

Clash of Titans: Streamlining the Complementary Roles of the DPP and the AG in Kenya's Extradition Procedure

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Abstract

Extradition encompasses both the administrative bodies and the judicial bodies. The Extradition (Contiguous and Foreign Countries) Act requires that an authority to proceed is issued once the Attorney General receives the extradition request. This is different from what is contained under the 2010 Constitution. Currently, the 2010 Constitution mandates the Director of Public Prosecutions to institute criminal proceedings as opposed to the Repealed Constitution which conferred it on the Attorney General. Hence, courts have interpreted the authority to proceed in extradition to fall within different ambits. For example, in the 2015 case of Samuel Gichuru v Attorney General, the High Court held that this authority fell under the Office of the Director of Public Prosecutions. This was overturned in the 2018 Court of Appeal case, Chrysanthus Okemo v Attorney General, where the authority was to be granted by the Attorney General. However, the Supreme Court in Director of Public Prosecutions v Chrysanthus Okemo (2021) upheld the High Court's decision. Therefore, this paper sets out to determine and streamline the nature of extradition in Kenya, given that there exist overlapping mandates and lacunae that the law needs to address for a uniform practice of extradition in Kenya.

Keywords: *Extradition in Kenya, Authority to Proceed, Judicial Nature of Extradition, Administrative Nature of Extradition, Quasi-Criminal Nature of Extradition*

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I. Introduction

Extradition is the delivering up of a person by one state to another as provided by a treaty or national legislation,¹ for punishment for crimes committed. It can also be defined as the surrender of a fugitive based on agreements.² Extradition is partly judicial and partly administrative.³ Therefore, judicial authority is not limited to judges but is also exercised by bodies that administer criminal justice such as the Office of the Director of Public Prosecutions (hereafter DPP).⁴ Furthermore, extradition is partly administrative meaning that the executive authority in the country concerned,⁵ for example, the Attorney General in Kenya (hereinafter AG), plays a role. The working definition for this research will be the latter which defines extradition to include both judicial and executive authority and is based on an agreement.

In Kenya, there are two systems of extradition governed by two statutes: the Extradition (Contiguous and Foreign Countries) Act which applies to non-Commonwealth countries⁶ and the Extradition (Commonwealth Countries) Act which applies to Commonwealth countries.⁷ The Extradition (Commonwealth Countries) Act (hereafter the Act) lists various offences including any offence that constitutes money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009.⁸ One such instance of money laundering is evident in a case that involved Former Energy Minister, Chris Okemo and Former Kenya Power Chief Executive, Samuel Gichuru. During their tenure, they were accused of using proxy companies to squander public funds and thereafter hid the money in Jersey Island through Windward Trading Limited.⁹ This led to them being charged in the Royal Court of Jersey for corruption and money laundering.¹⁰

¹ Article 102, *Rome statute*, 17 July 1998, 2187 UNTS 38544.

² Section 2 Model law on extradition, *United Nations Office on Drugs and Crime*, 1990, UN Doc 45/116.

³ Halsbury's Laws of England, 4th ed.

⁴ *Minister for Justice and Equality v OG and PI*, ECtHR Judgement of 27 May 2019, para. 50. This case explains that there is a capability of including authorities who participate in administration of criminal justice when defining judicial authority.

⁵ Schaffer B, 'The distinction between executive and administrative work' 17 (2) *Australian Journal of Public Administration*, 1958, 112.

⁶ *Extradition (Contiguous and Foreign Countries) Act* (Act No. 76 of 1966).

⁷ *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁸ Provided for under the Schedule of the Act, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁹ Ondieki E, 'To end turf wars, Haji seeks Kenya trial for Gichuru, Okemo' Nation, 28 June 2020— <<https://nation.africa/kenya/news/to-end-turf-wars-haji-seeks-kenya-trial-for-gichuru-okemo-152150>> on 1 January 2021.

¹⁰ *Attorney General v Windward Trading Limited* (2016), The Jersey Royal Court.

The law in Jersey provides for the confiscation of assets gained through criminal activities. Consequently, the cash in their accounts was frozen and the assets seized.¹¹ The cash was later repatriated to Kenya due to an agreement reached between Kenya and Jersey to bring in the first batch of Kshs. 444 million out of the total in hard currencies, estimated at around Kshs. 997 million.¹² Therefore, if they are found guilty of the charges against them and extradited to Jersey, they would serve a jail term of up to 14 years.¹³

The process of extradition as provided for by the Act¹⁴ was followed in *Samuel Gichuru v Attorney General*.¹⁵ In this case, the extradition request was received by the AG through the British High Commission, Nairobi, on behalf of the AG of Jersey on 6 June 2011. It was then forwarded to the Chief Public Prosecutor, an office that fell under the AG under the repealed Constitution.¹⁶ The Prosecutor then issued an authority to proceed to the magistrate on 6 July 2011 under Section 7 of the Act.¹⁷

The 2010 Constitution establishes the Office of the DPP¹⁸ as a separate office from the AG's.¹⁹ Therefore, the powers to institute criminal proceedings that had been conferred on the AG in the repealed Constitution were transferred to the DPP. This raises the issue as to who should issue the authority to proceed.²⁰ It is important to note that in separating the roles, the Commission aimed to separate prosecutorial functions from those of policy.²¹ Okemo and

¹¹ Article 29, *The Proceeds of Crime (Jersey) Law* (Jersey).

¹² Ngugi B, 'Deal closed on sh444m seized from Gichuru, Okemo' *Business Daily*, 7 January 2021, 1 and 4.

¹³ Article 30, *The Proceeds of Crime (Jersey) Law* (Jersey).

¹⁴ Section 7, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

¹⁵ *Samuel Kimuchu Gichuru and another v Attorney General & 3 others* (2015) eKLR.

¹⁶ Section 26(5), *Repealed Constitution* (1963).

¹⁷ Section 7, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

¹⁸ Article 157, *Constitution of Kenya* (2010). This article outlines the role of the DPP to include instituting and undertaking criminal proceedings and that the DPP shall not require the consent or authority from any person to institute criminal proceedings.

¹⁹ Article 156, *Constitution of Kenya* (2010). This article outlines the roles of the AG to include being the principal legal adviser to the government and representing national government in legal proceedings other than criminal proceedings. Additionally, Section 7 of the *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968) grants the AG power to issue the authority to proceed.

²⁰ Section 2, *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013). This section defines prosecution to include extradition prosecutions. Also, Section 4 (f) of the Act tasks the DPP to advise the state on matters relating to administration of criminal justice.

²¹ Constitution of Kenya Review Commission, *Verbatim report of plenary proceedings presentation of draft bill of Chapter 17 & 18*, 5 June 2003, 9. This means that the AG could not exercise prosecutorial functions while being a member of the executive as it had political influence. There is a case, *Genking v President of the Republic of South Africa* (2002), Constitutional Court of South Africa. It elaborated on exercise of extradition authority by a member of the executive is political in nature.

Gichuru appealed against the High Court judgment where the court ruled that the authority to proceed will be under the docket of the DPP as it is his mandate to institute criminal proceedings.²² Therefore, at the Court of Appeal, one of the issues was that ‘the appellants contend that in the absence of authority to proceed under the Attorney General, a statutory requirement, the extradition proceedings are invalid in law’.²³

The Court of Appeal held that the AG is mandated to issue the authority to proceed under Section 7(1) of the Act and that the proceedings instituted against the appellants without written authority to proceed from the AG are a nullity in law.²⁴ However, the Supreme Court on 5 November 2021,²⁵ determined that Okemo and Gichuru should be extradited under the auspice of the DPP²⁶ and therefore upheld the High Court’s decision.²⁷ This decision, however, side-lines the executive nature of extradition and therefore disregards the role of the AG which as provided in the Extradition Act is to act as the central authority.²⁸

This study, therefore, investigates the nature of extradition in Kenya and the challenges that it mainly poses by the ambiguity in the ruling on practical measurements for the DPP’s execution and, further, a separation of the other pertinent components that constitute the nature of extradition. It also seeks to elaborate on the principle of double criminality which denotes that an offence has to be considered criminal in both the requesting and the requested state²⁹ but at the same time inquire whether universal jurisdiction could be the way forward.³⁰

This paper aims to assess whether extradition proceedings are correctly placed under the criminal ambit ignoring their administrative nature, or whether

²² *R v Governor Brixton Prison Ex Parte Abson and others* (1969), The United Kingdom Queen’s Bench Division. This case mentioned that extradition proceedings are criminal proceedings of a special kind but nonetheless they are criminal proceedings.

²³ *Chrysanthus Barnabas Okemo & another v Attorney General & 3 others* (2018) eKLR, para. 5. This explains the exact important constitutional issue in contention.

²⁴ *Chrysanthus Barnabas Okemo & another v Attorney General & 3 others* (2018) eKLR.

²⁵ *Director of Public Prosecution v Okemo and 4 others* (2021) eKLR.

²⁶ Wangui J, ‘Supreme Court allows DPP to extradite Okemo, Gichuru to Jersey’ Business Daily, 5 November 2021, 1.

²⁷ Ngugi B, ‘Deal closed on sh444m seized from Gichuru, Okemo’ Business Daily, 7 January 2021, 4.

²⁸ Section 7, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

²⁹ Blass F, ‘Double criminality in international extradition law’ unpublished, University of Stellenbosch, South Africa, 2003, 3.

³⁰ Williams S, ‘Arresting developments? Restricting the enforcement of the UK’s universal jurisdiction provisions’ 75 (3) *The Modern Law Review*, 2012, 368. Universal jurisdiction connotes the exercise of national jurisdiction by a state that has no link to the crime at all.

they should be viewed as a quasi-criminal concept³¹ in Kenya.³² The problem that arises in the current position is an inefficient process of extradition due to a lack of expeditious access to justice (case in point—the *Okemo and Gichuru* case stalled for 10 years in a bid to answer the question of who holds the authority to proceed).³³ The reason there is confusion and delay in the process and jurisprudence of extradition in Kenya is that the laws are vague and silent. This creates a scenario of overlapping mandates and lacunae that the law needs to address for the uniform practice of extradition in Kenya. Even with the recent Supreme Court decision, this area is still murky and unclear.

Part I is the introduction of the paper and it lays out the background to the problem. Part II discusses the doctrines of separation of powers and joint enterprise to elucidate how these theories play out within the question of authority to proceed in extradition in Kenya. Part III discusses the extradition procedure in Kenya according to the statutes. It also discusses the double criminality principle to highlight other legal requirements that Kenya needs to consider. This lays the background for Part IV which discusses the multifaceted nature of extradition. Furthermore, Part V explores the quasi-criminal nature of extradition based on a three-phase approach taken by Canada. Part VI makes recommendations, mainly based on the cooperation of the three entities, and concludes the study by stating what the nature of extradition proceedings in Kenya ought to be.

II. The Doctrines of Separation of Powers and Joint Enterprise

The theory of separation of powers was expanded by Baron Montesquieu who is regarded by scholars such as Robert Hazo, as the prophet of the basic idea of separation of powers. Hazo considers this regardless of whether Montesquieu intended the doctrine to constitute partial independence of the arms of government or complete independence.³⁴ Montesquieu, in *L'Esprit des Lois*, noted that there is an executive, a legislature, and a judiciary and that this kind of structure is a common feature of most governments.³⁵ It is also

³¹ *Director of Public Prosecution v Okemo and 4 others* (2021) eKLR. This means that extradition encompasses elements of criminal and administrative law.

³² This means that this will involve the AG, DPP and courts coming together to decide on the matter because extradition proceedings have an administrative and criminal aspect to them.

³³ *Chrysanthus Barnabas Okemo & another v Attorney General & 3 others* (2018) eKLR.

³⁴ Hazo G, 'Montesquieu and the separation of powers' 54 (7) *American Bar Association Journal*, 1968, 668.

³⁵ Ambani J and Mbondenyi MK, *The new constitution law of Kenya: Principles, government and human rights*, Law Africa Publishing, 2013, 60.

important to note that Montesquieu mentioned that there exists a lack of liberty without the idea of separation of powers.³⁶

Many scholars of the Supreme Court and many justices have asserted the importance of the federalist papers as they protect institutional legitimacy.³⁷ It is therefore noteworthy that when Madison wrote Federalist Paper 51, his political theory was greatly influenced by Montesquieu.³⁸ One of the key notions he discussed was the separation of powers. He mentioned that the perception of the legislature, executive, and judiciary are by no means separate and distinct from each other. Their functions overlap and interconnect and there should be some level of dependency on each other as much possible as necessary.³⁹ Additionally, he mentioned that the idea of checks and balances is needed to prevent one branch from taking up another's role and equally prevent any of that from happening as this will ensure interdependence between the arms.⁴⁰

A pure separation of powers in terms of institutions and functions of government has never been achieved because the phrase 'separation of powers' has been used to refer to different ideas.⁴¹ He also posits that pure separation of powers would result in the breakdown of government but having stability between the three arms of government enhances the interlocking of the institutions.⁴² Moreover, Justice Jackson cautions that even though the constitution intends to diffuse powers, it should also contemplate that the powers can be integrated to form a workable government.⁴³

The doctrine of separation of powers posits that the three arms of government should be distinct. In Kenya, the Constitution provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested and exercised by Parliament.⁴⁴ The executive authority of

³⁶ Kavanagh A, 'The constitutional separation of powers' in Dyzenhaus & Thorburn (eds) *Philosophical foundations of constitutional law*, Oxford, 2016, 221.

³⁷ Corley P, Howard R and Nixon D, 'The Supreme Court and opinion content: The use of the Federalist Papers' 58 (2) *Political Research Quarterly*, 2005, 339.

³⁸ Bill of Rights Institute, <https://billofrightsinstitute.org/primary-sources/federalist-no-51>, 3 on 1 March 2021.

³⁹ Madison J, Federalist Papers No. 51 (1788). The Federalist papers were first published, and it argued for ratification of the proposed United States Constitution. The papers were written by Alexander Hamilton, John Jay and James Madison.

⁴⁰ Kavanagh A, 'The constitutional separation of powers', 234.

⁴¹ Kavanagh A, 'The constitutional separation of powers', 223.

⁴² Huq A, 'Separation of powers metatheory' 118 *Columbia Law Review* 5, 2018, 1523.

⁴³ Michael J, 'An enduring, evolving separation of powers' 115 (3) *Columbia Law Review*, 2015, 521.

⁴⁴ Article 94(1), *Constitution of Kenya* (2010).

the state is placed under the President, the Deputy President, and the Cabinet.⁴⁵ The Judiciary is placed under the Chief Justice as established in *Chapter 10 of the Constitution of Kenya* (2010).⁴⁶

The author ensued in a discussion of the doctrine of separation of powers to set the ground to examine one of the criticisms of the doctrine which applies to the instant problem. This criticism is that having such a rigid approach to the arms of government would be unsuited to the modern needs of government.⁴⁷ This includes the welfare and prosperity of the people and solving the different complex issues they face.⁴⁸ Therefore, there is a need for a multiplicity of different tasks by the arms of government.⁴⁹

Among other functions, parliament is mandated to protect the constitution and promote democratic governance.⁵⁰ For the executive which includes the AG, their executive authority, which is derived from the people of Kenya, ought to be exercised as per the Constitution.⁵¹ In the exercise of judicial authority, the judiciary is subject to the constitution and guided by principles such as justice.⁵² It has been proposed that to solve the needs of the modern state, it is important that each arm of government has its primary function but it should also be able to perform other functions at the periphery.⁵³ The different functions include that this approach will also advocate for tyranny as it confers too much power on a body, and to solve this there is a need for checks and balances from time to time.⁵⁴ Consequently, there is a need to blend and interconnect the tasks of governance in the different branches of government.

It is important to have different roles involving the AG, the courts, and the DPP in extradition proceedings. However, such distinction has brought about delays when determining who should issue the authority to proceed as each ambit argues that it falls within their purview. Such challenges have occasioned delays as can be exemplified in the extradition case involving the Former Energy

⁴⁵ Article 130(1), *Constitution of Kenya* (2010).

⁴⁶ Article 161, *Constitution of Kenya* (2010). The judiciary consists of the Chief Justice, Deputy Chief Justice, judges of superior courts, magistrates, chief registrar, judicial service commission and judicial officers as well as other staff.

⁴⁷ Bruff H, 'Presidential power and administrative rule making' 88 (3) *Yale Law Journal*, 1979, 453.

⁴⁸ iPleaders, *Separation of powers and its relevance*, 2019, 12.

⁴⁹ Kavanagh A, 'The constitutional separation of powers', 230.

⁵⁰ Chapter 8, *Constitution of Kenya* (2010).

⁵¹ Chapter 9, *Constitution of Kenya* (2010).

⁵² Chapter 10, *Constitution of Kenya* (2010).

⁵³ Kavanagh A, 'The constitutional separation of powers', 226.

⁵⁴ Ambani J and Mbondenyei MK, '*The new constitutional law of Kenya*' 65.

Minister, Chris Okemo, and Former Kenya Power Chief Executive, Samuel Gichuru whose matters took ten years before they could be handed over to Jersey Island. It is, therefore, necessary to have the functions interconnect to show where extradition proceedings take a quasi-criminal form encompassing the Attorney General, the Director of Public Prosecutions, and the courts.

The criticism of the theory of separation of powers is of importance to this paper since there is a need for interconnection in the arms of government on matters of extradition as opposed to the strict separation of powers. This intermixture of functions is necessary and desirable.⁵⁵ It is almost impossible to have each branch with a specifically assigned responsibility. For this to work, scholars such as Aileen Kavanagh propose that separation of powers should be structured in terms of division of labour where each organ performs a different institutional role.⁵⁶ She mentions that such a structure encompasses different functions informed by their different roles in the constitution and they can share power and functions at the same time while retaining their assigned roles.⁵⁷ This is what she terms a joint enterprise as it involves the idea that the arms are not viewed as solitary entities but constituents of a joint enterprise with an assigned role and each making a partial contribution.⁵⁸ An important characteristic of the joint enterprise is that there exists inter-institutional comity which involves the branches of government collaborating to promote values such as fairness and efficiency while having a common vision of a joint enterprise.⁵⁹ This will in turn ensure that the different needs of society are met, and in case of any conflict, the different arms will be guided by their vision of a joint enterprise.⁶⁰

Additionally, extradition has an element which involves the fugitive's rights as protected in the constitution and international cooperation, such as when gathering evidence through mutual legal assistance⁶¹ between states. Hence most

⁵⁵ Kavanagh A, 'The constitutional separation of powers', 222.

⁵⁶ Kavanagh A, 'The constitutional separation of powers', 231.

⁵⁷ Kavanagh A, 'The constitutional separation of powers', 232.

⁵⁸ Kavanagh A, 'The constitutional separation of powers', 235.

⁵⁹ King J, 'Institutional approaches to judicial restraint' 28 (3) *Oxford Journal of Legal Studies*, 2008, 428.

⁶⁰ King J, 'Institutional approaches to judicial restraint', 428.

⁶¹ Section 6 (2), *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968). It defines legal assistance to mean mutual legal assistance in criminal matters such as identifying, freezing and tracing proceeds of crime. Additionally, Mutual legal assistance aids in facilitating cross border access to evidence; and such burden sharing mechanisms aim to ensure that the national systems are strengthened. It is mainly achieved through mutual legal assistance treaties; and an important characteristic to note is that the treaties operate through normal criminal justice enforcement and judicial channels as opposed to administrative channels.

states end up having a mix of judicial/executive approaches.⁶² The courts have been lauded for being conscious of the fact that state comity is necessary and at the same time, ensuring due process which includes protecting the rights of the fugitive.⁶³ This, therefore, recognises the fact that the judicial authorities and the administrative bodies need to work together to ensure an efficient extradition process. From the above, it can be noted that Kenya ought to recognise the need for exercising separation of powers which mainly asserts the independence of the various arms of government. However, interdependence is equally important since all arms should work to serve the people of Kenya. This will help to show the different roles played by the different entities in extradition in Kenya.

III. The Principle of Double Criminality and Extradition in Kenya

i. The principle of double criminality

Extradition requires the satisfaction of certain principles. For the cooperation of states in the administration of criminal justice, the legal obligations are solely canvassed on treaties.⁶⁴ When interpreting the extradition treaties, the principle of double criminality is the underlying principle to which execution of the obligations under a treaty ought to be carried out.⁶⁵ This principle denotes the fact that an offence has to be considered criminal in both the requesting and the requested state.⁶⁶ This is mostly a condition to be met in criminal matters such as extradition.⁶⁷

On the one hand, bilateral treaties contain a list of offences for which a fugitive may be extradited.⁶⁸ On the other hand, multi-lateral treaties stipulate that the act for which extradition is sought ought to be a crime in both jurisdictions.⁶⁹

⁶² LaForest A, 'The balance between liberty and comity in the evidentiary requirements applicable to extradition proceedings' 28 (1) *Queen's Law Journal*, 2002, 104.

⁶³ LaForest A, 'The balance between liberty and comity in the evidentiary requirements applicable to extradition proceedings' 105.

⁶⁴ Hudson M, 'The factor case and double criminality in extradition' 28 (2) *The American Journal of International law*, 1934, 276.

⁶⁵ Hudson M, 'The factor case and double criminality in extradition' 285.

⁶⁶ Blass F, 'Double criminality in international extradition law' unpublished, University of Stellenbosch, South Africa, 2003, 3.

⁶⁷ Blass F, 'Double criminality in international extradition law' unpublished, University of Stellenbosch, South Africa, 2003, 3.

⁶⁸ Honig F, 'Extradition by multilateral convention' 5 (4) *The International and Comparative Law Quarterly*, 1956, 553.

⁶⁹ Honig F, 'Extradition by multilateral convention' 553.

Therefore, one would find that most multi-lateral treaties codify the double criminality rule.

In *Samuel Kimuchu Gichuru and another* case, the appellants put forward the argument that it would be unconstitutional to allow for extradition because they failed to satisfy the dual criminality principle.⁷⁰ However, the Court of Appeal did not deal with this question because they proposed that it would be dealt with by the extradition magistrate.⁷¹ Courts have held that, as a general principle of international law, the offence must be made criminal in both jurisdictions.⁷² Furthermore, in the case of *Collins v Loisel*, the court held that if it is proven that the acts charged are criminal in both countries then the offence is extraditable with no doubt.⁷³

The law in Kenya as per the Extradition (Commonwealth Countries) Act is enumerative as it lists the extraditable offences in the schedule.⁷⁴ The fact that an offence ends up being included in an extradition treaty is sufficient authority that the offence has fulfilled the principle of double criminality.⁷⁵ This then shows that the provisions of the Commonwealth Act heavily rely on the various treaties Kenya has ratified,⁷⁶ any offence listed in the Act fulfils the principle of double criminality. The fact that this principle is very fundamental, in an instance when a convention is silent, the applicable law on this principle should suffice.⁷⁷ For development to take place in extradition, one of the important tools to be considered must be the principle of double criminality.⁷⁸

It is then important to understand the nature of extradition to determine what the law caters for expressly when it comes to extradition in Kenya. This will ensure that the overlapping mandates and lacunae created by the vague laws are addressed to ensure the uniform practice of extradition in Kenya.

ii. Kenya's extradition procedure

The process is well elaborated in Section 7 of the Extradition (Commonwealth Countries) Act. This part of the paper looks into the process and evalu-

⁷⁰ *Samuel Kimuchu Gichuru and another v Attorney General and 3 others* (2015) eKLR.

⁷¹ *Samuel Kimuchu Gichuru and another v Attorney General and 3 others* (2015) eKLR.

⁷² *Wright v Henkel* (1903), The Supreme Court of the United States.

⁷³ *Collins v Loisel* (1922), The Supreme Court of the United States.

⁷⁴ Schedule, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁷⁵ United Nations Office on Drugs and Crime Country Office Nigeria, *Cases and materials on extradition in Nigeria*, 2016, 24.

⁷⁶ *Samuel Kimuchu Gichuru and another v Attorney General and 3 others* (2015) eKLR.

⁷⁷ Hudson M, 'The factor case and double criminality in extradition' 286.

⁷⁸ Hudson M, 'The factor case and double criminality in extradition' 306.

ates whether the process was followed in trying to extradite Former Energy Minister, Chris Okemo and Former Kenya Power Chief Executive, Samuel Gichuru.

The process according to the Act is as follows:

- a) Request to Kenya by the requesting country.⁷⁹
In *Okemo and Gichuru's case*, the request was submitted to the Attorney General through the British High Commission in Nairobi.⁸⁰
- b) Once the Attorney General receives the request, it follows that an authority to proceed is issued unless it appears that the warrant of surrender was not lawfully made or by the Act.⁸¹
In this case, the Attorney General received the request and proceeded to hand over the request to the office of the Chief Public Prosecutor's office, as it was formerly known in the pre-2010 Constitution, which was a department under the Attorney General's office that would then delegate functions.⁸²
- c) Issuance of warrant of arrest which would then allow for court proceedings to take place.⁸³
The Director of Public Prosecutions (this comes after the enactment of the 2010 Constitution), after carefully looking into the matter, proceeded to issue an authority to proceed to the extradition judge and further filed the extradition proceedings.⁸⁴
- d) When it comes to applying for habeas corpus, in which a fugitive is to be informed of such a right, Section 10 provides that the court may order the fugitive to be discharged from custody if the offence is trivial, due to the passage in time that he is alleged to have committed the offence and because the said accusation is not made in good faith and interest of justice.⁸⁵
- e) Section 11 then allows the Attorney General to surrender the fugitive to the requesting country once the proceedings end. However, the Attorney General is prohibited from surrendering on grounds of step (d) above as well as if such an action is prohibited by the Act in any way.⁸⁶

⁷⁹ Section 7(2), *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁸⁰ *Samuel Kimuchu Gichuru and another v Attorney General and 3 others* (2015) eKLR.

⁸¹ Section 7(3), *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁸² Article 86(3), *Repealed Constitution* (1963).

⁸³ Section 9(1), *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁸⁴ *Samuel Kimuchu Gichuru and another v Attorney General and 3 others* (2015) eKLR.

⁸⁵ Section 10, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

⁸⁶ Section 11, *Extradition (Commonwealth Countries) Act* (Act No. 77 of 1968).

In *Okemo and Gichuru's case*, there was a 10-year delay at the second stage of the listed extradition process. This was occasioned by the uncertainty of whose onus it was to issue the authority to proceed.

IV. The Multi-Faceted Nature of Extradition

Examination of the extradition process shows different interests that the judiciary and the executive have.⁸⁷ This leads to the issue of whether the state should rely upon a formal or functional⁸⁸ analysis in determining its roles.⁸⁹ A formalist approach is used by scholars to show that whatever the constitution stipulates as the different roles for each arm of the government is what should be adhered to unless the constitution permits an exception.⁹⁰ On the other hand, a functionalist approach discourages operations of the different arms with absolute independence as it envisions co-mingling and shifting of powers, but at the same time, preserving the core functions.⁹¹

Scholars such as Suzanne Clair argue that a functionalist approach would yield better results because the interests of different organs are weighed against their effect on the ability of another branch to carry out a constitutionally assigned function.⁹² On the other hand, Clair argues that a formalist approach would make the institutions label themselves distinctively as per their function which fails to promote cohesion within the different institutional actors.⁹³

A formalist approach on its own or a functionalist approach independently would make it incapable of describing a government and therefore an interconnection of both as suggested by Peter Strauss would be sufficient.⁹⁴ This is also emphasised by William Eskridge, who mentions that it is important that formalism and functionalism are conjoined so that it would make a

⁸⁷ Curley M, 'Untying a judicial knot: Examining the constitutional infirmities of extrajudicial service and executive review in U.S extradition procedure' 49 (5) *Vanderbilt Law Review*, 1996, 1284.

⁸⁸ A formalist approach is used by scholars to show that whatever the constitution stipulates as the different roles for each arm of the government is what should be adhered to. On the other hand, a functionalist approach allows for the interdependence of the different arms of government as it envisions co-mingling and shifting of powers but at the same time preserving the core functions.

⁸⁹ Curley M, 'Untying a judicial knot', 1287.

⁹⁰ Merril T, 'The constitutional principle of separation of powers' 1991 *Supreme Court Review*, 1991, 232.

⁹¹ Merril T, 'The constitutional principle of separation of powers' 226.

⁹² Clair S, 'Separation of powers: A new look at the functionalist approach' 40 (1) *Case Western Reserve Law Review*, 1989, 341.

⁹³ Clair S, 'Separation of powers: A new look at the functionalist approach' 342.

⁹⁴ Strauss P, 'Formal and functional approaches to separation of powers questions-A foolish inconsistency?' 72 (3) *Cornell Law Review*, 1987, 526.

government much stronger and more efficient in carrying out different roles.⁹⁵ In this instance, it is very important to have the judicial authorities, as well as the executive authority, carry out extradition proceedings in harmony as opposed to differentiating the roles. This will allow for efficient extradition proceedings. Hence this part of the paper aims to show the different facets of extradition largely divided into both judicial and administrative.

i. Extradition as criminal proceedings

Murphy and Stewart highlight the failure to involve the criminal justice bodies in extradition proceedings and how this exclusion stunts the process and gives leeway to the executive authorities to find shortcuts, rather than strengthening and accelerating the process.⁹⁶ This is evident in how the extradition case of Former Energy Minister, Chris Okemo and Former Kenya Power Chief Executive, Samuel Gichuru took ten years before the Supreme Court could finally give a decision on the matter.⁹⁷ It also illustrates the importance of a system that encourages interconnection between different bodies as they carry out the different mandates assigned in law.

Extradition proceedings involve a procedural aspect of guaranteeing rights at the courts and this involves human rights protection. This protection is best achieved under the criminal justice system.⁹⁸ Scholars have argued that extradition involves the right to a fair trial and its objective is to ensure that those accused of a crime are brought to trial and that those convicted are punished.⁹⁹

The European Union legislators have been lauded by Anne Mei for ensuring that the rights available to a fugitive are protected. The rights as mentioned include but are not limited to, the right to access a lawyer, right to information, and the right to presumption of innocence in an extradition proceeding.¹⁰⁰ Furthermore,

⁹⁵ Eskridge W, 'Relationships between formalism and functionalism in separation of powers cases' 22 (1) *Harvard Journal of Law and Public Policy*, 1998, 29.

⁹⁶ Bassiouni M, Blakesley C, Stewart D, Murphy J and Dinstein Y, 'Major contemporary issues in extradition law' 84 *Cambridge University Press*, 1990, 389.

⁹⁷ *Director of Public Prosecutions v Chrysanthus Barnabas Okemo and 4 others* (2021) eKLR. The DPP started the extradition proceedings before the magistrates' court in 2011 and the final decision rendered in 2021 after several appeals.

⁹⁸ Watney M, 'A South African perspective on mutual legal assistance and extradition in a globalized world' 15 (2) *Potchefstroom Electronic Law Journal*, 2012, 297.

⁹⁹ Ferreira G, Scholtz W, 'Has the constitutional court found the lost ball in the high weeds? The interpretation of section 231 of the South African Constitution' 42 (2) *The Comparative and International Law Journal of South Africa*, 2009, 267. Rivera A, 'A case for the due process right to a speedy extradition' 50 (2) *Creighton Law Review*, 2017, 259.

¹⁰⁰ Mei A, 'The European Arrest Warrant system: Recent developments in the case law of the court of

in an extradition proceeding, the right to bail is recognised and the fugitive is not to be denied the right as has been argued by Moses Ray.¹⁰¹ Owing to the rights that a fugitive has in extradition proceedings as argued by different scholars, states will then be reluctant to extradite a person to a state that is likely to deny them due process or violate their fundamental rights.¹⁰²

ii. Extradition as administrative proceedings

However, scholars such as Roberto Iraola have argued that extradition proceedings are not criminal in that the person whose return is sought is not entitled to rights available in a criminal trial.¹⁰³ It has been further emphasised that in a criminal prosecution, the accused would be entitled to constitutional safeguards which are lacking in an extradition hearing.¹⁰⁴ Furthermore, Severino Ganã discusses the extradition experience within extradition hearings. He states that the hearing process is not to determine whether the accused is guilty and, equally, it lacks the measures available in a criminal case.¹⁰⁵

Executive authorities such as the AG in Kenya, have always had decision-making power in matters of extradition.¹⁰⁶ This, therefore, limits the discretion of the courts and the public prosecutor's office.¹⁰⁷ Furthermore, it is evident how the executive in Kenya has been limiting the DPP's role arguing that the proceedings fall solely under the AG.

Scholars have further argued that statutes dealing with extradition should serve as a mechanism in which the extradition agreement should be enforced.¹⁰⁸

justice' 24 (6) *Maastricht Journal of European and Comparative Law*, 2017, 904.

¹⁰¹ Moses R, 'Interstate extradition to answer criminal charges' 9 (3) *South Texas Law Journal*, 1966, 181.

¹⁰² Wilt H, 'The role of international criminal law in responding to the crime-terror nexus' 16 (3) *European Journal of Criminology*, 2019, 327.

¹⁰³ Iraola R, 'Contradictions, explanations and the probable cause determination at a foreign extradition hearing' 60 (1) *Syracuse Law Review*, 2009, 120.

¹⁰⁴ Wiehl L, 'Extradition law at the crossroads: The trend toward extending greater constitutional procedural protections to fugitives fighting extradition from the United States' 19 (3) *Michigan Journal of International Law*, 1998, 741.

¹⁰⁵ Ganã S, 'Extradition and legal assistance: The Philippine experience' 114th International Training Course, Visiting Experts' Papers, Resource Material Series 57, 1999, 53 https://www.unafei.or.jp/publications/pdf/RS_No57/No57_10VE_Gana.pdf on 27 February 2021.

¹⁰⁶ Watney M, 'A South African Perspective on mutual legal assistance and extradition in a globalized world' 297.

¹⁰⁷ Wieczorek I, 'Extradition between Hongkong and mainland China: A comment on the 2019 amendment to the Hong Kong fugitive offenders ordinance in comparison with the European arrest warrant' 11 (4) *New Journal of European Criminal Law*, 2020, 520.

¹⁰⁸ Joshua J, Camesasca P and Jung Y, 'Extradition and mutual legal assistance treaties: Cartel enforcement's global reach' 75 (2) *Antitrust Law Journal*, 2008, 363.

Also, the extradition treaties should be interpreted in a way that does not hinder the primary purpose of effective justice, meaning that its validity is founded on the treaties and effected by reciprocal statutory provisions.¹⁰⁹ Cameron Moore explained that if a matter is not suitable for the legislature or judiciary, then it must be handled by the executive but may be limited by a written constitution.¹¹⁰ This means that the AG's role could be limited by the constitution, which authorises the DPP to institute criminal proceedings and advise on the administration of criminal justice.¹¹¹

It may be argued that exempting the AG from having judicial control in extradition proceedings will lessen exposure to internal and external political pressures and, consequently, decisions rendered will be just and fair. It is important to note that there is a need to limit such control as it will avoid making administrative bodies overly powerful. Consequently, this will affect the exercise of executive authority and, in this instance, the AG, thereby courts will have unfettered discretion in extradition proceedings.¹¹²

It has been proposed that for courts to recognise the executive's constitutional responsibility, the executive should participate in the hearing stage of extradition proceedings.¹¹³ This can be done by having interdependence between the judiciary and the executive to allow a response to individual concerns and, at the same time, flexibility in conducting foreign policy.¹¹⁴

iii. Court's role in extradition proceedings

The general position is that the court's role in extradition remains largely undefined. Michael Blanchflower maintains that courts lack jurisdiction in overseeing matters such as extradition that deals with compliance with treaty provisions.¹¹⁵ However, courts have been receptive to the idea that they take

¹⁰⁹ Joshua J, Camesasca P and Jung Y, 'Extradition and mutual legal assistance treaties: Cartel enforcement's global reach' 75 (2) *Antitrust Law Journal*, 2008, 363.

¹¹⁰ Moore C, *Crown and sword: Executive power and the use of force by the Australian Defence Force*, Australian National University Press, Australia, 2017, 9.

¹¹¹ Article 157, *Constitution of Kenya* (2010). Section 4 (f), *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013) tasks the DPP to advise the state on matters relating to administration of criminal justice.

¹¹² Aughterson N, 'The extradition process: An unreviewable executive discretion' 24 *Australian Year Book of International Law*, 2005, 13.

¹¹³ Hughes T, 'Extradition reform: The role of the judiciary in protecting the rights of a requested individual' 9 (2) *Boston College International and Comparative Law Review*, 1986, 320.

¹¹⁴ Hughes T, 'Extradition reform: The role of the judiciary in protecting the rights of a requested individual' 9 (2) *Boston College International and Comparative Law Review*, 1986, 320.

¹¹⁵ Blanchflower M, 'Examination of the law of requesting state in extradition proceedings' 34 (3) *Criminal Law Quarterly*, 1992, 283.

up an important part of the extradition proceedings since they ensure fugitives receive humane treatment.¹¹⁶ This has been further explained by scholars such as James Pfander and Daniel Birk who posit that courts mainly determine the legality of the extradition request, after the issuance of an arrest warrant.¹¹⁷ They further assert that incorporating judicial determination into the extradition process would appear as enlisting the judiciary into a mainly administrative task.¹¹⁸ However, some scholars have argued that the role of the courts in extradition proceedings is to uphold the rule of law¹¹⁹ and protect the Bill of Rights enshrined in the Constitution. They are to determine whether there is sufficient evidence to warrant the trial of the accused and not mainly on convicting the accused.¹²⁰

Moreover, Joseph Bonasera argued that in empowering courts during extradition proceedings, the aim is to strip them of the decision-making power that political authorities have in extradition and limit it to ancillary support.¹²¹ Furthermore, empowering courts in extradition proceedings reduces the role of the executive and, in turn, this becomes an avenue to smoothen out the surrender proceedings.¹²²

This study focuses on establishing certainty on how the DPP should grant the authority to proceed in extradition proceedings. This largely involves analysing the nature of extradition proceedings as discussed by different scholars given that extradition is both criminal and administrative—consequently, quasi-judicial.

This current legal framework on extradition shows that the court's role is limited. Their role is limited to the extradition hearing as espoused in the extradition process. The law does not expressly cater for the aspect of having protective provisions in extradition laws. The current laws are vague and untidy

¹¹⁶ Semmelman J, 'Federal courts, the constitution and the rule of non-inquiry in international extradition proceedings' 76(6) *Cornell Law Review*, 1990-1991, 1200.

¹¹⁷ Pfander J and Birk D, 'Article III judicial power, the adverse-party requirement, and non-contentious jurisdiction' 124 (5) *Yale Law Journal*, 2015, 1459.

¹¹⁸ Pfander J and Birk D, 'Article III judicial power, the adverse-party requirement, and non-contentious jurisdiction' 1461.

¹¹⁹ Alegre S and Leaf M, 'Mutual recognition in European judicial cooperation: A step too far soon? Case study- the European arrest warrant' 10 (2) *European Law Journal*, 2004, 217.

¹²⁰ Iraola R, 'Foreign extradition, provisional arrest warrants, and probable cause' 43 (2) *San Diego Law Review*, 2006, 358.

¹²¹ Bonasera J, 'Brexit and the European arrest warrant: The United Kingdom's chance to curtail abuse of the surrender system' 34 (3) *Arizona Journal of International and Comparative Law*, 2017, 645.

¹²² Wicczorek I and Yanhong Y, 'What model for extradition between Hong Kong and mainland China? A comparison between the 2019 (withdrawn) amendment to Hong Kong extradition law and European arrest warrant' 11 (4) *New Journal of European Criminal Law*, 2020, 523.

as they fail to outline the different roles that the different players in extradition can take up. It is important in that it will be very useful in showing how the DPP the Courts, and the AG can have their roles well elaborated in the law.

V. Quasi-Criminal Nature of Extradition

The Supreme Court in *Director of Public Prosecutions v Chrysanthus Barnabas Okemo and 4 others* (2021) eKLR failed to guide how the DPP will initiate and conduct extradition proceedings. Therefore, there is a need to develop the concurring opinion given by Honourable Justice Njoki Ndung'u on extradition proceedings being quasi-criminal as they have elements of criminal and administrative law. She mentioned that the Attorney General and the Director of Public Prosecutions play equal but complementary roles with each office required to play its part in the sequence of events.¹²³ In line with this concurring opinion, the author relies on Canada to borrow lessons from within which Kenya can apply to its extradition procedures to realise its quasi-criminal nature.

i. Analysis of the quasi-criminal nature of extradition

It is important to understand that Kenya's obligation to extradite fugitives arises out of treaty obligations. For multilateral conventions such as the London Scheme, extradition is based on the fact that both state parties have to work together. The International Court of Justice has held that the aspect of the obligation to extradite should be premised on universal jurisdiction.¹²⁴ Universal jurisdiction connotes the exercise of national jurisdiction by a state that has no link to the crime; the crime was not committed by the nation concerned and did not in any way affect the nation or the nation's interest.¹²⁵ Thus, universal jurisdiction has two ambits: one, that there exist specific crimes under customary international law, and two, the presence of treaties that include a provision on the obligation to extradite or prosecute.¹²⁶

The International Law Commission provides that in establishing the necessary jurisdiction, it is important to consider implementing the obligation to extradite as a prior step.¹²⁷ It further mentions that if the alleged crime has no

¹²³ *Director of Public Prosecutions v Chrysanthus Barnabas Okemo and 4 others* (2021) eKLR, para 8.

¹²⁴ *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Judgement, ICJ Reports 2012, 422.

¹²⁵ Williams S, 'Arresting developments?' 368.

¹²⁶ Williams S, 'Arresting developments?' 369.

¹²⁷ Final report of the International Law Commission, *The obligation to extradite or prosecute (aut dedere aut*

link with the state intending to exercise universal jurisdiction, then that clearly shows universal jurisdiction in play.¹²⁸ Courts have held that universal jurisdiction is the jurisdiction to establish territorial jurisdiction over extraterritorial events.¹²⁹ Additionally, in the *Pinochet case*, the courts noted that universal jurisdiction is best explored if the countries involved would handle any adjudication issues that arise. The court also mentioned that although the 1948 Genocide Convention failed to expressly provide for universal jurisdiction, it did not prohibit it.¹³⁰

The International Court of Justice has also noted that there is no requirement to have the alleged offender present for prosecution.¹³¹ This was important to establish because it was very evident in the case of the *Democratic Republic of Congo v Belgium*.¹³² Here, an international arrest warrant had been issued in absentia against the Democratic Republic of Congo's Minister of Foreign Affairs. This warrant had been sought for his provisional arrest pending extradition over speeches on racism in Belgium. The Democratic Republic of Congo was quick to make an application at the International Court of Justice and they complained that the universal jurisdiction exercised by the Belgian state in trying to arrest him violated international law principles. The court ordered Belgium to withdraw the warrant. However, in the dissenting opinion by Judge Van Den Wyngaert, she mentioned that even though universal jurisdiction assumes the presence of the offender, it is not a requirement¹³³ and Belgian law was not in any way contrary to international law.¹³⁴

Additionally, the case of *Democratic Republic of Congo v Belgium* discusses immunity as a relevant principle under extradition law.¹³⁵ The court in this case held that it could not arrest and prosecute the Democratic Republic of Congo's Minister of Foreign Affairs because of the international principle of immunity.¹³⁶ However, the court went ahead to discuss the four ways in which prosecution

judicare), 2014, 8.

¹²⁸ Final report of the International Law Commission, *The obligation to extradite or prosecute (aut dedere aut judicare)*, 2014, 8.

¹²⁹ *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgement, ICJ Reports 2002, 75.

¹³⁰ *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (1999), The United Kingdom House of Lords.

¹³¹ *Arrest warrant of 11 April 2000*, ICJ, 80.

¹³² *Arrest warrant of 11 April 2000*, ICJ, 80.

¹³³ *Arrest warrant of 11 April 2000*, ICJ, 80.

¹³⁴ Boister N, 'The ICJ in "The Belgian Arrest Warrant case": Arresting the development of international criminal law' 7 (2) *Journal of Conflict and Security Law*, 2002, 310.

¹³⁵ *Arrest warrant of 11 April 2000*, ICJ, 80.

¹³⁶ *Arrest warrant of 11 April 2000*, ICJ, 80.

would be allowed: when the individual is no longer a head of state or a high government official; if the crime was committed through private acts; the acts were committed when the individual was not in office, and lastly when the charges are brought up by an international tribunal.¹³⁷

The case further mentioned that immunity can exist if national legislation or bilateral treaties provide alternatives to extradition. This is a way in which states authorise denial of extradition when it comes to political offences.¹³⁸ With such failure to establish the dual criminality aspect in the treaties as discussed above in part two, this then leads to extradition being denied. This was discussed in the *Pinochet case* where the court held that the double criminality rule was required for the extradition request to suffice.¹³⁹

Therefore, International law is clear on the obligation to extradite as discussed above and in instances where extradition is inappropriate, treaties should impose alternative obligations to prosecute the fugitive. This then ensures that the extradition process is efficient. Furthermore, it serves as a solution when extraditing fugitives for crimes of international concern and therefore conventions should include clauses on the obligation to extradite, to give prosecuting bodies the power to look into extradition treaties with the different states.

Extradition proceedings have two elements in them as has been held by the courts. Courts have explained that there is a fundamental difference between the administrative aspect and the judicial aspect in extradition proceedings and the two must co-exist for efficiency in the extradition procedure. This is highlighted in the case of *Geuking v President of the Republic of South Africa*¹⁴⁰ which involved Mr Geuking who was to be extradited to the Federal Republic of Germany on counts of fraud and arson. The court emphasised that it is important to appreciate these phases of extradition proceedings. The first phase is the judicial phase which encompasses the determination of a factual or legal basis to extradite the fugitive. This phase requires that there is an application of all procedural safeguards such as guaranteeing fundamental rights and gathering of evidence. The second phase then involves surrendering the fugitive and here, the administrative ambit exercises discretion on whether to surrender the fugitive to the requesting state, and this phase presents itself as political.

¹³⁷ *Arrest warrant of 11 April 2000*, ICJ, 80.

¹³⁸ Criscitelli S, 'The extradition question: Immunity and head of state' 6 (1) *Georgetown Journal of International affairs*, 2005, 85.

¹³⁹ *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (1999), The United Kingdom House of Lords.

¹⁴⁰ *Geuking v President of the Republic of South Africa* (2001), Constitutional Court of South Africa.

ii. *Lessons that Kenya can learn from Canada: Why Canada?*

The author chooses to compare Kenya to Canada because both countries are in the Commonwealth; they both date back to being former colonies of the British empire. Canada's Extradition Act of 1999 shows that its enactment was to ensure fugitives are brought to trial and that there is accommodation when it comes to the different treaty partners.¹⁴¹ The author acknowledges that Canada's administrative structure is more or less similar to that of Kenya since they both have the executive branch and the legislative branch which the House of Commons falls.¹⁴² This shows a similar position to that in Kenya, in that there exists the judicial authority which courts and the DPP fall under, and the executive authority which comprises the AG.

Canada is at the forefront to ensure that extradition which forms under international law is smoothened to ensure efficient extradition processes.¹⁴³ Kenya, on the other hand, is keen to ensure that judicial authorities and administrative bodies assist each other in ensuring extradition is efficient within the different states. Recently in the Supreme Court decision of *Director of Public Prosecutions v Chrysanthus Barnabas Okemo and 4 others* (2021), Justice Njoki Ndung'u mentioned that Kenya's extradition laws are vague and untidy which then calls for an amendment of the said laws.¹⁴⁴ For this reason, Canada can be used as a good comparator in outlining the phases of extradition in Kenya. Thus, this part explains how this can be done by borrowing the approach used by Canada to ensure efficient and expeditious extradition processes.

iii. *The Canadian extradition process explained*

In the past, extradition in Canada was implemented under two statutes which were: The previous Extradition Act¹⁴⁵ which ideally was a copy and paste of the British Statute, and a repealed *Fugitives Offenders Act* which dealt with Commonwealth Countries.¹⁴⁶ An increase in transnational crimes pushed Canada to reform its extradition law and hence the enactment of the Extradition Act, of 1999 (The Canadian Act).¹⁴⁷ This new legislation ensured a more streamlined three-phase process which shows clear-cut roles by the major players in the

¹⁴¹ Botting G, 'Canadian extradition law practice' 37 (1) *Ottawa Law Review*, 2005, 165.

¹⁴² House of Commons, *The Canadian Parliamentary System*, 1.

¹⁴³ Botting G, 'Canadian extradition law practice' 165.

¹⁴⁴ *Director of Public Prosecutions v Chrysanthus Barnabas Okemo and 4 others* (2021) eKLR, para 8.

¹⁴⁵ *Extradition Act* (Canada).

¹⁴⁶ *Fugitives Offenders Act*, (Canada).

¹⁴⁷ Chapter 18, *Extradition Act* (Canada).

extradition process.¹⁴⁸ Kenya should borrow a leaf from the way Canada divides its roles into phases so that the Director of Public Prosecutions, the Courts, and the Attorney General carry on their tasks without any interference. The phases are explained below.

a. Authority to proceed by the DPP

The first stage as provided for in Section 15 is termed 'Issuance of Authority to Proceed'.¹⁴⁹ This stage involves fulfilling the treaty requirements through a document titled 'Authority to Proceed'. This document authorises the commencement of extradition proceedings. Concerning Kenya, the DPP could have a similar document that allows them to activate treaty negotiations when needed. Canada's Authority to Proceed document has major similarities to a formal charge in a domestic criminal proceeding.¹⁵⁰ Therefore, having such a document allows Kenya's DPP to proceed with the initiation of criminal proceedings.

Article 157 of the Kenyan Constitution outlines the role of the DPP to include instituting and undertaking criminal proceedings and that the DPP shall not require consent or authority from any person to institute criminal proceedings.¹⁵¹ This will allow the DPP to activate extradition treaties while at the same time conducting criminal proceedings as was held by the Supreme Court of Kenya.¹⁵² Additionally, the law can be made to expressly provide for the DPP to implement extradition agreements as has been done in Canada as per Section 7.¹⁵³

b. Extradition hearing: the judicial phase

The second phase in Canada is commonly referred to as the Judicial phase. This entails an extradition hearing before the superior court as provided for in The Canadian Act.¹⁵⁴ The Canadian Act provides that the legal representative for the requesting state is the AG. As discussed in Part III, the courts must be empowered to implement judicial cooperation in a system that is based on

¹⁴⁸ Currie J, 'Wrongful extradition: Reforming the committal phase of Canada's extradition law' 44 (1) *Manitoba Law Journal Forthcoming*, 2021, 10.

¹⁴⁹ Section 15, Chapter 18, *Extradition Act* (Canada).

¹⁵⁰ Department of Justice Canada, *Independent review of the extradition of Dr. Hassan Diab*, 2019, 19.

¹⁵¹ Article 157, *Constitution of Kenya* (2010).

¹⁵² *Director of Public Prosecutions v Chrysanthus Barnabas Okemo and 4 others* (2021) eKLR.

¹⁵³ Section 7, Chapter 18, *Extradition Act* (Canada). This section gives power to Canada's Minister of Justice to implement extradition agreements and deal with the requests that come under the Act.

¹⁵⁴ Section 24, Chapter 18, *Extradition Act* (Canada).

mutual recognition. However, it is important to note that the courts cannot work independently. The office of the DPP and the AG need to fulfil their mandates to ensure interdependence. Scholars have been quick to mention that the judicial phase encounters a problem when it comes to the adduction of evidence.¹⁵⁵ This was evident in the case that involved Dr Hassan Diab who was to be extradited to France for charges relating to a bombing in Paris.¹⁵⁶ The problem was that the evidence adduced during the extradition hearing in Canada was insufficient. Thus, this meant that he was never committed to a trial although he had been imprisoned for more than three years.¹⁵⁷

Scholars such as Maeve McMahon propose that there is a need for extradition judges to actively contribute more during the adduction of evidence in extradition proceedings.¹⁵⁸ He argues that this will reduce situations such as the one that happened in Hassan Diab's case. Scholars also note that the process of adducing evidence is unfair and usually the judges are not keen when it comes to the fugitive's liberty because of basing it on unreliable material.¹⁵⁹ They propose an amendment to the Canadian Act to resolve this hiccup and attain fairness, transparency, and having the courts play their role: ensuring the protection of constitutional safeguards.¹⁶⁰ It is therefore important that Kenya is very wary of this stage and that the Act must portray how matters of evidence will be dealt with as discussed in the previous chapter.

c. Authority to surrender to an extradition partner: the executive prerogative

The third phase in Canada is termed the executive phase. Here, the discretion is given to the Minister of Justice who decides whether to order the person's surrender to the extradition partner.¹⁶¹ Under Section 2, the Canadian Act defines an extradition partner as a state with an extradition agreement with Canada and the name appears in the Schedule.¹⁶² In addition, a list of grounds is provided on which the Minister of Justice may refuse to surrender.¹⁶³

¹⁵⁵ McMahon M, 'The problematically low threshold of evidence in Canadian extradition law: An inquiry into its origins and repercussions in the case of Hassan Diab' 42 (3) *Manitoba Law Journal*, 2019, 364.

¹⁵⁶ *Attorney General of Canada (The Republic of France) v Diab* (2011), Ontario Surrogate Courts.

¹⁵⁷ *Attorney General of Canada (The Republic of France) v Diab* (2011), Ontario Surrogate Courts.

¹⁵⁸ McMahon M, 'The problematically low threshold of evidence in Canadian extradition law' 305.

¹⁵⁹ Canadian Lawyer, *Canada's extradition laws need an overhaul: Expert Panel*, 28 October 2021, 4.

¹⁶⁰ Canadian Lawyer, *Canada's extradition laws need an overhaul: Expert Panel*, 28 October 2021, 6.

¹⁶¹ Section 40, Chapter 18, *Extradition Act* (Canada).

¹⁶² Section 2, Chapter 18, *Extradition Act* (Canada).

¹⁶³ Section 44-47, Chapter 18, *Extradition Act* (Canada).

For Kenya, the AG could play this role in surrendering the fugitive, which will ensure cooperation. It is key to note that *Article 132(5)* of the Kenyan constitution requires the President to ensure that the cabinet secretary, linked with international responsibility, fulfils his mandate. The AG, being a member of the cabinet performing special ministerial responsibilities, is tasked by the President to do so and therefore the AG undertakes extradition proceedings as they are matters dealing with international relations.¹⁶⁴ Additionally, as discussed in Part III, it is also important that the AG plays a role in mutual legal assistance. From this, regional cooperation between states is therefore realised by those in the foreign affairs sector in each state.¹⁶⁵

VI. Recommendations and Conclusion

iv. Recommendations

Based on the theory of separation of powers, there must be a separation of the different arms of government, specifically the executive and the judiciary. However, separation of powers includes both independence of the arms and interdependence between the arms. As such, this paper recommends that the executive and judiciary work together while simultaneously respecting the set boundaries, to smooth out the extradition proceedings in Kenya. The following recommendations are therefore espoused within this theory:

Kenya should amend the Extradition (Contiguous and Foreign Countries) Act which applies to the non-Commonwealth countries and the Extradition (Commonwealth Countries) Act which applies to the Commonwealth countries by abandoning the list-based approach and having extradition that is based on dual criminality.

Also, the Extradition (Contiguous and Foreign Countries) Act which applies to the non-Commonwealth countries, and the Extradition (Commonwealth Countries) Act which applies to the Commonwealth countries should be amended to capture the three-phase approach similar to that of Canada. This is in consideration that it would work well in dividing the various roles, especially after the Supreme Court ruling that extradition proceedings are criminal.

Furthermore, all extradition treaties signed by Kenya must have a clause on the obligation to extradite. This is important because when a requesting

¹⁶⁴ Article 156, *Constitution of Kenya* (2010).

¹⁶⁵ Abegunde B, 'Regional cooperation and state sovereignty' 172.

state seeks extradition based on extraterritorial jurisdiction, a fugitive may be extradited and this, in turn, ensures an efficient extradition process.

Lastly, the Supreme Court should consider reviewing the ruling delivered on 5 November 2021 to encompass the role of persons within the executive arm of government and the executive nature of extradition proceedings. This will ensure an efficient and expeditious process of extradition in Kenya.

v. *Conclusion*

This study found that extradition is best viewed as quasi-criminal. This will incorporate the ruling given by the Supreme Court on 5 November 2021, which held that Okemo and Gichuru should be extradited under the auspices of the DPP. Because this decision side-lines the executive nature of extradition, it is therefore important that Kenya amends its laws to reflect how the different bodies can execute their roles. The decision omits other important questions that touch on extradition roles.

As has been discussed, extradition proceedings involve two phases. The judicial phase—involves the prosecuting authority and the courts, and the administrative phase—then involves the executive, and in this instance the Attorney General. There is a vital need for clearly defined roles to avoid an overstepping of mandates.

The author believes that the reconceptualization of extradition procedures advanced in this paper is critical in implementing Kenya's international law obligation on extradition.