises when the courts interfere in an ongoing impeachment process as seen from the *Wambora case,* an 'impeachment' case that proceeded all the way up to the Supreme Court and that, therefore, represents the current status of jurisprudence on the matter.[30]

This paper therefore, seeks to address at what point courts of law can intervene in the impeachment process of governors in Kenya. The author will be guided by the following questions. First, whether courts' intervention in the impeachment process of governors through judicial review goes against the doctrine of separation of powers. Secondly, whether the courts' interference with the impeachment process of governors disrupts the orderly functioning of the county assemblies and Senate. Lastly, whether the human rights of the

23 Article 179 (2)(a), *Constitution of Kenya* (2010).
24 Kangu J, '*Constitutional Law of Kenya on Devolution*,' Strathmore University Press, Nairobi 2015, 14.
25 Article 179(4), *Constitution of Kenya* (2010).
26 Section 30, *County Government Act* (2012).
27 Section 33, *County Government Act* (2012).
28 Section 33, *County Government Act* (2012).
29 Article 165(2)(b), *Constitution of Kenya* (2010).
30 *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR.

aggrieved parties (the governors in this case) are enforced more when the courts intervene in legislative functions such as the impeachment process.

These questions form a point of debate as there is no clarity as to what point in time the courts can intervene. Nonetheless, it is this author's hypothesis that a synchronised approach between the courts, the Senate, and the County Assembly would solve the present issue by clearly determining the point at which courts of law may interfere with the impeachment process. Such an approach would require the governor to approach the senatorial committee first for any issues they have and want to be resolved before approaching the courts.

Part II discusses separation of powers as a conceptual framework that shall support the author's findings. Part III focuses on relating the discussion in Part II to the Kenyan context in order to highlight how power is divided between the three main arms of government. Thereafter, the paper proceeds to discuss the process of impeachment in Kenya, with *Martin Nyaga Wambora v Speaker of the Senate & 6 others* as a case study. Lastly, Part IV concludes the discussion and provides recommendations for the way forward.

II. The Doctrine of Separation of Powers and the Impeachment Process

As stated in Part I of this paper, the problem the author seeks to address is at what point the courts can intervene in the impeachment process of governors. This paper recognises that there are instances in which the courts can legally interfere in legislative processes, including the impeachment process of governors. However, if they intervene as the impeachment process is ongoing, the very essence of the separation of powers may be defeated. Additionally, the judiciary would seem to hold too much power and would be overreaching. On the other hand, if they restrain from intervening in the process due to separation of powers, fundamental human rights and freedoms such as the right to fair administrative action may be violated.

With this, Part II argues that each of the three main branches of government should operate independently without intrusion from the other branches. However, this Part also recognises that there are some instances where interference is permissible through a system of checks and balances. The author looks at the external separation of powers, the internal separation of powers, checks and balances and how these concepts relate to the problem under study.

i. External Separation of Powers

The external separation of powers adheres to the formalist approach which stresses that each branch should remain as distinct and separate as possible from other branches.[31] This idea has been expressed by various scholars and philosophers. For instance, John Locke, argues that man is weak by nature and, therefore, if all the power is left in one man or a few hands, such power will be abused. For this reason, Locke concludes that government power should be divided into three branches, namely: the executive, the legislature and the federative. This is to avoid a situation where the same persons, who have law-making power, have also in their hands the power to execute or adjudicate laws.[32]

Furthermore, Locke illustrates that separating the functions of the creators of the law from those of the executors of the law would lessen the temptation to abuse power. He is famous for stating that 'it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage.'[33] If the lawmakers had the power to execute the laws they make, it would be contrary to the aim of the law which is to protect the interests of society. Therefore, the executive body is established in order to execute the laws made by the legislature.[34]

Baron de La Brède et de Montesquieu also envisions a government made up of the executive, legislature and the judiciary and a pure separation of powers of these three bodies aimed to protect fundamental human rights and liberties.[35] As stated by Locke, the legislature is the body that enacts laws, the executive 'establishes the public security and the judiciary has the authority to punish criminals and solve disputes between individuals accordingly'.[36] In Montesquieu's view, it is necessary to separate the functions of these three bodies as he recalls from experience that 'every man invested with power is apt to abuse it, and to

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31 Strauss P, 'Formal and Functional Approaches to Separation of Powers Questions a Foolish Inconsistency', 72 *Cornell Law Review* 3,1987,489.

32 Locke J, 'The State of Nature', *Second Treatise on civil government'*, Prometheus Books, New York, 1986.

33 Locke J, 'The State of Nature', Chapter xii, 143.

34 Locke J, 'The State of Nature', Chapter xii, 147.

35 Ambani J and Mbondenyi M, *'The New Constitutional Law of Kenya: Principles, Government &Human Rights'*, Claripress LTD Nairobi, 2012, 60.

36 Montesquieu B, '*The spirit of Laws'*, in Nugent T (ed), Batoche Books Kitchener, Ontario, 2001, XI, 4.

carry his authority as far as it will go'.[37] Thus, where the power of the judiciary is vested in the legislature, there would be arbitrary control, and, if entrusted in the executive only, there would be oppression.[38] This would lead to the inexistence of liberty. From Montesquieu's idea of dividing power, it is evident that this structure was for the greater good and aimed at minimising the opportunities of people in government to abuse the power handed to them.

Additionally, and in turn, Van der Vyver, adds on to Montesquieu's view by simplifying the doctrine of separation of powers into certain principles, which are as follows:

i) Distinction between the three branches of government, to avoid the same people serving in more than one arm of government at a time;

ii) The three arms should have separate and independent functions in order to avoid interference from other branches; and

iii) The principle of checks and balances.39

These principles are referred to as 'a pure separation of powers' by many scholars such as Maurice Vile, in his book 'Constitutionalism and the Separation of Powers'.[40] Thus, according to the 'pure separation of powers' view, in order to maintain independent functions as well as avoid non-interference, the power to impeach a governor should be vested in the senate and county assembly completely without any interference from courts of law.

In as much as complete separation of powers is advocated for, it has been the subject of critique. Scholars such as Wade and Bradley have argued that it is impossible to have a version of pure separation of powers both in practice and in theory.[41] In addition, Ambani and Mbondenyi have also argued that rigid separation of powers would be 'subversive of the efficiency of government' and as a result would lead to its collapse.[42] Kavanagh also criticised the 'separation as confinement' view and notes that it fails to take into account the 'interactive and interdependent nature' of the branches of government when carrying out their functions.[43] As a result of these critiques, Vile argues that an exception must

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37 Montesquieu B, '*The spirit of Laws*', XI, 6.

38 Montesquieu B, '*The spirit of Laws'*, XI, 6.

39 Van der Vyver JD, 'Political Power Constraints in the American Constitution' *South African Law Journal* (1987).

40 Vile J, '*Constitutionalism and the Separation of Powers'*, 2 ed, Liberty Fund Inc, Indianapolis, 14, 1998.

41 S Wade & W Bradley, '*Constitutional Law'*, 1970, 25.

42 Ambani J and Mbondenyi M, *'The New Constitutional Law of Kenya: Principles, Government &Human Rights*', 64.

43 Kavanagh A, 'The Constitutional Separation of Powers', *Oxford University Press*, Oxford, 2015, 228.

be made to this rigid approach and suggests a mutual supervision between the branches of government through checks and balances.[44]

ii. Internal Separation of Powers

Madison argues that further dividing the branches into other branches creates more efficiency.[45] He notes that different branches of government 'will control each other and at the same time each will be controlled by itself'.[46] By this, Madison is somehow referring to devolution. Under this system, branches of government are further divided into two levels, the national level and the country level, and each level is performing distinct functions but at the same time checking on the other.[47] This system ensures that the rights of the people are safeguarded as power is not abused if each level keeps the other in check. Thus, this system achieves a balance and, in the instance of an impeachment proceeding in Kenya for example, the judiciary should respect, but also check, the constitutional right that the county assembly has over the impeachment process.

Madison expressed the idea of checks and balances in the Federalist Paper 51. He noted that each arm of government should be empowered and have a will of its own but at the same time checks and balances must be put into place to prevent one branch of government from usurping the other. [48] Furthermore, he adds that each branch of government should have 'the necessary constitutional means and personal motives to resist encroachments of the others'. [49] From this, it is safe to say that Madison's idea revolves around empowering each branch of government in order to counteract any manipulation from the other branches. This is supported by his famous quote 'ambition must be made to counteract ambition'.[50] Thus, the ambitions of the branches of government will eventually even out and none will be more powerful than another.

In the Kenyan context, entrusting the legislature's bodies such as the senate and the county assembly with power over the process of impeaching governors

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44 Vile J, '*Constitutionalism and the Separation of Power*s', 18.

45 Madison J, '*Federalist Papers Number 51'*, 7.

46 Madison J, '*Federalist Papers Number 51'*, 7.

47 Article 95(5) & Article 96 (4), *Constitution of Kenya* (2010).

48 Madison J, *'Federalist Papers Number 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*,' 1788.

49 Madison J, '*Federalist Papers Number 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*,' 1788.

50 Madison J, '*Federalist Papers Number 51'*, 7.

is a way in which they check the executive.[51] The executive, on the other hand, checks the legislature through, for example, presidential assent of bills.[52] While the senate and the county assembly exercise the power of the impeachment process, the judiciary can still subject such power to judicial review. The power of judicial review rests in the judiciary by virtue of Article 47 of the Constitution.[53] Nwabueze defines judicial review as 'the power of the court to declare a governmental measure either contrary to or in discordance with the constitution or the governing law, with the effect of rendering the measure invalid and void or vindicating its validity'.[54] This highlights that the court has the power to assess the legitimacy and effectiveness of the legislative and executive decisions in order to safeguard the principles of the constitution. This is why courts are viewed as the guardians of the rule of law.[55] A critique may therefore conclude that the courts have standing in interfering with the process of impeaching governors.

The courts have emphasised this point in the following instances. The High Court in *Trusted Society of Human Rights and others v Attorney General and others*[56] highlighted its interpretative role in determining the constitutionality of all governmental actions. Additionally, in the case of *Judicial Service Commission v. Speaker of the National Assembly and 8 others,*[57] the High Court noted that if any constitutional organ fails to act in accordance with the Constitution, the Court is empowered to determine whether their actions are inconsistent with the Constitution. Lastly, the Supreme Court's decision in *Speaker of the Senate and another v Attorney General and others*[58] asserted that the courts are sometimes called to be the ultimate judge of right or wrong in instances of any conflict with the Constitution. This was later affirmed by JB Ojwang when he noted that the court has the 'power to pronounce legality with a final voice'.[59] It is necessary that these

51 Article 181, *Constitution of Kenya* (2010).

52 Article 115, *Constitution of Kenya* (2010).

53 Article 47 (3), *Constitution of Kenya* (2010).

54 Nwabueze BO, '*Judicialism in Commonwealth Africa: The role of the courts in government'*, St. Martin's Press, New York, 1977.

55 Ochiel D, 'the Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case would be decided differently today', Kenya Law, 2015.
http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/ on 18 February 2019.

56 *Trusted Society of Human Rights and others v Attorney General and others* (2012), eKLR para 64.

57 *Judicial Service Commission v. Speaker of the National Assembly and 8 others* (2014), eKLR, para 121.

58 *Speaker of the Senate and another v Attorney General and others* (2013) eKLR para 64.

59 Ojwang J.B '*Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order'*, Strathmore University Press, Nairobi, 2013, 39.

checks and balances are in place as 'men are not angels' and if they were, 'no government would be necessary'.[60]

This Part has argued that the very essence of the separation of powers doctrine is to prevent concentration of power in the hands of one arm of government, which tends to lead to abuse. Furthermore, it has shown that in as much as the branches of government are to perform their functions independently, they must check on each other to ensure that none acts *ultra vires*. Another important aspect this Part has discussed is accountability for the actions that each branch takes. The part has also highlighted the two forms of separation of powers; namely the exterior separation and the interior separation. The exterior approach is the separation of the functions of the three main branches and interior is the separation of the devolved government, which fits the Kenyan context.

As demonstrated in this Part, the discussions on the doctrine of separation of powers evidence that each arm of government ought to perform its functions without the interference of the other branches with the exceptions of checks and balances.

III. Impeachment Process of Governors in Kenya

Kenya's road to devolution was a bumpy and murky one. The fight for devolution goes back to the post-independent period where the then constitution – the Constitution of 1963 (also known as the *Majimbo Constitution*) – created a federal system with three levels of government. These were the national, regional and the local governments.[61] This created a decentralised system of government. However, when Jomo Kenyatta came into power, his regime amended the Constitution by consolidating power in the office of the president.[62] As a result of this, the executive began abusing power.

Unfortunately, this continued during Daniel Toroitich Arap Moi's era. In 1982, Kenya became a one-party state and, through administrative mechanisms, the local government was weakened and presidential power was strengthened further.[63] Consequently, Kenyans grew tired of this tyrannical period and

60 Madison J, '*Federalist Papers Number 51'*, 10.
61 Kangu J, '*Constitutional Law of Kenya on Devolution*', Strathmore University Press, Nairobi, 2015,73.
62 Kangu J, '*Constitutional Law of Kenya on Devolution*', 74.
63 Kangu J, '*Constitutional Law of Kenya on Devolution'*, 83.

began to protest and fight for constitutional review. During this period, it was established that the only way in which the issue of oppression would be solved was by reintroducing a decentralised system. This was captured in the objects and purposes of the Constitution of Kenya Review Act. One of the goals of this Act was to plan and achieve devolution.[64] Thereafter, the 2010 Constitution was introduced.

This Constitution, from the onset, recognises devolution as it notes that the sovereign power of the people is exercised at the national and county level.[65] The principle of checks and balances apply at both levels with the aim of reducing corruption and enhancing efficiency.[66] Furthermore, the distribution of power was expected to bring citizens closer to government and further enable development by empowering previously marginalised groups.[67] This is reflected in the objects and principles of devolution in the Constitution.[68]

Part II discusses separation of powers as a key concept in preventing misuse of power by ensuring that each organ performs its functions without intrusion. The exception to this rule is checks and balances.[69] It is in this respect that a governor can be impeached. This Part briefly discusses the process of the impeachment of a governor in Kenya. This is to pave the way for the discussion in Part III, which is an analysis of the *Wambora* case. This case illustrates how the courts' intervention can be problematic as far as the proper functioning of the judiciary and the legislature in a governor's impeachment process is concerned.

The Constitution provides for grounds on which a county governor may be impeached.[70] They may be impeached:

i) If found to have grossly violated the Constitution or any other law;

ii) If there are serious reasons to believe that he/she has committed a crime under national or international law;

iii) If the governor abuses his or her position of office, or gross misconduct; and

iv) If he /she has a physical or mental incapacity that prohibits them from performing functions of a county governor.[71]

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64 Section 4, *Constitutional of Kenya Review Act*, Chapter 3A (2008).

65 Article 1 (4), *Constitution of Kenya* (2010).

66 Cheeseman N, Lynch G, Willis J, 'Decentralization in Kenya: The governance of governors', 4 *Journal of Modern African Studies* 1, 2016, 6.

67 Cheeseman N, Lynch G, Willis J, 'Decentralization in Kenya: The governance of governors', 3.

68 Article 174, *Constitution of Kenya* (2010).

69 *Council of Governors & 3 others v Senate & 53 others* (2015) eKLR.

70 Article 181 (1), *Constitution of Kenya* (2010).

71 Section 181(1), *Constitution of Kenya* (2010).

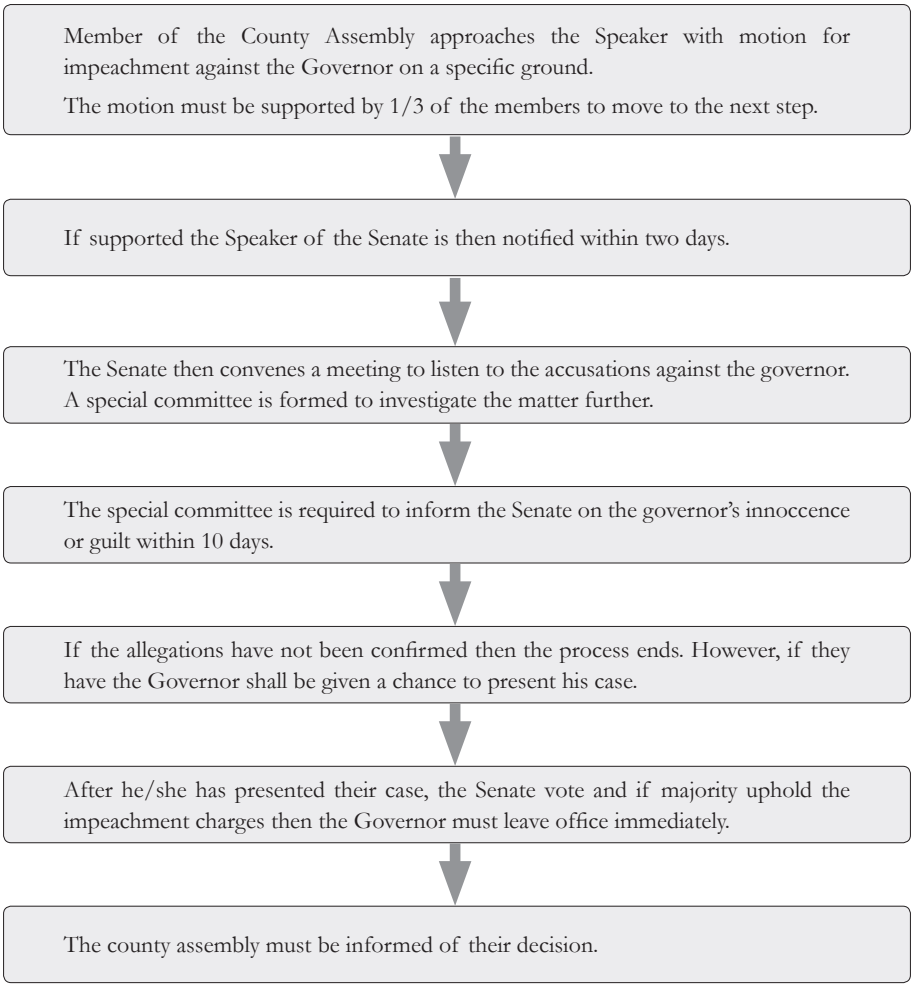
The County Government Act, on the other hand, lays out the procedure for the impeachment of a governor. The first step is for a member of the county assembly to notify the Speaker of the assembly, through a motion, of the removal of a governor under the grounds stipulated in the above quotation. This motion must be supported by at least a third of all the members of the assembly.[72]

Thereafter, if the motion is supported, it is for the Speaker of the assembly to inform the Speaker of the Senate of the resolution of the assembly within two days.[73] During this period, the governor is allowed to continue performing their functions as usual pending the outcomes of the proceedings.[74] After receiving the notice of a resolution from the Speaker of the county assembly, the Speaker of the Senate convenes a meeting to hear the charges against the governor and, through a resolution, they may appoint a special committee that comprises 11 members to investigate the matter further.[75] This must be done within seven days.[76] Afterwards, the special committee that is appointed by the Senate is required to update the Senate on whether the allegations against the governor have been proven within a period of ten days.[77] During the investigations, the governor has the right to appear before the special committee and present their case.[78]

The results of the investigations are then presented to the Senate and, if the allegations have not been confirmed, the proceedings are to end. However, if they have been confirmed, the governor shall be provided with an opportunity to be heard and the impeachment charges shall be voted on.[79] If the majority votes to uphold the impeachment charges, then the governor must leave their office immediately.[80] But, if the Senate does not have the majority vote, then the Speaker of the Senate is to notify the Speaker of the County Assembly of the outcome of their investigations.[81] In such a case, the impeachment can only be re-introduced after a period of three months has lapsed.[82]

The process is illustrated below in form of a diagram.

72 Section 33 (1), *County Government Act* (2012).
73 Section 33 (2) (a), *County Government Act* (2012).
74 Section 33 (2) (b), *County Government Act* (2012).
75 Section 33 (3), *County Government Act* (2012).
76 Section 33 (3), *County Government Act* (2012).
77 Section 33 (4), *County Government Act* (2012).
78 Section 33 (5), *County Government Act* (2012).
79 Section 33(6), *County Government Act* (2012).
80 Section 33 (7), *County Government Act* (2012).
81 Section 33(8), *County Government Act* (2012).
82 Section 33(8), *County Government Act* (2012).



The author now looks into the *Martin Wambora* case to show the impeachment procedure in action.

IV. The Wambora Case

In as much as the position of a governor is a relatively new one in Kenya, there have been several impeachment attempts. The latest one on which the Supreme Court has issued a decision is the impeachment of Martin Wambora, the Embu County Governor. His impeachment went on from the year 2014 and ended in 2017. The Supreme Court being the highest court in the land makes

the Wambora case the current status of the law on the question of impeaching governors in Kenya.

In 2014, in the case of *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* (Hereinafter *Wambora I*),[83] Mr Wambora sought to challenge the validity and constitutionality of the impeachment process against him as he faced charges of gross violation of the Constitution. Subsequently, the Kerugoya High Court granted conservatory orders restraining the Speaker of the Senate from proceeding with the ongoing impeachment process.[84] The Court's ruling, however, fell on deaf ears as the Senate carried on with the motion to impeach the governor and they conclusively voted for the removal of Mr Wambora. Nonetheless, the Governor argued that the impeachment was unconstitutional as it was contrary to the rules of natural justice; mainly, his right to fair administrative action, and went against the orders of the Court.

In response to Wambora's allegations, the County Assembly reminded the Court that one of the objects of devolution was to 'promote democratic and accountable exercise of power'.[85] The County Assembly further argued that this, therefore, placed the Governor in a position where he is subject to oversight and scrutiny by both the County Assembly and the Senate in order to promote efficiency and make sure the interests of the people are met.[86]

In addition, the County Assembly maintained the position that it is not the role of the Court to review their actions and that 'no organ should interfere with the core functions of another'.[87] Another important point brought out by the Respondents in this case is, according to Section 33 of the County Government Act, the jurisdiction to move a motion for impeachment of a governor vests in the County Assembly. Moreover, the steps as depicted in the diagram above must be followed without any interference by the courts as courts are not mentioned in this process. The Respondents argued that this was in line with the concept of separation of powers and should thus be respected.

The Respondents proceeded by borrowing from the dicta in *Marbury v Madison* and noted that the role of the Court is to decide on matters in relation to people's rights and not to investigate into how the Senate and County Assembly have performed their duties.[88] Therefore, it was the Respondent's view that the

[83] (2014) eKLR.
[84] *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR, para 6 and 7.
[85] Article 174(a), *Constitution of Kenya* (2010).
[86] *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR, para 21.
[87] *Martin Nyaga Wambora v Speaker of the Senate & 6 others* (2014) eKLR, para 28.
[88] *Marbury v Madison* (1803), The Supreme Court of the United States.

Court should maintain a supervisory role and not intervene in the process of impeachment as the courts do not have jurisdiction to govern it. Nevertheless, the Court was of the opinion that the impeachment process was null and void since it occurred while disobeying court orders, and as a result, the Governor was restored to office.

In the year 2015, in the case of *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (hereinafter *Wambora II*), [89] Mr Wambora rushed to Court again after the second impeachment motion commenced arguing that he was entitled to participate in the process of his removal and that he was denied this opportunity. Hence, he claimed that his rights during this second impeachment were infringed upon making the impeachment unconstitutional again.

In response to the Governor's claim, the Respondents relied on the principle of separation of powers noting that each branch of government must allow the other branches to perform their functions without intrusion. Additionally, the Respondents relied on the case of Doctors *for Life International v Speaker of the National Assembly and others (*hereinafter *Doctors for Life case)* that states that 'the courts should strive to achieve a balance between their role as guardians of the Constitution and of the rule of law, including an obligation to respect what Parliament is constitutionally required to fulfil.[90] Therefore, the Respondents still stood by their position in *Wambora I* where they argued that Parliament is the only body with jurisdiction during the process of impeaching a governor and, as such, Parliament should be able to conduct it wholly without any interference. [91] It is important to note that Parliament in this instance refers to the Senate and the County Assembly.

The Court recognised that the judiciary has the power to review and check whether the actions of the Senate and the County Assembly are in compliance with the Constitution and whether they have the power to quash an impeachment proceeding if it occurs contrary to the Constitution.[92] The Court continued by stating that there are clear steps to be followed for the removal of governors provided by the County Government Act. The Court stated also that they are allowed to intervene where matters of constitutional violations arise. Therefore,

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89 *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (2015) eKLR.

90 *Doctors for Life International v Speaker of the National Assembly and others* (2006), The Constitutional Court of South Africa.

91 *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (2015) eKLR, para 241.

92 *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (2015) eKLR, para 241.

the Court concluded that the impeachment process was conducted according to the law and no constitutional violation arose as Mr Wambora was provided an opportunity to appear before the senatorial special committee and present his case. However, he did not show up. [93]

Mr Wambora, dissatisfied with the judgement of the High Court; appealed to the Court of Appeal of Nyeri. This was the case of *Martin Nyaga Wambora v County Assembly of Embu & 37 others . (*hereinafter *Wambora III).* [94] He argued that there was lack of public participation in the impeachment process and a lack of fair hearing, and there was bias on the part of the Senate during the proceedings.[95] The Respondents sustained their previous argument in the High Court noting that the process of impeachment was one preserved for the County Assembly and the Senate. Thus, the Courts' intervention is uncalled for because there was no constitutional provision that has been violated. While taking into consideration all arguments brought before it, the Court of Appeal came to the conclusion that the judgement of the High Court does not stand.[96]

In 2017, in the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another (hereinafter Wambora IV)*,[97] the Speaker and the Clerk of the County Assembly of Embu approached the Supreme Court with the aim of challenging the Court of Appeal's decision. The main argument the Appellants brought before the Court was that the courts can only interfere upon the conclusion of the impeachment process to question the constitutionality of the outcome and to investigate if due process was followed. They thus argued that interference in-between would be contrary to the doctrine of separation of powers, which is guaranteed by the Constitution.[98] Furthermore, the Supreme Court did not state their position on which point the courts can intervene during the impeachment process of governors explicitly but noted that the courts' interference should be determined on a case-by-case basis. In addition to that, the Supreme Court concluded by formulating the following principles for guidance:

i) each arm of Government has an obligation to recognise the independence of other arms of Government;

ii) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

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93 *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* (2015) eKLR, para 241.
94 *Martin Nyaga Wambora v County Assembly of Embu & 37 others* (2015) eKLR.
95 *Martin Nyaga Wambora v County Assembly of Embu & 37 others* (2015) eKLR, para 8.
96 *Martin Nyaga Wambora v County Assembly of Embu & 37 others* (2015) eKLR, para 8.
97 *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR.
98 *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 33.

iii) the Courts of law are the proper judge of compliance with the constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment; and

iv) for the due functioning of constitutional governance, the Courts shall be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

v) in the performance of the respective functions, every arm of Government is subject to the law.[99]

This Part of the paper, through the use of Wambora's case, has sought to demonstrate the prevailing issue on court intervention in the impeachment process of governors. It also sought to portray that the intervention of the courts is considered overstepping and to some extent undermines the legislative authority as their intervention will be on a case-by-case basis. Lastly, it is evident that the courts' intervention in the impeachment process of governors lengthens the impeachment process as Mr Wambora, for instance, was in and out of court from the year 2014 to the year 2017. This is not the ideal situation as mentioned above. One may fairly maintain that this could have affected the way he was to discharge his constitutional mandate as a governor. The doctrine of separation of powers dictates that the organs ought not to interfere with the independent functions of the other bodies unless through checks and balances.

Furthermore, through illustrating the challenges facing the impeaching of governors, aspects such as clarity and failure to follow due process often force the courts to intervene. Thus, if such situations could be avoided and the legislature could perform its functions as it ought to, the court would wait to be approached after the process is complete on the basis of appealing the decision of the Senate. Thus, it is evident that a synchronised approach should be adopted and the procedure for impeachment should clearly state the point at which intervention of the courts should take place.

V. Conclusion and Way Forward

The doctrine of separation of powers demands that each branch of government performs its functions without interference - except for checks and balances. Thus, the branches relate with each other through checks and balances.

[99] *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017) eKLR, para 63.

However, conflict may occur occasionally between the arms due to the over-supervision of the role of one branch by another. This challenge is illustrated in the Wambora case.

This Part focuses on concluding the discussion and providing a way forward. The questions this paper sought to answer were whether the court can intervene in the impeachment process of governors and, if so, at what exact point in the impeachment process. As discussed in the previous Part, the courts can intervene in the impeachment process of governors in order to protect rights from being infringed such as the right to a fair hearing as in Wambora's case. This is so as to avoid an instance where the courts would be dealing with an issue of rights violated when the governor has been sworn in and it is too late for any recourse.

The author proposes two recommendations. The first is that of a cool off period before approaching the courts, whereby for a certain period of time the impeachment proceedings would be put on halt. During this period of cooling off, the aggrieved governor would be able to approach the Senate or County Assembly depending on when they are of the view that their rights have been violated and lay down the procedural issues they would need to be resolved. For example, if Wambora was of the view that his right to be heard was violated, this would be discussed and determined during this period instead of him immediately approaching the courts.

Further, if the governor is of the view that they still have not been heard or the issue under determination has not been solved, they may then approach the courts. This would ensure that all avenues have been exhausted with the courts being the last resort. In this way, the Senate would not feel that their authority and power is undermined. Instead, through this complementary system the governor would have made the Senate aware of their problem and whenever issues brought up are not addressed the aggrieved governor should be able to approach the court for the necessary redress.

Secondly, an independent commission could be formed to oversee and supervise the impeachment process in general. This would ensure that the process runs smoothly as such a commission would observe and monitor the full process such that in the instance a right is infringed it would not go unresolved. In the instance that there is violation of the rights of a governor, the commission would have the mandate to resolve it. Thereafter, if the governor wants to appeal, they may approach the courts which would require them to intervene and make appropriate orders.