

**A CRITICAL EXAMINATION OF THE LAW GOVERNING
INDEPENDENCE OF JUDICIARY IN TANZANIA: THE CASE OF
APPOINTMENT AND REMOVAL OF JUDGES FROM OFFICE**

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REGISTRATION NO: PG. 201800543

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LLM)**

**DEPARTMENT OF PUBLIC LAW
OF THE OPEN UNIVERSITY OF TANZANIA**

2025

CERTIFICATION

The undersigned certifies that he has read and here by recommends for acceptance by The Open University of Tanzania a dissertation titled, **A Critical Examination of the Law Governing Independence of Judiciary in Tanzania: The Case of Appointment and Removal of Judges from Office**. In partial fulfillment of the requirements for award of Master of Laws (L.L.M) of the Open University of Tanzania.

.....

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DECLARATION

I, **Joseph Kisusi**, declare that, the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirement for award of Master of Laws (L.L.M).

.....

Signature

.....

Date

DEDICATION

This work is dedicated to my family and my mother the retired teacher Mrs. Sekunda F. Wamay.

ACKNOWLEDGEMENT

This work is a result of contributions from various individuals. Taking that context into account, I would like to express my profound gratitude and thankfulness to everyone who contributed entirely to the completion of this research. As acknowledging each person by name is extremely challenging, I extend special appreciation to my supervisor, Dr. Rindstone Bilabamu Ezekiel for his good supervision; in fact, his contributions were essential towards making this work possible.

I am also indebted to my classmates for their constant efforts to maintain a welcoming learning atmosphere as well as for their exceptional material support, guidance, and encouragement during our entire academic career. Special appreciations are extended to Mr. Kalenzi Socepeter, Sabinus Ndunguru and Asha A. Wallady for their tireless contributions until completion of this work.

I applaud my family who in one way or another made the studies achievable. I am at a loss for words or materials to express my gratefulness, so all I can say is, “thank you so much, and may the Almighty God reward you abundantly.”

ABSTRACT

This study examines critically the law governing judicial independence in Tanzania in the context of appointment and removal of judges from office. The study had two objectives namely to examine the current legal and regulatory framework governing appointment and removal of judges from office and the legal gaps available on the framework. The study adopted doctrinal research approach with an analytical and descriptive research design. Data was collected through various Acts of Parliament and scholarly materials. Data collected were analyzed by using legal analysis methods. The findings observed that the jurisdiction has got laws to regulate appointment and removal of judges from office. Meanwhile, the law governing appointment has lacunae as the executive dominates the process of appointing judges and their removal from office. For instance, President after consultation with the Chief Justice, suspends the Judge or Justice of Appeal and constitute a special tribunal. The law had not stipulated the time frame would president suspend the judge and had not provided time frame would he appoint the special tribunal nor the time frame would the tribunal investigate the matter and commence disciplinary proceedings to completion. Similarly, it is silence on the time frame would the President comply with the advice of the special tribunal and judges have got no avenue to appeal. Therefrom, it is recommended that the law governing appointment and removal of judges from office be amended to rectify the anomalies.

Keyword: *Law Governing Judicial Independence, Appointment, Removal of Judges from Office.*

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LIST OF CONSTITUTIONS

The Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

The Tanganyika Order in Council of 1920.

The Constitution of Tanganyika of 1961.

The Republican Constitution of 1962.

LIST OF STATUTES

The Magistrates Courts Act, Cap. 11 [R.E 2019]

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AG v Francis Ishengoma Ndyanabo [2004] TLR 14

Joseph Masunzu v Rex Criminal Appeal, No. 3 of 1993, High Court of Tanzania at Tabora (unreported)

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Republic v Iddi S/o Mtegule Criminal Revision No. 1 of 1979, High Court of Tanzania, at Dodoma (Unreported)

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Attorney General v Lesinai Ndeinai [1980] TLR 214.

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Marbury v Madison (1803) 5US 137.

Scott v Stansfield [1868] L.R. 3 Ex. 220.

Millar v Dickson [2002] 3 ALL 1041.

The communication of Olo Bahamonde v. Equatorial Guinea Communication No. 4688/1991 UN Doc. CCPR/4/49/D/468/199 (1993) the United Nations Human Rights Commission.

LIST OF ABBREVIATIONS

E	–	Edition
LLM	–	Lex Legum Beccalaureus
R	–	Rule
R.E	–	Revised Edition
R	–	Republic
Rex	–	Republic
S	–	Section
TLR	–	Tanzania Law Report
V	–	Vis Avis
Vol.	–	Volume

CHAPTER ONE

GENERAL INTRODUCTION AND BACKGROUND

1.1 Introduction

This study examines critically the law governing independence of the judiciary in Tanzania on the aspect of appointment and removal of the judges from office. Independence of the judiciary in a nutshell, refers to the doctrine in constitutional law that insists on courts' freedom in their decision making process. The doctrine requires courts to decide legal disputes without any undue influence or pressure from the executive, legislature or from any authority.¹ This chapter is a cornerstone for this study and in that sense, it presents the general introduction and background of the study. In that view, the chapter sets the yardstick of the research problem by describing the root causes of the problem, a statement of the research problem which elucidates the area where the legal problem is grounded, a literature review showing various empirical studies relevant to the study, research objectives, significance of the study, research questions, research methodology underlines the methods applied in the research, and justification, scope of the study as well as limitations of the study. Finally, the chapter has concluded with an affirmation that the first chapter's discussion successfully introduced the basic components around which this study has been built.

¹ Mohamed, A. M (2022). *Judicial independence versus judicial impartiality a comparative approach* (PhD thesis, Middlesex University, London) p. 18

1.2 Background of the Study

The background of the law governing independence of the judiciary in Tanzania on the appointment and removal of judges from office is traced quite far back from the colonial period. Referring to the history, the Berlin Conference of 1885 divided the African continent into influences of colonial powers. Following this division, Tanganyika became under the German regime² until 1919 when it surrendered Tanganyika to the British regime trusteeship following victory by the alliance forces in the First World War. Tanganyika was ruled by the British from that point until it gained independence in 1961. The British government recognized the independence of the judiciary in 1701 when it passed the Settlement Act, which was intended to protect judges from the power of monarchs and other officials who might have an impact on court rulings.³ While in control of Tanganyika, the British introduced its Westminster system of selecting judges where their appointment and removal were under control of executive. This system did not allow the judiciary to operate independently, instead regarded it as a vital component of the administration.⁴ Essentially, the colonial government pursued its goals of maintaining law and order.⁵ As long as the administration viewed the judiciary not as an independent institution for justice but as an integral branch of the executive, it had nothing to do with ensuring its independence.⁶ The judiciary of that era was just regarded

² Ocheni, S. et al. (2012). Analysis of colonialism and its impact in Africa. *Cross Cultural Communication*, No.8, Vol.3, p. 46-54.

³ Retrieved June 18, 2024 from <https://www.Britannica.com>

⁴ For example, section 19 (1) of the Tanganyika Order in Council of 1920 vested the Governor with powers to appoint the Judges.

⁵ Vyas, Y. (1992). The independence of the judiciary: A third world perspective. *Third World Legal Studies Journal*, Vol. 11, p. 131

⁶ Ibid

as the structure of the executive which had a duty of enforcing law and order of the colonial regime to further colonial interests and not an instrument of protecting individual liberty.⁷

The colonial legal position discussed above had an impact on the development of their colonies' future legal systems because Tanganyika created a legal system that matched with British rules even after their departure,⁸ and adhere to British laws today.⁹ After its independence, Tanzania later embraced several constitutional reforms, beginning with the 1961 Constitution, which was in effect until 1962. This legislation reflected all features of the British regime laws and contained provisions for the independence of the judiciary, but left the appointment of judges to the Governor. The Republican Constitution of 1962 –1964 replaced that legislation, giving the President the authority to nominate judges, and transferring responsibilities previously held by the Governor. This practice continued until the 1964 Interim Constitution, and in the Constitution of the United Republic of Tanzania of 1977. Due to this historic roadmap, some improvements should be made to the judiciary so as to make it more independent because even the Britain itself has halted the use of this sort of appointing judges.¹⁰

⁷ Oloka, O. J. (1993). *Judicial Power and Constitutionalism in Uganda*. Working Paper. Kampala: Centre for Basic Research. 1993, p.12

⁸ Nyanduga, T.B. and Manning, C. (2006). A guidance to Tanzanian legal system and legal research. Retrieved May 12, 2024 from <http://www.nyulawglobal.org>.

⁹ Even today S. 9 of the Judicature and Application of Laws Act, Cap 1 [R.E 2019] allows applicability of some Acts of Parliament of the United Kingdom in Tanzania.

¹⁰ The United Kingdom stopped using the Westminster System of Judicial Appointment vide the Constitutional Reforms Act, 2005.

1.3 Statement of the Research Problem

Judiciary's independence entails ability of the judiciary to resist excessive influence and pressure from the executive, within the judiciary, and from other authorities. It is safeguarded by constitutions because it is an essential element for the administration of justice and the protection of individual liberties. Despite the existence of several provisions of the Constitution of the United Republic of Tanzania¹¹ that provide for freedom of the courts and the doctrine of separation of powers, the practice in Tanzania reveals otherwise. According to literatures linked to this study, the government has significant influence over the judiciary in a number of areas connected to the nomination, and removal of judges from office.¹² The executive which in some cases may become a litigant, appoints the Judges the situation that makes the judiciary subordinate to the executive. Legal procedures applied in appointing the judges are not transparent. Similarly, the President is the disciplinary authority of the judges as he has got powers of suspending the judge pending investigation of a disciplinary matter. The law has neither provided the time limit would the disciplinary investigation commence nor the timeframe would the disciplinary proceedings itself commence to its disposal. Meanwhile, it has not provided the time limit would the judge stay suspended pending investigation and determination of the matter. Too, the judges have no avenue where they would appeal decisions of their disciplinary authority in case they are aggrieved.

¹¹ The Constitution of United Republic of Tanzania, articles 4 and 107B

¹² Ibid articles 109 (1), 110A, 118

1.4 Objectives of the Research

1.4.1 General Objective

The general objective of this study is to examine critically the law governing independence of the judiciary in Tanzania looking on the appointment of judges and their removal procedures.

1.4.2 Specific Objectives

Specifically, this study has focused on the following areas:-

- a) To examine the current legal and regulatory framework governing the appointment and removal of judges from office in Tanzania.
- b) To identify the gaps experienced in the legal and regulatory framework regulating the appointment and removal of judges from office in Tanzania.

1.5 Research Questions

This study examines critically the law regulating independence of the judiciary in Tanzania on the appointment and removal of judges from office. In that context, the research questions guiding the study are;-

- a) What are the legal and regulatory framework governing the appointment and removal of judges from office in Tanzania?
- b) What are the gaps found within the legal and regulatory framework governing the appointment and removal of judges from office in Tanzania?

1.6 Literature Review

Aron,¹³ talked about the doctrine of independence of the judiciary in two dimensions: first, is independence of the courts in terms of the institution itself where he asserts that the judiciary as an institution must be independent in the sense that the executive, legislature and other groups should not interfere judicial operations, and the second parameter, is independence of judiciary in terms of the judges as individuals, that the judges must be independent, that is, they must decide legal matters without undue influence and pressures from the executive and legislature. He asserted that guaranteeing independence of the courts, requires this institution be free from control of the executive, and to secure independence of individual judges. The author remarked that judges and magistrates should be free in their course of making judicial decisions and execution of daily judicial businesses. This literature is relevant to the current investigation as the author thoroughly covered the concept of the judiciary's independence basing on institutional and personnel independence, attributing to address the research problem. Nevertheless, this literature has knowledge gap because the author had not talked about independence of the judiciary in the Tanzanian context.

Aka¹⁴ had defined doctrine of independence of the judiciary as the ability of judges or magistrates to make decisions without excessive pressure or influence from external authorities. He proceeded to say that, this principle refers to the freedom of judges and

¹³ Aron, D. (2020). Institutional independence of Federal Courts in Ethiopia: Observations, *Mizan Law Review Journal*, Vol. 2, N0.14, p.316.

¹⁴ Aka, P. C. (2014). Judicial independence under Nigeria's fourth republic: Problems and prospects, *California Western International Law Journal*, vol. 45, p. 10.

magistrates to decide legal issues tabled before them impartially by paying consideration on the facts so adduced save that they should conform to the law. Executive, legislature and other members from the society should not pose to the judiciary any limits, improper directives, incentives, threats or interventions.¹⁵ The author describes independence of the judiciary basing on both dimensions of the doctrine to wit independence of the judiciary as an institution, and freedom of the judiciary basing on individual judges. This literature is appropriate to the current study as it addresses the doctrine of independence of the judiciary by paying consideration into its dimensions of institutional and personnel independence. However, this literature still has a knowledge gap on the reason that it had not addressed the doctrine of independence of the judiciary basing on the context of Tanzania on the aspect of appointment and removal of the judges the undertaking that had been addressed by this study.

Chibesankunda¹⁶ elucidated the doctrine of judiciary's independence basing on the independence of the individual judges. As he views the freedom of the judiciary basing on unconventionality of the individual judges, the author has submitted that the doctrine of independence of the judiciary refers to freedom of judges or magistrates to decide cases that are presented before them in line with their understanding of the law and their judgment of the facts. It is unacceptable for anybody to attempt to sway their decision-making using unethical means, favours, inducements, malice, or direct or indirect force. This literature was vital to the present study because it relates with the research problem

¹⁵ Ibid

¹⁶ Chibesankunda L. P. (2014). *Judicial independence: The challenges of the modern era*. Paper submitted at CMJA annual Conference at 7- 11 September, 2014 at Livingstone in Zambia, p.11

as the writer had discussed the freedom of the judiciary on the aspect of distinctiveness of personnel. Nevertheless, this literature has knowledge gap as it describes the doctrine of independence of the judiciary in a narrow sense as he had discussed it basing on dimension of independence of personnel only without describing independence of the judiciary basing on the dimension of the institution. Likewise, the author had not addressed independence of the judiciary in Tanzania's circumstances, an issue that has been discussed in the present study.

Igwe¹⁷ elucidates the doctrine of independence of the judiciary basing on two dimensions: freedom of the judiciary as an institution and independence of individual judges. In that sense, the author views the principle of freedom of the judiciary as a doctrine emphasizing on the freedom of the judicial system from government interference. The author stressed that the supervisory may subvert the freedom of the judiciary if it vests powers of appointing judges and paying them salaries. In this aspect, the author relates the practice of the executive to appoint the judges and paying their salaries as a factor which may undermine the independence of the judicial system. From this literature, it can be noted that where the executive is given powers of appointing judges, such powers of the executive may be used to exert excessive influence over the judiciary, in turn, destroying her independence integrity. This literature is crucial to this study and can help the researcher in obtaining potential insights on the research problem.

¹⁷ Igwe, I. O. C. (2021). Rule of law and constitutionalism in Nigerian democracy: A critical relativism discussion in the context of international law. *Athens Journal of Law*, Vol. 7, No.3, p. 317 -333.

Yet, there is a knowledge gap in this literature since the author did not address freedom of the judiciary in Tanzania, a topic covered in the current study.

Malan¹⁸ clarified principle of freedom of the judiciary in view of government and parliament interference. In that clarification, the author had the views that independence of the judiciary exists when the courts have a separate relationship from both the parliament and administrative branch and on that sense the judges and magistrates are free to decide legal matters without influence emanating from the said two state organs. From this literature, the author has the view that the courts would be independent if only the government and parliament would stop exerting their influences, inducements and pressures over the judiciary. This literature is crucial to this study because the writer adduced things which are necessary in securing the freedom of the courts to include security of work, mode of appointment and financial independence. Essentially, the author had described the manner on how to ensure the freedom of the judges and magistrates, the aspect which would aid in providing valuable insights on the research problem of this study. Besides, because the author did not address the issue of judicial freedom in Tanzania, which is covered in the current study, there was a knowledge gap in this literature.

¹⁸ Malan, K. (2014). Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa. *Potchefstroom Electronic Law Journal*, vol. 17, No.5, p.1984.

The International Bar Association ¹⁹ examined the concept of the judiciary's independence by examining the institution's independence as well as the individual judges' independence. This association views that judges are eligible to decide the cases referred before them according to the law, free from fear of personal criticism or reprisals of any kind, even in the situations where they are forced to render judgments in problematic and complex cases. From the views of the International Bar Association, it can be construed that the concept of the judiciary's freedom necessitates judges to resolve cases without undue influence, inducement or pressures from the executive or legislature. This literature was vital to this study as it describes the freedom of the judiciary in terms of personnel and the institution itself, and therefore it would be useful in responding to the research problem. Nevertheless, this literature has knowledge gap because the writer had not addressed the doctrine of independence in relation to the normative framework of Tanzania particularly on the aspect of appointment and removal of judges, the subject that this particular study had dealt with.

Siyo et al.,²⁰ argued that the principle of independence of the judiciary is a broad accepted concept measured by considering independence of individual judge as well as independence of the judicial system as an institution: independence of an individual judge or magistrate is construed as the ability of a judge or magistrate to adjudicate legal issues impartially and independently by applying their understanding of the law and fact

¹⁹ The International Bar Association (2014). Challenges to the independence of the judiciary: A case study of the removal of the three judges in Lowa, London, December 2014, p. 6-8.

²⁰ Siyo, L et al. (2015). The independence of South African judges: A constitutional and legislative perspective, *Potchefstroom Electronic Law Journal*, Vol.18 No.4, p. 817-818.

without undue influence. The other level is the one attached to the independence of the institution itself. This kind of independence of the judiciary manifests through the ability of the law court to control administration and appointment of its personnel.²¹ Applying the syllogism method of reasoning on this literature, it can be deduced that the style of appointment in the judiciary is the tool for guaranteeing the principle of independence of the judiciary, and therefore this principle is compromised where the appointment of judges is controlled by the executive or legislative branch. This literature was resourceful to this study as it enabled the researcher to understand the principle of independence of the judiciary and its scope. Yet, this literature had knowledge gap because the authors had not addressed independence of the judiciary on Tanzania's background, the feature addressed by the present study.

Maqutu²² discussed about the independence of the judiciary where he went further to describe it as an insulation of the judiciary against overt and covert influences of the executive and legislature to ensure that judges and magistrates preside and make decisions in accordance with norms of the state and the requirements of principles of administration of justice. This work inculcates that independence of the judiciary may be compromised through covert and overt means. The covert means may be executed through the process of appointment. That is to say, the appointment authority may use appointing as a mechanism to compromise independence of the judiciary by appointing

²¹ Siyo, L et al. (2015). The independence of South African judges: A constitutional and legislative perspective, *Potchefstroom Electronic Law Journal*, Vol.18, No. 4, p. 817 -818.

²² Maqutu, L, (2015). When the judiciary flouts separation of powers: Attenuating the credibility of the national prosecution authority, *Potchefstroom Electronic Law Journal*, Vol. 18, No.7, p. 2674.

adjudicators who had been nominated on basis of partisan relationship. This situation may appear in the situation in which the appointing authority has uncontrolled powers of appointing the judges and the process lacks transparency. This literature was useful to this study because it enabled the researcher to understand the judicial independence and the limitations associated with this concept. However, this literature has knowledge gap because the author had not spoken about independence of the judiciary in the situation of Tanzania, the subject that has been addressed in the present study.

Stebek²³ defined the concept of the judicial independence by paying reference on some requirements pertinent for securing the judiciary freedom. The author viewed that independence of the judiciary may be influenced by the judicial budget autonomy, appointment, stable terms of service, disciplinary system for court personnel, adequate salaries and retirement benefits for judges. Other factors that are crucial in vindicating the independence of the judiciary include the mode of appointment of judges should be transparent and the removal and supervision of judicial personnel should not vest to the executive. From this literature, it can be determined that lack of adequate judicial budget may compromise independence of the judiciary. Financial resources are controlled by the executive, and the executive can disturb the judiciary's budget in pursuit to compromise its independence. This literature is critical to the present study because it precisely discussed about independence of judiciary, and assisted the researcher in addressing the research question in the current study. However, there is a

²³ Stebek E, N, (2015). Judicial reform pursuits in Ethiopia. *Mizan Law Review*, Vol. 9, No.2, p.220.

knowledge gap because the Stebek had not addressed the judiciary's freedom in the legal regime of Tanzania as investigated in this study.

Chiduza,²⁴ described the principle of the judicial independence basing on independence of an individual judge. According to him, independence of judiciary entails to the state of judges and magistrates to have freedom of deciding issues without pressure or influence from whatever angle. In addition, the author had observed independence of the judiciary by examining the area of disciplinary system as he submitted that judicial disciplinary systems have adverse effects on the principle of the judicial independence. From this prose, one may deduce that independence of the judiciary prospers where judges are free from pressures, inducement and influences of the executive. In that sense, where appointment is not transparent it can serve as an inducement and favour used to compromise independence of the judiciary. Moreover, the literature reveals that disciplinary bodies may influence the judicial independence. Therefore, in the jurisdiction where the executive or judiciary have control over judicial disciplinary organs, then, they may use these bodies to impede the judiciary' freedom. This literature was resourceful to this study as it reflects the current research problem. However, this literature has knowledge gap because Chiduza had not talked about independence of the judiciary in the context of Tanzania's legal position, a theme that has been addressed in the present study.

²⁴ Chiduza, L (2014). Towards the protection of human rights: Do the New Zimbabwean Constitutional Provisions on judicial independence suffice, *Potchefstroom Electronic Law Journal*, Vol.17, No.1, p. 399-612.

Ochieng²⁵ discussed the doctrine of democratic legal order by focusing on the judicial power as an institution and independence of the justice basing on individual judge. In that parameter, the author submits that the judicial prerogative is an independence of the legal system from external political, economic and social influences, and thus judges and magistrates make judicial decisions basing on interpretation of law and assessment of facts. To him, the judiciary should not be under control of the executive or legislative body. He argues that the law should insulate the judiciary from influences and external pressures of the president and legislative body of the state. This literature illustrates that the rule of independent judiciary is compromised where the president or legislative body controls the judiciary. The control may be in terms of appointment of judges or in terms of governing their disciplinary processes. This literature suits this study because it reflects the research problem, and therefore enabled the researcher in answering the problem. Yet, this literature has knowledge gap because the author had not talked about independent judiciary in Tanzania's settings.

Grove²⁶ defined the concept of independent judiciary as the doctrine which supports judges or magistrates to adjudicate legal issues in an environment that secures their freedom of adjudication but with conformity with their assessment of the facts, evidence so adduced and the contemplation of the applicable laws. He proceeded to postulate that an independent judiciary is a system of judiciary which performs its adjudicatory

²⁵ Ochieng W.K. (2017). *The State of Judicial Independence & the Judicialisation Politics: The state of judicial independence in Kenya – reflection from the 2017 presidential election*, the Kenya Section of the International Commission of jurist, Nairobi, 2018, p. 6

²⁶ Grove T. L (2018). The Origin (a Fragility) of judicial independence. *Vanderbilt Law Review*, Vol.71, No.2, p. 472

functions in an environment where judges and magistrates are not restricted in any way by other branches of the state and for that case they enjoy protection against any interference, prejudice or manipulation intending to subvert their impartiality.²⁷ This literature inculcates that independence of the judiciary is becomes practicable possible where the executive and the legislature refrain themselves from posing influences over the judicial decision making process, thus the judges and magistrates just make their decision by considering the enabling law. This literary text is relevant to this research as it enabled the researcher in answering the problem. Nevertheless, this literature has knowledge gap because Grove had not addressed independent judiciary in Tanzanian environment, the aspect that has been discussed in the present study.

Abeyratne,²⁸ discussed the precept of independent judiciary as freedom of judges and magistrates to execute their duties without undue influence or restrictions from the executive or parliament. To him, the rule of the judicial privilege is understood as a judicial system of a country in which the judiciary is protected against undue influences, inducement, interference and favour of executive powers or legislative branch of the state. In that situation, judges and magistrates just decide cases by basing on the law and not out of that. The protection should include issues like appointment of judges and judicial budget as the executive or legislature may use the two at the detriment of the ideology of independent judiciary. Besides, the president or parliament should neither control judicial disciplinary bodies nor regulate the disciplinary procedure as the said

²⁷ Ibid

²⁸ Abeyratne R. (2015). Rethinking judicial independence in India & Sri Lanka. *Asian Journal of Comparative Law*, Vol. 10, p. 99 – 135.

may be used to impair the judicial power. This literature is useful because it relates to the subject which is the cornerstone of this study, and had helped the researcher in assessing the theory of independence of the judiciary. Still, this literature has knowledge gap since Abeyratne did not address this doctrine by looking in the context of the legal regime of Tanzania, the aspect addressed in the present study.

Welsh et al²⁹ denoted the notion of independence of the judicial power as freedom of the judicial system from the executive branch of the state. In that case, judges make decisions of cases by basing on fundamental principles and other laws. The independent judiciary is of public importance as its existence in a state paves way for prosperity of a free democratic society, separation of powers as well as rule of law. From this literature, the author has tried to elaborate doctrine of the judicial prerogative basing on institutional and individual judge's neutrality. This work demonstrates that independence of the judiciary prevails where the executive does not interfere judicial decision making process. In that view, the executive should not interfere the judiciary through appointment of judges and control of their disciplinary matters. The executive will put the judiciary under its auspice in case it starts controlling the judicial appointment and their disciplinary matters. This literature is appropriate to the current investigation as it addresses the research subject, and helped the researcher to address the issue at hand. The author of this literature did not address the subject of judiciary

²⁹ Welsh R. A et al. (2014). Judicial independence from the executive: A first-principles review of Australian cases. *Monash University Law Review*, vol.40, No.3, p.593-638.

independence in the Tanzanian context, which is covered in the current study, in turn, creating a knowledge gap.

Nyingchia et al ³⁰ examines the ideology of independence of the judiciary by observing the level of control and dominance which the executive and parliament exercise over the judiciary. He defined this doctrine as a state of court's immunity against control and domain of other state powers namely the executive arm and the legislature branch to the extent that enables the judges and magistrates decide legal disputes without any undue influence, interference, inducement or favour from the said branches of the state. He considered the independent judiciary as paramount prerequisite to strengthen quality righteousness. This literature inculcates us that independence of the judiciary becomes possible in the environment where executive and the legislature refrain themselves from posing influences over court's immunity. In that said, the president or legislature does not control the judiciary either on the appointment or disciplinary processes. Therefore, this literature is useful as it leads the researcher in answering the research questions pertinent to the present study. Nonetheless, this literature has knowledge gap since the authors had not addressed the notion of independence the judicial system with the reference of Tanzanian state of affairs, the aspect investigated by this study.

³⁰ Nyingchia L, et al. (2021). Appraisal of the independence of judiciary in Cameroun in the fight against corruption. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol.12, No.1, p. 183 - 185,

Shehu ³¹ construed the principle of the judicial independence as a state where the executive, legislature, other officials within the judiciary itself and other stakeholders from the society refrain from exerting pressures and undue influence over the judicial power, and therefore allowing judges and magistrates take their judicial decisions without any interference. Accordingly, the executive branch or legislature power abstains to take any action to influence judicial decisions at any point. From this literature, we are inculcated that independent judiciary is secured where the government, parliament, officials within the judiciary itself and other stakeholders from the society desist from exerting unjustified influences, inducement, pressures and favour over the judicial power. This situation makes the judges work under the working environment which secures their freedom of adjunction and thus confine to the law during decision making. This literature serves the purpose of this study since it reflects the research topic, and helped the researcher in answering the problem. Nevertheless, there is a knowledge gap because the author had not examined the judicial power in the condition of Tanzania as scrutinized by this study.

Dijk³² viewed the canon of the judicial independence in terms of individual judges and the judicature as an institution. To him, doctrine of the judicial independence is solely connected with style of appointment of judges and existence of guarantee of freedom to

³¹ Shehu A. T (2016). Suspension of Justice Isa Ayo Salami: Implications for rule of law, judicial independence and constitutionalism. *African Journal of Criminology and Justice*, Vol. 9, No.1, p. 42-3.

Shehu A. T, 'Independence of Judiciary and the Executive Branch in Nigeria', *GIMPA Law Review*, Vol.1, No.1, p. 42-3 and Shehu A. T, (2012). Imperative independent judiciary for constitutionalism and sustainable democracy in Nigeria, *Journal of Public Law*, Vol.1, p.42-3.

³² Dijk F. V. (2021). *Perceptions of the Independence of Judges in European*. Congruence of Society and Judiciary, Palgrave Macmillan, Netherlands. p. 9 - 11.

facilitate judges decide the cases before fairly, without any kind of restrictions even in situations where they must make decisions in challenging and delicate scenarios. This literature views that the mode of appointment of judges has considerable influences over independence of the judiciary. Thus, the appointment may be used as a mechanism to influence the principle of independence of the judiciary. Therefore, this literature had suggested that the mode of appointing adjudicators can pose adverse effects as may be used for sometimes as a weapon to influence independence of the judiciary. The literature is significant based on its ability to helping the researcher comprehended the notion of the judiciary's independence with regard to personnel independence. Nonetheless, there is a knowledge slit in this literature since the author did not to address the guideline of independent judiciary on Tanzanian lawful system, which is the subject of the current study.

Abdullah³³ provides a critical analysis of the practical realities of the separation of powers doctrine. According to Abdullah, constitutional conflicts often arise when one branch unintentionally or deliberately intrudes upon the functions of another. He notes that no constitution explicitly separates powers completely; rather, the separation is often implicit, leaving room for functional overlaps and interdependence.³⁴ This theoretical framework is crucial for understanding judicial independence in Tanzania, particularly concerning the appointment and removal of judges. In Tanzania, the executive nominates judges, while the legislature indirectly participates through vetting

³³Abdullah, A. (2023). Declassifying theory of separation of powers and its inherent system of checks and balances: A comparative study, *Zakariya Journal of Social Science*, pp. 34-36.

³⁴ *Ibid.*

processes and budgetary control.³⁵ This structure mirrors the interdependent model Abdullah describes, where each branch relies on the other for efficient governance but also risks overreach.

The Tanzanian judiciary, like in United States of America, can review the constitutionality of laws and executive actions. However, the lack of robust legal safeguards around judicial appointments and removals creates vulnerability to executive or legislative influence.³⁶ Therefore, analyzing these safeguards is essential to assess whether Tanzania's judiciary can maintain independence while operating within a system of inherent checks and balances.

1.7 Methodology

Research methodology refers to a systematic and methodical approach employed to study and analyze a particular phenomenon.³⁷ In legal research, it involves the structured process of identifying, examining, and interpreting legal materials to solve a specific research problem. It may also be viewed as the scientific study of how legal research is conducted, including the various steps typically followed by a researcher and the rationale for their application.³⁸ Research methodology provides the overall strategy and framework guiding the study. It outlines the type of data needed to answer the research questions, the sources from which such data are obtained, and the methods of analysis

³⁵*Ibid.*

³⁶ Abdullah, A. (2023), *supra* (n.33).

³⁷Gioia, D. (2021). A Systematic Methodology for Doing Qualitative Research. *The Journal of Applied Behavioral Science*. <https://doi.org/10.1177/0021886320982715>, accessed 16th September 2024.

³⁸See: <https://gradcoach.com>, accessed 16th September 2024.

applied.³⁹ This study specifically adopted the doctrinal legal research methodology, which primarily involves an in-depth analysis of existing statutory provisions, case law, regulations, and legal principles. The doctrinal approach focuses on determining the current state of the law and exploring how the law ought to be.⁴⁰ Data for this research were collected from primary and secondary legal sources, including statutes, judicial decisions, and scholarly writings, accessed mainly through library research and reputable online databases. The collected data were then analyzed using qualitative methods, allowing for critical interpretation and synthesis of the relevant legal materials.

1.7.1 Doctrinal Research Methodology

This study has exclusively employed the doctrinal legal research methodology. Doctrinal legal research refers to a method of studying, analyzing, and interpreting legal doctrines by critically examining statutes, case law, regulations, and other authoritative legal materials. According to Kharel, doctrinal research is a reasoning-based approach that involves locating, examining, explaining, and justifying the existing legal framework relevant to the research problem.⁴¹ Majeed et al. describe doctrinal legal research as a process focused on systematically identifying, organizing, and analyzing primary and secondary legal sources to clarify the current legal position.⁴²

³⁹ <https://www.google.com/search> accessed on the 19th September 2024.

⁴⁰ Ibid (n.33)

⁴¹ Kharel, A. (2024). Doctrinal Legal Research, Securities Board of Nepal Silver Jubilee Publication, SEBON, Lalitpur, Nepal, pp. 237–252.

⁴² Majeed, N., et al. (2023). Doctrinal Research in Law: Meaning, Scope and Methodology. Bulletin of Business and Economics, Vol. 12, No. 4, pp. 559–563.

This methodology allows for a detailed exposition of legal rules, judicial decisions, and scholarly writings, highlighting how the law operates and identifying potential areas for reform. As noted by Pearce et al., doctrinal research not only maps out the legal landscape but also examines the interrelationship between various legal rules.⁴³

In conducting this study, the researcher analyzed statutory provisions, case law precedents, and relevant legal literature related to the independence of the judiciary, focusing particularly on the appointment and removal of judges. The research also applied established legal reasoning tools, including rules of statutory interpretation, syllogism, deductive reasoning, and inductive reasoning, to assess the law's application and implications. The choice of doctrinal methodology is justified by its suitability in exploring the certainty, coherence, and development of legal principles, particularly when addressing complex legal questions such as judicial independence and accountability.

1.7.2 Data Collection Methods

1.7.2.1 Primary and Secondary Data Collection Method

The term data is defined to mean and include all the information that the researcher collected and gathered for the purpose of the study and there are two types of data namely primary and secondary data.⁴⁴ In this study, the researcher had used both types of data to wit primary and secondary data. The primary data were gathered from various

⁴³Pearce, D. et al. (2018). Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, *Journal of Professional Legal Education*, Vol. 5, No. 2, pp. 201–212.

⁴⁴<https://www.google.com> Accessed on 19th September 2024

Acts of Parliament and decided cases both reported and unreported. Secondary data is the information that is obtained from published sources such as books, journals, articles or from individuals who worked on the subject. This includes reviewing of library written materials including, books, journals, articles, government papers, correspondences, policies, various speeches, bills, the internet, governmental, non-governmental records and other documentary literature. The researcher has preferred to collect data by using primary and secondary data collection methods because these methods are the cardinal methods applied by all scholars in data collection. In the light of that, the methods have enabled the researcher to collect relevant data suitable for the study. As that is the case, the data collected had helped this study in finding out about what other scholars have written about the subject and come up with answers to suit the research questions.

1.7.2.2 Data Analysis

The researcher had applied legal analysis as a mechanism in analyzing data collected in this study as the research had based on library search. Legal analysis in the broad sense is defined as a statement given by a court, judicial officer, or legal expert as to the legality or illegality of an action, condition or intent.⁴⁵ In the sake of establishing clear argument on answering research questions pertaining the guarantee of the doctrine of independence of the judiciary on the aspect of appointment and removal of judges from office, this study had explored and discussed various existing written laws and case

⁴⁵ <https://definitions.uslegal.com> visited on the 16th September 2024

laws/precedents originating from courts of records. The analysis has managed to reveal that the laws governing independence of the judiciary in Tanzania particularly on the appointment and removal of judges from office is impracticable as the executive controls appointment of the judges and also controls their discipline thus interfering independence of the judiciary in both dimensions of independence of the judiciary as the institution as well as operational independence.

1.7.2.3 Research Design

This study has employed analytical and descriptive research design. Analytical research design is that kind of research design that makes a detailed critical examination of the existing state of a phenomenon.⁴⁶ Analytical research design attempts to establish the reason perpetrated occurrence of the fact or how it came to be, the analytical research usually concerns itself with the cause-effect relationship. In this study analytical research design has been used at analyzing the Tanzania legislations governing the appointment and removal of the judges from office to explore as to whether they guarantee independence of the judiciary. Similarly, on the other hand, the study has applied the descriptive research design. Descriptive research design is a fact finding investigation because it systematically describes a solution character phenomenon or problem.⁴⁷ It elucidates the existing state of a fact as it appears in a current situation. In respect to that, this study has therefore used descriptive design to satisfy the research

⁴⁶ <https://www.google.www.questionpro.com> Accessed on the 18th September 2024

⁴⁷ Ibid

objective that sought to explore the current policy and the law governing appointment and removal of judges from office in Tanzania.

1.8 Scope of the Study

This study critiques the doctrine of independence of the judiciary in Tanzania in the case of the appointment and removal of the judges from office. Specifically, in examination of the legal regime, particular attention was given on the legal procedures governing aspects of appointment and removal of judges from office not any other concepts underlying doctrine of judicial independence such as judicial financial autonomy, separation of powers, impartiality just to mention fewer. Interestingly, attention was given on the domestic normative framework regulating the doctrine. The list of domestic laws in contemplation, are the Constitution of the United Republic of Tanzania which is the grundnorm in the jurisdiction where all other laws draw mandate, the Judiciary Administration Act and its regulations calibrated to ensure better management of the judiciary, the Magistrates' Courts Act, which contains some provisions which protect the judges from facing civil and criminal prosecution for acts done in the course of their adjudicatory function as well as the Judges (Remunerations and Terminal Benefits) Act which pursues to protect doctrine of independence of the judiciary through financial autonomy.

1.9 Research Justification

The term research justification is the explanation seeking to reveal the rationality attached to the study. The section provides rational reasons that propagated the study to

be carried out on the research topic though the same topic had been carried out by some other scholars.⁴⁸ From the above explanation it follows that, this study is justifiable as the perusal of various scholarly materials had revealed that similar studies to the present research problem have been conducted by various scholars.⁴⁹ Some of them had examined various aspects relating to Tanzania's judicial independence. Nevertheless, the said studies are not exhaustive as far as the doctrine of independence of the judiciary is concerned especially on the aspect of appointment and removal of judges from office in Tanzania. Moreover, the present study has used different approach in investigating the research problem including the use of the theory of separation of powers, theory of rule of law, theory of judicial accountability and theory of judicial function in constitutional domains as theoretical tools of interpreting the law something which has not been done in the past studies.

1.10 Significance of the Research

This work is useful to the government, legislature, legal scholars and policy makers. For instance, the findings will help the Tanzanian government officials in evaluating the judiciary's independence, particularly on the aspect pertaining appointment and removal of judges from office, and formulating effective system that will provide the solutions.

As to the parliament, the study will assist members of the parliament to enact laws that address adequately the method of nomination and dismissal of judges, and thus secures

⁴⁸ <https://www.google.com/search?q=what+is+research+justification> visited on the 19th September 2024

⁴⁹ Juma, K.M (2022). The Role of the independence of the judiciary in Promoting Good Governance in Tanzania: *A Case of Korogwe District Court*. Master thesis, The Open University of Tanzania. Magalla, A. (2013). The independence of judiciary in Tanzania (LLB thesis, Ruaha University, Tanzania. Sibalukhula, N, (2012). *The judicial appointment in Kenya and its implications for judicial independence in Kenya* (Master thesis, University of Pretoria, South Africa).

independence of Tanzania's judiciary. In addition, legal scholars on their side will easily understand the concept of the judicial power in particular on aspect of selection and removal of judges. Further, the legal scholars would also understand the legal position governing the appointment of judges in Tanzania. Meanwhile, this research will indicate new legal aspects to be studied in the future. On part of the policies, this study is helpful to policy makers as it would help them evaluate existing policies and subsequently develop rich policies that address the anomaly experienced on aspect of appointment and dismiss of judges from office, and making vindication of independent judiciary in Tanzania being practicable.

1.11 Outline of the Dissertation

This dissertation has been organized in a total of six chapters whereas the first chapter comprises the general introduction of the research as it laid down the fundamental base upon which this dissertation had taken its precedent. On top of that, the second chapter elucidates various concepts and theories underlying the doctrine of independence of the judiciary. Along with that, this section has pointed out the theory which governs the study and provided the rationale behind it. Besides that, the third chapter discusses legal framework governing the doctrine of independence of the judiciary in Tanzania. In pursuit of that aspect, the chapter has analyzed various domestic laws relevant to the subject. Coupled with that, chapter four has illustrated the institutional and legal issues impacting the doctrine of independence of the judiciary. Chapter five on its part has analyzed and discussed the research findings. This chapter has analyzed the data and

reveals the gaps available in the law. Eventually, chapter six has concluded the study and provided the recommendations to improve the shortcomings that have been revealed by the study as the study has portrayed that the law has insufficiently protected independence of the judiciary in Tanzania.

1.12 Limitations of the Study

This study had encountered some limitations⁵⁰ like scarcity of literature written on Tanzania's independence of judiciary. To overcome this inadequacy in legal documents on the research problem, the reliance was shifted to studies conducted outside the Tanzanian settings. Also, the researcher experienced inadequate budget in conducting the study. To tackle this problem, the researcher solicited some funds from friends and relatives in order to accomplish the research within the timeframe.

1.13 Conclusion

This chapter establishes the foundation for this dissertation and therefore, in that sense, the chapter introduces key areas which the study has gone through on the search of studying the doctrine of independence of the judiciary on the aspects of appointment and removal of judges from office in the context of Tanzanian legal system. In that purview, the chapter has presented historical background of the study starting from colonial era to the present. Also, the chapter has described the statement of the problem to reveal the

⁵⁰ Mwamlangala, D.F (2020). Privacy and Security in the Cloud: Tanzania and South Africa in Comparative Perspective, PhD Thesis, the Open University of Tanzania, Tanzania, p 18 limitations refer to constraints that faced the researcher at the moment he was doing his study.

problems existing in the law. Moreover, in studying the research problem, this chapter had reviewed various literature materials relating the doctrine of independence of the judiciary as tools of investigating the problem. Likewise, it has described the research methodology applied in the study as well the rationale underlying the adoption of the said research methodology. Furthermore, the chapter elucidated the limitations that faced the researcher and scope of the study. Meanwhile, the chapter has elaborated the rationale of the study as well the reasons that attracted the study to be conducted on the subject. Ultimately, the chapter has shown the dissertation outline which shows the manner the study has been organized. This chapter leads us to chapter two which elaborates various concepts and theories manifest in the principle of independence of the judiciary.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK OF JUDICIAL INDEPENDENCE IN TANZANIA

2.1 Introduction

This chapter has described a couple of concepts and theories guiding canon of the judicial power on appointment and removal of judges from office. On the area of concepts, this part has provided clear meaning of independence of the judiciary on the aspect of external, internal, institutional and independence of an individual judge, constitution and constitutionalism. Other concepts covered under this part include the judiciary which is a branch of the state dealing with adjudication, discipline, and removal of judge from office, executive, and impartiality of judges, legislature and suspension of judges. The second part to this chapter has described theoretical framework guiding the study. The study has highlighted several theories such as theory of separation of powers, theory of rule of law, theory of judicial accountability and theory of judicial function in constitutional domains as fundamental components that form theoretical framework of this study. These theories help analyze how the judiciary functions independently, the extent to which it is subject to external influences, and how its actions may be evaluated. Ultimately, the study has concluded that the conceptual and theoretical framework is vital component in building up a legal principle.

2.2 Conceptual Framework of Independence of Judiciary

A concept refers to an idea or principle. The concept is an essential component in building a legal principle. Thus, this part has described various concepts underlying the study. The concepts described under this part are the judiciary the organ vested powers of administering justice, independence of the judiciary which entails court immunity to decide matters without undue interferences from the executive, legislature, the constitution which is the supreme law of the land, impartiality which refers to a quality of being unbiased on either of the party to the dispute, removal of judges which entails the act of expelling a judge from employment, executive which means a machinery of the state dealing with state's policy making and their implementation, and legislature which in a literal meaning is the state organ constituted by people elected for the purpose of enacting and amending laws. Other concepts are constitutionalism, separation of powers, immunity of judges, external, internal and institutional independence of the judiciary, security of tenure of judges and suspension of a judge. These concepts are the roadmap of this study as they serve as the cornerstone towards answering the research questions. Therefore, underneath is a detailed elaboration for each concept.

2.2.1 Judiciary

In a literal meaning, judiciary is the branch of the state vested powers of administering justice.⁵¹ In the legal frame work of Tanzania, the law describes the judiciary as the structure of the state that involves the Court of Appeal, High Court of the United

⁵¹ Gunireama I, (2020). The executive and independence of judiciary in Nigeria, *Pinis Journal of Arts, Social Studies and Humanity*, Vol.2, No.1, p. 59.

Republic of Tanzania, and Courts subordinate thereto.⁵² The role of the judiciary is to interpret laws and making all decisions pertaining to legal affairs.⁵³ As pointed by His Lordship Samatta C.J (as he then was), the court of law is the sole resort of the oppressed and bewildered.⁵⁴ It is the judiciary which ensures respect of rule of law as it makes the government acts within its legal bound. Cementing on the role of the judiciary, Mwesiumo J (as he then was) had the view that the court is the temple of justice where all individuals who encounter legal disputes should not afraid to seek legal right as provided by the normative framework of the land.⁵⁵ In essence, the law of Tanzania had vested in the domains of the judiciary of Tanzania all the authority of interpreting the laws. In supporting the above position, the judiciary had emphasized in *Ally Linus and Others v Tanzania Harbour Authority*⁵⁶ that it is the judiciary that has the final word on the interpretation of laws and administration of justice. It is important to understand the concept judiciary when studying doctrine of judicial independence as doing that would help in search of examining its independent.

2.2.2 External Independence of the Judiciary

The phenomenon external independence of the judiciary entails to the freedom of the judiciary from external pressures and influences during the decision making process.⁵⁷

That is to say, the concept of external independence of the judiciary tries to describe

⁵² Section 3 of the Judiciary Administration Act, Cap.237 [R.E 2019]

⁵³ Article107A of the Constitution of the United Republic of Tanzania, Cap.2 [R.E 2019]

⁵⁴ [2004] TLR 14

⁵⁵ *Joseph Kivuyo and Another v Regional Police Commander of Arusha and Another*, Miscellaneous Civil Application No. 22 of 1978, High Court of Tanzania at Arusha, (Unreported). (emphasis added)

⁵⁶ Civil Appeal No. 2 of 1983, Court of Appeal of Tanzania (Unreported)

⁵⁷ Braithwaite, B et al.. [eds] (2021). Independence and impartiality of the judiciary: An over view of relevant jurisprudence of the European Court of Human Rights. Zemun: Kuca Stampe Plus Publishers, p.33

independence of the judiciary by looking at the pressures and influences exerted by other state organs towards the judiciary. This concept is fundamental in understanding judicial independence because it refrains other external organs from directing their influences and pressures towards the judiciary leaving it free to decide matters basing on the assessment of the law.⁵⁸ With this concept, external organs such as legislature, executive or other groups coming out of the judicial system should not influence the ultimate results of the case as a result the said fate remains in the domains of the judiciary. This concept insulates the judiciary against interferences, pressures and undue influences emanating from other organs of the state and thus making the judiciary protects its integrity of deciding the cases basing on the assessment of the facts and the law of the land.⁵⁹ From the above elaboration, the idea of external independence of the judiciary is simply the freedom of the judicial system from the interferences or influences arising out of the judicial system.

2.2.3 Internal Independence of the Judiciary

The phenomenon internal independence of the judiciary entails to the freedom of the judiciary from the pressures and influences arising within the judiciary during the decision making process.⁶⁰ That is to say, the concept of internal independence of the judiciary tries to describe independence of the judiciary by examining at the pressures

⁵⁸ Republic v Iddi S/o Mtegule, Criminal Revision No. 1 of 1979, High Court of Tanzania, at Dodoma (Unreported).

⁵⁹ Shetreet S. (2015). *The culture of judicial independence: Rule of law and world peace*. Boston: Brill Publishers. p. 13

⁶⁰ Hannan, M.A et al., (2021). Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal. *Open Access Library Journal*, vol. 8, p. 1-21

and influences exerted by higher ranked judicial officers over lower ranked judicial officers. This concept is also crucial in examining judicial independence because it serves as a mechanism to refrain higher judicial officers from directing their influences and pressures towards the lower ranked judicial officers leaving them be free to decide matters basing on their assessment of the law and facts.⁶¹ With this concept, higher ranked judges such as the Chief Justice, Justices of Appeal and the Principal Judge are forbidden from influencing the ultimate results of the case as instead the said fate should remain in the domains of the presiding judge. Moreover, the judges of the High Court of Tanzania should not influence decisions of cases in the subordinate courts. Magistrates presiding in these Courts should be free to decide cases basing on the assessment of the law and facts. This concept insulates lower ranked judicial officers against interferences, pressures and undue influences originating within the judicial system. From the above position, the idea of internal independence of the judiciary is simply the freedom of the lower ranked judicial officers from the interferences or influences coming from higher ranked judicial officers.

2.2.4 Institutional Independence of the Judiciary

The concept of institutional independence of the judiciary is the constitutional based doctrine that requires the judiciary be independent of the other state pillars namely the legislative and executive organs of the state.⁶² In Tanzania, the cornerstone for institutional independence of the judiciary is premised under article 4 of the Constitution

⁶¹ Ibid.

⁶² Valente v The Queen (1985) 2 SCR 673, 679.

of the United Republic of Tanzania⁶³ as the said proviso establishes the judiciary of Tanzania as a separate institution apart from the executive and the legislature. Essentially, under this concept the executive or the legislative organs of the state cannot interfere judicial operations or their decisions whether overt or covert.⁶⁴ This aspect touches on the areas of administration of the judicial system as well as the financial matters too. That is to say, the executive and legislature should not interfere management of the judiciary as the said undertaking should be under the monopoly of the judicial system itself. Meanwhile, the judiciary should also be autonomous on respect of its financial matters.⁶⁵ From the above illustrations, this concept is vital in studying judicial independence as vindicates the judiciary as the institution separate from other state organs to the extent that the said other organs would not be capable of influencing judicial decisions.

2.2.5 Independence of an Individual Judge

The concept of independence of an individual judge is important in examining judicial independence because it describes the state of a presiding judge to feel free from any form of pressures, inducements and influences from either party or corner during the time of discharging his judicial functions.⁶⁶ Individual independence of an individual judge is grounded on his security of tenure and institutional independence of the judiciary itself. That is to say, this concept requires that a presiding judge should not

⁶³ Cap. 2 R.E 2019

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Canada v Beauregard (1986) DLR 481-491

have a sense of risk of his tenure when making judicial matters. Too, he presides the cases without feeling any fear from the parties or from external organs of the state or from within the judiciary itself.⁶⁷ In Tanzania, the cornerstone for individual independence of the judge is premised under article 107B of the Constitution of the United Republic of Tanzania as the said proviso expressly states that the judges should have freedom in deciding cases except they should only conform to the constitution and other laws of the land. From the explanation above, the concept of independence of an individual judge is referred to as a phenomenon that sought to insulate an individual judge against influences, pressures and inducements arising from his colleagues or from other organs of the state.

2.2.6 Constitution

Constitution appears in several forms as some countries have a written constitution while others have an unwritten constitution. As the case may be, the constitution has been defined in diverse ways. Bradley et al⁶⁸ defined the constitution as a document that has got superior legal status forming the framework and principal functions of government organs within the state, and declares rules by which state organs should operate. The constitution is antecedent to the government, and the constitution is the creator of government. His Lordship Samatta C.J (as he then was) views the constitution as the document with the soul and consciousness of its own designed for the

⁶⁷ Ibid

⁶⁸ Bradley, A. W., et al., (2018). *Constitutional and administrative law* (18th ed.), Pearson Publishers, London, p. 3.

purpose of serving the present and future generation.⁶⁹ Whereas, His Lordship John Marshall C.J (as he then was) on his side views the constitution as the supreme law of the country superior to any supplementary laws, and for that case any laws enacted by legislative body of the state should be in accordance to the constitution.⁷⁰ This position reflects the Constitution of Tanzania where the constitution is taken as the mother law of the land where other laws take precedent therefrom and any rule conflicting the constitution becomes void to the extent which it conflicts the constitution.⁷¹ Therefore, in studying judicial independence it is important to understand the concept constitution because this is a grundnorm defining functions of the judiciary and of all other state organs. Thus from the constitution, one will understand powers and limits of all state organs including judiciary.

2.2.7 Constitutionalism

In studying judicial independence it is palatable to understand the concept constitutionalism as it is a form of political theory and action that seeks to prevent arbitrary use of authority and therefore guarantees the liberty and rights of individuals on which free society is premised.⁷² In the other meaning, constitutionalism is defined as a form of governance where the power of government authorities and its leaders are defined and limited by the dictates of the body of the fundamental legal principles of the

⁶⁹ Francis Ndyababo Ishengoma v Attorney General [2004] TLR 14(emphasis added). This position was also stated in Thornhill v The Attorney General of Trinidad and Tobago [1981] AC 61.

⁷⁰ Marbury v Madison (1803) 5US 137 (emphasis added)

⁷¹ The same may be seen in the Constitution of the United Republic of Tanzania, article 64 (5)

⁷² Alasunkanmi A, (2018). “*Constitutions without Constitutionalism: Interrogating the African Experience*,” Arts and Humanities Open Access Journal, Vol. 2 No. 5, p. 1

constitution.⁷³ As a body of political and legal doctrine, constitutionalism refers to the government that is, in the first instance, devoted both to the good of the entire community and to the preservation of the fundamental rights of individual persons. Constitutionalism therefore in a common parlance, prescribes a form of government whereby the government's powers are limited in the sense that government officials, whether elected or not, cannot ultra vires, rather they should act intra vires and conform to the constitution. This doctrine bases on the idea that government powers should be limited in the constitution and that its operations should depend on the limitations. In this regard, constitutionalism is synonymous a constitution in action as it controls arbitrary use of powers. Therefore, practicability of constitutionalism makes judicial independence robust.

2.2.8 Impartiality of Judges

Impartiality is one among of the aspects that plays key role in promoting judicial independence. This aspect is insisted in the Bangalore Principles of Judicial Conducts.⁷⁴ Impartiality plays essential role in the discharge of judicial office. It applies not only to the decision itself but also to the process towards the decision making.⁷⁵ In a literal

⁷³ Adagbabiri M, (2015). “*Constitutionalism and Democracy: A Critical Perspective*”, International Journal of Humanities and Social Science, Vol. 5, No. 12, p. 108 – 109, Ibiam A.E, (2016). “*Federalism, Democracy and Constitutionalism: The Nigerian Experience*”, Journal of Law, Vol. 53, No. p 4, Hirschl R, (2020), City, State Constitutionalism and the Megacity, Oxford University Press, London, p. 31, Grimm D, (2016). Constitutionalism: Past, Present and Future, Oxford University Press, London, p.6 and Barber N. W, (2018). The Principles of Constitutionalism, Oxford University Press, London, p.1.

⁷⁴ Principle 2 of the Bangalore Principles of Judicial Conducts, UNECOSOC Resolution 2007/22

⁷⁵ Ibid

meaning, impartiality refers to a quality of being unbiased on either of the party to the dispute.⁷⁶ The Black Law Dictionary⁷⁷ defines impartiality as being unbiased, fair and unprecedented. Also, according to the Cambridge Dictionary, impartiality is the action of not supporting either of parties involved in a given dispute.⁷⁸ Impartiality is the quality of absence of favour, bias and litigants to a dispute are treated equally. According to these authorities, one may understand that the concept of impartiality refers to an act in which a decision making entity decides matters without inclining to either of the party to a dispute, the authority determining the dispute treats all the parties to a dispute fairly, unbiased and unprecedented. In the other sense, impartiality refers to the quality of not inclining on either of the party when determining a dispute. It refers to the mentality of impartiality in the judiciary. That is to say, impartiality as a state of mind of a judge, necessitates juries to determine disputes fairly and treat the parties to a case equally without favour or any prejudice, and resolve the dispute putting the facts and the law into consideration. Therefore, a thorough study would reveal that impartiality has coherency with judicial independence.

2.2.9 Suspension of a Judge

As according to the Cambridge Dictionary, suspension refers to the act of requiring an employee to stop coming at working place pending investigation of his matter.⁷⁹ Also, as

⁷⁶ Impartiality (2024). Retrieved Sept 8, 2024 from <https://www.vocabulary.com>.

⁷⁷ Impartiality (2024). Retrieved Sept 8, 2024 from <https://thelawdictionary.org>.

⁷⁸ Impartiality (2024) Retrieved Sept 8, 2024 from <https://dictionary.cambridge.org>.

⁷⁹ Suspension (2024). Retrieved Sept 10, 2024 from <https://dictionary.cambridge.org.com>

according to the Oxford Dictionary,⁸⁰ suspension entails to a temporary measure of forbidding an employee from coming to the office at the time his matter is under investigation. Suspension is synonymous to temporary removal of someone from the employment. Black Law Dictionary defines suspension as the act of restricting an employee from the office pending investigation of his matter.⁸¹ From the above dictionary meaning, one may comprehend that suspension is nothing other than just restricting an employee from office pending the investigation of his disciplinary matter. As the concept is applicable to the judges, suspension may be referred to as the temporary act of stopping the judge from his employment pending the investigation of his disciplinary matter. Examining the legal framework of Tanzania, an individual will find that the law allows a judge or justice of Appeal to be suspended when it appears he has committed serious misconduct which warrants dismissal and this powers are vested in the President executed after consultation with the Chief Justice of Tanzania.⁸² Moreover, the Chief Justice, Judge Kiongozi or Judge In-charge have powers of suspending judicial officers accused to have committed misconducts.⁸³ Therefore, suspension may have positive or negative impacts on judicial independence.

2.2.10 Removal of the Judge

As according to the Cambridge Dictionary, removal refers to the act of taking someone

⁸⁰ Suspension (2024). Retrieved Sep 8, 2024 from <https://www.oxfordlearnersdictionaries.com>.

⁸¹ Suspension (2024). Retrieved Sept 8, 2024 from <https://thelawdictionary.org.com>.

⁸² The Constitution of the United Republic of Tanzania, art. 110

⁸³ The Judiciary Administration Act, S, 50 (13)

or something away from a certain point.⁸⁴ Also, as according to the Oxford Dictionary⁸⁵ removal entails to the act of expelling an individual from his or her employment. Removal is synonymous to termination or expulsion of someone from the employment. Black Law Dictionary defines removal as the act of removing or state of being removed.⁸⁶ From the above dictionary meaning, one may comprehend that removal is nothing other than dismissal or expulsion. As the concept is applicable to the judges, removal may refer to the termination or dismissal of a judge from employment or may refer to abolition of office of a judge while in office, and may also refer to the appointment of a judge to hold other officer in a public service the conduct that keeps him out of the judicial activities. For example, in Tanzania, the president as the head of the state has got powers of appointing individuals to hold different positions in a public service.⁸⁷ In the exercise of these powers, it is evident that the president appoints judges to hold positions in a public service.⁸⁸ Therefore, in studying judicial independence it is important to understand ways through which removed of judges from office is made as removal can be applied at the expense of judicial independence.

2.2.11 Security of Tenure of Judges

The security of tenure is one of the key element in a bid to ensure independence of the

⁸⁴ Removal (2024). Retrieved Sept 10, 2024 from <https://www.dictionary.cambridge.org.com>.

⁸⁵ Removal (2024). Retrieved Sep 8, 2024 from <https://www.oxfordlearnersdictionaries.com>.

⁸⁶ Removal (2024). Retrieved Sept 8, 2024 from <https://www.thelawdictionary.org.com>.

⁸⁷ The Constitution of the United Republic of Tanzania, art 36

⁸⁸ It is a long time the executive have been appointing Judges to hold positions in the public service. The history shows most of them were being appointed to be Attorney Generals or in the National Electoral Commission. To mention fewer are, Werema J (as he then was), Kisanga J (as he then was) and Fereshi J who was appointed Attorney General and later restored to the judiciary as Justice of Appeal.

judiciary on the aspect of independence of an individual judge. It is observed that a judge would have freedom in performing his judicial functions where he has assurance of his security of tenure.⁸⁹ The concept of security of tenure is very broad as on one side it seeks to insulate the judicial officers from arbitrary removal from office whether through expulsion or abolishing their offices.⁹⁰ As to cement this point, the Constitution of the United Republic of Tanzania⁹¹ is relevant as it prescribes the time upon which the Judges of the High Court of Tanzania and Justices of Appeal would retire. As from this articles, Judges of the High Court of Tanzania would compulsorily retire upon attaining the age of sixty years old. Meanwhile, they are allowed to retire voluntarily upon attaining the age of fifty five years old. The President may extend the retirement age subject to the agreement of the judge. For Justices of Appeal, their compulsory retirement age is sixty five years, but they are allowed to retire voluntarily at the age of sixty years. As applied to the Judges of the High Court, the President may extend the retirement age of Justice of Appeal subject to the agreement.⁹² Too, the security of tenure insulates judicial officers from arbitrary deprivation of their benefits. On this premise is where the Judges (Remuneration and Terminal Benefits) Act⁹³ comes into play as it regulates salaries, allowances and other benefits of Judges, Principal Judge, Justices of Appeal and the Chief Justice as they would be determined by the President. To effect

⁸⁹ Canada v Beauregard (1986) DLR 481-491

⁹⁰ Bulmer, E. (2017), *Judicial Tenure, Removal, Immunity and Accountability*, 2nd ed, International IDEA Publications, Stockholm, p.4

⁹¹ The Constitution of the United Republic of Tanzania, articles 110 and 120

⁹² Articles 109 (5) and 118 (9) of the Constitution of the United Republic of Tanzania, Cap.2 R.E 2019 have forbidden the abolition of offices of Judges while in office as a mechanism of securing their tenure of office.

⁹³ The Judges (Remuneration and Terminal Benefits) Act, section 4 (1)

this role, this legislation directs the benefits of judicial officers to be charged from the consolidated fund.⁹⁴

2.2.12 Judicial Immunity

The concept of judicial immunity is a mechanism designed to protect judicial officers especially the Judges and Magistrates from criminal liability or civil suits for monetary damages when they act improperly in the course of their employment.⁹⁵ This concept is fundamental in studying judicial independence because it intends to ensure that judges and Magistrates make decisions without improper influence or pressures arising from whatever corner.⁹⁶ Besides insulating the Judges and Magistrates from criminal and civil liability, judicial immunity extends its coverage to protect the Judges and Magistrates against unwarranted disciplinary proceedings. In that saying, judicial immunity is a tool that creates confidence to a Judge or Magistrate and therefore enables him to deliver impartial judgments as with judicial immunity judges operate in the working atmosphere where there is no fear of facing criminal liability, civil litigation as well as being subjected to baseless and unjustified disciplinary liabilities. The legal framework of Tanzania have been designed to promote judicial immunity. To justify this position, the Magistrates Courts Act⁹⁷ is relevant. This legislation offers immunity to magistrates as it protects them from facing criminal or civil liabilities for actions arising from their course of employment provided the same was done in good faith.

⁹⁴ Ibid, S.4 (2)

⁹⁵ Judicial Immunity (2024). Retrieved October 10, 2024 from <https://www.google.com>.

⁹⁶ Ibid

⁹⁷ The Magistrates Courts Act, s. 66 (1)

2.2.13 Executive

Executive is another concept annexed to this study. Executive is synonymous to government. The Oxford Dictionary defines executive as having the power of putting plans into action.⁹⁸ The Black's Dictionary defines executive as the state organ that deals with the detail of carrying the laws into effect and securing their due observance. The Cambridge Dictionary defines executive as the state organ that is responsible for making certain that laws and decisions are implemented.⁹⁹ Scholarly writings reveal that executive is that branch of state that deals with policy making as well as the implementation of the said policies.¹⁰⁰ From these definitions, it can be understood in a simple term that executive is the machinery of the state which is responsible with promulgation of various policies and certainly, implements them to achieve the goals of the nation. The executive is made up by various departments and agencies. These departments and agencies serve as vehicles for policy making and their implementations. To enable the executive performs its core duties, this machinery has got a head of the executive where for Tanzania is the president, and has got legal powers of appointing other heads of departments and agencies to manage various executive departments and agencies.¹⁰¹ Therefore, the concept executive is important in studying judicial independence because execution of functions of this organ might pose positive and negative impacts over judicial independence.

⁹⁸ Executive (2024). Retrieved Sept 8, 2024 from <https://www.oxfordlearnersdictionaries.com>.

⁹⁹ Executive (2024) Retrieved Sept 8, 2024 from <https://dictionary.cambridge.org>.

¹⁰⁰ Cohn, M. (2021). A Theory of the Executive Branch: Tension and Legality. United Kingdom: Oxford University Press. p. 8 - 9

¹⁰¹ The Constitution of the United Republic of Tanzania, art 36 and 37

2.2.14 Legislature

The legislature is another vital concept underlying this study. This terminology is used interchangeably with the term parliament. Cambridge Dictionary defines legislature as a body made up by elected people having legislative powers.¹⁰² Oxford Dictionary defines legislature as an organisation made up of individuals who have been elected to enact laws of the country.¹⁰³ Researchers view the legislature as the state organ that has been created for the purpose of approving measures and ultimately enact the laws of a country. Tanzania's constitution defines the legislature as an organ of the state having lawmaking powers. For Tanzania, this organ has two parts namely, the President and the National Assembly.¹⁰⁴ The National Assembly consists of elected members from constituencies, and some women from special seats, 5 members elected by the House of Representative of Zanzibar, Attorney General, not more than 10 members elected by the President of the United of Tanzania, and the Speaker in case he was elected out of members of parliament. Therefore, in a simple verbal, legislature is an organ of the state consisting of people elected for making laws, advising the government and oversee daily government businesses. It is also fundamental to understand the concept legislature in a bid to examine judicial independence because legislature enacts laws which may have positive or negative results on judicial independence.

¹⁰² Legislature (2025) Retrieved June 5, 2025 from <https://dictionary.cambridge.org>.

¹⁰³ The Oxford Handbook of Legislative Studies (2014). United Kingdom, Oxford University Press. p.1 - 2

¹⁰⁴ The Constitution of the United Republic of Tanzania, art 4 and 62 (1)

2.3 Theoretical Framework of Judicial Independence

Having gone through with conceptual framework, the present part has described in detail theoretical framework governing judicial independence. A perusal of various legal scholarly materials had shown that theoretical framework for judicial independence takes precedent from theory of separation of powers, theory of rule of law, theory of judicial accountability, theory of judicial activism as well as theory of narrative policy framework.¹⁰⁵ These frameworks help analyze how the judiciary functions independently, the extent to which it is subject to external influences, and how its actions may be evaluated. However, this part has opted to use four theories to analyze the study. These are theory of separation of powers, theory of rule of law, theory of judicial accountability and theory of judicial function in constitutional domains.

2.3.1 Theory of Separation of Powers

The theory of separation of powers divides state authority into different state organs.¹⁰⁶ This theory is designed to prevent concentration of powers into one state organ. In so doing, it protects abuse of powers by one branch of the state. The separation involves, separation of functions, personnel as well as institution.¹⁰⁷ This separation entails that, each state organ should have its defined functions distinct from the other. Also, it should be an independent institution with its own personnel. Therefore, the theory is crucial in examining judicial independence as it can help in protecting it. Attributing the theory of

¹⁰⁵Theories of judicial independence (2025) Retrieved June 5, 2025 from <https://dictionary.cambridge.org>.

¹⁰⁶ The Constitution of United Republic of Tanzania, article 4

¹⁰⁷ Bilchitz D et al..(2018). The revolution of the separation of powers between the global north and the global south, Cheltenham, Edward Elgar Publishing Limited, p.2

separation of powers into judicial independence, the judiciary would be an independent institution, having its personnel as well its own defined functions. This framework is relevant in this study in the comprehension on how judicial independence supposes to be. That is, an independent judiciary should be the judiciary having its defined functions, its personnel as well as an institution distinct from other state organs. Influences of other state organs should have no chance to penetrate into the judiciary via its functions, personnel as well as the judicial institution itself.

2.3.2 Theory of Rule of Law

The theory of rule of law is essential in examining judicial independence. This theory emphasizes on the obedience of the law in the sense that all state organs should obey the law and their day today conducts should be authorized by the law establishing them.¹⁰⁸ Meanwhile, all state institutions should be established by the law and that particular law should define their mandates to guide their conducts. In addition to that, all individuals, including government officials, are subject to and accountable under the law.¹⁰⁹ This theory insists on equality before the law. Therefore, applying this theory in the context of judicial independence, it implies that judges should apply the law equally to all subjects without any fear of reprisal or undue influence, even from other branches of government or powerful entities established in the land.

¹⁰⁸ Bellamy R (2017). The rule of law and the separation of powers. United Kingdom, Taylor & Francis Publishers, p. 2

¹⁰⁹ Ibid

2.3.3 Theory of Judicial Accountability

The theory of judicial accountability is another theory pertinent in examining judicial independence. It is clearly established that Judges deserve working environment that secures their independence. Nevertheless, this fact does not preclude them from confining to ethical standards. Following this position, accountability comes into play to account them for their misconducts. It is from this foundation where most jurisdiction decided to lay down procedures and establish disciplinary organs to deal with discipline of judges.¹¹⁰ This theoretical framework is fundamental in studying independence of judiciary because the procedures of holding judges accountable and organs that enforce the procedures might have positive or negative impacts on judicial independence in case they create fear or influence on the judiciary.

2.3.4 Theory of Judicial Function in Constitutional Domains

The theory of judicial function in constitutional domains¹¹¹ is another theory pertinent in examining judicial independence. It is the tradition that most countries have stipulated functions of the courts in their constitutions. The similar position is reflected in Tanzania in which the constitution has provided the constitutional function of the courts as it provides that the judicial function shall be administration of justice.¹¹² That is to say, a court is the sole organ in the state which deals with interpretation of laws. In supporting

¹¹⁰ For Tanzania, organs that supervise accountability of judicial officers are the Judges Ethics Committee, District and Regional Judicial Officers Ethics Committees established under s. 36, 51 and 50 of the Judiciary Administration Act, Cap 237 [R.E 2019] respectively and the President of the United Republic of Tanzania as provided under r. 9 (2) of the Judiciary Administration (General) Regulations 2024.

¹¹¹ The theory of judicial function in constitutional domains, (2025) Retrieved July 5, 2025 from <https://dictionary.cambridge.org>.

¹¹² The Constitution of United Republic of Tanzania, article 107A (1)

the above position, the judiciary had emphasized in *Ally Linus and Others v Tanzania Harbour Authority*¹¹³ that it is the judiciary that has the final word on the interpretation of laws and administration of justice. It highlights the need to balance policy uncertainty, compliance pressure, and all resistances facing judicial decisions. Thus this theoretical framework is fundamental in examining independence of judiciary as it enables an individual notice as to whether there is any interferences over judicial functions.

2.3.5 Relevance of Theories

This study has chosen to use four theories from a couple of theories applicable in studying judicial independence because these theories are coherent to the laws governing judicial independence in Tanzania. These theories are the theory of separation of powers, rule of law, accountability and the theory of judicial function in constitutional domains. Their nexus with the domestic laws governing judicial independence in Tanzania has been depicted in Chapter four.

2.4 Conclusion

This chapter has discussed in detail the concepts and theories underlying judicial independence. In light of the discussion, it is submitted that legal concepts are vital components in building up a legal principle of the study. In that saying, the legal principle of this study is built up by couple of concepts such as the judiciary which deals

¹¹³ Civil Appeal No. 2 of 1983, Court of Appeal of Tanzania (Unreported)

with administration of justice, judicial independence, the concept that advocates freedom on court immunity to decide matters without facing any undue interferences and influences from the executive and legislature, the constitution which refers to principal laws in force within a country which supersedes all supplementary laws, impartiality entails a quality of being unbiased on either of the party to the dispute, removal which has a meaning of the act of taking someone or something away from a certain point, the executive which is a machinery of the state that forms policy and implements them as well as the legislature an organ responsible for legislation. In addition, this part has described fundamental theories guiding this study to wit separation of powers, rule of law, accountability and the theory of judicial function in constitutional domains. The study has shown the nexus existing between the judicial independence, concepts and the theories by pointing out the key role of each concept or theory in relation to judicial independence. This chapter guides us to chapter three which describes the legal framework governing judicial independence in Tanzania.

CHAPTER THREE

LEGAL FRAMEWORK OF INDEPENDENCE OF THE JUDICIARY IN TANZANIA

3.1 Introduction

This chapter describes legal framework governing independence of the judiciary in Tanzania. In the bid to examine judicial independence in Tanzania, the study has analyzed several domestic to wit the Constitution of the United Republic of Tanzania which is the grundnorm, the Judges (Remuneration and Terminal Benefits) Act which regulates remunerations and various benefits belonging to the Judges, the Magistrates Courts Act the legislation which insulates the judges against criminal and civil litigation for any act done or ordered to be done by him in the exercise of his judicial obligations, the Judiciary Administration Act the law which deals with management of the judicial system as well as the Judiciary Administration (General) Regulations the regulations which are in place to enable implementation of the Principal Act namely the Judiciary Administration Act. Therefore, the analysis of these domestic laws in view of judicial independence in Tanzania appears as shown below.

3.2 The Constitution of the United Republic of Tanzania

The Constitution of the United Republic of Tanzania,¹¹⁴ is the leading legislation in the list of laws in a bid to examine critically independence of the judiciary in Tanzania. This legislation have got several provisions which have embodied several concepts and

¹¹⁴ Cap. 2 [R.E 2019]

theories governing judicial independence. In the light of conceptual framework, the constitution has got several provisions covering different concepts pertinent in the examination of judicial independence. The first concept is the appointment of judges.¹¹⁵ Under this proviso, the president appoints judges of the High Court of Tanzania, Jaji Kiongozi, Justices of Appeal as well as the Chief Justice of Tanzania. In appointing judges of the High Court of Tanzania and Jaji Kiongozi, the Judicial Service Commission initiates the procedure by identifying vacancy in the relevant post and upon its satisfaction, it notifies the President and recommends to him at least three names of persons qualified for each post for the appointment. Then, President shall appoint the Judges of the High Court or Jaji Kiongozi after consultation with the Judicial Service Commission. For the appointment of the Justices of Appeal, the law just requires the President to consult with the Chief Justice, and after that consultation he/she will exercise the appointment. On part of appointing the Chief Justice, the President needs to consult none where he needs to exercise his powers. This form of appointing judges makes them subordinate to the executive thus affecting external, internal and institutional and independence of an individual judge.

Moreover, the constitution have got provision embodying the concept of judicial independence. This constitutional proviso guarantees judicial independence as it provides that where the courts are performing their adjudicatory function, they should have freedom and be required to observe the provisions of the Constitution and other laws of the land. This proviso insulates the judiciary against internal, external and

¹¹⁵ Ibid, articles 110 and 118

institutional pressures. In addition to that, the Constitution embodies a proviso for a concept of impartiality of Judges and Magistrates, as prohibits abolition of their offices while they are in office, a practice that ensures their security of tenure. The stated legal position prevents arbitrary technical removal of judges from office through way of abolishing their offices and thus guaranteeing individual independence of the Judges and Justices of Appeal subsequently protecting judicial independence.

In line with the conceptual framework, the constitution had embodied provisions to take aboard the theoretical framework of judicial independence. In doing that, it has got a provision for the theory of judicial function in constitutional domains.¹¹⁶ This provision states function of judiciary to be the administration of justice. This provision had stated clearly the constitutional function of the judiciary which is distinct from functions of other state powers. In addition to that, it has got a provision which provides for a theory of rule of law.¹¹⁷ This proviso insists on equality before the law in the sense that all subjects are equal before the law and are entitled. This proviso is important in promoting judicial independence as it simplifies work of the judiciary in applying law in the sense that judiciary should not have other choice than applying the law equally. Furthermore, the constitution has got a provision that advocates a theory of separation of powers thus separating the judiciary from other state organs.¹¹⁸

¹¹⁶ Ibid, article 107A (1)

¹¹⁷ Ibid, article 13

¹¹⁸ Ibid, article 4

Meanwhile, the constitution has embodied several provisions for implementation of the theory of judicial accountability as it established several procedures and organs to address misconducts of judges.¹¹⁹ It has provided procedures through which judges save for the Chief Justice, would be removed from office in case they commit misconducts.

Analysis of law, had shown that the executive controls discipline of the judges as their disciplinary authority. In exercising that role, the executive through the President has got mandate of initiating disciplinary matter against the judge, and also appoints the special tribunal to deal with disciplinary matter of a particular judge. That is to say, where the question of removal is to be investigated, the President would consult with the Judicial Services Commission and suspend the judge from office. From that point, the president would consult with the Chief Justice, and constitute special tribunal. The tribunal will investigate the matter at hand and at its disposal advises the President appropriate measures to be taken. These procedures differ in the case of the Chief Justice as on his part, the President would just remove him from office as the law is silent about the procedures the President would follow in exercising his disciplinary powers against the Chief Justice.

¹¹⁹ Ibid, article 110

3.3 The Judges (Remuneration and Terminal Benefits) Act

This principal legislation ¹²⁰ is crucial in examining critically judicial independence as it promotes judicial independence through providing various remunerations and terminal benefits as it regulates matters relating to salaries, allowances and other benefits of Judges, Principal Judge, Justices of Appeal and the Chief Justice as the said benefits would be determined by the President of the United Republic of Tanzania. In giving that role into effect, this legislation authorizes benefits of judicial officers to be charged from the consolidated fund.¹²¹ This means that the salaries and other benefits of the said judicial officers are regarded as standing charges and therefore the executive is obliged to pay them from its main bank account, they do not depend on the annual appropriation enacted by the acts of parliament. With this situation, the fund for paying the benefits of the Judges, Principal Judge, Justices of Appeal and the Chief Justice of judicial officers cannot be affected by the budgetary issues of the executive, the situation that secures these judicial officers from financial pressure. This practice bolsters independence of judicial officers in terms of finance. It is therefore that, the tendency of securing independence of the individual judicial officer insulates them from being tempted to malpractices such as corruption that might impede their individual freedom as well as the judicial independence as a whole.

¹²⁰ The Judges (Remuneration and Terminal Benefits) Act, s. 4 (1)

¹²¹ Ibid, s.4 (2)

3.4 The Magistrates Courts Act

The Magistrates Courts Act¹²² is helpful in examining judicial independence in a view of a concept of judicial immunity. This legislation secures independence of judiciary by protecting judicial officers against criminal and civil liabilities which may result due to implementation of judicial authority. This law directs that a magistrate holding a magistrates' court would not be liable regarding any act done or ordered to be done by him in the exercise of his judicial responsibility, nor shall a justice of the peace be liable to be sued in any court for any act done or ordered to be done by him in the exercise of his functions or duty as a justice, whether or not such an act is within the purview of his or the court's jurisdiction, if at the time of doing such an act or making such an order the the magistrate believed in good faith that he had jurisdiction to do the said act or make the order.¹²³ This proviso has positive impacts in making judicial independence robust as it insulates judicial officers from reprisals.

3.5 The Judiciary Administration Act

The Judiciary Administration Act,¹²⁴ is essential in examining judicial independence through the theory of judicial accountability. This law facilitates better administration of the judicial system. Besides that, it establishes various Judicial Officers Ethics Committees and vests them powers to regulate disciplinary matters of judicial and non-

¹²² Cap. 11 [R.E 2019]

¹²³ Ibid, s. 66 (1)

¹²⁴ Cap. 237 [R.E 2019]

judicial officers working in the judicial machinery.¹²⁵ The established Disciplinary Committees are the Judges Ethics Committee, Regional Judicial Officers Ethics Committees and the District Judicial Officers Ethics Committees.¹²⁶ This law has laid down quorum for each committee and provides a list of misconducts as a guideline towards accountability. In addition thereof, it has laid down procedures through which an individual would lodge his complaints before the committees.¹²⁷

3.6 The Judiciary Administration (General) Regulations

The Judiciary Administration (General) Regulations¹²⁸ made under the Principal legislation¹²⁹ provide us a guidance in studying about judicial independence in view of a concept of appointment of judges and the theory of accountability. As per these regulations, procedures applicable in appointing Judges of the High Court of Tanzania and Jaji Kiongozi, start with the Judicial Service Commission to identify presence of vacancy in the relevant post and upon its satisfaction, it notifies the President and recommends to him at least three names of persons qualified for each post for the appointment.¹³⁰ Then, President shall appoint the Judges of the High Court or Jaji Kiongozi after consultation with the Judicial Service Commission. This mode of appointing judges conflicts with the theory of separation of powers because can allow penetration of influence of the appointing authority through the personnel he appoints

¹²⁵ Ibid, ss. 37, 40 and 41

¹²⁶ Ibid

¹²⁷ Ibid, ss. 37,39,40,41,42,43,44,45, 50 and 51

¹²⁸ 2021

¹²⁹ The Judiciary Administration Act, s. 66 (1)

¹³⁰ Ibid (n.40) R. 9 (1) and (2)

them judges as the mode of appointment makes them subordinate to the appointing authority and thus attributing negative impacts to judicial independence. On top of that, the regulations have embodied the theory of judicial accountability by giving the president a mandate of dealing with discipline of judges.¹³¹ The procedures are outlined under the constitution. The syllogism suggests that, the president is at a good position where he can influence judicial independence in both negative and positive because he is the appointing authority of the judges and also he is a disciplinary authority.

3.7 The Experience from Other Common Law Jurisdictions

Judicial independence is a cardinal principle for smooth administration of justice and protection of individual freedom. Many commonwealth countries ensure protection of judicial independence in their domestic laws. Basing on that position, this part has chosen Kenya to be the case study in examining the law governing judicial independence on the aspect of appointment and removal of judges from office. The discussion will confine itself just on the procedures applied in appointing judges and the procedures applicable in removing them in office in case they have committed misconducts. Moreover, the attention will be on the Constitution of Kenya and the Judicial Service Act of Kenya.

3.7.1 Procedures For Appointment of Judges in Kenya

The journey towards appointment of judges in Kenya is that the judicial service

¹³¹ Ibid, r. 5(3)

commission initiates the process by announcing posts to invite qualified members of the public apply. Then, it conducts a public recruitment process where members of public are also involved in the process. The panel shortlists names of successful candidates and forward them to the president for appointment. These processes are outlined in the Constitution¹³² as well as in the Judicial Service Act.¹³³ The President makes appointments basing on recommendations of the Judicial Service Commission.¹³⁴ However, in appointing the Chief Justice and Depute Chief Justice, the president will seek approval of the national assembly.¹³⁵

3.7.2 Procedures For Removing Judges From Office in Kenya

The legal processes of removing judges from office in Kenya are well articulated in the Constitution of Kenya.¹³⁶ The process begins when the Judicial Service Commission had received a petition from any member of the public or decides to initiate removal proceedings suo moto. It gathers evidence to satisfy itself about the validity of the claims. If the claim is valid, the Judicial Services Commission refers it to the President and the President will suspend the judge from office within 14 days. Then, he shall appoint the tribunal composing of individuals with legal expertise to probe into the matter including hearing and the presentation of evidence. Upon completion of the process, the tribunal will recommend to the President regarding removal of the judge. Recommendations of the tribunal bind the President. The President shall act on the

¹³² 2010

¹³³ Judicial Service Act, s. 30

¹³⁴ Constitution of Kenya, article 166 (1) (b)

¹³⁵ Ibid, article 166 (1) (b)

¹³⁶ 2010

recommendations of the tribunal save that no appeal has been preferred or the time for appeal has expired. The Judge who is aggrieved by findings of the tribunal has got an avenue to prefer an appeal against the decision of the tribunal before the Supreme Court. Time frame work for appeal is ten days.

3.7.3 Similarities Between Kenya and Tanzania on Regards of Appointment of Judges

The analysis of law have shown that Kenya and Tanzania have got similar procedures on some areas when the appointment of Judges comes into question. First of all, in both countries, the President is the appointment authority of the Judges.¹³⁷ In both Countries, Judicial Service Commissions initiate the process for appointment of Judges save for the Chief Justice and Depute Chief Justice of Kenya. These bodies conduct interview and recommend names of successful candidates to the President for appointment.¹³⁸

3.7.4 Dissimilarities Between Kenya and Tanzania on Regards to Appointment of Judges

The perusal of laws have depicted that despite the existence of some similarities in the process of appointing Judges, these countries differ in some areas. The Procedures applied in appointing Chief Justice and Depute Chief Justice of Kenya are more

¹³⁷ The Constitution of the United Republic of Tanzania, articles 109 and 118 provides for powers of the President to appoint Judges of the High Court, Jaji Kiongozi, Justices of Appeal and the Chief Justice whilst in Kenya this powers are articulated under article 166 of the Constitution of Kenya, 2010

¹³⁸ Constitution of Kenya, article 166 (1) (b)

transparent as involve the public at large. Furthermore, their appointment is subject to approval of the National Assembly.¹³⁹ The practice is quite different from Tanzania where the appointment of the Chief Justice does not require approval of the National Assembly. Meanwhile, the law had not provided procedures applicable to appoint the Chief Justice and his appointment is not transparent.

3.7.5 Similarities Between Kenya and Tanzania on the Procedure of Removing Judges From Office

Removing judges from office following the misconducts they have committed is a part of implementing a theory of judicial accountability. This theory is fundamental in a critical examination of judicial independence as it requires judges to be accountable for their misconducts. Analysis of the laws in both Tanzania and Kenya reveals that the two countries have got similar essential features in implementing the theory of judicial accountability.¹⁴⁰ From that point, it follows that Presidents of both countries are the disciplinary authorities of the judges and they have powers of suspending judges pending investigation of disciplinary matter. Moreover, the process of removing judges from office involves the issue of appointing a tribunal. This tribunal is appointed by the President.¹⁴¹

¹³⁹ Ibid, article 166 (1) (a)

¹⁴⁰ The Constitution of the United Republic of Tanzania, article 110A enshrines procedures for removal of judges from office in Tanzania whereas for Kenya that aspect is under Constitution of Kenya, article 168

¹⁴¹ Ibid

3.7.6 Dissimilarities Between Kenya and Tanzania about Procedures of Removing Judges From Office

The study has noticed a presence of some distinction features between Kenya and Tanzania in the procedures applicable in a bid to implement the theory of judicial accountability. The first noticeable character, is that in Kenya the law had provided 14 days as the time frame for which the president would take to suspend the Judge after receiving recommendations of the Judicial Service Commission.¹⁴² Too, recommendations of the tribunal bind the president. Likewise, Judges aggrieved by decision of the tribunal have avenue to seek redress before the Supreme Court within ten days. All these practices exercised in Kenya do not exist in Tanzania.

3.8 Conclusion

To sum up this chapter, it might be stated that this chapter had analyzed the legal framework of judicial independence in Tanzania. In that process, several domestic laws were put into contemplation. These laws are the Constitution of United Republic of Tanzania, the Judges (Remuneration and Terminal Benefits) Act, the Magistrates Courts Act, Judiciary Administration Act and the Judiciary Administration (General) Regulations. The analysis of law portrays that the Constitution of United Republic of Tanzania plays key role in the process of governing judicial independence as it provides procedures to govern appointment and removal of judges from office. Besides that, the constitution has incorporated essential theories applicable in examination of judicial

¹⁴² Ibid

independence. These theories are such as the theory of separation of powers and theory of rule of law just to mention fewer. The Judges (Remuneration and Terminal Benefits) Act, on its part, promotes judicial independence in terms of remunerations and terminal benefits as it regulates matters relating to salaries, allowances and other benefits of Judges, Principal Judge, Justices of Appeal and the Chief Justice. The Magistrates Courts Act, secures judicial independence by insulating judicial officers against civil and criminal liabilities that may result due to implementations of judicial functions. The Judiciary Administration Act facilitates better administration of the judicial system by establishing mechanisms that allow implementation of the theory of judicial accountability. On top of that, the chapter has highlighted the practice in Kenya as compared to Tanzania. In essence this chapter has made a foundation for Chapter four.

CHAPTER FOUR

LEGAL AND INSTITUTIONAL ISSUES IMPACTING THE DOCTRINE OF INDEPENDENCE OF JUDICIARY IN TANZANIA

4.1 Introduction

This chapter addresses legal and institutional issues impacting judicial independence in Tanzania. Judicial independence is a key element in the administration of justice. Nevertheless, some legal issues and institutions may impact judicial independence in both positive or negative. In this study, it is observed that legal procedures governing appointment and removal of judges as enshrined under the Judiciary Administration Act and the Constitution of the United Republic of Tanzania impact independence of Judiciary. Meanwhile, institutions impacting judicial independence are the executive, legislature, political parties, media, civil society as well internal dynamics within the judiciary itself. These aspects in their totality are capable of influencing judicial independence positively or negatively.

4.2 Legal Issues Impacting Judicial Independence

Laws are essential in a critical examination of judicial independence as they govern conducts. However, laws may impact judicial independence in the way that when these laws appear to be weak they attribute negative impacts on judicial independence and when they appear to be firm they bring positive impacts on judicial independence. Under this part, the study has found that the law governing appointment of Judges impacts

judicial independence. Similar attribute is reflected on the law governing removal of judges from office as shown underneath.

4.2.1 Law Governing Appointment of Judges Impacts Judicial Independence

The study has found that the law governing appointment of judges in Tanzania impacts judicial independence as the critical analysis made in the study has shown that it grants excessive control to the executive over appointment of judicial officers. This situation is clearly noticed in the case of appointment of the Chief Justice¹⁴³ where the law governing his appointment has not provided procedures the president would follow in exercising the powers to appoint the Chief Justice. A perusal of various literatures had noticed that excessive power is likely to be abused by the authority vested such power.¹⁴⁴ The syllogism suggests that the president may use this weakness of the law to influence judicial independence. A further analysis of the law shows that the Chief Justice of Tanzania is a product of direct presidential appointment because the governing law does not require him consult any authority before he appoints him, thus he uses formal procedures the executive use to appoint other public officials. A thorough perusal of various legal authorities reveals that judges directly appointed by the president are always not impartial and thus cannot defy the wish of the appointment authority.¹⁴⁵ This

¹⁴³ The Constitution of United Republic of Tanzania, article 118 (2)

¹⁴⁴ Wibley, L. et al. (2021). Public law, cases, texts and materials (5th Ed.). Glasgow: Oxford University Press. p. 115

¹⁴⁵ Refer the communication of Olo Bahamonde v. Equatorial Guinea, Communication No. 4688/1991 UN Doc. CCPR/4/49/D/468/199 (1993) the United Nations Human Rights Commission, in which it was held that judges directly nominated by the president or government cannot be impartial as the appointment acts as an inducement to render them decide congenial to the president or government incumbent.

situation violates the theory of rule of law enshrined under the constitution¹⁴⁶ as the judges would fail to apply the law equally in the matter where interests of the appointment authority are brought at the attention of the court. Theory of rule of law is a cardinal theory in judicial independence whereas any violations made thereof impacts judicial independence.

Moreover, this law exposes the judiciary into political pressures because the appointment authority is also a chairperson of political party, thus may use the judiciary as a mechanism in furthering his political outcomes. Likewise, the analysis of the law has revealed that the law has subjected the budget of the judiciary in the control of the executive through the Chief Court Administrator. The executive may use this opportunity to influence judicial independence through budgetary issues.

4.2.2 Procedures for Removal of Judges from Office Impacts Judicial Independence

This study has found that procedures for removal of judges from office in a bid to implement the theory of judicial accountability impact judicial independence because they are not well defined. For example, legal analysis of rules of procedures governing removal of judges from office have revealed that the law had not provided procedures of removing the Chief Justice from office. Meanwhile, the Chief Justice has got no avenue to appeal decision of disciplinary authority. This situation threatens his tenure of service

¹⁴⁶ The Constitution of United Republic of Tanzania, article 13 (1)

as it does not insulate him from arbitrary removal from office. Even other Judges have got no avenue to appeal decisions of disciplinary authority.

Moreover, the legal analysis had revealed that the executive initiates the disciplinary proceedings against a judge and also has got powers of suspending him pending investigation of the disciplinary matter upon consultation with the Judicial Service Commission.¹⁴⁷ Upon the consultation with the Chief Justice, the executive has got mandate of appointing the special tribunal to investigate and determine disciplinary issue against a judge, and thereafter, submits recommendations to the president for removal.¹⁴⁸ However, the legal procedures are silent on the timeframe the President would constitute the special tribunal, and also have not stipulated clearly the period upon which the judge would stay suspended pending the matter.

Similarly, the law had not stipulated clearly the duration upon which the special tribunal would investigate the matter and determine it to its finality. Likewise, the law had not provided the avenue where a judge aggrieved by decision of the special tribunal appeal to seek redress. This context impacts judicial independence as threatens their tenure of service a concept which plays vital rule in judicial independence. The need to have clear legal procedures was explained best by Katiti J (as he then was) in *Joseph Masunzu v Rex* (unreported)¹⁴⁹ where the court remarked that one cannot peacefully make a journey

¹⁴⁷ The Constitution of United Republic of Tanzania, articles 110A and 120A

¹⁴⁸ Ibid

¹⁴⁹ Criminal Appeal, Number 3 of 1993, High Court of Tanzania at Tabora

through life without law telling him the right direction to follow, and sometimes even the time to follow and when to start the said venture and through which route.

4.3 Institutions Impacting Judicial Independence

As it happens with the law in impacting judicial independence, institutions may impact judicial independence both in a negative and positive way. At that point, this study has found that the following institutions impact judicial independence. These institutions include the executive, legislature, political parties, media, civil societies and the internal activism within the judiciary.

4.3.1 The Executive Impacts Judicial Independence

This study has found that the executive synonymous the government can exert pressure on the judiciary through various ways. These ways include attempts to influence appointments of judicial officers the practice which offends the theory of separation of powers enshrined under the constitution.¹⁵⁰ Meanwhile, this tendency of executive to influence judicial appointment violates the theory of equality before the law enshrined in the constitution¹⁵¹ as far as it results into appointment of judicial officers who are incapable of being impartial. In other way, the executive may move the parliament enact law that has got procedural barriers to the extent that conflicts the theory of constitutional judicial function domains enshrined under the constitution¹⁵² as a result

¹⁵⁰ The Constitution of Tanzania, article 4

¹⁵¹ Ibid, article 13

¹⁵² Ibid, article 107A

impacting judicial independence. For example, the executive vide the Written Laws (Miscellaneous Amendment) Act,¹⁵³ moved the parliament amend some provisions of the Basic Rights and Duties Enforcement Act.¹⁵⁴ These amendment introduced very cumbersome procedures for a litigant who sought to challenge violations of human rights vide public litigation. The amendments had negative impacts to judicial independence as they barred access to justice. Nevertheless, the executive on the other hand may bring positive impacts over judicial independence. This might be witnessed through legislation where the executive initiates the process and on doing that it may initiate a process of legislating laws that bolster judicial independence.¹⁵⁵

4.3.2 The Parliament Impacts Judicial Independence

The study has found that the parliament can impact judicial independence in the similar ways the executive does. These ways include attempts to influence appointments of judicial officers the practice which offends the theory of separation of powers enshrined under the law.¹⁵⁶ On top of that, this tendency violates the theory of equality before the law enshrined in the constitution¹⁵⁷ as far as it results into appointment of judicial officers who are incapable of being impartial. Other way in which the parliament impacts judicial independence is through pre -emption of judicial decisions through legislation the tendency which violates a theory of constitutional judicial function

¹⁵³ No. 3 of 2020

¹⁵⁴ Cap 3 [R.E 2019]

¹⁵⁵ One may refer enactment of the Judicial Administration Act, Cap 247 [R.E 2019], this law was enacted for the purpose of better management of the judiciary. The process was initiated by the executive.

¹⁵⁶ The Constitution of Tanzania, article 4

¹⁵⁷ Ibid, article 13

domains enshrined under the constitution¹⁵⁸ as a result impacting judicial independence. Apart from causing negative impacts to judicial independence, the parliament may bring positive impacts to judicial independence. The parliament is the principal organ of the state that enacts laws,¹⁵⁹ therefore it may use this mandate to enact laws that have got positive impacts to judicial independence¹⁶⁰ and also it might be used by the executive to enact laws that undermine judicial independence.

4.3.3 Political Parties Impact Judicial Independence

This study has found that political parties impact judicial independence. This is done through various ways whereas one of them is through making public critics against court decisions they disagree with.¹⁶¹ Excessive and frivolous critics made against the judicial power impute negative impacts to judicial independence because it erodes public trust of the judiciary thus ruining its independence.¹⁶² However, on the other face, critics may influence enactment of new law with a view of bolstering judicial authority thus making judicial independence robust.

4.3.4 Media Impacts Judicial Independence

While the media plays a vital role in informing the public about day today affairs, the

¹⁵⁸ Ibid, article 107A

¹⁵⁹ The Constitution of United Republic of Tanzania, article 64 (1)

¹⁶⁰ One may refer enactment of the Judicial Administration Act, Cap 247 [R.E 2019], this law was enacted for the purpose of better management of the judiciary. The process was initiated by the executive.

¹⁶¹ Political parties impact on judicial independence (2025) Retrieved July 5, 2025 from <https://dictionary.cambridge.org>.

¹⁶² Ibid

study has found that media can impact judicial independence. This practice can be officiated through sensationalized reporting, biased narratives, or attacks against an individual judge as a result destroys public trust and thus creating pressure on the judiciary.¹⁶³ Conversely, media can bring positive impacts to judicial independence. This can happen through investigative journalism to reveal several misconducts of judicial officers such as corruption practices and ultimately hold the judiciary accountable and as a result strengthen judicial independence.

4.3.5 Civil Societies Impact Judicial Independence

This study has found that civil societies have impacts on judicial independence because some of them advocate judicial independence and accountability. Organizations like human rights groups and legal associations can play a crucial role in advocating for judicial independence and holding the judiciary accountable. Some of these organizations monitor court proceedings, investigate and report on abuses as a result influence reforms into the judiciary. For example, the Legal and Human Rights Center has a tradition of publishing annual report every year. In its report,¹⁶⁴ it has recommended amendment of the law to allow individuals to challenge presidential election results. This movement seeks to restore judicial authority that has been stolen by the law.

¹⁶³ Media impacts on judicial independence (2025) Retrieved July 5, 2025 from <https://dictionary.cambridge.org>.

¹⁶⁴ For Example in the Legal and Human Rights Center Reports 2023, one among their recommendations is about legal reform

4.4 Conclusion

To wind up this chapter, an individual would see from the discussion that the chapter was discussing all about legal and institutional framework impacting judicial independence. It is clear in the discussion that the law governing appointment of judges in Tanzania impacts judicial independence as the critical analysis made in the study has shown that it grants excessive control to the executive over appointment of judicial officers. Similarly, the procedures for removal of judges from office in a bid to implement the theory of judicial accountability impact judicial independence because they are not well defined. In the similar vein, the study has managed to examine law and institutions which impact judicial independence to wit the executive, parliament, political parties, media and civil societies. The analysis revealed that these institutions may influence judicial independence in both positive and negative angles. For example, political parties may criticize judicial decisions in public. This practice may have negative impacts as may destroy trust of the public but may also have positive impacts as may influence enactment of new law for better judicial functions.

CHAPTER FIVE

DATA ANALYSIS AND DISCUSSION OF RESEARCH FINDINGS

5.1 Introduction

This chapter has analyzed and discussed the findings of this study. The research is all about critical examination of the law governing doctrine of independence of judiciary in Tanzania on the aspect of appointment and removal of Judges from office. The specific objectives of the study were to examine the legal and regulatory framework governing the appointment and removal of judges from office alongside identifying the legal gaps experienced in that particular practices. In that undertaking, this study has found that the jurisdiction has got laws to regulate appointment and removal of the judges from office whereas the leading law to the catalogue is the Constitution of the United Republic of Tanzania¹⁶⁵ which is considered as a supreme law of the land in line with other Acts of parliament. Meanwhile, the study found that the law governing appointment is futile as it does not vindicate independence of judiciary in terms of its all parameters of external, internal, institutional and independence of an individual judge. On top of that, the study has managed to reveal the procedures governing appointment and removal of judges from office and the gaps available thereof. More discussion and analysis are brought underneath.

¹⁶⁵ Cap.2 [R.E 2019]

5.2 The Law and Regulatory Framework Governing Appointment of Judges in Tanzania

This study has observed that Tanzania has got laws governing appointment and removal of Judges from office. These laws are the Constitution of the United Republic of Tanzania,¹⁶⁶ the Judiciary Administration Act¹⁶⁷ and the Judiciary Administration (General) Regulations.¹⁶⁸ Starting with the Constitution of the United Republic of Tanzania,¹⁶⁹ one might find that this legislation contains several relevant articles governing appointment of Judges. The analysis of these articles reveals that appointment of the Judges of the High Court of Tanzania and Jaji Kiongozi, begins by the Judicial Service Commission to identify vacancy in the relevant post and upon its satisfaction, it notifies the President by recommending to him at least three names of persons qualified for each post for the appointment.¹⁷⁰ Then, upon receiving the report, the President shall appoint the Judges of the High Court or Jaji Kiongozi after consultation with the Judicial Service Commission.¹⁷¹ For the appointment of the Justices of Appeal, the law just requires the President to consult with the Chief Justice, and thereafter he exercises the appointment.¹⁷² On part of appointing the Chief Justice, the President needs to consult none where he needs to exercise his powers.¹⁷³

¹⁶⁶ Cap.2 [R.E 2019]

¹⁶⁷ Cap 237 [R.E 2019]

¹⁶⁸ 2021

¹⁶⁹ Ibid (no.176), articles 109 (1), 118 (1) and (3)

¹⁷⁰ Ibid (no.178) R. 9 (1) and (2)

¹⁷¹ Ibid,(n.176) article 109 (1)

¹⁷² Ibid article 118 (3)

¹⁷³ Ibid article 118 (2)

This mode of appointing the Chief Justice and other judges make them subordinate to the executive. As it is pointed out in empirical studies¹⁷⁴ that where the Chief Justice is appointed by the President, then the possibility of excessive presidential or executive influences over the judiciary arises. This situation influences judicial decisions in favour of the executive the practice that violates the theory of rule of law as well as the theory of constitutional judicial function domains as they are enshrined under the grundnorm.¹⁷⁵ The theory of rule of law insists on equality before the law in the sense that judiciary should apply the law equally to all subjects without favour. Thus, the judiciary violates this theory in any case it is inclining on the executive. Moreover, the theory of constitutional judicial function domains insists on judicial constitutional function, in the sense that judiciary should perform its constitutional function the departure of which violates this theory.

5.3 Gaps on the Law and Regulatory Framework Governing Appointment of the Judges in Tanzania

From the analysis of the law, this study observed that the law regulating appointment of judges in Tanzania suffers from a number of gaps. Firstly, the study has noticed that the legal procedures governing appointment of the judges lack transparency. The analysis of the law shows that President appoints the Judges of the High Court after consultation

¹⁷⁴ Ndulo M. (2021). Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to a just system. *Zambia Social Science Journal*, vol. 2, No.1, p. 9.

¹⁷⁵ The Constitution of United Republic of Tanzania, articles 13 and 107A respectively

with the Judicial Service Commission.¹⁷⁶ The law is silent on the manner upon which names of candidates sought to be appointed judges are nominated. Likewise, these posts are not published to allow qualified members of the public apply. This practice offends principle IV of the Commonwealth Latimer House Principles¹⁷⁷ which provides for independence of the judiciary. The syllogism reveals that this lacuna paves way for the appointing authority to appoint judges of its favourite the situation that undermines independence of the judiciary because judges of this sort are subjective to the appointing authority as they retain subordination with the authority, thus would not defy directives coming from the appointing authority. Udeze O.A et al¹⁷⁸ has argued that Judges who are appointed by the politicians in power would not make the judiciary independent and would not dispense fair and just judgment especially when it concerns the actions of the government which appointed them. The Judges of this sort lack courage of resisting threats to judicial independence and actively advocate judicial independence.¹⁷⁹ To support this argument, the communication of *Olo Bahamonde v. Equatorial Guinea*¹⁸⁰ had noticed that judges directly nominated by the president or government cannot be impartial as the appointment acts as an inducement to render them decide congenial to the president.

¹⁷⁶ Ibid, (n. 181)

¹⁷⁷ 2003

¹⁷⁸ Udeze O.A et al (2020). Independence of the Judiciary: The Nigerian Experience. *Journal of Public and Private Law*. vol. 10, p.69-70

¹⁷⁹ Ibid

¹⁸⁰ Ibid (n.142)

Meanwhile, the Constitution of the United Republic of Tanzania¹⁸¹ requires the president to consult the Judicial Service Commission before he appoints judges of the High Court of Tanzania. This requirement is designed to limit the powers of the President in exercising his authority of appointing the judges of the High Court of Tanzania. However, that practice is not a solution to guarantee independence of the judiciary because the Judicial Service Commission itself is not independent as all members forming its quorum are appointees of the president,¹⁸² thus would not depart from the desire of the president in case there is a need to do so. Similarly, the president is not bound to consult or agree with the opinion of the Judicial Service Commission. He has discretionary powers of appointing even individuals who are not recommended by the Commission. As established by Webley et al.¹⁸³ that excessive power is likely to be abused. Therefore, having total control over the appointment of the judges, the executive would undermine independence of the judiciary on the aspect of institutional judicial independence. The aspect of institutional judicial independence requires the judiciary to have control over appointment of its officials rather than the said power be controlled by other state organs to wit the executive as well as the legislature.

In addition to that, the President appoints the Chief Justice of Tanzania.¹⁸⁴ However, in exercising this authority, the law does not require him to consult any authority. Also, the post of the Chief Justice is not published to invite qualified members of the public apply

¹⁸¹ The Constitution of the United Republic of Tanzania, article 109 (1)

¹⁸² The Judiciary Administration Act, section 13 (2)

¹⁸³ Wibley, L. et al. Public Law, Cases, Texts and Materials, 5th Ed, Oxford University Press, Glasgow, 2021, p. 115

¹⁸⁴ Ibid (n.40) article 118 (2)

and the law does not state the procedures on the manner the name is nominated. In that way, the executive enjoys full control of the whole exercise when it becomes the issue of appointing the Chief Justice of Tanzania. Gunireama I¹⁸⁵ argues that the appointment procedures may make the Chief Justice stooges of the executive. In addition to that, this lacuna in the enabling law may make the executive arm appoint the Chief Justice of its preference and thus ruining independence of the judiciary. There is no doubt that, the Chief Justice portrays power and image of the judiciary, therefore appointing him through a manner that lacks clear legal procedures as well as transparency puts independence of the judiciary at stake. The need to have clear governing legal procedures was explained best by Honorable Katiti J (as he then was) in *Joseph Masunzu v Rex*¹⁸⁶ where he pointed that a person cannot peacefully make his journey through life, without law telling him or her the right course to follow, and sometimes even the time to follow and when to start the journey and through which route. Thus, this legal lacuna impacts independence of the judiciary as it destroys the substantive aspect of judicial independence of the Chief Justice.

In the similar way, the lacuna on the law governing the appointment of the Chief Justice makes him subordinate to the executive and can even try to direct the judiciary do something touching interests of the executive and the judiciary cannot resist that call.¹⁸⁷

¹⁸⁵ Gunireama I, (2022). The Executive and Independence of the Judiciary in Nigeria, *Pinisi Journal of Art, Humanity and Social Studies*, vol. 2, No.1, p.63

¹⁸⁶ Criminal Appeal, No. 3 of 1993, High Court of Tanzania at Tabora (unreported)

¹⁸⁷ A good reference might be drawn from the late President John P. Magufuli's speech at the Law Day directing the Chief Justice (the Judiciary) to fasten determination of 400 cases relating tax evasion so that the executive can secure money to allocate to the Judiciary. The information is available on the <https://www.thecitizens.co.tz.com>. Visited on the 23/11/2024.

Also, the appointing authority may even dare to influence decisions of the judiciary through the Chief Justice as the Chief Justice is the image and power of the judiciary thus his directives cannot be deviated by the Judges subordinates to him. As it is pointed out by Ndal¹⁸⁸ that where the Chief Justice is appointed by the President, then the issue of possible excessive presidential or executive influences over the judiciary arises. The syllogism shows that, the executive is a litigant as can sue and be sued.¹⁸⁹ Given it powers to appoint and oversee the discipline of the judges is congruent with the situation where two teams are in a competition then one team in the competition has been given chance of choosing the referee to officiate the game. The reasoning suggests that the referee of this kind is likely to incline on the side of the team that appointed him, the same applies to independence of the judiciary that, judges who are appointed by the executive are not independent,¹⁹⁰ and they would decide in favor of the executive wherever the interests to do so arise. This is obvious as said by African proverb that he who pays the piper will attempt to choose the tune.

5.4 The Law Governing Removal of Judges from Office in Tanzania

Analysis of the law has shown that the law governing removal of judges from office in Tanzania are the Judiciary Administration Act,¹⁹¹ the Code of Conduct and Ethics for Judicial Officers,¹⁹² and the Constitution of the United Republic of Tanzania.¹⁹³ The

¹⁸⁸ Ndulo M. (2021). Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System. *Zambia Social Science Journal*, vol. 2, no. 1, p. 9

¹⁸⁹ S. 3 (1) of the Government Proceedings Act, Cap.5 [R.E 2019]

¹⁹⁰ Ibid (n.193)

¹⁹¹ Cap. 237 [R.E 2019]

¹⁹² 2020

Principal legislation has established disciplinary machineries to oversee discipline of Judges whilst the Code of Conduct and Ethics for Judicial Officers provides the standards which the judges should adhere. The Constitution on its part, envisages procedures governing removal of judges from office.¹⁹⁴ Analyzing the said procedures, it is noticed that Judges of the High Court of Tanzania and Justices of Appeal may be removed from office for committing misconducts. The procedures for their removal appear that for misconducts which warrant removal from office of a Judge or Justice of Appeal, the President after consultation with the Chief Justice would constitute a special investigative tribunal.¹⁹⁵ The tribunal would probe on the matter at hand and at its own disposal advises the President about the measures to be taken in respect of the matter. During time of investigation, the President has powers to suspend the Judge or Justice of Appeal pending the matter.¹⁹⁶

5.5 Legal Gaps on the Law Governing Removal of Judges from Office in Tanzania

This study has found that the legal procedures governing removal of judges from office have got lacunae. Analysis of these procedures reveals that for misconducts which warrant removal of a Judge from office or Justice of Appeal, the President after consultation with the Chief Justice would suspend the Judge or Justice of Appeal pending the matter.¹⁹⁷ Then, he would appoint a special investigative tribunal to probe on the matter at hand and at its own disposal advises the President to remove the judge

¹⁹³ Ibid (no.176)

¹⁹⁴ Ibid, articles 110A and 120

¹⁹⁵ Article 110A (3) (b) of the Constitution of the United Republic of Tanzania, Cap 2 [R.E 2019]

¹⁹⁶ Ibid article 110A (3) (a)

¹⁹⁷ Ibid article 110A (3) (a)

or otherwise.¹⁹⁸ The law had not stipulated the time frame would president suspend the judge. Also, it had not provided time frame would the President appoint the special tribunal. On top of that, the law had not stipulated the time frame would the special tribunal investigate the matter and commence disciplinary proceedings to completion. Similarly, the law is silence on the time frame would the President comply with the advice of the special tribunal. The absence of time resolution in the procedures for removal of judges from office violates the principle of fair hearing as it can cause undue delays and thus conflicts the theory of rule of law advocated by the Constitution of United Republic of Tanzania.¹⁹⁹ Similarly, the law had not established an avenue where Judges and Justices of Appeal can appeal against decision of their disciplinary authorities. Being that the position, any decision to remove them from office is final and conclusive. The same experience applies to the Chief Justice as where the President removes him from office, he would have nowhere to seek redress.²⁰⁰ This legal position contravenes the theory of rule of law propounded under the Constitution of United Republic of Tanzania.²⁰¹

¹⁹⁸ Article 110A (3) (b) of the Constitution of the United Republic of Tanzania, Cap 2 [R.E 2019]

¹⁹⁹ The Constitution of United Republic of Tanzania, article 13 (1) and (6) (a)

²⁰⁰ The practice has shown that due to the lack of an avenue to appeal some judicial officers who had been aggrieved by decisions of judicial officers' disciplinary organs have tried to seek redress via judicial review. Nevertheless, this step was futile as it did not help them get their rights due to the tendency of the government being reluctant of implementing courts order. Meanwhile, rules governing execution of decrees against the government are very cumbersome. A good example is drawn from the case of *See Deusdedit Silvanus Malebo v The Chief Court Administrator and Two Others* Miscellaneous Civil Cause No. 15 of 2028, High Court of Tanzania, Main Registry Dar es salaam, (Unreported) he applied for judicial review as he was interdicted in 2015 following criminal charge that was facing him, nevertheless he continued interdicted even the time where his charges ended without conviction.

²⁰¹ The Constitution of United Republic of Tanzania, article 13 (1) and (6) (a)

5.6 Conclusion

In summary, this chapter presents data analysis and discussion of the findings. From the data collected, it is manifested that Tanzania has got laws to govern appointment and removal of judges from office whereas the leading law to the catalogue is the Constitution of United Republic of Tanzania. The discussion of the finding realizes that the law has got shortcomings on the process of appointment and procedures for removal of judges. On the process of appointment, the law has given the executive excessive powers to the extent that judges become sub ordinate of the appointment authority and thus undermining their independence in terms of its all parameters of external, internal, institutional and independence of an individual judge. On top of that, the procedures for removal of judges from office have got legal gaps. The procedures have initiated a journey without fixing time for commencement and finality. They require President after consultation with Chief Justice, suspends a judge without stipulating the time frame would he effect the suspension. Meanwhile, they had required President to appoint special tribunal without stating the time frame would he appoint it. Moreover, they had not stipulated the time frame would the special tribunal take to investigate the matter nor the time frame would it commence disciplinary proceedings to finality. Similarly, the law is silence on the time frame would the President comply with advice of the special tribunal. Also, the law is silence as to whether the advice of the tribunal binds the President. In the same vein, the law had not established an avenue where Judges can appeal against decision of their disciplinary authorities. Being that the position, any decision to remove them from office is final and conclusive. The same experience

applies to the Chief Justice as where the President removes him from office, he would have nowhere to seek redress. From the discussion, it is clear that the shortcomings experienced in the law governing appointment and removal of judges from office have got repercussions on judicial independence. Now, having gone through with this chapter, it brings us to chapter six where we shall have opportunity to study the conclusion and recommendations assigned to this study.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 Introduction

This chapter concludes this dissertation by providing the general conclusion and recommendations of the study. As one would have seen from the beginning of the dissertation that the study was exploring the ideology of independence of the judiciary in Tanzania by examining critically the appointment and removal of judges from office. The first chapter set the foundation of the study heading us to chapter two where we got an opportunity of understanding the legal framework governing the study. Eventually, the study took us to chapter three where we were taught various concepts and theories pertinent to the study. Therefrom, we headed to chapter four where we were exposed to institutional and legal issues conflicting the dogma of judicial independence. This chapter led us to chapter five which embodied the discussion and analysis of the findings of the study. The end of chapter five brought us to chapter six which in a nutshell concludes the study by establishing that the normative structure governing appointment and removal of judges from office in Tanzania conflicts the principle of judicial independence as the executive has massive control over the judiciary in the aspects of appointment, promotion and discipline and therefore calling for the amendment of the law to make independence of the judiciary practicable.

6.2 Conclusion

This study concludes that the law governing appointment and removal of judges from

office in Tanzania falls short as does not adequately vindicate judicial independence as the president has excessive control over the judiciary in terms of appointment, promotion and discipline.²⁰² On appointment, the exercise is not transparent as there are no clear procedures on the manner upon which the name of the Chief Justice is obtained save for Judges of the High Court. In contrast, there is no advertisement of vacancies or public interview of candidates for this post to enable the Chief Justice be appointed on merits. Lack of clear appointment procedures endangers judicial independence. For example, the Justice of Court of Appeal may be loyal to the executive hoping for promotion into position of the Chief Justice, the same thing might appear to the judges of the High of Court hoping for promotion into Justices of Appeal. This situation violates the theory of rule of law as it discourages equality before the law and therefore making judicial independence impracticable. Meanwhile, this mode of appointing judges could not protect them from influences of the executive and that of the ruling political party because the appointing authority is the head of the executive as well as chairperson of incumbent political party. In that context, the executive can even use political affiliation or loyalty to the government as criteria to legitimize appointment of judges. The syllogism suggests that, the law governing appointment of judges makes the judges subordinate to the executive and the ruling party, and thus cannot be impartial when it happens the interests of the appointing authority are in question the practice which violates the theory of separation of powers as well as the theory of judicial constitutional function domains. Besides that, the procedures of removing the judges from office are

²⁰² R. 9 (2) of the Judiciary Administration (General) Regulations 2021 and Articles 109 (1), 118 (2) and 118 (3) of the Constitution the United Republic of Tanzania, Cap.2 [R.E 2019]

problematic as they can pose threat to the tenure of office of judicial officers. These procedures have no time resolution in every step towards the process of implementing theory of judicial accountability. The procedures have initiated a journey without fixing time for commencement and finality. For instance, they require President after consultation with Chief Justice, suspends a judge without stipulating the time frame would he effect the suspension. Meanwhile, they had required President to appoint special tribunal without stating the time frame would he appoint it. Moreover, they had not stipulated the time frame would the special tribunal take to investigate the matter nor the time frame would it commence disciplinary proceedings to finality. Similarly, the law is silence on the time frame would the President comply with advice of the special tribunal. Also, the law is silence as to whether the advice of the tribunal binds the President. In the same vein, the law had not established an avenue where Judges can appeal against decision of their disciplinary authorities.

6.3 Recommendations

Having gone thoroughly with the discussion pertaining the topic of independence of the judiciary on the area of appointment and removal of judges from office, this study sees it preferable to recommend the followings;-

6.3.1 The Procedures for Appointment of Judges to be Reviewed

The procedure for appointing judges should be reviewed. They should start by the Judicial Service Commission identify the vacancy that has fallen short. This practice

should involve vacancy of judges of all levels that is to say for Judges of the High Court, Jaji Kiongozi, Justices of Appeal as well as the Chief Justice. Having identified the vacancy fallen short, the Judicial Service Commission should announce it to invite qualified members of the public apply for the position.²⁰³ The announcement should state clearly the criteria as set out in the Constitution of the United Republic of Tanzania and put the duration of lodging the applications. Thereafter, the Judicial Service Commission should set out the venue, time and date where interview would be conducted. The interview should be officiated publicly to allow public participation. Then, names of successful candidates should be announced publicly. Thereafter, the Judicial Service Commission would shortlist names of qualified candidates and submit them to the President of the United Republic of Tanzania just for approval. The same footage should be followed for the case of the appointment of the Jaji Kiongozi, Justices of Appeal as well as the Chief Justice who is the image and icon of power of the judiciary. This situation would improve vindication of independence of judiciary in Tanzania and makes it more practicable.

6.3.2 Procedures for Removal of Judges from Office to be Amended

This study recommends that where it has been revealed that the Judge of the High Court of Tanzania, Jaji Kiongozi, Justices of Appeal as well as the Chief Justice has committed disciplinary offence that warrant removal from office, the rules of procedure should start with the Judicial Service Commission to form an independent inquiry committee to

²⁰³ R. 11 (2) of the Judiciary Administration (General) Regulations 2021

probe into the matter immediately after it has received that information. The time for commencement and finality of investigation should be stated and the aggregate time for the exercise should not exceed ninety days. The Judicial Service Commission should have mandate of extending the time for investigation for 14 days upon application. The Judicial Service Commission may suspend the Judge pending investigation of the matter. Where the independent inquiry committee accomplishes its duty, it will submit the report to the chairperson of the Judicial Service Commission. Having received the report, the Judicial Service Commission should within 7 days, initiate disciplinary proceedings against the judge. Also, the law should establish an avenue where aggrieved Judges would appeal decisions of their disciplinary committees. The rules of natural justice and all other principles of justice governing disciplinary proceedings as provided under the Judiciary Administration (General) Regulations²⁰⁴ should be observed. Meanwhile, the Judges should also have a right of legal representation. This practice if implemented will improve the mode of supervising discipline of judicial officers and thus vindicate independence of the judiciary on the other hand. Executive should not be involved in any stage of disciplinary process.

6.3.3 Restructuring the Judicial Service Commission

This study is of the view that the current Judicial Service Commission should be re-structured in order to perform its duties perfectly. First, it should have a permanent chairperson who shall not be employee of the government nor the judiciary. This

²⁰⁴ 2021

chairperson should be serving on a permanent basis for the period of five years each term renewable for three periods. Other members of the Commission should be the deputy chairperson who will be chosen among members of the Judicial Service Commission, and his tenure of office shall be 36 months renewable for three terms, 2 members representing the judiciary appointed by the Chief Justice, 2 members representing the Tanganyika Law Society, 2 members representing the Public Bar Association, 2 members representing the public who are elected through transparent procedures, 1 member representing the Public Services Commission, and the Attorney General as an ex-officio member.

6.3.4 Area for Future Research

The ideology of independence of the judiciary is crucial for administration of justice. Financial standing is one of the area which may contribute to make independence of the judiciary robust. Nevertheless, the law has established the office of Chief Court Administrator as the judicial chief administration officer. The Chief Court Administrator is appointed by the executive to manage financial matters of the judiciary in lieu of the executive. In practice, he guarantees executive's financial interests in the judiciary. He is not a judicial officer as well as his qualifications do not necessitate him to be conversant with law or judicial practices. Moreover, his disciplinary authority is the executive. In that sense, he can be used to conflict independence of the judiciary through the financial area. Thus future studies should be carried out on this area so that to recommend the best

practices through which this office would operate without exposing independence of the judiciary at stake.

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