UNIVERSITY OF NAIROBI

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TRANSFORMATION OF JUDICIAL REVIEW IN KENYA UNDER THE 2010 CONSTITUTION

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ABSTRACT

As the topic suggests, *Transformation of Judicial Review in Kenya under the 2010 Constitution* is a discourse on the changed approach to judicial review arising from the promulgation of the Constitution of Kenya, 2010. The research is informed by the problem that despite the promulgation of the Constitution, judicial review within the Kenyan legal system has not yet fully transformed in line with the Constitution. This incomplete transformation has arisen partly from the failure of courts to completely orientate the practice and conceptual approaches to judicial review to the dictates of the current Constitution. The situation has resulted into confusion in the administration of judicial review by Kenyan courts some six years into the life of the current Constitution. Additionally, the insistence on technical procedure, limited scope of review, few remedies and strict distinction between public and private exercise of power still remains a barrier to the full transformation of judicial review.

This research therefore sets out to: investigate the extent to which the constitution has transformed judicial review and how this is reflected in reality as evidenced by court decisions; examine how the continuation of judicial review under the common law affects the transformation of judicial review under the Constitution in Kenya; and suggest a new approach to judicial review anchored on constitutional ideals.

The research is set out in some four chapters. Chapter 1 ‘Introduction to Transformation of Judicial Review in Kenya’ discusses the problem statement, objectives, justification of research, literature review, statement of the problem and research questions, hypothesis and research methodology.

Chapter 2 ‘Transformation of Judicial Review in Kenya’ discusses how the Constitution has transformed judicial review and the extent to which this is reflected in judicial decisions. The chapter also highlights the ways in which the continuation of judicial review under the common law affects the transformation of judicial review as envisaged by the Constitution in Kenya.

Chapter 3 ‘Judicial Review in Kenya Post-2010: Grounds, Procedures and Remedies’ discusses new approaches to judicial review anchored on constitutional ideals and suggests some new grounds, procedures and remedies of judicial review. Lastly, Chapter 4 ‘Findings, Conclusions and Recommendations’, revisits the hypothesis and problem statement, and provides a summary of the findings. Finally, the chapter recommends reforms and suggests further research.

DECLARATION

I Odhiambo John Dudley Ochiel, declare that this thesis is my original work and has not been submitted and is currently not being submitted either in whole or in part by any other person for the award of a degree at any other University.

SIGNED..

ODHIAMBO JOHN DUDLEY OCHIEL

This thesis is submitted with my approval as University Supervisor

SIGNED...

PROF. KIARIE MWAURA

DEDICATION

To my father Mr Samuel Ochiel Odondi - the man who taught me how to read and write.

To Maurice Odumbe* the man whose investigation and suspension by the International Cricket Committee inspired this research.

* See *Republic v Kenya Cricket Association ex parte Maurice Odumbe* [2006] eKLR.

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I wish to thank my dear friend Peggy Mideva whose encouragement was sufficient motivation. My sisters Beline and Tabitha Ochiel gave me immeasurable support. My friends Oyugi Boniface, Kendi Mutuma, Patricia Kirui, Moses Wanjala, Teddy Musiga, Ezra Omolo, Erick Odiwuor, Carol Kinyua and Diana Nyakundi urged me on at points of despair. My father Samuel Ochiel and mother Gladys Ndere kept praying for me. My boss Cornelius Lupao gave me time off work to concentrate on and finish this project. Josephine Mutie and Jenipher Ogada assisted me to format the work.

The former Chief Justice Willy Mutunga, Justice George Odunga, Justice Louis Onguto and Justice Weldon Korir listened to me with patience as I vaguely explained what I perceived the transformation of judicial review to be all about. Elisha Ongoya and Prof James Gathii allowed me to bounce some of my ideas off their minds.

My supervisor Prof Kiarie Mwaura made tremendous contributions and provided guidance that enabled me to improve the quality of this work and complete it successfully. He sacrificed his time and worked with me on extremely tight deadlines. I am forever beholden to him.

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CHAPTER ONE

INTRODUCTION TO TRANSFORMATION OF JUDICIAL REVIEW IN KENYA UNDER THE 2010 CONSTITUTION

1.0 INTRODUCTION

The aim of this chapter is to highlight the research design and methodology on transformation of judicial review. Accordingly, the research discusses the background, problem statement, hypothesis, objectives, research questions, justification, theoretical and conceptual frameworks, methodology and justification.

1.1 BACKGROUND TO THE RESEARCH

On the 27th of August, 2010, Kenya adopted a Constitution that replaced the previous Constitutional order.[1] This constitutional moment, was a climax to a long quest to radically transform the country's pre-existing socio-economic, political as well as its cultural framework.[2] The move toward a new Constitution was stimulated by the fact that the democratic project became untenable within the previous authoritarian constitution which vested enormous powers in the presidency.[3] The quest for constitutional reform therefore remained on the public agenda for decades, culminating in the promulgation of the current Constitution.[4]

As a result, it has been claimed that promulgation of the 2010 Constitution heralded the overthrow of the pre-existing social order and the creation in its place of a nascent political, economic, social, and legal order.[5] In this regard, the current Constitution is seen as the shift from imperialism and authoritarianism to a post-liberal, 'accountable', 'horizontal' and 'responsive' state structure.[6]

As indicated in the preamble, therefore, the current Constitution reflects the desire of ordinary Kenyans for a system of governance founded among others on the basis of 'human rights',

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1 Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Fort Hare University Inaugural Distinguished Lecture Series October 16, 2014) < http://www.constitutionnet.org/files/mutunga_-_theory_of_interpreting_kenyas_transformative_constitution_2-1_oct_14.docx> accessed 15th February, 2015.

2 *Ibid.*

3 Morris K Mbondenyi, 'Introduction' in P. L. O. Lumumba, M. K. Mbondenyi and S. O. Odero (eds), *The Constitution of Kenya: Contemporary Readings* (Law Africa, 2013) 1, 3.

4 *Ibid.*

5 Mutunga note 1 *ibid* at 2.

6 *Speaker of the Senate v AG* [2013] eKLR.

‘equality’, ‘freedom’, ‘democracy’, ‘social justice’ and ‘the rule of law’.[7] As a result, the Constitution recreates Kenya as a multiparty democratic state based on the supremacy of the Constitution and founded upon the ‘national values and principles of governance’ in Article 10.[8]

Additionally, the Constitution entrenches a system of devolved governance based on coordination, consultation and cooperation with inter-dependent yet distinct governments at either level.[9] Additionally, the Constitution includes a Bill of Rights with not only secures political and civil rights, but also economic, social and cultural rights as well and operates as the integral foundation of Kenya as a democratic state.[10] The Bill of Rights is therefore the linchpin from which arise all socio-economic as well as cultural policies.[11] In this regard, the horizontal application of the Bill of Rights, as between citizens, is seen from Article 20(1) in the application of the Bill of Rights to all law and its binding effect upon every State organ and over any persons.[12]

To this end, Article 23 of the Constitution recognizes judicial review as amongst the remedies for any threat to or actual violation of any right or freedom including by private persons.[13] At the same time, Article 47 guarantees all persons a right to fair administrative action extending to the assurance of expedition, efficiency, lawfulness reasonableness and procedurally fairness of administrative action.[14] Likewise, if an administrative action violates or threatens to violate any fundamental rights or freedoms, the concerned person would be entitled to written reasons in justification of the administrative action.[15]

To implement the provisions of the Article 47 of the Constitution, Parliament has enacted the Fair Administrative Action Act, 2015 (the Act).[16] The Act radically alters the judicial review landscape in Kenya in conformity with the transformative Constitution of Kenya, 2010 which permits judicial review against both private and public bodies.[17] The horizontal application of the right to fair administrative action under Article 47 is replicated in the scheme of the Act. The definition of

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7 Constitution of Kenya 2010.
8 Articles 2(1) and 4(2).
9 Article 6.
10 Chapter 4; Article 19(1).
11 Article
12 *Ibid.*
13 Article 3(f)
14 Article 47(1).
15 Article 47(2).
16 Act No 3 of 2015.
17 Ochiel Dudley, ‘Grounds for Judicial Review in Kenya – An Introductory Comment to the Fair Administrative Action Act, 2015’ (2015) 31 Kenya Law Bench Bulletin 26, 26.

'administrative action' under the Act covers any exercise of power, performance of a function or carrying out of a duty exercised by an authority or quasi-judicial tribunal as well as all other actions, omissions or decisions that impinge the legal rights and interests of any person to whom the administrative action relates.[18]

The critical point is therefore to determine whether the administrative action or decision complained against is the act of a public authority or quasi-judicial tribunal or if it is attributable to any other person, body or authority but impacts the rights, entitlement or welfare of the complainant.[19] The proposition is that acts, decisions or omissions of public authorities and quasi-judicial tribunals are expressly reviewable by their very nature, while actions or omissions of private persons or bodies can be reviewed where they affect the legal rights or interests of an affected party.[20] The end result is that every exercise of power is reviewable because any exercise of power bears the potential to impact the rights and interests of individuals over whom that power is exercised.

In this constitutional set-up, the theory and practice of judicial review has changed. Ideally, judicial review is no longer exercisable as a common law prerogative, but has attained the status of a constitutional principle whose object is the upholding of the fundamental right to fair administrative action and other entitlements in the Bill of Rights.

1.2 STATEMENT OF THE PROBLEM

Despite the promulgation of the Constitution, judicial review within the Kenyan legal system has not yet fully transformed in line with the Constitution. This incomplete transformation is seen, partly, in the failure of courts to completely orientate the practice and conceptual approaches to judicial review to the dictates of the current Constitution. The situation has resulted into confusion in the administration of judicial review by Kenyan courts some six years into the life of the current Constitution. Additionally, the insistence on technical procedure, limited scope of review, few remedies and strict distinction between public and private exercise of power still remains a barrier to the full transformation of judicial review.

The situation persists despite the enactment of the Act as well as the delivery of a progressive decision by the Supreme Court of Kenya in the ***Communications Commission of Kenya v Royal***

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18 Section 2.

19 Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would Be Decided Differently Today' (2013) Issue 28 Kenya Law Bench Bulletin 11, 11.

20 *Ibid*.

Media Services Limited,[21] **(CCK Case)** where the Supreme Court recognized that 'the Constitution of 2010 had elevated the process of judicial review to a pedestal that transcends the technicalities of common law'. The negligible constitutional development in the theory and practice of judicial review is a cause for concern. It arises in part from because of the courts propensity to apply and interpret the law through classical liberal lenses as well as the invocation of common law doctrines to judicial review applications raising constitutional questions.[22] Accordingly, there is a danger that the judiciary, which has a duty to develop the law and oversee the process of constitutional implementation, will instead stand in the way of legal transformation as envisaged by the Constitution. This gap in understanding is inappropriate and requires research to fill in. The research should explicate the transformation of judicial review and determine the current status of the practice and theory of judicial review, more than five years after the promulgation of the Constitution.

1.3 THEORETICAL FRAMEWORK

Four theories, two dominant and two minor, have been identified to guide this research in answering the research questions and testing the hypothesis. First, the research is primarily guided by post-liberal theory.[23] Post-liberal theory recognizes that private entities and individuals have an impact on human rights.[24] It is argued that because of this reason the administrative actions of private persons should be amenable to judicial review where rights and interests of individuals are affected. Reliance is placed on the fact that non-state actors may have legal human rights duties specified at international or national law to bolster the argument that the Article 47 guarantee of fair administrative action binds private administrators.[25]

Secondly, the other dominant theory is Karl Klare's 'transformative constitutionalism'.[26]

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21 [2014] eKLR at 355.

22 See *Idris Sheikh Abdulahi Odow v Farah Abaille Galef* [2016] eKLR.

23 Richard A. Epstein, *The Classical Liberal Constitution* (Harvard University Press) xi.

24 J. J. Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 Vanderbilt Journal of Transnational Law 801, 802.

25 George Kent, *Freedom from Want: The Human Right to Adequate Food* (Georgetown University Press, 2005) 116; Danwood Mzikenge Chirwa, 'State Responsibility for Human Rights' in Mashood A Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades After the UDHR and Beyond* (Ashgate Publishing, 2010); Adam McBeth, *International Economic Actors and Human Rights* ((Routledge Research in International Law, 2010) 60; Peter Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises'in Rory Sullivan (ed), *Business and Human Rights: Dilemmas and Solutions* (2003) 39; David Weissbrodt, 'Human Rights Standards Concerning Transnational Corporations and other Business Entities' 23 Minn. J. Int'l L. (2014) 135; Daniel Friedmann and Daphne Barak-Erez 'Introduction' in Daniel Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Hart Publishing, 2001) 1.

26 Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146, 150; See also Lourens

'Transformative constitutionalism' implies 'a long term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[27] It is argued that the 'constitutionalisation' of the rule of natural justice and requirement for fair administrative action the Constitution has reinvented judicial review by altering the Kenyan state to an 'accountable', 'horizontal' and 'responsive' structure from its 'non-accountable', 'vertical', and 'imperial' as well as authoritative orientation under the repealed Constitutional order.[28]

Third, the research further operates within the framework of 'legal formalism'.[29] The formalist legal approach is characterised by a conception of law as an autonomous discipline with its own methodology, rationality and history and as one which excludes all non-legal phenomena including social, political and economic realities as well as the purposes or effects of any law.[30] Consequently, it is argued that while formalism might ensure continuity, objectivity and uniformity in the rule of law and administration of justice, coupled up with the doctrine of *stare decisis,* it has a formidable conservative influence which is undesirable for the transformation of judicial review.[31] As a result, it is contended that formalism may obstruct the makeover of judicial review towards the ends envisaged by the Constitution since a radical Constitution cannot prosper under a 'legal system which erects a transformative constitutional architecture onto a common law or customary law plinth'.[32] Kenyan courts must therefore avoid a formalistic approach or 'undue regard to procedural technicalities' in the administration of judicial review.[33]

Fourth, 'legal realism' on the other hand is the jurisprudential perception of law as 'prophecies of what the courts will do in fact'.[34] Legal realism posits that 'rules and principles should be adapted

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du Plessis, 'Affirmation and Celebration of the Religious Other' (2008) 8 South African Journal on Human Rights 376, 378.

27 *Ibid*.

28 Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Fort Hare University Inaugural Distinguished Lecture Series October 16, 2014) < http://www.constitutionnet.org/files/mutunga_-_theory_of_interpreting_kenyas_transformative_constitution_2-1_oct_14.docx> accessed 15th February, 2015.

29 Richard A. Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 Case Western Reserve Law Review 179, 180.

30 Jude Wallace and John Fiocco "Recent Criticisms of Formalism in Legal Theory and Legal Education (1980-81) 7 Adelaide Law Review 309

31 Anthony Mason, 'Future Directions in Australian Law' (1987) MonashULawRw 149, 150.

32 Karl Klare and Dennis M. Davis, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 South African Journal on Human Rights 403; See also Catherine Albertyn and Dennis Davis, 'Legal Realism, Transformation and the Legacy of Dugard' (2010) 26 South African Journal on Human Rights 188.

33 Article 159(2)(d).

34 Oliver Wendell Holmes, *The Path of the Law* (1897) 10 Harvard Law Review, 457, 461

to social, economic, and political change'.[35] Indeed, under the current Constitution, in applying a provision of the Bill of Rights, courts are required to develop the law to the extent that it does not give effect to a right or fundamental freedom.[36] Additionally, the Constitution requires interpretation in ways that that permit the 'development of the law'.[37] In this regard, legal realism is a befitting tool of analysis in the quest for an understanding of how judicial review has been transformed by the Constitution.

The four theories have been picked not only because of their direct relation to the research hypothesis and objectives, but also due to their relevance to the research questions. Both post-liberal theory and the theory of transformative constitutionalism will be useful in investigating how the Constitution has transformed judicial review as well as the extent to which this is reflected in judicial decisions. On the other hand, reliance will be placed on legal formalism to understand how the sustenance of the common law approaches to judicial review affects the development of judicial review under the Constitution. Equally, legal realism will be relied upon to provide answers to the research question on approaches to towards development of judicial review anchored on constitutional ideals.

1.4 CONCEPTUAL FRAMEWORK

In this research, the relation between three major concepts is examined: 'transformative constitutionalism', 'judicial review', and 'common law' and how they affect the 'transformation of judicial review'. The key thesis is that interactions between traditional common law approaches to judicial review and transformative constitutionalism should lead to the transformation of judicial review and thereby a culture of judicial review based on constitutional ideals. At the same time, the effect of the common law approaches on the transformation of judicial review is also studied.

Accordingly, the independent variable is judicial review; the intervening variables are common law, precedents and transformative constitutionalism; while the dependent variable is transformation of judicial review. A dependent variable is what the researcher wants to explain[38] or in other words 'the discrete things being measured'.[39]

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35 N. E. H. Hull, "Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism", (1989) 38 Duke Law Journal 1302, 1308

36 Article 20(3)(a)

37 Article 259(1)(c)

38 Judith Burnett *Doing Your Social Science Dissertation* (Sage Publications, 2009) 188.

39 Wayne C. *Booth*, Gregory G. Colomb and Joseph M. Williams, *The Craft of Research* (2nd edn, University of

1.5 LITERATURE REVIEW

This section surveys the current literature on the concepts under study: transformative constitutionalism, common law and judicial review. The section is arranged thematically for ease of understanding.

1.5.1 Transformative Constitutionalism

The first research question partly concerns the ways in which the Constitution has transformed judicial review. As a result, this research approaches the power of judicial review as an aspect of constitutionalism which Waluchow defines as the idea that powers of government ought to be limited, which limits lead to legitimacy.[40] Mark Tushnett demonstrates the link between constitutionalism and judicial review.[41] To him, constitutionalism requires a commitment permitting people to democratically determine the policies under which they will live.[42] Nevertheless, constitutionalism demands some constitutional limits on the policy choices people can democratically make.[43] Thus emerge two means of control meant to ensure constitutionalism: parliamentary supremacy and judicial review.[44] To the contrary, it is argued that Parliamentary supremacy is no longer the basis of judicial review in Kenya.

Although there is a developing body of literature on transformative constitutionalism, none of the current research touches on the present topic as framed. However, the literature provides a foundation to anchor the current research and the basis for future researches into this field of constitutional critique. As the literature surveyed reveals, transformative constitutionalism has mainly taken root in South Africa.

Comparatively, there is not as much literature from the Kenyan jurisdiction on transformative constitutionalism or its impact on judicial review. This gap can be attributed to the relatively young age of the Kenyan constitution (six years since promulgation).[45] Transformative constitutionalism including the transformation of judicial review is therefore a live area for research. The following

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Chicago Press 2003) 250.

40 W J Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, New York 2007) 21.

41 Mark Tushnett, *Weak Courts Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton Unviersity Press, 2008) x

42 *Ibid* at 18.

43 *Ibid* at 19.

44 *Ibid.*

45 27th August, 2010.

literature was reviewed while conceptualizing the present research.

To begin with, Karl Klare's idea of 'transformative constitutionalism' is explicated as:

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[46]

Klare however notes the potential conflict between the Constitution's transformative vision of social, political and economic change and the prevalent legal culture in South Africa.[47] Particularly, Klare notes that despite the Constitution's post-liberal or transformative goals, the underlying legal culture may remain conventional due to the deployment by jurists of legal methodologies that place 'relatively strong faith in the precision, determinacy and self-revealingness of words and texts'.[48] This approach to interpretation of legal texts bears scarce regard to non-jural phenomena such as values or policy and is instead 'highly structured', 'technicist', 'literal' and 'rule-bound'.[49] Klare therefore suggests the need to develop a legal culture that grips the transformative and normative framework pronounced by the Constitution's transformative ideals.[50] This research will accordingly argue for the development of an approach to judicial review that aligns with the Constitution's transformative ideals.

At the same time, Karin van Marle perceives transformative constitutionalism as 'critique'.[51] The author describes this as an approach 'committed to transforming political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general'.[52] She distinguishes this perspective from other transformative approaches to substantive equality or socio-economic rights premised on liberal politics and

46 KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146, 150.
47 *Ibid.*
48 *Ibid.*
49 *Ibid*.
50 *Ibid.*
51 Karin van Marle, 'Transformative Consitutionalism as/and Critique' (2009) 2 Stell LR 286, 288.
52 *Ibid*.

approaches to law.[53] Thus, transformative constitutionalism enables the law to make a break with conventional perceptions of law and enables a multidisciplinary approach to law that engages with fields like philosophy, political theory and sociology toward social transformation.[54] In this regard, transformative jurisprudence and legal culture must not be insular, but must take a multidisciplinary approach and engage for instance with other non-legal concepts and issues.[55] The idea of the transformative constitutionalism as critique responds to all three research questions in that while the Constitution has at the normative level transformed judicial review, that transformation is not fully felt in practice because the abiding influence of the common law, creating the need for a new approach to judicial review.

In accordance with the theory of legal realism, this research argues for a transformative jurisprudence which is multidisciplinary and takes into account non-phenomena towards the transformation of judicial review. According to Etienne Mureinik, transformative constitutionalism engenders a shift 'from a culture of authority to a culture of justification' with the Constitution as the bridge between those two cultures.[56] It is argued that it is on the basis of non-legal phenomena such as those in Article 10 of the Constitution that a decision under review can be justified and upheld as reasonable.

Pius Langa renders an account of the fundamental alteration in law and legal culture brought about by a transformative constitutional dispensation.[57] According to Langa, it would thus 'no longer be sufficient for judges to rely on the say-so of Parliament or technical readings of legislation as justifications for their decisions' but that 'judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values'.[58] This research will demonstrate that the judiciary can stultify the transformative ideals of the constitution over judicial review by over-relying on the traditional approaches to judicial review.

To Quinot, an integral component of the transformative project is 'open engagement with substantive values in justifying legal outcomes'.[59] Against this background, Alfred Cockrell argues

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53 *Ibid.*
54 *Ibid.*
55 *Ibid.*
56 Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31, 32.
57 Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351, 354.
58 *Ibid*.
59 Geo Quinot, 'Transformative Legal Education' (Inaugural Lecture delivered on 19 September 2011 at Stellenbosch University) < http://www0.sun.ac.za/ctl/wp-content/uploads/2011/10/G-Quinot-Inaugural-Final28.pdf > accessed 15th February, 2016

that transformative constitutional dispensations involve significant changes within the legal system which necessitates 'substantive' as opposed to 'formal' vision of the law.[60] This vision creates an obligation to balance moral and political values in the adjudicatory process so that a legal rule would be invalid if it did not conform with conceptions of what is substantively right, just or good.[61] It is necessary for Kenyan courts to approach judicial review from a substantive standpoint as opposed to a formalistic common law approach. Legal rules on judicial review including rules on *locus standi* and the applicable remedies should thus be validated according to conceptions of what is substantively right, just or good.

The need for transformation of the underlying legal culture has been noted by Erin Daly who recognizes that nations in transition from tyrannical and lawless regimes to democratic dispensations face a number of challenges including creating new governing bodies, writing new laws while repealing old ones and redefining the balance of private and public power.[62] Transforming the culture within which these nascent liberal governments operate is however one of the greatest challenges, but one that receives insufficient attention.[63] By reliance on the post-liberal theory, this research attempts to draw attention the ways in the current Constitution has redefined power balances including by engaging horizontal application of the Bill of Rights.

It is necessary to interrogate the possibility for judicial review of private power within Kenya's transformative legal system. To this end, Daly notes that it is necessary for the new democratic governments to transform the entire society from toleration of oppression to a culture of observance of human rights and democratic values as the basis of legitimacy.[64] Therefore where the public had been part of the previous oppression, the legal culture that permitted or enabled that oppression must itself be changed.[65] Thus 'simply changing the governors will not cure a problem that resides as well in the governed'.[66] There must, therefore, be not just a transition, but a transformation.[67]

Daly's views accord with the proposition in this research that the Constitution is post-liberal as

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60 A Cockrell, 'Rainbow Jurisprudence' (1996) 12 South African Journal on Human Rights 1–7; See also Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987).

61 *Ibid.*

62 Erin Daly, 'Transformative Justice: Charting A Path to Reconciliation' (2001-2002) 12 International Legal Perspectives 73, 73.

63 *Ibid.*

64 *Ibid.*

65 *Ibid*.

66 *Ibid.*

67 *Ibid.*

evidenced in the horizontal application of the Bill of Rights and with impact on judicial review.[68] This view is affirmed by Jan Smits, who opines that the constitutionalisation of private law has seen the spread of fundamental rights originally developed to govern the relation between the State extend to citizens in private relationships between parties.[69] Such rights can be codified in a national constitution like Kenya's or in a human rights treaty or they can be unwritten.[70] Overall, judicial review emerges as an essential tool for redefining the balance of both private and public power - the former where rights and fundamental freedoms of an individual are likely to be affected by the actions of a private administrator, the latter on all occasions.

1.5.2 Common Law

The greatest danger to the transformation of judicial review is the prevalence of common law judicial review remedies at the expense of those anticipated by the Constitution. Accordingly, it is necessary to determine how the continuation of judicial review under the common law may affect the transformation of judicial review towards the ends envisaged by the Constitution.

Concerning this, Boggenpoel investigates the 'extent to which remedies are applied in the same way as they were before' the passage of a transformative constitution 'where constitutional rights are infringed and an appropriate remedy is sought'.[71] This illustrates the need to re-imagine the interaction between conventional common law remedies on one hand and constitutional on the other hand, especially where constitutional rights are impacted.[72] The author poses three questions concerning: the place of a methodological approach in choosing appropriate remedies to ensure constitutional rights are upheld; the freedom of litigants to opt for a common law remedy where constitutional rights are infringed; and whether courts can deny those remedies and instead fashion constitutional remedies.[73] Thus, he proposes the need to evaluate the place of common law remedies in constitutional disputes and determine the 'possibility of direct reliance on a constitutional right remedy in applications brought purely on the basis of common-law remedies'.[74]

Boggenpoel's views are significant to this research because judicial review in Kenya originated as a

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68 Constitution of Kenya 2010, Article 19.
69 Jan Smit, 'Private Law and Fundamental Rights: A Sceptical View' in Tom Barkhuysen and Siewert D Lindenbergh (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff Publishers, 2006) 9.
70 *Ibid.*
71 Zsa-Zsa Temmers Boggenpoel, 'Does Method Really Matter? Reconsidering the Role of Common-law Remedies in the Eviction Paradigm' (2014) 1 Stell LR 72, 72.
72 *Ibid* at 85.
73 *Ibid* at 86.
74 *Ibid.*

common law prerogative, but has now attained constitutional underpinning.[75] At the same time, the Act which implements Article 47 of the Constitution provides that the principles outlined in the Act are not in derogation to, but in addition to the common law principles.[76] Besides that, Odunga J has recently called for the fusion of constitutional and common law grounds for judicial review.[77]

Hence, this research investigates the place of the common law in the administration of judicial review since the promulgation of the Constitution. Besides, Kwasi Prempeh notes the problematic application of the common law with its legal culture and language as the grund norm for theorisation and analysis of all legal controversies including those raising constitutional questions.[78] He illustrates the point that the common law carries with it elements and predispositions which may not accord with the transformative vision of a modern Constitution.[79]

Klare and Davis have similarly addressed the inherent incongruity and conflict between the common law and transformative constitutionalism.[80] The learned authors opine that inbred formalism within a legal culture as is bound to arise within the common law, working in tandem with the absence of a critical jurisprudential tradition, is bound to muffle the Constitution's transformational goal.[81] Further, it is assumed that progress toward social justice is impossible under a legal system that places a transformative constitutional system upon the foundation of the common law tradition from an unequal past.[82] They therefore propose the adoption of transformative methodologies influence both by the Bill of Rights and the Constitution's goal of justice, democracy and egalitarianism.[83] That is the kind of approach that can facilitate the transformation of judicial review in Kenya.

The authors also make the point that judges have immense powers to not only to quiz, but also to to uphold the values embedded in the Bill of Rights by modernizing the common and customary law in order.[84] According to the authors, the developmental clause obliges judges to promote

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75 Article 47.

76 Section 12.

77 *Republic v Director of Public Prosecution ex parte Chamanlal Vrajlal Kamani* [2015] eKLR.

78 Kwasi H Prempeh, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 Tulane Law Review 72, 72; See also Jenkins David, 'From Unwritten to Written: Transformation in the British Common-Law Constitution' (2003) 36 Vand. J. Transnat'l L. 863, 867.

79 *Ibid.*

80 Karl Klare and Dennis M Davis, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 SAJHR 403, 405.

81 *Ibid*.

82 *Ibid* at 411.

83 *Ibid* at 412.

84 *Ibid* 409.

constitutional values and ensure that judicial precedents conform to constitutional standards.[85] Secondly, the success of the constitutional enterprise depends upon the reinvention of the common law since progress towards constitutional goals requires transformation both at the constitutional level as well as the secondary rules that orient socio-economic life.[86] Kenyan judges have a similar duty since the constitution expressly requires the courts, in applying a provision of the Bill of Rights, to develop the law to the extent that the law as it stands does not give effect to a right or fundamental freedom.[87] The Constitution also calls for its interpretation in a manner that permits the development of the law including on judicial review.[88]

On the conflict between the common law and the Constitution, Moseneke invokes the ubiquity of the Constitution to argue for the need to develop the common law in line with transformative constitutionalism.[89] He opines that implicit in the transformation agenda is the duty imposed on the judiciary to promote the Constitution's transformative design.[90] In this regard, the supremacy of the Constitution elevates it above all other law and brings all state organs and all conduct under it.[91] The all pervasiveness of the Constitution implies that all norms, including the practice of judicial review under the common law, derive legitimacy from the Constitution and are therefore subject to constitutional control.[92] Any conflict between common law and the Constitution on judicial review must be resolved in favour of the Constitution.

Moseneke also cites at length the dicta of Chaskalson P in the *Pharmaceuticals Case*[93] to reinforce the point that the common law not only derives its force from, but also supplements the Constitution.[94] Accordingly, the common law must be developed to fulfil Constitutional ends, an approach that would ensure that the common law grows within the outline of the Constitution and consistently with the transformative legal order established by the Constitution.[95] The implication is that there is only one legal system of law wherein the Constitution is supreme and all other law compliant to the Constitution.[96] Kenyan courts must therefore develop the prevailing common law

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85 *Ibid* 410.
86 *Ibid.*
87 Article 20(3)(a).
88 Article 259(1)(c).
89 Dikgang Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 SAJHR 309, 314.
90 *Ibid.*
91 *Ibid.*
92 *Ibid.*
93 *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA* 2000 (2) SA 674 para 44.
94 *Ibid.*
95 *Ibid.*
96 *Ibid.*

doctrines on judicial review to accord with the transformative vision of the Constitution.

1.5.3 Judicial Review

All the three research questions are inherently about judicial review and how it has been transformed by the Constitution, how that transformation is affected by the common law and what needs to be done to achieve the kind of transformation decreed by the Constitution. Admittedly, as Hilaire Barnett notes, judicial review is part of the rule of law.[97] The author notes that judicial review employs the 'concepts of intra and ultra vires and the rules of natural justice and ensure that the executive acts within the law'.[98] Wade and Forsyth, on the other hand, opine that judicial review serves to enforce parliamentary sovereignty by guaranteeing that a public body does not exceed the powers given to it by Parliament.[99] Wade's perception of judicial review is therefore anchored on the 'ultra vires' doctrine which is described as the juristic foundation of judicial review and whose effect is to elevate Parliament's supremacy over the Judiciary.[100] To the contrary, while this paper concedes that judicial review is linked to the rule of law, it is argued that the juridical basis of judicial review in Kenya has since shifted from Parliamentary supremacy to constitutional supremacy. The ultra vires doctrine cannot therefore apply as it previously did including by precluding merit review or review of private power.

To this end, Alex Caroll emphasizes the traditional public law element of judicial review.[101] The author describes judicial review as the process by which an individual challenges the legality of the way in which a public power has been used by a public authority.[102] The author explains that public authorities derive their power either from statute or from royal prerogative and judicial review supervises the use of this power.[103] To the author, though government bodies may exercise both public and private rights, judicial review is limited to the exercise of public power.[104] For this reason, the author presents an account of judicial review as a 'distinct and discrete public law remedy with its own procedure and related terminology'.[105] The traditional account of judicial review rendered by Paul Jackson and Patricia Leopold also emphasizes the exercise of public

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97 Hilaire Barnett *Constitutional & Administrative Law* (5th (edn), Australia, Cavendish Publishing Limited 2004) 88.
98 *Ibid.*
99 HWR Wade and CF Forsyth, *Administrative Law* (10th edn, OUP 2009) 3.
100 *Ibid.*
101 Alex Carroll, *Constitutional and Administrative Law* (6th (edn), Pearson Education Limited 2011) 321.
102 *Ibid.*
103 *Ibid.*
104 *Ibid* at 323.
105 *Ibid* at 371.

powers conferred by statute or common law as the proper province of judicial review.[106] Prior to the Constitution, judicial review of private power was hardly ever thought possible.

Indeed, Alnasir Visram in an article written just seven months before the promulgation of the Constitution of Kenya, 2010 illustrated the conception of judicial review obtaining before the current transformative dispensation. What clearly emerges from this article is the emphasis on the emphasis on public law as a prerequisite for grant of judicial review remedies, before the promulgation of the Constitution. To this end, Visram noted that:

> judicial review is only available against a public body in a *public law* matter. In essence, two requirements need to be satisfied. First, the body under challenge must be a *public body* whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve *claims based on public law principles* not the enforcement of private law rights. The traditional test for determining whether a body of persons is subject to judicial review is the source of power. Judicial review is concerned with the activities of bodies deriving their *authority from statute.* If the duty is a *public duty* then the body in question will be subject to public law and judicial review as a public law remedy will only be invoked if the person challenging was performing a public duty. (emphasis supplied)[107]

The central thesis of this paper is however that the position captured by Justice Visram is no longer tenable under the current constitutional dispensation. However, this research seeks to demonstrate that the courts are extremely slow in adjudicating judicial review claims from the standpoint of the constitution.

On the other hand, just as Ian Loveland, this research examines the duality between public law and private law and the implication of that tension on judicial review.[108] It is argued that the horizontal application of the Bill of Rights renders the traditional public-private dichotomy otiose because the decisive factor is the effect of power as opposed to its source.

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106 O Hood Philips, Paul Jackson and Patricia Leopold, *O Hood Philips & Jackson: Constitutional and Administrative Law* (8 edn, London: Sweet and Maxwell, 2001) 698.

107 Alnashir Visram, 'Review of Administrative Decisions of Government by Administrative Courts and Tribunals' (Paper presented at the 10th Congress of the International Association of Supreme Administrative Jurisdictions Sydney – March 2010) <http://www.aihja.org/images/users/1/files/kenya.en.0.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu1> accessed 16th February, 2016.

108 Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (3rd (edn), Lexis Nexis UK 2003) 491.

Likewise, Dawn Oliver recognizes that even in the English Courts with a conservative common law tradition, ‘judicial review has progressed from the ultra vires rule to a concern for the protection of individuals, and for the control of power, rather than powers, or vires’.[109] This is the same view expressed by Migai Akech in his critique of the *Odumbe* case.[110] The author critiques the decision in *Odumbe* for being contra to the progressive view which was then emerging that the ‘dispositive factor’ in judicial review was not whether the powers exercised were public, but that every exercise of power had the potential to adversely affect individual rights.[111] For this reason, every exercise of power with potential impacts on the rights of others’ ought to be controlled through judicial review.[112] That view which now resides in Article 47 as implemented by the Act is explored and developed in this research.

It is also necessary to clarify the place of common law judicial review under the Constitution for two reasons. First, James Gathii has cautioned against the development or sustenance of a dual track judicial review system, separating between application of the common law and the Constitution respectively.[113] Second, Mark Eliott has identified the need to re-examine the constitutional justification of judicial review and to ‘identify both the *constitutional warrant* for review and the legal basis of the principles which the courts apply in effecting review’.[114] This would make it ‘possible to confine context-specific justificatory devices like ultra vires to their proper sphere and to enquire into the legitimacy of judicial review of administrative action in a more open manner’ thus obviating the ‘need to stretch established doctrine beyond breaking point’.[115] The applicability of the ultra vires principle in Kenya needs to be re-examined.

The gap identified, through the literature review, is that almost all literature on judicial review focus on the liberal conceptions of judicial review which is informed by the Western traditional liberal constitutional theory which opined that the basic purpose of the constitution is the limitation of

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109 Dawn Oliver, ‘Is the Ultra Vires Rule the Basis of Judicial Review?’ in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hartland Publishers, Oxford 2000).

110 *Republic v Kenya Cricket Association ex parte Maurice Odumbe* [2006]eKLR.

111 Migai Akech, ‘The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organisations’ (2008) 6 Entertainment and Sports Law Journal 1, 4.

112 *Ibid.*

113 James Thuo Gathii ‘The Incomplete Transformation of Judicial Review’ (A Paper presented at the Annual Judges’ Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014); See also Willy Mutunga, ‘The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions’ (Fort Hare University Inaugural Distinguished Lecture Series October 16, 2014) < http://www.constitutionnet.org/files/mutunga_-_theory_of_interpreting_kenyas_transformative_constitution_2-1_oct_14.docx> accessed 15th February, 2015.

114 Mark Eliott, *The Constitutional Foundations of Judicial Review* (US and Canada: Hart Publishing, 2001) 20.

115 *Ibid.*

governmental power and preservation of the autonomy of civil society.[116] Accordingly, judicial review is perceived as a means of checking governmental authority.[117] This is reinforced by the argument that since the role of the constitution is to guarantee core values and principles, the function of government becomes the protection of those core principles.[118] Consequently, government and 'those emanations which exercise functions on its behalf whether public or private' become constitutional agents with constitutional duties.[119] There was no place for the horizontal application of the Bill of Rights in the manner intended by the Constitution, rather, judicial review is limited to the acts of public bodies.

However, Carol Harlow and Richard Rawlings have identified the need for transformation of judicial review in the UK.[120] They critique the positivist foundation of judicial review and recount the tendency of English judges to avoid considerations of policy aspects of the issues they decide.[121] They also question the perception of the judge as wholly analytical - discovering previously existing law and applying it logically before the court.[122] According to this view shared by Attiyah and Summers, judges are not only precluded from considering policy questions, but also the law making powers of the judiciary are scarcely recognised.[123] This research argues for a departure from that deferential approach which is inconsistent with a Constitution that permits merits review and requires development of the law.[124]

1.6 HYPOTHESIS

This study is under-girded by the following three propositions:

1. The Constitution has transformed the nature of judicial review into a constitutional principle from a common law prerogative though this is hardly the case in practice;
2. Continuation of judicial review under the common law affects the transformation of judicial review under the Constitution in Kenya; and

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116 Yash Pal Ghai, 'Constitutions and Governance in Africa: A Prolegomenon' in Sammy Adelman and Abdul Paliwala (eds), *Law and Crisis in the Third World* (Hans Zell Publishers, London 1993) 54.

117 Ibid at 54.

118 Diane Longley and Rhoda James, *Administrative Justice: Central Issues in UK and European Administrative Law* (London and Sydney: Cavendish Publishing Limited, 1999) 10.

119 *Ibid*

120 Carol Harlow and Richard Rawlings, *Law and Administration* (3rd (edn.) Cambridge University Press, United Kingdom 2009) at 95

121 *Ibid.*

122 *Ibid.*

123 P Atiyah and R Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Theory and Legal Institutions* (Clarendon Press, 1987).

124 Article 20(3)(a).

3. There is need to develop an approach to judicial review anchored on constitutional ideals.

1.7 OBJECTIVES

The overriding goal of this research is to analyse the transformation of judicial review in Kenya subsequent to the promulgation of the current Constitution. In this regard, the specific objectives are to:

(a) investigate the extent to which the constitution has transformed judicial review and how this is reflected in reality as evidenced by court decisions;
(b) examine how the continuation of judicial review under the common law affects the transformation of judicial review under the Constitution in Kenya; and
(c) suggest a new approach to judicial review anchored on constitutional ideals.

1.8 RESEARCH QUESTIONS

In view of the statement of the problem, therefore, this research seeks answers to the following questions:

1. How has the Constitution transformed judicial review and to what extent is this reflected in judicial decisions?
2. How does the continuation of judicial review under the common law affect the transformation of judicial review under the Constitution in Kenya?
3. What approach should be taken towards the development of judicial review anchored on constitutional ideals?

1.9 RESEARCH JUSTIFICATION

As has already been demonstrated above, there is a gap in the practice and theory of judicial review after the promulgation of the Constitution of Kenya, 2010. There is need for research to fill this gap. The findings of this research will benefit the judiciary, lawyers, litigants and administrators interested in the field judicial review to adopt new approaches to the practice and theory of judicial review. The research will also assist the Kenyan judiciary in making a transition from the age of common law practice of judicial review to judicial review under the Constitution.

1.10 RESEARCH METHODOLOGY

To investigate the transformation of judicial review in Kenya, this research took the form of an exploratory qualitative research. The study was primarily library based. There was review of primary sources of data on judicial review including Kenya's 2010 the Constitution, legislation such as the Act as well as the Law Reform Act, Cap 26 and judicial decisions from the courts of record. Reliance was also placed on secondary sources of law such as academic commentary, books, journal articles and websites. A comparative approach was envisaged, to draw lessons from other jurisdictions such as South Africa, United Kingdom (UK) and the United States of America (USA). A preliminary literature review was conducted to delimit the research area, conduct a theoretical review, contextualise the research and identify current research gaps.

1.11 SCOPE AND LIMITATIONS

Magistrates' courts in Kenya now have the jurisdiction to adjudicate claims relating to violation of sections of the Bill of Rights.[125] These include: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; right to a fair trial; and right to an order of *habeas corpus.*[126] Arguably, where any of these rights have been violated, the subordinate courts have the power to grant any appropriate relief including a judicial review order.[127] The study is however limited to decisions of the superior courts. The work of administrative tribunals and other bodies like the Commission on Administrative Justice as envisaged under the Constitution or various statutes is omitted.

1.12 CHAPTER SYNOPSIS

This study is set out in four chapters broken down as follows.

Chapter 1 'Introduction to Transformation of Judicial Review in Kenya', which is the introductory chapter, is dedicated to research design and methodology. Accordingly, the chapters discusses the problem statement, objectives, justification of research, literature review, statement of the problem and research questions, hypothesis as well as research methodology.

Chapter 2 'Transformation of Judicial Review in Kenya' is dedicated to the first two research

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125 Section 8, Magistrates Courts Act, 2015.
126 Article 25.
127 Article 23(3)(d).

questions. First, the chapter discusses how the Constitution has transformed judicial review and the extent to which this is reflected in judicial decisions. Secondly, there is a discussion of the ways in which the continuation of judicial review under the common law affects the transformation of judicial review as envisaged by the Constitution in Kenya.

Chapter 3 'Judicial Review in Kenya Post-2010: Grounds Procedures and Remedies' is linked to the research question about a new approach to judicial review anchored on constitutional ideals. There chapter therefore presents a discussion of the envisaged grounds, procedures and remedies of judicial review under the Constitution.

Lastly, Chapter 4 'Conclusions and Recommendations' summarizes the findings of the research, revisits the hypothesis in this thesis, and gives recommendations for reform as well as proposals for future studies.

CONCLUSION

Arising from the statement of the problem, there is need to study the transformation of judicial review in Kenya with a view to developing a practice of judicial review which accords with the Constitution. The justification for the study is that it could reduce some of the confusion that currently reigns on judicial review and thus enable litigants to enjoy the right to fair administrative action fully.

CHAPTER TWO

TRANSFORMATION OF JUDICIAL REVIEW IN KENYA UNDER THE 2010 CONSTITUTION

2.0 INTRODUCTION

In line with the first two objectives of this research, this Chapter investigates how the Constitution has transformed judicial review and the extent to which this is reflected in judicial decisions. The chapter also examines the ways in which the continuation of judicial review under the common law affects the transformation of judicial review as envisaged by the Constitution in Kenya. The two issues for discussion are therefore directly linked to the first and second research questions.

2.1 TRANSFORMATION OF JUDICIAL REVIEW IN KENYA

In seeking to answer the research questions set out above, the following sections rely on the link between judicial review and constitutional interpretation. It is similarly urged that the concept of parliamentary sovereignty as the foundation of judicial review under the common law has since ceded ground to the idea of constitutional supremacy. The chapter further advances the argument that judicial review is no longer exercised as a royal prerogative, but rather as a constitutional principle for the enforcement of Kenya's transformative Bill of Rights. At the same time, it is argued that Constitution's post-liberal leaning means that the private-public dichotomy is no longer primary, but is of secondary importance in judicial review applications. The horizontal application of the Bill of Rights also implies that remedies which were initially applicable to public authorities or to private persons performing public functions are now applicable to all administrators where rights and interests are in issue.

Additionally, it is argued with reference to the theory of legal formalism, that the courts must be circumspect in applying common law doctrines to the practice of judicial review especially where those doctrines stand in opposition to the constitution. As a result of these changes, the chapter places reliance on legal realism to draw the conclusion that there must of necessity follow a shift in the theory and practice of judicial review.

2.1.1 The Shift from Parliamentary Sovereignty and Its Impact on the Traditional Grounds of Judicial Review

This section, related to the first two research questions discusses how the Constitution has transformed judicial review through the shift from parliamentary sovereignty to constitutional supremacy. The section is divided into sub-headings merely for ease of discussion without detracting from the original research questions which are how the Constitution has transformed judicial review and the reflection of this in practice as well as the effect of the continuation of the common law judicial review on this transformation.

The discussion adopts the following thematic outline: (a) parliamentary sovereignty as the traditional origins of judicial review; (b) the shift from parliamentary sovereignty to constitutional supremacy as the basis of judicial review; the impact of the shift from parliamentary sovereignty on judicial review; and whether the shift from parliamentary sovereignty to constitutional supremacy as the basis of judicial review is completely reflected in judicial decisions on judicial review.

(a) Parliamentary Sovereignty as the Traditional Origins of Judicial Review

Judicial review can be defined as the 'revision of the decree or sentence of an inferior court by a superior court'.[128] However, judicial review bears a more nuanced importance linked to the liberal conception of limited government and implying the power of courts to test for validity any legislative and other public exercise of power.[129] A dominant perception of judicial review inherited by Kenya from the British legal system perceives the judicial review jurisdiction as apt for the enforcement of the will of Parliament.[130] Judicial review therefore was designed to ensure that public bodies did not overstep the powers donated to them by Parliament through the doctrine of ultra vires which in turn elevates Parliament over the Judiciary.[131] As a result, the doctrine of *ultra vires* has been expressed to be the very 'juristic basis' of conventional judicial review, without which judicial review would stand on shaky ground.[132] In this way, the doctrine of ultra vires is the central principle of administrative law and the basis of judicial review.[133] The principle thus

128 Adarsh Sein Anand, 'Protection of Human Rights Through Judicial Review in India' in Mads Andenas and Duncan Fairgrieve (eds) *Judicial Review in International Perspective* (Kluwer Law International 2000) 381, 384.
129 *Ibid*.
130 William Wade and Christopher Forsyth *Administrative Law* (10th: Oxford University Press, 2009) 3.
131 *Ibid.*
132 *Ibid.*
133 Wade & Forsyth, *Administrative Law* (7th ed., 1994)41; See also Christopher Forsyth, 'Of Fig Leaves and Fairy

provides both the basis for, and limits to, the power of judicial review with the objective of ensuring that public agencies remain within the area assigned to them by Parliament.[134]

Judicial review under the old constitutional order was founded on the theory of 'parliamentary supremacy' wherein whatever Parliament said was law; without any need to rationalize or justify its decisions to the courts or to anyone else.[135] Parliamentary supremacy or sovereignty is the conventional basis of the UK Constitution.[136] The foundation of parliamentary supremacy is the 1688 revolution which was a decisive political act establishing the parliamentary basis of our constitution.[137] Parliamentary supremacy is seen in the alternative as the creation of the common law whereby the courts concede power to Parliament in the interests of democracy.[138] The supremacy of parliament implies the courts would resist any attempt to sidestep certain rules of the common law thus inculcating a political practice of obeying Parliament.[139] The traditional position was as a result very deferential, positing that a court had power to determine if an alleged prerogative power existed, but had no power to review the actual exercise of that power.[140]

The principle of parliamentary sovereignty means that Parliament had, under the English constitution, the right to make or unmake any law and further that no person or body was recognised by the law of England as having a right to override or set aside the legislation of Parliament.[141] The power of parliament to make laws was untrammelled however unreasonable, unacceptable, unjust or even unenforceable such laws might have been in the perception of those they sought to bind.[142] As a result of this principle, three concepts pervade English law: parliament is considered to possess unlimited lawmaking power by which it can make any kind of law; the legal validity of laws made by Parliament cannot be questioned by any other body; and a

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Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 Cambridge Law Journal 122, 122

134 Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart, 2000) 1.

135 Mureinik *ibid*.

136 John Alder *General Principles of Constitutional and Administrative Law* (4th (edn), Palgrave Macmillan 2002) 121.

137 Ibid; See also HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 Cambridge Law Journal 172-197.

138 *Ibid.*

139 John Alder *ibid.*

140 Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2016) 494.

141 Albert Venn, *Dicey, Introduction to a Study of the Law of the Constitution* (8th (edn), Macmillan, London 1915)

142 Ismail Mahomed, 'The Impact of a Bill of Rights on Law and Practice in South Africa' (1993) De Rebus 460, 460.

contemporary parliament cannot bind a future Parliament.[143]

The deferential approach of Kenyan courts was also largely informed in part by the related political question doctrine. The United States Constitution does not have an express provision permitting the judiciary to review the acts of the executive or legislature. Some have argued that judicial review is potentially unconstitutional because permitting unelected judges through judicial review to nullify actions of elected executives or legislators is to act contrary to the 'majority will' a problem Bickel dubs the 'countermajoritarian difficulty'.[144] The court in *Marbury* however also considered that its standing as a court required it to have some power to declare the law.[145] Thus the dilemma expressed in the poignant words of Chief Justice Marshal 'if some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction'.[146]

(b) The Shift from Parliamentary Sovereignty to Constitutional Supremacy as the Basis of Judicial Review

In contrast, constitutionalism which is now an inherent and interwoven part of the Kenyan legal system and the definition of the modern nation-state is the current basis of judicial review in Kenya.[147] This proposition is consistent with the values, purposes and principles of the Constitution of Kenya, 2010. To begin with, the Preamble indicates the desire of the people of Kenya for 'government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'.[148] Article 2(5) and 6 import treaty law and general rules of international law while 10 enshrines human rights as among the foundational touchstones of Kenya as a multi-party democratic State.[149] That apart, Article 19(1) perceives the Bill of Rights as an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.[150]

Kenya has therefore transformed from a parliamentary sovereignty into a constitutional democracy where the Constitution is supreme as opposed to Parliament.[151] In the Division of Revenue Case,

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143 *Ibid.*
144 Alexander M Bickel The Least Dangerous Branch*:* The Supreme Court at the Bar of Politics (Yale University Press, 1986) 16.
145 Marbury *ibid.*
146 *Ibid.*
147 Inger-Johanne Sand, 'Polycontextuality as an Alternative to Constitutionalism' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart, 2004) 41.
148 Constitution of Kenya 2010.
149 Constitution of Kenya *ibid.*
150 *Ibid.*
151 Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would Be Decided Differently Today' (2013) Kenya Law Bench Bulletin 11, 11.

Speaker of the Senate v Attorney General[152] the Supreme Court held that Parliament had to function under the Constitution and that the 'English tradition of Parliamentary supremacy' did augur well to emergent democracies like Kenya. What this means is that it would be illogical to conduct judicial review on the parliamentary supremacy whereas supremacy lies in the Constitution and not Parliament. Therefore, British traditional approach to judicial review which was founded on the conception of parliamentary sovereignty must be treated with abundance of caution.[153]

(c) What is the Impact of the Shift from Parliamentary Sovereignty on Judicial Review?

Due to the shift from sovereignty of Parliament to supremacy of the Constitution, there must be a shift in the practice of judicial review as a constitutional principle for the vindication of the Bill of Rights by Kenyan courts. To this end, in ***Margaret Nyaruai Theuri v National Police Service Commission*** Ongaya J has recognized that Article 22 and 23 guarantees any person the right to seek judicial review orders so that there is no longer any need for applicants or parties seeking judicial review to move the court in the name of the Republic.[154] He therefore held that the current constitutional order did not envisage a crown and the related concept of prerogative orders.[155] The issue had been whether the application for judicial review was incompetent for not having been commenced in the name of the Republic. Respondent cited several decisions made during the pre-constitutional order inter alia that only the Republic could seek judicial review and therefore an application not brought in the name of the Republic was incurably defective.[156]

Cameron similarly makes the point that due to constitutional supremacy, the Constitution creates a new legal order where every aspect of adjudication must be informed by the Constitution.[157] As such, courts are obliged when interpreting any law, or in applying and developing the common law, to have due regard to the spirit, purport and objects of the Constitution.[158] Indeed, Odunga J in ***Nairobi City County Government v Chief of Defence Forces, Kenya Defence Forces***[159] invoked the concept of 'popular sovereignty' resident in Article 1 of the Constitution to give citizens access

152 *[2013]eKLR.*
153 Ochiel supra note 149 *ibid.*
154 [2016] eKLR.
155 *Ibid*.
156 See *R v Secretary Public Service Commission* [2010] eKLR; *Farmers Bus Services v Transport Licensing Appeals Tribunal* [1997] eKLR; *Kenhon Kijabe Hill Farmers Cooperative Society v District Officer Naivasha* [1996] eKLR.
157 *De Klerk v du Plessis and others* [1995] (2) 40 (T).
158 *Ibid.*
159 [2016] eKLR

to a disputed public road the Kenyan army had blocked.[160] The court was told that residents of the area had been cut off from accessing essential services including educational and health facilities.[161] The judge held that the people's sovereignty required the court to weigh the peoples' interest in proportionately determining disputes with conflicting interests.[162] Prior to the Constitution, perhaps this is a point in which the army being representative of the crown, would have prevailed on the argument of national security or the like.

For this reason, judicial review is no longer a royal prerogative, but has become a constitutional principle anchored on constitutional supremacy as informed by the popular sovereignty of the Kenyan people. As a result, the courts must infuse the practice of judicial review with the requisite constitutional values right from issues about the public-private dichotomy, to grounds of judicial review and ultimately the reliefs available in applications for judicial review. What we are proposing is not a complete abandonment of the common law, but instead that judicial review must stand on the Constitution, a higher pedestal than the common law.

In the period leading up to the promulgation of the Constitution, judicial review took place along the common law grounds such as violation of the principles of natural justice, breach of legitimate expectation, absence of proportionality, as well as unreasonableness of impugned administrative action.[163] Other grounds included the 3 Is – irrationality, illegality and impropriety.[164] Presently, judicial review has shaped into:

> a constitutional principle with five major dimensions – fairness in administrative action under Article 47; protection of the constitutionally guaranteed fundamental rights and freedoms in the Bill of Rights; judicial review of the decisions of tribunals appointed under the Constitution to consider the removal of a person from office; jurisdiction on questions of legislative competence and the

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160 *Ibid.*

161 *Ibid.*

162 *Ibid.*

163 See for instance *Kenya National Examinations Council v Republic* e*x parte Geoffrey Gathenji Njoroge* [1997] eKLR; *R v National Environmental Management Authority and Another* [2006] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR; *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* [2008] eKLR; *Republic v Commissioner of Lands e*x parte *Lake Flowers Limited* [1998] eKLR; *Commissioner of Lands v Kunste Hotels Ltd* (1995-1998) 1 EA 1; *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354; *Republic v Judicial Service Commission* ex parte *Pareno* [2004] 1 KLR 203-209.

164 *Re National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya)* [2006] 1 EA 47.

> interpretation of the Constitution; supervisory jurisdiction over the subordinate courts and over *any person*, body or authority exercising a judicial or quasi-judicial function.[165]

For this reason, it is impossible to de-link judicial review from the idea of constitutionalism as some courts have attempted to. Accordingly, Kenyan courts must avoid a formalistic approach or undue regard to procedural technicalities. Judicial review adjudication is an aspect of constitutional interpretation and must therefore be approached in the same way.

This difference in approach to judicial review has implications in its practice. For instance, while the Constitution permits judicial review over private administrators, the common law only permits the judicial review of the administrative acts of public bodies. Kenyan judges therefore have a duty to 'develop the law to the extent that it does not give effect to a right or fundamental freedom'.[166] The Constitution also directs that it must be interpreted in ways that enable the law to develop.[167] It has been held that in order to realize the developmental clause may require previous decisions that violate a fundamental right to be superseded even when those rules have been invested with the highest stature of pre-constitutional judicial authority.[168] Accordingly, previous decisions on judicial review must be read with such alterations and adaptations to bring them in conformity with the Constitution. This is the point Kathurima J makes in ***Equity Bank Limited v West Link Mbo Limited***[169] where he held that though all decisions that ante-dated the Constitution are important, they have to be applied subject to Article 259 of the Constitution.

Common law derives its force from, but only supplements, the Constitution.[170] Accordingly, common law must be developed to fulfil Constitutional ends, an approach that would ensure that the common law evolves within the framework of the Constitution and in consistency with the basic norms of the transformative legal order that it establishes.[171] The implication is that there is only one system of law, within which the Constitution is supreme, and all other law must comply with the Constitution.[172] However, the Act provides that the provisions of the Act in addition to and not

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165 Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would Be Decided Differently Today' (2013) Issue 28 Kenya Law Bench Bulletin 11, 11.
166 Article 20(3)(a).
167 Article 259(1)(c).
168 *De Klerk v du Plessis and others* [1995] (2) 40 (T).
169 [2013] eKLR.
170 Dikgang Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 SAJHR 309, 314.
171 *Ibid.*
172 *Ibid.*

in derogation from the general rules of the common law and the rules of natural justice.'[173]

Beatty makes the point that only one law can be paramount and that everything else that has legal force must be subordinate.[174] In the final analysis, Kenyan courts must develop the prevailing common law doctrines on judicial review to accord with the transformative vision of the Constitution.

It is necessary for Kenyan courts to approach judicial review from a substantive standpoint as opposed to a formalistic common law approach. To the contrary, under the common law, judicial review is seen as a deferential tool for supervising the exercise of public power without interfering with the decision itself. In ***R v Secretary of State for Education and Science ex parte Avon County Council***,[175] it was held that judicial review is not about private rights or merits but decision making processes towards fair treatment by decision makers.

This purpose was reiterated in ***Chief Constable of the North Wales Police v Evans***[176] where it was held that the purpose of judicial review is to ensure that the individual receives fair treatment, and that the authority, after according fair treatment a conclusion which is correct in the eyes of the court on a matter which it is authorised by law to decide for itself. Similarly, American courts show deference to an agency's competence and uphold administrative findings if they are satisfied that the agency had examined the issues, reached its decision within the appropriate standards, and followed the required procedures.[177]

Following on this common law tradition, Kenyan courts had in the period preceding the promulgation of the Constitution long held the view that judicial review was concerned with the decision making process and not the merits of the decision itself so that the court would only concern itself with procedural issues.[178] Accordingly, the courts repeatedly reiterated that they would not sit on appeal over the decisions under review by going into the merits of the decision itself such as the presence or absence of sufficient evidence to support the decision.[179]

To the contrary, Allan eschews a rigid distinction between procedure and substance as artificial and

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173 Section 12 *ibid.*
174 David M Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 164.
175 [1991] All ER 282, at 285.
176 [1982] 1 WLR 1155.
177 Frank Albert Schubert, *Introduction to Law and the Legal System* (10 (edn) Wadsworth, 2004) 488.
178 See *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR; *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* [2008] eKLR.
179 *Ibid.*

unworkable and instead proposes that the rule of law must be taken as a set of interrelated principles making up the theory of constitutionalism.[180] Also, even at common law considerations of proportionality or legitimate expectation are questions about merit. Furthermore, Odunga J has acknowledged that the decision in ***Wednesbury Corporation***[181] permits the consideration of the merits of a decision in the circumstances 'where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it''.[182]

Largely though, the question whether judicial review under the Constitution extends to merit or is limited to procedure alone remains problematic and is exacerbated by the insistence of some Kenyan courts on the distinction between merit and procedure in judicial review of decisions. The worrying trend is that a majority of judges insist on the distinction between merit and procedure even in cases decided under the current constitutional order. Some judges have on the other hand began to recognize that judicial review cannot be limited to procedural issues alone, but extends to substantive considerations of merit as well.

Ongaya J of the Employment and Labour Relations Court (ELRC) ***Peter Muchai Muhura v Teachers Service Commission*** held that 'in judicial review proceedings under the current constitutional dispensation 'the court (in such proceedings) is entitled to delve into both procedural and *substantive or merit* issues'.[183] Similarly, in ***Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board***[184] Onguto J held that the court effectively is bound to question both the merits and legality of the decision due to the requirement of 'reasonable' administrative action under Article 47. Equally, Muriithi J in ***Khadhka Tarpa Urmila v Cabinet Secretary Ministry of Interior and Coordination of National Government***[185] held that even though the petitioner was seeking a judicial review order such as certiorari, the proceedings before the court was a constitutional petition for the enforcement of the Rights. Accordingly, the stricture of the scope of inquiry in judicial proceedings under Order 53 of Civil Procedure Rules did not apply as a result of which the constitutional court could as well examine the *merits* of a decision in its

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180 T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001)
181 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All E.R 680
182 *Republic v Public Procurement Administrative Review Board ex parte - Sanitam Services (E.A) Limited* [2013]eKLR
183 [2015] eKLR,
184 [2016] eKLR.
185 [2016] eKLR.

adjudication.[186]

(d) Is the Shift to Constitutional Supremacy Completely Reflected in Judicial Decisions on Judicial Review?

While some judges have made effort to orient judicial review to a new conceptual framework informed by the Constitution, other judges have however largely stuck to the old and erroneous position that judicial review does not extend to merit review.[187] To illustrate the point, Odunga J has held that care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the Law Reform Act, Cap 26 and Order 53 of the Civil Procedure Rules had been discarded or that it involved merit review except in those cases provided in the Constitution. His view has consistently been that Order 53 of the *Civil Procedure Rules* precludes merit review.[188]

For one, **Githua J** held in ***Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited***[189] that it had to always be remembered that judicial review questioned the process a statutory body employed to reach its decision and not the merits of the decision itself. Majanja J in ***Republic v Kenya Revenue Authority ex parte Bear Africa***[190] held that the 'nature and scope of orders of judicial review is not in issue' and that the same did not extend to merit review. Emukule J arrived at the same conclusion in ***Republic v Kenya Revenue Authority ex parte Abdalla Brek Said t/a Al Amry Distributors*** holding that the purpose of a judicial review court was not to look at the merits of the decision being challenged but at the process through which the decision was made.[191]

Olao J has adopted the erroneous view of merit preclusion in judicial review in his *obiter dictum* in ***Virginia Wangari Njenga (Suing as administratix of the Estate of Charles Njenga Mukuna) v Land Registrar, Murang'a***.[192] Korir J has similarly not been left behind in the view of judicial review as concerned with the process taken in arriving at a decision and not the merits of the

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186 *Ibid.*

187 See: *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development* [2014] eKLR; *Republic v National Water Conservation & Pipeline Corporation* [2015] eKLR; *Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani* [2015] eKLR.

188 *Ibid.*

189 [2012] eKLR.

190 [2013] eKLR.

191 [2016] eKLR.

192 [2015] eKLR.

decision itself.[193] He similarly held in ***Republic v Kenyatta University, Vice Chancellor - Kenyatta University ex parte Elena Doudoladova Korir*** that judicial review was different from an appeal as an appellate court looked into the merits of a decision whereas judicial review was only interested in the legality, rationality and propriety of the process through which the decision was reached.[194] The philosophy of the High Court on the preclusion of merit-based judicial review is shared by Nderi J of the Employment and Labour Relations Court who has held that the court could not go into the merit of the effected change in the subject application before him.[195]

This tenuous distinction between merit and procedure continues even where the Constitution has expressly been invoked. As an example, in ***Republic v Public Procurement Administrative Review Board ex-parte Olive Telecommunication PVT Limited***[196] the court had specifically been informed that there is a paradigm shift in judicial review based on constitutional underpinning of judicial review. The court was further urged that Article 47 of the Constitution is the game changer and that the Article raised the bar in judicial review and is in addition to or over and above the traditional or conventional grounds for judicial review as formulated within the common law tradition.[197]

The court however missed the moment and instead relied on pre-constitutional decisions which had precluded the court from carrying out a merit review in judicial review proceedings. The court reiterated the decision in the ***Pharmaceuticals Case*** including the principle that the Constitution had expressly rejected the doctrine of the supremacy of Parliament.[198] It also acknowledged that there was no bright line between public and private law, administrative law, which forms the core of public law, occupied a special place in transformative jurisprudence. The court also noted that the Constitution had shifted constitutionalism, and all aspects of public law, from the realm of common law to the prescripts of a written supreme Constitution.[199]

The logical decision in the circumstances would have been for the court to perceive that the fundamental change on the foundation of judicial review now makes merit review possible. Instead, it adopted the dictum of Odunga J in ***Republic v Director of Public Prosecution & another Ex***

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193 *Republic v Public Private Partnerships Petition Committee (The Petition Committee) ex parte A P M Terminals* [2015] eKLR.
194 [2015] eKLR.
195 *Republic v B W Gachegu ex parte Maina Mbui* [2015] eKLR.
196 [2014] eKLR.
197 *Ibid.*
198 *Ibid.*
199 *Ibid.*

Parte Chamanlal Vrajlal Kamani[200] that the Constitution was incremental in language and required that both grounds and remedies in judicial review applications under the Constitution and the common law be developed, fused and intertwined so as to meet the changing needs of the Kenyan society so as to achieve fairness and secure human dignity. As a result, judicial review did not extend to merit review. The question that begs is: how could constitutional grounds of judicial review be fused or intertwined with that which is inconsistent with it? The correct approach is that in the ***Pharmaceuticals Case*** which Odunga J and other Kenyan judges have consistently misread – ‘the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with the Constitution and subject to constitutional control’.[201]

In fact, because of the fallacy that judicial review does not extend to merit review, Odunga J has wrongly held that a *declaration* did not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before granting the declarations sought.[202] In reality, section 11(1)(a) of the Act in similar terms to under Article 23 of the Constitution, empowers the judicial review court to make any order that is just and equitable, including an order declaring the rights of the parties in respect of any matter to which the administrative action relates.[203] Additionally, where proceedings for judicial review relate to failure to take an administrative action, the court may grant any order that is just and equitable, including an order declaring the rights of the parties in relation to the taking of the decision between the parties, costs and other monetary compensation.[204]

2.1.2 Judicial Review and the Horizontal Application of the Bill of Rights

The second bit of the discussion within this chapter draws from the post-liberal theory and is similarly linked to the first two research questions investigating the transformation of judicial review by the Constitution and the reflection of this in practice as well as how the effect of continuation of common law judicial review on the transformation of judicial review. Similar to the previous section, the discussion is undertaken in portions for flow of the argument. Any questions posed in the sub-headings are not meant to detract from the original research questions.

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200 [2015] eKLR.
201 *Supra*.
202 *Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani* [2015] eKLR.
203 Fair Administrative Action Act *ibid.*
204 Section 11(2) *ibid.*

The discussion takes the following outline: (a) traditional liberal focus on public power in judicial review; (b) horizontality of the Kenyan Bill of Rights and its impact on judicial review; and

(a) The Traditional Liberal Focus on Public Power in Judicial Review

Because of its liberal origins, judicial review under the common law was targeted at the exercise of public power. However, in ***R v Panel on Take-overs and Mergers ex parte Datafin***[205] the Court of Appeal recognized that a private body exercising a *public function* could be checked by judicial review. Nevertheless, the rule in ***Datafin*** only applies to private bodies recognized to be exercising some *public* function. Therefore, under the common law, private persons not exercising any public function are not susceptible to judicial review. Stephen Waddams highlights the futility of attempts at strict legal mapping or classification of legal concepts including the traditional distinction between public and private law.[206] Blackstone has similarly been criticised for over-relying on verbal parallels and antitheses in distinguishing 'rights in personam' and 'rights in rem' and between 'private wrongs' and 'public wrongs'.[207] Until today, legal categories have an abiding influence on English administrative law organised around remedies and causes of action.[208]

When one juxtaposes the English practice of administrative law judicial review against the kind of approach to judicial review that the Constitution envisages, clear lines of contradiction emerge.

Contrarily, the horizontal application of the Bill of Rights signifies that a private-public dichotomy is no longer a useful distinction in determining the efficacy of judicial review in Kenya. This section argues that the horizontal application of the Bill of Rights has rendered otiose the common law public-private dichotomy by which judicial review was perceived only as applicable to public exercise of power. As a result it is argued that, the correct position presently is, judicial review is available as a remedy against the exercise of private power.

Unlike the previous constitution which applied vertically,[209] Article 19(3) indicates that the Bill of Rights not only applies to all law, but also binds all persons. Essentially, all rights in the Bill of Rights are enforceable against private parties. In this regard, Article 23 of the Constitution

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205 [1986] EWCA Civ 8; [1987] QB 815

206 Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge, 2003) 1.

207 *Ibid.*

208 Martina Kiinnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007) 39.

209 See for instance Kenya Bus Services v AG [2005] eKLR.

recognizes judicial review as a remedy for violation of the Bill of Rights including violation of Article 47 by private persons. At the same time, the Constitution extends the reach of the High Court's power of judicial review to subordinate courts and any other persons, bodies or authorities with judicial or quasi-judicial powers.[210]

To implement the provisions of the Article 47 of the Constitution Parliament has enacted the Fair Administrative Act, 2015. The horizontal application of the Bill of Rights, particularly Article 47, is clearly replicated in the scheme of the Act. The Act defines 'administrative action' to include 'powers, functions and duties exercised by authorities or quasi-judicial tribunals' or 'any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates'.[211]

The decisive question should therefore be if the decision in question can be attributed to an authority or quasi-judicial tribunal, on one hand or to any other person, body or authority but affects the legal rights or interests of an affected party, on the other hand. The implication is that the decision of a public authority or quasi-judicial tribunal is outright amenable to judicial review while the decision of a private person or body would be liable to judicial review where it impacts or has the potential to affect rights or interests of the party concerned. The end result is that all power is susceptible to judicial review because it can affect the rights and interests of individuals. In this constitutional set-up, the theory and practice of judicial review has changed.

Within this scheme, the transformative, post-liberal, and horizontal application of Kenya's 2010 is a matter that the Supreme Court appreciated through the concurring opinion of the Chief Justice Willy Mutunga in the case of ***Speaker of the Senate v Attorney-General***[212] where he remarked that the Kenyan state had been restructured into a horizontal tilt in accordance with the post liberal theory.

Additionally, even without reference to any Article of the Constitution, Gacheche J had no trouble perceiving the horizontal application of modern Bill of Rights, holding as she did in ***Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi***[213] that trends in human rights law had overtaken the the rigid position that human rights applied vertically due to the realisation that private individuals and bodies wield power over the citizenry. The citizens in turn need protection from such non-State

210 Article 165(6).
211 Section 2 *ibid.*
212 [2013] eKLR.
213 [2011] eKLR.

actors who could unfairly discriminate or otherwise violate the Constitutional.[214]

As a result, the horizontal application of Article 47 is attributable to the Constitution's post-liberal leaning recognizing that private entities and individuals impact human rights.[215] The 2010 Constitution represents a departure from liberal constitutionalism by incorporating a Bill of Rights that applies vertically as against the state and horizontally as against individuals.[216] Horizontality of the Bill of Rights is further underpinned by international human rights law which has become the global language in the realm of politics, international relations, and law.[217] In this sense, the right to fair administrative action alike any other human rights is meant for protection of the vulnerable from oppressive exercise of power.[218] The source of that power does not matter as long as its impact on fundamental rights and freedoms is discernible.

(b) Horizontality of the Kenyan Bill of Rights and its Impact on Judicial Review

At the international level, it was traditionally assumed accepted that the primary responsibility to ensure realization of human rights rests with state partly because it is the government which signs and ratifies international human rights treaties.[219] This point of view is however incompatible with objective readings of the international human rights law treaties including the Universal Declaration of Human Rights as well as the emerging consensus on the human rights obligations of non-state actors. The UNDP recognizes that in relation to the achievement of good governance, the protection of human rights is not an exclusively government affair.[220] To start with, the Universal Declaration of Human Rights outlines a comprehensive set of rights which inhere in every person simply by virtue of being born human and does not preclude non-state responsibility.[221] Notably, the preamble

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214 *Ibid*

215 J. J. Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 Vanderbilt Journal of Transnational Law 801, 802.

216 John Osogo Ambani and Morris Kiwinda Mbondenyi 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights' in Morris Kiwinda Mbondenyi, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris (eds), Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal (Pretoria University Law Press, 2015); See also Walter Khobe Ochieng, 'The Horizontal Application of the Bill of Rights and the Development of the Law to Give Effect to Rights and Fundamental Freedoms' (2014) 1 Journal of Law and Ethics 77.

217 H Victor Conde, *A Handbook of International Human Rights Terminology*, (University of Nebraska, Second Edition, 2004).

218 Laurence J Kirmayer, 'Culture and Context in Human Rights' in Michael Dudley, Derrick Silove and Fran Gale (eds) *Mental Health and Human Rights: Vision, Praxis, and Courage* (Oxford UP, 2012) 95.

219 George Kent, *Freedom from Want: The Human Right to Adequate Food* (Georgetown University Press, 2005) 116; See also Robert McCorquodale, 'Non-state Actors and International Human Rights Law' in Sarah Joseph and Adam McBeth (eds), Research Handbook on International Human Rights Law (Edward Elgar, 2010).

220 UNDP, *Good Governance Practices for the Protection of Human Rights* (UN: New-York and Geneva, 2007) 5.

221 Universal Declaration of Human Rights, 1948.

to the Declaration acknowledges that the full realization of human rights involves responsibilities on states, every organ of society and individuals.[222]

The more accurate position is therefore that international human rights law now imposes obligations of non-state actors extending to corporate entities being socially existent organs of societies, and excluding no one, company, cyberspace or market.[223] It has been remarked that nonstate actors may have legal duties specified at international or national law and that these duties can be analyzed within the four frameworks of obligations: respect, protect, fulfill and promote.[224] While there is consensus that nonstate actors must respect others human rights and not do anything to violate them, there is no general agreement about the duty of non-state actors to protect, fulfill or promote others' human rights.[225]

It is recognized that the rapid expansion of transnational economic activity and corresponding growth in power of transnational corporations and other business entities together with globalisation has resulted in several powerful actors that transcend the regulatory capacity of any one state and whose activities may have profound positive or negative effects on human rights[226]

Friedmann and Barak-Erez allude to the perception of 'rights and freedoms vis-à-vis the State and other public authorities' meant to protect individuals against omnipotent States with immense powers to detain, expropriate and censure.[227] This traditional perception of the state as the sole actor within the field of international human rights law borrows heavily from the domestic liberal theory of the individual as the bearer of rights; instead substituting the state for the individual and positing the state as the free and equal object and subject of international law.[228] Liberal theory thus denotes the classic paradigm of a consent based system of sovereign states without regard to the individuals

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222 Danwood Mzikenge Chirwa, 'State Responsibility for Human Rights' in Mashood A Baderin and Manisuli Ssenyonjo (eds) *International Human Rights Law: Six Decades After the UDHR and Beyond* (Ashgate Publishing, 2010).

223 Adam McBeth, *International Economic Actors and Human Rights* ((Routledge Research in International Law, 2010) 60; See also Peter Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises' in Rory Sullivan (ed), *Business and Human Rights: Dilemmas and Solutions* (2003) 39.

224 George Kent *ibid.*

225 *Ibid.*

226 David Weissbrodt, 'Human Rights Standards Concerning Transnational Corporations and other Business Entities' 23 Minn. J. Int'l L. (2014) 135; See also Melba Wasunna 'Human Dignity and Corporate Accountability for Human Rights Violations' (2014-15) 5 Kenya Law Review 47, 48.

227 Daniel Friedmann and Daphne Barak-Erez, 'Introduction' in Daniel Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Hart Publishing, 2001) 1.

228 Gerry J. Simpson, 'Imagined Consent: *Democratic Liberalism in International* Legal Theory' (1994) Australian Yearbook of International Law 103, 106.

who live within those states.[229] Liberal theory has impacted constitutional law and by extension constitutional law and judicial review in a major way.

Comparatively, within the American legal system, the utility of the classification between public law and private law has been challenged because constitutional law pervades disputes between individuals.[230] Similarly, it has been said that legal taxonomy may obscure what is 'truly important in legal classification' being the purposes and principles that animate legal decision-making which enable us to interpret, apply, expand and criticise the law and that should be the features that define and distinguish legal categories.[231]

To this end, the Constitution of Kenya, 2010 represents a departure from liberal constitutionalism and has a Bill of Rights that applies both vertically and horizontally against the state and individuals, respectively.[232] Having had this background, the continuation of judicial review alongside the traditional public-private distinction is a path fraught with difficulties.

(c) Is the Horizontal Application of the Bill of Rights Completely Reflected in Decisions on Judicial Review?

The absurdity of the court's insistence on the vertical private-public approach has already come forth. In ***Idris Sheikh Abdulahi Odow v Farah Abaille Galef***[233] in seeking leave to apply for judicial review orders, the applicant contended that the court had jurisdiction under Article 23(1) to determine issues on alleged infringements or violation of rights to exercise culture under Article 11. In other words, the claim though directed against a private party, had a constitutional basis and therefore scrutiny under Article 47 and entitlement to any appropriate relief under Article 23(3)(f) of the Constitution, including an order of judicial review.

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229 Anne-Marie Slaughter, 'A Liberal Theory of International Law' in *Proceedings of the Annual Meeting American Society of International Law* (American Society of International Law, 2000) 240-253 http://scholar.princeton.edu/sites/default/files/slaughter/files/liberaltheory.pdf accessed 24th November, 2016.

230 Alan Farnsworth, *An Introduction to the Legal System of the United States of America* (Oceana Publications, 1963) 94.

231 Emily Sherwin, 'Legal Positivism and the Taxonomy of Private Law' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing, 2008).

232 John Osogo Ambani and Morris Kiwinda Mbondenyi, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights' in Morris Kiwinda Mbondenyi, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris (eds), *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal* (Pretoria University Law Press, 2015); Walter Khobe Ochieng, 'The Horizontal Application of the Bill of Rights and the Development of the Law to Give Effect to Rights and Fundamental Freedoms' (2014) 1 Journal of Law and Ethics 77.

233 [2016] eKLR.

Dulo J however, erroneously, denied a party leave to file judicial review proceedings against another private party.[234] In a most technical ruling, the judge reverted to the old position that judicial review proceedings are proceedings brought against public institutions or public officials acting in exercise of their official power and not brought private individuals or individuals acting in a private capacity.[235] The judge went on to hold that since none of the respondents was said to have been a public official, institution or representative of a public institution, they could not be amenable to judicial review proceedings, which are (sic) directed at correcting excesses of exercise of power by public officials. To the judge, clan matters were private matters which are in the purview of private litigation, when disputes arose. This position is at odds with the horizontal application of the Bill of Rights and the Act.

In fact even Odunga J has recently made a welcome departure from his previous stance that judicial review was not available against private parties.[236] In ***Ntaryamira v Gichuhi***,[237] the respondent in an application for leave had contended that the court had no jurisdiction to deal with the matter as the dispute concerning the appointment of an arbitrator was a private law matter as opposed to a public law or administrative matter.[238] The applicant however contended that Article 165 comprehensively catalogued the jurisdiction of the High Court hence entrenching judicial review jurisdiction in the Constitution.[239] The judge noted that Article 165(6) specifically granted the High Court supervisory jurisdiction over subordinate courts and over other persons, bodies or authorities with judicial or quasi-judicial functions.[240] The judge further noted the wide definition of 'administrative action' as well as the application of the Act to both state and non-state agencies and therefore held that, judicial review orders can issue against the decisions of private administrator.

CONCLUSION

In line with the first two objectives of this research, this Chapter had set out to investigate how the Constitution has transformed judicial review and the extent to which this is reflected in judicial decisions. The chapter had also purposed to examine the ways in which the continuation of judicial review under the common law affects the transformation of judicial review as envisaged by the Constitution in Kenya. The two issues are directly linked to the first and second research questions.

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234 *Ibid.*
235 *Ibid*
236 See for instance *Republic v Kenya Association of Music Producers (KAMP) ex-parte Pubs, Entertainment and Restaurants Assocation of Kenya (PERAK)* [2014] eKLR.
237 [2015] eKLR.
238 *Ibid.*
239 *Ibid.*
240 *Ibid.*

The discussion of the two research questions directly tested all three hypothesis in this research and was also informed by the theories relied on in the research being: transformative constitutionalism, post-liberal theory, legal formalism and legal realism.

As the discourse above shows, the Constitution has transformed the nature of judicial review from a liberal prerogative writ, into a constitutional right. While judicial review was traditionally restricted the exercise of judicial or quasi-judicial power by a public authority, judicial review now extends to the acts of private parties. Similarly, whereas judicial review was limited to enforcing the will of a sovereign Parliament, it has morphed into a constitutional principle. As a result, the approach to judicial review cannot continue as if there had been no change.

However, while some judges have shifted their theory and practice of judicial review onto the constitutional base, other judges are still engaged in the adjudication of judicial review as if it still were a common law prerogative. This approach to judicial review has so far affected the development of judicial review under the Constitution. First, the dominance of the common law approach has limited the scope of judicial review to procedure as opposed to both merit and process review. Additionally, some judges still insist on limiting judicial review remedies to the traditional three: certiorari, mandamus and prohibition. This has had the effect of depriving applicants of the constitutional right to any just and appropriate relief. Similarly, the continuation of the traditional communal law approaches to judicial review has hindered the horizontal application of the right to fair administrative action. Some courts still hold the wrong view that judicial review does not extend to private parties, but is limited to public exercise of power. Finally, the restrictive procedural rules under the common law has had the effect of limiting access to justice for judicial review applicants.

There is therefore a need for transformation of judicial review. In line with the last objective of the research, having proved the validity of all three hypothesis, the next chapter therefore suggests a requisite approach to the grounds and remedies in judicial review under the current constitutional dispensation.

CHAPTER THREE

JUDICIAL REVIEW IN KENYA UNDER THE 2010 CONSTITUTION: GROUNDS, PROCEDURES, AND REMEDIES

3.0 INTRODUCTION

As the previous Chapter demonstrated, the transformation of judicial review by the Constitution implies that there must be new approaches to the practice and theory of judicial review. Otherwise, the transformation project will be undermined if litigants, public agencies and private administrators continue to apply for, and the courts to administer judicial review orders on the basis of common law principles. This chapter, linked to the third research objective, therefore sets out to suggest approaches to judicial review anchored on constitutional ideals and in so doing provide answers to the third and last research question.

As a result, the Chapter examines the meaning and scope of the right to fair administrative action as well as the place of expedition, efficiency, lawfulness, reasonableness and procedural fairness in administrative action under the Constitution and the Act. The paper also explores the meaning and scope of the entitlement to reasons for an administrative action. Focus ultimately shifts to the new judicial review reliefs and procedure for enforcement of the right to just administrative action.

3.1 JUDICIAL REVIEW GROUNDS UNDER THE 2010 CONSTITUTION

As indicated in the previous chapter legal categories have had an abiding influence on English administrative law structured along the lines of remedies and causes of action. In terms of remedies, English administrative law strictly distinguished between private and public law remedies. As a result, it is necessary to propose new approaches to grounds, procedures and reliefs in judicial review.

Craig notes that the defects in the traditional model of public law have created legal space for new rights-based approaches as opposed to the idea that courts are simply enforcing the will of Parliament.[241] According to him this approach courts should not only interpret administrative action to be in conformity with fundamental rights and freedoms, but should also articulate certain

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241 Paul Craig, *Administrative Law* (7th (edn), Sweet and Maxwell 2012) 16.

procedural and substantive principles.[242] Such principles, according to Craig, would include: '...legality, procedural propriety, participation, openness, rationality, relevance, propriety of purpose, reasonableness, legitimate expectations, legal certainty and proportionality'.[243] Accordingly, the purpose of judicial review should henceforth be seen as promoting individual rights and allowing the courts to engage more openly engage in the principled evaluation of open-textured concepts which demand the balancing of diverse competing interests and claims.

3.1.1 Article 47 Reasonableness: The Shift from *Wednesbury* Unreasonableness to Proportionality

This section discusses the traditional meaning of unreasonableness as applied by Kenyan courts as well as the proposed new meaning of reasonable befitting judicial review under the current constitutional order. The thrust of this section is that reasonableness of administrative action has more to do with proportionality under Article 24 than outrageousness as was the case under the common law.

(a) The Traditional Meaning of 'Unreasonableness' under the Common Law

The most influential doctrine of British constitutional law is the concept of legislative supremacy or parliamentary sovereignty acceding to the Parliament's legislative competence.[244] The doctrine thus asserts that the ultimate legal authority for law making is Parliament and that there is no limitation on the legislative competence of Parliament.[245] Dicey felt that Parliament had 'under the English constitution the power to make or unmake any law whatever'.[246] As a result, it was presumed that Parliament had the power to enact any law it pleased notwithstanding how unreasonable, unacceptable, unjust or even unenforceable such a law could be in the perception of its subjects.[247] For instance, in ***British Railways Board v Pickin***[248] it was held that a court could not question an Act once passed and that no challenge could be made to a statute even in the presence of fraud.

The main objective, and result, of this formalist perception of the separation of powers was to keep

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242 *Ibid.*
243 *Ibid* at 17.
244 Paul Jackson and Patricia Leopold, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (Sweet & Maxwell, 2001) 22.
245 Mathew Partington, *Introduction to the English Legal System* (Oxford University Press, 2012) 29; See also A W Bradley and K D Ewing, *Constitutional and Administrative Law* (12th (edn), Longman 1997) 58.
246 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) 110 - 115.
247 Ismail Mahomed, 'The Impact of a Bill of Rights on Law and Practice in South Africa' (1993) De Rebus 460, 460.
248 [1974] 1 All ER 609.

judges from evaluating the merits of legislation or administrative decisions as it was felt that would extend beyond the formal role assigned to judges.[249] Thus instead of scrutinizing the merits of administrative decisions courts, erected conceptual distinctions to maintain the formal separation of powers administrators, Parliament and the Judiciary.[250]

In this regard, the locus classicus for the traditional doctrine of 'reasonableness' is found in the speech of Lord Green in the case of ***Associated Picture Houses Limited v Wednesbury Corporation***[251] where he stated:

> the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which ought not to have been taken into account or conversely have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that although the local authority has kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no local authority could ever have come to it. In such a case, I think the court can interfere.'[252]

At common law, to obtain judicial review one was required to pass the test set by Lord Diplock[253] requiring a demonstration that the decision had been tainted with illegality, was influenced by irrationality or vitiated by procedural improprieties.[254] Although a decision could be annulled on the grounds of irrationality or rather unreasonableness the test for unreasonableness was set quite high requiring a decision so 'outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[255]

Similarly, unreasonableness itself dispositive as disclosed the presence of other vitiating factors such as abuse of power or ultra vires.[256] The decision in ***R v The Chief Constable of North Wales***

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249 Matthew Lewans, 'Deference and Reasonableness Since Dunsmuir' (2012) 38 Queen's LJ 59, 64.
250 *Ibid*.
251 [1948] 1KB 223.
252 *Ibid*.
253 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375.
254 *Ibid*.
255 *Ibid*.
256 Paul Jackson and Patricia Leopold, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (Sweet

ex parte Evans shows that the *Wednesbury* approach worked in tandem with the idea that judicial review was about the decision-making process and not the merits of the decision.[257]

Accordingly, Kenyan courts historically and consistently adopted the *3Is* – irrationality, illegality and procedural impropriety as the grounds for judicial review.[258] The potential for growth of judicial review beyond the 3Is was recognized by Nyamu J (as he then was) in ***Republic v The Commissioner of Lands Ex parte Lake Flowers Limited***[259] where he held that 'although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality'.[260] However, in strict adherence to *Wednesbury unreasonableness* judicial review was restricted to the decision-making process and never extended to a review of the merits of the decision itself. [261] *Wednesbury* unreasonableness is incompatible with the Constitution including that it has the potential to immunize oppressive or improper decisions that would otherwise be reviewable if court were to question only those decisions 'verging on the insane'.[262]

(b) Finding a New Meaning for 'Reasonableness' under the Constitution

Due to the highlighted shortcomings of '*Wednesbury* unreasonableness' the need to re-orient reasonableness to human rights principles was recognized in UK. In the case of ***R v Ministry of Defence ex parte Smith***[263] it was held that the test of unreasonableness was whether decision was 'beyond the range of responses open to a reasonable decision-maker'. The court further held that the greater the level of interference with rights and freedoms, the higher the burden of justification imposed by the court.[264]

However, the European Court of Human Rights in the same case ***Smith and Grady v United Kingdom,***[265] subsequently replaced 'unreasonableness' with the test of 'proportionality' with. The

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& Maxwell, 2001) 705.

257 [1982] 1WCR 1155.

258 *Re National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya)* [2006] 1 EA 47.

259 Nairobi HCMISC Application No. 1235 of 1998.

260 *Ibid*.

261 See *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge* [1997] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR; *Commissioner of Lands vs. Kunste Hotels Ltd* (1995-1998) 1 EA 1; *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* [2008] eKLR.

262 Jeffrey Jowell and Anthony Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1987) PL 368, 372.

263 [1996] QB 517.

264 *Ibid*.

265 (1999) 29 EHRR 493.

holding that test for unreasonableness 'effectively excluded any consideration of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued' under Article 8 of the Convention.[266]

Wednesbury was subsequently criticised and its place the lower test of whether a reasonable administrator could have reached the decision in question proposed. [267] Other commentators on English law shave similarly called for a shift towards proportionality.[268] For instance, Poole perceives that *Wednesbury* unreasonableness and ultra vires under the common law have ceded way to 'rights', 'proportionality' and 'deference'.[269] In this context, proportionality requires any administrative action with potential impact on rights and freedoms to be proportionate to the public purpose sought to be protected.[270] Accordingly, a restriction cannot be deemed necessary in an open and democratic society if it is not proportionate to the aim pursued.[271] At the same time UK courts have recognized that where rights of an individual are likely to be affected then there must be 'anxious scrutiny' to determine if the decision maker went beyond the scope of his authority.[272] According to the authors, the anxious scrutiny test permits a determination of whether a violation of rights was justified.[273]

Under European Law, where proportionality has emerged as a befitting tool for rights adjudication, it is seen as requiring every action to be proportionate to its objective.[274] To this end, proportionality has therefore been endorsed as a means for assessing whether an administrative decision limiting a right secured in the Human Rights Act, 1998 should be upheld or annulled.[275] In the case of ***R (Daly) v Secretary of State for the Home Department***[276] it was held:

> the contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries,

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266 *Ibid*.
267 *R v Chief Constable of Sussex ex Parte International Trader's Ferry Ltd* [1999] 2 AC 418 at 452.
268 Jeffrey Jowell and Arnold Lester, 'Proportionality: Neither Novel Nor Dangerous' in Jeffrey Jowell and D. Oliver (eds) *New Directions in Judicial Review* (Stevens 1988).
269 Thomas Poole, 'The Reformation of English Administrative Law (2009) 68 Cambridge Law Journal 142, 142.
270 A W Bradley and K D *Ewing Constitutional and Administrative Law* (12th ed., Longman, 1997)781.
271 *Ibid* citing *Dudgeon v United Kingdom* [1981] 4 EHRR149.
272 HWR Wade and CR Forsyth *Administrative Law* (Oxford University Press, 2014) 304; See *also R v Secretary for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, 531.
273 *Ibid*.
274 Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff, 2015) 1.
275 *Ibid*.
276 [2001] 2 AC 532 per Lord Steyn

Lands and Housing [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the .legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[277]

As a result, the structured test of proportionality under the European Convention obliges administrators to address the following points cumulatively:

1. ...Whether the … objective is sufficiently important to justify limiting a fundamental right;

2. Whether the measures designed to meet the legislative objective are rationally connected to it;

3. Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective;

4. Whether a fair balance has been struck between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.[278]

As a result of the foregoing, proportionality obliges the court to determine the balance struck in according relative weight to competing interests.[279] Consequently, the test requires the making of value judgment by the primary decision maker who in turn cannot hide behind the veil of procedure.[280] Petersen concedes that limitation of constitutional rights on the basis of what is 'reasonable and justifiable in an open and democratic society' involves a value judgment and an

277 *Ibid*
278 Wade and Forsyth *ibid* at 307.
279 R v Daly *ibid*.
280 Wade *ibid*.

assessment based on proportionality.[281] As Lord Hoffman has noted, what matters is the result since proportionality is concerned with substance and not process.[282] As opposed to the classical view of judicial review which focused on procedure, proportionality is concerned with outcomes and permits substantive judicial review.[283]

Unfortunately, Kenyan Courts have so far failed to discern the conceptual link between Article 24 and reasonableness or proportionality. In fact the dominant view evident in recent decisions like ***James Opiyo Wandayi v Kenya National Assembly***[284] has been that proportionality ought to be seen in the context of rationality because it is the one prevailing in England in accordance with the dicta of Lord Steyn in ***R (Daly)***.[285] The other result is that some courts have conflated proportionality with considerations of public interest vis a vis private interest.[286] Yet other courts have properly understood proportionality to mean the balancing of competing interests and rights in order to secure the rights and freedoms in question.[287] Significantly, other courts have with great circumspection begun to admit that application of proportionality as a ground for judicial review of administrative decisions leads to a consideration of merits review.

For instance, in ***Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board***[288] it was held that the court was bound to review both 'merits and legality of the decision' as well as 'process and procedure' adopted.[289] Similarly, in ***Suchan Investment Limited v Ministry of National Heritage & Culture***[290] the Court of Appeal held thus on the subject:

> the test of proportionality leads to a 'greater intensity of review' than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision... In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial

281 N Petersen, 'Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court' (2013) New York University Public Law and Legal Theory Working Papers No 384.
282 R(SB) v Denbigh High School [2006] UKHL 15.
283 Wade and Forsyth ibid at 307.
284 [2016] eKLR.
285 *Ibid*.
286 *Republic v Cabinet Secretary for Transport & Infrastructure ex-parte Kenya Country Bus Owners Association (Thro Paul G. Muthumbi Chairman) Samuel Njuguna Secretary Joseph Kimiri Treasurer [2014] eKLR*.
287 *Kanini Kega v Okoa Kenya Movement* [2014] eKLR.
288 [2016] eKLR.
289 *Ibid*.
290 [2016] eKLR; See also *Garissa County Government v National Land Commission* [2016] eKLR.

review applications.[291] (emphasis supplied)

The effect of the lack of a conceptual link of proportionality to Article 24 is also reflected in the deferential refusal of the courts to undertake merits review though they recognize and claim that they power to do so. Ironically, the ***Suchan*** court having held that 'consideration of the substantive merits of a decision play a much greater role' since 'proportionality invites the court to evaluate the merits of the decision' and that 'consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.'[292] still went on to say:

> it must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.[293]

In reality, there is nothing that forbids the review court from substituting its own decision for that of the administrator. Further, nothing binds the court to only remitting the matter to the administrator making the orders expressly stipulated in Section 11 of the Act. Section 11(1) of the Act is wide and unrestrictive and permits the court to issue any just or equitable relief.[294]

The deferential approach by Kenyan courts therefore betrays their fixedness on English precedent even when they have no cause to follow or be bound by it. In the United Kingdom it is on one hand recognized that 'the courts approach to proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting', and further that 'the domestic court must make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time'.[295] On the other hand, there remains a deferential approach and insistence on the view

291 *Ibid*.
292 *Ibid*.
293 *Ibid*.
294 Section 11.
295 Lord Bingham in *Denbigh High School ibid* at 30.

that 'there is no shift to a merits review'.[296]

Secondly, it would appear that in the United Kingdom proportionality is limited to decisions made under the Convention law,[297] but courts would not feel obliged to apply it in all other cases to decisions by domestic administrators thus sustaining the *Wednesbury* standard.[298] It has been stated that courts could not strike down administrative decisions by domestic administrators for being disproportionate as to do so would involve the court coming too close to inquiring into the merits of the decision. [299] Further, it was opined that there was no need to introduce proportionality into the English legal system since where a decision was disproportionate; it was also likely to be irrational.[300]

The situation in the United Kingdom is likely to get even more complicated and it is interesting to see the direction that developments in administrative law will take in the wake of UK's exit from the European Union. The proportionality jurisprudence in the United Kingdom arose out of the application of the European Convention and the Human Rights Act, 1998 and even then has been treated with great suspicion by the UK courts.[301]

That, though, is a difficulty Kenyan courts do not have to worry about. In contrast to the nuanced shift from *Wednesbury* unreasonableness to proportionality in the English legal system, Article 47 of the Kenyan Constitution establishes a right to fair administrative action which is procedurally fair and is informed by expedition, efficiency, lawfulness, reasonableness.[302] Moreover, where rights are threatened the concerned person has the right to be given written reasons for the action.[303] It is upon such reasons that it can be ascertained whether the decision was in fact reasonable and justifiable in an open and democratic society. Under Article 24(3), the burden of justifying an administrative action is on the administrator consistent with the culture of justification.[304] Therefore the suggestion by Wade and Forsyth that 'reasonableness does not require reasons to be stated'

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296 *Ibid.*

297 Regina v Chief Constable of Sussex ex Parte International Trader's Ferry Limited [1999] 1 All ER 129; R v Secretary of State for Health ex parte Eastside Cheese [2000] Environment Health Law Reports 52.

298 Wade and Forsyth ibid at 305; See also R v *Secretary of State for the Environment ex parte Nottinghamshire County Council* [1986] AC 240.

299 [1991] 1 All ER 720.

300 *Ibid* per Lord Donaldson.

301 Brian Jones and Katharyn Thompson, 'Administrative Law in the United Kingdom' in René Seerden and F. A. M. Stroink (eds), *Administrative Law of the European Union*, *its Member States and the United States: A Comparative Analysis* (Intersentia, 2002) 244.

302 *Ibid*.

303 Article 47(2) *ibid*

304 Article 24 *ibid.*

cannot be correct in the Kenyan context.[305]

(c) Article 24 as the New Measure of 'Reasonableness'

The argument in this section is that due to its embodiment of proportionality, Article 24 is the proper conceptual framework for any discussion on the meaning of reasonableness of administrative action under the current Constitutional order. As a starting point, the Act defines administrative action to include any act, omission or decision that affects the legal rights or interests of any person to whom such action relates.[306] At the same time, section 7(2)(l) of the Fair Administrative Action Act, 2015 foresees judicial review where the administrative action or decision is not proportionate to the interests or rights affected.[307] To this end, proportionality provides a means of balancing and resolving conflicting constitutional values such as are bound to arise whenever a tribunal exercises its powers or any other person undertakes any 'act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates'.[308]

In this regard, Article 24 of the Constitution of Kenya, 2010 would requires any limitations to fundamental rights and freedoms by an administrative action to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors'.[309] The relevant factors include: 'the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose'.[310] The requirements of the Article permit no difficulty and have been applied in a number of decisions by Kenyan courts.[311] Indeed, proportionality is an ideal way of reconciling private interests to legitimate public interest which is often the aim of administrative actions.[312]

Therefore, a reasonable administrative action is one that accords with Article 24 and takes into

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305 Wade and Forsyth *ibid* 306.
306 Section 2.
307 *Ibid*.
308 Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 German L.J. 1387.
309 Article 24 *ibid.*
310 *Ibid*.
311 See *Coalition for Reform and Democracy v The Republic* [2014] eKLR; See also *Andare v AG* [2016] eKLR.
312 Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff, 2015) 1.

account ‘the nature of the right or fundamental freedom affected by that administrative action; the importance of the purpose of the administrative action; the nature and extent of the administrative action; the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others; and the relation between the choice of the specific administrative action and its purpose and whether there are other less restrictive means to achieve that purpose’.[313]

In the case of public bodies or other persons exercising quasi judicial power the additional requirement of limitation by law applies, with the result that for an administrative action to be reasonable it must be one that is permitted by law to start with. The decision must in other words be intra vires the powers of that person or body. An ultra vires decision is prima facie unreasonable.

In comparative context, a similar formulation to Article 24 is found at Article 36 of the South African Constitution which permits limitations on rights and fundamental freedoms only in reasonable and justifiable circumstances in an open and democratic society.314 In ***S v Makwanyane***.[315] Chaskalson J stated that ‘the fact that difference rights have different implications for democracy … means that there is no absolute standard which can be laid down for determining reasonableness and necessity’.[316] He however perceived the following considerations:

> in the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[317]

Comparatively, Article 1 of the Canadian Charter of Rights and Freedoms provides that the rights are guaranteed by the Charter ‘subject only to such reasonable limits prescribed by law as can be

313 Article 24 *ibid*.
314 Constitution of South Africa, 1996.
315 [1995] ZACC 3.
316 *Ibid*.
317 *Ibid*.

reasonably justified in a free and democratic society'.[318] In ***R v Big M Drug Mart Ltd***[319] it was held that consideration of whether the means chosen are reasonable must follow the recognition of a sufficiently significant interest.[320] This assessment would include the court inquiring 'whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question'.[321]

Reasonableness therefore combines bounded rationality with deference required by institutional coordination in the legal process and therefore retains a proper balance between the court's power of judicial review and the deference due in appropriate cases to administrators.[322] A review for reasonableness is also consistent with the rule of law because it shifts focus from the character of the decision maker to the nature of the interests at stake.[323] It is therefore the appropriate standard where fundamental constitutional rights are impacted and requires especially greater scrutiny of administrative decisions where the impact or outcome is particularly threatening to a constitutional right.[324] Defining an action as reasonable entails offering practical justification with the result that reasonableness serves to justify human actions, choices, decisions.[325] On the other hand, an unreasonable administrative action can be described as one that is senseless, unfair, discriminatory, immoral or inflexible.[326] Reasonableness has an innate connection to the rule of law and is most befitting in a legal system with the judiciary as the guardian of the constitution on the grounds of reasonableness.[327]

On the same point, in the Canadian Supreme Court case of ***Dunsmuir v New Brunswick***[328] it was held that reasonableness is aimed toward justification, transparency and intelligibility of an administrative decision. A court examining for reasonableness queries whether the process by which the decision was made was reasonable and also whether the decision itself is reasonable and falls within the possible range of acceptable and justifiable outcomes in the circumstances.[329] The

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318 Canadian Charter of Rights and Freedoms.
319 [1985] 1 S.C.R. 295.
320 *Ibid*.
321 *Ibid*.
322 Giovanni Sartor, 'A Sufficientist Approach to Reasonableness in Legal Decision Making and Judicial Review' in Giorgio Bongiovanni, and Chiara Valentini (eds), *Reasonableness and Law* (Springer, 2009) 17.
323 D Mullan, 'Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals' in D Dyzenhaus (ed) *Public Law* (Hart Publishing, 2004) 21.
324 *Ibid*.
325 Silvia Zorzetto, 'Reasonableness' [2015] 1 Italian Law Journal 107.
326 *Ibid*.
327 *Ibid.*
328 [2008] 1 SCR 190.
329 *Ibid*.

Canadian approach to 'unreasonableness' stands in opposition to the standard of 'outrageous in defiance of logic or acceptable moral standard' set in ***Wednesbury.***

Comparatively, the South African approach to unreasonableness was elucidated in ***Bato Star Fishing Ltd v Minister of Environmental Affairs and Tourism***[330] where the court had the chance to interpret section 6(2)(h) of the South African Promotion of Administrative Justice Act where unreasonableness is expressly defined as 'so unreasonable that no reasonable person could have so exercised the power or performed the function'.[331] The South African court therefore adopted Lord Cooke's dicta in ***R v Chief Constable of Sussex ex parte International Trader's Ferry Ltd***[332] defining an unreasonable administrative action as 'one that a reasonable decision-maker could not reach'.[333]

The court in ***Bato Star Fishing***[334] therefore proffered the following factors in determining whether an administrative action was reasonable: 'the circumstances of each case necessarily implying a consideration of the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.[335] One should not miss the point that the South African Act expressly defines unreasonableness while there is no similar definition in the Kenyan context. As a result, the Kenyan courts must develop an interpretation of reasonable that in accordance with Article 20(3)(a) most favours the enforcement of the right to fair administrative action.[336] Reasonableness under the Constitution and the Act must be taken to require a determination of whether the administrative decision is justifiable and struck a balance between the administrative decision and the rights affected by that decision.

It is on this point that the Kenyan courts must cease from the traditional *Wednesbury* standard in its evaluation and use of reasonableness as a ground for the exercise of judicial review. Additionally, courts should be wary of continuing to treat reasonableness as *Wednesbury* unreasonableness. Further, reasonableness works in tandem with the right to reasons because it is upon such reasons that it can be ascertained whether the decision was in fact reasonable and justifiable in an open and

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330 [2004] ZACC 15 at 44.
331 Section 6 *ibid*.
332 [1999] 2 AC 418.
333 *Ibid*.
334 *Ibid*.
335 *Ibid*.
336 *Ibid*.

democratic society. Under Article 24(3) consistent with the culture of justification, the burden of justifying an administrative action is on the administrator.[337] Therefore the suggestion that 'reasonableness does not require reasons to be stated' cannot be correct in the Kenyan context.[338]

3.1.2 Lawfulness

Traditionally, the doctrine of parliamentary sovereignty implied that public bodies could only exercise powers within the limits conferred by Parliament.[339] A decision was therefore considered ultra vires if the public body concerned attempted to deal with a matter outside the statutory mandate or in doing so failed to follow the prescribed procedure.[340] The ultra vires doctrine was considered the central principle of administrative law.[341] However, analysis of the traditional concept of ultra vires in the UK shows that the doctrine was informed by and focused on statutory powers based on the concept of parliamentary sovereignty as opposed to the Kenyan legal system built on the foundations of constitutional supremacy.

Similarly, the principle had its shortcomings of including determining the exact scope of an agency's administrative area, where finality or ouster clauses precluded judicial challenge, and the use of open ended legislation with wide discretionary powers under the welfare state.[342] A further challenge is that private administrators would not be bound by the ultra vires doctrine as they ordinarily do not act under any statute. It is therefore proper to consider lawfulness including by breach of the Constitution as the broader ground for judicial review on analogous terms as the ultra vires doctrine.

Currently, every exercise of public power must be informed by the values, purposes and principles of the Constitution. Indeed, the supremacy clause stipulates that the Constitution is supreme and binds all persons with the consequence that any conduct that is inconsistent with the Constitution is invalid.[343] It is for this reason that the judiciary has the jurisdiction inter alia to determine the constitutionality of anything done under authority of the Constitution or any law.[344]

An administrative decision would be ultra vires if it expressly goes against a constitutional

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337 Article 24 *ibid.*
338 Wade and Forsyth *ibid* 306.
339 Paul Craig, *Administrative Law* (Sweet and Maxwell, Seventh Edition, 2012) 5.
340 *Ibid.*
341 HWR Wade and CR Forsyth, *Administrative Law* (Oxford UnIversity Press, 2014) 27.
342 *Ibid* at 10.
343 Article 2.
344 Article 165.

provision or ignores an issue that ought to have been considered under the Constitution. Such considerations would include the national values and principles of governance. For example a legislation enacted without public participation would be ultra vires the legislative powers of parliament. The new approach to ultra vires is however not limited to decisions of public bodies but can also curb unlawful action by private administrators. A ready example is where the concerned private administrator engages in an administrative action based on grounds that amount to discrimination or undertakes an administrative action that has the effect of unjustifiably impairing a fundamental right or freedom. Where public bodies are concerned, lawfulness of administrative action can continue to be determined along the lines of the ultra vires doctrine.

3.1.3 Expedition

Delay was one of the factors which courts often considered in deciding whether or not to grant leave with applicants required to demonstrate that they had not come to court after an inordinate delay.[345] At the same time, where specific timelines are prescribed then decisions made outside that prescribed are considered as having been made without jurisdiction and therefore invalid.[346] Similarly, unjustified administrative delay is recognized in the UK as a species of maladministration calling for the intervention of the Ombudsman.[347]

However, pre-2010 there was hardly any discussion of delay by an administrator as a ground for review including in cases where mandamus had been sought. In fact, in the oft cited decision of the Court of Appeal in ***Kenya National Examination Council v Republi ex parte Geoffrey Gathenji Njoroge***[348] it was held that where a general duty had been impose then an order of mandamus could not require that duty to be done at once. In the case before it, the Court noted that 'times and frequency of the examinations are left to the discretion of the Council and it cannot be forced by mandamus to hold an examination at any particular time in the year'.[349]

The idea seems to have been to defer to the discretion of the administrator including on 'when' to carry out the decision. In the USA, delay in administrative action has been described as an 'intractable problem' and one that enhances the costs and burdens of seeking administrative

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345 See *Lady Justice Joyce N. Khaminwa v Judicial Service Commission* [2014] eKLR.

346 *Kate Kokumu & Another v University of Nairobi* [2016] eKLR; See also *Choitram and Others v Mystery Model Hair Saloon Nairobi* (HCK) [1972] EA 525; *Wasike v Swala* [1985] KLR 425.

347 Wade and Forsyth at 450.

348 [1997] eKLR.

349 *Ibid*.

action.[350]

Delay and the lack of expedition, aside of the old adage that justice delayed is justice denied, have been seen as element of the absence of due process equal to the factors giving rise to judicial review and as having more far-reaching effects than actual errors in administrative settlement of controversies.[351] It has similarly been stated that the 'slow, cumbersome, and costly manner' in which administrative decisions are made runs counter to the desire for an 'efficient and prompt' administrative process.[352] The emerging picture is that prior to the Constitution the USA jurisdiction already recognized delay or lack of expedition as a cause for concern within the administrative law sphere calling for judicial intervention. Our courts could borrow vital lessons from that comparative experience.

Presently, expedition in administrative action is one of the requirements of fair administrative action under Article 47.[353] The same edict is reiterated in section 4(1) of the Act.[354] Similarly, an administrative action is reviewable under the Fair Administrative Action Act if there was abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.[355] Indeed the Commission on Administrative Justice Act, 2011 defines administrative action to include failures by officers in the public service to act in discharge of public duty.[356] Similarly, the Commission has power to investigate allegations of 'delay' 'administrative injustice', 'incompetence', 'inefficiency' or 'ineptitude within the public service'.[357]

However, under section 7(3) of the Act, there is no jurisdiction for judicial review on the ground of 'unreasonable delay' unless the administrator is under duty to act in relation to the matter in issue; the action is required to be undertaken within a period specified under such law; and the administrator has refused, failed or neglected to take action within the prescribed period'.[358]

Contrary to the provisions of the Act, decisions can be reviewed for delay even if there is no

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350 Gregory L. Ogden, 'Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability' (1980) 7 Pepp. L. Rev. 3; See also James O Freedman, 'Review Boards in the Administrative Process' (1969) 117 University of Pennsylvania 546.

351 James M. Landis, 'Perspectives on the Administrative Process' (1961) 14 Administrative Law Review 66-74.

352 Note, 'Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings' (1963) 72 Yale Law Journal 574-589.

353 Article 47 *ibid*.

354 *Ibid*.

355 Section 7(2) *ibid*.

356 Section 2 *ibid*.

357 Section 8(b).

358 *Ibid*.

expressly specified period provided for the taking of such an administrative action in any law. First, there is a constitutional right to expeditious administrative action. Secondly, allowing such an approach to stand would allow impunity to reign among private administrators since their administrative powers are almost never provided for in any law as opposed to public agencies. Third, the Constitution provides that where no particular time is prescribed by the Constitution for performing an administrative action that action must be taken without unreasonable delay and as often as occasion arises.[359]

The latter has been the case in a number of immigration cases where the courts have consistently found that though there is no specific time frame for issuance of a certificate of citizenship, the same must be done within a reasonable period and without inordinate delay. [360] For instance in ***Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government ex parte Patricia Olga Howson***[361] the Respondents had argued that the question of inordinate delay did since based inordinate delay depended on its own facts and circumstances.[362] The court however held that a delay of six months in processing an application for citizenship prima facie amounted to inordinate delay since such delays precluded the applicant from the enjoyment of rights held by citizens.[363] The court however reverted to the position that that 'the only remedies available in judicial review proceedings under sections 8 and 9 of the ***Law Reform Act, Cap 26*** are certiorari, prohibition and mandamus and hence declaratory orders cannot be issued in purely judicial review proceedings'.[364]

In reality, section 11(2) of the Act grants the court a wide latitude to make any order that it deems appropriate due to delay or failure to take an administrative action.[365] The court can also make an order 'directing the taking of the decision; *declaring* the rights of the parties in relation to the taking of the decision; directing any of the parties to do, or to refrain from doing any act or thing … which

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359 Article 259(8).

360 *Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government ex parte Patricia Olga Howson* [2013] eKLR; *Bhangra, Kana and Bashir Mohamed Jama Abdi vs Minister for Immigration and Registration of Persons* [2014]eKLR; *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR; *Hersi Hassan Gutale & Another v Attorney General* [2013] eKLR; *Kamal Jadva Vekaria v Director General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR*; Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government* [2015] eKLR.

361 *Ibid.*

362 *Ibid*.

363 *Ibid*

364 *Ibid*.

365 Section 11(2).

the court or tribunal considers necessary to do justice between the parties'.[366] Since administrative delay results from inaction rather than excessive or unnecessary action failure to act cannot be remedied by a negative injunction, but by a mandatory injunction directing the administrator to act.[367] Such an injunction can be issued against any public or private administrator.

Where however, what is in contention is the performance of a public duty owed in law and over which the applicant has a legally enforceable right, then the court can issue an order of mandamus.[368] The new regime of judicial review largely retains the traditional view that mandamus compels performance of statutory or public duties in cases of omission to the detriment of an aggrieved party.[369] It should be recalled however, that because of the expanded locus under the Constitution, there is no need to demonstrate that the applicant himself was injured. Similarly, it is no longer necessary to show that there was actual harm. Rather, mandamus can also be obtained where no loss has yet occurred but the omission threatens a fundamental right or freedom.

3.1.4 Efficiency

Accuracy, efficiency and acceptability are the three essential elements of an optimum administrative system or other dispute resolution mechanism.[370] It has similarly been said that governmental efficiency is one of the fundamental interests sought to be secured by administrative law.[371] Efficiency literally means 'achieving maximum productivity with minimum wasted effort or expense'.[372]

Also, though undefined by the Constitution efficiency can be taken to mean 'use of the available means and adequate resources to produce a determined result in the best possible in the most expeditious, economical, responsive and less costly and least strenuous manner'.[373] Efficiency is

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366 *Ibid*.

367 Stanford Law Review, 'New Remedy for Administrative Delay. Fourth Circuit Enjoins a Hearing' (1962) 14 Stanford Law Review 869-876.

368 Section 11.

369 *In the Matter of an Application by Salt Manufacturers for Orders of Mandamus* [2013] eKLR; See also *Haji Yusufu Mutenda v Haji Zakaliya Mugnyiasoka* [1957] EA 391.

370 David P Currie and Frank I Goodman, 'Judicial Review of Federal Administrative Action: Quest for the Optimum Forum' 75 Columbia Law Review 1-89, 4; See also Jerry Mashaw, 'Explaining Administrative Process: Normative, Positive and Critical Stories of Legal Development' (1990) 6 Journal of Law Economics and Organization 267-298.

371 Frank Johnson Goodnow, *The Principles of the Administrative Law of the United States* (Lawbook Exchange, 2003) 371.

372 Elizabeth Jewell, *The Pocket Oxford Dictionary and Thesaurus* (OUP, 2010).

373 Márcio Almeida do Amaral, 'Analysis of the Principle of Administrative Efficiency Applied to Public Procurement in Brazil' (The Minerva Program, IBI - The Institute of Brazilian Business & Public Management Issues, George Washington University, 2011).

about the need to reduce the costs of administrative justice and would be covered by avoiding undue delay, expense, or prolix litigation.[374] The main concern of efficiency is therefore to balance effective use of resources and individual justice.[375]

Needless to say that just like expedition which has already been discussed, efficiency was not recognized as a ground for judicial review under the common law. One must therefore see efficiency as yet another sphere of transformation wrought by the 2010 Constitution. The desire for transformation of public is evidenced in part by the establishment of the Commission on Administrative Justice to among others investigate delay, incompetence, inefficiency or ineptitude within the public service.[376]

Only an efficient government can achieve the egalitarianism and progressive social welfare state that the Constitution aspires for. [377] The efficiency movement is about removing 'government from its isolation' and making it 'the customary and accepted common agency' for getting things done for 'all groups of citizens in the execution of public purposes upon which they divide either because of racial, sectarian, social, economic or political differences'.[378] However, while efficiency depends on the transaction in question, it is a truism that any inefficiency is borne by the market, in this case the public.[379] Efficiency and effectiveness can give legitimacy to and restore faith in the public service.[380] It should be noted that it is the people who are sovereign and therefore state agencies must serve and be accountable to the people. Perhaps this is the greatest reason why efficiency is given primacy in the Constitution. It is a matter of local notoriety that Kenya's civil service and state bureaucracy was underperforming historically known for underperforming and public service delivery did not serve the public interest optimally.[381]

Efficiency as a quality of administration also relates to ideas about the market. Inefficient administration action by any agency militates against reason that agency is trusted with regulatory

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374 *Ibid*.
375 Robin Creyke, 'Administrative Justice - Towards Integrity in Government' (2007) 31 Melbourne University Law Review 705-732.
376 Section 4 Commission on Administrative Justice Act, 2011.
377 Henry Bruère, William H. Allen, Frederick A. Cleveland and S. Josephine Baker, 'Efficiency in City Government' (1912) 41 *The Annals of the American Academy of Political and Social Science* 3-22.
378 *Ibid*.
379 William G. Ouchi 'A Conceptual Framework for the Design of Organizational Control Mechanisms' (1979) 25 Management Science 833, 839.
380 Henry D. Kass, 'Stewardship as a Fundamental Element in Images of Public Administration' (1988) 10 Dialogue 2.
381 Kempe Ronald Hope, 'Managing the Public Sector in Kenya: Reform and Transformation for Improved Performance' (2012) 2 Journal of Public Administration and Governance 128.

powers in the first place which is the 'correction of inefficient or inequitable market practices' in accordance with the public interest theory.[382] The public interest theory of regulation proffers that markets are extremely inefficient are apt to operate very inefficiently if left on their own without government regulation which costs nothing.[383] Therefore regulation by the state is no more than an intervention to correct remediable inefficiencies and inequities in the free market.[384] However there is always the danger that regulatory agencies can turn into tyrannous institutions which are a law unto themselves.[385] Demanding efficiency in administrative action curbs that kind of fear because efficient systems are more likely to achieve just, fair and reasonable decisions.[386]

Administrators may be considered effective in accordance with the ways in which they take action, solve problems, and act effectively.[387] Efficiency therefore works in tandem with good governance which is a national value and principle of governance under Article 10 and is concerned with management of public resources and efficient public service.[388] The requirement for efficiency in Article 47 must also be read together with the values and principles of public service which include 'efficient, effective and economic use of resources' as well as 'responsive, prompt, effective, impartial and equitable' service provision.[389] According to Adrian Leftwich democratic good governance combines respect for human rights and freedoms with a competent, non-corrupt and accountable public administration.[390]

Efficiency requires satisfaction of public needs and the maintenance of a good relationship between resources employed and outcomes achieved.[391] Contrarily, poor governance manifests in the 'diversion of public resources for private gains, arbitrariness, excessive rules which impede the functioning of markets, allocation of resources inconsistently with the priorities of development'

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382 Richard A. Posner, 'Theories of Economic Regulation' 1974) 5 Bell Journal of Economics and Management Science 335, 358.
383 *Ibid*.
384 *Ibid*.
385 A. A. Berle, 'The Expansion of American Administrative Law' (1917) 30 Harvard Law Review 430, 432.
386 L G Baxter, 'Fairness and Natural Justice in English and South African Law' (1979) 96 South African Law Journal 607, 629.
387 Leon van den Dool, Alberto Gianoli, Frank Hendriks, Linze Schaap, 'Good Urban Governance: Challenges and Values' in Leon van den Dool, Alberto Gianoli, Frank Hendriks and Linze Schaap (eds), *The Quest for Good Urban Governance: Theoretical Reflections and International Practices* (Springer VS, 2015) 24.
388 World Bank, *Governance and Development* (1992).
389 Article 232(1)(b) and (c).
390 Adrian Leftwich, 'Governance, democracy and Development in the Third World' (1993) Third World Quarterly 605.
391 João Figueiredo, 'Efficiency and Legality in the Performance of the Public Administration' (Conference on Public Administration Reform and European Integration, Budva, Montenegro 26-27 March 2009) < http://www.sigmaweb.org/publications/JFigueiredo_EfficientPA_Eng_July10.pdf> accessed 7th October 2016.

and 'in-transparent' decision-making processes.[392]

The Constitution envisages that Kenya's public administration must transform and orient itself towards results while eschewing the bonds of excessive 'concern with means, process, mere compliance to the routines and standard rules that have little to do with the desired results' or in other words technicalities of procedure.[393] As a matter of fact, the migration cases discussed under the preceding section on expedition and delay were also about efficiency though the issue never arose at all in the context of those cases.

In comparative context, in the South African case of ***Mahambehlala v MEC for Welfare Eastern***[394] the court decried the 'administrative sloth and inefficiency' which bedeviled the concerned department. The applicant did not receive any response to her application for a disability grant for a period of 32 months a period the court held to be unreasonable in the absence of an explanation.[395]

Efficiency is yet to develop as a ground for judicial review in Kenya. There is potential though that efficiency will rise into a powerful tool for the improvement of service delivery. The requirement for efficiency is two-prong. While inefficiency is ground for judicial review, the remedies for violation as well as the mechanisms for seeking redress must also be efficient.

3.1.5 Procedural Fairness

A fair procedure is one that is impartial, free from conflict of interest, representative, accurate, properly informed, and admits diverse views while treating parties consistently and respectfully.[396] At the minimum would require a party to be furnished with evidence against him, be afforded a chance to cross examine his accuser, be allowed to give rebutting evidence, and have the chance to address the administrator.[397]

The traditional model of administrative law also gave rise to procedural rights expressed in the twin

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392 Surendra Munshi, Biju Paul Abraham and Soma Chaudhuri, *The Intelligent Person's Guide to Good Governance* (SAGE Publications India Pvt Ltd, 2009) 5.
393 Figueiredo *ibid* at 22.
394 (2002) 1 SA 342 (SECLD).
395 *Ibid.*
396 David Doherty and Jennifer Wolak , 'When Do the Ends Justify the Means? Evaluating Procedural Fairness' (2012) 34 Political Behavior 301, 303.
397 Fergal Sweeney, 'Commissions of Investigation and Procedural Fairness' (2013) 102 Studies: An Irish Quarterly Review 377, 378.

principles of right to be heard and right to a neutral hearing.[398] Natural justice as a concept forbids one from being a judge in his own cause and demands that one be heard fairly on his defence. The first limb of natural justice forbade the adjudicator from being biased 'no man shall be a judge in his own cause' expressed in Latin as 'nemo judex in causa sua'. The second limb entitles individuals to notice of the charge and an adequate and fair hearing 'no man shall be condemned unheard' expressed in Latin as 'audi alteram partem'.[399] A violation of either limb of the rule voids the administrative decision.[400]

The rule of natural justice is presently a constitutional value protected by Articles 47 and 50 as well as the Act. In ***Martin Nyaga Wambora v Speaker of the Senate***[401] it was held that Articles 47 and 50(1) had elevated the rules of natural justice and duty to act fairly in administratively, judicially or quasi-judicially into a constitutional entitlement capable of enforcement.

The Act outlines certain entitlements toward procedural fairness applicable in different contexts including: prior and adequate notice; chance to be heard and to make representations as well as a notice of the right to review or appeal of the decision.[402] Other requirements include a statement of reasons, information on right to legal representation and chance to cross-examine as well as access to any information, materials or evidence sought to be relied upon in making the administrative decision.[403] The above requirements must be given prior to the taking the administrative action together with reasons.

There are further safeguards which are applicable in the course of the administrative action itself. These include the opportunity to attend proceedings, in person or in the company of an expert of one's choice, to cross-examine adverse witnesses, and right ot request for an adjournment where that adjournment is necessary to ensure a fair hearing.[404]

It is necessary to make a further observation on the right to representation before an administrator since the right to appear in persons is said not to limit the right to appear or be represented by a 'legal representative' which term is undefined.[405] The courts should interpret the term legal

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398 Paul Craig *Administrative Law* (Sweet and Maxwell, Seventh Edition, 2012) 8.
399 Paul Craig at 339.
400 Wade and Forsyth at 374.
401 [2014] eKLR at 151.
402 Section 4(3).
403 *Ibid.*
404 *Ibid* subsection 4.
405 Section 4(5).

representative and not unnecessarily confine it to mean 'advocate'.[406] It would seem Parliament was deliberate in allowing, for instance, paralegals, union officials, floor representatives or work colleagues to appear for or to represent parties in administrative action. The latter interpretation seems most accurate, since administrative action may at times arise in situations where representation by an advocate is expensive or unnecessary. As a matter of fact the Legal Aid Act, 2016 which commenced on 1st July, 2016 defines 'legal aid provider' to include paralegals among other providers of legal aid.[407] To enhance access to administrative justice, the phrase legal representative should be given a similar wide interpretation.

There isn't much difficulty with the requirement for fair hearing although it has been traditionally been understood to apply to procedures before public bodies a view that a number of judges have stuck to.[408] In the judgment of Githinji J in Judicial Service Commission v Mbalu Mutava[409] emphasis was put on the duty of 'public officers, state organs and independent bodies or tribunals' while making 'judicial, quasi-judicial or administrative' decisions to act fairly 'depending on the empowering provision of the Constitution or the law'. [410] The judge referred to the House of Lords decision in ***Ridge v Baldwin*** as laying down the law that 'the rules of natural justice applied to bodies having a duty to act judicially as well as bodies exercising public powers.[411]

Despite the common law's fixation with categories and the public-private dichotomy, it was willing to extend the rule of natural justice to the private sphere even where there was no statute or contract entitling one to the same.[412] The weakness with the common law however was that there had to be an element of public exercise of power or activities within the public sphere before the courts could step in to remedy the infraction.[413] Largely though, the rule of procedural fairness is well developed under the common law and this is one area where the Constitution and the common law are in harmony. The courts can therefore safely and properly borrow from the common law in adjudicating claims for violation of natural justice. The only transformation needed in this regard is to understand that the duty to give a fair hearing currently binds private administrators as well. Under the current regime, private administrators similarly have a duty to act fairly.

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406 See Section 2 of the Advocates Act, Cap 2.
407 Section 2.
408 See the decision of Korir J in *Republic v Central Bank of Kenya Ex parte Middletown Forex Bureau Ltd* [2016] eKLR.
409 [2015] eKLR.
410 *Ibid*.
411 [1964] AC 40.
412 *Ibid.*
413 Odumbe Case; *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815.

Yet another aspect of procedural fairness at common law was found in the doctrine of legitimate expectation been developed to protect citizens who place their trust in a benefit promised by a public official.[414] In ***Communications Commission of Kenya & 5 others v Royal Media Services Limited***[415] the Supreme Court reiterated that legitimate expectation ensures fairness and reasonableness where a person has an expectation or interest in the retention of a long-standing practice or keeping of a promise by a public body.

3.1.6 Reasons

Every person expected to be bound by a decision is entitled to an explanation of the use of power.[416] However, due to the deferential nature of common law judicial review and reluctance to inquire into administrative policy and there is no clear rule under the common law that reasons be given for administrative decision. There is therefore no general right to reasons under the common law.[417]

In contrast, the right to reasons is a constitutional right guaranteed in Article 47(2) and explicated by the Act. Similarly, the Act reiterates the constitutional provisions on right to reasons and under section 4(3) requires that information on the nature of the administrative action together with prior and adequate reasons must be given.[418] In ***Priscillah Wanjiku Kihara v Kenya National Examination Council (KNEC)***[419] Odunga J held that where an administrator fails to give reasons, the can infer that there were no good reasons; also that if the reasons given are not the ones the administrator is lawfully and justifiably entitled to rely upon, the Court is entitled to intervene since the conclusion would be that the administrative action is based on an irrelevant matter.[420]

Indeed, a right to reasons is an essential part of a properly functioning system of judicial review since unless one can perceive the real reasoning behind the decision, one may not tell if the decision is reviewable or not thus defeating the purpose of the entitlement to fair administrative action.[421] Giving of reasons leads to accountability and efficiency in decision making while eliminating

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414 Wade and Forsyth at 450; See also *Council of Civil Service Union v. Minister for Civil Service* [1985] 1 A.C.374 and *R v Devon County Council, ex parte Baker; R v. Durham County, ex parte Curtis* [1995] 1 All ER 73; *Republic v Nairobi City County & Another ex parte Wainaina Kigathi Mungai* [2014] eKLR.

415 [2014] eKLR at 263.

416 Ronald C. Den Otter *Judicial Review in an Age of Moral Pluralism* (Cambridge, 2009) 82.

417 Wade and Forsyth at 440; See also *R v Home Secretary ex parte Doody* [1994] 1 AC 531; See also *R v Minister of Defence ex parte Murray* [1998] COD 134.

418 Section 6(4).

419 [2016] eKLR citing *Re Hardial Singh and Others* [1979] KLR 18; [1976-80] 1 KLR 1090.

420 *Ibid*.

421 Wade and Forsyth *ibid* at *440.*

arbitrariness.[422] At the same time reasons are a measure of impartiality and reflect on the absence of bias therefore encouraging public confidence in administrative systems while giving legitimacy to administrative decisions.[423] Further, reasons are not only a part of the principles of natural justice and fairness, but also enable an affected person to know the possibility of and grounds for potential appeal and the reviewing authority to have a better appreciation of the decision thus conduct a better appeal or review.[424]

In this regard, the Act entitles every affected person to information necessary to facilitate application for appeal or review, including reasons for the decision as well as any relevant documents.[425] As a result, apart from being adequate and given in advance, the reasons supplied by the administrator must be sufficient, reasonable, justifiable and related to the administrative action in question.

Under the current Constitution, giving of reasons by decision makers also works to reinforce the sovereignty of the people through public participation in making of administrative decisions which affect a group of persons or the general public. To this end, the public is similarly entitled to reasons for administrative actions that affect the public at large.[426] Administrators can only limit the right to reasons if such a limitation is reasonable and justifiable in an open and democratic society.[427]

3.2 JUDICIAL REVIEW PROCEDURES UNDER THE 2010 CONSTITUTION

Traditional judicial review was strictly focused on form. The focus on form was informed by the traditional approach to judicial review as a prerogative writ. Judicial review remedies were designed to control public power and were granted at the suit of the crown and thus the insistence on the name of the crown in the proceedings.[428] The orders were also discretionary and depended on formal proceedings. As a result, procedure was treated strictly with courts paying great attention to issues such as the entitling of proceedings. In the oft cited ***Jotham Mulati Welamondi v The Electoral Commission of Kenya,***[429] it was held that the since orders of Certiorari, Mandamus or Prohibition were issued in the name of the Republic, applications were made in the name of the

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422 Rose M. B. Antoine, 'A New Look at Reasons—One Step Forward—Two Steps Backward' (1992) 44 Administrative Law Review 453, 454.
423 *Ibid.*
424 *Ibid.*
425 Section 6(1) and (2).
426 Section 5.
427 Article 24; Section 5.
428 *Ibid* at 500.
429 [2002] 1 KLR 486.

Republic.

Part of the formalities under Order 53 of both the Kenyan and English Civil Procedure rules was the requirement for leave. No leave however could be granted after the lapse of six months. Article 22 requires informality of pleadings. Article 159 eschews procedural technicalities. Moreover, there is generally no limitation of time on claims for violation of the Constitution. It is therefore envisaged that applications for the judicial review order of certiorari can be brought well beyond the traditional six months.

Similarly, Emukule J in ***Maimuna Ibrahim (Suing on behalf of Ukunda Youth Polytechnic) v County Government of Kwale***[430] has held that no leave is necessary under the Constitution although he erroneously found that leave is only required under Act. The Act is a derivative of Article 47 and there is no distinction such as the learned judge attempted to draw. Secondly, such an action for relief may be brought in the form of a Petition under the currently prevailing Mutunga Rules. It can also be brought informally without challenge. Similarly, a claim for judicial review can be brought through any other special pleading such as a claim filed at the Employment and Labour Relations Court. Because of the fixation with traditional common law position, Wasilwa J has recently reached the wrong conclusion that the Employment and Labour Relations Court has no jurisdiction to adjudicate judicial review proceedings and that there can be no judicial review of private administrative action by an employer in ***John Karanja Ngugi v Kenyatta University***.[431]

3.3 JUDICIAL REVIEW REMEDIES UNDER THE 2010 CONSTITUTION

A remedy is a cure for a wrong.[432] According to the ‘reason conception of remedies’ whatever the law regards as an injustice, a wrong or the causative event it also deems as the justification for the remedy.[433] As a result, it is the injustice to be corrected which itself will determine the scope and nature of appropriate remedy to correct it.[434] Of utmost importance is that judicial review remedies are now constitutional remedies available as a matter of constitutional right for the redress of any violation of the right to fair administrative action.[435]

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430 [2016] eKLR.
431 [2016] eKLR.
432 Peter Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 Oxford Journal of Legal Studies 1, 1.
433 Ernest J Weinrib, ‘Two Conceptions of Remedies’ in Charles EF Rickett (ed) *Justifying Private Law Remedies* (Hart Publishing, 2008) 3-9.
434 *Ibid.*
435 Alfred Hill, ‘Constitutional Remedies’ (1969) 69 Columbia Law Review 1109, 1111.

Indeed, Wade and Forsyth recognize that enforcement of rights depends on the existence of appropriate remedies.[436] However, sometimes English law approached remedies as ends upon themselves divorced from the surrounding policy considerations.[437]

Indeed, the traditional focus of judicial review was to keep bodies within the ambit of parliamentary sovereignty as a result of which judicial review remedies were designed to meet this limited purpose. However the deficiency of this approach in facilitating review of administrative action led to changes in the law. Therefore in addition to harbeas corpus, certiorari, prohibition and mandamus were the main prerogative writs available in judicial review applications under the common law although legal reforms subsequently introduced declarations and injunctions.[438]

Ironically, some Kenyan judges still follow the ancient position that a declaration is not a remedy in judicial review. For instance in ***Idris Sheikh Abdulahi Odow v Farah Abaille Galef*** [439] Dulo J insisted that there were only three reliefs in judicial review under Order 53 of the Civil Procedure Rules - certiorari, prohibition, and mandamus and therefore an applicant could not be granted a stay or even a declaration.

This proposition by this line of decisions is a legal fiction informed by a rigid adherence to a position from which even the English legal system has since shifted. The correct position is that the Constitution itself empowers the court to accord appropriate reliefs in application to enforce the Bill of Rights. Equally, the Act has expanded the scope of remedies to some eleven plus reliefs. Where loss has occurred or where necessary to remedy violation of the right to fair administrative action the court might as well award damages. Article 23 of the Constitution as well as 11(1)(j) of the Act grant victims of unfair administrative action the right to compensation in damages for breach of the right to fair administrative action.

The award of damages as a remedy to violation of the Bill of Rights is not a new feature. Injured reputation or unlawfully restrained liberty is compensated by damages so is violation of any other provision of the Bill of Rights. Indeed, it is a matter of particular notoriety that the High Court has since the promulgation of the Constitution been awarding damages to claimants whose rights were violated by previous regimes. Consequently, Odunga J therefore missed the moment when he

436 Wade and Forsyth at 477.
437 *Ibid.*
438 Paul Jackson and Patricia Leopold, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (Sweet & Maxwell, 2001) 718.
439 [2016] eKLR.

declined to award damages for violation of the right to fair administrative action leading to direct loss through the demolition of the applicant's wall in ***Republic v Nairobi City County***.[440] Having found that the Respondents had unlawfully demolished the Applicant's boundary wall, the judge however held as follows:

> this application is merited in so far as the orders of judicial review are concerned. With respect to damages, there is no satisfactory material laced before me on the basis of which I can determine the quantum of damages in form of compensation as it is my view that under section 11(1)(j) of the Fair Administrative Action Act, 2015, a judicial review Court can only award compensation and not general damages.[441]

Similarly, under the common law, judicial review orders were discretionary and courts could withhold relief where it deemed fit.[442] The shortcoming of such discretion, its threat to the rule of law, and the resulting need to treat discretion cautiously has been elucidated in the following terms:

> there are great objections to giving discretion to the courts to decide whether governmental action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right and to live under the rule of law, not the rule of discretion. To remit the maintenance of constitutional rights to the region of judicial discretion is to shift to the foundations of freedom from rock to sand. The true scope for discretion is in the law of remedies, where it operates within narrow and recognised limits.[443]

Thus, even under the deferential English legal system, objections to the requirement for one to exhaust local remedies have arisen.

It is therefore doubtful if Kenyan courts can continue to treat the grant of judicial review orders as a matter of discretion, since the right to administrative action is now an enforceable constitutional right.[444] Accordingly, where the facts as pleaded point to a violation of the right to fair

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440 [2016] eKLR, 44.
441 *Ibid*.
442 Wade and Forsyth 498.
443 *Ibid* at 599.
444 See *Johnstone Muthama v Inspector General of Police* [2016] eKLR at 26 on 'discretion' versus 'judgment' in

administrative action it would be remiss for the court to pretend that it has discretion over the matter and opt to grant or not grant judicial review orders. It is in this context that the weakness of the Act in requiring exhaustion of local remedies arises. The requirement would make sense if judicial review were still a discretionary remedy as opposed to a constitutional right.

3.4 CONCLUSION

This chapter, linked to the third research objective, had set out to suggest approaches to judicial review anchored on constitutional ideals and in so doing provide answers to the third and last research question. As a result, the Chapter examined the meaning and scope of the right to fair administrative action as well as the place of expedition, efficiency, lawfulness, reasonableness and procedural fairness in administrative action under the Constitution and the Act. The chapter also explored the meaning and scope of the entitlement to reasons for an administrative action. There is a discussion within the chapter of the new judicial review reliefs as well as procedure for enforcement of the right to just administrative action.

In answer to the research question, the chapter has shown that the transformation of judicial review must be linked to a new approach to the grounds, remedies and procedures of judicial review. Particularly, courts must shift base to Article 47 and the Act as the basis for judicial review. The courts should particularly pay attention to the provisions of the Act on the grounds as well as the remedies for judicial review. Insistence on exercise of judicial review on the basis of common law doctrines may stultify the transformation project.

Accordingly, part of the changes proposed within the chapter is a departure from *Wednesbury* unreasonableness and a new meaning of reasonableness that is closer to proportionality, than insanity. The chapter also suggests the meaning of efficiency, expedition, lawfulness, and procedural fairness as grounds of judicial review under Article 47 of the Constitution.

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grant of bail.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.0 INTRODUCTION

This Chapter is inherently linked to the third research objective which was to summarizes the findings of the three research questions on the transformation of judicial review. The hypothesis is also revisited to see whether it has been proven true or false. Based on the determination of the research question and to meet the third objectives of the research, recommendations are proposed to enable courts, litigants and other scholars to meaningfully engage with the transformation of judicial review.

4.1 CONCLUSIONS

Chapter 1 had set out to detail the statement of the problem and justification of research into the phenomenon of transformation of judicial review. The findings in this research demonstrate that the problem statement about the incomplete transformation of judicial review is valid. Briefly therefore, the key finding in this research is that there is potential for studies of the transformation of judicial review in Kenya delineated by the scope and limitations identified in the current discussion. Such studies could cover the gaps left out by this research and create more knowledge thus facilitate the transformation of judicial review even more.

The chapter also demonstrated that there exists a coherent theoretical framework which justifies the transformation of judicial review in Kenya. First, the post-liberal theory points to the fact that there must of necessity be a shift in the practice and theory of judicial review. The concept of transformative constitutionalism also provides a further anchor for the transformation of judicial review. In the same way, legal formalism and realism supply additional theoretical frameworks for the study of transformation of judicial review.

Chapter 2, in line with the first two objectives of this research, had set out to investigate how the Constitution has transformed judicial review and the extent to which this is reflected in judicial decisions. The chapter had also purposed to examine the ways in which the continuation of judicial review under the common law affects the transformation of judicial review as envisaged by the Constitution in Kenya. The research questions, similar to the objectives, involved ways in which the Constitution has transformed judicial review with its reflection in practice as well as how the

sustenance of common law judicial impacts the transformative project. The discussion of the two research questions directly tested all three hypothesis in this research and was also informed by the theories relied on in the research being: transformative constitutionalism, post-liberal theory, legal formalism and legal realism.

As the discourse above shows, the Constitution has transformed the nature of judicial review from a liberal prerogative writ, into a constitutional right. While judicial review was traditionally restricted the exercise of judicial or quasi-judicial power by a public authority, judicial review now extends to the acts of private parties. Similarly, whereas judicial review was limited to enforcing the will of a sovereign Parliament, it has morphed into a constitutional principle. As a result, the approach to judicial review cannot continue as if there had been no change.

However, while some judges have shifted their theory and practice of judicial review onto the constitutional base, other judges are still engaged in the adjudication of judicial review as if it still were a common law prerogative. This approach to judicial review has so far affected the development of judicial review under the Constitution. First, the dominance of the common law approach has limited the scope of judicial review to procedure as opposed to both merit and process review. Additionally, some judges still insist on limiting judicial review remedies to the traditional three: certiorari, mandamus and prohibition. This has had the effect of depriving applicants of the constitutional right to any just and appropriate relief. Similarly, the continuation of the traditional communal law approaches to judicial review has hindered the horizontal application of the right to fair administrative action. Some courts still hold the wrong view that judicial review does not extend to private parties, but is limited to public exercise of power. Finally, the restrictive procedural rules under the common law has had the effect of limiting access to justice for judicial review applicants.

There is therefore a need for transformation of judicial review. The next chapter suggests a requisite approach to the grounds and remedies in judicial review under the current constitutional dispensation.

Chapter 3 in tune with the third research objective had set out to suggest new approaches to judicial review consistent with the Constitution. The research question was what approaches should be taken towards the development of judicial review anchored on constitutional ideals. In answering the research question, reliance was placed on the theory of transformative constitutionalism, post-

liberal theory and legal realism with a demonstration of why legal formalism must be abandoned. The discussion in the chapter revealed that the transformation of judicial review requires a new approach to the grounds, remedies and procedures of judicial review. Particularly, courts must shift base to Article 47 and the Act as the basis for judicial review grounds, remedies and procedures. Insistence on exercise of judicial review on the basis of common law principles runs the danger of stultifying the transformation project. Part of the changes proposed within the chapter is a departure from *Wednesbury* unreasonableness and a new meaning of reasonableness that is closer to proportionality, than insanity. The chapter also suggested the meaning of efficiency, expedition, lawfulness, and procedural fairness as grounds of judicial review under Article 47 of the Constitution.

4.2 RECOMMENDATIONS

The Judiciary Training Institute needs to dedicate its resources to developing its members' understanding of the transformation of judicial review. The Law Society of Kenya should similarly devote some of its Continuing Professional Development Programmes to this topic. At the same time, university law schools as well as the Council of Legal Education and Kenya School of Law should attune their syllabi to reflect the current realities in judicial review. Moreover, the Act is fairly straightforward and is one of the shortest legislations in Kenya's statute books, paralegals, administrators as well as non-lawyers should familiarise themselves with the Act. It is suggested that the National Councils for Law Reporting considers simplifying and translating the Act in Swahili to increase public awareness about it. It is also suggested that academic researchers and scholars of constitutional law critique this work and build on it towards the future and further research in the transformation of judicial review. Law schools could hold multi-sectoral forums or colloquiums on the transformation of judicial review since it is a weighty, but ill understood area of law.

Parliament also has a role to play. The Law Reform Act, Cap 26 has been left untouched and has therefore contributed to the current confusion. Parliament should repeal the relevant portions of the Law Reform Act, Cap 26 in order to cure the mischief in section 12 of the Act and allow the growth of judicial review under the Constitution. Another problematic law is the provision in the Fair Administrative Action Act proclaiming that the Act which really is a normative derivative of the Constitution is in addition, not derogation from the common law. Similarly, section 9 of the current Act on exhaustion of alternative remedies must be examined under Article 24 to determine if it is justifiable and reasonable in an open and democratic society in so far as it has the potential to limit

access to administrative justice.

Courts must engage with and give meaning to the concepts of right to fair administrative action as well as the values of expedition, efficiency, lawfulness, reasonableness and procedural fairness in under the Constitution and the Act. Courts should further develop the right to reasons for administrative actions as the basis for judicial review. Obviously, not all the previously established principles have to be discarded, however the Constitution must be the basis of determining what parts of the old system should remain, what aspects of it must be modified and what must either be developed or invented. Discretion and exhaustion of alternative remedies have no place in the exercise of constitutional rights.

Similarly courts could admit claims, but exercise discretion on what appropriate relief to grant including the remitting of the decision to the decision maker or failing to award costs. The courts should never refuse to consider claims merely because a party has failed to submit themselves to some other authority and has instead invoked the jurisdiction of the High Court as they are entitled to.

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