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Judicial Activism vs. Judicial Restraint Debate: A Case for a Balanced Approach in the Exercise of Judicial Review in Kenya.

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Declaration

I declare that this dissertation is my original work and has not been submitted to any other academic institution or organisation for academic qualification or award of grade.

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Supervisor Approval

This thesis has been submitted for examination with my approval as the University Supervisor

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Dedication

I am dedicating this thesis to my family of Mr. and Mrs. Gichuki for the love and support they have shown me throughout this journey.

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First, I wish to acknowledge the Almighty God for being there for me throughout this academic journey. I owe the far I have reached to him as this would not have been possible without him.

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CHAPTER ONE: AN INTRODUCTION TO THE STUDY

1.0 Background of the Study

After years of struggle, Kenyans finally gave themselves a constitution in 2010. Many have hailed this Constitution as one of the most transformative constitutions in the continent.[1] Some have even argued that the Constitution of Kenya 2010 ranks second after the South African Constitution.[2] One of the qualities that have earned it such a high rating is its transformative and progressive provisions on the Bill of Rights.[3] The government, and all its organs, is obligated to respect, observe, and promote the rights and fundamental freedoms provided by Constitution.[4]

To ensure that these rights and freedoms are realized, the Constitution of Kenya vests the courts with the power to uphold and enforce the Bill of Rights.[5] This Constitution also provides the reliefs that courts can grant a victim of human rights violation.[6] The courts have power under the Constitution to exercise the judicial review against the other organs of government including the executive.[7] The Supreme Court of Kenya is the final avenue in the interpretation of the Constitution.[8]

In the exercise of these powers, the Kenyan judiciary has often found itself in conflict with the executive. This problem arises when courts issue orders against the executive which often affects the executive's policy decisions. This has created tension and has threatened to affect the working

[1] G Musila 'Realizing the transformative promise of the 2010 Constitution and new electoral laws' in G Musila (ed) Handbook on election disputes in Kenya: context, legal framework, institutions and jurisprudence (2013) 2.
[2] Ibid.
[3] Rodger Owiso and Bright Sefah, 'Actualising Women's Participation in Politics and Governance in Africa: The Case of Kenya and Ghana' (2017) African Human Rights YB 263.
[4] Constitution of Kenya 2010 art. 21 (1)
[5] Ibid art.23 (1)
[6] Ibid art. 23 (3)
[7] Ibid art. 47.
[8] Ibid art. 163 (4) (a)

relationship of the two arms. The friction has played out in public as the two arms seek two defend what they believe is their constitutional functions.

Justice Mativo, at one point, stated that the executive, through cabinet ministers, was engaging in competition with the judiciary as to who has more 'muscle'.[9] This was after several court orders were seen to have been disobeyed by the executive. The Cabinet Minister in his response accused some judges of colluding to humiliate the executive and for being out to ensure that the executive does not perform.[10] This situation must be addressed and this study will discuss how this problem can be resolved.

Admittedly, the Constitution of Kenya has vested enormous powers in the judiciary. The Kenyan judiciary has the power to adjudicate over any matter as long as there is has a constitutional question to be determined.[11] This has allowed virtually anyone to access the courts and challenge executive's decisions. In turn, this has put the judiciary at war with the executive.

One of the questions that this study will seek to interrogate is whether Kenya is experiencing a phenomenon of judicial supremacy. Has judicialization of politics taken root in Kenya where all issues have become justiciable before the court? Is there too much judicial activism within the Kenyan Courts? Why is it that a lot of executive's decisions are being overturned by the courts? Is it a case of incompetence on the Attorney General's part in advising the executive or has the judiciary's approach to constitutional interpretation become too inconsistent and unprincipled that

[9] Miguna Miguna v. Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR.
[10] 'Evil clique of judges' out to humiliate us, says Matiang'i <https://www.standardmedia.co.ke/kenya/article/2001277145/evil-clique-of-judges-out-to-humiliate-us-says-matiangi> Accessed June 3, 2021.
[11] Constitution of Kenya 2010, art. 258.

the Attorney General can no longer predict the courts' position on certain constitutional issues? These are just some of the questions that this study will seek to interrogate.

There has been an ongoing debate, in many democracies, about how the judiciary should exercise its powers to interpret and enforce a constitution and Kenya has not been left behind in this debate. In Kenya, the debate has been amplified by the ongoing wrangles between the judiciary and the executive arms. Given that Kenyan Constitution is fairly young, this debate is going to be there even as the Supreme Court continues to develop its jurisprudence to guide the courts below it.

In this debate, one side supports activism in constitutional interpretation by the court while another group advocates for total judicial restraint.[12] The question of judicial restraint versus activism, in the constitutional interpretation role of the court, featured quite prominently in the recent interviews for the recruitment of Chief Justice by the Judicial Service Commission.[13] This is an indication that this debate is quite alive in Kenya.

The term judicial activism has acquired several definitions but none of those has been accepted as the definitive one.[14] This term embodies a number of concepts and its usage depends on the context in which the term is being used.[15] According to Keenan, there are at least five basic definitions of judicial activism: (1) courts' actions of invalidating arguably what is a constitutional action of another branch of government (2) disregard of precedents in judicial decisions (3) departing from the recognized methods of interpretation (4) legislating from the bench and (5) "result-oriented" judgments.[16] According to the black's law dictionary, judicial activism is a philosophy where

[12] Richard A Epstein, 'Beyond Judicial Activism and Restraint' (2002) 1 Geo JL & Pub Pol'y 85 p. 85.
[13] Muthomi Thiankolu 'Why Kenya's Judges Recruiters are Skeptical about Activism on the Bench' THE CONVERSATION – Academic Rigour journalistic Flair < https://theconversation.com/why-kenyas-judge-recruiters-are-sceptical-about-activism-on-the-bench-160125 > Accessed June 11, 2021.
[14] Keenan Kmiek, 'The Origin and Current Meanings of "Judicial Activism"' (2004) California Law Review p.1442.
[15] Ibid p. 1443.
[16] Ibid p. 1444.

judicial decisions are based on Judges' personal views on public policy and other factors; where judges are willing to find constitutional violations without any regard to precedents.[17] Supporters and those who criticize judicial activism have differed on the correct definition for this concept.[18]

Arthur Schlesinger was the first person to coin the term judicial activism in his 1947 piece 'The Supreme Court: 1947.[19] The article described a group of American Supreme Court judges as judicial activists, another group as self-restrained, and another one as a middle group.[20] These groups differed on what the proper role of the courts in a constitutional democracy ought to be.[21]

The group that was characterized as pro-judicial activism opined that the Court ought to play an affirmative role in promoting the social well-being of the people in a democracy.[22] This group was of the view that judges should use their conception of what is good for the people when making judicial decisions.[23] On the other hand, the group that advocated for judicial self-restraint was of the view that the court ought to stick to the legislated law, even if it means going against their personal beliefs when making decisions.[24] This group emphasized the need for the courts to allow other organs of government to decide what is good for the citizens through policy decisions.[25] The proper role of the constitutional courts in a democracy will be thoroughly interrogated in this study.

Judicial restraint just like judicial activism has acquired several definitions. According to one of the definitions, judicial restraint refers to a doctrine that requires cases "to be decided on the

[17] Bryan A. Garner 'Black's Law Dictionary' 7th edition pg. 850.
[18] Nitu Mittal and Tarang Aggarwal, 'Judicial Activism in India' (2014) 1 Indian JL &Pub Pol'y 86.
[19] Ibid.
[20] Keenan Kmiek, 'The Origin and Current Meanings of "Judicial Activism"' (2004) California Law Review p.1446.
[21] Ibid.
[22] Frank Cross, and Stefanie Lindquist, "The Scientific Study of Judicial Activism" (2007). Minnesota Law Review p.652.
[23] Keenan Kmiek, 'The Origin and Current Meanings of "Judicial Activism"' (2004) California Law Review p.1446.
[24] Ibid.
[25] Ibid.

narrowest possible grounds, without resolving unnecessary issues, especially political or social controversies".[26] According to Richard Posner, judicial self-restraint require judges to, among other things, be careful not to allow their personal views on policy to influence the decisions.[27] Jeff King describes judicial restraint as the idea of judges refusing to substitute other organs decisions for their own.[28] For purposes of this study, judicial restraint refers to the concept that requires the courts to limit their power and to restrain themselves from interfering with the decisions and actions of the other organs of government.[29]

In Kenya, Some commentators have argued that the Constitution 2010 allows Courts to exercise judicial activism. Article 159 requires the courts and tribunals to promote the purpose and principle of the Constitution while exercising their judicial authority.[30] Some have argued that this provision has given the Kenyan courts latitude for judicial activism.[31] However, this study will argue that this space ought to be approached with some level of caution and restraint.

Indeed, after the promulgation of the Constitution 2010, Kenyan courts have resulted in what many perceive as activism.[32] Kenyans have witnessed numerous government's actions and decisions being overturned by the courts since 2010. Whereas this is good for the enhancement of checks and balances, promotion of constitutionalism, and protection of the rule of law, it may also have

[26] Susan Ellis Wild, 'Websters new world law dictionary' pg. 164.
[27] Richard A. Posner 'The Meaning of Judicial Self-Restraint' United States Court of Appeals for the Seventh Circuit Vol 59 (1983) pg.10.
[28]Jeff King, 'Institutional Approaches to judicial restraint' (2008) Oxford Journal of Legal Studies p. 409.
[29] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95. p.101.
[30] Constitution of Kenya 2010 art. 159 (2) (d).
[31] Willy Mutunga 'the 2010 Constitution of Kenya and its interpretation: Reflection from the Supreme Court's Decisions" (Vol 1) (2015) SPECJU 6. See also Abdiqani Ismail 'the State of Judicial Activism in Kenya' The Nairobi Law Monthly' 12th Feb 2019.
[32] Abdiqani Ismail, 'the State of Judicial Activism in Kenya' The Nairobi Law Monthly' 12th Feb 2019.

some adverse implications if judicial power is not controlled. The principle of separation of powers is key in the effective discharge of the respective constitutional duties of each arm of government.[33]

This study will expose the risks of unrestrained judicial activism and also caution on the drawbacks of adopting total restraint by the courts in a constitutional democracy. This study will delve deep into the judicial activism versus judicial restraint debate and argue that total restrain is not the way to go for Kenya and neither is all-out activism. The study will seek to demonstrate that finding a middle ground is the way to go in ensuring a cordial working relationship among the arms of government. The study will also discuss related concepts such as judicialization of politics, pragmatism in judicial decisions, the doctrine of political question, the doctrine of deferment, doctrine of avoidance among others.

1.1 Statement of the Problem

The problem has been that the Kenyan judiciary, post-2010, has also failed to find a proper balance between activism and restraint. There has also been a lack of a consistent principled approach to constitutional interpretation by the Kenyan Courts. Admittedly, this is a difficult balance but it is achievable. This study will argue for a balanced approach between activism and restraint by the Kenyan judiciary. This will go a long way in fostering a good judiciary-executive relationship.

1.2 Justification of the Study

There seems to be limited Kenyan literature on the judicial powers to interpret the Constitution and to check other arms of government vis-à-vis the principle of separation of powers. The few that exist do not seem to offer effective solutions to the jurisdictional conflict between the judicial arm and the executive. Most literature seems to appreciate the problem that exists but fail to

[33] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95. p.96.

recommend proper solutions mainly due to the wrong diagnosis of the problem or wrong philosophical, conceptual, and/or theoretical approaches to the problem.

Another problem with the Kenyan literature is the authors' belief that the problem can be only be solved by adopting either judicial activism or restraint approaches to the courts' power to interpret the Constitution. This has limited their imaginations and creativity. As a result, no literature seems to be prescribing a sustainable and practical solution. This study will seek to conduct a rigorous interrogation of the problem by conceptualizing and contextualizing the problem. A rigorous analysis of the theoretical framework and a well-structured comparative study will help in coming up with the right and agreeable recommendations.

1.3 Statement of objective

The overall objective of this study is to establish the best approach and proper exercise of judicial review power in a constitutional democracy.

The specific objectives include;

1) To carry out a critical analysis of various theories and concepts of judicial review such as separation of powers, pragmatism, legitimacy among others.
2) To determine and analyze the Kenyan courts' jurisprudential approach to specific facets of judicial review such as separation of powers, the doctrine of deferment, doctrine of avoidance, the political question among others.
3) To find out how selected constitutional courts from other jurisdictions have approached the aspects of judicial review mentioned in objective no. 3.
4) To recommend the best approach in exercising judicial power of review in Kenya.

1.4 Research Questions

This study seeks to answer the following questions;

1) How should the courts exercise the power of judicial review?
2) What is the Kenyan courts' jurisprudence concerning various aspects of judicial review?
3) How have courts in other Jurisdictions approached the same aspects of judicial review and what lessons can Kenya borrow from these courts?
4) What recommendation can this study offer as the way forward?

1.5 Theoretical and Conceptual Framework

1.5.0 Applicable Theories

The theory of separation of powers finds relevance in this study. This theory which was established by Montesquieu in his work, 'the spirit of laws',[34] is at the heart of judicial restraint versus activism debate. In his book, Montesquieu described the separation of powers by using the analogy of the Constitution of England.[35] He stated that he was impressed by the English form of government.[36] This government had three arms. One arm would legislate, the second one interprets while the third one would enforce the law.[37]

The separation of powers theory calls for the independence of each of the three arms of government.[38] This theory warns against encroachment by one arm into the jurisdiction of another.[39] According to Montesquieu, separation of powers preserves liberty and prevents decay.[40]

[34]George Rossman, 'The Spirit of Laws: The Doctrine of Separation of Powers' (1949) 35ABA J 93. p. 93.
[35] Ibid.
[36] Ibid p.94.
[37] Ibid.
[38] James T Brand, 'Montesquieu and the Separation of Powers' (1933) 12 Or L Rev 175. p.176.
[39] Ibid.
[40] George Rossman, 'The Spirit of Laws: The Doctrine of Separation of Powers' (1949) 35ABA J 93. p. 94.

Benjamin V. Madison believes that judicial activism violates the separation of powers.[41] This study will seek to determine how courts can exercise judicial activism in a restrained manner without necessarily violating the principle of separation of powers.

The principle of checks and balances is a corollary of the separation of powers theory.[42] This principle requires the three arms of government i.e. the judiciary, the executive, and the legislature to check each other's excesses.[43] Justice Marshall stated that "when judges decide controversial cases with loose adherence to legitimate tools of constitutional interpretation, they risk charges of judicial activism."[44] He argues that even as the judiciary checks the other arms of government through its role of constitutional interpretation, it must observe restraint.[45]

The theories of originalism and pragmatism are of great importance to this study. These two theories are very relevant as they provide important arguments on the proper role of the courts in a democracy and the scope of judges' power when interpreting the law and the constitution. The approach of these two theories are brought out very well in Posner's excerpts ("What Am I? A Potted Plant?" and "Bork and Beethoven") in his book 'Overcoming Law'.[46] Posner who a critic of originalism advocates for a limited government.[47]

Some of the key arguments of originalism are as follows;

[41] Benjamin V Madison II, 'Rico, Judicial Activism, and the Roots of Separation of Powers' (2004) 43 Brandeis LJ 29. p.33.
[42] Wallace Mendelson, 'Separation, Politics and Judicial Activism' (1977) 52 Ind LJ 313 p. 313.
[43] Darwin N. Kelley, 'Roots of the Principle of Separation of Powers in the Indiana Constitution' Indiana Magazine of History Vol. 47, No.4 (1951) p. 367-375.
[44] Marshall Rothstein, 'Checks and Balances in Constitutional Interpretation' (2016) 79Sask L Rev 1 p. 1.
[45] Ibid p.5.
[46] Richard Posner, 'Overcoming Law' (1995) Harvard University Press.
[47] Ibid.

First, the theory of originalism argues that judges, who are not elected, should not be seen to exercise power meant for elected leaders.[48] The proponents of originalism argue that non-originalists give judges too much leeway to impose their own elitist views which are mostly subjective. Originalism expects the legislature to amend their bad laws but not leave it to judges to decide the fate of those laws.[49]

Robert Bork, who is one of the proponents of originalism, argued that law is what the framers intended it to be and so is the constitution.[50] To him, a judge should not purport to create new rights or destroy existing ones.[51] Doing so, according to Bork, is tantamount to violating his/her own limits of authority as a judge.[52] According to Bork, judicial restraint is meant to accomplish separation of powers.[53] The judiciary, to him, should not engage in policymaking but should instead focus on its role which is limited to implementing the policy decisions of the political branches.[54]

Pragmatism theory on the other hand views judges' roles and authority in a completely different perspective from originalism theory. Posner argues that judicial review is a necessary safeguard against the executive and the legislature and that this safeguard should not be reduced or limited.[55] Posner argues that constitutional provisions especially the ones touching on rights should be written on very general terms to allow judges discretion when interpreting them.[56]

[48] Ibid.
[49] Ibid.
[50] Robert Bork, 'The Tempting of America: The Political Seduction of the Law', (1990) BYU L. Rev. p. 666.
[51] Ibid.
[52] Richard Posner, 'Overcoming Law' (1995) Harvard University Press.
[53] Robert Bork, 'The Tempting of America: The Political Seduction of the Law', (1990) BYU L. Rev. p. 668.
[54] Richard Posner, 'Overcoming Law' (1995) Harvard University Press.
[55] Ibid.
[56] Ibid.

Posner observes that in the U.S. Constitution, the human rights provisions that have been written in specific terms have always been problematic unlike the ones written in general terms.[57] For him, the general provision is flexible to cover unforeseen changes.[58] Posner is however quick to note that this flexibility may give room for alternative interpretation, therefore, allowing judges to exercise discretion; something that is against the theory of legitimacy.[59] He however argues that judges are required to exercise discretion, in circumstances not contemplated by drafters, by weighing the consequences of a decision.[60] To Posner, a judicial decision is not a bad law just because "it violates the tenets of strict construction".[61]

Justice Oliver Wendell Holmes also weighs in on this debate. Holmes is greatly linked to pragmatists.[62] In his legal theory, he talks about the timing of judicial decisions and the idea of societal readiness in the delivery of certain constitutional decisions by the court.[63] According to Holmes, the justification, or lack of it, of certain rulings depends on the timing.[64] Holmes advocates for judicial restraint but he is against narrow textualism.[65] He recognizes the role of the courts in societal reforms but he is cognizant of the fact that without the cooperation of the political class,

[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Eric Thomas Weber, Review of Kellogg's 'Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint' p. 136. available at https://d1wqtxts1xzle7.cloudfront.net/30949126/Weber-ReviewOfKellogg-with-cover-page-v2.pdf? Accessed November 19, 2021.
[63] Frederic R. Kellogg, 'Holmes, Common Law Theory, and Judicial Restraint, 36 J. Holmes, Common Law Theory, and Judicial Restraint, (2003) 36 J. Marshall L. Rev. 457. p. 467.
[64] Frederic R. Kellogg, 'Holmes, Common Law Theory, and Judicial Restraint', Cambridge University Press p. 1. Available at https://books.google.co.ke/books?hl=en&lr=&id=dpWbtEL-WQUC&oi=fnd&pg=PA1&dq=frederick+kellogg+Oliver+wendell+holmes+and+judicial+restraint&ots= accessed November 19, 2021.
[65] [65] Eric Thomas Weber, Review of Kellogg's 'Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint' p. 138. Available at https://d1wqtxts1xzle7.cloudfront.net/30949126/Weber-ReviewOfKellogg-with-cover-page-v2.pdf? Accessed November 19, 2021.

and ultimately the people, the courts would be fighting a losing battle in trying to effect these changes.[66]

Legal realists argue that judges should be guided by judicial notions of public policy to best promote the general welfare of the people.[67] Realists are against the rigid and mechanical positivists approach to constitutional interpretation.[68] Dean Roscoe Pound propounded that the law should be interpreted in accordance with the dominant trend in societal development.[69]

Professor Ronald Dworkin comes up with what he refers to as the moral reading of the constitution.[70] To him, this approach cuts across both liberal and conservative approaches to constitutional interpretation.[71] What is unique about his approach is that it advocates for the application of the 'abstract moral principle(s)' by the courts in decision making.[72] What Dworkin was proposing here is that judges should decide cases using their own notion of political morality but not the purported ideas of constitutional structure and historical intention.[73] This study is against Dworkin's approach of affording judges too much discretion which may be subject to abuse and the need for predictability in decisions. Dworkin is not just an advocate of judicial review but he is also a supporter of judicial activism particularly in the protection of rights.[74]

Dworkin also propounded the idea of "theory" which requires judges when facing difficult matters to "justify legal claims by showing that principles that support those claims also offer the best

[66] Ibid.
[67] Richard A Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 Case W Res L Rev 179 p. 179.
[68] Edward McWhinney, 'Judge Jerome Frank and Legal Realism: An Appraisal' (1957) 3 N Y LF 113 p. 115.
[69] Ibid.
[70] Michael McConnel, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution', (1997) 65 Fordham L. Rev. 1269. p. 1269.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Stanley Brubaker, 'Reconsidering Dworkin's Case for Judicial Activism' (1984) The Journal of politics. p.503.

justification of more general legal practice in the doctrinal area in which the case arises."[75] The 'best justification' he says, is that principle that "fits the legal practice better" and gives it better light.[76] Dworkin asserts that when judges are called upon to interpret a constitution, they must undertake a significant journey into political morality or a 'deep expedition into theory'.[77]

Other theories which are relevant to this study are the liberal and conservative theories. Conservatives are pro-judicial restraint and denounce judicial activism.[78] Conservatives hold that liberal judges should adhere to precedents.[79] Liberals on the other hand have been described as 'ascendant on the Supreme Court'.[80] These two opposing groups however keep swapping their positions on the question of the role of the court, judicial review and judicial restraint.[81]

Each theory discussed here is useful in a judicial review discourse. However, when applying any of the above theories in support of either judicial restraint or activism within the context of judicial review, it is important to weigh each theory against the standards of a good constitutional theory.

David Strauss comes up with some well-thought-out standards of assessing constitutional theories. First, he posits that a good constitutional theory should use the points of agreement (widely held views within a legal culture) and extend them to cover controversial cases.[82] A good legal theory also justifies a certain controversial decision by referring to points of agreement that exist in the

[75] Richard A. Posner, Response, "Conceptions of Legal Theory: A Response to Ronald Dworkin", (1997) 29 Arizona State Law Journal 377. p.377.
[76] Ibid.
[77] Ibid.
[78] Frank Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?'(2002) 73 University of Colorado Law Review 1403. p. 1401.
[79] Ibid.
[80] ibid
[81] Jack Balkin, 'Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time' (2002) U. Colo. L. Rev. p.
[82] David Strauss, 'What is Constitutional Theory?' (1999) 87 California Law Review. p. 581.

legal culture.[83] According to Strauss, a theory that completely disregards the text has no place in the accepted legal culture and therefore cannot be used to resolve a disagreement.[84]

According to Fallon, a good constitutional theory promotes the rule of law, political democracy and individual rights.[85] Fallon is very firm on the importance of a theory that is principled to the extent of sometimes making a judge reach a result which he or she would otherwise reject.[86]

This study advocate for a pragmatic principled approach to constitutional interpretation as opposed to a non-doctrinal approach. Non-doctrinal approach means the judiciary has the discretion to decide every legal dispute on a case-to-case basis.[87] Of course in any model, the judges should enjoy some level of discretion. As a matter of fact, the biggest advantage of a non-doctrinal approach is that it is very flexible allowing judges to decide cases on their merit and context.[88]

However, this study is against a fully non-doctrinal approach for several reasons. First, to give judges wide discretion would offend the very essence of rule of law and legal principle.[89] Secondly, there will always be a clash between the courts and other branches of government if judges are allowed to make decisions without fidelity to any legal principles.[90] Lastly, and most importantly, there ought to be some level of predictability in judicial decisions and this predictability can only exist when there is already a set legal standard to be met for a case to case to be won or lost.[91] This

[83] Ibid.
[84] Ibid p. 586.
[85] Richard H. Fallon, Jr., How to Choose a Constitutional Theory, (1999) 87 CALF. L. REV. 535. p. 539.
[86] Ibid.
[87] Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) Oxford Journal of Legal Studies, Vol. 28, No. 3. p. 410.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.

study, therefore, advocates for a principled approach to counter the shortcomings associated with a fully non-doctrinal approach.

1.5.1 Relevant Concepts

The concept of judicialization of politics finds relevance in this study. According to Ran Hirschl, judicialization of politics refers to reliance on the judiciary to address issues of moral predicaments, political controversies, and questions of public policies.[92] He argues that judicialization of politics has become a significant phenomenon in the recent past.[93] Hirschl observes that in the late 20th and early 21st century, the national high courts word-wide, with the renewed judicial review procedures, had been called upon to resolve issues ranging from the scope of expressions and religious freedoms, education, labour, environment, trade, migration etc.[94]

This study will seek to determine whether there has been judicialization of politics in the Kenyan judiciary post-2010. This will be done by analysing some of the controversial cases that have been entertained by the Kenyan courts. Hirschl observes that globally, the courts have grown tremendously in political significance and its scope has have expanded to become "a manifold, multifaceted phenomenon that extends well beyond the now-standard concept of judge-made policy-making"[95].

The new phenomenon of judicialization of politics now includes a total transfer of all manner of political controversies that can be found in a democratic polity.[96] Globally, political controversies

[92] Ran Hirschl, 'The Judicialization of Politics' The Oxford Book of Political Science (2011) available at https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?source=post_page accessed 28 September 28, 2021.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.

are being framed as constitutional issues.[97] It is being assumed that the judiciary, and not demos or politicians, is the best forum for making key political decisions. According to Hirschl, judicialization of politics has also been treated as "a natural outcome of global convergence toward constitutional supremacy and the prevalence of rights discourse"[98].

The concept of judicial review has two dimensions. Judicial Review of constitutionality and judicial review of separation of powers.[99] One act of judicial review is when a court reconsiders executives of legislative action meant to sanction someone before such a sanction becomes final e.g. statutory interpretation. [100] The second act of judicial review is the act of a court of reviewing the constitutionality of a government's acts.[101]

This study is also going to determine whether Kenya is experiencing the phenomenon referred to as judicial supremacy. Karmer defines judicial supremacy as the concept of judges having the idea of the courts being the alpha and omega in constitutional interpretation where their interpretation becomes the meaning of the constitution.[102] In the American third debate between Douglas and Lincoln, the former declared that the court should be the one to decide all constitutional questions as the final avenue and when it does, that becomes the law of the land.[103]

He further averred that this decision is binding on everyone and that whoever disobeys the final decision of the highest court "aims a deadly blow" to the government; a blow which is capable of

[97] Ibid.
[98] Ibid.
[99] Frank R. Strong, 'Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law', (1967)69 W. Va. L. Rev. p. 250.
[100] Ibid.
[101] Ibid.
[102]Robert Post & Reva Siegel, 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy' (2004) California Law Review, p. 1027.
[103] Ran Hirschl, 'The Judicialization of Politics' The Oxford Book of Political Science (2011) avalilable at https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?source=post_page accessed 28 September 28, 2021.

placing liberties at the mercy of anarchy and violence and passion.[104] According to John Agresto, judicial restraint was "an attempt to minimize the chilling effect of final judicial decision on democratic life.[105]

Another concept that has dominated the discourse on judicial powers is the counter-majoritarian effect of judicial review and the question of legitimacy of the judiciary when exercising this power. According to Githu Muigai, a Constitutional Law Scholar, the very power vested on the courts to interpret the Constitution through the judicial review process is controversial and "Counter-majoritarian".[106] Githu argues that the idea of a non-elected body having the powers to overrule enactments and actions of elected representatives raises the question of legitimacy.[107]

The doctrine of political question also finds relevance in this study. Louis Henkin, in 1976, wrote about this doctrine. This doctrine has been defined as a situation where the court is asked to perform a role that is meant for the political branches.[108] Mchalapf argues that the logic in Marbury v. Madison demands that the doctrine of political question only arises where the constitution has expressly put the issue being raised before the court in the exclusive jurisdiction of a political branch for determination.[109]

Louis observed that the doctrine of political question had been used quite often by the American courts.[110] These courts had maintained that their role in judicial review was limited to answering the question of whether the political branches had acted within the Constitution and the law.[111]

[104] Ibid.
[105] Ibid p. 493.
[106] Gath Mugnai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) 2004 E Afr LJ 1 p.1.
[107] Ibid.
[108] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.
[109] Scharpf – 'Judicial Review and the Political Question: A functional Analysis. (1966) Yale Law Journal. p. 518.
[110] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.
[111] Ibid.

The court further stated that the question as to whether the action was done wisely or not was a political question that this court was not willing to entertain.[112]

Louis, however, rejects these as definitions for political question doctrine stating that they merely describe aspects of justiciability and the obligation of the judiciary to respect the functions of other arms.[113] To him, a proper doctrine has to be more than that.[114] He views this doctrine as a scenario where an issue, which would on the face of it be adjudicated by a court of law, will not be decided by the court but will 'extraordinarily' be left to the political branches to decide.[115]

Martin Redish has observed that scholars have not only differed on the scope and rationale of the political question doctrine but also its validity.[116] Its application has also been controversial.[117] According to Redish, the doctrine connotes the existence of certain constitutional law issues that are best suited to be handled by the political arms of government.[118] This means that they are non-justiciable and that 'the court will neither 'disapprove nor reject' the judgment by the political arms but will allow the political processes to take their own course.[119] This is the definition that will be used for purposes of this study. The study will interrogate how the Kenyan courts have handled the doctrine of political question since it is a crucial facet in judicial review.

Finally, this study will seek to determine how the Kenyan courts have applied the doctrine of deferment and the doctrine avoidance in judicial review cases. Has described the doctrine of avoidance as instances where a court decides not to adjudicate over a dispute that is highly political

[112] Ibid.
[113] Ibid.
[114] Ibid p. 599.
[115] Ibid.
[116] Martin Redish, 'Judicial Review and the "political Question" (1985) 79 Nw. U. L. Rev. 1031 p. 1031.
[117] Jesse Choper, 'The Political Question Doctrine; Suggested Criteria' (1984) Duke LJ, 2004. p. 1458.
[118] Martin Redish, 'Judicial Review and the "political Question" (1985) 79 Nw. U. L. Rev. 1031 p. 1031.
[119] Ibid.

in nature or political questions that are not justiciable.[120] He posits that the courts 'avoids' these kinds of cases to preserve their legitimacy.[121]

The doctrine of deference arises when the court lacks competence and expertise to deal with certain matters and refers these matters to either administrative or political organs having such expertise for determination.[122] This doctrine may also be invoked when a matter before a court is a policy question and which the primary authority by dint of the Constitution lies with the political branches.[123] The doctrine of deference and avoidance are key aspects of judicial review which this study will discuss when and how they should be exercised in balancing judicial activism and restraint.

1.6 Research Methodology

The mode of research that this study will employ is exploratory qualitative research. The research will majorly be library-based. The study will seek to review the primary data available on the exercise of judicial powers in Kenya. This will include the Constitution of Kenya 2010, legislations and judicial decisions. The primary data will help in establishing, for instance, whether the constitution and other laws provide for a theory or principles of constitutional interpretation. The study will also utilize the international instruments available. As for the secondary sources, the study will seek to utilise various scholarly journals, books, academic commentary and scholarly websites. These will be useful in providing different scholars' perspectives on various issues that arise in this study.

[120] Jed Odermatt 'Patterns of Avoidance: Political Questions before International Courts', (2018) International Journal of Law.
[121] Ibid.
[122] T.R.S. Alan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 L. Q. Rev. 96. p.96.
[123] Ibid.

The study will interrogate and analyze the judicial decisions of various select cases decided by the Kenyan Courts to establish the emerging jurisprudence on judicial review. The study will target select political cases. The selection of these cases will be guided by; (1) the themes that this study intends to cover and (2) cases that have drawn public interest and generated reaction from the political class. This will help in providing a rigorous analysis.

This study will also conduct a case study to establish the different approaches adopted in other select jurisdictions. The comparative research will seek to compare the jurisprudential approaches adopted in these jurisdictions concerning judicial power of review. The comparative analysis will be based on several chosen variables such as separation of powers, political question doctrine, pragmatism, the doctrine of deference, the doctrine of avoidance among others.

The choice of cases here will be influenced by the nature of cases used for the analysis of Kenyan jurisprudence. The aim here will be to provide effective comparative analysis. These cases will also be the ones decided under the current constitutions of the respective selected jurisdictions. This will further enhance the effectiveness of the comparative analysis since the select cases will be based on current constitutional dispensations of chosen countries. The comparative will also utilize the Scholarly material in order to benefit from the analysis of scholars on the state of jurisprudence in those states.

This study has chosen South Africa, India and the United States for comparative analysis. The study will focus on the South African Constitutional Court, the Indian Supreme Court and the Supreme Court of the United States. The study has chosen the Constitutional Court of South Africa because of its reputation of having one of the most robust and transformative jurisprudence among

constitutional courts in the new democracies.[124] Kenya and South Africa are both African countries having in force post-independent constitutions and these two countries have some shared history thus making the South African Constitutional Court an ideal pick for this exercise.

The choice for the Supreme Court of India has been informed by the fact that this Court has developed a constitutional interpretation approach with a coherent philosophy, enhanced and robust judicial review to the extent of declaring constitutional amendments unconstitutional and has maintained judicial independence.[125] Just like in Kenya, this Court has moved to protect fundamental rights and to promote rule of law by providing avenues for redress such as allowing public interest litigation.[126]

The Supreme Court of the United States has been touted as one of the most, if not the most, extraordinary and powerful courts in the world.[127] This Court was the first to assert its power of judicial review in (Marbury v. Madison[128]).[129] These facts make the Supreme Court of the United States suitable for comparative study.

A thorough literature review will be conducted to appreciate the literature that exists in relation to this study and to identify the gaps in the literature available. A study of the conceptual and theoretical framework will also be conducted for effective analysis of the emerging issues in the course of the study.

[124] Roux Theunis. 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) International Journal of Constitutional Law, vol. 7 p. 106
[125] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 477.
[126] Ibid.
[127] Peter E. Quint, "The Most Extraordinarily Powerful Court of Law the World Has Ever Known"? Judicial Review in the United States and Germany' (2006) 65 Md. L. Rev. 152.
[128] 5 US (1 Cranch) 137 (1803).
[129] Robert Frankel Jr. 'Before Marbury: Hylton v. United States and the Origins of Judicial Review' (2008) Journal of Supreme Court History p. 1.

The nature of this study suggests that the research would be much richer if it involved interviews with various judges to find out how they arrived at certain decisions. The aim here would be to find out whether a judge was exercising activism or restrain when making certain controversial decisions. This research methodology would therefore be suitable. However, owing to the Covid 19 pandemic this exercise would not be possible. To make up for this, this study will utilise the available scholarly materials that provide ways of determining when a judge is exercising judicial restraint or activism in a judgment. The study will also utilize the available theories to identify judicial activism or restraint in certain controversial judgments.

1.7 Literature Review

One of the Kenyan scholars who have written on theories of constitutional interpretation is Professor Githu Muigai. In his work, he discusses judicial review and its counter-majoritarian effect.[130] He observes that the role of the court to interpret the Constitution through judicial review process is controversial since its counter-majoritarian.[131] He also posits that the idea of a court overturning decisions of elective organs raises issues of legitimacy.[132] Githu argues that for there to be legitimacy of constitutional democracy, there must be a consistent and coherent interpretation of the constitution.[133] He advocates for a principled approach to constitutional interpretation and rightfully argues that an unprincipled and inconsistent constitutional interpretation undermines the Constitution's legal authority.[134]

[130] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1. p.1.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.

Githu holds that jurists must strive to come up with principles of constitutional interpretation.[135] He observes that several competing approaches must be reconciled.[136] One group advocates for neutral principle while another group is against the neutral principle.[137]Some push for a goal-oriented method of interpretation and others push for a result-oriented approach.[138] He argues that the middle ground must be found and that this middle ground would be found by courts coming up with a rational, consistent system of value.[139] Githu however leaves it to scholars to develop and refine this theory.[140] Githu does not also tell his readers how the principled approach he proposes is to be applied; whether it is on a case to case basis or whether uniformly in all cases.

John Harrington and Ambreena Manji hail the transformative role being played by the Kenyan judiciary in promoting constitutionalism through judicial review.[141] Just like Professor Gath before them, these two authors argue for a principled approach to constitutional interpretation.[142] The two are against the positivist literal approach and support a purposive approach in judicial decision making.[143] In analyzing the case of Odinga v IEBC[144] Harrington and Manji posits that the Supreme Court of Kenya avoided the guiding principles; that it was overly cautious in its reasoning and ignored the wider historical context in its decision which they argue was meant to shield the electoral body from scrutiny.[145] They also argued that this decision served to restore 'Levithian'

[135] Ibid p.15.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid p.116.
[140] Ibid.
[141] John Harrington & Ambreena Manji, 'Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013' (2015) Journal of Eastern African Studies, 9:2, 175-192 p.176.
[142] Ibid.
[143] Ibid.
[144] Odinga v IEBC (Petition No. 5 of 2013) [2013] eKLR.
[145] John Harrington & Ambreena Manji, 'Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013' (2015) Journal of Eastern African Studies, 9:2, 175-192 p. 176.

in Kenya. The two authors disagree with Lumumba and Franceschi[146] who viewed the judgment in Odinga v. IEBC as pragmatic even though the latter admitted that the decision was doctrinally incoherent.[147]

Walter Ochieng has written on judicial-executive relations in Kenya. He posits that at the heart of the quest for the new Constitution was a reconfiguration of the government to entrench separation of powers and enhance checks and balances.[148] Ochieng observes that the judiciary has become independent and powerful under the constitution 2010.[149] The judiciary can now question the actions of the executive.[150] That the exercise of judicial review has come under attack from the executive and a section of the members of publicly accusing the judiciary of activism.[151] Ochieng however urges the judiciary to stand firm when exercising its role of judicial review.[152]

Although the title of his work suggests that the paper would interrogate the question of judicial supremacy in Kenya, it fails to do so. His work lacks a theoretical analysis of judicial review. The paper also fails to provide a conceptual analysis of relevant concepts used such as judicial supremacy. In fact, this phrase only appears in the title.

Franceschi, Muthoni and Wabuke have written on judicial review. Their paper focuses on the development of judicial review concept in Kenya.[153] Citing David Law[154], they view the judicial review as probably the most important power that the court has since it enables the court to prevent

[146] Ibid p.186.
[147] Lumumba and Franceschi, 'The Constitution of Kenya, 2010: An Introductory Commentary' (2014) Strathmore University Press p. 676.
[148] Walter Ochieng, 'Judicial Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' (2016) Stellenbosch Handbooks in African Constitutional law p. 286.
[149] Ibid p. 291.
[150] Ibid.
[151] Ibid p. 297.
[152] Ibid.
[153] Luis Gabriel Franceschi, Linet Muthoni and Emmah Senge Wabuke, 'Judicial Review and Public Power in Kenya: Revisiting Judicial Response to Select Political Cases' (2017) Springer International Publishing p.77.
[154] David Law, 'A Theory of Judicial Power and Judicial Review' (2008) 97 The Georgetown Law Journal p. 723

the government from abusing its power to the detriment of the people.[155] Their paper analysis the shift of judicial interpretation of court power of judicial review from the pre-2010 to post-2010 Constitution. The two authors attribute the expansion in scope and the growth of judicial review to Kenya's pre-2010 experience.[156] A deeper analysis of this observation is however missing. The paper then cautions against activism[157] but does not attempt to define this activism, a concept that this paper demonstrated can be understood differently depending on the context in which it has been used.

Michaela, in her excerpt, talks about constitutional legitimacy and separation of powers in Africa.[158] She expresses her optimism about democracy in Africa and observes that things have changed drastically over the last two decades with many African countries promulgating constitutions that are transformative on governance.[159] She also observes that constitutionalism is slowly taking shape in most African states as a result.[160]

Michaela observes that, unlike many African states whose constitutions are mere negotiated transition documents, South African Constitution represents real revolutionary constitutionalism.[161] Revolutionary constitutionalism principles are deeply entrenched in the South African Constitution which also establishes a constitutional court to protect and enforce them.[162]

[155] Luis Gabriel Franceschi, Linet Muthoni and Emmah Senge Wabuke, 'Judicial Review and Public Power in Kenya: Revisiting Judicial Response to Select Political Cases' (2017) Springer International Publishing p. 79.
[156] Ibid p. 106.
[157] Ibid.
[158] Michaela Hailbronner, 'Constitutional Legitimacy and Separation of Powers' (2016) Stellenbosch Handbooks in African Constitutional law p. 385.
[159] Ibid.
[160] Ibid.
[161] Ibid p. 388.
[162] Ibid.

Michaela notes that unlike in South African where the constitution-making process was largely a revolutionary group affair, elites in the previous regimes were involved in constitution-making in other countries such as Kenya and Benin. Some of these elites would later be elected to serve under the constitutional dispensation with the expectation that they would adjust to the new reforms. The path that these countries took, she notes, has caused a lot of problems to the constitutional courts as they face the issue of legitimacy when trying to enforce a constitution in a counter-majoritarian manner.[163]

Michaela posits that people ought to understand the separation of powers in a broader sense than the traditional understanding which is simply the avoidance of concentration of power.[164] She argues that separation of powers should now be understood to encompass efficiency while constitutionalism should encompass social-economic right by the courts.[165]

She notes that the fact that a constitution is not a product of a revolutionary movement does not mean that such a constitution cannot enjoy supremacy.[166] She cites examples of Kenya and Benin whose constitutions enjoy popular sovereignty, having been voted for by the citizens, and which the constitutional courts in these countries derives their authority from.[167] She observes that in Kenya for instance, the courts have been able to stand firm against some of the executive and the legislature's decisions as was the case in Mumo Matemu's case where the Supreme Court nullified his appointment as a chair of a commission on integrity grounds.

Finally, Michaela discusses the doctrine of political question, the doctrine of judicial deference. She views these two as useful tools in judicial review and she points out the need for some issues

[163] Ibid p.339.
[164] Ibid p. 392.
[165] Ibid p.393.
[166] Ibid.
[167] Ibid. 390.

to be exempted from judicial scrutiny.[168] She advocates for a principled form of judicial deference and she is against it being used on a case-to-case basis like the way it is practised in German constitutional court where the court cannot base its use on the established doctrinal concept.[169] Michaela's excerpt is well-argued but fails to define concepts such as judicial deference and political question. It also fails to analyze the relevant theories on deterrence on the judicial deference.

James Gathii's article is a response to a critique by Samuel Moyn on judicial review and his advocacy for 'judicial modesty'.[170] He rejects Moyn's view that judicial overreach has become a global menace and also rejects Moyn's proposal for judicial modesty.[171] Gathii hails the Kenyan and South African constitutions for empowering courts in their role of judicial review and authorizing courts to develop the law.[172] Gathii disagrees with Moyn who criticizes courts globally for being in a state of juristocracy where judges through judicial activism are engaged in expanding human rights beyond the statutory provisions.[173] Gathii also disapproves of Moyon's idea when he warns his readers about judicial activism which he says is capable of ending 'popular self-rule'[174] with its counter-majoritarian effect. According to Gathii, Moyn exaggerates the dangers of judicial review and states courts are important fallback institutions whenever the majority threatens the rights of minorities.[175]

[168] Ibid p. 394.
[169] Ibid.
[170] James Gathii, 'Beyond Samuel Moyn's Counter-majoritarian Difficulty as a Model of Global Judicial Review' (2019) V and. J. Transnat'l L. p. 1237.
[171] Ibid.
[172] Ibid.
[173] Ibid p. 1239.
[174] Samuel Moyn, 'Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory', (2019) 52 VAND. J. TRANSNAT'L L. 1135 p. 1160.
[175] James Gathii, 'Beyond Samuel Moyn's Counter-majoritarian Difficulty as a Model of Global Judicial Review' (2019) V and. J. Transnat'l L. p. 1242.

Joseph Isanga's article discusses judicial review in Africa and the judicialization of politics. He observes that increasingly, African Courts are getting involved, through judicial review, in policy-making; which he terms as Judicialization of politics.[176] Isanga makes a case for constitutional courts being involved in policymaking and notes that even if these courts often adopt a positivistic approach, they do influence policy.[177] He does not however reconcile his support for courts being involved in policymaking with the theory of separation of powers and the counter-majoritarian aspect of his approach. To make judicial review in Africa more effective, Isanga call for an African model of judicial review which he feels would be more appealing to the African political elites.[178] He does not describe how this model should look like. What he does instead is to propose that African countries should borrow more from each other as opposed to borrowing more from outside Africa.[179]

Cecil Yongo[180] delves into the debate of Kenyan courts' narrow versus broad interpretation of the Constitution which then informs the powers of the courts. She makes a case for a narrow interpretation approach. She cites article 81, which the Supreme Court used to adopt a "broad principle" approach, as one which can be interpreted in different ways. Yongo opines that the Supreme Court ought to have taken advantage of the different ways of interpreting the provisions of article 81 to validate the narrow-based interpretation approach. She terms the court's "broad principle" approach as unfortunate.

[176] Joseph Isanga, 'African Judicial Review, the Use of Comparative African Jurisprudence, and the Judicialization of Politics', (2017) Concordia University School of Law, p. 750.
[177] Ibid.
[178] Ibid p. 752.
[179] Ibid p. 799.
[180] Cecil Yongo, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' (2019) 27 Afr J Int'l & Comp L 203.

She states that this constitutional interpretation approach is not only bad to the community but to law students who grow up believing that the broad-based approach is the best in interpreting the constitution. She claims that judges have been over-powered and not limited. Yongo says it is about time that narrow constitutional interpretation is given a chance just as liberal interpretation was. She sees no danger of such a move. She backs judicial restraint as the way to go for democratic self-government. She cites the rise of human rights and the influence of civil society as the cause for the fall of judicial restraint.

In justifying her support for judicial restraint, she cites among other issues, separation of powers and the need to accord the executive enough discretion to effectively perform its mandate. Yongo however recognizes the reason Kenyan courts decided to take a broad approach to constitutional interpretation. She bases the choice for this approach on the Kenyan experience during the dark days which she refers to as the "no rule era".

She however claims that Kenya cannot go back to those days since according to her, there are enough constitutional safeguards to prevent such a situation. That is where she misses the point. She fails to acknowledge the fact that it is very easy to reverse any constitutional gains. She fails to recognize that it is one thing to have a transformative constitution in place and another thing to have constitutionalism. It requires a vibrant and independent judiciary to promote constitutionalism.

Yongo's paper also ignores the negative implications of a narrow-based approach to constitutional interpretation. Her work, therefore, fails to address how these challenges can be overcome if the courts were to adopt her recommended narrow-based approach.

Elijah Oluoch[181] also weighs in on the debate of judicial powers and whether the Kenyan courts should exercise restrain or adopt judicial activism. He observes that the judiciary in Kenya has been accused of interfering with the functions of the other two arms of government. His article seeks to determine how far the judiciary should interfere in the affairs of the other arms of government.

Oluoch observes that the structural design of the Constitution 2010 was meant to entrench the doctrine of separation of powers. He states that this was a deliberate effort to tame the overbearing executive that had dominated the other two arms for four decades since independence. He then delves into the question of courts' powers.

Oluoch asserts that the courts' powers to determine matters concerning the constitutionality of the actions of other branches of government put the role of the courts in direct conflict with the doctrine of separation of powers. As to the extent to which the courts should intervene in the functions of other branches, Oluoch quickly invokes the doctrine of legitimacy. He claims that the courts lack the mandate of the people and therefore, the courts' powers should be restrained. He cites the reasons for his support for judicial restraint as courts' lack of popular mandate and the need to protect the judiciary from the political processes.

When Oluoch states that the courts lack the mandate of the electorates, he ignores one fundamental fact. The judiciary, just like the other two arms, exercises the sovereignty donated to it by the people of Kenya under the Constitution.[182] On the question of the importance to protect the judiciary from politics which he bases as the reason why the courts should exercise restraint, he is

[181] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95.
[182] Constitution of Kenya 2010 art. 1 (3) (c).

reminded by Gath Mugnai that the court's function is to interpret the Constitution and that the Constitution is both a legal and political document.[183] For this reason, it is difficult to separate the courts from the political processes.

Oluoch then proposes that the courts should only intervene with actions of other branches when such actions are in clear contravention of the constitution. He fails to show instances when the courts have struck down the action of another branch of government without declaring such an act unconstitutional. Oluoch asserts that even where courts decide to strike down the action of another arm on constitutionality grounds, the court should remain within the self-imposed limits. He fails to clearly describe the instances when "self-imposed" limits should be invoked. Oluoch paper, though well-detailed on the importance of judicial restraint in the exercise of judicial powers, fails to acknowledge the shortcoming of this approach. He therefore does offers no remedy to such shortcomings.

Jeremy Waldron's Essay goes beyond criticizing judicial activism to attacking the concept of judicial review.[184] He rejects the idea that rights can only be protected through judicial review.[185] He argues that these rights can be protected by a democratic legislature.[186] This study argues that the arguments propounded by Jeremy can only apply in an ideal country where the three arms of government work faultlessly; a phenomenon that does not exist in the real world.

Thomas Hobbes once opined that upon the establishment of an entity called the government, it was realized that this entity was capable of abusing its power if left unchecked.[187] This necessitated

[183] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1. p.1.
[184] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) the Yale law Journal p. 1346.
[185] Ibid.
[186] Ibid.
[187] Thomas Hobbes, 'Leviathan' (1651) C.B. Macpherson (ed) (Penguin 1968) 183–90.

the creation of checks and balances.[188] The judiciary, being 'the least dangerous' arm of government,[189] was charged with the role of ensuring democracy is not abused.[190] It is not surprising therefore that some authors like David Law rightfully describes judicial review as the most important function of the judiciary.[191]

Justice Richard Posner is one of the greatest proponents of pragmatism in judicial review. He opines that Legal pragmatism should not be taken as a 'fancy term'.[192] To him, judicial pragmatism involves considering, by the judges, the systemic consequences of a decision and not just the consequence of a specific case.[193] He argues that the ultimate test for pragmatism is reasonableness.[194] He posits that under pragmatism, judges are not obliged to look at all possible consequences of a decision and further that pragmatism regards adherence to precedents as a necessity but not a duty.[195]

Richard A. Epstein had attacked Posner's pragmatism. Posner admits that he does not like the word 'pragmatic' and that he does not have a clear understanding of its meaning.[196] He argues that Posner's support for judges to apply 'reasonableness' when deciding a case can only mean that the judges will not be constrained when deciding hard cases.[197] More discussion on the theory is to be found in the theoretical framework section.

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[188] Luis Gabriel Franceschi, Linet Muthoni and Emmah Senge Wabuke, 'Judicial Review and Public Power in Kenya: Revisiting Judicial Response to Select Political Cases' (2017) Springer International Publishing p. 78.
[188] Ibid p. 106.
[189] Alexander Bickel, 'The Least Dangerous Branch' (1986) Yale University Press.
[190] Tom Ginsburg, 'Judicial Review in New Democracies: Constitutional Courts in Asian Cases' (2003) Cambridge University Press p. 2.
[191] David S. Law, 'A Theory of Judicial Power and Judicial Review' (2008) 97 The Georgetown Law Journal p. 723.
[192] Richard A. Posner, 'Response, "Legal Pragmatism Defended", (2004) 71 University of Chicago Law Review p. 683.
[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] Richard Epstein, 'The Perils of Posnerian Pragmatism' (2004) 71 University of Chicago Law Review p. 639.
[197] Ibid p. 640.

Okogbule and Brown[198] (on page 55) rightfully opine that there are two forms of judicial activism. There is the extreme model of judicial activism and there is also the moderate or conservative model of judicial activism. The extreme model, according to them is where the judiciary dominates the other two arms of government. Here, the courts are very intrusive in the functions of the other arms. The conservative model on the other hand is where the courts respect and observe the doctrine of separation of powers. The courts should only get involved when there is a gap that needs to be filled especially in legislation.

Okogbule and Brown identify two important functions of judicial activism. The first function, according to them is helping in filling the gaps in legislation. The second function is helping in fulfilling the aspirations of the people. They cite the Indian Justice Bhagwan who stated that judicial activism in Indian has helped in enhancing the human rights jurisprudence which has been of great help to the people of India. They also cite Lord Denning who once said that judges are not "timorous souls" and cannot be impotent, incapable or sterile in the face of justice.

Despite these two authors obvious inclination to activism, they acknowledge the negative implications of judicial activism. They associate judicial activism with issues such as violation of the separation of separation principle. They also recognize that there is always the question of political legitimacy when courts are involved in judicial activism. They acknowledge the fact that uncontrolled activism is detrimental to the rule of law where judges try to impose their views and positions on legal matters. They observe rightly that judicial activism undermines peoples' confidence in the judiciary.

[198] Nlerum S Okogbule and Cleverline T Brown, 'Social and Economic Rights and Transformative Constitutionalism in Africa: Imperative of Expanding the Frontiers of Judicial Activism' (2019) 16 US-China L Rev 52.

However, despite all these shortcomings of judicial activism, the two authors hold that judicial activism is a good thing for the actualization and transformation of African societies. To them, and contrary to the views of many, judicial activism has helped to promote the best interests of the majority in society. They assert that judicial activism can be used as a tool for enforcing social-economic rights in transforming the lives of people in society.

Okogbule and Brown make a very strong case for judicial activism and its importance to society. They also distinguish models of judicial activism. However, having recognized the negative implications of activism, they fail to offer a solution in dealing with the shortcomings that they attribute to judicial activism.

Juma and Okpaluba[199] ascribe the trend of constitutional changes in Africa to the changing character of "national, regional and global politics". They claim that the need by Africans to change their constitutions has been caused by failures of the judicial systems in Africa. He accuses the African courts of failing to protect their respective constitutions by not adopting a constitutional interpretation that reflects the changing social economic and political environment.

They are oblivious to the fact that the judicial power itself emanates and must be exercised within the constitution. They are also alive to the fact that courts are not involved in the constitution-making process; the same constitution that stipulates the judicial power. They argue that this notwithstanding, the courts are the guardian of the constitution especially in checking the excesses of the other two arms of government, this power is limited by the constitution. They posit that there are two reasons for the restraint of this power. The first reason is the separation of powers and the second one is to promote the doctrine of constitutionalism.

[199] Laurence Juma and Chuks Okpaluba, 'Judicial Intervention in Kenya's Constitutional Review Process' (2012) 11 Wash U Global Stud L Rev 287.

While accusing the judiciaries in Africa of not interpreting the constitutions in a manner that embraces the social-economic and dynamics, Juma and Okpaluba, acknowledge the context in which these judiciaries operates. They rightly point out that the judiciaries must exercise their powers within the same constitutions which they seek to interpret. They don't propose how these judiciaries are to navigate the constitutions that prevent them from being flexible to the changing socio-economic and political environment.

Kibet and Wangeci's[200] paper takes a very limited approach to the discussion of the doctrine of separation of powers in attempting to address the problem of disobedience of court orders by the executive. Their paper is shallow on the concepts of judicial activism and judicial restraint. They briefly describe judicial activism as a recent phenomenon. They only define it and claim that it is detrimental to the doctrine of separation of powers. This study argues that in dealing with the question of separation of powers, particularly within the context of judicial powers of checking the other arms of government, the concepts of judicial activism and restraint must be sufficiently explored.

Michael Masinde is another Kenyan author who has written on separation of powers and executive-judiciary relations.[201] According to Masinde, the idea of separation of powers is to promote good relationships among the three arms of government and to enhance competence through the allocation of roles.[202] Masinde notes that after the promulgation of the constitution of Kenya 2010, separation of powers has been given new impetus.[203]

[200] Emanuel Kibet and Kimberly Wangeci, 'A Perspective on the Doctrine of the Separation of Powers Based on the Response to Court Orders in Kenya' (2016) 1 Strathmore L Rev 220.
[201] Michael Masinde, 'Separation of power in Kenya: analysis of the relations between judiciary and the executive' (2017) Int. J. Human Rights and Constitutional Studies p. 32.
[202] Ibid.
[203] Ibid p.37.

He then contributes to the judicial activism-judicial restraint debate. He begins by noting that there are no clear definitions for two concepts.[204] He observes that with the expanded role, the judiciary will inevitably encroach on the traditional domain of the other organs of government and this should not be viewed as activism.[205] Maside argues that in Kenya, judges considered as activists are the best suited to check the other two arms of government.[206] This study rejects this assertion on the account that a judge does not need to be an activist for him/her to be in a position to perform the role of keeping other arms of government in check.

Masinde adopts the meaning of judicial restraint that defines the concept as the theory that requires judges to avoid nullifying actions and decisions of other organs of government unless they are unconstitutional.[207] He observes that the attack on the judiciary by the other organs has been based on separation of powers and that the judiciary has used the requirement of checks and balances as a defence.[208] He does not offer any recommendation of how this problem can be addressed.

1.8 The Scope of the Study and Limitations

This study will seek to identify the best approach to the exercise of judicial powers of interpreting the constitution and to checking the other arms of government. The discussion, however, will be limited to the judicial powers to check the executive arm and exclude parliament. The study will also limit its scope to the superior courts. The study will also delve deeper into the judicial activism versus restraint debate. The study will also discuss other related concepts such as the principle of separation of powers, judicialization of politics etc. The study will employ a thorough review of

[204] Ibid p.39.
[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Ibid.

various works from different authors who have written about the subject. This will help in appreciating the different perspectives of approaching the problem.

The study will also conduct a rigorous comparative study to establish how different states have approached the problem. When carrying the comparative analysis, the study will limit itself to the constitutional courts of other jurisdictions.

1.9 Hypothesis

There has been a wrong approach in the exercise of courts powers to interpret the constitution and check the executive arm of government. Judicial activism is not the proper exercise of judicial powers and neither is total restraint. That a solution is not what most authors are recommending. A solution lies in between the two extremes i.e. judicial activism and judicial restraint. That this middle ground can be found. That this is the approach that other jurisdictions have adopted to achieve a harmonious co-existence between the judiciary and the executive.

1.10 Chapter Breakdown

This study comprises five chapters.

Chapter One

Research Proposal

This chapter is on the research proposal. It acts as a guide to the research paper. It provides for the background of the study, the statement of the problem, justification of the study, research questions, the hypothesis, theoretical framework, research methodology, scope of the study, literature review, and chapter breakdown.

Chapter Two

A Critical Analysis of Judicial Response to Select Constitutional and Judicial Review Cases in Kenya.

This chapter seeks to study and analyze the judicial decisions of select cases by the High Court and the Court of Appeal, both pre-2010 and post-2010, to establish whether there has been any shift in jurisprudence occasioned by the promulgation of the 2010 Constitution. This chapter will also review the emerging jurisprudence from the Supreme Court of Kenya. Suffice to state that the cases that will be discussed in this chapter will not offer a comprehensive overview of judicial review cases, which is beyond the scope of the chapter. The chapter will focus on certain select cases (mostly political) which have attracted public attention and elicited a reaction from the political class. The shift of judicial review jurisprudence from pre-2010 to post-2010 will also be analyzed.

Chapter Three

A Case Study of the Jurisprudence of South African, Indian and the United States Constitutional Courts

This chapter will seek to study the jurisprudence of constitutional courts from other jurisdictions regarding the powers of the courts to review actions of the other arms of government through constitutional interpretation.

The chapter will discuss the jurisprudence from the South African Constitutional Court, the Indian Supreme Court, and the United States Supreme Court. The chapter will focus on understanding how these courts exercise judicial review power. The aim here will be to draw lessons from the

success stories of other countries in dealing with the problem of conflict between the judiciary and the executive. The comparative analysis will seek to discover other approaches to the problem.

Chapter Four

Conclusion and Recommendations

The chapter summarizes the findings of this study. The chapter forms the most critical part of the study as it seeks to highlight and offer a solution to the fundamental issues that arise in the course of the study. The chapter will then seek to offer recommendations on the best approach in dealing with the problem that forms the basis of this study.

CHAPTER 2

A Critical Analysis of Judicial Response to Select Constitutional and Judicial Review Cases in Kenya.

2.0 Introduction

On numerous occasions, the judiciary has been called upon to review the decisions of the executive including those of county executives. In these instances, this study argues that the courts need to find a proper balance in the exercise of judicial review so that they are not seen to interfere with what would otherwise be a constitutional mandate of the other organs of government and in this case the executive. This is because violation of the principle of separation of powers undermines democracy. It also hinders development and good governance in general because of the constant wars it causes between the arms of government.

However, whereas separation of power is essential for the good coexistence of the three arms of government, the judiciary ought to be encouraged and facilitated in performing its role of taming the overbearing executive. In doing so, the judiciary ought to be governed by the objective standards of adjudication. The cardinal principle in many constitutions is that the state, including all its organs and officials, must at all times act within the confines of the Constitution. This is one of the requirements of article 2 of the Constitution of Kenya 2010. The doctrine of separation of powers and other privileges or immunity should not be used as a shield to protect the unconstitutional exercise of the executive or legislative powers.

In this Chapter, the study will examine how courts view their role in upholding the Constitution. The method that this chapter will apply is reviewing and analyzing some of the judicial decisions that have been made by the Kenyan courts over the years on this topic. The study will review the

judicial decisions by the High Court and the Court of Appeal, both pre-2010 and post-2010, to establish whether there has been any shift in jurisprudence occasioned by the promulgation of the 2010 Constitution. This chapter will also review the emerging jurisprudence from the Supreme Court of Kenya.

It is worth mentioning from the outset that this chapter does not present a comprehensive survey of judicial review cases since that is beyond the scope of the chapter. The chapter will only conduct a critical analysis of select cases in order to highlight some of the emerging trends in the Kenyan courts with regard to various aspects of judicial review within the context of judicial activism-judicial restraint debate. The chapter will focus more on the political cases that have elicited political undertones and attracted public interest. The main aim here will be to establish how the Kenyan courts view their role in upholding the Constitution.

2.1 The High Court of Kenya

The bulk of judicial review and constitutional matters are litigated in the High Court. Since the promulgation of the Constitution 2010, there has been a major shift in jurisprudence in respect to the exercise of judicial power of review in Kenya and how the courts have interpreted this power. This shift can be explained by several factors.

First is the issue is judicial constitutional authority. After coming to effect of the Constitution 2010, the Kenyan judiciary acquired a special constitutional authority that was lacking in the old constitutional dispensation. Michaela notes that the constitutions that have emerged in the recent past in several African states entrench special power upon the courts to enforce the constitutions.[209]

[209] Michaela Hailbronner, 'Constitutional Legitimacy and Separation of Powers' (2016) Stellenbosch Handbooks in African Constitutional law p. 392.

She cites Kenya and Benin as examples of these countries.[210] She also argues, rightfully, that the fact that these two countries subjected their draft Constitutions for public approval through referenda after a rigorous process of public participation gives the authority of the constitutional courts more impetus.[211]

Franceschi, Muthoni and Wabuke have opined that judicial independence as enshrined in the Constitution of Kenya 2010 has played a huge role in the growth of judicial review and that it has given it new impetus.[212] This judicial independence was lacking under the old constitutional dispensations as several scholars observed.[213]

Another explanation for the shift in the judicial review jurisprudence under constitution 2010 is its provisions in Article 259 states that courts should give effect to the values, principles and purpose of the Constitution when interpreting it.[214] It also requires its interpretation to be done in a manner that advances the Bill of rights and fundamental freedoms[215] and allows the development of the law.[216] This provision has given the courts wider discretion in the interpretation of the Constitution. Some have even argued that it has allowed judicial activism.[217]

Some scholars like Willy Mutunga have even argued that the Constitution through Article 259 provides a theory of constitutional interpretation, a position that was opposed by Professor Githu Muigai in their great debate that was held at the University of Nairobi.[218] Githu argues that Article

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[210] Ibid p. 390.
[211] Ibid.
[212] Luis Gabriel Franceschi, Linet Muthoni and Emmah Senge Wabuke, 'Judicial Review and Public Power in Kenya: Revisiting Judicial Response to Select Political Cases' (2017) Springer International Publishing p. 78.
[213] Makau Mutua, Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', (2001) 23 Hum. Rts. Q. 96 p. 98.
[214] Constitution of Kenya 2010 art. 259 (1) (a).
[215] Ibid art. 159 (1) (b).
[216] Ibid art. 59 (1) (c).
[217] Abdiqani Ismail 'the State of Judicial Activism in Kenya' The Nairobi Law Monthly' 12th Feb 2019.
[218] 'The Great Debate: Prof. Githu Muigai vs. Dr. Willy Mutunga at UoN School of Law' Available at https://www.youtube.com/watch?v=6Pxbvmr2IA4 .

259 only provides principles of constitutional interpretation. Whatever the case, Article 59 has changed the approach to constitutional interpretation in Kenya.

2.1.0 The High Court Pre-2010

The state of the High Court pre-2010 particularly during the Kanu regime was in the words of Makau "subservient to the executive".[219] According to Ochieng, the judiciary did not show any capability or willingness of upholding the rule of law against the interests and the whims of the executive, senior government officials and their cronies.[220] Nowrogee once observed that the more senior the official against whom the Bill of Rights was sought to be enforced, the more difficult it was for the judiciary to assume its role of enforcing human rights.[221] The judiciary lacked the required independence to perform its role.[222] Without independence, the High Court could render shocking decisions that attracted a lot of criticism. The judiciary failed in many instances to uphold human rights.

This study argues that whereas there was, undeniably, an element of judicial interference by the executive behind some of the ridiculous and unjustifiable judicial decisions, a lot of these decisions also had a lot to do with the mere abdication of judicial role by judges in order to maintain status quo.[223] Professor Githu Muigai notes that in a country where "the judiciary is committed to maintaining status quo, it becomes more executive than the executive itself".[224] Here, the court

[219] Makau Mutua, Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', (2001) 23 Hum. Rts. Q. 96 p 98.
[220] Walter W. Ochieng 'Judicial-Executive Relations in Kenya post 2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks in African Constitutional Law p. 288.
[221] Pheroze Nowrojee, 'Fundamental Problems Regarding Fundamental Rights: The Kenyan Experience' in Kivutha Kibwana (ed.), Law and the Administration of Justice in Kenya (The International Commission of Jurists, Kenya Section 1992) 57, 64.
[222] Ibid.
[223] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1.p. 10.
[224] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1.p. 10.

views its role as that of upholding the power of the government to ensure political stability in a country.[225] The court, therefore, ends up abdicating its role of enforcing the Constitution.

According to the distinguished Professor, the courts uses several strategies to justify abdication of its constitutional duties.[226] One of them includes denying jurisdiction. The other strategy is denying the petitioner locus. In both of these strategies, the judiciary dismisses cases in the preliminary stages. Another strategy is interpreting the constitution narrowly and in a pedantic manner. In some instances, the court can subvert not only the spirit of the constitution but also its letter to achieve a political goal.

In his article which was published in 2004[227], Githu Muigai observed how the judiciary would manipulate technical rules to achieve political goals. Suffice to mention that this was the general state of affairs and feeling among Kenyans about the Kenyan judiciary. It does not mean there were no instances where the courts decided against the government. The following cases will illustrate the general state of affairs post-2010 in the Kenya judiciary.

In Gibson Kamau Kuria vs. Attorney General,[228] (unreported) the petitioner moved to the High Court seeking a declaration that his movement rights were violated when the government confiscated his passport thereby denying him the freedom to travel in and out of Kenya. The Court held that section 84 that granted the High Court jurisdiction to enforce the Bill of Rights was not in operation since no practice rules were in place to guide on how one would access the court to enforce the Bill of Rights.

[225] Ibid.
[226] Ibid.
[227] Ibid p. 9.
[228] Miscellaneous Civil Application No 550 of 1988.

This ruling attracted a lot of criticism since by the time this decision was being rendered, a lot of cases going as back as twenty years had been litigated on the said section. Some have argued that the status of the applicant as a leading critic of the government played part in the government decision to depart from the existing precedent and to deny its jurisdiction of determining the application for enforcement of the Bill of Rights.[229]

A similar decision was arrived at in Maina Mbacha and Two Others v. Attorney General[230] (unreported). In this case, Justice Dugdale declined to enforce section 84 of the repealed constitution that conferred the High Court with original jurisdiction to enforce the Bill of Rights. The High Court held that the repealed Constitution in, Section 84, was not in operation. The Court premised its decision on the fact that there were no rules of procedure were in place to enforce the Bill of Rights. The Court proceeded to dismiss the case for lack of jurisdiction. The original jurisdiction conferred upon the High Court to enforce the Bill of Rights was therefore rendered dead-letter law.

As Gath had observed about this Court, these two cases are classical examples of manipulation of technical rules to achieve political objectives.[231] This study opines that no court, applying objective standards of adjudication, would arrive at such a decision. The argument that the Court which had express jurisdiction under the Constitution lacked the same jurisdiction for the insistence of rules of procedure is disturbing. If a constitution confers authority upon a body to do something, such constitutes inherent authority unless the same Constitution limits such authority.

[229] Algeisa Vazquez, 'Is the Kenyan Bill of Rights Enforceable After 4th July, 1989?'(1990) 20 The Nairobi Law Monthly 7. See also Walter W. Ochieng 'Judicial-Executive Relations in Kenya post 2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks in African Constitutional Law p. 290.
[230] Nairobi High Court Miscellaneous Application No. 356 of 1989.
[231] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1.p. 10.

Another instance of abdication of constitutional duty by the judiciary in order to maintain the status quo and achieve political goals was when the court decided to uphold the executive's decision to stop LSK from leading the crusade against the one-party system and its support for the reintroduction of the multiparty system. When Paul Muite assumed the position of LSK Chairman, he pushed the government to allow political opposition.[232]

Four Members of LSK allegedly working on behalf of the Attorney General petitioned the High Court to Stop the LSK Chairman and other LSK council members from; taking part in any political activities, making political statements that had the potential of causing political disaffection and stopping him from presiding over or participating in any LSK council meetings.[233] Justice Dugdale who was a contact judge at the time allowed the petition which was later upheld by Justice A. Mango.

This Judge noted that the action of LSK of pushing the government to allow for multiparty democracy amounted to inciting the members of the public to defy the law and that it created contempt to the lawmakers.[234] The judge stated that it was not for the LSK to advise the members of the public that their version was the right one and not that of the government as this amounted to confusing the public. Makau notes that such a statement from the Court was chilling[235]

In yet another case where for political reason the High Court sided with the ruling party to deny peoples their rights, Justice Akiwumi declined to allow a petition by a Kanu member who claimed

[232] Makau Mutua, Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23 Hum. Rts. Q. 96 (2001) p 114.ri.
[233] Ibid.
[234] Aaron Gitonga Ringera & 3 Others v. Paul K. Muite & 10 Others, Civil Suit No. 1330 of 1991(30 Apr. 1991).
[235] Makau Mutua, Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23 Hum. Rts. Q. 96 (2001) p 114.

that the nomination process by the party denied him certain constitutional rights.[236] The High Court stated that it lacked jurisdiction to determine the constitutionality of the actions taken by Kanu in respect to an aspirant's political rights. This was despite the fact that the High Court enjoyed unlimited original jurisdiction to hear such matters. The Court held that Kanu had the discretion to determine its rules of political processes without judicial review.

These are just some of the numerous cases that can be used to illustrate the dominant culture in the Kenyan judiciary which was generally a manipulation of technical rules in order to achieve political objectives,[237] as Githu had observed. It can also be said that the judiciary lacked the required independence to effectively perform its constitutional mandate. In Kibaki's Regime, before 2010, judicial independence was much improved with several reforms that would finally culminate in the promulgation of the Constitution of 2010 which provides for an independent judiciary.[238] There was also a major shift in jurisprudence in the manner in which the judicially approached its role of safeguarding the Constitution. The reasons for this shift was explained earlier in the text.

[236] James Kefa Wagara and Rumba Kinuthia v. John Anguka and Ngaruro Gitahi, High Court of Kenya, Civil Case No. 724 of 1988.
[237] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1.p. 10.
[238] Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law-Discussion paper, A review by AfriMAP and the Open Society and Open Society Initiative for East Africa. [2011].

2.1.1 The High Court Post-2010

Introduction

The post-2010 High Court has been radically different from the pre-2010 High Court in terms of its jurisprudence on the judicial power of review and constitutional interpretation. From the cases that are going to be discussed in this section, it is clear that the Court has assumed its role as the principal enforcer of the constitution. This has to do, to a large extent, with the replacement of the repealed Constitution with the 2010 Constitution that ushered in a new dispensation of an empowered and independent judiciary.

The High Court, post-2010, has overturned numerous executive's decisions which is a shift from the previous norm. It is no longer about the need to maintain stability of the political order but safeguarding the Constitution. As it will be demonstrated from the cases discussed in this section, the current judiciary does not seem to care so much about the consequences of its decisions with respect to its relationship with the executive. What seems to be of paramount importance to this judiciary is discharging its constitutional obligation which the Court cites in every case in which its jurisdiction has been questioned.

Cases Touching on Appointment and dismissal of Persons in High Public Offices

The following case illustrates how the post-2020 high court is firm in upholding the Constitution.

In Community Advocacy Awareness Trust and Others v Attorney General of 2011[239] was one of the first cases in which the executive's adherence to the provisions of the newly enacted Constitution was challenged. This case was brought before the Court by a group of community-based organizations, trusts and registered associations challenging the appointment of the

[239] Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others [2012] eKLR.

Chairperson of the National Gender and Equality Commission. The petitioner claimed that the appointment did not meet the Constitutional threshold. The Court stated that the Constitution 2010 requires appointments to the public offices to be done in a manner that is competitive, transparent, promotes equality equity and adheres to the values and principles of governance.[240] The Court affirmed its duty of interpreting the constitution whenever a petition of its violation is brought before the Court.[241]

The Court observed that the Constitution 2010 ushered in a new dispensation which was a break from the past where appointments were characterized by favouritism, corruption, nepotism, tribalism, political patronage, and scraping the barrel.[242] The court observed that the work of an appointment panel is to safeguard the appointment process from the above. The court dismissed the petition on the ground that the appointment process was not disputed.[243]

Another case was the matter of Judicial Service Commission v. Speaker of The National Assembly & 8 Others.[244] This case brought into focus the tension that had emerged under the newly promulgated Constitution in respect to the doctrine of separation of powers and the relationship between the arms of government and the state organ when discharging their respective constitutional mandate. The question, in this case, was whether the president was within the Constitution when he, with the recommendation of the National Assembly, appointed a tribunal to remove some members of the Judicial Service Commission. The Court held that since there was

[240] Ibid [1].
[241] Ibid [141].
[242] Ibid. [73].
[243] Ibid [85]
[244] Petition No 518 of 2014 eKLR.

an existing order restraining Parliament to continue with the process leading to the appointment of the tribunal, the president's action was invalid.

The High Court further held that the President had power, with the recommendation of the Parliament, to constitute a tribunal for removal of members of the JSC but such power must be exercised within the Constitution. The High Court also observed that the Judicial Service Commission being an independent Commission under the Constitution was not subject to the control or influence of any person or body. The Court proceeded to quash the appointment of members of the tribunal by the president.

In answering the A.G's submission that the Court ought to have exercised restraint since this matter before the Court was a function of parliament, the Court affirmed its jurisdiction by citing article 165 (3) (d) (2). According to this provision, the court has the power to interrogate whether anything said to be done under the Constitution is consistent or is in contravention of the Constitution.

Another case is Matthew Lempurkel v. The Governor, Laikipia County.[245] The claim was that the governor of Laikipia had contravened various Constitutional provisions such as Articles 10 and 232 of the Constitution in the appointment for the county executive committee positions.

The petitioner, a member of parliament, alleged that the Governor had violated the said Articles by not having, in his county executive committee, a single member from the Samburu community. The petitioner also cited a violation of section 35(1) of the County Government Act (Act No. 17 of 2012), by the respondent, which provides that in the nomination of the members of the executive committee, the county governor should ensure that the composition of the executive committee must represent the face of the county in terms of cultural and ethnic diversity. This case required

[245] Mathew Lempurkel v. Joshua Wakahora Irungu County Governor Laikipia County and 2 others (1) [2013] eKLR.

a very careful balancing by the court between enforcing the Constitution and at the same time observing the doctrine of separation of powers.

This study argues that the courts should always be careful not to engage in overturning executive's decisions based on their merits as this would be an encroachment of a territory reserved for the executive and against the theory of separation of powers that warns against such encroachment.[246] The study is of the view that the court should only occupy itself with constitutional procedures on selection, vetting and appointment. If the Court can enforce the procedures as provided in the Constitution, the outcome will generally be acceptable. Ron Fuller once said that if men are forced to act in the right manner, they will generally do the right things.[247]

The Court when dismissing the petition cited the case of FIDA-K & Others v Attorney-General and Others Nairobi Petition No. 102 of 2011 (Unreported) where the Court, with regard to the decision by the Judicial Service Commission to appoint judges, stated that "It is not our mandate to consider the merits of their decision but only whether the choice JSC made was extraneous to the purpose for which the discretion was granted and whether the due process in that regard was followed in the execution of their mandate."

The court also held that that the bodies involved in the appointment process enjoy a margin of discretion in the exercise of their authority. This is in line with the theory of separation of powers. To uphold the doctrine of separation of powers, the courts' duty should not be to review the merits of the executive's decision but to ensure the due process was followed. It is very clear that in cases

[246] James T Brand, 'Montesquieu and the Separation of Powers' (1933) 12 Or L Rev 175. p.176.
[247] L. Fuller, 'Positivism and Fidelity to the Law: A Reply to Professor Hart', (1958) 71 Harvard Law Review, 4, p. 643.

such as the ones discussed above, the courts are mostly concerned with the process as opposed to the merits or outcome of the decision.

The Doctrine of Avoidance in the Kenyan Courts

On a few occasions, the court has exercised avoidance by restraining itself from answering questions that are not within its mandate to do so. The case of Samuel Mugnai Nganga v. The Minister for Justice, National Cohesion and Constitutional Affairs & Another[248] case can illustrate this. The court, in this case, was asked to give an advisory opinion as to who is a full-time state officer and whether members of parliament both at the national and county level are full-time state officers for purposes of Article 77(1) of the constitution.[249]

The petitioner stated that no statute provided for who a full-time state officer is and he was therefore inviting the court to give an opinion on the issue.[250] The court declined this invitation by stating that the court has no jurisdiction to handle hypothetical and abstract matters. It was further held that the jurisdiction of the court of interpreting the Constitution is not exercisable in the absence of a real dispute. This study argues that the court applied the correct approach in this case.

The doctrine avoidance has been described as instances where a court decides not to adjudicate over a dispute that is highly political in nature or political questions that are not justiciable.[251] This matter was clearly not justiciable. In the United States, the Supreme Court as will be seen in the next chapter does not entertain these kinds of questions when brought before the Court. This court in the case of Ashwander v. Tennessee Valley Authority[252] introduced the principle of ripeness

[248] (2013) eKLR.
[249] Ibid [1]
[250] Ibid [4]
[251] Jed Odermatt 'Patterns of Avoidance: Political Questions before International Courts', (2018) International Journal of Law.
[252] [1936] 297 U.S 288.

and stated that the court should not be called up to determine an issue when it is too early based on apprehension. For an issue to be determined by a court, the U.S. Supreme Court held that it must be ripe and based on facts.[253]

The High Court on the Role of the courts in Safeguarding Constitutionalism

Recently the Court declared the establishment, by the President, of the position of Chief Administrative Secretary unconstitutional and that the Cabinet Secretaries who were not vetted for the second term of the president were in office in contravention of the Constitution.[254] The court in this case, while citing the famous Treatment Action Campaign case[255] in South Africa, held that the primary duty of the court is to uphold and protect the constitution and the law. That the constitution expects the executive to protect and promote the Bill of Rights.

The Court further stated that when a policy by the executive is challenged in court, such court must determine whether the executive gave effect to constitutional obligation when formulating the impugned policy. If it is determined that the executive failed to do so, the court must say so. If doing so is seen as an intrusion by the courts in the function of the executive, the Court said that the Constitution allows such intrusion. This study submits that both the principle of separation of powers and the doctrine of political question does not bar a court from declaring a policy unconstitutional. They are only against the court arrogating powers of making policy decisions on behalf of political arms. Louis observed that the doctrine of political question had been used

[253] Ibid.
[254] Okiya Omtatah Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested parties) [2021] eKLR.
[255] Minister of Health and Others vs. Treatment Action Campaign and Others **(**2002) 5 LRC 216**,** 248 [99].

numerously by the American courts.[256] These courts had maintained that their role in judicial review was limited to answering the question of whether the political branches had acted within the Constitution and the law.[257] As to whether the action was done wisely or well, this was a political question that the court was not willing to entertain. The idea of courts making policies also raises the issue of judicialization of politics which refers to reliance on the judiciary to address among other things questions of public policies.[258]

Another recent case where the Court asserted its authority of safeguarding constitutionalism is a case involving the disputed Constitution of Kenya Amendment Bill 2020. In this case[259], the High Court has held that the President or the executive, in general, cannot be is an ordinary Kenyan for purposes of initiating constitutional amendment through the popular initiative. The Court has further held that the president can be sued in his capacity for constitutional violations. The relevant part of the judgment to this study is where the High Court of Kenya again cited the South African Constitutional Court's Judgment that held that the core duty of a court is to the Constitution and the Law. When exercising this duty, courts are required to be impartial and fearless. Constitutionally, the state is required to promote, respect and protect the Bill of Rights.

When a petition challenging a policy by the state is brought before a court, the court is required to examine whether the state considered its constitutional obligation when coming up with such a policy. If the court establishes that the state failed to do this, it is the duty of the Court to say so. If

[256] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.
[257] Ibid.
[258] Ran Hirschl, 'The Judicialization of Politics' The Oxford Book of Political Science (2011) available at https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?source=post_page accessed 28 September 28, 2021.
[259]David Ndii & others v Attorney General & others [2021] eKLR.

by exercising this duty the court is deemed to intrude in the territory of the executive, the South African Court held that this is an intrusion that is mandated by the constitution itself.

Some have seen the judgment of this case as a pure act of judicial activism.[260] The High Court in the above case sought to answer these critics. The court recognized that some pundits have equated instances where the Court has invoked the judicial review to correct the wrongs of the executive as judicial activism.[261] The Court stated that it was convinced that the path it has taken is simply a constitutional path for attaining checks and balances within the separation of powers doctrine.[262] The court rejected the Attorney General's strict interpretation of Article 143 by maintaining that such an approach would mean disregarding the objects, values, purposes, and the spirit of the Constitution as provided under Article 259. The court observed that doing so would (1) undermine accountability from the office of the president to the people and (2) promote impunity and disparage the Constitution.

Prof Githu Mugai, in the appeal case, opined that BBI was a political process and that Courts should exercise restraint in political processes.[263] Justice Musinga of the Court of Appeal, in the BBI appeal case, however, held that the issues raised were not merely political questions but were in their very nature constitutional issues requiring the court's interpretation.[264] The jurisprudential issues emerging in the appeal case will be discussed in a later section.

[260] Silas Apollo & Justus Wanga, 'BBI promoters accuse judges of activism, vow to appeal court ruling' available at < https://nation.africa/kenya/news/politics/bbi-promoters-accuse-judges-of-activism-vow-to-appeal-court-ruling-3400788?view=htmlamp> accessed 15 June 2021.
[261] David Ndii & others v Attorney General & others [2021] eKLR.
[262] Ibid.
[263] Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae) [2021] eKLR.
[264] Ibid.

In yet another case where the court asserted its authority to check the executive against excesses, the court held that the President has no discretion to choose whether or not to appoint judges upon recommendation by the judicial service commission.[265] The Court found the President to be in violation of the Constitution and the Judicial Service Act for failure to appoint judges after they were recommended by Judicial Service Commission for the appointment. These are just some of the numerous cases in which the court has affirmed its constitutional power to safeguard the rule of law and constitutionalism.

Some Instances of Judicial Activism from the High Court

There have been several instances of judicial activism from the High Court. Whether this is positive activism or negative activism can only be judged by analyzing the systemic consequences of such Activism. Pragmatism is always key even in a judicial decision, may they be activist decisions.

In a recently concluded case, the High Court ordered President Uhuru Kenyatta to appoint persons that had been recommended by the Judicial Service Commission for appointment as judges to various levels of the courts within 14 days.[266] According to the judgment, these persons were going to be deemed duly appointed as judges if President failed to appoint them within the 14 days as his power would have expired and his office rendered functus. The High Court allowed the Chief Justice to swear in these person as judges after the lapse of the 14 days whether the president made the appointments or not.

[265] Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR.
[266] Katiba Institute v President of the Republic of Kenya and others [2021] High Court Petition no. 206 [2020] [136].

Several issues arise from this judgment. First, can the Court order the president to perform a constitutional duty? Secondly, what happens when the president declines to comply with a court order requiring him to comply with a Constitutional duty? Finally, can a court 'bypass' a function conferred on the president constitutionally, if the president fails to perform that duty, and declare such a duty as done?

On the first issue, Article 2 provides that the Constitution is supreme and that it bind all persons and all organs of government.[267] The Constitution further provides that one of the guiding principles for the courts and tribunals is to dispense justice without regard to a person status.[268] When it comes to constitutional rights, the High court is the primary enforcer by virtue of Article 23 (1).[269] The President's actions or inactions (being a public officer) are subject to reliefs under article 23 (3) including orders of judicial review.[270]

On the question of the recourse available, if the president decides to disobey a court order, this study posits that the court can only go as far as holding the president in breach of the Constitution. This is because the president while in office cannot be charged with contempt of court, which is a criminal offence, by dint of Article 143 of the Constitution.

The last question is perhaps the one that is controversial and requires interrogation. First and foremost, this study views the decision of the High Court to 'bypass' the constitutional role of the president as an act of judicial activism. Whether it was positive activism or not is a different matter

[267] Constitution of Kenya 2010 art. 2 (1).
[268] Constitution of Kenya 2010 art. 159 (2) (a).
[269] Constitution of Kenya 2010.
[270] Ibid.

altogether. This decision fits in one of the definitions of judicial activism. The decision was heavily result-oriented. This is one of the definitions of judicial activism.[271]

The role of appointing judges is an exclusive function of the president. The Constitution provides in express terms that upon recommendation by the Judicial Service Commission, the President shall appoint all judges in accordance with this Constitution.[272] This study holds that refusal by the president to appoint judges after recommendation by the Judicial Service Commission amounted to a violation of the Constitution that requires (in mandatory terms) the president to perform this duty upon recommendation by the Commission.

However, the Constitution is supreme and binds all[273] (including judges) when interpreting it. Whereas the frustration by the court is justifiable given that the court had previously pronounced itself on the same matter (in Adrian Kamotho case),[274] the judiciary must always operate within the confines of the constitution. What is desirable in a democracy is constitutional supremacy and not judicial supremacy. Judicial supremacy is where judicial pronouncement becomes the law whether it is constitutional or not.[275] The principle of separation of powers should apply to all organs including the judiciary.[276] The constitution does not allow any organ of government to usurp the powers of another organ.

This study argues that that the decision by the High Court that the president's role of appointing judges can be declared functus is contrary to the requirements of a principled approach to

[271] Keenan Kmiek, 'The Origin and Current Meanings of "Judicial Activism"' (2004) California Law Review p.1442.
[272] Constitution of Kenya 2010 art. 166 (1) (b).
[273] Ibid art. (2) (1).
[274] Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR.
[275] Robert Post & Reva Siegel, 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy' (2004) California Law Review, p. 1027.
[276] George Rossman, 'The Spirit of Laws: The Doctrine of Separation of Powers' (1949) 35ABA J 93. p. 93.

constitutional interpretation that this study advocates for. Judicial decisions that go outside the Constitution cannot be said to be principled.[277] Principled here means being 'controlled' or restrained. [278] A principled interpretation of the constitution is important for the legitimacy of the Court.[279] An unprincipled interpretation of the constitution undermines its legal authority.[280] Any theory of interpretation that ignores the text is not good.[281]

Using the theory of pragmatism, the decision by the High Court that the president's role of appointing judges can be declared functus is faulty. The theory of pragmatism requires judges to consider the systemic consequences of a decision, especially in controversial cases.[282] This decision if applied uniformly would mean for every constitutional duty that the president fails to do, anyone can rush to court to have that which was not done declared as done. This would cause an untidy situation in governance. Moreover, any theory of interpretation that leads to a decision that is contrary to the provision of the Constitution is not a good theory because it undermines the rule of law.[283]

In another controversial ruling, the High Court barred the Governor of Samburu from continuing to perform his official duties pending the hearing and determination of a graft case against him.[284] This study argues that this decision was activist since it was 'result oriented' but it was not

[277] Martin Redish and Matthew Arnould, 'Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" (2012) Alternative, 64 Fla. L. Rev. p. 1523.
[278].Ibid p. 1485.
[279] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) E Afr LJ 1. p.1
[280] Ibid.
[281] David Strauss, 'What is Constitutional Theory?' (1999) 87 California Law Review. p. 581.
[282] Richard A. Posner, 'Response, "Legal Pragmatism Defended", (2004) 71 University of Chicago Law Review p. 683.

[283] Richard H. Fallon, Jr., How to Choose a Constitutional Theory, (1999) 87 CALF. L. REV. 535. p. 539.
[284] Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR [58].

pragmatic. As mentioned earlier Pragmatism requires judges to take into account the systemic consequences of a decision because making it.[285]

First, the decision can be abused by malicious individuals to settle political scores or people with vested interests to achieve selfish ends. Secondly, a uniform application of this decision would be impractical and counterproductive where both a governor and his/her deputy governor are both implicated in graft. Thirdly, applying the decision in instances where a governor who for some reason does not have a sitting deputy, like had been the case in Nairobi for a long time under the former Governor Mike Sonko, would also face challenges. This decision, therefore, however well-meant, would fail the pragmatism test.

In another case, Justice Mumbi Ngugi in enforcing social-political rights ordered the state to report within 60 days the current state of state's policies and programs on food and housing for the marginalized groups and within 90 days to report on the measures it had put in place in order to meet the petitioners' social-economic rights.[286] First, this decision appears to be result-oriented. Secondly, the decision raises the question of judicialization of politics which refers to the over-reliance on the judiciary to answer inter alia issues of public policy.[287] The political question doctrine also arises here. This is where a court is called upon to decide upon an issue meant for other bodies.[288]

In fact, when this matter came before the Court of Appeal, it was dismissed entirely on the basis of the doctrine of political question where the Court of Appeal cited article 20 (2) and 20 (4) of

[285] Richard A. Posner, 'Response, "Legal Pragmatism Defended", (2004) 71 University of Chicago Law Review p. 683.
[286] Mitu-Bell Welfare Society v Attorney General & 2 others (2013) eKLR
[287] Ran Hirschl, 'The Judicialization of Politics' The Oxford Book of Political Science (2011) available at https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?source=post_page accessed 28 September 28, 2021.
[288] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.

the Constitution which requires the courts to limit itself from the matters at hand.[289] The Court of Appeal however upheld the High Court decision that the courts had the power to enforce social-economic rights but agreed with the Court of Appeal decision to overturn the High court decision requiring the state to furnish the Court with policy programs towards the realization of social-economic rights for the marginalized groups.[290] The Supreme Court was being pragmatic when it held that this order by the High Court was not going to be beneficial to the petitioner. Posner argued that the test for pragmatism is reasonableness.[291]

The High Court's jurisprudence on the Role of the Judiciary in Political Processes

Another area that requires interrogation is how the High Court of Kenya has dealt with political matters once they are brought before it. Many have argued that political processes and decisions should be left to political actors and that the courts should keep off. A review of several cases of political nature brought before the court reveals that the High Court has been entertaining political cases. The High Court in 2013 stated that it has jurisdiction to intervene in functions of other organs.[292] The Court further stated that the extent the Court may go in doing so is a second level of inquiry that is based on the circumstances of each case.[293] The High Court stated this in the case of Frank Mulisa Makola v Felix G. Mbiuki & 4 others.

The petitioner, in this case, had moved to court to challenge the election of the speaker in the county assembly of Machakos. He averred that the manner in which the election was conducted contravened constitutional principles and violated his constitutional political rights. The petitioner

[289] Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR.
[290] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR
[291] Richard A. Posner, 'Response, "Legal Pragmatism Defended", (2004) 71 University of Chicago Law Review p. 683.
[292] Frank Mulisa Makola v Felix G. Mbiuki & 4 others [2013] eKLR.
[293] Ibid.

alleged that the county representatives were bribed, intimidated and unduly influenced to vote for the Speaker. He claimed that Governor and his deputy induced the representatives to vote for Mr. Mungata and the entire electoral process was skewed in his favour of the impugned speaker. The petition was dismissed for lack of sufficient evidence of the alleged acts of intimidation and bribery.

The Court declined to set aside the election of the speaker since there was no clear violation of the Constitution in the manner in which the speaker was elected. The Court further observed that doing so would amount to a violation of the doctrine of separation of powers. The Court stated that the doctrine of separation of powers demands that the court does not interfere with standing orders of parliament.

The Court however noted that the three arms of government are all subject to the authority of the Constitution. The Court further noted that the High Court has the power to strike down actions of the other arms if they violate the Constitution. The court stated that the doctrine of separation of powers cannot be used to shield the legislature or the executive from judicial scrutiny when their actions are unconstitutional. This notion conforms to a holding in another High Court judgment that handed down in 2012.

In that judgment[294], the Court again quoted the judgment in the South African case stating that where a government policy is in contravention with the Constitution, it is the constitutional duty of the court to say so. Further, if the action of the court to declare a policy to be unconstitutional is to be viewed as an intrusion of another organ's functions, then that intrusion is mandated by the Constitution.

[294] Ibid.

It is evident that since Kenya promulgated the current Constitution in 2010, the High Court's jurisprudence has been that the judiciary is the main custodian of the Constitution and that the courts will always intervene in the functions of other organs whenever there is a clear violation of the constitution. The Court has however stressed that its role is not to perform the functions meant for other organs of the government. Its role is purely to enforce the Constitution.

In the case of Martin Wambora v. Speaker County Assembly of Embu & 5 Others[295], the question was whether the court could issue conservatory orders stopping an impeachment process for the governor of Embu on the ground that the county assembly and senate decided to proceed with the impeachment of the petitioner against an existing court order. The Court stated that when the County Assembly its constitutional and statutory duty under Article 181 and Section 33 of the County Government Act respectively, it is the County Assembly to ascertain that the legal threshold for impeachment has been met and not the court.

The Court went on to state that its role cannot come before the County Assembly's inquiry role. Further, the Court stated that its role is not to review the merits of the Assembly's decision. The court has maintained this jurisprudence even in the most recent cases.

In Mike Sonko Mbuvi Gideon Kioko v Clerk Nairobi City County Assembly & 5 Others,[296] The Court was emphatic that the impeachment of a Governor is a mandate of the County Assembly and the Senate. The Court further held that courts have a duty to intervene but only when the fundamental rights of the petitioner have been infringed and the Constitution is threatened. In arriving at this holding cited the case of Anne Mumbi Waiguru v. County Assembly of Kirinyaga and Charity Kaluki Ngilu v County Assembly of Kitui & 2 others.

[295] [2014] eKLR.
[296] [2020] eKLR.

The High Court in Anne Mumbi Waiguru v. County Assembly of Kirinyaga[297] stated that it was not in its place to determine whether the allegations brought before the County Assembly met the threshold for instituting an impeachment process. According to the Court, the issue of threshold forms the substance of impeachment motion and therefore the County Assembly is the best placed to determine it. The Court went further to state it can, through its supervisory jurisdiction, comment on the issue of threshold but that this is best done after the fact.

The High Court's jurisprudence in the Enforcement of Social Economic Rights

This is one of the areas where the High Court's jurisprudence on the role of the judiciary in influencing policies in Kenya can be interrogated. In South Africa, as will be illustrated in the next chapter, the Constitutional Court has on several occasions broken away from the limitations of the doctrine of separation of power to push the executive's implementation of certain policies in order for social-economic rights to be realized.

In what would be viewed by some as an activist approach on the part of the High Court, Justice Mumbi Ngugi issued supervisory orders which required the state to report to the court showing progress that had been made in the resolution of a case on social-economic rights.[298] The learned judge noted that the social-economic rights are to be realized progressively. However, she held that the Executive has a constitutional duty to demonstrate to the Court its plan and measures that are already in place in ensuring a progressive realization of social-economic rights. In particular, the Judge required the executive to show the court how the rights of the petitioners fit into its policies. Justice Ngugi directed inter alia that:-

[297] [2020] eKLR.
[298] Mitu-Bell Welfare Society v Attorney General & 2 others (2013) eKLR.

"That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements….That the parties report back on the progress made towards a resolution of the petitioners' grievances within 90 days from today."

This decision by the High Court would later be set aside entirely by the Court of Appeal. The Court of Appeal held inter alia that the doctrine of political question and the constitutional provisions in article 20 (2) and 20 (5) provide that a trial court should limit itself from interfering with the policy decisions of a state with regard to allocation of resources towards the progressive realization of economic rights simply because the court has a different idea on how much should be done.[299]

When this matter was finally bought before the Supreme Court for determination, the Supreme Court upheld the courts' power of enforcing realization of social-economic rights progressively by requiring the state to take legislative, policy and other measures in ensuring social-economic rights are realized progressively.[300] The Supreme Court however agreed with the Court of Appeal decision to overturn the High Court's order requiring the respondents to demonstrate to the court, through a report, the current policies, plans and programmes aimed at ensuring that the right to housing and shelter is realized. The Supreme Court held that this order was not of any beneficial remedy to the appellants.

The prevailing jurisprudence in Kenya is that the judiciary has the power to enforce social-economic rights against the state. This is in line with Article 43 as read with Article 23 (1) of the constitution of Kenya 2010. The Articles provides that every person has rights to social-economic

[299] Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR.
[300] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR.

rights and that the High Court has the authority to enforce the Bill of Rights respectively.[301] Social-economic rights is therefore a justiciable issue and failure by the states to show efforts toward the progressive realization of social-economic rights should invite courts' intervention.

Michaela has even argued separation of powers out to be understood in a broader sense than the traditional understanding which is simply the prevention of concentration of power.[302] She argues that separation of powers should now be understood to encompass efficiency while constitutionalism should entail the enforcement of social-economic rights by the courts.[303]

2.2 The Court of Appeal of Kenya

2.2.0 Court of Appeal Pre-2010

The History of this Court is similar to that of the High Court. This Appellate Court was the Highest in the Land before the coming to effect of the Constitution of Kenya 2010. Under the old constitutional dispensation, especially under the Kanu Regime, this Court used to make decisions aimed at maintaining the status quo and upholding the power of the executive. Decisions made by this Court depicted a Court under the control and influence of the executive arm.

2.2.1 Court of Appeal Post-2010

Just like High Court, the Court Appeal post-2010 paints a picture of a court that is ready and willing to exercise its constitutional authority of defending the rule of law and upholding constitutionalism. Most of the decisions by the Court of Appeals shows that the Court while acknowledging the importance of separation of powers, understands that its fidelity is to the

[301] Constitution of Kenya 2010 art. 43 & art. 23 (1).
[302] Ibid p. 392.
[303] Ibid p.393.

Constitution and therefore it is its duty to check the other organs of government against any form of constitutional violations.

One of the landmark decisions made by the Court of Appeal just after the promulgation of the 2010 Constitution was in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others[304] The brief facts of the case are that the appellant (Mumo Matemu) had filed an appeal against the High Court decision of upholding a petition challenging the constitutionality of his appointment as the chairperson of the Ethics and Anti-Corruption Commission based on ethics and integrity. The Court of Appeal upheld the decision of the High Court.

One of the issues that the Court of Appeal was required to answer was whether the High Court had jurisdiction to entertain the matter. On this question, the Court of Appeal answered in the affirmative. The Appeal Court referred to Article 165(3) d and (5) of the Constitution that provides inter alia that the High Court has jurisdiction to determine matters regarding the interpretation of the Constitution, including the power to determine whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of, the Constitution.

Another issue for determination by the Court of Appeal was whether the High Court's decision amounted to usurping the function and powers meant for other arms of government. This Court stated that even though the Court has the power to review the appointments in public service, the courts can only review the procedural issues by not the merits. This is in line with the theory of separation of powers. The Appeal Court faulted the High Court for elevating itself to a vetting

[304] [2013] eKLR.

body of sorts, an action that undermined the principle of separation of powers. The Court of Appeal entirely set aside the decision of the High Court.

The obiter, in this case, was also very informative. In the obiter, the Court commented on the normative ideas enshrined in Chapter six, on leadership and integrity, warning about its application based on what the judges termed as its 'open-textured' nature.

In Attorney General & 6 others v Mohamed Balala & 11 others[305] the Court of Appeal upheld an earlier decision by the High Court that the requirement for presidential authorization for anyone wishing to dispose of or acquire first and second-row beach plots in the Coast was unconstitutional. The petitioner had argued that this requirement had no legal basis and that it was discriminatory since it applied only to the Coast region and not in the whole country. The petitioner sought a declaration from the Court that this requirement was discriminatory and illegal.

The Court of Appeal granted the orders being sought by the petitioner. The Court noted that the requirement for presidential consent was discriminatory and that it contravened constitutional values such as the rule of law, non-discrimination, transparency and equity. Further, the Court noted that the presidential consent requirement was an anachronistic policy that had no place in modern society for its discriminatory nature.

This decision by the Court of Appeal can be seen as a shift from the old constitutional dispensation especially under the Kanu regime where such a policy from the executive was likely to be upheld by the Court. The Court defined the rule of law as the restriction against the arbitrary exercise of

[305] Attorney General & 6 others v Mohamed Balala & 11 others [2014] eKLR.

power by subjecting actions to well defined and established laws. The Court further noted that every citizen including the lawmakers is subject to the law. The Court used Plato's quote where the philosopher stated that,

"Where the law is subject to some other authority and has none of its own, the collapse of the State, in my view, is not far off; but if the law is the master of government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a State."

In a recent case that involved a dispute arising from an initiative to amend the Constitution 2010, the appellants petitioned the Court of Appeal to overturn an earlier High Court decision that declared the initiative and the impugned amendment Bill null and void. This was in the BBI appeal case.[306] Each judge in the case delivered an individual judgment. One of the individual judgments that this of relevance to this study is the judgment by Musinga J.

Justice Musinga, in his judgment, answered one of the issues that came up in the submissions about the political questions around the case. Musinga J. stated that the argument that the case raised political questions could not hold. He argued that the questions raised before the high court were not mere political questions but constitutional questions that needed to be determined by a constitutional court. He noted that the questions raised in the petition could only have been determined by the High Court.

According to justice Musinga, the High Court had the jurisdiction under Article 165 of the Constitution to hear the matter given the nature of the issues that the petition raised. The learned

[306] Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae) [2021] eKLR.

Judge also noted that the judiciary was the best suited to properly and adequately adjudicate the matter. Therefore according to Justice Musinga, the argument by the appellants that the High Court ought to have exercised deference could not hold.

Justice Musinga delved deeper into the controversial question of judicialization of politics, which this study seeks to address in the final chapter. The learned Judge observe rightly that the decision to entertain the case was likely to be perceived by some as "unwarranted judicialization of politics. Justice Musinga reaction to this was what could arguably be more controversial. In his words, Musinga J. stated that.

"…it must be understood that judicialization of politics in our country is a function of the 2010 Constitution that has in several ways widened the scope of the Judiciary, and in particular commands, judges to defend the Constitution".

Justice Musinga admitted that it is a requirement for judges to exercise restraint when it is appropriate and for them to respect the doctrine of separation of powers. However, he noted that whenever any person approaches the courts claiming that an official from the executive or the legislature has violated or is threatening to violate the Constitution, judges must look into the matter and decide one way or the other.

Indeed this study argues that this has been the prevailing jurisprudence since the promulgation of the Constitution. It is only that judges have been restrained in their words to admit that every matter where a petitioner has raised constitutional issues has virtually become justiciable. This study argues that this is where the problem lies and it is only when this issue will be resolved by the judiciary that the war pitting the judiciary against the other arms of government will be resolved.

This study argues that there will always be a constitutional issue that can be raised in all government activities. Given that the judiciary is the one charged with the role of interpreting the

Constitution, does it follow therefore that the judiciary should entertain any petition against the other arms of government simply because a constitutional issue has been raised? This study will seek to answer this fundamental question in the final chapter.

Nambuye J. A when answering the same question about the justiciability of the case quoted an American Constitutional Law book by Prof Lawrence H. Tribe. The distinguished Professor on page 67 refers to the limitation of the court through a description of the subjects that the court has jurisdiction to entertain and also the parties. On the question of justiciability, the Professor opines that the doctrine encompasses principles such as refusal of the court to make declarations to, or to assume jurisdiction over matters which are conferred to other branches of government. The doctrine of justiciability, to him, also entails a refusal to decide issues that are not ripe or those that are mute. The learned judge however noted that the issues that were raised before the Court were constitutional issues and therefore justiciable.

It is evident that the prevailing jurisprudence of the Court of Appeal post-2010 is that issues that touch on constitutional violation are justiciable and that it is the duty of the judiciary to ensure that everything that the government and all its organs do adheres to the dictates of the Constitution. How then does the court balance between democracy and constitutionalism, the former advocating for popular will and the latter advocating for limitation of the powers of popular government? How should the judiciary address the question of counter-majoritarian decisions by courts? These are some of the questions that the last chapter will seek to address.

3.1 The Supreme Court of Kenya

The Supreme Court of Kenya plays a very key role in the growth of law in Kenya. It develops precedents with a binding force on all the Courts below it. The Supreme Court helps in the growth of jurisprudence which is consumed by other courts, legal practitioners, scholars and law students. This Court is a critical player in determining the relationship between the judiciary and other organs of government. This apex Court provides the final avenue where fundamental and weighty constitutional matters are conversed and determined.

This Court has also on several occasions pronounced itself on the issue of the courts' power of judicial review and constitutional interpretation. These decisions are very important as they have a direct impact on broader principles of democracy, constitutionalism and the rule of law. The Supreme Court's approach to constitutional interpretation also determines the success or failure of the concepts of separation of powers and checks and balances.

The prevailing jurisprudence from this apex Court, going by the cases reviewed in this chapter, is that the doctrine of separation of powers whereas important does not bar the judicially from adjudicating a matter of constitutional violation. According to this Court, this is true even when the question before the court is within the constitutional function of another arm or organ of government. This becomes interesting when one appreciates political question doctrine which has had different meanings among scholars.

This doctrine has been defined as a situation where the court is asked to perform a role that is meant for the political branches.[307] Mchalapf argues that the logic in Marbury v. Madison demands that the doctrine of political question can only arise where the constitution has expressly put the

[307] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.

issue being raised before the court in the exclusive jurisdiction of a political branch for determination.[308]

The doctrine of political question had been used quite often by the American courts.[309] These courts had maintained that their role in judicial review was limited to answering the question of whether the political branches had acted within the Constitution and the law.[310] As to whether the action was done wisely or well, this was a political question that the court was not willing to entertain.[311]

Louis rejects these definitions on the basis that they merely describe aspects of justiciability and the duty of the court to respect the functions of other arms.[312] To him, a doctrine has to be more than that.[313] He views this doctrine as a scenario where an issue, which would on the face of it be adjudicated by a court of law, will not be decided by the court but will 'extraordinarily' be left to the political branches to decide.[314]

This Court, like the other courts below it, has affirmed the authority of the judiciary in protecting the constitution against all forms of violation from any person or state organ.

One of the first decisions to be handed down under the newly promulgated Constitution by a newly established Apex Court was the decision in In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (Unreported).

The Supreme Court had the following to say concerning the doctrine of separation of powers;

[308] Scharpf – 'Judicial Review and the Political Question: A functional Analysis. (1966) Yale Law Journal. p. 518.
[309] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid p. 599.
[314] Ibid.

"The effect of the Constitution's detailed provision for the rule of law in processes of governance is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government and that these organs play mutually countervailing roles. In this setup, it is to be recognized that none of the several government organs functions in splendid isolation."

What the Supreme Court was stating here is that checks and balances among the arms of government are part of the separation of powers and that no one arm has isolated roles from other arms of government.

Another leading Supreme Court' decision that provides for this Court's jurisprudence on the judicial power of review and constitutional interpretation is the case of the Speaker of Senate in Senate and Another and the Attorney General and Others.[315] The Court affirmed the authority of the judiciary to determine the constitutionality of the conduct of other branches of government. Supreme Court in its advisory opinion stated that,

"Parliament must always exercise its authority within the confines of the Constitution which is the supreme law of the land.., if Parliament violates the procedural requirements of the constitution, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the constitution."

The Constitution of Kenya admittedly has expressly made the constitutionality of the actions and decisions of the other branches of government a justiciable issue. This puts the role of the judiciary

[315] (2013) eKLR.

in apparent conflict with the principle of separation of powers.[316] The view of this study is that it is upon the Kenyan courts to limit themselves in the spirit of separation of powers by invoking doctrines such as avoidance and deference.

The holding in the case of Trusted Society of Human Rights Alliance v Mumo Mateo & 5 others[317] is in line with this study's view of how the judiciary should exercise its power of review vis-à-vis the constitutional functions of the other arms of government. According to the Supreme Court, in this case, the Constitution has deliberately delegated the sovereign power among the three arms of government and it requires that each arm exercise its functions without the interference of the other two arms.

This, according to the High Court, means that the courts must exercise deference when it is called upon to perform a duty that is within the purview of either the executive or the legislature. According to this Court, the legislature is a vital institution in furthering constitutional democracy through legislation while it is the duty of the executive to implement them. However, the Court, in this case, noted that the courts have a role to interpret the Constitution and that the court has the last word in the determination of the constitutionality of government decisions and actions. The High Court further held that this role is incidental to the doctrine of separation of powers. The Supreme Court of Kenya stated that the justiciability requirement ensures that judges respect the territory of the other branches and reduces the aspects of counter-majoritarian judicial review.

[316] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 101.
[317] [2015] eKLR.

In the case of Justus Kariuki Mate & another v Martin Nyaga Wambora & another,[318] the Supreme Court outlined the principles to be applied by the Courts when observing the doctrine of separation of powers.

According to the Supreme Court,

"(a) each arm of Government has an obligation to recognize the independence of other arms of Government;

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

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

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

(e) in the performance of the respective functions, every arm of Government is subject to the law."

It is clear that the Supreme Court of Kenya recognizes that the principle of separation of powers should be respected by the arms of government. According to the Court, the judiciary should only

[318] [2017] eKLR.

intervene in the functions of other arms of government when their actions contravene the Constitution. Given that almost all actions have a constitutional aspect, the Court should provide guidance by developing a clear jurisprudence on what kind of cases they should exercise deference or avoidance.

3.2 Conclusion

The chapter has established that the Kenyan Judiciary since the promulgation of the Constitution 2010 has assumed enormous powers almost creating a situation that Fowkes refers to as "Judicial Supremacy."[319] From pre-2010 to post-2010 the judiciary has evolved from a once subservient judiciary to a powerful institution that to some seem to be literally dominating the other two arms of government.

In the final analysis, from the review of the cases discussed in this chapter, the jurisprudence from the Kenyan courts is a mixed menu of approaches which suggests a lack of a principled approach to constitutional interpretation as evident in some of the decisions. There is also a lack of proper balance between judicial activism and judicial restraint, as is seen in some of the cases discussed, caused by a lack of pragmatism in decision making. The final chapter will seek to offer recommendations to these problems.

[319] James Fowkes 'Ralationships with Power: Re-imagining Judicial Roles in Africa' p. 215.

CHAPTER 3

A Case Study of the Jurisprudence of South African, Indian and the United States Constitutional Courts

3.0 Introduction

This chapter seeks to review the jurisprudence in selected jurisdictions in relation to courts' power of judicial review. This case study will help in providing jurisprudential ideas, approaches and experiences from other jurisdictions which will be useful in the chapter on recommendations. To provide a proper comparative analysis, the chapter will focus on certain specific variables and analyze how each of the selected constitutional courts has behaved when confronted with similar scenarios.

3.1 The Constitutional Court of South Africa

The Constitutional Court of South Africa has been hailed for its transformative judgments in the interpretation of the constitution.[320] Indeed, some of the decisions that this Court have handed down has been phenomenal especially coming from a court in such a young democracy. This court has handed down numerous decisions that have not been unpopular among the other organs of government.[321]

South Africa adopted a Transitional Interim Constitution in 1993.[322] This Constitution was to operate temporarily as the country embarked on a journey in search of a new constitution. The

[320] Peter E. Quint, "The Most Extraordinarily Powerful Court of Law the World Has Ever Known"? Judicial Review in the United States and Germany, (2006) 65 Md. L. Rev. 152 p. 152.
[321] Ibid p. 107.
[322] Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 U Pa J Const L 205.

Interim Constitution provided for a non-racial multiparty democracy founded on respect for human rights.[323] Apartheid rule ended in 1994 and there was the formation of a democratic government.[324]

The Constitutional Court of South Africa was established in 1995 under the Interim Constitution.[325] It was tasked with laying the jurisprudential groundwork for a great new society.[326] This court was to operate under the interim Constitution and would play a vital role in the making of the new constitution.[327]

In 1996, South Africa promulgated the new constitution.[328] This was a monumental achievement for the people of South Africa given the terrible history of this republic during the apartheid rule. The executive arm led by President Nelson Mandela and Parliament worked hard to create social and institutional structures necessary for the transition to a multi-racial democracy.[329]

Both the Interim Constitution and the new Constitution provided for their judicial interpretation. Section 39 of the new Constitution provides that the court must consider international law when interpreting the constitution.[330] The constitution goes on to provide that the Court may consider foreign law when interpreting the constitution.[331] What may have informed these two provisions is the fact that South Africa was behind in respect to jurisprudence and case law and therefore the need to borrow from both international law and foreign democratic states. Section 39 also provides

[323] Roux, Theunis. "Principle and Pragmatism on the Constitutional Court of South Africa." International Journal of Constitutional Law, vol. 7, no.1, (2009)106-138.
[324] Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 U Pa J Const L 205.
[325] Brice Dickson, Protecting Human Rights Through a Constitutional Court: The Case of South Africa, 66 Fordham L. Rev. 531 (1997).
[326] Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 U Pa J Const L 205.
[327] Ibid.
[328] Constitution of South Africa 1996.
[329] Ibid.
[330] Constitution of the Republic of South Africa 1996, s.39 (1) (b).
[331] Ibid s. 39 (1) (c).

that when exercising its power of interpreting the Bill of Rights, a court of law must promote values that underlie an open and democratic society based on human dignity, equality, and freedom.[332]

Another remarkable shift in the transition to democracy was the change from parliamentary to constitutional supremacy.[333] Until the establishment of the Interim Constitution in April 1994, Parliament was supreme.[334] State power remained unchecked. The legislature could pass a law and the courts had only a procedural reviewing function.[335] Justice Didcott once observed that "our courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it and then implement it in accordance with the interpretation of it".[336]

The promulgation of the Constitution of the Republic of South Africa saw an empowered Constitutional Court. The Constitutional Court could at times uphold the government actions and other times strike them down.[337] At one time, the newly elected president Nelson Mandela complained on national television following the outcome of a case in which the government was a party but expressed his unqualified acceptance of the dispositive force of the court.[338] The relationship between the executive and the court in South Africa however remained one of mutual respect[339] and is the case even today.

[332] Ibid s. 39 (1) (a).
[333] Jeremy Sarkin, 'The Political Role of the South African Constitutional Court' (1997)114 S African LJ 134.
[334] Ibid.
[335] Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 U Pa J Const L 205.
[336] Nxasana v. Minister of Justice & Another 1976 (3) SA 745 (D).
[337] Johann Kriegler, 'The Constitutional Court of South Africa' (2003) 36 Cornell Int' lLJ 36.
[338] Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 U Pa J Const L 205.
[339]Ibid.

The Constitutional Court of South Africa has been hailed as one of the most transformative courts among the new democracies.[340] Kenya Court and indeed courts in many jurisdictions borrow heavily from the decisions and the jurisprudence of the Constitutional Court of South Africa.

The first case on social-economic rights that was brought before the Constitutional Court of South Africa was the case of Soobramoney v Minister of Health (KwaZulu-Natal).[341] In this case, the appellant who was suffering from renal failure had appealed, to the Constitutional Court, the decision by the High Court to dismiss his petition seeking to enforce his social-economic rights. The High Court had declined to issue orders compelling the state hospital to admit him. The hospital had denied him admission on the ground that he wasn't a suitable candidate since he was also suffering from Ischemia making him ineligible for transplant. The hospital cited scarcity of resources as the reason for the appellant's denial of admission.

When this matter finally came before the Constitutional Court, the Court upheld the decision of the High Court. The Constitutional Court held that the hospital authorities had acted reasonably and that enforcement of social-economic rights depended on the availability of resources. This study holds this decision served to undermine the authority of the constitution. If the courts were to allow the defence of 'scarcity of resources' from the state every time such a case is brought before the court, the constitutional provision guaranteeing social-economic right would be rendered meaningless.[342]

[340] Roux Theunis, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) International Journal of Constitutional Law, vol. 7 p. 106.
[341] 1998 (1) SA 765 (CC),
[342] Lynn Berat, 'The Constitutional Court of South Africa and jurisdictional questions: In the interest of justice?' (2005) Icon-international Journal of Constitutional Law p.66.

Two years later, the Constitutional Court was confronted with another social-economic rights case. This case closely resembles Kenya's famous 'Mitu-Bell case'.[343] This time the Constitutional Court of South Africa attempted to craft a jurisprudential framework on the enforcement of these rights. In this case, (Government of the Republic of South Africa and Others v Grootboom and Others[344]) the petitioners appealed against eviction from private land where they had camped as squatters. This land was meant for the low-cost housing project and these squatters had been waiting for years for the low-cost houses to be built. The government ordered their shanties to be demolished using bulldozers destroying the little possessions that they had.

When this matter went before the High Court, the government was ordered by the Court to resettle them and buy for them all the necessities they needed to survive. The High Court cited section 26 of the Constitution that provided for the right to housing. The state under this section was required to enact the necessary legislation to help in the progressive realization of the right to housing.[345] Despite the court finding that the constitution did not place a mandatory obligation to the state to provide shelter for the homeless, it used section 28 (1) (c) to hold that children had an absolute right to shelter and since the parents had to leave with their children, the parents were entitled to these shelters.

When this matter came before the Constitutional Court, this Court overruled part of the High Court's finding and upheld part of it. On s. 28, the court held that the High Court's interpretation was faulty to the extent that it gave parents who would otherwise have had no absolute right to shelter through their children.[346] The Court held that the correct interpretation of this section is that

[343] Mitu-Bell Welfare Society v Attorney General & 2 others (2013) eKLR.
[344] 2000 (11) BCLR 1169 (CC).
[345] Constitution of South Africa s. 26.
[346] 2000 (11) BCLR 1169 (CC) [77].

the primary duty of sheltering children rested on the parents and that government's responsibility was secondary.[347]

Although the Constitutional Court agreed with the High Court that there was no obligation on the state to provide housing on demand, the Constitutional Court gave provision of section 26 a wider interpretation. The Constitutional Court held that this provision required the state to put in place 'coherent' policy that would provide homes to the homeless. The Court did not, however, define 'coherent'. The Court's decision was based on 'reasonableness' and the main question here was whether it was reasonable to require the state to provide homes for the homeless under section 26. Avoiding getting too much into the policy decision which is a mandate of the executive the Court refused to delve into the question of whether there were better measures that could have been put in place or whether there were better ways of spending public money.[348]

This was a very balanced exercise of power Constitution interpretation. It was sound and pragmatic. The court was restrained in applying its power of enforcing the social-economic right. This study would recommend this kind of approach to constitutional interpretation.

One of the cases which Kenyan courts have cited numerously is the case of Minister of Health & Others v Treatment Action Campaign.[349] This case was important to the people of South Africa because it involved the state's unsatisfactory response to HIV and AIDS that had killed a lot of people in this country.[350] In this case, the Court affirmed in clear terms the supervisory powers

[347] Ibid para [77].
[348] Ibid para [41].
[349] [2002] 5 SA 721(CC).
[350] Mark S. Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective', (2003) 6 Chap. L. Rev p. 147.
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of the Judiciary. The Court asserted its authority of oversight on the implementation of the right to health by the state. In paragraph 99 of the judgment, the Court stated that;

"Where State policy is challenged as inconsistent with the Constitution, a court has to consider and determine whether in formulating and implementing such policy the State has abided by its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. And so far as this may be seen as constituting an intrusion into the domain of the Executive, this is an intrusion mandated by the Constitution itself."

The Constitution Court of South Africa applied judicial activism effectively in this case to enforce social-economic rights guaranteed in the Constitution.

Another decision that has featured numerously in the Kenyan Courts is the holding of the Constitutional Court of South Africa in the case of Doctors for Life International v Speaker of the National Assembly and Others.[351] In examining the extent of the court's intervention in the legislative process, the Constitutional Court of South Africa stated that;

"The court should always strive to achieve the appropriate balance between its role as the ultimate guardians of the Constitution and the rule of law and requirement of the principle of separation of powers".

The Constitutional Court of South Africa has over the years developed rich jurisprudence in respect of courts power of constitutional interpretation and judicial review. The Court has had to carefully strike a jurisdictional balance in order to maintain, and effectively discharge, its role of defending the Constitution while at the same time adhering to the principle of separation of powers.

[351] (CCT12/05) [2006] ZACC 11.

To a large extent, the Court has been able to balance between activism and restraint by applying them carefully on a case to case basis. In doing so the Court has had to balance between the need to achieve public support, legal legitimacy and institutional security.[352] The Court has used its flexible principle of separation of powers to avoid confrontation with other organs of government.[353]

3.1.0 Pragmatism

Richard Posner stated that the main tenet of Pragmatism in constitutional interpretation requires judges to consider the systemic consequences of their decisions.[354] The Constitutional Court of South Africa has severally, used this approach strategically in politically controversial cases. It has done this mostly to avoid confrontation with political branches.

In the case of the New National Party of South Africa v. Government of the Republic of South Africa,[355] the court employed a pragmatic approach in its decision. In this case, the petitioner sought the Court's declaration that a provision in the Electoral Act which was enacted by parliament was unconstitutional. The impugned provision required that for a citizen of South Africa to be eligible to vote, he or she ought to have been registered as a voter and to have certain identity documents. According to the petitioner, the requirement of this document had the effect

[352]Roux, Theunis. 'Principle and Pragmatism on the Constitutional Court of South Africa.' (2009) International Journal of Constitutional Law, vol. 7, no. 1, 106-138.
[353] Ibid.
[354]Roux, Theunis. 'Principle and Pragmatism on the Constitutional Court of South Africa' (200) International Journal of Constitutional Law, vol. 7, no. 1, 106-138.
[355] 1999 (3) SALR 191 (CC).

of disenfranchising the white minority who did not have the required document. They argued that this statutory provision was a violation of their right to vote.

While dismissing the petition, the Court through the majority judgment stated that the said requirement was meant to facilitate the right to vote and not as a limitation on the right. Further, the court stated that people who wanted to take part in the constitutional right of voting ought to have taken reasonable steps in pursuit of their rights. Curiously though, the constitutional court in the majority opinion did not cite a single authority in support of their decision. Moreover, they did not make any effort to develop a single principled understanding of the right to vote under the constitutional and political context.[356] The Court stated something rather controversial. In the words of the Court, "Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament".

The court went on further to state that the doctrine of separation of powers requires the court to desist from reviewing statutory provisions on the ground of reasonableness. This statement contradicted the express provision of the 1996 Constitution on its interpretation. As Justice O'Regan observed, in his powerful dissenting opinion, that it was difficult for one to come to any other conclusion other than the fact that the majority failed to give the Constitution a principled reading.

The court here had to contend with two fundamental political questions. Firstly, would the political branches accept the success of such an unsympathetic litigant in that case and if not, would a decision by the Court to compromise on principle have resulted in long-term damage to the

[356] Roux Theunis. "Principle and Pragmatism on the Constitutional Court of South Africa." (2009) International Journal of Constitutional Law, vol. 7, no.1, 106-138.

constitutional project that could be offset by the institutional security gains to be made? On both questions, the Court appears to have decided on the negative. In this case, the Court's decision was more pragmatic than principled.

It is very clear from the above cases that when the Constitutional court of South Africa is faced with a controversial case the court will resort to a pragmatic approach. Where the compromise on principle will have far-reaching damage to the constitution, the Court to stick to the principle approach to the interpretation of the Constitution.

Just recently, chaos was witnessed when the Court abandoned pragmatism in a judicial decision. People were made to pay the ultimate price by losing their lives and properties. All this happened because the Constitutional Court of South African failed to exercise pragmatism in a case facing a former head of state Jacob Zuma. The Court sentenced the ex-president to 15years in jail for contempt of court in a corruption case he is currently facing.[357] Chaos erupted following the violent protests from Zuma's supporters who claimed that he (Zuma) was a victim of political conspiracy.[358] This study argues that courts should always be pragmatic in such cases and consider the consequence of a decision before making it.

Conclusion

The jurisprudence arising from the Constitutional Court of South Africa is the need for courts to balance aspects such as legal legitimacy, institutional security and public support when making decisions in controversial political cases. The Constitutional Court of South Africa has on numerous occasions applied pragmatism to balance the above aspects. The main problem that the

[357] 'Ex-President Jacob Zuma sentenced by South Africa's Top Court' available at https://www.bbc.com/news/world-africa-57650517 accessed September 29, 2021.
[358] Ibid.

pragmatic approach faces is the danger of jurisprudential inconsistency. A pragmatic decision should therefore as much as possible be principled.

3.2 The Supreme Court of India

The Indian Supreme Court has developed constitutional jurisprudence for over half a century in the world's most populated democracy.[359] Over the years, this Court has gained enormous power including the power to overturn amendments to the Constitution.[360] The Supreme Court of India interprets and enforces the lengthiest Constitution in the world containing over 300 pages with more than 370 articles and multiple schedules.[361]

Against all odds, this Court has developed constitutional interpretation with a coherent philosophy, enhanced judicial review against sustained attacks to the extent of declaring constitutional amendments unconstitutional and has maintained judicial independence.[362] The Court has protected fundamental rights and freedoms and promoted rule of law by providing an avenue for redress such as the introduction of public interest litigation.[363] The Supreme Court of India enjoys wide constitutional jurisdiction.[364] In its duty to defend fundamental rights and freedoms, the Court has the power to issue writs.[365]

Initially, the Supreme Court of India used to interpret the Constitution in a narrow, positivist approach. In 1950, the Court was confronted with the interpretation of article 22 of the Constitution

[359] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 476.
[360] Kesavananda Bharathi v. State of Kerala, A.I.R. 1973 S.C. 1461.
[361] Granville Austin, 'The Indian Constitution: Cornerstone of a Nation' (1966) Oxford Univ. Press.
[362] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 477.
[363] Ibid.
[364] Ibid.
[365] Constitution of India (as amended in 2019) art. 139.

where it, by a majority decision, upheld widespread preventive detention of political dissenters. This was in the case of A. K. Gopalan v. the State of Madras[366]. It was the Court's first major test in the protection of fundamental rights.[367]

The court, in this case, chose to interpret each article as self-contained ignoring other constitutionally guaranteed rights in Article 19, such as freedom of speech, freedom of movement and freedom of expression. The Court declined to enforce the right to access due process of the law as provided in the Constitution. Instead, the court stated that as long as the detection acts were enacted in compliance with the procedure as set out in the Constitution, then the requirements of due process were satisfied.[368]

In 1971 the Indra Gandhi government initiated some constitutional amendments one of them seeking to place all statutes meant for implementing the directive principles beyond the review powers of the courts.[369] The Supreme Court of India through the case of Kesavananda Bharathi v. State of Kerala[370] declared this proposed amendment unconstitutional. The Court held that this amendment was a violation of the 'basic structure' principle in the Indian Constitution by removing the function of the judiciary as a custodian of fundamental rights.
In 1978, India had just experienced one of the most traumatizing violations of human rights that occurred during the 1975-1977 emergency.[371] There was a need for the Supreme Court to stamp its authority as the main defender of the constitution.

[366] A.I.R. 1950 S.C. 27.
[367] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 479.
[368] A. K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27.
[369] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 491.
[370] A.I.R. 1973 S.C. 1461.
[371] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 480.

Reacting to the massive violation of human rights, the Court in Maneka Gandhi v. Union of India[372] shifted from the narrow Constitutional interpretation approach adopted in the Gopalan case to a broad purposive approach. The Court upheld individual liberty against unreasonable and arbitrary curtailment. This decision marked the beginning of increased protection of human rights by the Constitution of India under the banner of the Public Interest Litigation movement.[373] The doctrine of Standing where only an aggrieved party could petition the court was abandoned.[374] The reasoning for this was that there were many Indians who were unable to access the court for various reasons.[375] Other people were therefore allowed to petition the court on their behalf.[376]

Burt Neuborne observes that through courage, political acumen, good fortune and craft, the Supreme Court of India has managed to achieve a philosophy of interpretation, decisional finality and judicial independence.[377] He notes that whereas this is a good achievement, the people whom this Court serves are only interested in whether this Court is capable of enforcing the values of open and democratic governance.[378] In other words, according to Neuborne, the acid test of any constitutional court is its ability to protect human rights. Neuborne holds that the Supreme Court of India has delivered on its role since 1978.[379]

Manoj Mate observes in his 2015 article observed that, through its activism and assertiveness, the Supreme Court of India, arguably, is one of the most powerful courts among the democratic

[372] A.I.R. 1978 S.C. 597.
[373] Burt Neuborne, 'The Supreme court of India' (2003) Int'l J. Const. L. p. 480.
[374] Ibid p. 502.
[375] Ibid.
[376] Ibid.
[377] Ibid p. 495.
[378] Ibid.
[379] Ibid p. 496.

states.[380] Mate states that the Supreme Court of India began asserting its authority in 1977 (post-emergency era) and that post-1990 the Court was challenging the executive and had taken over government policy-making role and governance in general.[381]

In the late 1970s and early 1980s under the leadership of the activist justices P.N. Bhagwati, V.R. Krishna Iyer, and other judges the Supreme Court of India adopted a new activism approach advancing the course of human rights and social justice for the oppressed and the poor people in India.[382]

In 1981, in the case of S.P. Gupta v. Union of India,[383] the Court through and seven judges constitutional bench delivered a decision that liberalized and formally incorporated standing for Public Interest into law. In this case, a group of advocates had challenged the decision of the Government to transfer some High Court judges in violation of the laid down procedure and without the consent of the affected judges. The government argued that the petitioners lacked standing since the decision to transfer the said judges did not affect petitioners in any way. The Court rejected the argument of the government stating that advocated had a strong interest in ensuring the independence of the judiciary.

However, in what was seen by some scholars as Court's strategy to avoid the political backlash that would have followed should the Court have delivered a more assertive decision, the Court held that the requirement of 'consultation' did not oblige the executive to follow the advice or

[380] Manoj Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (2015) Whitter Law School. p. 106. Available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.961.5548&rep=rep1&type=pdf accessed 14 September 2021.
[381] Ibid. p. 107.
[382] Ibid.
[383] Supp. S.C.C. 87, 90.

opinion of the judges.[384] Here, the Court chose to be pragmatic and strategic to avoid confrontation with the executive. The Court was able to uphold judicial independence and at the time avoiding confrontation with the executive.

The Supreme Court of India has been successful in the enforcement of human rights by using activism whenever necessary. In what may be seen as a controversial statement, Justice Bhagwati, who is a retired Chief Justice of India wrote in his biography "My Tryst with Justice" that: - "Throughout my judicial life, there was only one ideal which motivated and inspired all my judicial pronouncements and that was the advancement of the welfare of my people by ensuring to them the enforcement of the basic human rights enshrined in the Fundamental Rights and Directive Principles set out in the Constitution. I was, therefore, determined to bend the law in the service of my people."[385]

3.3 Supreme Court of the United States

The Supreme Court of the United States (hereby the U.S. Supreme Court) has been hailed as one of the most, if not the most, extraordinary and powerful courts in the world.[386] The U.S. Supreme Court enjoys various powers including interpretation of the Constitution, determining cases that involve the application of the Constitution and the power of judicial review[387]. This Court has both limited original and appellate jurisdiction.

[384] Manoj Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (2015) Whitter Law School. p. 107. Available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.961.5548&rep=rep1&type=pdf accessed 14 September 2021.
[385] Bhagwati P.N, (Justice),' My Trust with Justice' , (2013) Universal Law Publishing Co. Pvt. Ltd, (New Delhi, India) p.114.
[386] Peter E. Quint, "The Most Extraordinarily Powerful Court of Law the World Has Ever Known"? Judicial Review in the United States and Germany (2006) 65 Md. L. Rev. 152.
[387] n1.

The Court enjoys the power of judicial review where it determines whether a statute, treaty, or administrative action is in violation of Constitutional provisions. It is worth noting that the U.S. Supreme Court's power of judicial review is not spelt out in the Constitution but is a court established doctrine.[388] The doctrine was established in the case of Marbury v. Madison[389] in 1803.

In this case, the court asserted its authority to strike down a law as unconstitutional and established the doctrine of judicial review. The brief facts of the case are that after the Presidential election of 1800, Thomas Jefferson who was leading the then newly organized Democratic-Republican political party defeated the Federalist Party who had backed the incumbent President John Adams. During the final weeks of this term, President Adams appointed several judicial officers including justices of the peace for the District of Columbia. Their commissions were approved by the Senate and signed by the outgoing president. The last step that remained to be fulfilled to complete the appointment was to have the commissions delivered. It is believed that this was motivated by efforts to preserve the control the Federalist Party had over the judiciary[390].

Upon assuming office, on 5th March 1801, President Jefferson ordered his Secretary of State, James Madison, not to deliver the commissions. The newly appointed judges could not assume office without the delivery of the commissions. William Marbury, who was one of the appointees, moved to the Supreme Court seeking a writ of mandamus for the Secretary of State to show cause why he had failed to deliver the Commissions and further to compel him to do so.

[388] Peter E. Quint, "The Most Extraordinarily Powerful Court of Law the World Has Ever Known"? Judicial Review in the United States and Germany', (2006) 65 Md. L. Rev. 152.
[389] 5 US (1 Cranch) 137 (1803).
[390] Urofsky Melvin, 'Marbury v. Madison' (Encyclopedia Britannica, (17 Feb. 2021) <https://www.britannica.com/event/Marbury-v-Madison. Accessed 16 April 2021.

The Supreme Court in its decision found that Marbury had been properly appointed and the procedures followed in his appointment and thus had a right to the writ. Consequently, that the law had to afford him a remedy. The Court then went ahead to reiterate the courts' responsibility in protecting citizens against government excesses even where a wrong has been done by a sitting president.

United States Supreme Court on Social-Economic Rights

The United States has in numerous cases declined to enforce social-economic rights.[391] Unlike South African, and Kenyan courts that enforce social-economic rights, the United States Supreme Court rarely enforce these rights and this can be attributed to differences in societies, legal systems and political systems.[392] The main reason for this however is the fact that the United States Constitution does not provide for social-economic Rights.[393] This Court has therefore declined to enforce these claims for lack of constitutional basis.

In the case of Harris v. McRae,[394] for instance, the Court held that the health care programme that failed to include hospital coverage for medical abortions even when such pregnancy put a woman in danger did not violate 'substantive due process.[395] The Court only seem to enforce social-economic right when there is an aspect of breach of what is known as equal protection fundamental interests. This is where there is an element of discrimination in a case.

[391] Mark S. Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective', (2003) 6 Chap. L. Rev p. 150.
[392] Ibid.
[393] Ibid.
[394] 448 U.S. (1880) 297.
[395] Mark S. Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective', (2003) 6 Chap. L. Rev p. 150.

In the case of Plyler v Doe[396], for example, the Supreme Court declared unconstitutional a law from Texas that made it mandatory for alien students to pay for them to attend public schools. The United States Supreme Court has on numerous occasions rejected social-economic right cases on the basis of separation of powers.[397]

3.3.0 Pragmatism

One lesson that can be learned from the U.S. approach to its powers of interpreting the Constitution and judicial review is that this Court, just like the Constitutional Court of South Africa applies pragmatism when the circumstances require it. Here, the Court considers the most probable practical consequences of an interpretation of the Constitution. Pragmatism involves weighing or balancing the consequences the variant approaches may have as well as weighing the future costs or benefits of an interpretation to society or political branches and choosing the one with the best outcome[398].

The U.S. Supreme Court also exercises passive virtues and judicial minimalism whereby the Court declines to rule on certain constitutional and political issues by adhering to certain doctrines. This is practised under the doctrine of avoidance, where the Court avoids becoming frequently embroiled in controversial and sensitive issues thereby preserving the Court's institutional resources for key cases[399]. This approach also protects the Court from attacks from the other arms of government and preserves the Court's role as the defender of the Constitution.[400] Further, this

[396] 457 U.S. (1982) 202.
[397] Mark S. Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective', (2003) 6 Chap. L. Rev p. 152.
[398] Richard A. Posner, 'Response, "Legal Pragmatism Defended", (2004) 71 University of Chicago Law Review.
[399] Andrew Nolan The Doctrine of Constitutional Avoidance: A Legal Overview (Congressional Research Service, 2nd September 2014) CRS Report prepared for Members and Committees of Congress.
[400] Ibid, p7.

approach encourages cooperation, collaboration and dialogue with the arms of government and the public on finding solutions[401].

Political and non-justiciable questions

The U.S. Supreme Court has also as much as possible avoided determining questions that lack justiciability. This Court has stated that it must ascertain and be convinced that a case brought before it is justiciable before determining it. In the case of Ashwander v. Tennessee Valley Authority,[402] the U.S. supreme held that courts should only determine cases that invite 'a real earnest and vital controversy. According to the U.S. Supreme Court, the rule of justiciability prohibits courts from entertaining cases which are academic in nature or hypothetical.

The U.S. Supreme Court further held that courts should not be expected to engage in what is referred to as abstract arguments. The court introduced the principle of ripeness by stating that the court should not be called up to determine an issue when it is too early based on apprehension. For an issue to be determined by a court, the U.S. Supreme Court held that it must be ripe and based on facts.

On the issue of courts being invited to answer political questions, the U.S. Supreme Court's decision in Baker v. Carr[403] also illustrates its position. The facts of this case were that Charles Baker and several other voters from the State of Tennessee had sued the state for inter alia failing to update the apportionment plan on voters and redistricting to reflect the population growth. They argued that this gave unequal power of voting between the urban and rural voters, more prominence being given to the voter in the rural areas and disfranchising urban areas. The Court

[401] Barry Friedman, The History of the Counter majoritarian Difficulty, Part One: The Road to Judicial Supremacy, (1998) 73 N.Y.U. L. REV. 333, 334.
[402] [1936] 297 U.S 288.
[403] 369 U.S. 186 (1962).

used the opportunity to frame what is considered political questions and what it considered justiciable questions that the court should determine. The Court described a political question as follows:

"*Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"*[404].

It is the view of this study that the approach taken by the U.S. Supreme Court of avoiding political questions is recommendable. The Court role is primarily to interpret the law and therefore should only entertain justiciable matters. In other words, the judiciary should only concern itself with purely legal matters in its quest to maintain a good relationship with the other arms of government.

3.3.1 Conclusion

Pragmatism is a prominent feature in the decisions of the United States Supreme Court decision. This Court avoids determining political matters in cases where a decision is likely to cause conflict among the arms of government. This is the proper approach in ensuring good relations between the arms of government and promotes separation of powers.

[404] Ibid.

CHAPTER 4

Conclusion and Recommendations

In Kenya, judicial independence has been one of the milestones in the Constitution 2010. For many years, especially during the Kanu regime, the judiciary used to be subservient to the executive arm.[405] It understood its role as maintaining the status quo and upholding the powers of the government. However, under the Constitution of Kenya 2010, the independence of the judiciary has been enhanced significantly.[406] The judiciary under the 2010 Constitution views its role as upholding the rule of law and constitutionalism. Its main duty is protecting and enforcing the Constitution and this is manifest in the numerous judicial decisions that have been handed down since 2010.

Several constitutional provisions are meant to enhance judicial independence from the executive. Key among them is the provision that in the exercise of its constitutional powers, the judiciary shall not be under the influence or control of any person or authority but will only be subject to the Constitution and the law.[407] This means that unlike in the old dispensation, judges, under the Constitution 2010, are required and facilitated by the Constitution to discharge the mandate without influence or control.

To secure judicial independence, the Constitution 2010 establishes the Judicial Service Commission.[408] This body is charged with the recruitment of judicial officers, including judges of superior courts, investigating any complaint against judicial officers, and dismissing them where

[405] Makau Mutua, Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', 23 Hum. Rts. Q. 96 (2001) p.98.
[406] Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law-Discussion paper, A review by AfriMAP and the Open Society and Open Society Initiative for East Africa. [2011] p.7.
[407] Constitution of Kenya 2010, art. 160 (1).
[408] Patricia Mbote and Migai Akech, 'Kenya Justice System and the Rule of Law-Discussion paper, A review by AfriMAP and the Open Society and Open Society Initiative for East Africa. [2011] p.7.

the law warrants it.[409] Another mechanism employed by the Constitution 2010 to promote judicial independence is the provision of security of tenure of the Chief Justices and the judges. Others include the provision that judges shall be paid from the consolidated fund and the immunity extended to judicial officers against suits involving the lawful discharge of their constitutional mandate.[410]

The promulgation of the Constitution of Kenya in 2010 also saw an empowered judiciary.[411] Immense powers have been bestowed on the judiciary as the overseer of constitutionalism and the rule of law. Some of the areas in which the judiciary has been empowered are in the interpretation of the Constitution, enforcement of the Bill of Rights and in its role of checking the executive against excesses. In the exercise of these functions, the judiciary has been accused of overreaching and interfering with the function of the executive.[412] Despite these accusations, the judiciary has stood firm and has been very assertive in its authority to protect and uphold the constitution and the rule of law.

There are many instances where the court has been called upon to review the decisions of the executive including those of county executives. In these instances, this study argues that the courts need to find a proper balance in the exercise of power so that they are not seen to interfere with what would otherwise be a constitutional mandate of the executive. This is because violation of

[409]Constitution of Kenya 2010, art. 172 (1).
[410] Constitution of Kenya 2010, art. 160 (4) & (5).
[411] Walter W. Ochieng 'Judicial-Executive Relations in Kenya post 2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks in African Constitutional Law p. 294.
[412] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95. p. 95.

the principle of separation of powers undermines democracy.[413] It also hinders development and good governance in general because of the constant wars between arms of government.

Those who argue that courts should refrain as much as possible from making policy decisions, meant for political branches, mostly base their argument on the principle of separation of powers.[414] However, as discussed in a previous chapter, the same principle allows the judiciary to check the other arms of government in enforcing the Constitution.[415] The Constitution of Kenya 2010 has given the judiciary new impetus in judicial review.[416] The judiciary can now review virtually all actions and decisions of the other arms of government whenever someone petitions the courts for review. The question that needs to be answered is the extent to which the judiciary should intervene in the actions of other arms in view of the principle of separation of powers.

This study agrees with the argument that a complete separation of powers is not desirable[417]. The three arms government i.e. the judiciary, the legislature and the executive need to cooperate in the discharge of their respective mandates. They also need to check each other because unchecked power is subject to abuse.[418] This is where the balance is required between the judiciary's function to check the executive while at the same time observing the principle of separation of powers.

In adherence to the principle of separation of powers, there are things that courts must always consider. Before admitting any matter touching on the actions or decisions of the executive, the

[413] James Gardner, 'Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior', (2005) 79 St. John's L. Rev. 293.
[414] James T Brand, 'Montesquieu and the Separation of Powers' (1933) 12 Or L Rev 175. p.176.
[415] Darwin N. Kelley, 'Roots of the Principle of Separation of Powers in the Indiana Constitution' Indiana Magazine of History Vol. 47, No.4 (1951) p. 367-375.
[416] Luis Gabriel Franceschi, Linet Muthoni and Emmah Senge Wabuke, 'Judicial Review and Public Power in Kenya: Revisiting Judicial Response to Select Political Cases' (2017) Springer International Publishing p. 78.
[417] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 96.
[418] Steven Calabresi, Mark Berghausen & Skylar Albertson, 'The Rise and Fall of the Separation of Powers' Northwestern University Law Review (2012) Vol. 106, No. 2 p. 548.

court must always consider the justiciability of the matter being brought before it for determination. The doctrine of justiciability determines, among other things, what matters are and what matters are not susceptible to determination by a court of law.[419]

The basis of justiciability is to ensure that courts do not overreach themselves by requiring them to refrain from entertaining matters that cannot be decided through the proper judicial method.[420] An issue is considered non-justiciable when the court is called upon to determine questions that are neither legal questions nor factual issues capable of being proved through admissible evidence.[421]

This is where the doctrine of political question comes in. This doctrine has been defined as a situation where the court is asked to perform a role that is meant for the political branches.[422] When a question touching on policy is brought before the court for determination, it amounts to a political question and the court should differ it to the political branches for determination.[423] In other words, a political question should be non-justiciable.

Whereas separation of power is essential for the good coexistence of the three arms of government the judiciary must be encouraged and facilitated in performing its role of taming the overbearing of the executive. The cardinal principle in many constitutions is that the state, including all its organs and officials, must always act in accordance with the Constitution. This is one of the

[419] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 95.
[420] Khaira & Others v. Sherquill & Others (2012) eKLR.
[421] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 96.
[422] Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal p. 598.
[423] Ran Hirschl, 'The Judicialization of Politics' The Oxford Book of Political Science (2011) available at https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?source=post_page accessed 28 September 28, 2021.

requirements of the Constitution of Kenya 2010.[424] The High Court of Kenya has held that the doctrine of separation of powers and certain privileges or immunity should not be used as a shield to protect the unconstitutional exercise of legislative and executive power.[425]

The Constitution of Kenya has expressly made the constitutionality of the actions and decisions of the other branches of government a justiciable issue.[426] This puts the role of the judiciary in apparent conflict with the principle of separation of powers.[427] With the immense powers that the Kenyan judiciary processes currently, it is for the court to find ways to limit this power in the spirit of the principle of separation of powers and to avoid the perceived dominance over the other arms of government.

Kenyan judiciary just like any other judiciary in the world has to balance institutional security, public support and legitimacy. To achieve this balance a pragmatic approach is needed in controversial cases whose decisions are likely to cause conflict among the arms of government. The practice of the doctrine of avoidance and deference by the Constitutional Court of South Africa, the U.S. Supreme Court and the Supreme Court of India offers a good lesson of how Kenyan courts can achieve much-needed harmony among the arms of government.

Judicialization of politics can be avoided by courts exercising restraint whenever presented with political questions. United States Supreme Courts approach to the political question is recommended here. This will help in avoiding counter-majoritarian decisions by the Kenyan courts.

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[424] Art. 2.
[425] Frank Mulisa Makola v. Felix G.Mbiuki & 4 others (2013) eKLR.
[426] Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae) [2021] eKLR.
[427] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 101.

Judicial Restraint v. Judicial Activism debate

This debate must begin with the acknowledgement of the fact that unlike in the executive which generally enjoys the popular mandate of the people to support their policies, the judicial officers are appointees who lack the popular mandate. [428] The idea of limiting the judicial power vis-à-vis the functions of other arms must be seen through these lenses. It, therefore, follows that the intervention of the judiciary in the functions of the other two arms must be limited.[429] Failure to have some set limits to judicial power will give rise to what Gath Mugnai refers to as the "counter-majoritarian"[430] effect.

Judicial restraint, therefore, in the context of the separation of powers principle requires judges to limit the exercise of judicial power and to hesitate in invalidating actions of the other branches unless there are clear constitutional violations in those actions.[431] The courts' function is to examine whether an action, by the other arms, which has been challenged is unconstitutional or not. If the court is satisfied that there is a constitutional breach, the court is justified to strike down such action in accordance with the law. However, when doing so the court must remain within the self-imposed limits.[432]

In the exercise of judicial restraint, the courts can apply various mechanisms. These mechanisms include invoking the doctrine of avoidance, the doctrine of justiciability, and deference.[433]

[428] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 101.
[429] Ibid.
[430] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) 2004 E Afr LJ 1.p.1.
[431] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 101.
[432] Asif Hameed and Others v. State of Jamu and Kashmir and Others, 1998; Re the Matter of the Interim Independent Electoral Commission, (2011) eKLR. See also Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 101.
[433] Elijah Oluoch Asher, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law' (2015) 35 JL Pol'y & Globalization 95 p. 101.

However, care must be exercised to prevent the exercise of judicial restraint from being seen as an evasion of the courts' constitutional duty of interpreting the Constitution and ensuring that the other branches of government adhere to constitutional provisions.

To avoid unjustifiable interference with the function of the other branches, the judiciary must exercise some level of restraint. In the absence of a clear ground of constitutional violation, courts should decline any invitation to interfere with the functions of the other arms. Courts should also endeavour to always find a proper balance while interpreting the constitution to ensure the conducts of other organs are in line with constitutional provisions.

There is no doubt that judicial activism is not entirely a vice in a democracy as many would think. It is necessary in certain cases while it is not desirable in others. The same case applies to judicial restraint. Those who are opposed to judicial activism opine that it is dangerous and they describe it by using the metaphor of an unruly horse which a rider cannot predict the extent it will carry him once he decides to ride on it.[434] Admittedly the term ‘activism’ may have a negative connotation to some.

Okogbule[435] however posits that there are two models of judicial activism. The first one, according to him, is the extreme model of judicial activism where a court is so intrusive and pervasive and dominates the other organs of government. The second model of judicial activism is the conservative or moderate model where the judiciary observes the separation of powers and its only intervention is to administer justice and to enforce the true purpose of the Constitution.

[434] Nlerum S Okogbule and Cleverline T Brown, 'Social and Economic Rights and Transformative Constitutionalism in Africa: Imperative of Expanding the Frontiers of Judicial Activism' (2019) 16 US-China L Rev 52.
[435] Ibid.

The choice of exercising activism or restrain largely depends on whether the judge handling a matter is conservative or liberal. This study argues that whatever the case may be, both of these types of judges need to reconcile the methods and the goals. This is important for achieving the consistency needed in judicial jurisprudence.

The most important thing for the Court is to come up with a proper balance by identifying the kind of matters to apply judicial activism and to what extent. The court must also identify the cases that require the application of restraint and to what extent. However, one thing that the judiciary must always strive to achieve in exercising either judicial restraint or activism is a coherence and consistency of its jurisprudence.[436] Conflicting and constantly changing application and interpretation of the constitution undermines the legal authority and political significance of a constitution.[437] The judiciary must also strive at all times to give reasoned decisions. The courts should always endeavour to address and converse all issues that are subject to possible objections by a person of a different opinion.

From the above, several issues arise which this study ought to address. The first issue is how to reconcile the concepts of democracy and constitutionalism in constitutional interpretation. Democracy advocates for popular will while constitutionalism advocates for limitations on the powers of a government by popular will.[438] This study agrees with Professor Githu Muigai that the judiciary needs to find a constitutional theory that reconciles these two conflicting values.[439]

When determining constitutional disputes, the courts need to balance the competing values and claims. Justice Visram came up with principles of achieving this balance. The learned judge stated

[436] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) 2004 E Afr LJ 1.p 1.
[437] Ibid.
[438] Ibid.
[439] Ibid.

that apart from the constitutional text, constitutional interpretation must consider the social and political realities existing in a given time, and the aspirations and the needs of the people.[440] As Githu Muigai rightly observes the questions that beg is what is the formula to be applied and how is the formula to be applied on a case to case basis.[441]

The justification for the call for a balance between judicial activism and restraint is based on the fact that both stability and change are essential in a healthy and vibrant society. Judges must sometimes be bold and sometimes cautious. They must strive to reconcile liberty and authority, individual freedom and state security, social-economic rights for the poor and development, and the letter and the spirit of the Constitution.

The existence of liberal and conservative jurists does not imply that judicial activism should be personalized. Judicial activism must be institutional. Law must always be certain and should not be subject to the predilection of an individual judge however well-meaning. Court decisions should at all times be based on well-established principles and should be capable of being applied uniformly in different situations. This is vital for the legitimacy of the court.[442] In judicial activism, the decision arrived at and redress issued should always be principled and institutionalized.

Pragmatism is also key in decision making, especially in controversial cases. Judicial pragmatism requires judges to consider the systemic consequences of a decision and not just the consequence of a specific case.[443] Justice Oliver Wendell Holmes talks about the timing in judicial decisions and the idea of societal readiness in the delivery of certain constitutional decisions by the court.[444]

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[440] Royal Media v.Telkom.
[441] Githu Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation' (2004) 2004 E Afr LJ 1.p 15.
[442] Ibid.
[443] Ibid.
[444] Frederic R. Kellogg, 'Holmes, Common Law Theory, and Judicial Restraint, 36 J. Holmes, Common Law Theory, and Judicial Restraint, (2003) 36 J. Marshall L. Rev. 457. p. 467.

According to Holmes, the justification, or lack of it, of certain rulings depends on the timing.[445] This study argues that pragmatism is key in some controversial decisions. However, this study is firm on a principled approach.

In Conclusion, the exercise of the judicial power of review should be robust but at the same time balanced and principled. This is important for the growth of a democracy like Kenya. It helps in averting unnecessary quarrels and the constant tension between the judiciary and the other arms of government while at the same time promoting the growth of fundamental rights and freedoms.

[445] Frederic R. Kellogg, 'Holmes, Common Law Theory, and Judicial Restraint', Cambridge University Press p. 1. Available at https://books.google.co.ke/books?hl=en&lr=&id=dpWbtEL-WQUC&oi=fnd&pg=PA1&dq=frederick+kellogg+Oliver+wendell+holmes+and+judicial+restraint&ots= accessed November 19, 2021.

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