JUDICIAL DEFERENCE: AN EVALUATION OF THE SHIFTING APPROACHES TO JUDICIAL DEFERENCE UNDER THE CONSTITUTION OF KENYA 2010

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DECLARATION

I declare that this research project is my original work and has not been presented to any other institution of learning for the award of an academic certificate

Signed..... Date .....18/08/2021.....

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This research project has been submitted for assessment with my authority as the University Supervisor

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DR. NKATHA KABIRA

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DEDICATION

To my parents. You showed me the way to excellence through honest hard work.

TABLE OF DOMESTIC LEGISLATION

Constitution of Kenya, 2010, Laws of Kenya.

Commission on Administrative Justice Act Number 23 of 2011, Laws of Kenya.

Fair Administrative Action Act Number 4 of 2015, Laws of Kenya.

Law Reform Act Chapter 26 Laws of Kenya, Laws of Kenya.

TABLE OF REGIONAL LEGISLATION

Constitution of the Republic of South Africa Number 108 of 1996

Code of Judicial Conduct, No. R. 865 (18 October 2012)

Promotion of Administrative Action Act (PAJA), South Africa Act No. 3 of 2000

TABLE OF INTERNATIONAL LEGISLATION

INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)

East African Community Treaty (signed on 30 November 1999 and entered into force on 7 July 2000) EAC XIV 1999

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Convention on Economic, Social and Cultural Rights Treaty (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICESCR)

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

TABLE OF CASES

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Wangari Maathai V Kenya Times Media Trust Ltd High Court Civil Case 5403 of 1989 [1989] *eKLR*

Wilfred Manthi Musyoka v County Assembly of Machakos; Governor - County Government of Machakos & 2 others (Interested Parties) Machakos High Court Constitutional Petition No.16 of 2018 [2019] eKLR**.**

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Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15.

Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal (CCT10/98) [1998] ZACC 20.

Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1.

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3

Canada

Dunsmuir v New Brunswick [2008] 1 SCR 190

R v Ministry of Defence ex Parte Smith [1996] QB 517

Campaign for Nuclear Disarmament (CND) v Prime Minister and others [2002] EWHC 2777

India

Asif Hameed & Others v. State of Jammu & Kashmir & Others 1989 SCR (3) 19

Maharashtra State Board of Secondary and Higher Secondary Education vs Paritosh Bhupesh Kumar Sheth Etc 1985 SCR (1) 29

United Kingdom

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Liversidge v Anderson [1942] AC 206

Egerton v Brownlow (1853) 4 HLC 121, 10 ER 359

International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158

USA

Brown v Board of Education of Topeka 347 U.S. 483 (1954)

Chevron U.S.A., Inc. v. Natural Resources Defence Council, 467 U.S. 837 (1984)

Marbury v Madison 5 US 137 (1803)

Morse v Frederick 551 US 373(2007)

Plessy v Ferguson 163 US 537 (1896)

Skidmore v Swift & Co 323 US 134 (1944)

Korematsu v United States 323 U.S. 214 (1944)

U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals Matter of W-G-R-, Respondent 26 I&N Dec. 208 (BIA 2014)

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AfriCOG	Africa Centre for Open Governance
AU	African Union
BBI	Building Bridges Initiative
BIA	Board of Immigration Appeal (Department of Justice USA)
CAJ	Commission on Administrative Justice
CAJA	Commission on Administrative Justice Act
CJ	Chief Justice
E&LRC	Employment and Labour Relations Court
EACC	Ethics and Anti-Corruption Commission
FAAA	Fair Administrative Action Act
FIDA	Federation International De Abogadas
HC	High Court
IAJ	International Association of Judges
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KNUT	Kenya National Union of Teachers
LEG-CO	Legislative Council
MR	Master of Rolls
NASA	National Super Alliance
NCAJ	National Council on the Administration of Justice
PAJA	Promotion of Administrative Justice Act

SC	Supreme Court
SCJ	Supreme Court Judge
TSC	Teachers Service Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
USA	United States of America

DEFINITION OF TERMS

Activism: The term is used to describe invalidation by courts of arguably constitutional actions of other arms of Government or result-oriented judging by departure from accepted interpretive methodology and adherence to precedent.[1] It may also be referred to as judicial legislation.

Deference: The use of this term in this study refers to yielding by courts to decisions made by other arms of Government including dispute resolution entities. There are various types of deference including Epistemic deference which means respect for decisions by according weight to the decision; Doctrinal deference which refers to acknowledging the right of other entities to make reasonable decisions; and Curial deference which refers to showing respect to other decision-makers based on their competence or expertise.[2]

Judicial Restraint: The term refers to with-holding judicial review to allow room for political solutions. Courts show restraint by giving interpretations that emphasise the limited nature of the court's power and preference for solemn respect for the separation of governmental powers. Related to judicial restraint is avoidance whereby courts may decide a case on statutory instead of constitutional grounds if the case can be resolved that way.[3] Other examples of judicial restraint include delay where courts avoid deciding contentious issues to allow dialogue among political arms of Government.

Transformative constitutionalism: In this study, the term is used to help understand the reliance on the Constitution to transform society and re-order political relationships by strengthening democracy through effective popular participation.[4] In a country such as Kenya

[1] Roosevelt Kermit, 'Judicial Activism | Definition, Types, Examples & Facts' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/judicial-activism> accessed 29 May 2021.
[2] Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press 2012) <http://ebookcentral.proquest.com/lib/ksg-ebooks/detail.action?docID=977216> accessed 26 February 2020.
[3] A Klaasen, 'Public Litigation and the Concept of "Deference" in Judicial Review' (2015) 18 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1900.
[4] Eric Kibet and Charles Fombad, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 African Human Rights Law Journal 340.

which moved from an autocratic rule with disregard for human rights, the transformation is a continuing activity and judicial deference helps to manage interactions between arms of government where tensions and conflict may occur and adversely affect ways of implementing transformative social change on a large scale.

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ABSTRACT

This study examines the extent to which the Constitution of Kenya altered historical and contemporary approaches to judicial deference in Kenya. The study argues that although historically Kenyan courts exercised judicial restraint in their relations with other branches of Government, nevertheless the promulgation of the Constitution of Kenya 2010 resulted in a fragmented approach to judicial deference because it was people-centred and rights-based. Those approaches by courts include declining to accept jurisdiction where decisions are reserved for determination by other arms of government; showing curial deference by respecting the competence of other agencies and authorities; and declining to defer to other authorities based on the authority of courts to exercise Constitutional scrutiny of Government conduct.

The study argues firstly that fragmentation has resulted from the search for harmonization of approaches. By exploring deference in different select jurisdictions including the United States of America, Canada, the United Kingdom, India and South Africa, the study reveals that it is an evolving concept and legal practice. Deference by courts is influenced by issues presented to them and the existing relationship between them and other branches of government. The study also argues that failure to defer to decisions of administrative authorities undermines public confidence in them thereby limiting the Constitutional Right of Access to justice. The study relies on the transformative constitutional theory by Karl Klare's which argues that changes in the judicial deference doctrine depend on governance whose focus is on rights enforcement and social transformation.

The study has found that deference by courts to other arms of government guarantees respect for judicial independence. Key recommendations include the exercise of caution and judicial restraint as well as increased use of alternative dispute settlement mechanism.

1.0 CHAPTER ONE: INTRODUCTION TO THE CHANGING APPROACHES TO JUDICIAL DEFERENCE DOCTRINE IN KENYA

1.1 Background to the Study

The Constitution of Kenya 2010 was promulgated at a ceremony on August 27, 2010, after approval in a referendum on 4th August 2010. This was the outcome of Kenyans' aspiration to live in a society that valued and protected their freedoms and livelihoods free from discrimination.[5] The Constitution introduced a new political, economic, social and legal order that represented a major shift from centralized authoritarianism characterized by non-accountability to a post-liberal democratic state structure.[6] In the Preamble, the people of Kenya expressed their aspiration for a government that was based on respect for, among other values, human rights and the rule of law.[7] The Constitution restructured Kenya into a multi-party democracy based on the Constitution's supremacy and a set of national values and governance principles.[8] A devolved system of government at the national and county levels was introduced which are distinct but interdependent and interact based on consultation and cooperation.[9] A Bill of Rights is an integral part of the Constitution and secures political, civil, economic, social and cultural rights.[10]

The Bill of Rights, according to the Constitution, applies to all laws and binds everyone, including government agencies.[11] The High Court is granted jurisdiction to hear and determine redress applications for violations of rights and freedoms in the Bill of Rights.[12]

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[5] JM Migai Akech, *Kenya: Institutional Reform in the New Constitution of Kenya* (International Center for Transitional Justice 2010).
[6] Advisory Opinion Reference 2 of 2013 [2013] eKLR.
[7] Constitution of Kenya 2010, Laws of Kenya.
[8] ibid Article 4(2).
[9] ibid Article 6(2).
[10] ibid Article 19(1).
[11] ibid Article 20(1).
[12] ibid Article 23(1).

The Constitution guarantees the right to fair administrative action[13] and requires that written reasons be given where a right or fundamental freedom has been or is likely to be adversely affected by administrative action.[14] In compliance with and to operationalize the Constitutional right to fair administrative action Parliament enacted the Fair Administrative Action Act.[15] The Act defines administrative action and ensures that it encompasses decisions of authorities, entities or persons that affect personal rights.[16] In effect, the Act codifies grounds for judicial review and effectively broadens the reach of the right to Fair Administrative Action to private legal relations.[17] This Constitutionalisation of the right to Fair Administrative Action is underscored by a duty to subject the handling of grievances related to fair administrative action to Constitutional discipline.[18] The establishment of the Commission on Administrative Justice[19] as a Constitutional Commission[20] boosted the potential for strengthening the administration of justice in Kenya. Under this arrangement relief for administrative grievances is subjected to both Constitutional protections as a right as well as common law through Judicial Review.

Judicial deference relates to respect by courts for the decisions of other branches of Government and in particular dispute resolution entities. Deference is related to judicial restraint which consists of courts deferring to processes of politics in society.[21] When courts exercise judicial restraint, they elect to emphasize the limited nature of the court's power as they show respect for separation of powers between branches of government. In a society in

[13] ibid Article 47(1).
[14] ibid Article 47(2).
[15] No. 4 of 2015, Laws of Kenya.
[16] ibid Section 2.
[17] Brian Sang YK, 'The Reach of the Bill of Rights into Personal Legal Relations in Kenyan Constitutional Law and Jurisprudence' (2016) 16 Oxford University Commonwealth Law Journal 235.
[18] John Gichuhi, 'John Gichuhi, Constitutionalisation of Administrative Justice in Kenya, 2014.' <https://www.academia.edu/7052956/John_Gichuhi_Constitutionalisation_of_Administrative_Justice_in_Kenya_2014> accessed 6 June 2021.
[19] Commission on Administrative Justice Act No. 23 of 2011
[20] Const2010 (n 3) Article 59.
[21] Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 The University of Toronto Law Journal 23, see also Roosevelt Kermit, 'Judicial restraint' *Encyclopedia Britannica* (16 Oct. 2019) <https://www.britannica.com/topic/judicial-restraint> accessed 29 May 2021

transformation such as Kenya, judicial deference can help to manage interactions between arms of government where tensions and conflict may occur and adversely affect ways of implementing social change. Self-restraining courts can help to stabilize relationships between the arms of Government as well as all other political actors.

Both judicial deference and restraint are the opposite of judicial activism which consists of the preference by courts to invalidate constitutional actions of other arms of Government. Activism by courts involves a departure from accepted interpretive methodology with an aim for results-oriented judging.[22] There are benefits of judicial activism and an example was the decision that ended segregation in the USA in *Brown v Board of Education of Topeka.*[23] A similar Kenyan example of a decision that was bold, results-oriented and had a positive impact on policy is *Organization for National Empowerment v Principal Registrar Of Birth And Deaths & Another*.[24] Lenaola J ruled in that case that a child was entitled to a name and nationality and indeed, the practice of denying birth certificates to adopted children and only issuing adoption certificates was discriminatory and unconstitutional.[25] The Principal Registrar of Births and Deaths was ordered to issue birth certificates with no reference to adoption in the certificate. That was in the best interests of adopted children. Judicial activism has some risks, however. They include courts transforming themselves into the conscience of society and in extreme cases, judicial tyranny may manifest itself. Courts would find deference useful in the management of their relationships with other arms of Government because it adjusts to circumstances in society and serves to strengthen the Constitutional separation of powers.

[22] Kermit (n 1).

[23] 347 U.S. 483 (1954)

[24] Petition 289 of 2012 [2013] eKLR

[25] Const2010 (n 3) Article 27.

1.2 Statement of the Problem

Although historically judicial restraint and judicial deference have been a hallmark characteristic of Kenyan courts, nevertheless the Constitution of Kenya 2010 marked a departure from judicial restraint to a fragmented approach about judicial deference. The result is that courts have discarded their past reluctance to endorse challenges to actions that offend the Constitution. In doing so, some important shortcomings are evident. First, there is no harmonized judicial method with agreed approaches for managing judicial deference and its effects on relations with the other arms of Government. Second, there is no evidence of a specific test applied by the courts to determine which actions amounting to administrative action are reviewable since not all of them are as the court noted in *Republic v Inspector General of Police & another Ex parte Edmund Polit James & another*.[26]

1.3 Justification of the Study

As demonstrated above, there is a gap in understanding the fragmented approach taken by courts in judicial deference in Kenya. The findings of this research will benefit scholars, the judiciary, lawyers and administrators interested in a harmonized approach to deference by courts in reviewing decisions and actions of administrative authorities that affect rights. The study will help in highlighting the risks involved when courts decline to defer to decisions of expert authorities and agencies in other arms of Government that exercise functions granted to them by the Constitution or statute. A significant risk is the loss of public confidence suffered by those authorities in their capacity to resolve issues presented to them. Inevitably such loss of public confidence stunts the growth of the alternative resolution of administrative and governance issues that the Constitution intended to avail through its extensive work of reconstructing the framework of rights enforcement. The important Constitutional right of

[26] Judicial Review Application 193 of 2017 [2019] eKLR

access to justice is thus substantially denied.[27] Another important contribution of the study is to draw attention to the need of preventing tyranny by one arm of Government over the others when it involves itself in every issue of disputed policy, economic or political interest to society. Opportunities will arise for the inclusion of guidance for example in judicial service manuals and practice directions on thresh-holds for judicial deference to decisions and actions of other bodies exercising powers mandated by law.

1.4 Objectives

The goal of this study is to assess Kenyan judicial deference principles and the changing approach taken by courts following the promulgation of the Kenyan Constitution in 2010. The specific objectives are therefore to:

1. Investigate the historical approach to judicial deference in Kenya against the backdrop of the global history of judicial deference.
2. Investigate the legislative and institutional framework governing judicial deference and highlight the influence of approaches embodied in the frameworks.
3. Analyse the doctrinal approaches in judicial deference captured in Kenya's jurisprudence in the post-2010 dispensation and compare with doctrinal approaches in select jurisdictions.

1.5 Research Question

This research seeks answers to the following questions:

1. How has the historical approach to judicial deference in Kenya resulted in a lack of uniformity by courts?
2. How does the legislative and institutional framework influence judicial deference and the different approaches embodied in those frameworks?

[27] Const2010 (n 3) Article 48.

3. What are the doctrinal approaches to judicial deference that are captured in Kenya's jurisprudence in comparison with doctrinal approaches in select jurisdictions?

1.6 Theoretical Framework

The study will rely on several theories which include Transformative Constitutionalism, Law as integrity for Constitutional interpretation, sociological as well as historical jurisprudence. The main theory that has been relied on in this study is transformative constitutionalism by Karl Klare.[28] A long-term endeavour for social change through nonviolent political procedures anchored in law is referred to as transformative constitutionalism.[29] It involves the enactment of a constitution and its subsequent interpretation and enforcement with a focus on substantive equality and substantive justice. The purpose is to empower previously-excluded segments of society by promoting the protection of rights whose aim is the attainment of social justice.[30] Transformative Constitutionalism comprises two important elements: transformation and constitutionalism. Transformation describes a change of the type brought by the Constitution of Kenya 2010. The change was in a new democratic governance system which included devolution, new organs of Government that were independent, a set of national values, principles and checks and balances. Very significantly the change included rights and fundamental freedoms which were enforceable and provision was made for rectification of historical inequalities as well as injustices in matters such as land ownership. The element of constitutionalism introduced by the Constitution comprised entrenched forms of representation, fair administrative action, compliance with the rule of law and observance of the principle of separation of powers. Both of these elements of transformative constitutionalism are dependent on courts that have the mandate of interpreting the Constitution

[28] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146.

[29] Kibet and Fombad (n 4).

[30] ibid.

and the role of courts is thus important to the promised transformation of Kenya. By exercising caution and respecting the separation of powers among branches of Government as transformation extends in Kenya, courts will find ways to develop a uniform approach to judicial deference for improved governance practices and societal progress.

The theory of Transformative Constitutionalism is used in the study to help us understand social change on a large scale without recourse to violence and in compliance with the law.[31] Such change is not revolutionary but like reform for social good. It involves interpretation and enforcement to transform a country's institutions as well as the exercise of power through effective popular participation and inclusiveness.[32] Communities will be empowered to enable them to achieve developmental goals, re-distributive equality, participatory governance and positive duties on the part of the state to promote social welfare, democratic values and human rights.[33] The Constitution in that scenario steers society to its desired goal of renewal.[34] To be effective the Constitution requires different mechanisms for self-regulation that can balance the relationship of the people to whom power belongs, with the government.[35] Such mechanisms also address the resolution of conflicts caused by tensions between arms of Government. The Constitution of Kenya is transformative because it was promulgated after an autocratic era. The transformation is a continuing activity and judicial deference is a component of the interactions between the branches of government where tensions and conflict may occur and adversely affect ways of implementing transformative constitutionalism. Karl Klare points out, about transformative constitutionalism in South Africa, that the mindset prevailing in courts as well as rules and procedures in use are part of the law and should be part of any desired change for promotion of both the spirit and letter of the constitution.[36] This was

[31] ibid.
[32] Klare (n 28).
[33] ibid.
[34] ibid.
[35] ibid.
[36] ibid.

especially important to a society where a previous formalistic legal culture did not support political discussion nor engage in legal discourses. It was essential that a harmonized judicial method, as well as legal interpretation, were developed to realise the progressive aspirations of that society that was emerging from autocratic rule.[37]

The study will also rely on the principle of separation of powers which according to John Locke requires division of powers between the legislature, executive, and judiciary because of the temptation on the part of those making laws and executing them to misuse their powers.[38] Quoting E. Carolan, Haplan states that the normative reasons for separation of powers include keeping a balance between institutions enabling them to supervise each other through a system of checks and balances; ensuring the law is made in the public interest; enhancing efficiency by giving responsibility to the most appropriate institutional actors and preventing partiality and self-interest by separating those involved in decision-making.[39] Other eminent sources of the principle include Baron de Montesquieu whose discussion of separation of powers in his book 'The Spirit of the Laws' linked the idea of rule of law and liberty as a guard against tyranny.[40] In modern governments, separation of powers facilitates a division of labour, and by enabling each arm to check the others, prevents dominance by any one of them.

Other theories that were considered to be helpful include Law as integrity for Constitutional interpretation by R. Dworkin.[41] This is a theory which states that integrity in decision making by administrators exercising public powers is achieved through constructive interpretation to resolve conflicts of law. The adjudicative function is properly served when courts and

[37] ibid.

[38] Martin Hapla, 'Is Separation of Powers a Useless Concept? Part II: Tripartite System Criticism and Application Problems' (2020) 9 Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza <https://pressto.amu.edu.pl/index.php/ppuam/article/view/21677> accessed 6 June 2021.

[39] ibid.

[40] Montesquieu 'The Spirit of Laws' treatise by Montesquieu https://www.britannica.com/topic/political-science/Historical-development#ref848401 <https://www.britannica.com/topic/The-Spirit-of-Laws> accessed 6 June 2021.

[41] Steven Ross, 'Law, Integrity, And Interpretation: Ronald Dworkin's "Law's Empire"' (1991) 22 Metaphilosophy 265.

administrators enforce the will of the people through a system of agreed standards that ensure accuracy, justice and discourage arbitrariness.[42]

Two schools of sociological jurisprudence will help in examining the significance of the transformative character of the Constitution of Kenya. Sociological theories of law see the law as a social phenomenon that reflects human needs and desires and also embodies the basic values of society. Rudolf von Jhering, known as the "Father of Sociological Jurisprudence," claimed that the purpose of law is to promote social interests.[43] According to the Historical School of sociological jurisprudence represented by von Savigny, law originates in custom, expresses national uniqueness and principles derived from the beliefs of the people. Codification of the law only gives it technical expression in books. The theory was criticized for being difficult to accept in modern societies which are pluralistic and less homogeneous. The theory however helps in examining judicial deference approaches in Kenya by highlighting reasons for the attitudes adopted by courts through the different phases of governance starting with the colonial period and progressing through the post-independence period to the centralized governance stage and eventually to the post-Constitution of Kenya 2010 period. The sociological school of jurisprudence of the 20th Century was concerned with the view of law within the broad social context including attitudes, organizational behaviour, powers and practical improvement of the legal system through legislation and court adjudication.[44] Law indeed exists to protect and balance societal and individual interests.[45] Judicial deference in Kenya takes place within our social context and is influenced by the attitudes of different actors including judges. Consistency in approach by courts will help to establish thresholds for deference and lead to improvement of the legal system.

[42] ibid.
[43] EG Nalbandian, 'Notes: Introductory Concepts of Sociological Jurisprudence: Jhering, Durkheim and Ehrlich' (2010) 4 Mizan Law Review 348.
[44] ibid.
[45] ibid.

The two main theories relied on as well as the others referred to will be used in examining the historical approaches by courts to judicial deference doctrines in Kenya which have resulted in the absence of uniformity in judicial deference in the post Constitution of Kenya 2010 period.

1.7 Principles and Factors Favouring the Concept of Judicial Deference

Two principles that are relevant to factors that favour the concept of judicial deference are the Separation of Powers and the Political Question Doctrine. The first is the principle of separation of power where a perception of accumulation of power by the judiciary would upset the balance that should be maintained by the three arms of government. The second is the Political Question Doctrine and the sense in which courts have become emboldened to proceed with review of administrative action as well as rights enforcement matters while ignoring the need for invoking the doctrine. The factors that favour judicial deference include the reconstruction of the judiciary to enhance its independence as well as the establishment of administrative bodies such as the Commission on Administrative Justice with constitutional and statutory powers.[46]

1.7.1 Principle of Separation of Powers

The principle of separation of powers is a feature of the Constitution of Kenya although there is no specific mention of such a principle. The principle dates back to the 4th Century BC with Aristotle who advocated in his Treatise 'Politics' that the structure of state should consist of three agencies- the general assembly, public officials and the judiciary.[47] Others who wrote on the principle include Aristotle and St Thomas Aquinas.[48] John Locke wrote in his 'Treatise of Civil government' about the principle and gave the titles of Executive, Legislature and

[46] Const2010 (n 3) Article 59.

[47] Emanuel Kibet and Kimberly Wangeci, 'A Perspective on the Doctrine of the Separation of Powers Based on the Response to Court Orders in Kenya' (2016) 1Strathnmore Law Review 220 ; See also Martin Hapla, 'Is the Separation of Power a Useless Concept? The Components and Purpose of the Separation of Powers, Adam Mickie Wicz University Law Review,< http//:Pressco.omu.edu.pl/> and Jeremy Waldron, 'Separation of Powers or Division of Power in Public Law and Legal Theory Research Paper Series, at <https://papers.ssrn.com/sol3/papers.cfm?>.

[48] ibid.

Judiciary to the branches of government.[49] while Baron de Montesquieu wrote on the principle of separation of powers by linking the idea of rule of law and liberty as a guard against tyranny.[50] Modern governments vest power in distinct branches of government including the executive which implements the law, the judiciary which interprets the law and the legislature which makes the law. Absolute independence of the arms of government is not practical since it would undermine the unity of the state. Separation of functions is the division of labour that is pursued and balance between the branches is needed to prevent dominance by one of them.[51] By dividing powers efficiency is enhanced in the system of government by the specialization of different branches and bodies for the good of the functions they perform. Checks and balances also help to prevent the tendency of any excessive autonomy of some of the branches of government and though the principle also empowers each organ to check the others, no branch is entitled to exercise powers granted to another one.[52] According to Jeremy Waldron, the rationale of separation of powers is related to the rule of law and is concerned with the integrity of each branch of government.[53] It is further emphasized that even though courts must be free from interference with their judicial functions, they should not be completely independent of all control. The effective control of public officials which is based on the principle that such officials exercise power given to them by the people applies to the courts.[54] The Constitution of Kenya promotes the separation of powers and the system of checks and balances through various provisions such as stating that all sovereign power belongs to the people[55] and is delegated to the three branches of government and that only the legislature has

[49] ibid.
[50] ibid.
[51] ibid.
[52] *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 258 of 2017 [2017] eKLR, para 25 quoting *Mumo Matemu v. Trusted Society Human Rights Alliance & 5 Others* (2013) eKLR
[53] Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 17, Boston College Law Review (2013) Vol 52 Issue 2.
[54] Waldron (n 53).
[55] Const2010 (n 3) Article 1.

the power to make provisions having the force of law.[56] Executive authority which belongs to the people is required to be exercised in compliance with the Constitution[57] and Judicial authority is said to also belong to the people and should be exercised by courts and tribunals established by law.[58] Some of the grounds for checking the power of the judiciary were stated by the court, for example, in *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others* the court held that it had jurisdiction under Article 165 to hear issues of interpretation of the constitution and the constitutional relationship between levels of government and it would only interfere with the executive and legislature when they exercised their mandate in a manner that threatened to contravene the constitution.[59] Courts ought therefore to be cautious and avoid determinations that discredit the legitimate constitutional functions of other branches of government.

As they discharge their mandate in the system of checks and balances courts have been consistent in their view that their interpretive role includes having the final say in determining the constitutionality of all government actions.[60] Judicial review of Fair Administrative Action cases in particular aim at preventing the executive from becoming a law unto itself by scrutinizing the chain of legality from the fairness of administrative decision-making process to substantive controls on administrative authority. That review has taken both the Constitutional approach as well as the common law statutory approach that was in use before 2010. The two have been said to co-exist in a complementary manner.[61] This has resulted in decisions where courts decline to review administrative decisions for failure to exhaust available mechanisms before approaching the court.[62] Indeed the Fair Administrative Action

[56] ibid Article 94(5).
[57] ibid Article 129.
[58] ibid Article 159(1).
[59] Embu Constitutional Petition 7 & 8 of 2014 [2015] eKLR, para 108.
[60] Civil Appeal 290 of 2012 [2013] eKLR
[61] Tuya John Mayani, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action'.(LLM Thesis University of Cape Town 2017).
[62] Judicial Review Application 193 of 2017 [2019] eKLR (n 20).

Act requires courts not to review an administrative action in the absence of exhaustion of other legal remedies.[63] The principle of separation of powers should help courts avoid the perception of accumulation of power that may affect the desired balance among the arms of government.

1.7.2 Political Question Doctrine

The political question doctrine provides that courts should avoid involvement in controversies whose resolution is vested in other arms of government.[64] This is the position when the constitution assigns responsibility for the resolution of issues to particular arms of government. The judiciary does not abdicate its duty by invoking the doctrine although the effect is to decline jurisdiction. Instead, the judiciary is properly assigning the issue before it to another arm of government.[65] One of the reasons for invoking the doctrine may be a lack of capacity on the part of the court and in particular when courts appear to be overstepping the boundaries and involve themselves in resolving questions belonging to other arms of government. In a dispute which required the decision of state officials and congress regarding which government was lawful in Rhode Island in 1841, Chief Justice Taney declined jurisdiction and said that 'when the decision of the court threatens to result in chaos the court must then examine very carefully its powers before exercising jurisdiction'.[66]

1.7.3 Factors Favouring Judicial Deference

Several Factors favour judicial deference in Kenya. Those factors include first the reconstructed judiciary which under the constitution has become more independent with an improved public reputation as a trusted forum in rights enforcement. The second factor is inclusion of many justiciable rights in Chapter Four of the Constitution inviting active intervention by courts. The third factor is the growth of the judiciary as it moves away from

[63] No. 4 of 2015 (n 11) Section 9(2).
[64] Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers'(2014 Congressional Research Service Report 7-5700) < https://fas.org/sgp/crs/misc/R43834.pdf> accessed 6 June 2021.
[65] ibid.
[66] *Luther v. Borden*, 48 U.S. 1 (1849)

the self-censorship of previous historical periods of centralized governance beginning with colonial times and ending with promulgation of the Constitution in 2010.

Various authorities, bodies and tribunals are allocated powers and functions in the exercise of administrative duties and that entitles them to enjoy the necessary leeway to discharge their mandate so long as they comply with the law. Lack of such leeway has stunted their robust growth as contemplated by the Constitution through which the people of Kenya distributed decision making powers among different bodies whose decisions should be respected. Courts have disapproved of deference to decisions of administrative authorities despite strong arguments i*n R v Inspector General of Police & Another Ex parte Edmund Polit James & Another* advising that the Constitution did not create an ' imperial judiciary' that was legally entitled to get involved in every societal problem despite the availability of better suited mechanisms for addressing the issues raised.[67] Kenya is characterized as a young democracy starting afresh with a new governance dispensation brought about by promulgation of a liberal Constitution and continues to face significant challenges of transformation. Indeed, among those challenges is the absence of systematic guidance on judicial deference which allows the executive to act efficiently and promptly.[68] Moreover such guidance would enable courts to treat decisions by other arms of government with respect and thereby demonstrate recognition of their proper role in the Constitution.[69] If the courts stand in the way of growth in capacity of administrative authorities, bodies and tribunals established to manage Fair Administrative Justice matters, citizens may lose the confidence required to approach those authorities for final resolution of administrative grievances or enjoyment of the Constitutional right of access to justice.[70]

[67] Judicial Review Application 193 of 2017 (n 20).

[68] *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* (CCT10/98) [1998] ZACC 20; 1999 (2) SA 91' <http://www.saflii.org/za/cases/ZACC/1998/20.html> accessed 1 June 2021.

[69] ibid.

[70] Const2010 (n 3) Article 48.

1.8 Research Methodology

To investigate deference by courts under the transformative Constitution of Kenya 2010 this research took a mixed method approach in order to illustrate fragmentation in the doctrine of judicial deference. Exploratory qualitative research was undertaken and the study was mainly library based. There was review of primary sources of data on judicial review, judicial deference, the Constitution of Kenya 2010, legislation such as the Fair Administrative Action Act[71] as well as the Commission on Administrative Justice Act[72] and judicial decisions from the courts. Secondary sources of law such as academic commentaries, books, journal articles and websites were also relied on. The review of both primary and secondary sources was intended to enable the researcher understand the concept of judicial deference as a doctrine, its mandate under the Constitution of Kenya and the challenges it represents in governance. There was a lot of literature available internationally on judicial deference but little had been done locally in the area of judicial deference.

The selection of cases that the study reviewed was informed by the consideration that as the guardians of public interest and constitutional governance, courts would not take positions that contradicted Constitutional principles, in particular the principle of Separation of Powers.[73] The cases showed therefore that Courts recognized the duty to show deference to other arms. The selection of cases focused on the highest courts where judicial deference was considered against the need to promote the rule of law when other arms of government violated rules of natural justice or where courts were being challenged for involvement in policy and political question issues. The cases selected in Kenya highlighted the absence of uniformity in approach to judicial deference particularly in light of the power granted to subject government actions to

[71] No. 4 of 2015 (n 11) 4.
[72] No. 23 of 2011 (n 15).
[73] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinions* Application 2 of 2012 [2012] eKLR

constitutional scrutiny as well as the constitutionalisation of fair administrative action.[74] Decisions examined in such cases showed that courts were prevented from surrendering their duty by deferring to decisions of other arms of government.

Cases from other jurisdictions were selected to highlight the approach adopted by courts when no deference would be shown for decisions of other arms of government which were in conflict with the Constitution. In cases selected from India for example, courts held that they would defer to decisions of competent professional bodies or other authorities as long as no transgression of Constitutional or statutory limits occurred.[75]

The choice of cases from USA was based on important decisions that established the judiciary as a branch of Government that was equal to the others as well as cases where courts refused to defer in the face of social challenges such as racism requiring them to influence change through policy and laws.[76] Cases from Canada showed that courts had determined that they were not subservient to decisions of other arms of government.[77] Cases selected from the United Kingdom highlighted the change from a general attitude of judicial deference to other branches of Government to one of qualifying deference by requiring that decisions by other authorities should not be in violation of the law and neither unreasonable or rash.[78]

1.9 Literature Review

The introduction of the right to fair administrative action by the Constitution of Kenya 2010 has been viewed as breaking Administrative Law in Kenya from its linkage with English Common Law.[79] Judicial review is now seen within the broader Constitution of Kenya structure

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[74] 'Advisory Opinion Reference 2 of 2013 - Kenya Law' (n 6).

[75] *Maharashtra State Board Of ... vs Paritosh Bhupesh Kumar Sheth Etc* 1985 SCR (1) 29 <https://indiankanoon.org/doc/174675/> accessed 27 February 2020.

[76] James T. Patterson, William W. Freehling, 'Brown V. Board of Education: A Civil Rights Milestone and Its Troubled Legacy' (Oxford University Press Google Books) <https://books.google.co.ke/books?hl> accessed 27 February 2020.

[77] *Dunsmuir v. New Brunswick* 2008 SCC 9[2008] 1 SCR 190

[78] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223, per Lord Green

[79] Walter Khobe, 'The Architectonics of Administrative Law in Kenya Post-2010' (Social Science Research Network 2016) SSRN Scholarly Paper ID 3344210 <https://papers.ssrn.com/abstract=3344210> accessed 26 February 2020.

instead of the narrow grounds of common law. Under Article 47, administrative action should meet the standard of procedural fairness, lawfulness, expeditiousness, efficiency, reasonableness and duty to give reasons. This is a stringent standard unlike the Constitutional review standard in respect of other executive powers requiring that such powers be exercised in good faith and not irrationally or arbitrarily.[80] This latter standard helps to maintain the desirable balance of power for separation of power in the Constitution of Kenya. Review of literature on the concept of deference in the context of Kenya's transformative constitution has shown a dearth of relevant literature. There is a gap in understanding which requires research to fill in. This section reviews the available literature on the meaning and application of deference. The literature is drawn mainly from Europe and North America including South Africa and its relevance should build interest and strengthen focus in Kenya on the subject. The review of literature has followed three themes: first a discussion of the meaning of deference whose dynamic nature and application have influenced the task of defining it; second, consideration of judicial self-regulation and restraint and thirdly the approach to deference taken by courts in Kenya after 2010 and other jurisdictions including South Africa, United Kingdom and USA.

1.9.1 Judicial Deference Models

The Supreme Court of Canada in *Dunsmuir v New Brunswick* provided a good definition of deference by saying:

> 'Deference is both a court's attitude and a requirement of judicial review law. Deference does not imply that courts are submissive to decision-makers' decisions; rather, deference implies respect for adjudication bodies' decision-making process in light of both the facts and the law.'[81]

[80] ibid.
[81] *Dunsmuir v. New Brunswick* (n 66) para 48, Bastarache and LeBel JJ.

Deference is epistemic when it is taken to mean respecting decisions on the basis of the weight given to them and when referred to as doctrinal deference it refers to the notion of allocating authority to others to make binding decisions which may be limited by considerations of reasonableness.[82] A third description is curial deference which refers to paying respect to another's competence.[83] Deference is thus dynamic and as observed by Guobin Zhu, the degree of applicability is dependent on type of the disputed issue, its seriousness and level of technicality or whether it relates to Human Rights.[84]

Deference models exist and Alison L Young has categorized three of them as follows:[85]

a. **Model 1**: Submission - This type may be described as an issue of non-justiciability.
b. **Model II:** Submission plus correction - This type is found where despite the other arms of government being better placed to determine an issue, the possibility remained that they may make mistakes which the courts are entitled to correct by identifying errors as to applicable principles,
c. **Model III:** Respect - This type involves the court determining issues of proportionality for itself by giving weight to the opinion given by others.

Young recommends deference as 'respect' as a good model since it calls upon courts to give due 'weight' to the opinion of others, a view that is supported by Paul Daly who argues that deference is best exemplified by showing respect for decisions made by others by means of 'giving weight' to their decisions.[86] Deference is successful according to Dyzenhaus when the standard on which its reasons are based are correctness and reasonableness.[87] He goes further

[82] Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press 2012)
[83] ibid.
[84] Guobin Zhu, *'Deference to the Administration in Judicial Review: Comparative Perspectives'* (Springer International Publishing 2019).
[85] Alison L. Young, 'In Defence of Due Deference' *The Modern Law Review* (2009)72, no. 4: 554-80 http://www.jstor.org/stable/20533270. <https://www.jstor.org/stable/> accessed 29 February 2020.
[86] ibid.
[87] David Dyzenhaus, 'Dignity in Administrative Law: Judicial Deference in a Culture of Justification' (2012) 17 Review of Constitutional Studies 87.

to conclude that 'deference does not require submission but respect and therefore it is prudent for courts to exercise a degree of caution before they decide that the other arms of government have violated the Constitution in order to maintain respect'.[88] Courts in Kenya have tended to choose the Second and Third Model of deference as a mark of their independence and duty to put decisions of administrative bodies under Constitutional discipline in the post Constitution of Kenya 2010 period.

1.9.2 Judicial Deference or Self-regulation by courts

There is need to sustain a Constitutional dialogue and interaction between the three arms of Government through a conscious practice on the part of courts of considering arguments by the legislature and executive in order to support the values and principles of a democratic society.[89] Edwards argues that difficult choices have to be made and courts may see the need to defer to the opinions of elected bodies or persons who may be said to be best placed to make policy choices. He refers to this as the doctrine of 'due deference' which has become a feature of judicial review in British Human Rights cases and argues that courts should exercise restraint in reviewing decisions of bodies that have specialized expertise.[90] The question posed by such arguments is the extent to which courts should defer without leaving discretion entirely to the legislature or the executive and expose courts to an appearance of practicing 'minimal scrutiny' or 'judicial avoidance.[91] Would this not result in stunting the growth of the culture of justification which modern constitutionalism promotes? Daly has suggested that in order to avoid giving deference the appearance of 'servility', the term 'curial deference' should be used to denote paying respect to another's competence.[92] He points out that curial deference based on appropriate statutory provisions is easy while review of executive powers that may not be

[88] ibid.
[89] Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 The Modern Law Review 859.
[90] ibid.
[91] ibid.
[92] Daly (n 2).

delegated by statute may be difficult to review or show deference to. Deference is not directly based on statute according to Reitz but is to be found in Judicial Review particularly where technical expertise is called for in issues related to science, security, military and foreign affairs.[93] Since deference is based on respect for decisions made by agencies acting on delegated powers from government, the role of courts as argued by T R S Allan is to loyally enforce legitimate statutory requirements as well as lawful decisions made by such agencies of government.[94] The focus for the courts then ought to be on defending principles of law and constitutional rights and at the same time avoid imposing their own solutions in public policy issues.[95] This thinking is criticized by Michael Fix on the grounds that judicial deference is a choice that is made by courts to either defer always and risk on the one hand making government agencies turn into bureaucratic dictators or on the other overstep their judicial role and replace the judgement of bureaucrats with their own.[96] He notes that it is possible for courts to take into consideration the importance of a case to the public and exercise deference but the danger is always that their legitimacy is placed at risk when decisions against agencies are ignored.[97] The challenge for courts is in making the strategic choice of deciding whether to be deferential either to important or less significant cases. In his view, small administrative issues of daily life by minor people may indeed be more important and more deserving of deference than bigger cases.

Further criticism of deference has been made by Daly who observes that in the last half-century, the scope of Administrative Law has shown an increase of 'intrusive' grounds of judicial

[93] John C Reitz, 'Deference to the Administration in Judicial Review' (2018) 66 The American Journal of Comparative Law .
[94] TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 The University of Toronto Law Journal .
[95] ibid.
[96] Michael P Fix, 'Does Deference Depend on Distinction? Issue Salience and Judicial Decision-Making in Administrative Law Cases' (2014) 35 Justice System Journal 122.
[97] ibid.

review and judicial creativity without provision of legislative barriers to such creativity.[98] He also suggests that separation of powers denotes divided governance and has less 'state-centredness' particularly in developed countries which would favour deference much more than in developing political economies which maintain strong state centredness.[99] He supports that suggestion with the observation that deference as a concept has its origins in North America before spreading to the rest of the world. According to C. Eric the American system differs from the English one by favouring respect by courts for government agencies and their statutory interpretation.[100] American courts however, do not defer to findings of fact by such agencies and indeed intervene in administrative matters for which they lack expertise.

The English Parliamentary system protects the independence of the courts 'jealously' and refrains from scrutiny of findings of fact by administrators.[101] Nevertheless, a departure from this approach was made by Lord Atkin in *Liversidge v Anderson* in a criticism of judges who on questions of interpretation 'showed themselves to be more executive than the Executive'.[102] His view in that war-time case was that while it was not wrong to sympathise with the needs of the executive, judges needed to do their job regardless by balancing claims and concerns by the Executive against those of liberty and settle disputes according to law by conducting highly formalized hearings and take the correct action against any person or agency for non-compliance with the law.[103]

This growing push for judicial independence and the competing notion of deference to decisions of other branches of Government was addressed in *International Transport Roth*

[98] Daly (n 2).
[99] ibid.
[100] Ip, Eric C., 'Doctrinal Antithesis in Anglo-American Administrative Law' (October 1, 2014). Supreme Court Economic Review 22 (2014): 147-180. DOI/10.1086/682017, University of Hong Kong Faculty of Law Research Paper No. 2019/079 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471508> accessed 29 February 2020.
[101] ibid.
[102] [1942] A.C. 206 (HL) para 244
[103] Liversidge v. Anderson (n 91).

GmbH v Secretary of State for the Home Department.[104] The court held that the system of penalties made by the Government for lorry drivers who ferried illegal immigrants to the United Kingdom were in violation the lorry drivers' human rights under the Human Rights Act[105] and the appeal was allowed. The dissenting opinion of Laws LJ is however significant as it set out tests of the deference that courts should grant to other branches of government and this introduction of a doctrine of deference into UK law was summed up as follows:

> 'To begin with, more deference should be shown to Parliament than to the executive. Second, more deference should be shown in cases involving qualified rights than in cases involving unqualified rights. Third, more deference should be shown to decisions that had the seal of democratic approval than to those which did not, and fourth, more deference should be shown where the decision-maker had expertise in the relevant subject matter.'[106]

Courts in the United Kingdom appear to have an approach to deference that could gain acceptance and provide required guidance for purposes of uniformity.

Judges do not make the law according to Posner they apply it and therefore in clear cases they should defer to decisions of administrative bodies and in doing so allow them to build credibility as fair adjudicators of disputes.[107] For Kenya that is a significant consideration as organs such as the Commission on Administrative Justice created by the Constitution struggle to gain acceptance in society. It may, moreover, be in the best interest of Courts to avoid

[104] [2002] EWCA Civ 158.
[105] Human Rights Act 1998 <https://www.legislation.gov.uk/ukpga/1998/42/contents> accessed 18 June 2021.
[106] [2002] EWCA Civ 158 (n 93).
[107] Richard A Posner, 'The Rise and Fall of Judicial Self-Restraint' (2012) 100 California Law Review 519.

welcoming every controversy to them since it may cost them their dignity and risk loss of their neutrality.[108] Accordingly, the practice of judicial deference merits consideration.

Judicial Restraint has been distinguished from deference by Aileen Kavanagh[109] who explains that judicial restraint involves the discretion to choose the level to which public interest should be raised in order to make a decision on which policy decision to adopt. Deference on the other hand involves yielding to 'Institutional expertise' which means that a public authority is better placed to know best.[110] According to the author, judicial restraint is a matter of self-restraint where a judge determines the appropriate restraint without raising questions about the legality of the decision made. Kavanagh presents several considerations for the exercise of judicial restraint by a judge and they include firstly judicial expertise, secondly an incremental nature of judicial law making in the sense that Parliament can overhaul a whole law and make the law anew which a judge cannot do; thirdly institutional legitimacy and finally the reputation of courts as impartial and fair.[111]

1.9.3 Judicial deference approaches in Kenya and Region

Literature on deference in African jurisdictions is growing particularly in South Africa. An example is Klaasen Abraham who cautions that courts should be careful not to be swayed in favour of the executive as it may be harmful to a young democracy.[112] They should preferably remain duty bound to protect the constitution and individual rights and only give weight to an agency's decision depending on the character of the decision and the decision maker. In his view both decisions not backed by facts and unreasonable ones should be subjected to review.[113]

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[108] Eboso Benard Mweresa 'Judicialization of Politics Under the Constitution Of Kenya 2010' (LLM Thesis,University of Nairobi 2014).

[109] Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 The University of Toronto Law Journal 23.

[110] ibid.

[111] ibid.

[112] A Klaasen, 'Public Litigation and the Concept of "Deference" in Judicial Review' (2015) 18 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1900.

[113] ibid.

In discussing the future of Judicial Review in South Africa, John Evans quotes Professor Hoexter who advises that unlike the past where courts were submissive to administrative agencies, there should be 'willingness to appreciate the administration and constitutionally created agencies and accept their expertise.[114] The legitimate interests of the agencies should be respected as well as the financial and other constraints they operate under'.[115] The type of deference courts should therefore consider is concerned with individual rights and careful weighing of determinations without 'usurping the functions of the agencies'.[116] This approach would be ideal for Kenya courts with the caution that a country's constitution reflects the level of development for society at a particular period of its history.[117] Many African countries including Kenya are familiar with the failure of governments to follow the law.[118] Review of actions by such governments takes precedence and judicial deference becomes less common. As will be seen later in this work courts in Kenya have addressed judicial deference and while no specific rulings have been delivered on the issue, they have acknowledged that there is merit in deferring to decisions of the other branches of government and agencies.[119]

Courts in North America approached the issue of Judicial Deference differently by stepping in to influence national policy changes in such landmark cases as *Brown v Board of Education of Topeka* that ended segregation in USA and became one of the cornerstones of the civil rights movement,[120] *Marbury v. Madison* where the United States Supreme Court ruled that Congress

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[114] John M Evans, 'Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State' (2003) South African Law Journal 120.2 322-329.

[115] ibid.

[116] ibid.

[117] Atilo A Boron,'Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism' in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero and Steven C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World : The American Council of Learned Societies Comparative Constitutionalism Papers* (Oxford University Press 1993).

[118] ibid 101 Julio Faundez, 'Constitutionalism: A Timely Revival Constitutionalism and Democracy Transition in the Contemporary World.

[119] See Advisory Opinion Reference 2 of 2013 (n 2) eKLR,,Civil Appeal 20 of 2015 (CA) [2017] eKLR, Civil Appeal 290 of 2012 (CA) [2013] eKLR and High Court Judicial Review 378 of 2017 [2017] eKLR.

[120] 347 U.S. 483 (1954)

could not enact a law that could override the Constitution,[121] *Goldwater v Carter* where the court said the Judicial branch could not decide cases involving the separation of powers unless there was a major Constitutional impasse.[122] Indeed courts defer to the executive in foreign affairs issues. In the UK the approach to deference is cautious although courts guard their independence jealously. In *Anisminic Ltd v Foreign Compensation Commission*, the House of Lords rejected a legislative provision that attempted to oust the court's jurisdiction[123] and in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* the House of Lords established that a local authority's decision could be unlawful if it 'took into account matters it should have disregarded, if it ignored matters it should have considered and if the decision was irrational and unreasonable'.[124]

1.9.4 Gaps

The review of literature has highlighted notable gaps that require study. The gaps include understanding the historical approaches to judicial deference doctrine in Kenya against the background of global history of judicial deference. Another gap is lack of consistent judicial pronouncements on judicial deference and lack of evidence of support for growth and respect for determinations made by other bodies dealing with administrative action complaints. The politics of rights, use of courts by interest groups and the decision of judges to participate in policy making have led to challenges for judicial deference locally and abroad and resulted in the coinage of such terms as 'Judicialisation of politics' and 'juristocracy'.[125] Courts have also become the arena for judicial review of electoral processes and outcomes and the pursuit of other political controversies.

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[121] 5 U.S. 137 (1803)
[122] 111, 444 U.S. 996 (1979).
[123] [1969] 2 AC 147
[124] [1948] 1 K.B. 223 (n 67).
[125] Tate C. Neal & Torbjorn Vallinder, 'The Global Expansion of Judicial Power(NYU Press, 1997) Google Books' <https://books.google.co.ke/books?id> accessed 29 February 2020.

1.10 Limitations

There is a lot of literature available internationally on judicial deference but little has been published locally in the area of judicial deference. Much of the study is limited to decisions of superior courts and foreign sources whose concentration is the legislative functions of administrative agencies of the modern administrative state that has evolved in United States of America and Canada. There is mention of the work of administrative tribunals including the Commission on Administrative Justice but no detailed examination of their work is included. Another limitation is that the study follows the doctrinal research methodology but nonetheless highlighted the socio-legal theory particularly due to the identification of socio-political issues that influenced the development of the doctrines of judicial deference.

1.11 Hypothesis

This study hypothesizes:

1. The reconstruction of the Judiciary by the Constitution of Kenya 2010 has changed the historical approach to judicial deference in Kenya resulting in lack of uniformity by courts
2. The lack of a uniform approach by courts to judicial deference has resulted in fragmentation and lack of clarity.
3. Deference by courts to decisions of administrative authorities established by the Constitution and given powers and functions to exercise administrative duties enhances confidence in the capacity of those authorities to resolve administrative grievances strengthen access to justice, democracy and the rule of law.

Three primary arguments are made in this study. The first point is that historically courts in Kenya did not hold executive or legislative powers in check and exercised restraint. As courts try to define a harmonized approach, the enhanced duty of the courts under the Kenyan Constitution of 2010 to evaluate policy questions through review of administrative action has

resulted in a fragmented approach to judicial deference. The second argument is that when courts review decisions of administrative authorities for unlawfulness, unreasonableness or procedural unfairness, they consider those to be the grounds for setting aside the decisions regardless of the deference sought to be shown. This approach promotes judicial independence and accountability and avoids the perception that courts are policy agents. The third argument is that failure by courts to defer to decisions of other arms of Government in recognition of their authority to make decisions as well as competence to do so undermines public confidence in those authorities and their capacity to resolve administrative grievances constitutionally reserved to them. That in turn limits access to justice for the public.

1.12 Summary

There has not been a consistent approach to the concept of deference by courts to other arms of Government in Kenya. This has resulted in a lack of growth by administrative entities with Constitutional and statutory mandates to deliver services to the people of Kenya and strengthening of public confidence in their work. Strong and credible administrative bodies and public service entities will free courts to deal with other disputes and demonstrate that not every dispute requires the involvement of the courts in the current culture of justification attributable to the Constitution of Kenya 2010. Judicial review of administrative action when accompanied by deference to decisions of other branches of government will enable courts to boost the promotion of constitutionalism, democracy and the rule of law.

1.13 Chapter Breakdown

This study is set out in six chapters that are broken down as follows:

Chapter One is the introductory chapter and addresses the research design and methodology. It discusses the statement of the problem, justification of the research, statement of objectives, research questions, Theoretical framework, research methodology, literature review, Limitations and hypothesis. A review of literature in the area of interest was conducted to

contextualise the research, identify current research gaps and conduct a theoretical review. The literature review relies to a large extent on material published by scholars from jurisdictions where deference has been well established. The Chapter traces the history of judicial deference both locally and internationally in order to understand the meaning of the doctrine of judicial deference.

Chapter Two provides an extensive historical background on deference by the judiciary to decisions of administrative authorities from. It seeks to answer the research questions on the cause of the fragmented approach to judicial deference to decisions and actions of authorities established by other arms of Government and granted powers and functions under the transformative Constitution of Kenya 2010. It also explores how judicial deference can strengthen the capacity of those bodies to achieve the desired results in fair administrative practices and meet the needs of access to justice by citizens. The Chapter discusses best practice in judicial deference to other arms of Government through the experience of select jurisdictions with a common law heritage including the United States of America, United Kingdom, Canada, India and South Africa. The growth of the administrative state and the nature of relations between the three branches of government and its consequent influence on deference by courts is explored particularly in United States of America. The changes in approach by courts in Kenya through the various political phases of the country's history and their treatment of judicial deference are reviewed. A discussion on case law to explore deference by courts in judicial review and the effect of constitutionalisation of fair administrative action has also been included.

Chapter Three looks at the second research question which relates to the contribution made by judicial deference to strengthening confidence among citizens in the capacity of administrative authorities to make decisions in administrative issues brought to them for resolution. It discusses the legislative and institutional framework governing judicial deference to other

administrative bodies at international, regional and local levels in light of decisions made by courts to ensure that government is accountable to the citizens. The roles that judicial independence and discretion as well as separation of powers play in judicial deference to decisions of other entities are examined. Particular focus is accorded to societies that had emerged from autocratic systems of government where citizens' rights were disregarded.

The discussion concludes with the suggestion that strengthening Constitutionalism and respect for the rule of law is important to courts as they grapple with the need for deference to decisions of other arms of Government.

In Chapter Four, judicial decisions from Kenya are examined to highlight the differences in approach which may contribute to consistency in Kenya's growing jurisprudence in judicial deference. A conclusion is made that courts have acknowledged increasingly that judicial deference as well as an approach of restraint are important to the ability of other arms of government to discharge their Constitutional and statutory mandates effectively and without interference.

Chapter Five examines judicial decisions from different select jurisdictions to show that in exercising the right of courts to have the last word in Constitutional interpretation, they need to acknowledge that they cannot deal with every type of problem when there are better suited mechanisms. Judicial deference to decisions of administrative authorities and other bodies exercising powers granted by law thus remains necessary provided that such authorities do not fall outside the bounds of reasonableness.

Chapter Six will summarise the findings of the research work, re-examine the hypothesis, give recommendations for an approach to judicial deference and make proposals for future study.

2.0 CHAPTER TWO: HISTORICAL BACKGROUND OF JUDICIAL DEFERENCE AND SHIFTING APPROACHES

2.1 Introduction

This chapter locates the historical origins of judicial deference with a view of showing the factors that influenced its development within the legal and socio-political contexts regionally and locally. The background will examine the growth of the administrative state in the United States with the purpose of insulating administration from political control as part of American legal theory of making national administration apolitical and based on expertise.[126] Also to be discussed is the growth of constitutionalism and its relationship with judicial deference in the United Kingdom and South Africa and how the colonial and post-authoritarian state influenced courts in their engagement with political processes and shaped their approach to judicial deference in Kenya. The background study of judicial deference in the United States of America, United Kingdom and South Africa has significance for Kenya. This is due to the shared historical link to common law based on judicial precedent as well as administrative law governance and traditions. The history of the development of the Constitution of Kenya 2010 was an example of this shared legal heritage. Judicial attitudes to deference in Kenya have been shaped by practices and approaches found in those jurisdictions discussed in this Chapter. The chapter has section highlights of the origins of judicial restraint in United States of America in late 18th and Early 19th Century including negative effects of judicial restraint which resulted in affirmation of racially discriminatory laws later in the 19th Century. The growth in USA of the Administrative State in the first half of the 20th Century particularly during the 1930's New Deal period was accompanied by strong promotion of judicial restraint as a means of preventing courts striking down economic regulations made by President Franklin D.

[126] Ronald Pestritto, 'The Birth of the Administrative State: Where It Came From and What It Means for Limited Government' (*The Heritage Foundation Policy Report* November 20 2007*)* <https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited> accessed 22 February 2021.

Roosevelt's administration. The second half of the 20th Century witnessed faster growth of judicial deference to decisions of bodies established by other arms of government with administrative and judicial functions. A significant example was the willingness to allow judicial deference to Executive privilege during the planned impeachment of President Richard Nixon. Other highlights relate to approaches to judicial deference in Canada, the United Kingdom, South Africa and Kenya.

2.2 Judicial Deference in United States of America

2.2.1 Late 18th Century and Early 19th Century

With the establishment of judicial review in the 1780s in the United States, judicial self-restraint began as a notion of deference to other political decision makers. .[127] Two justifications developed for judicial review between Republicans who belonged to the Democratic-Republican Party of Thomas Jefferson and the Federalists led by John Adams the second President of USA.[128] According to the Republicans, judicial restraint was important to preservation of the notion of the superior authority of the people. Under this notion of popular constitutionalism courts acted as the agents of the people in determining the constitutionality of laws and it was the people therefore who made that determination.[129] For the Federalists, courts had final interpretive authority and deference was a matter of prudence to avoid overstepping the limits of separation of powers.

The elections of 1800 resolved the issue when the Republicans won and Thomas Jefferson became the third President of USA in what became the first peaceful transition of political power between opposing parties in the country's history. The Federalists were mainly Merchants and manufacturers who preferred strong federal authority that could control the excesses of popular majorities. Republicans were made up of states' rights advocates who

[127] Larry D Kramer, 'Judicial Supremacy and the End of Judicial Restraint' (2012) 100 California Law Review 621.
[128] 'The Election of 1800 [Ushistory.Org]' <https://www.ushistory.org/us/20a.asp> accessed 7 June 2021.
[129] ibid.

championed less national authority and more direct rule by the people through state governments.[130] The Federalists disappeared and among the changes that followed was the clear rule on Judicial Review set down by Chief Justice John Marshall that it was the Supreme Court that had the final word on interpretation of the Constitution. The rule settled the position of the Judiciary as independent and equal to other branches of government.[131]

In general, judicial self-restraint was justified on the grounds that in a democracy it was elected officials who were responsible for policy-making and if courts usurped that role and declined to defer, they would be a constraint for democratic self-government.[132] By 1810, there was agreement that courts should strike down laws only for unconstitutionality.[133]

2.2.2 Latter half of 19th Century

In the latter half of the 19th Century, courts were experiencing difficulties in the exercise of deference when they declined to interfere with violations of rights where judicial assertiveness was required. Some of the decisions where courts decided to exercise that restraint included *Plessy v Ferguson* where racial segregation of railroad cars was upheld based on the separate but equal doctrine[134] and *Korematsu v United States* where the court upheld race-based discrimination against Japanese-Americans during World War II.[135]

2.2.3 First half of 20th Century

i. Administrative state

From the latter half of the 19th Century and on to the first half of the 20th Century, Progressives had started thinking of introducing as a novelty a vision of administration that separated it from politics. The thinking was that national administration should be apolitical, based on expertise

[130] ibid.
[131] Kramer (n 127).
[132] Kermit Roosevelt, 'Judicial Restraint | Definition, History, & Facts' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/judicial-restraint> accessed 22 February 2021.
[133] ibid.
[134] 163 U.S. 537 (1896)
[135] 323 U.S. 214 (1944)

and operated on business principles.[136] Woodrow Wilson who became the 28th president of the United States from 1913 to 1921 had started writing on administration as a scholar starting from his time in John Hopkins, America's first research university founded in 1876. His view was that there should be no political influence on administration and the principle of checks and balances was a hindrance to efficiency in the exercise of administrative power.[137] Progressives and modern liberals like him who included Frank J Goodnow, a great proponent of the Administrative State spoke of the need for administrative elasticity and discretion with a new governing principle of delegation of power combination of functions and protection of administration from political and legal control.[138]

ii. New Deal

The 1929 Stock Market Crash and the following Great Depression of the 1930s gave impetus to the expansion of government power desired by Progressives when measures were instituted to restore prosperity to Americans and stabilize the economy. When Franklin D Roosevelt was elected in the midst of the Great Depression as 32nd President of the US, there was an urgent need to tackle the serious economic crisis and he did so through a lot of legislation and executive orders to roll out programmes is social security, unemployment, agriculture subsidies, insurance and industry. This series of programs and regulations became known as the New Deal. The Supreme Court led by Chief Justice Charles Evans Hughes, had a conservative majority and between 1935 and 1936 stuck down many New Deal initiatives that to a large extent stopped government functions.[139] The Court's decisions against New Deal programmes resulted in popular dissatisfaction with it. For 168 days the President who had won a second term by a landslide embarked on a plan with the help of Congress to do 'court-

[136] Pestritto (n 126).
[137] ibid.
[138] Frank Johnson Goodnow, *Politics and Administration: A Study in Government* (Transaction Publishers 1914).<https://books.google.co.ke/books?id> accessed 22 February 2021
[139] 'When Franklin Roosevelt Clashed With the Supreme Court—and Lost' (*Smithsonian Magazine*) <https://www.smithsonianmag.com/history/> accessed 22 February 2021.

packing' which involved employing additional justices who would weaken the votes of the conservative majority.[140] Though the plan was not carried out, the Supreme Court changed its approach and validated many New Deal laws. The contest between the executive and judiciary was termed "the constitutional revolution of 1937" because it resulted in legalisation of expanded powers of the Executive that persisted for a long time.[141] Though the Supreme Court did not lose its status as an equal and important arm of government judicial restraint continued to be promoted as a message by liberals to prevent courts from striking down New Deal economic regulations for restoration of prosperity to Americans and stabilization of the economy.

2.2.4 Second half of 20th Century

i) Deference to decisions of regulatory agencies

Although in general courts continue to review administration, such review is done more by public authorities and not courts of law. Such authorities were established by law and given functions as federal agencies that function outside the direction of the Executive.[142] Because the legislature has assigned administrative and judicial tasks to the agencies, the doctrine of separation of powers cannot be invoked to question the legality of the laws they administer.. Courts thus do not have exclusive exercise of all judicial power.[143]

Courts in the US are required to give weight to an agency's well considered views when they interpret legislation particularly when such agencies have technical or other expertise.[144] Giving weight to an agency's interpretation of a statute was in earlier years referred to as the *Skidmore Doctrine* which provided that opinions and interpretations of administrators constitute

[140] ibid.
[141] ibid.
[142] Pestritto (n 126).The agencies include the Interstate Commerce Commission to regulate railways, the Federal Trade Commission, Securities and Exchange Commission, National Labour Relations Board and the Occupational Safety and Health Administration
[143] ibid.
[144] Valerie C Brannon and Jared P Cole, 'Chevron Deference: A Primer' (September 19, 2017 Congressional Research Service 7-5700).

informed judgment on the basis of thoroughness and validity of reasoning, consistency with earlier and later pronouncements and factors giving power to persuade.[145]

Deference doctrines continued to develop in defence of broad deference enjoyed by agencies that make policy decisions, exercise discretion in enforcement and determine meaning in scientific and technical analyses.[146] During the 1980s the Reagan Administration passed regulations under the Clean Air Act that had definitions resulting in a cheaper and more manageable licensing programme on emissions control. The question of what interpretation would be given to openings from which pollutants could emanate could not be answered by the legislation itself and when the issue went before the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defence Council.*[147] The court said that the regulatory agency had been given by the legislature the right to choose a regulatory policy that it preferred and it was up to the agency to fill in details, clarify ambiguities if the legislature overlooks questions or issues when passing broad regulatory matters. The decision gave rise to the Chevron Deference which restrained courts from making agencies aggressive in enforcing regulations than may be politically possible. Where Chevron deference applies due to authority being granted to an agency by the legislature to make enforceable rules, a two-step analysis is done by a court to help it decide whether to defer to the agency or not.[148] There has been recent criticism of the Chevron deference by courts on grounds that judicial deference to interpretation of rules that may be ambiguous would be contrary to the constitutional right of courts to have the final say on interpretation of the law.[149]

In a decision dated February 7, 2014, the U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals dismissed an appeal against denial of

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145 Skidmore et al v Swift & Co 323 U.S. 134

146 Jonathan H Adler, 'What's Wrong with Chevron Deference Is Congress' (*National Review*, 6 June 2019) <https://www.nationalreview.com/magazine/2019/06/24 /> accessed 23 February 2021.

147 467 US 837 (1984)

148 Brannon and Cole (n 144).

149 ibid.

asylum sought by a former member of the Mara 18 gang in El Salvador. The asylum seeker claimed that the gang fitted in the definition of a particular social group that qualified for protection. The Board based the dismissal on the ground that the asylum seeker could not be considered a member of such a group within the meaning of the relevant legal definition.[150] The issue thereafter was whether deference should be extended to the decision of the Appeals Board or have it reviewed to ensure that International Refugee law protections are respected by USA.

ii) Executive Privilege

Following the Watergate political scandal between 1972 and 1974 the Supreme Court took addressed the issue of Executive Privilege claimed by President Richard Nixon when ordered by a grand jury investigating the scandal to hand over recordings of his conversations in the White House. The court ruled on August 5, 1974 that the President must hand over the tapes and argued that the confidentiality of material could not justify withholding criminal evidence.[151] The court agreed that deference should be accorded to the President under the principle of Executive Privilege and the privilege was fundamental to the operation of government and was rooted in the separation of powers under the Constitution.[152] While, however, emphasizing that the judiciary was in charge of saying what the law is and would not share that power with the other branches of government the court agreed that there were times when the privilege was merited and gave examples of military, diplomatic or sensitive national security secrets.[153]

[150] Matter of W-G-R Respondent 26 I & N Dec. 208 (BIA 2014) U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3794.pdf> accessed 7 June 2021.

[151] Olivia B. Waxman, 'President Trump Invoked Executive Privilege. Here's the History of That Presidential Power' *Time* (June 13, 2019) <https://time.com/5605930/executive-privilege-history/> accessed 7 June 2021.

[152] ibid.

[153] ibid.

2.3 Judicial Deference in Canada

In Canada deference is shown where issues of high policy such as making of treaties, foreign affairs and defence are involved.[154] In *R v Ministry of Defence ex Parte Smith* the court stated that only rare cases are beyond review by courts and gave examples of national security and where the court lacks expertise or material to form a judgement.[155]

Canada has a common law tradition and courts supervise and review administrative decisions of other entities. Where jurisdictional errors are committed courts intervene to correct them.[156] Though the need to respect administrative autonomy is acknowledged by courts jurisdictional and non-jurisdictional errors are treated with deference only within limits. Such deference to interpretations of law by administrators has been resisted because courts view it as going against tradition. Indeed, until 1979 traditionalist common-law thinking resulted in courts treating administrative decision-makers with some hostility and readily subjected their decisions to judicial review.[157] By 1998 courts considered themselves to be experts on many issues of regulatory law and downplayed the capacities of tribunals to deal with those issues as intervention for jurisdictional error and error of law continued.[158] Implementing deference continued to be difficult and directions by the Supreme Court have progressively strived to restrict courts to the application of reasonable tests even as they have continued to claim a judicial role in supervising the administrative process. An appreciation of the competence of administrative adjudicative bodies would help to reduce resistance by courts to the application of deference.

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[154] The Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom and Others [2002] EWHC 2759 (QB)

[155] [1996] 1 All ER 256; [1996] QB 517' [1996] 1 All ER 256;

[156] Paul Daly, 'A Brief History of (Recent) Time: The Struggle for Deference in Canada' (*Paul Daly Administrative Law Matters*, May 30 2014) <https://www.administrativelawmatters.com/blog/2014/05/30/a-brief-history-of-recent-time-the-struggle-for-deference-in-canada/> accessed 29 May 2021.

[157] ibid.

[158] ibid.

2.4 Judicial Deference in United Kingdom

Traditionally, prerogative powers in the United Kingdom not derived from legislation or the constitution have been exercised by the executive to discharge functions such as treaty making, conferring honours, issuing passports, declaring war or pardoning criminals.[159] With the growth of bureaucracy however, maladministration has grown and the need for both political and judicial control to address complaints. When courts do enquire into the legal competence of public authorities, they have refrained from substitute their own decisions for those of administrative authorities.[160] This caution had its foundation in the 17th Century struggle between the Judges and the Stuart Kings over the right of judges to make independent judgements in cases where the King had an interest.[161] The constitutional struggle continued in the reign of Charles I until the independence of the Judges was established and agreement reached on the principle that the judiciary should not be interfered with in exercise of its functions by other branches of government. The Judiciary could, however test the lawfulness of executive acts. Changes came which altered the view that 'the King could do no wrong' with the enactment of the Crown Proceedings Act in 1947 which made it possible to file proceedings in tort against Government departments.[162] Administrative tribunals were also appointed by the Lord Chancellor to deal with citizens' disputes with Government departments in various areas such as rent control, local taxation assessment and land acquisition. The tribunals were not subject to strict rules of evidence and procedure and members had special knowledge and experience with the subject matter. The tribunals have gained public acceptance because of the good quality of their work and appeals on a question of law go to the High Court of Justice.

[159] Page, Edward C. and Robson, William Alexander. 'Administrative law' *Encyclopedia Britannica* (4 Apr. 2020) <https://www.britannica.com/topic/administrative-law Administrative Law - Judicial Review of Administration> accessed 27 May 2021.
[160] ibid.
[161] ibid.
[162] ibid.

The situation in the United Kingdom, nonetheless is that courts do not pursue specific administrative jurisdiction for judicial review of every decision of the executive.[163]

2.5 Judicial Deference in South Africa

Deference is said to be a misused concept in administrative law in South Africa because the courts could not defer when reviewing for unlawfulness, unreasonableness or procedural unfairness. Those grounds are the reason for setting aside administrative decisions regardless of how much deference may have been sought.[164] It is said that deference has never changed a result and courts do exercise independence and decide on the facts because judges know their role, understand the doctrine of separation of powers and also know the difference between review and appeal.[165] In post democracy South Africa, courts have struck a balance between judicial activism and showing appropriate deference when declaring legal provisions and actions of ministers as well as the President to be invalid.[166]

2.6 Judicial Deference in Other Countries

Deference as a concept and legal practice is present in the Constitutional systems of the world and its operation is silently positioned in a country's legal order.[167] With the expansion of the administrative machinery of governments courts recognise the need to check actions and decisions of the other branches of Government for constitutionality. In Israel where courts tend to start off with an activist stance, they change to deference to other arms in matters of immigration, anti-terrorism or allocation of public resources.[168] They may intervene to evaluate decisions to appoint public officials.[169] In China courts adopt a deferential stance towards the

[163] ibid.
[164] Clive Plasket, 'Judicial Review, Administrative Power and Deference: A View from the Bench' (2018) 135 South African Law Journal 502.
[165] ibid.
[166] ibid.
[167] Zhu (n 84).
[168] ibid.
[169] ibid.

administration.[170] In Hong Kong courts decline deference to other arms of Government in human rights issues such as the right to life, protection against torture, freedom of expression and right to fair trial.[171] In Singapore, there is absolute deference to such issues as Parliamentary business on foreign affairs, issues of national security, public safety, peace and good order.[172] In general, courts value public trust as it is important to their legitimacy and in critical times weigh opposing interests and prevailing circumstances before deciding whether to defer to other arms of Government or not.[173] Other reasons for deference by courts include growing technical expertise in science and technology, health and safety, environment, and increased professionalism in Government. In these circumstances therefore, as was stated by Reagan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* courts defer to decisions of other branches of Government out of respect for the principle of separation of powers but not purely as judicial courtesy.[174] The stance of courts to deference is thus attributable to the type of issue before them and their relations with other branches of Government.

2.7 Judicial Deference in Kenya

Judicial independence is traced back to liberal democratic ideals and the separation of powers attributed to Aristotle, Locke and Montesquieu.[175] The separation of the judicial arm has an important role in the prevention of illegal oppression, limiting arbitrariness and ensuring that governmental power is used for the benefit of society.[176] Judicial independence is related to the idea of the rule of law involving equality of the parties before the law regardless of status,

[170] ibid.
[171] ibid.
[172] ibid.
[173] ibid.
[174] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC) <http://www.saflii.org/za/cases/ZACC/2004/15.html> accessed 30 May 2021.
[175] John A Fairlie, The Separation of Powers (1923) 21 Michigan Law Review 393.
[176] Yash Pal Ghai, 'Constitutions and Constitutionalism: the fate of the 2010 constitution' in Godwin R. Murunga, Duncan Okello and Anders Sjögren (eds) *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014)

protection of fundamental rights and absence of arbitrary power by government.[177] The judiciary was thus created by the Constitution of Kenya 2010 to be separate from the executive and legislature. This was a major departure from the history of constitutionalism in Kenya.

European colonisation of Africa in the late 19th Century created changes in social, economic and political terms and establishment of institutions and methods of control that were alien.[178] The 1885/5 Berlin Conference partitioned Africa and the British took East Africa whose formal administration began in 1888 by Imperial British East Africa Company. This lasted until 1895 when the company went bankrupt and the British Government took over. The construction of the railway from Mombasa between 1896 and 1901 opened up the territory and a settler colony was created which was renamed Kenya in 1920. By 1960 European settlers numbered 61000, Asians were 169,000 while the Africans numbered 7.8 million.[179] European settlers nonetheless dominated the best professions, industries and large scale farming in the best agricultural areas which was achieved through legislation and coercion with use of the police and military. Political activities for Africans was limited and when the East African Association was formed in 1924 by Harry Thuku he was arrested and the association proscribed. Africans were forced to channel their political grievances only through Native Councils until 1944 when the Kenya African Union was formed. In a development that sought to include Africans amidst settler determination, for self-government on the Rhodesian pattern, Eliud Mathu was the first African to be appointed to the Legislative Council (LEGCO).[180] In 1953, the Union was declared illegal due to the emergence of the Mau Mau insurrection in the struggle against colonial control. To appease the insurgents, the colonial authority enacted the Lyttleton Constitution in 1954, which

[177] Kenya: The Struggle for a New Constitutional Order (n 164).

[178] Michael Mwenda Kithinji, Mickie Mwanzia Koster and Jerono P Rotich (eds), *Kenya After 50: Reconfiguring Historical, Political, and Policy Milestones* (Palgrave Macmillan US 2016) <https://www.palgrave.com/gp/book/9781137574213> accessed 22 February 2021.

[179] ibid.

[180] Commission's Final Report - Const of Kenya Conf' Chapter Three Para 3.1 <https://constitutionnet.org/sites/default/files/KERE-440.pdf> accessed 19 June 2021.

established a council of ministers comprised of one African. This was followed by the Lennox-Boyd Constitution in 1958 which however failed to address redistribution of land, release of political prisoners and repeal of repressive laws.[181] Colonial rule ended with independence on December 12, 1963. Based on liberal democratic tradition the purpose of a constitution is to limit the authority of government and regulate political processes in the state and in theory government was required to follow rule of law.[182] As Kenya moved from the reconstituted state immediately after independence to recentralized power, governance assumed the character of 'Constitutionality without constitutionalism'.[183] This meant low interest in civil rights and due process, weak limits on executive power and competence and absence of participation in political and decision making processes with the result that there was unfettered growth of state power.[184] It was clear that colonial foundations strongly influenced post-colonial Kenya. Coercive administrative law involving limitation of personal freedom of citizens and control of their properties was strengthened through administrative law as the legal basis of executive power with wide discretionary power.[185] Indeed, during the colonial period in particular, courts performed administrative non-judicial functions where a District Commissioner also performed the duties of Magistrate and law and order became the primary concern of the criminal justice system.[186] By being empowered to appoint the Chief Justice the President and hence the executive, could constitutionally control the judiciary.

[181] Ibid (n 176) Para 3.1.

[182] HWO Okoth-Ogendo and American Council of Learned Societies, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox* (American Council of Learned Societies 1988) <https://books.google.co.ke/books?id=QUpuHQAACAAJ>.

[183] ibid.

[184] ibid.

[185] ibid.

[186] Melissa Mungai, 'When Courts Do Politics: Public Interest Law and Litigation in East Africa by J Oloka-Onyango' (Cornell Institute for African Development Cambridge Scholars Publishing 2017)

Indeed, an aloof judiciary which functioned under the principles of the common law and with the mandate to interpret and pronounce on the law continued to play the role of ensuring implementation of the general law.[187]

Despite clear powers to do so courts of the early independence era were reluctant to endorse challenges to executive or legislative actions that violated the Constitution.[188] The attitude of the courts was not in keeping with the aspirations of independence and was due to the composition of the judiciary which included foreign judges among whom were British citizens and non-Europeans made up of Indians, Caribbeans and West Africans. The judges were employed on contract and did not want 'to rock the boat'. [189] As a result, there was little development of ideologies of separation of powers or rule of law.[190]

The judiciary which oversees adherence to the rule of law continued to function throughout the 1960s and 70s and 80s with hardly any effort to ensure accountability in the exercise of power by the executive through a Constitution that favoured the executive and with little participation by the people.[186] The 1980s and 90s during President Moi's era saw a constriction of space as well as narrowing of the judiciary's autonomy. Courts exercised judicial power with restraint whose roots are in English law in order to avoid any notion of policy formulation or confrontation with the executive when decisions were likely to have political outcomes.[191] This self-censoring approach was adopted in cases involving the maintenance of public order,

[187] Ojwang J B, 'Constitutional Reform In Kenya: Basic Constitutional Issues And Concepts - Constitution of Kenya Review Conference Paper 2001) <http://www.commonlii.org/ke/other/KECKRC/2001/10.html> accessed 22 February 2021.

[188] Mungai (n 186).

[189] ibid.

[190] ibid.

[191] See Truro and Parke B LJJ in *Egerton v Earl of Brownlow* [1853] 4 HLC 484 at p 196: 'It is the province of the judge to expound on the law only.....and not to speculate on what is best, in his opinion, for the advantage of the community'

human rights and personal freedom.[192] There were indeed no cases showing executive power being held in check.

In the period 1989/90, the so-called Cold War ended and Western democracies began pressurising their allies in developing countries including Kenya to adopt democratic governance. Civil society in Kenya led the campaign for constitutional reform and the Constitution of Kenya Review Commission, called the Bomas Process' became one of the methods of spearheading this change to democratic governance.[193]

The architecture of the Kenyan Constitution of 2010 established judicial authority, which is described as the power that any sovereign must have to decide disputes between itself and its subjects, whether the concerns concern life, liberty, or property.[194] The mandate of the Judiciary in Kenya is to promote constitutional supremacy and rules based governance as part of the transformation of society. It was expected to play its role well through judicial review of government actions and making decisions aimed at protection of rights as commitment to constitutionalism is gradually nurtured. Particular challenges faced by courts include making decisions that affect the balance of power in the principle of separation of powers or determining issues with far reaching policy and moral consequences on society. The effect of such decisions is to raise tension between the branches of government and risk the loss of status by the judiciary as a neutral and non-partisan institution with the privilege of having the last word on interpretation of the law.

For effective implementation of the Constitution the independence of the judiciary has been strengthened through a more representative Judicial Service Commission[195] and availability of

[192] James Odek and JB Ojwang, 'The Judiciary in Sensitive Areas of Public Law: Emerging Approaches to Human Rights Litigation in Kenya', Netherlands International Law at 29-52 (Co-Author)' <http://erepository.uonbi.ac.ke/handle/11295/28142> accessed 7 June 2021.

[193] Commission's Final Report - Const of Kenya Review Conference 2005 (n 176).

[194] Kenya: The Struggle for a New Constitutional Order (n 164).

[195] Const2010 (n 3) Article 171.

more secure financial resources.[196] Judicial decisions that have been made since 2010 have shown a spirited effort to minimize the idea of deference to administrative acts of the executive much as has been the case in South Africa. The courts have made it clear that they will defend their authority as the final interpreter of the law and should not be expected to avoid review of executive acts for lawfulness.

As the work of constitutional transformation progresses, some challenges have surfaced which have significance for the question of deference by courts to other arms of government. The first of those challenges is that Judges lack electoral legitimacy but have power to invalidate actions of other arms of government as unconstitutional. They must thus accept limitations on their legislative discretion and avoid doing politics.[197] The second challenge relates to the problems of abuse of power and corruption which it was alleged are not confined to the executive and legislature but have included the judiciary. The perception by citizens is that the judiciary is losing legitimacy as the dispute resolution forum.[198]

2.8 Conclusion

This chapter has shown that judicial deference is an evolving principle whose growth in American, African, Asian and European jurisdictions has responded to the growth of the administrative state which is characterized by the establishment of administrative tribunals with executive, legislative and judicial functions delegated by legislation. In the description of judicial deference based on the power of judicial review of administrative action that is part of the separation of powers it has been demonstrated that the judiciary is a co-equal member of the three branches of government. Courts defer to actions or decisions of the other branches of government unless there are constitutional violations and where they can avoid the impression

[196] ibid Article 173.

[197] Pablo T. Spiller and Rafael Gely, 'Strategic Judicial Decision Making' (August 2007) NBER Working Paper Series Paper 13321, <https://www.researchgate.net/publication/4820191> accessed 7 June 2021.

[198] Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' (2011) Social Science Research Network SSRN Scholarly Paper ID 1838102 <https://papers.ssrn.com/abstract=1838102> accessed 7 June 2021.

of unnecessary intrusion into the spheres of responsibility of those other branches of government. The chapter has highlighted the influence of the colonial legacy of executive dominance over the judiciary and the self-restraint on the part of courts in cases where decisions had political repercussions during the period of after re-centralisation of power in Kenya. In the post-authoritarian state, which includes the period after 2010, judicial deference to decisions of other arms of government is not completely free of the colonial influence but is also embracing the transformative constitutionalism of the new Constitution. It has been seen that where courts do need to inquire into the lawfulness of executive acts, they can declare them unconstitutional and strike them down regardless of the deference expected and they may also prefer to avoid substituting their decisions with those of administrative bodies. There is therefore room for deference by courts to tribunals and other bodies whose members have special knowledge and experience with the subject matter of issues brought to them.

3.0 CHAPTER THREE: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING JUDICIAL DEFERENCE

3.1 Introduction

In Chapter Two it was pointed out that the judiciary was a co-equal member of the three arms of government and would defer to the others only where there were no constitutional violations or engage in unnecessary intrusion into the spheres of responsibility of the other branches of government. The judiciary would also not substitute its decisions with those of administrative authorities and would indeed defer to those authorities where they had special knowledge and experience in the subject matter of issues brought to them.

This chapter addresses the second research question which relates to the influence that legislative and institutional frameworks have on judicial deference. It looks at the legislative and institutional framework governing judicial deference by courts to other administrative bodies without surrendering their interpretive role in issues requiring constitutional scrutiny of decisions by other branches of government. Both the legislative and institutional frameworks where judicial deference is addressed will be examined at international, regional and local levels in light of decisions made by courts as they seek to ensure that government is accountable to the citizens. The roles that judicial independence, discretion and the doctrine of separation of powers play in judicial deference to administrative and other bodies will also be examined. In jurisdictions where states place a high premium on the protection of the dignity of citizens who were previously disadvantaged it will be seen that deference by courts goes a long way in promoting the constitutional principle of separation of powers.[199]

3.2 Legislative Framework

This section discusses the independence of the judiciary which is anchored in legislation and institutional frameworks at international, regional and national levels. Independence of the

[199] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (n 163).

Judiciary ensures accountability as a co-equal member of the three arms of government. It carries with it responsibility for the judiciary to show deference to decisions and actions of other arms without dominating or disrespecting their constitutional roles.

3.2.1 International Framework

The United Nations (UN) system has taken many measures to protect human rights and promote good governance and among those measures is the influence that an independent judiciary has on human rights protections. Various instruments support the role of an independent judiciary that promotes rights and the rule of law.

a) The UDHR[200] is a document marking an important milestone in the development of human rights. It was promulgated by the UN after World War II and for the first time set out fundamental rights that were to enjoy universal protection.[201] The Declaration provides that all people enjoy the right to protection of the law[202] and entitlement to a fair and public hearing by an independent and impartial tribunal.[203] These rights have been appropriately captured in Kenya in the Bill of Rights to promote fair administrative justice.[204] The protections enjoyed by people in the declaration have been built as national constitutional protections that guarantee that courts as well as other arms of Government avoid violations of rules of natural justice and indeed empower courts to subject administrative action to constitutional scrutiny. Courts would only defer to other bodies when no rights violations occur. As one of the rules that could guide the courts in developing a uniform approach to deference in Kenya, this rule is appropriate.

b) The ICCPR[205] in recognises the responsibility of states to strive for the promotion and observance of rights and freedoms set out in the convention including fair trial in determination

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[200] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5

[201] UN General Assembly, resolution 217 A (III), A/RES/3/217 A, 10 December 1948) <https://www.ohchr.org/EN/Issues/Education/.aspx> accessed 7 June 2021.

[202] UDHR (n 186) Article 6.

[203] ibid Article 10.

[204] Const2010 (n 3) Article 47 and Fair Administrative Action Act No. 4 of 2015.

[205] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

of rights by judicial, administrative or other competent authorities as well as entitlement to judicial remedies.[206] In order to effectively ensure respect for the rights protections contained in this convention, courts should only defer to other bodies performing constitutional and statutory duties that are domesticated from the Covenant's provisions where no violations of natural justice occur. Deference by courts would be conditioned on compliance with the convention by other arms of Government. Judicial scrutiny of such compliance usually through the power of Judicial Review should be promoted and courts should on their part adopt clear thresh- holds for the granting or denying judicial deference.

c) A UNGA Declaration was made to reaffirm the commitment of States to the rule of law and its importance in addressing the complex challenges of social transformation to fairer societies in the world.[207] It was part of the continuing commitment by the UN to entrenchment of constitutionalism and fairness through respect for the rule of law. It emphasized the responsibilities of States to respect human rights and fundamental freedoms for all, the importance of fair, stable and predictable legal frameworks, independence of the judicial system and non-discrimination. This Declaration recognized that respect for human rights was not a settled issue. Accordingly, in societies where systems and practices for respect of rights and freedoms had not been firmly established, courts should only rarely defer to decisions of other branches of government. The transformative character of the Constitution of Kenya necessitates Constitutional scrutiny of many decisions and actions of other arms of Government. As a result, courts have adopted a stance of declining deference. That stance contributes to the continuing absence of a uniform approach to deference. The Declaration provides criteria to be relied on by courts in choosing whether to grant or decline deference and courts should adopt the standards it sets in order to address deference.[208]

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[206] ibid Article 2 (3)(b).

[207] Declaration of the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels UNGA Res A/RES/67/1 (24 September 2012) (Adopted by 68 member states)

[208] Ibid (n 193).

d) Resolutions were passed in 1985 as Basic Principles relating to the Independence of the Judiciary to assist States in protecting the independence of the judiciary by requiring impartiality, determination of cases in accordance with the law and without interference for any reason.[209] In determining issues brought to court, judicial independence is bound to play a major part in the decision whether deference to decisions of other administrative bodies would be appropriate and in which circumstances. Kenya took clear measures to implement the Basic Principles for Judicial independence in the Constitution by providing that courts are subject only to the Constitution and the law in the exercise judicial authority.[210] These Basic Principles on independence of the judiciary act as a guide and can be effective only if other considerations such as transparent recruitment of judicial staff, fair remuneration, effective budgetary support for the Judiciary, modernization of facilities and systems and strong support for ethics and good governance in society are taken into account. The Independence of the judiciary is an essential basis for deference to decisions of other branches of Government. The formulation of a uniform approach to deference by courts in Kenya will benefit from these Basic Principles which emphasise judicial independence that can enhance trust in courts as the neutral arbiter they are required to be.

3.2.2 Regional Framework

At Regional level various initiatives have been made and instruments agreed upon to uphold the independence of the judiciary:

a) The independence of the Judiciary and delivery of efficient justice were acknowledged as essential to the success of the relations among the branches of Government by the Commonwealth Heads of Government in 2003 when they endorsed the Latimer House Guidelines for ensuring judicial independence.[211] The Principles helped to emphasise the close

[209] UNGA Res 40/32 AND 40/146) (13 December 1985)
[210] Const2010 (n 3) Article 160.
[211] Latimer House Principles (*The Commonwealth*, 23 August 2013) <https://thecommonwealth.org/history-of-the-commonwealth/latimer-principles> accessed 7 June 2021.

connection that judicial independence has to the rule of law and also highlighted the significance of the requirement that courts should interpret and apply the Constitution and national legislation in accordance with human rights conventions.[212] In addition to the Latimer House Principles other closely related initiatives include the Bangalore Principles that also promote independence, impartiality, equality, competence and diligence for the judiciary.[213] The Universal Charter of Judges Adopted by the International Association of Judges is also another Regional initiative on judicial independence.[214] Further guidance on judicial independence is found in The American Convention on Human Rights which promotes protection human rights through the work of a competent, independent and impartial judiciary.[215] These regional instruments provide excellent guidance for the establishment and growth of a robust judiciary in every member country. The value of those principles is normally only realizable when there is a vibrant exchange of ideas and experiences at regular meetings and sharing of the growing jurisprudence among countries. Despite the busy schedules that judicial authorities have, time should be set aside for regional engagements with peers and professional colleagues. Such engagements include symposia, conferences, staff exchanges, joint research initiatives and scholarly writing.

b) The African Commission on Human and Peoples' Rights whose mandate includes promotion and protection of human and people's rights passed a resolution in 1996 which called on member states to avoid actions that may threaten the independence and the security

[212] Mumba Malila, 'The Independence of the Judiciary through the Eyes of the African Commission on Human and Peoples' Rights' (Judges' Symposium on Judicial Independence, Impartiality and Accountability Lesotho, 28-29 July 2010).

[213] The Bangalore Principles,2002, revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>.

[214] OHCHR | 'International Standards -Special Rapporteur on the Independence of Judges and Lawyers' - Universal Charter of the Judge (adopted on 17 November 1999 and updated on 14 November 2017) <https://www.ohchr.org/EN/Issues/Judiciary/Pages/Standards.aspx> accessed 7 June 2021.

[215] American Convention on Human Rights "Pact of San José, Costa Rica" signed 22 November 1969 1144 UNTS123 UNTC

of judges and magistrates.[216] The resolution recognized the importance of African countries having a strong and independent judiciary that the people trust. Judicial Independence in Africa continues to develop and the obstacles that get in the way of successful management of the relationship of the three arms of Government are regularly addressed with a view to ensuring that the judiciary remains free of interference in the discharge of its mandate.[217] Kenya included the principles of judicial independence in the Constitution of Kenya 2010 and took measures to strengthen people's confidence in the judiciary by constitutionalising the right of access to fair administrative action.[218] One of the concerns that should be addressed is the tendency to confuse judicial independence with autonomy that encourages supervision of other arms of government in areas of policy and political matters. Given the developmental and political challenges in developing countries which include ethnicity differences, competition for resources, poverty and eliticism, the risk is high of courts being drawn into socio-political controversies. In such eventualities, judicial deference becomes impossible to practice or respect. Conscious efforts should therefore be made to uphold professionalism and neutrality among judicial officers.

c) In South Africa under PAJA[219] decisions of review courts are subject to appeal to the Constitutional Court on constitutional matters and to the Supreme Court of Appeal in all other matters.[220] Without a general administrative appeals tribunal therefore appeals from administrative bodies are provided for by legislation on an ad hoc basis.[221] The grounds for review are set out in Section 6(2) of PAJA and judicial deference is applied in cases which

[216] African Commission on Human and Peoples' Rights Sessions Resolution on the Respect and the Strengthening on the Independence of the Judiciary-ACHPR/Res.21(XIX)96

[217] Wahab O. Egbewole *Judicial Independence in Africa* (Wildy & Sons Ltd 2017)

[218] Const2010 (n 3) Article 47.

[219] Promotion of Administrative Justice Act 3 of 2000 | South African Government <https://www.gov.za/documents/promotion-administrative-justice-act> accessed 8 June 2021.

[220] ibid.

[221] Visram Alnashir, 'Review Of Administrative Decisions Of Government By Administrative Courts And Tribunals' (10th Congress of the International Association of Supreme Administrative Jurisdictions, Sydney, March 2010) <https://www.aihja.org/images/users/1/files/kenya.en.0.pdf> accessed 28 May 2020

involve complex administrative procedures that are beyond the court's expertise.[222] Deference is nonetheless applied by courts on the basis of the Constitutional principle of separation of powers and not from judicial courtesy.[223] South Africa prefers to regulate judicial deference on the basis that it is more important to enforce government accountability to the citizens for its actions because their dignity had been denied them for long by the previous Apartheid regimes. PAJA demonstrates this approach in Section 8 (1)(a)(ii) which provides that an order can be issued directing an administrator to act in the manner that a court or tribunal requires. A judicial officer therefore has power to substitute his or her own decision for that of the administrator and the circumstances where such corrective action can be done are set out.[224] Other laws that guide judges in the application of judicial deference include the Leadership and Integrity Act, The Public Ethics Act and the Draft Judicial Code of Conduct and Ethics.[225]

There are risks in allowing a system to operate where courts continue to substitute their opinions for those of competent authorities and experts who have Constitutional and Statutory authority to discharge functions that affect the rights of the people. While it may have been necessary to apply powers under Section 8(1)(a)(ii) of the PAJA when new constitutional governance was introduced, experience in constitutional compliance in service delivery has grown and the type of judicial scrutiny intended by that legal provision may have gradually become unnecessary. The ideal option is continued respect for separation of power which is recognised in the South African Constitution and granting deference to other branches of government in suitable cases where they have been legally vested with decision-making responsibility.

[222] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (n 163).
[223] ibid.
[224] PAJA (n 205) Section 8.
[225] Acts | South African Government <https://www.gov.za/documents/acts> accessed 8 June 2021.

3.2.3 National Framework

The local framework for addressing judicial deference is drawn from the Constitution of Kenya and consequent legislation providing for administrative justice and institutions that facilitate it.

a. The Constitution of Kenya 2010

The Constitution of Kenya is characterized as progressive and transformative and introduced principles and ideals whose realisation is facilitated by changes in questions of justiciability and locus standi. Justiciability has been expanded by giving the High Court unlimited original jurisdiction in civil and criminal matters, jurisdiction over violations of the Bill of Rights, jurisdiction to hear appeals from tribunals appointed under the Constitution, adjudicate on questions of interpretation of the Constitution and any other jurisdiction conferred by law.[226] Any person has a right to refer any legal dispute to court for adjudication[227] and there is *locus standi* for anyone to exercise the Constitutional right of access to justice[228] to institute court proceedings claiming violation of rights or fundamental freedoms in the Bill of Rights whether in their name or by acting for others.[229] The High Court has jurisdiction to hear such applications for redress of violations of the Bill of Rights and grant relief[230] and in doing so the court is required to adopt an interpretation that most favours enforcement of the right.[231] The Constitution has solved the challenge of lack of *locus standi* faced by the late world renowned Professor Wangari Maathai when her Plaint was struck out by the High Court in *Wangari Maathai V Kenya Times Media Trust Ltd.*[232] The case was brought to stop construction of a high rise building in Uhuru Park in Nairobi which would damage the environment. Under the Constitution of Kenya 2010 such a case may be brought by a person acting in the public interest

[226] Const2010 (n 3) Article 165(3).
[227] ibid Article 50.
[228] ibid Article 48.
[229] ibid Article 22.
[230] ibid Article 23.
[231] ibid Article 20(3).
[232] HC Civil Case 5403 of 1989

to protect the environmental rights under the Constitution. The exercise of the right to institute proceedings claiming violation of rights with minimum formalities and cost the constitution is ensured by requiring the Chief Justice to make rules that facilitate the process.[233] Decisions of other arms of Government may be subjected to constitutional scrutiny through Constitutional petitions or the power of judicial review.[234]

An important power granted by the Constitution is the jurisdiction of the Supreme Court to give advisory opinions at the request of the two levels of government as well as state organs.[235] This power is useful because it provides direction for governmental conduct in maters that may be of a politically delicate nature.

The wide scope of justiciability, locus standi and the Constitutional objective of transforming Kenyan society has potential for activism by the country's rejuvenated judiciary which is keen to promote its independence. Deference by courts to other arms of Government is in such circumstances difficult and rare. The task for courts of ensuring accountability by the executive for its actions was of particular importance for a society that was emerging from autocratic governance and significant rule of law challenges. The Constitution's novel provisions such as judicial power being said to belong to the people, availability of alternative dispute resolution mechanisms such as mediation and negotiation which were well known in traditional customary practices set the tone for renewed respect for justice and the pursuit of administrative fairness.

The power to subject all government actions to Constitutional scrutiny by courts granted by the Constitution of Kenya 2010 has the potential for abuse if courts fail to defer to other arms of Government. The need for caution should go hand in hand with the performance of duties that courts have to prevent violations of rules of natural justice by bodies established to perform

[233] Const2010 Article 22(3).
[234] ibid Article 47.
[235] ibid Article 163(6).

administrative and statutory functions. Such caution can serve to forestall complaints of judicial over-reach, judicial theocracy and involvement in policy or political issues by courts. Deference by courts to acts and decisions of other bodies is addressed in the operationalization of the Constitution through legislation such as the Fair Administrative Action Act.[236]

b. The Fair Administrative Action Act

The Constitutional clause on the right to timely, legitimate, and procedurally fair administrative action was made operational by the Fair Administrative Action Act. .[237] In addition to defining administrative action the Act provides the grounds for review of administrative action by courts and facilitates the treatment of administrative grievances to Constitutional discipline. Despite the fact that the separation of powers is not clearly established in the Constitution, courts are often cautious to substitute administrative decisions with their own. The Fair Administrative Action Act is an example of legislation that states where review of administrative decisions may be obtained. Courts therefore play their part of giving the final interpretive role with regard to all legislation while subjecting administrative and other decisions of other branches of government to judicial scrutiny. In order that courts may defer to decisions of administrative bodies, deliberate efforts should be made to enhance the capacity of officials with responsibility for making administrative decisions and help to avoid violations of rules of natural justice in decision making.

c. The Commission on Administrative Justice Act

The Commission on Administrative Justice Act[238] was enacted in order to create a Constitutional Commission under Chapter Fifteen of the Constitution.[239] Section 30 of the Act limits the Commission's powers, including exempting Cabinet decisions, criminal offences,

[236] No. 4 of 2015 (n 11).
[237] Const2010 (n 3) Article 47.
[238] No. 23 of 2011 (n 15)
[239] Article 59(4) Const2010 (n 3).

cases pending before any court or judicial tribunal, the initiation of civil proceedings before a body performing judicial power, anything in regard of which there is a right of appeal or other legal remedy, and matters under investigation by a body performing judicial functions.[240] Those limitations effectively reduce the scope of administrative review that might ordinarily attract the application of judicial deference. With regard to enforcement of its recommendations, courts have held that such recommendations are enforceable but only by order of a court of law.[241] As discussed elsewhere in this study the control of enforcement of the Commission's decisions was challenged and the Supreme Court took the opportunity to hold that those decisions can only be binding if specifically provided for by law. It further held that the Commission cannot force a public entity to implement its recommendations.[242]

There is need to make amendments to enabling legislation in order that this Constitutional Commission can more effectively discharge its mandate without the limitations placed in its way by Section 30. Amendments which would benefit the people however include allowing decisions of the Commission to be more easily implemented without the necessity for court orders. Caution is nonetheless necessary to prevent duplication of powers and authority reserved for other arms of Government.

d. The Commissions of Inquiry Act

The Commissions of Inquiry Act[243] provides guidance for establishment and work of commissions of inquiry. It empowers the President to appoint commissions to inquire into any matter and until amended in 2010 reports by commissions were presented to the President as required but recommendations were rarely made public often due to vested interests.[244]

[240] No. 23 of 2011 (n 15) Section 30 (a)-(h).
[241] Civil Appeal 141 of 2015 - Kenya Law' 141 <http://kenyalaw.org/caselaw/cases/view/182167/> accessed 26 February 2021.
[242] Petition 42 of 2019 (SC) [2021] eKLR
[243] Cap. 102
[244] Eliud Kibii, 'Commissions Or Omissions Of Inquiry? Why Kenya Has Failed to Address Historical and Other Injustices' (*The Elephant* 5 April 2018) <https://www.theelephant.info/features/2018/04/05/ > accessed 1 June 2021.

Currently reports and findings of commissions of inquiry go to both the President and Parliament. Commissions fell into the categories of either those formed to gather information for policy formulation or review or investigatory inquiries which took the form of administrative instruments or task forces which recommended reforms.[245] Over the years, there was a tendency to appoint lawyers and Judges as chairpersons or members of commissions or task forces. The reasons for the choice revolve around the standing of judges as persons of integrity with the reputation for impartiality and objectivity. A study has shown that commissions are appointed to inquire into public administration lapses which do not amount to criminal acts but which require investigation to reduce public anxiety.[246] Many problems that are identified by inquiries only demand attitude or behaviour changes which are difficult to implement and often there are hardly appropriate mechanisms for follow-up action. In Kenya where there is a long history of commissions established to deal with such issues since colonial days, Judges have been the preferred chairpersons or members. Unfortunately inquiries which were set up for political purposes and chaired by serving Judges, sometimes ended up with criticism and questioning of such judges which was harmful to their standing as independent and impartial arbiters.[247] It appears necessary that serving members of the Judiciary should be excluded from membership of such inquiries in order that judicial review of reports made by such commissions can be undertaken without the risk of lower court Judges reviewing the recommendations of commissions whose members are serving judges of a higher court. The application of judicial discretion also faces challenges when reviews of the work of such commissions are undertaken. Indeed, extra-judicial engagements for serving judges are a risk to the judicial independence as well as deference to decisions of other branches of government.

[245] Kaguru Joseph Macharia, 'Towards Effective Commissions of Inquiry in Kenya: A Review of the Commissions of Inquiry Act in Light of the Constitution of Kenya 2010 (LLM Thesis UoN September 2018)
[246] A Study of Commissions of Inquiries in Kenya (Africa Centre for Open Governance (AfriCOG) 2007) <https://africog.org/old2019site/a-study-of-commissions-of-inquiries-in-kenya/> accessed 8 June 2021.
[247] Office of the President 'Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair(*Republic of Kenya* October 2005) <http://kenyalaw.org/kl/fileadmin/CommissionReportsf> accessed 8 June 2021.

3.2.4 Institutional Framework

Institutional frameworks at international, regional and national levels work in tandem with legislation that anchors judicial independence in Constitutions and other legislation that form the basis for judicial authority. Institutional frameworks provide guidelines on professional standards and constitute fora for development of principles and practices for successful steering of judicial functions. Judicial deference is a doctrine that plays a major part in the management of relations between arms of Government and its presence in institutional frameworks shapes the required focus for courts in Kenya.

a. International Institutional Framework

i) The International Association of Judges is a professional, non-political body comprising national associations of judges.[248] The Association's aim is to protect judicial independence as an essential requirement of the judicial function. In the discharge of its mandate, the Association issued The Universal Charter of The Judge which emphasizes the duty of judges to ensure fair trial and impartiality on their part.[249] The standards governing judicial deference can be found in the principles of the IAJ. It may be appropriate to require this Association to come up with proposals in respect of better management of judicial deference which is currently fragmented, particularly with regard to establishing a common thresh-hold for the exercise of deference by courts.

ii) The International Bar Association (IBA), which was founded in 1947 and is known as the "global voice of the legal profession," brings together lawyers, bar associations, and law societies from all around the world. .[250] The Association facilitates the interchange of views on developments in the practice of law and issues such as judicial deference are significant

[248] International Association of Judges, founded in Salzburg (Austria) in 1953. <https://www.iaj-uim.org/history/> accessed 8 June 2021.
[249] OHCHR | International Standards 'Universal Charter of The Judge -Special Rapporteur on the Independence of Judges and Lawyers' (n 200), adopted by the IAJ Central Council in Taiwan On November 17th, 1999
[250] International Bar Association <https://www.ibanet.org/> accessed 8 June 2021.

particularly for the growth of jurisprudence in Kenya in implementation of the Constitution and its fresh approach to governance challenges of our young democracy. The IBA Minimum Standards of Judicial Independence promote independence for Judges and set out standards that should promote a relationship for the three arms of government that respects judicial autonomy and independence for effective promotion of the Rule of Law.[251] Those standards should form an important basis for the development of a uniform approach to judicial deference by courts as well as its successful application. Both the Law Society of Kenya and International Federation of Women Lawyers (FIDA) are members of IBA.[252]

b. National Institutional Framework

At the national level institutions have been established to support judicial independence:

i) The JSC is a Constitutional Commission[253] with a mandate of among other responsibilities of promoting the independence of the judiciary and transparent administration of justice in Kenya.[254] It is responsible for the appointment and removal of judges and the discipline of other judicial officers and staff [255] and also ensures the successful delivery of judicial services with appropriate budgetary support of Government. Certain challenges which have been raised by the Commission have the potential of affecting judicial independence as well as effective administration of justice and they include late disbursement of funds by Government as well as low budget allocation.[256] Other challenges that the judiciary was said to have faced included reduced trust between the executive and the Judiciary attributable to perceived lack of support for Government policy directions in national development and political decisions when courts

[251] IBA Minimum Standards <https://www.icj.org/wpcontent/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf>

[252] International Bar Association (n 234).

[253] Article 171 Const2010 (n 3).

[254] Judicial Service Commission of Kenya <https://www.jsc.go.ke/> accessed 8 June 2021.

[255] No. 1 of 2011

[256] State of the Judiciary & the Administration of Justice Annual Report, 2017 – 2018 – The Judiciary of Kenya <https://www.judiciary.go.ke/download/state-of-the-judiciary-the-administration-of-justice-annual-report- 2017-2018-2/> accessed 8 June 2021.

delivered rulings against Government. Such reduced trust and delayed funding for the Judiciary may tend to result in lower protection of autonomy and independence that are essential for efficient delivery of justice to citizens.

The application of judicial deference in such a situation may be difficult to achieve and may even result in even closer scrutiny of Government by courts with increased instances of judicial activism. The likely result would be increased mistrust and non-cooperation among the arms of Government leading to paralysis in national development and social change. The response by the JSC to recent calls for re-constitution of the JSC and establishment of the office of Judiciary Ombudsman who would be appointed by the Executive demonstrates some of the negative effects of mistrust and non-cooperation between the Courts and other arms of Government and particularly the National Executive.[257]

Further non-cooperation may lead to courts increasingly seeking to guard their independence as they decline to defer to decisions of other branches of Government. They may also issue orders which the latter may in return disobey. The damage done to Rule of Law by those actions may last long and be very difficult to undo.

ii) The National Council on the Administration of Justice (NCAJ) is a coordinating body for policy development, implementation, and oversight.[258] The Council has a mandate of facilitating consultation that can effectively promote successful administrative justice as well as reform of the system of justice. The Council carries out its mandate through about six committees it has established in areas of activity including court users, children matters, criminal justice reform and traffic.

[257] JSC Statement on 'BBI Proposal on Appointment of Judiciary Ombudsman – The Judiciary of Kenya' <https://www.judiciary.go.ke/jsc-statement-on-bbi-proposal-on-appointment-of-judiciary-ombudsman/> accessed 23 February 2021.

[258] No. 1 of 2011 (n 251) 1, NCAJ is established under Section 34 of the Judicial Service Act.

The contribution made by the NCAJ to effective delivery of the Constitutional mandate of the Judiciary is significant and that includes reducing mistrust between arms of government and enhancing the successful enjoyment by citizens of access to justice. The work of the Council which brings courts, other arms of Government and the public closer together helps promote better understanding of deference by courts to other arms of Government including adjudicative bodies established by law. Such deference will be evident with greater frequency except in clear instances of violation of the Constitution in policy making and governance which other arms of Government will feel increasingly obligated to avoid.

3.3 Conclusion

This chapter has discussed the legislative and institutional framework internationally, regionally and locally which influence the application of judicial deference and the extent to which they both challenge and support judicial independence and deference to administrative action by other bodies established by law. There is adequate institutional and legal framework to support the application of judicial deference. The divergence in application of judicial deference is influenced by the priority assigned to the duty of the Judiciary to protect the dignity of those societies emerging from denial of dignity and rights for citizens and where governance is not properly established. It may be concluded that strengthening Constitutionalism and governance as well as the rule of law remains important to courts as they grapple with the need for judicial deference to other branches of government.

Chapter Four which follows will consider answers to the second research question by examining case studies highlighting the doctrinal approaches in Kenya's jurisprudence compared with similar approaches in select jurisdictions.

4.0 CHAPTER FOUR: DOCTRINAL APPROACHES IN KENYAN JURISPRUDENCE ON JUDICIAL DEFERENCE

4.1 Introduction

The examination in the previous chapter of the legislative and institutional framework at international, regional and national levels that influence judicial deference to decisions and actions of administrative authorities showed that there was sufficient legal support for the exercise of judicial independence and application of deference to administrative action by bodies established by law. Deference by courts in the Constitution of Kenya 2010 helps to emphasise judicial independence and promotes constitutionalism, the rule of law and access to justice for citizens.

This chapter discusses cases on judicial deference by grouping them into those where the courts declined to defer to decisions of other branches of government and those where judicial deference as well as measures of judicial restraint were approved. The absence of uniformity of approach by the courts in the development of a proper understanding of the concept of judicial deference is demonstrated first through dissenting opinions in some of the major cases determined by the Supreme Court and in other decisions elsewhere of the Court Appeal and High Court. In the discussion, cases on judicial deference from other regional and international courts including South Africa, India and United States of America have been included to show differences in approach by courts as they respond to the peculiar challenges facing their societies.

4.2 Case Reviews

4.2.1 Kenya Supreme Court and Judicial Deference

The newly established Supreme Court of Kenya considered judicial deference when an advisory opinion was sought pursuant to its Constitutional jurisdiction[259] in *The Matter of The*

[259] Article 163(6) Const 2010 (n 3).

Principle of Gender Representation In The National Assembly And The Senate.[260] The issues presented for an opinion related to election petitions in the absence of a president-elect after the first round of a Presidential election and whether the Constitution required immediate or progressive realisation of the provision stating that no more than two-thirds of members of elective public or appointive bodies shall be from the same gender.[261]

In its determination the court said it was entitled to offer an advisory opinion and said it had jurisdiction to entertain a dispute as to validity at any stage in the Presidential electoral process and also that the two thirds gender rule would be realised progressively.[262]

The Court made it clear that it should provide the advisory opinion where uncertainties existed and also acknowledged the duty to show judicial deference to other arms of government.

In its second Advisory opinion in *Speaker of the Senate Vs AG and Speaker of National Assembly,*[263] the Court decided that it could exercise its discretion and render the advisory opinion in a question involving a Money Bill concerning counties where contrary to the law the National Assembly had failed to involve the Senate in arriving at a decision. The Court in its majority decision advised that the Senate should have been involved by the National Assembly in the decision and future lack of accord in such matters should be resolved through mediation as a basis for harmonious relations. It was the dissenting opinion of Njoki Ndung'u SCJ that brought the issue of judicial deference up for consideration. The opinion referred to *Doctors for Life International Assembly and Others – South Africa*[264] and argued against

[260] Advisory Opinions Application 2 of 2012 (n 62).

[261] Article 81(b) as read with Article 27(8) of the Constitution of Kenya; the majority Opinion of the Court with Mutunga CJ dissenting held that the two-thirds gender rule was amenable to progressive realisation but was immediately applicable in the case of County Assemblies

[262] Advisory Opinions Application 2 of 2012 - Kenya Law' (n 69); the Court stated at para 25 that it was critical to resolve a legal ambiguity in a way that promoted the rule of law and the public good. By accepting the role of general advisor to the government, the court claimed that it would avoid taking a stance that contradicted basic constitutional values such as the principle of separation of powers.

[263] Advisory Opinion Reference 2 of 2013 - (n 2).

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

involvement by courts in matters reserved constitutionally for the other branches of Government as a mark of commitment to respect for separation of powers.

In the opinion it was urged that in checking each other to prevent abuse of power it was the Judiciary of the three arms of government that was appointed and unelected while the executive and legislature are 'tempered through regular elections'.[265] Further the review of the Constitutional authority structures or the issue of powers and functions of the Senate and the National Assembly was a strictly political process and not a judicial one and indeed the *political question doctrine* established by the decision of *Marbury v. Madison*[266] applied. In that decision the US Supreme Court held that the issue before it required a political and not judicial solution.[267] Accordingly, the Kenya Supreme Court should have exercised restraint and deferred to the decisions made in such issues by the other arms of government.

The view that courts ought to defer to other branches of Government when societal issues of a political or policy nature arose was repeated even more strongly in two dissenting opinions in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others.*[268] The petition had challenged results of the 2017 Presidential elections and complained of violations of relevant electoral laws with the result that the declared winner could not have been validly elected. In his dissenting opinion Ojwang J.B. SCJ addressed the issue of deference by courts to general policy and politics and observed:

> 'Judges, according to Ojwang, should focus their attention on the intellectual and jurisprudential sphere first, rather than the day-to-day

[265] Advisory Opinion Reference 2 of 2013 (n 2) paragraph 249.

[266] Melvin I.. Urofsky, 'Marbury v. Madison' Background, Summary, & Significance. *Encyclopedia Britannica* (17 Feb. 2021) <https://www.britannica.com/event/Marbury-v-Madison/Impact> accessed 27 February 2020.

[267] Ibid

[268] Presidential Petition No 1 of 2017 [2017] eKLR; The Supreme Court's majority decision, with Ojwang J.B. (SCJ) and N Ndung'u (SCJ) dissenting, stated that the declared result was invalid, that the declaration of the third respondent as the President elect was invalid, and that a new Presidential Election should be held within 60 days of the determination in strict accordance with the Constitution and applicable election laws.

motions of general policy and politics, which devolve to citizens and state political institutions.'[269]

Njoki Ndung'u SCJ who similarly delivered a dissenting opinion raised the concern that judicial tyranny would be a likely result when courts neglected to acknowledge limits to encroachment on decisions of other branches of Government.[270]

It is evident that as debate continues about judicial deference the majority opinion holds sway that the only deference that may be shown by courts is what is mandated by the Constitution. The dissenting opinions in the foregoing cases at the Supreme Court that captured national attention, nonetheless pose strong arguments for judicial deference to political and policy decisions of the legislature and executive in Kenya.

4.2.2 Declined Advisory Opinion by Supreme Court

An advisory opinion was declined in *the Matters of an Advisory Opinion under Article 163(6) of the Constitution*[271] on the grounds that the issues on which the opinion was sought by the Governor Makueni County and the county assemblies of Kericho and Nandi Counties were pending determination by the High Court. Quoting its own decision in *the Matter of the Principle of Gender Representation in the National Assembly and the Senate*[272] the Court said it would have courteous regard for, and so defer to, the assigned jurisdiction of different courts. Respecting its mandate of developing jurisprudence by allowing those courts to adjudicate on the matters before them was an added consideration. The deference described by the Supreme Court showed recognition of the duty the court had of allowing lower courts to hear litigation

[269] ibid Paragraph 225.
[270] ibid Paragraph 704; This was in reiteration of the Supreme Court Judge's earlier cautionary observation in her dissenting opinion in *Speaker of the Senate & Another v. Attorney-General & 4 Others*, Supreme Court Advisory Opinion No. 2 of 2013.
[271] Reference 3 & 4 of 2020 (Consolidated) **[2021]** eKLR - <http://kenyalaw.org/caselaw/cases/view/209171/> accessed 30 May 2021.
[272] Supreme Court Advisory Opinion Application 2 of 2012[2012]eKLR

brought before them and develop jurisprudence there without the need for the Supreme Court to step in and interfere by taking over a case in exercise of its Advisory opinion function.

4.3 Decisions Declining Judicial Deference

4.3.1 Among cases where courts declined to show deference was *David Oloo Onyango v A.G*[273] which was decided before 2010. The case which addressed protection of human rights from violation by Government provides an example of the approach adopted by courts at the time in addressing judicial deference to other branches. The issue that arose concerned deprivation of remission of sentence being served by the Appellant through an administrative decision by the Commissioner of Prisons[274] that ignored rules of natural justice.

In quashing the decision of Commissioner denying right to remission and awarding damages for false imprisonment for the additional period appellant was held in prison after serving sentence with remission, the court noted that the prisoner was not heard when the Commissioner of Prisons deprived him of his remission entitlement. The prisoner had not committed any prison disciplinary offence and it was not possible to tell what matters were taken into account or not and determine whether the Commissioner acted rationally or unreasonably.

The court made an important observation on deference by courts to administrative decisions of bodies acting on statutory powers. It noted that courts were the ultimate custodians of rights and liberties of people and no rule of law required them to abdicate jurisdiction because the matter under review involved internal disciplinary processes. There could be no judicial deference to administrative decisions in cases where individual rights were violated. This case provides an example of the case by case determination of criteria for deference by courts.

[273] Civil Appeal 152 of 1986[1987] eKLR
[274] Section 46(4)(a) of the Prisons Act CAP. 90

Another decision pre-dating the Constitution of Kenya 2010 where deference was mentioned concerned the dismissal of university students by university authorities and withholding of their diploma examination results *in Nyongesa & 4 others v Egerton University College* provided an opportunity for the court to make observations on judicial deference to decisions of administrative bodies acting under statutory powers.[275]

The Court found that the students were not given a fair hearing and the university had made the decision to dismiss them arbitrarily. The court would not defer to decisions of administrative bodies where clear violation of rights such as denial of the rules of natural justice occurred. The decision of the university was quashed since it had been made unjustly and an order made to release the students' results.

The decision whether it was impracticable to comply with a certain provision of an Act was a matter to be left to the Cabinet Secretary and courts should be cautious in exercising supervisory powers to avoid paralyzing the operations of Government. These were observations made by the court in *Child Welfare Society of Kenya vs The Child in Focus & AG*[276] but the court found that the decision by the Cabinet Secretary to disband the Child Welfare Committee without a hearing was wrong. Where there were violations of rules of natural justice by administrative bodies or offices, judicial deference would not be extended to their decisions. The court made it clear that deference to an administrator was appropriate to avoid interference with operations of other arms of Government. This is a rule that could inform the courts as they develop a uniform approach to deference.

4.3.2 Where Statutory bodies exercised their powers irrationally or acted unreasonably, courts would interfere with the determinations of such bodies if decisions were contrary to the interpretation of the statutes granting them powers. This was the court's view in *Moi University*

[275] Civil Appeal 90 of 1989 [1990] eKLR.
[276] Civil Appeal 20 of 2015 [2017] eKLR

vs Council of Legal Education & Commission for University Education,[277] where the University challenged an order by the Respondent under the Legal Education Act[278] to close the university's School of Law.

The court quashed the order to close the law school since the Council for Legal Education had exercised powers it did not have under the law. The court declined deference since the body established by statute had acted irrationally and unreasonably which was a suitable criteria for application by courts when they agree on a harmonised approach to deference.

4.3.3 In *R v Capital Markets Authority, Ex parte James R Murigu & And Barth Ragalo*[279] decisions made by Capital Markets Authority acting under its statutory powers to award penalties to two former directors of Uchumi Supermarkets Ltd for alleged misconduct in their official capacities were found by the court to have been based on repealed laws. The court said that a deciding authority should stay within the bounds of legal reasonableness to avoid acting ultra vires.

The decision by Capital Markets Authority was quashed as it was found to be irrational and an abuse of power by subjecting a person to criminal or quasi criminal proceedings in respect of an act which does not in law constitute an offence. The court would only defer to the decision of such a public authority if it acted reasonably.

4.3.4 Courts will also defer only where the Constitution permits such deference through Article 47 which had made judicial review a Constitutional right. This view was expressed in *R v IEBC Ex parte NASA Kenya & 6 Others*,[280] when the court quashed the decision to award printing of election materials was quashed and ordered IEBC to start the procurement process for election materials afresh despite constrained constitutional context of

[277] High Court Petition 425 of 2015 [2016] eKLR

[278] No. 27 of 2012

[279] High Court Miscellaneous Application 607 of 2016 [2018] eKLR

[280] High Court Judicial Review 378 of 2017[2017] eKLR

holding elections on time. The court considered issues of prudential and other policy-based reasons for declining jurisdiction as well as the doctrine of exhaustion of administrative remedies and determined that it would not exercise deference to the decisions of the Constitutional Commission. It observed that the Constitution did not specifically require judicial restraint nor advocate judicial activism. The court was of the view that review of administrative power helped to uphold the constitutional principle of the rule of law and was therefore justified.

4.3.5 Courts should defer to the other arms of Government but nevertheless retain the interpretive role of determining constitutionality of Government action. This was stated in *Wilfred Manthi Musyoka vs County Assembly of Machakos and the Governor*,[281] where the absence of public participation was said to have undermined the chances of amendments of Machakos County Assembly Standing Orders 59, 60 and 62. The Standing Orders contained regulated notice periods for removal of the Governor and Executive Committee which the County Executive Committee was accused of doing away with.

The court found that the public was not given sufficient time to discuss the proposals for amendment and were therefore not involved as required. An order of prohibition was issued stopping operation of the amendments and the court said that the branches of Government should avoid interference with each other. In the event that violations such as denial of public participation occurred no judicial deference would be shown to decisions made by either the legislature or executive.

4.3.6 The recent example of a decision with significant policy and political repercussions for Kenyan society where the court declined to defer to other arms of Government was *David Ndii & Others v AG & Others.*[282] The court declared the entire process

[281] High Court Machakos Constitutional Petition 16 of 2018 [2019] eKLR
[282] High Court Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & Petition 2 (Consolidated)of 2021 [2021] eKLR

known as 'Building Bridges Initiative'[283] which included a bill for amendment of the Constitution[284] unconstitutional. In stopping the process which was aimed at addressing electoral violence and inclusivity that had characterised political contests in Kenya for many years with adverse consequences to economic and social development, the court criticised other arms of Government, particularly the Executive, for failing to involve the people of Kenya properly and obtaining consent for amendment of fundamental provisions of the Constitution. The court pronounced itself on what it considered to be the applicable constitutional interpretation doctrines. Criticism of the ruling included the failure by judges to consider non-legal issues such as social justice and human rights and that in criticising the Head of State for his role in amendment of the Constitution the court disregarded the limits against encroachment on the functions of other branches of Government.[285] The criticisms raise the question whether the court could have deferred to the other arms of Government by allowing some of the BBI Constitutional amendment process to continue instead of rejecting all of it. Appeals against the judgment will proceed to higher courts[286] and the issue of deference by courts will continue to be topical in Kenya.

4.4 Decisions with Judicial Deference to Bodies and Other Arms of Government

4.4.1 Courts consider deference to be reciprocal and would defer to other branches in the same way that they should defer to them as required by the Constitution. This was observed by the High Court *in Trusted Society of Human Rights Alliance v Attorney General & 2 Others*[287] where the issue of jurisdiction to review an appointment to a Constitutional office

[283] BBI Steering Committee *Building Bridges to a United Kenya – From a Nation of Blood Ties to a Nation of Ideals.* | (Report October 2020) Kenya Law <http://kenyalaw.org/kenyalawblog/building-bridges-initiative-kenya/> accessed 29 May 2021.
[284] Constitution of Kenya Amendment Bill, 2020.Pdf' <http://parliament.go.ke/sites/default/files/2020-.pdf> accessed 21 June 2021.
[285] Edris Omondi, 'High Court Judges Ignored Key Issues in Ruling on BBI' *The Standard* (May 16th 2021) <www.standardmedia.co.ke/opinion/article/2001413030/> accessed 29 May 2021.
[286] ibid.
[287] High Court Petition 229 of 2012 [2012] eKLR

arose. The court held that deference by courts in such a matter was generally acceptable but they nonetheless retained jurisdiction to set an appointment aside for unconstitutionality.[288] The court noted that in their interpretive role of law courts defer to the other branches as required by the Constitution but have the last word which in this case was that the appointment should be set aside for a flawed appointment process. No deference was shown by the High Court. On appeal in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others*[289] the Court of Appeal set aside the High Court's decision holding that courts could not constitute themselves into a vetting body and carry out a 'merit review' of the decision of the appointing body.[290] That finding was supportive of judicial deference to decisions of the other competent arms of Government and provided a standard for a harmonisation of approach to judicial deference for courts in Kenya

4.4.2 Another instance of judicial deference to decisions of other competent bodies in the executive was in the decision of *Evans Nyambega Akuma V Attorney General & 3 Others*[291] where the issue was whether the court could remove the holder of a chairmanship of a Constitutional office from the position. The court dismissed the petition and said that the procedure for removal from office was what was relevant to the matter and it had not been followed. The Court refused to delve into the issue to the exclusion of bodies established to deal with such removal saying that the Chairman of the Constitutional Commission had taken office and removal for alleged lack of integrity was through the procedures contained in the Leadership and Integrity Act[292] and not by direct petition to court. There was deference by the court therefore to procedures established for removal from office of Constitutional office bearers.

[288] ibid para 79.

[289] Civil Appeal 290 of 2012 (CA)[2013] eKLR

[290] ibid Paragraph 87 (4).

[291] High Court Petition 513 of 2012 - Kenya Law [2013] eKLR

[292] Section 42, No. 19 of 2012, Laws of Kenya.

4.4.3 Deference to powers granted by statute to a constitutional commission for resolving the election dispute fairly and with finality was demonstrated by the High Court which gave effect to section 80 (4) of the Elections Act 2011 by automatic declaration by the Court of the apparent winner on a recount as the validly elected leader in *John Oroo Oyioka & Another V Independent Electoral and Boundaries Commission & 2 Others.*[293] John Oroo Oyioka who had the highest number of votes after the recount ordered by the court and had not committed an election offence was the validly elected as the Member of the National Assembly for Bonchari Constituency Seat. A Certificate was accordingly issued as required by law.[294]

4.4.4 In *Diana Kethi Kilonzo & Anor v IEBC & Others*[295] the issue before the court was whether exclusion of Ms Kilonzo as a candidate for the Makueni Senate seat by- election by the Independent Electoral & Boundaries Commission – Dispute Resolution Committee for failure to be a registered voter was valid or a violation of the candidate's constitutional rights. The court dismissed the petition and upheld the leeway enjoyed by bodies empowered by law to make decisions so long as they acted constitutionally. Such bodies and authorities would benefit the public more when courts avoided encroaching on areas of responsibility specifically reserved for them.[296] Courts would at all times be conscious of their constitutional mandate and therefore defer to administrative agencies by not intruding into their vetting mandates.

4.4.5 A situation when courts would defer to the expertise of proper professional bodies such as the Council of legal education with a mandate to train and qualify lawyers with the qualities of knowledge and skill to apply such knowledge arose in *Ronald Omondi Oimbo vs Council of Legal Education.*[297] In this case the petitioner challenged the decision by the

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[293] High Court Kisii Election Petition 2 & 4 of 2013 [2013] eKLR.
[294] Section 86 Elections Act No. 23 of 2011 (n 15).

[295] High Court Petition 359 of 2013[2013] eKLR.
[296] ibid paragraph 73.

[297] High Court Petition 347 of 2017[2017] eKLR.

Council of Legal Education to register him for examinations and the issue was whether the decision was illegal and whether therefore the court could intervene and grant the reliefs sought.

The court ruled that the regulations relied on for the decision by the Council for Legal Education setting the criteria for eligibility to sit for examinations were not unconstitutional and dismissed the petition.[298] The court observed that purely academic decisions are beyond the court's reach and the court should be slow to interfere with academic bodies on academic issues.

4.4.6 In *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others*[299] the Supreme Court set aside a Court of Appeal finding that decisions of the Commission of Administrative Justice had the force of law. The Court of Appeal had allowed an appeal from a decision of the High Court that dismissed a judicial review application by Engineer Judah Abekah seeking enforcement of recommendations by CAJ for redress of his complaint of unfair dismissal from employment by Kenya Vision 2030 Board.

The Supreme Court held that CAJ could only make recommendations and the body receiving such recommendations was at liberty to implement them or decline to do so. CAJ's recommendations could only be binding if specifically provided for by law which was not the case. The dispute was an employer-employee one and CAJ should have recommended reference to the E&LRC for remedies and the role of that specialised court should not have been usurped by the Court of Appeal as it did and award damages.[300] The decision by the Supreme Court was an example of deference to other bodies with the constitutional or statutory mandate to resolve disputes and in this case those bodies were the CAJ and E&LRC. Also, the

[298] Regulation 9(5) of Council of Legal Education Chapter 16A-(Kenya School of Law Regulations), 2009 (Repealed)<http://kenyalaw.org/kl/fileadmin/pdfdownloads > accessed 8 June 2021.

[299] Supreme Court Petition 42 of 2019 [2021] eKLR.

[300] Ibid

decision clarified the limits of the powers the CAJ had and the recommended approach for resolution of disputes within its adjudicative mandate. It set out the nature and extent of deference courts should grant to other arms of Government.

4.4.7 In *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others*[301] which was an Appeal against the order by the E&LRC awarding teachers high salary increments the court held that respect was essential among actors from different branches of Government to prevent usurpation of each other's functions. The assumption of labour dispute settlement procedures by the E&LRC was found to have been outside that court's jurisdiction[302] and in addition the court was faulted for failing to acknowledge that the advice of the constitutional body mandated to address public service salaries and remuneration was binding.[303] The court showed the need for judicial deference to Constitutional and statutory bodies whose decisions are based on their specialized roles they were created for.

4.4.8 The court made an important observation in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*[304] regarding judicial deference that courts would defer to the matrix of dispute resolution mechanists stated in Article 159 of the Constitution**.** The matrix justified another observation that the court proceeded to make that Kenya's was not 'an imperial judiciary dealing with every type of problem when other better suited mechanisms exist'[305]

The petition was dismissed and the court ordered that there should be public participation and use of the Matrix for dispute resolution in Article 159 of the Constitution to address the complaints of lack of transparency and proper assessment prior to distribution of coal mining

[301] Civil Appeal 196, 195 & 203 of 2015[2015] eKLR
[302] Section 61, Labour Relations Act No. 14 of 2007; As a general principle, a judge of the Employment and Labour Relations court has no jurisdiction to conduct conciliation under section 15 of the Employment and Labour Relations Court Act, No 20 of 2011 as read with Article 159(2) (c) of the Constitution
[303] Salaries and Remuneration Commission Act No. 10 of 2011
[304] Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated) - Kenya Law' (HC) Machakos [2015] eKLR
[305] ibid Paragraph 84.

blocks as well as failure to follow Public procurement procedures. The local community should be consulted and involved and an Impact Assessment carried out in the coal exploration and exploitation activities of Mui Basin in Kitui County. Deference to other dispute resolution mechanisms mandated in clear language by the Constitution was a requirement that courts should uphold.

4.4.9 Exhaustion of available remedies was provided as another mechanism of promoting judicial deference in *R v IP of police & Anor, Ex parte Edmund Polit & Anor*.[306] The case was brought to seek orders for investigation into the disappearance of two South Sudanese citizens while under UNHCR protection in Nairobi.

The Court dismissed the application for the orders sought since the applicants did not exhaust the avenues for the redress sought that available in the Fair Administrative Action Act[307] and statute establishing the Police Service Oversight Authority.[308] The Court was in support of the bar against review of administrative decisions in the absence of exhaustion of internal mechanisms of appeal and other remedies.[309] The court also made it clear that a restrictive interpretation would be given to legislation that sought to exclude the jurisdiction of courts.[310]

4.4.10 Recent case law where courts deferred to other arms of Government include *SGS Kenya Limited v Energy Regulatory Commission & 2 others*[311] in the Supreme Court. This was an appeal against a decision of the Court of Appeal to uphold termination of a tender award by the PPARB. The Supreme Court dismissed the petition and held that the High Court should not have carried out a merit review of the decision by the PPARB. Decision makers had flexibility in deciding the subject matter before them and accordingly courts should defer to

[306] Judicial Review Application 193 of 2017 [2019] eKLR
[307] No. 4 of 2015 (n 11).
[308] Independent Policing Oversight Authority Act No. 35 of 2011
[309] Section 9(2) Fair Administrative Action Act No. 4 of 2015' (n 11).
[310] Ibid (n 279) Paragraph 57
[311] Supreme Court Petition 2 of 2019[2020] eKLR

their expert determinations and opinions.[312] The court also deferred to the Constitutional and statutory mandate given to the executive arm to form government in the case of *Stanley Livondo v Attorney General.*[313] Korir J declined to determine whether a person who had served as Deputy President or Cabinet Secretary is barred from contesting for the post of President having served for a term of ten years. The issue did not raise a question of law for determination and only merited resolution by application of established principles of constitutional interpretation. The court deferred to the executive branch and thereby acted in support of separation of powers.

4.4.11 An examination of pre-Constitution of Kenya 2010 decisions for purposes of tracing the historical approach to deference by courts identified a ruling by Nyamu J. in *Republic V The Council of Legal Education Ex-Parte James Njuguna & 14 Others.*[314] The case involved a challenge by Law School students of the decision to deny them re-sits of examinations which were regulated by the Council.[315] The students had exhausted the four examination sittings permitted by the regulations. The court set out appropriate situations for judicial deference to more appropriate adjudicative bodies of other arms of Government for resolution of disputes. Such situations included where clear rules for resolving the dispute were absent, where it was impractical for a court to ensure enforcement of its decisions and also where the issues before court were highly technical or policy questions that were unsuitable for involvement of the court.[316] The application was dismissed and the court held that it is the courts that should determine whether they have jurisdiction and show restraint where necessary.

[312] Ibid

[313] High Court Petition 14 of 2020[2020] eKLR

[314] Misc Civ Case 137 of 2004 [2007] eKLR

[315] Regulation 9, LN 169/2009 CouncilofLegalEducationCap16A.Pdf (n 294).

[316] Ibid (n 285).

4.4 Conclusion

Courts in Kenya have acknowledged that judicial deference and judicial restraint are important to the ability of other arms of government to discharge their Constitutional and statutory mandates effectively and without interference. Judicial deference has been addressed by courts and it is the dissenting decisions of some of the Supreme Court judges that have argued strongly in support of judicial restraint and urged that deference be shown to decisions of other arms of government. Justification for judicial deference includes the duty to respect the doctrine of exhaustion of available remedies, use of alternative dispute resolution mechanisms in the matrix in the Constitution[317] and respect for separation of powers. Courts are anxious to police compliance with Constitutional prescriptions in governance by the legislature and the executive and indeed, the Constitution specifically allows deference in respect of the constitutionalised right to fair administrative action and made it justiciable.[318] A strict interpretation of the duty of courts to show deference to decisions of administrative authorities should not necessitate scrutiny of every decision of administrative agencies and bodies. Such an approach could stifle the growth of such bodies and even lead to judicial tyranny.

The Courts have adopted different approaches to judicial deference doctrine as follows -

a. Declining to accept jurisdiction where the decision in some matters are reserved for determination by other arms of government. This approach is similar to the political question doctrine where courts decline jurisdiction where the matter brought to them for adjudication is purely political or the Constitution clearly reserves the question to another branch of government;[319]

[317] Article 159 of the Constitution of Kenya, Laws of Kenya.
[318] ibid Article 47
[319] Cole (n 64).

b. Paying respect to the competence of another agency or authority. This is curial deference.[320] Usually this type includes both doctrinal and epistemic deference where weight is given to the decision as well as authority to make that decision.[321]

c. Declining to show judicial deference to decisions or actions of other arms on the basis of the expanded Constitutional authority granted to the courts to subject decisions of administrative authorities to constitutional scrutiny in the culture of justification introduced under the Constitution of Kenya 2010.

The approaches are fragmented and there is no evidence of agreed tests for review or indeed explain judicial deference fully.

[320] Daly (n 2).
[321] ibid.

5.0 CHAPTER FIVE: JURISPRUDENCE ON JUDICIAL DEFERENCE IN OTHER JURISDICTIONS

5.1 Judicial Deference in other jurisdictions

This Chapter discusses doctrinal approaches to judicial deference in other jurisdictions which include South Africa, USA, Canada and the UK.

5.1.1 South Africa

Several decisions from South Africa show an active interest by courts in policy and even political issues that affect society which tend to suggest a reluctance to defer to decisions of other branches of government. Courts and in particular the South African Constitutional Court review administrative action routinely for constitutional compliance.

In The State v Makwanyane and Another[322] the Constitutional Court decided to take the initiative and resolve the question whether capital punishment was constitutional. In its finding the court held that the death penalty for murder was cruel and inhuman and failed to be consistent with the constitutional right to life. Due to the inability to correct the punishment if passed by mistake it lacked the capacity to support all the rights that are associated with the right to life.[323] The court declared capital punishment to be unconstitutional, forbade any execution of prisoners on death row and ordered that sentences of death were to be substituted by lawful punishments.

The decision meant that rights could not be taken away through limitations and everyone has the right to life. The determination by the court that Capital punishment was unconstitutional influenced a major shift in public policy for South Africa and indeed regionally. Instead of deferring to the legislature which had the primary constitutional mandate for amendment of the law to remove the death sentence, the court acted with boldness and risked being branded as

[322] (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665.
[323] ibid.

activist. This was an example of the benefits accruing to society when courts decline to defer to other arms or Government and make rulings with far reaching consequences of benefit to society such as South Africa that is undergoing transformation.

The circumstances where courts may substitute their own decisions for those of the original maker were addressed in *Premier of Mpumalanga v Exec Cttee of State Aided Schools Eastern Transvaal*[324] The court observed that except where a decision was unconstitutional, discretion conferred by law on a legislator within the executive branch would not be interfered with by courts. In that case a decision made to withdraw bursaries for needy students in state aided schools with effect from July 1995 was challenged for administrative unfairness because the Respondents and its members did not receive reasonable notice of termination nor were they heard in the matter.

The court found that nothing could be gained by requiring a reversal of what was a political and not judicial decision by the original maker as the bursary withdrawal deadline had passed. This decision of the court was an example of deference to the arms of Government that were responsible for making political decisions. The court nonetheless repeated that unconstitutional decisions were invalid.

In Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others[325] the court evaluated whether it had the authority to review and overturn the President of South Africa's decision to sign an Act of Parliament into law.[326] The court held that though the constitutionally judicial review could control public power the proper use of discretion by the executive branch of Government could not be interfered with particularly in the absence of a law for a specific activity. Such a law would provide appropriate guidance. Courts would defer to the executive branch of

[324] (CCT10/98) [1998] ZACC 20; 1999 (2) SA 91
[325] (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674
[326] ibid Proclamation R49 of 1999 bringing into operation the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998.

Government subject to the condition that the actions of the executive did not violate constitutional requirements. The President's Proclamation was found to be invalid.

The court's views on deference were also presented in the recent case of *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs.*[327] The court demonstrated that deference to other arms of Government in South Africa is not granted readily when it struck down regulations made under the National Disaster Management Act[328] for control of the spread of Covid-19 as unconstitutional and invalid. The regulations were found to be not rationally connected to the objective of slowing Covid-19 and had encroached on constitutional rights. The court's decision had serious implications on national health and policy and Government was given 14 days to review and republish the regulations. The court stated that in upholding separation of powers, it would remain alert to the principles and call for remedial action by Government. Courts would not defer to decisions of the executive branch which was constitutionally responsible for managing national disasters as long as violations of the Constitution were identified by the courts.

5.1.2 India

Judicial deference in Indian court decisions shows interest in limiting involvement in the constitutional mandates of other branches of Government unless there are clear violations of the Constitution**.** *In Maharashtra State Board of Secondary and Higher Secondary Education vs Paritosh Bhupesh Kumar Sheth Etc*[329] the issue was whether regulations made by education authorities denying candidates the right to inspect examination answer books were ultra vires, unreasonable and void.

The court upheld Appeals against the judgement of the High Court and observed that Courts should not usurp the responsibilities of bodies entrusted with the responsibility of rulemaking

[327] High Court of South Africa (Gauteng Division, Pretoria)(21542/2020) [2020] ZAGPPHC 184 <http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html> accessed 31 May 2021.
[328] No 57 of 2002 <https://www.gov.za/documents/disaster-management-act> accessed 22 June 2021.
[329] 1984 AIR 1543, 1985 SCR (1) 29 <https://indiankanoon.org/doc/174675/> accessed 27 February 2020.

as long as they act within their statutory authority. Courts should avoid substituting their views with those of professionals with technical expertise in the working of educational institutions and departments controlling them.[330]

Courts should exercise the self-imposed discipline of judicial restraint when checking decisions and exercise of power by the other branches of Government. This was said in *Asif Hameed & Others v. State of Jammu & Kashmir & Others.*[331] Courts should examine the actions of the other branches for constitutionality but do so within self-imposed limits. Courts should not 'sermonize' on matters that are constitutionally within the mandates of those authorities.

The self-imposed restraint that was mentioned in this case provides appropriate guidance to courts which helps to prevent encroachment on functions that constitutionally fall under the control of other arms of Government. Restraint by courts is demonstrated through judicial deference which can control activism that may lead to court orders that the executive or legislature does not obey. Courts can follow agreed standards of deference that can guard against such eventualities which are harmful to the rule of law.

5.1.3 United States of America

In *Marbury v Madison,* the Supreme Court, led by Chief Justice Marshall, was accused of breaking the separation of powers by interfering with the discretion of another branch of government.[332] The court faced the question whether it would order the Executive to comply with its ministerial duties of issuing the commission appointing William Marbury as a Justice of the Peace in the District of Columbia against its wishes. The court found a way around the problem by finding the law under which the claim was brought to be unconstitutional and Mandamus which was the only way to get the order could not be issued by the Supreme Court.

[330] ibid.
[331] 1989 AIR 1899, 1989 SCR (3) 19 <https://indiankanoon.org/doc/1225520/> accessed 1 June 2021.
[332] 5 US 137 (1803)

The importance of the case to judicial deference is that judicial review was established as a mechanism for checking other arms of government particularly Congress from exceeding their authority. This placed the judicial arm as an equal branch of Government. Judicial deference to the other branches should be informed only by the duty to maintain the required balance in the system of checks and balances. It would help if courts as part of an equal arm of Government agreed on standards that would govern deference to decisions and actions of other arms.

In some other decisions courts would not show deference to other arms of Government in the face of societal challenges that required the court's influence in bringing change through policy and laws. The cases follow a path starting with *Plessy v Ferguson*[333] where the court upheld the constitutionality of racial segregation law which was known as the "separate but equal" doctrine. It was held in *Skidmore v Swift & Co*[334] that courts would defer to opinions and decisions made by an administrator on the basis of the weight given to the thoroughness and persuasiveness of such opinions. The interpretation in question related to whether the time spent by firemen in the fire hall constituted work in order to compute their wages. Deference to the interpretation by a body of a law it administers was appropriate and courts may defer to decisions of those bodies with legal mandates unless the decisions were in violation of the law. Such a rule would help courts build up standards for future guidance on deference to other arms of Government.

In *Korematsu v United States*[335] the Supreme Court held in 1944 that the conviction of Fred Korematsu, a Japanese-American who refused to obey the evacuation order (Executive Order 9066 signed by President Franklin D. Roosevelt on February 19, 1942) confining Japanese People in detention camps was lawful and it was not necessary to address the constitutional

[333] 163 U.S. 537 (1896) <https://www.law.cornell.edu/supremecourt/text/163/537> accessed 1 June 2021.
[334] 323 U.S. 134 (1944) Para 9
[335] 323 U.S. 214 (1944)

racial discrimination issues in this case. The military's evacuation order was justified by a martial necessity deriving from the threat of espionage and sabotage, and the limits were not unlawful. Wartime acts were more important than Korematsu's individual rights.

The exclusion order, according to Justice Robert Jackson's dissenting judgment, represented the legalization of racism, which was a violation of the Fourteenth Amendment's Equal Protection Clause. Korematsu and the other internees were not stripped of their constitutionally guaranteed civil rights because of the nation's wartime security concerns. This dissent was a proper example of denial of deference where the issues involved related to protection of fundamental human rights. Courts in Kenya could follow this example in determining whether to defer to other arms of Government in times of crisis such as the outbreak of war or other disaster. The choice they make may contribute to agreement on rules that may guide courts on deference.

The Supreme Court in *Brown v Board of Education of Topeka*[336] ruled that the "separate but equal" policy violated the Constitution and that led to dismantling of legal justification for racial segregation in USA. Chief Justice Warren brought different thinking to the court and relied for his opinion on social science studies since there was little or no case law to rely on in the court's jurisprudence. He also used simple language in the decision for non-lawyers.[337] The decision of the court was unanimous and influenced the approach adopted by the other arms to end racial segregation in USA.

Challenges of racism and discrimination based on it nonetheless continue to afflict society in USA as seen in widespread public protests in mid-2020 against police shootings of African Americans.[338] The decision however remains an outstanding example of the benefits of judicial

[336] 347 U.S. 483 (1954) .

[337] Brian P. Smentkowski, 'Earl Warren | Chief Justice of United States' *Encyclopedia Britannica* (15 Mar. 2021) <https://www.britannica.com/biography/Earl-Warren> accessed 8 June 2021.

[338] Office of Inspector General City of Chicago, 'Report on Chicago's Response to George Floyd Protests and Unrest' *The New York Times* (20 March 2021) <https://www.nytimes.com/interactive/2021/03/20/us/chicago-pd.html> accessed 8 June 2021.

activism which influenced public policy for society's benefit. Courts in Kenya may look to this example as they determine issues of public policy and choose whether to cross into policy-making for society's benefit. Such a choice would be called for on a case by case basis and therefore, the problem of lack of uniformity of approach by courts to deference would remain unresolved.

In *Chevron USA Inc v Natural Resources Defence Council Inc*[339] the US Supreme Court suggested steps to be taken for courts in deferring to interpretations of legislation by agencies. The steps include first that courts should defer when there is no ambiguity in the law, second allowing a court to decide whether the interpretation by the agency is permissible if the law is ambiguous; third a court should defer to the interpretation if the law is explicit and the agency's construction of the law is reasonable but the regulations violate the law. If however, the law is unclear and the agency's interpretation reasonable, the court should defer to that agency's interpretation.

Accordingly, where an agency is given power to make regulations they should not be arbitrary or contrary to the law. Courts defer to agency decisions in interpreting their regulations on the basis of standards of reasonableness determined through jurisprudence developed over time.

5.1.4 Canada

In *Dunsmuir v New Brunswick*[340] the court observed that courts tend to defer to administrative decisions on questions of fact. In this case involving dismissal of an employee of the department of Justice in Brunswick for poor performance the court rejected the reinstatement decision of the official adjudicator for unreasonableness. The adjudicator had made errors by overlooking and misinterpreting rules.

[339] 467 US 837 (1984)
[340] [2008] 1 S.C.R. 190, 2008 SCC 9, SCC Cases (Lexum)' (n 66)

The court said that in reviewing the administrative decision, even if deference was owed to the adjudicator the misinterpretations of the law were unlawful and did not meet the correctness and reasonableness standard. Deference did not mean that courts were subservient to the determinations of the decision-maker and maintain that they retain the right to be the final arbiters in interpretation of the law.[341]

5.1.5 United Kingdom

The court in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[342] said that it could decline deference to decisions of interfere with a public body exercising statutory powers if the decision was "so absurd that no sensible person could ever dream that it lay within the powers of the authority". This has become known as Wednesbury Unreasonableness.[343] Lord Greene MR made it clear in that case that courts did not override decisions of local authorities as appellate authorities but only to check whether they may have exceeded their powers and contravened the law.

Courts would defer except where decision-makers fail to consider issues they should consider, take into account irrelevant matters or make unreasonable decisions. The cautious approach to judicial deference adopted by courts in the United Kingdom is the result of the high regard with which the judiciary is held as well as the history of the struggle for independence of the Judiciary. Courts are therefore more inclined to set out rules for deference on a case by case basis than seek a harmonised standard approach.

5.2 Conclusion

The right of courts to have the final say in Constitutional interpretation is accepted in the select jurisdictions where examples of judicial deference were drawn from in this chapter's discussion. In exercising this right, courts acknowledge that they cannot deal with every type

[341] Ibid
[342] [1948] 1 K.B. 223 (10 November 1947)
[343] Wednesbury Unreasonableness (*Practical Law*) <http://uk.practicallaw.thomsonreuters.com/ > accessed 22 June 2021.

of problem when there are better suited mechanisms. The need remains for judicial deference to decisions of administrative authorities and other bodies exercising powers granted by law provided they do not fall outside the bounds of reasonableness to avoid acting ultra vires.

There is a risk that courts may usurp the functions of other constitutional actors. However, where they can influence policy and changes in the law for the good of society, they may be justified in utilizing their right to have the last word in constitutional interpretation whose purpose is to contribute to societal progress and full enjoyment of rights by citizens. The risk that courts may then run is to encroach into policy as well as political issues and engage in judicial activism. If the public views such a change negatively, then it would become difficult to return to their trusted and impartial status.[344] Nonetheless, as the examples from the United States discussed in this chapter amply demonstrate there is good that can ultimately come of it. In the next chapter a summary of the research findings will be presented and an answer to the third research question provided by recommending an approach to judicial deference in Kenya.

[344] Stephen Burbank, 'Judicial Independence, Judicial Accountability and Interbranch Relations' [2007] Faculty Scholarship at Penn Law,98 <https://scholarship.law.upenn.edu/faculty_scholarship/98>accessed 8 June 2021

6.0 CHAPTER SIX: FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This Chapter summarises the findings of the research work, re-examine the hypothesis, make recommendations for an approach to judicial deference and make proposals for future study.

This study made three main arguments. The first argument was that historically courts in Kenya did not hold executive or legislative powers in check and exercised restraint. However, there was a change when an expanded mandate was given to the courts by the Constitution. Courts were granted power to subject government actions to Constitutional scrutiny and determine policy questions through review of administrative action. This resulted in a fragmented approach to judicial deference as courts struggled to set a harmonized approach which has remained elusive. The second argument was that when courts reviewed decisions of administrative authorities for unlawfulness, unreasonableness or procedural unfairness regardless of the deference sought to be shown they are perceived to have won judicial independence and accountability and are able to avoid the appearance of policy agents. The third argument was that failure by courts to defer to decisions of administrative authorities out of respect for the latter's authority and competence to make decisions undermines public confidence in those authorities. The appearance of lack of capacity to resolve problems presented to them results in limiting the right of access to justice for the people of Kenya.

6.2 Summary of the study

The following is a summary of the study.

6.2.1 Historical and Contemporary Approaches to Judicial Deference

Chapter One traced the history of judicial deference both locally and internationally in order to understand the meaning of the doctrine of judicial deference. It introduced deference in its various terms including 'judicial deference, 'curial deference' and 'judicial restraint'. As the introductory chapter, it addressed the research design and methodology and explained the

theories of Constitutional Transformation by Karl Klare and Separation of Powers as expounded by John Locke and Baron de Montesquieu as the two main theories relied on in the research. The statement of the problem, justification of the research, objectives, research questions, literature review, Limitations and hypothesis were set out. It was noted that the widely available literature was drawn mainly from international jurisdictions where deference has been well established since not much had been written on judicial deference in Kenya.

6.2.2 Judicial Deference Doctrines Historical Approaches

Chapter Two located the historical origins of judicial deference from the growth of Judicial self-restraint as a doctrine of deference with the founding of judicial review in the 1780s in USA to the present standards set by the Supreme Court in Chevron.[345] It then examined the growth of approaches to judicial deference in select countries including Canada where very few cases appeared to have been subjected to judicial deference and the United Kingdom where traditionally, prerogative powers not derived from legislation or the constitution were exercised by the Executive to discharge some functions. Courts deferred to the other arms of Government until maladministration by an expanded bureaucracy made judicial scrutiny necessary. South Africa was selected as a comparison in the study due to the similarity of it Constitutional change as society there moved from Apartheid to new rights based democracy to Kenya where there was a change from autocratic rule to a rights based dispensation in 2010. The historical background of judicial restraint during colonialism and after independence was instrumental in keeping the judiciary aloof and deferential to the other arms of government. After promulgation of the constitution in 2010, courts adopted approaches to judicial deference that were fragmented as courts tried to implement the aspirational goals of the constitution through subjecting administrative decisions and actions to constitutional discipline. Courts have faced questions over usurpation of powers of other arms when they attempted to play the role of

[345] Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) (n 136).

policy agents by involving themselves in policy making instead of judicial decision-making and also declined to defer to the other arms of Government.

6.2.3 Judicial deference doctrines embodied in legislative and institutional frameworks

Chapter Three addressed the second research question which relates to the influence that legislative and institutional frameworks have on judicial deference. The purpose was to identify a basis for deference by courts whose independence and professional accountability were well articulated in legislations as well as institutions locally and internationally. Divergence in application of judicial deference is influenced by the priority assigned to the duty of the Judiciary to protect the dignity of those societies emerging from denial of dignity and rights for citizens and where governance does not comply with the rule of law. The legislative and institutional frameworks at international, regional and national levels which offers guarantees of judicial independence obligates the judiciary to show judicial deference in circumstances where decisions by the other branches of government responsible for policy and societal economic wellbeing merit such deference.

6.2.4 Judicial Deference Doctrines Case Analysis

In the Chapter the research study demonstrated that judicial deference doctrines in Kenya were guided more by focus on separation of powers and less so by judicial courtesy to decisions of administrative authorities and other bodies exercising powers granted by the Constitution. The analysis showed the following -

6.2.4.1 Local jurisprudence

In *The Matter of the Principle of Gender Representation in The National Assembly and the Senate*, the Supreme Court stated that it offered its advisory opinion to clarify legal uncertainties and both serve the public interest and promote the rule of law.[346] Accordingly, judicial deference would not be applicable. In the second advisory opinion, however, though

[346] Advisory Opinions Application No 2 of 2012

the court proceeded to offer the opinion, dissenting views of Njoki SCJ cautioned against involving the court in political questions which were constitutionally the preserve of the other arms of government.[347] The dissent marked the absence of consensus on establishment of thresholds for judicial deference. Further dissenting opinions followed in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* which urged judicial deference to other branches of government in political and policy issues.[348]

The Court of Appeal and High Court declined to show judicial deference to administrative decisions on various grounds. Such grounds included where authorities violated rules of natural justice for a prisoner's right to remission of sentence,[349] the right to fair hearing for university students,[350] a decision by the Cabinet Secretary to disband the Child Welfare Committee without a hearing[351] or when decisions were found to be irrational and an abuse of power.[352] Courts have also said that deference was allowable if approved through Article 47 which had made judicial review a Constitutional right.[353] Other examples where courts declined to defer to decisions of administrative authorities included an order of the Council for Legal Education to Moi University to close its law school for lack of jurisdiction[354] and failure by authorities to comply with the Constitutional right of public participation.[355]

Review of Kenyan decisions where courts deferred to decisions of other arms of Government demonstrated that courts expected reciprocal deference to them by other branches or where power was vested by the Constitution or statute to other competent and specialized bodies

[347] Advisory Opinion Reference 2 of 2013 - Kenya Law' (n 2).
[348] Presidential Petition 1 of 2017 (n 249).
[349] David Oloo Onyango v Attorney-General Civil Appeal 152 of 1986[1987] eKLR (n 254)
[350] Nyongesa & 4 others v Egerton University College Civil Appeal 90 of 1989 [1990] eKLR (n 255).
[351] Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya Civil Appeal 20 of 2015 [2017] eKLR (n 256)
[352] Republic v Capital Markets Authority Ex parte: James R.Murigu And Barth Ragalo Miscellaneous Application 607 of 2016[2018] eKLR (n 259).
[353] Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others Judicial Review 378 of 2017 [2017] eKLR (n 260).
[354] Moi University v Council of Legal Education & another Petition 425 of 2015 [2016] eKLR (n 257).
[355] Wilfred Manthi Musyoka v County Assembly of Machakos; Governor - County Government of Machakos & 2 others (Interested Parties) Constitutional Petition 16 of 2018 [2019] eKLR (n 261).

including academic authorities. Courts also deferred in order to uphold other Constitutionally mandated dispute resolution mechanisms granted by the Constitution as well as respect for the duty to exhaust remedies available in the Fair Administrative Action Act.[356]

6.2.4.2 Judicial Deference in Select Jurisdictions

i. South Africa

No deference was shown in declaring provisions of the Constitution and other legislation in force sanctioning capital punishment to be inconsistent with the Constitution and therefore invalid; no deference for decisions which are in conflict with the Constitution since they were invalid; no deference in matters involving control of public power through judicial review because such control by courts is and always has been a constitutional matter.

ii. India

The findings of the study revealed that courts defer to professionals with technical expertise and extensive experience in the operation of educational institutions and departments in charge of them, and that they do not substitute their views on what is wise, prudent, and proper in academic matters for those made by professionals with technical expertise and extensive experience in the operation of educational institutions and departments in charge. Furthermore, the study found that courts' deference was not used to direct or advise the executive in policy matters, or to preach on matters that are within the sphere of the legislature or executive under the Constitution, as long as these authorities do not go beyond their constitutional limits or statutory powers.[357]

iii. United States of America

[356] Section 9(2), No. 4 of 2015 (n 11).
[357] Maharashtra State Board of ... vs Paritosh Bhupesh Kumar Sheth Etc on 17 July, 1984' (n 64).

The research study demonstrated that in USA there were decisions whose importance was in establishing the judiciary as a co-equal branch of government on par with the executive and legislative branches. There were landmark decisions where courts would not show deference to other arms of Government in the face of societal challenges including racial prejudice that required the court's influence in bringing change through policy and laws. Others included *Chevron USA Inc v Natural Resources Defence Council Inc*[358] which established useful steps in determining whether to show deference to an agency's interpretation of a statute.

iv. Canada

The research study demonstrated that the courts have held that Deference did not mean that courts were subservient to the determinations of the decision-maker.[359]

v. United Kingdom

The decision in Associated Provincial Picture Houses Ltd v Wednesbury Corporation contributed significantly to judicial deference by holding that courts would show deference unless the decision maker had not considered matters that were lawfully required to be considered, had considered matters that were not relevant, or had made a decision that was so unreasonable that no reasonable person could have made it.[360]

vi. Other Jurisdictions

In China, Hong Kong, Israel, Singapore Judicial deference was determined by the peculiarities of the issue involved such as immigration and anti-terrorism in Israel, national security, foreign affairs, peace and good order in Singapore and the relationship between courts and other arms of government such as China where courts maintain a deferential stance towards the administration.[361] In Hong Kong Courts do not defer to other arms when human rights issues

[358] 467 U.S. 837 (1984) (n 136).
[359] Dunsmuir v. New Brunswick (n 66).
[360] [1948] 1 K.B. 223 (n 67).
[361] Zhu (n 84).

are involved.[362] Deference is therefore an evolving concept that is in those jurisdictions which were discussed but for which there is no uniform approach adopted by courts.

6.3 Conclusion

Some important conclusions can be drawn from chapters One, Two, Three, Four and Five. The first one is that when courts fail to show deference to decisions of other bodies, the growth of capacity for those authorities to discharge their mandates of fair administrative action in accordance with the Constitution is obstructed. Their credibility among the general public that seeks access to justice[363] is thereby diminished.

The second conclusion is that respect for judicial independence by other arms of government which has been guaranteed constitutionally and in legislative as well as institutional frameworks deserves reciprocating deference by the judiciary to actions and decisions of the other arms in a responsible acceptance of the constitutional principle of separation of power. Great care is necessary to avoid discrediting legitimate constitutional functions of other arms of Government and judicial deference to other arms comes to the aid of courts in that regard.

The third conclusion is that there is no consistency in the approach adapted by courts to judicial deference. This is demonstrated in judicial decision making which displays rejection of the duty for judicial restraint out of deference to the right of other arms to make decisions in accordance with Constitutional powers granted to them. Courts guard their independence jealously but risk being accused of judicial tyranny through involvement in every case including those addressing complex administrative procedures beyond the court's expertise. Indeed, usurpation of functions of other constitutional actors inevitably leads courts across the line to judicial activism. Any lack of judicial courtesy to decisions of administrative authorities and other bodies exercising powers granted by the Constitution is bound to breed disrespect for

[362] ibid.

[363] Article 48 of the Constitution of Kenya.

the judiciary by other arms in Kenya and damage its central oversight role of governance. The harm would extend to successful maintenance of that essential balance for any democracy that upholds the principle of separation of powers.

The discussion of judicial deference practices in other countries shows that there is no uniformity of approach. Deference is determined by the peculiarities of the issue involved and subsisting relations between branches of government. For that reason, deference is an evolving concept that is in every jurisdiction although no agreed uniform rules are in use. In some jurisdictions the practice by courts is to maintain a deferential stance to the administration while in others, courts deny deference to other arms of Government when human rights issues are involved. There are several jurisdictions where judicial deference is granted to other arms of Government in issues involving national security, anti-terrorism, immigration, foreign affairs, peace and good order. In Kenya, Superior courts have chosen to subject the actions of other branches to constitutional scrutiny in keeping with the spirit of the transformative approach of the Constitution whose interpretation they are responsible for. As they do so they continue with the search for a uniform approach to judicial deference.

The lessons for Kenya are that judicial deference promotes separation of powers. Deference by courts should be guided by the need to prevent constitutional violations by the other arms without the need for engaging in Judicial activism which may harm Kenya's young democracy and the search for national unity and social-economic progress. A uniform approach to judicial deference should therefore be developed for guidance of the Superior courts where constitutional interpretation is frequently required.

The study employed a mixed methodological approach to illustrate fragmentation in the doctrine of judicial deference. It examined legislative and institutional frameworks and reviewed case law to demonstrate that the reconstructed judiciary is central to the transformation attributable to the Constitution of Kenya. Such transformation cannot, however,

be complete without clarity on the relevance of deference by courts when they are called upon to review acts, decisions or failures of public authorities and tribunals or acts and omissions of private bodies that affect the rights of individuals. Judicial deference requires courts to balance the right of judicial scrutiny with the power of other arms to exercise decision making as contained in their Constitutional and statutory mandates.

6.4 Recommendations

Recommendations have been made as a result of this study whose implementation may be divided into short term, long term and immediate. Much of the work of implementation necessarily belongs to the Judiciary in efforts to manage the balance necessary in addressing shifting approaches to judicial deference. Policy initiatives are also required to enhance capacity in administrative agencies and authorities for effective decision making as well as better appreciation of reciprocity in showing deference among arms of government. The recommendations have highlighted the duty to exercise caution in the exercise of constitutional and statutory powers vested in different branches of government. They also address the need to promote alternative dispute settlement mechanisms, greater reliance on administrative remedies and capacity-building for decision-makers in all branches of Government to whom courts may defer.

6.4.1 Judicial Caution and Restraint - Short Term Implementation

The recommendation for the need for exercise of caution fits in the category of immediate or short-term implementation. The organs of government observe the caution that they ought not to interfere with each other's functions and indeed each one exercises the power granted under the principle of separation of powers to check the others. Those powers do not permit any of them to usurp powers vested elsewhere.[364] In reviewing administrative actions in order to prevent the executive from becoming a law unto itself courts should give more emphasis to the

[364] Presidential Petition 1 of 2017 (n 249).

need for exhaustion of available internal remedies under the Fair Administrative Action Act.[365] The opportunities arising from this act of restraint and prudence by courts mean that administrative authorities will ensure careful adherence to procedures and mechanisms put in place for fair and prompt administrative action in matters falling within their constitutional or statutory mandates. The chance to strengthen administrative resolution of issues that have an impact on individual rights is vital to building capacity, expertise and credibility for the administrative authorities in the other arms of government as well as Constitutional Commissions.

6.4.2 Reliance on Alternative Methods of Dispute Resolution - Medium Term Implementation

Courts can show more deference to the bodies and mechanisms created by the Constitution and statutes to make administrative determinations in compliance with the law. Useful approaches in this regard include greater reliance on the matrix for dispute resolution set out in the Constitution.[366] Further use can be made of the guidance by the court in *R v Inspector General of Police & Another Ex parte Edmund Polit James & Another*[367] which quoted with approval *the Matter of Mui Coal Basin Local Community*[368] that the Constitution did not create an ' imperial judiciary' which could involve itself in every societal problem which could be addressed by better suited mechanisms for addressing the issues raised. This recommendation requires progressive development of structured alternative dispute resolution processes and procedures and may be implemented in the medium term.

[365] No. 4 of 2015 (n 11).
[366] Article 159(2)(c) which seeks promotion of reconciliation, mediation, arbitration and traditional dispute resolution
[367] Judicial Review Application 193 of 2017 (n 20).
[368] Constitutional Petition Nos 305 of 2012 (Consolidated) (n 277).

6.4.3 Promotion of Administrative Law Remedies - Long Term Implementation

While judicial activism has, nevertheless, the capacity to influence national policy changes as seen in such landmark cases as *Brown v Board of Education of Topeka* [369] that ended segregation in USA and became a cornerstone of the civil rights movement in North America and elsewhere in the world, the risk of possible loss of respect for the judiciary for crossing the line to judicial activism remains a significant concern. Such loss of respect may include levels of disregard for inconvenient court orders which has harmful long and short term consequences for rights enjoyment.

As a long-term measure for progressive implementation courts should continuously make efforts to abstain from dealing with disputes or cases over which other state organs, bodies or institutions have been granted the primary Constitutional or statutory mandate. Courts have the right to exercise such power when jurisdiction lies elsewhere. This type of deference was demonstrated in *Goldwater -Vs- Carter* when the court deferred to the decision of the United States executive to end the defence treaty with Taiwan without Congressional approval.[370] The court was of the view that matters of a political nature including the conduct of foreign affairs or defence were not justiciable and courts should defer to the decisions of the executive in those matters. Courts in Kenya should exercise similar prudence and give weight to decisions of other arms of government. That choice promotes administrative law remedies where the rights of individuals are balanced with the operational requirements of government authorities, agencies and bodies engaged in discharging constitutional and statutory duties without judicial interference. Such deference, additionally, strengthens the constitutional principle of separation of power which is applicable in Kenya.

[369] U.S. 483 (1954) (n 65)
[370] Goldwater v. Carter, 444 U.S. 996 (1979)

The judiciary should continue to be sensitized to the usefulness of showing judicial deference where the primary constitutional or statutory mandate is given to other authorities or organs of Government.

Successful implementation of the recommendations made by this study is dependent to a significant degree on training of public officials in all arms of Government to improve capacity in the discharge of their Constitutional and statutory duties. Appropriate budgetary allocations should therefore be made for training including strengthening of capacity for the management of administrative remedies, the requirements of fair administrative action as well effective understanding of harmonized approaches to judicial difference under the Constitution of Kenya 2010.

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