

**JUDICIALIZATION OF POLITICS UNDER THE
CONSTITUTION OF KENYA 2010**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS
(LLM), UNIVERSITY OF NAIROBI, KENYA**

BY

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G62/75290/2014

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DECLARATION

I, **BENARD MWERESA EBOSO** declare that this Thesis is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

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This Thesis has been submitted for examination with my approval as University Supervisor.

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Date:

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DEDICATION

**This Work is dedicated to my Parents, the Late Johnson Eboso Budohi and Mama
Priscillar Mideva Eboso for educating me.**

ACKNOWLEDGEMENT

I acknowledge and appreciate the invaluable guidance from my Supervisor, Mrs Pamela Ager. I also appreciate the incisive comments of Dr Duncan Ojwang and Dr Agnes Meroka which greatly enriched this Work. Equally, I acknowledge the illuminating insight of my Comparative Constitutional Law Lecturer, Prof. Ben Sihanya, my Jurisprudence and Legal Theory Lecturers, Prof. Winnie Kamau and Justice (Rtd) Nancy Baraza, and the Dean of the School of Law, University of Nairobi, Prof. Patricia Kameri - Mbote. I also appreciate the invaluable support of Pauline Njoroge who assisted me in gathering and sifting through many volumes of material during my research. Lastly, I appreciate my Wife, Children and my Colleagues at Eboso & Company Advocates, for their support and for accommodating my demanding schedule throughout the entire period of my study.

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LIST OF ABBREVIATIONS

1. COFEK - Consumer Federation of Kenya.
2. CORD - Coalition for Reform and Democracy.
3. IEBC - Independent Electoral and Boundaries Commission.
4. KNUT - Kenya National Union of Teachers.
5. KUPPET - Kenya Union of Post Primary Education Teachers.
6. MRC - Mombasa Republican Council.
7. NGO - Non-Governmental Organization.
8. TSC - Teachers Service Commission.

CHAPTER 1: AN INTRODUCTION TO JUDICIALIZATION OF POLITICS UNDER THE CONSTITUTION OF KENYA 2010

1.0 Introduction

In August 2010, through a national referendum, Kenyans enacted a new Constitution, the Constitution of Kenya 2010. A key feature of the Constitution of Kenya 2010 is its elaborate framework for modern governance principles and concepts such as constitutionalism, access to justice, rule of law, due process, democracy, popular participation, accountability, transparency, human rights, fundamental freedoms and separation of powers.¹ Besides its elaborate governance principles and concepts, the Constitution of Kenya 2010 redefines the scope of justiciability to encompass any dispute that “can be resolved by the application of law.”² In addition, the Constitution of Kenya 2010 vests in the judiciary unfettered powers to entertain any claim founded on real or threatened contravention of the Constitution.³

In addition to the above salient features, the Constitution of Kenya 2010 fundamentally redesigned and reconstructed Kenya’s Judiciary. The reconstruction was intended to renew Kenya’s judiciary, grant it institutional independence, make it accessible, and spur the development of sound jurisprudence.⁴ One resultant phenomenon of this constitutional framework and the reconstructed judiciary is the marked increase in litigation involving political, public policy, and moral disputes, collectively referred to as judicialized politics.

Against this background, this Work examines the constitutional underpinnings of judicialization of politics within the Constitution of Kenya 2010. Second, it seeks to establish the extent to which Kenya’s reconstructed judiciary has juridically implemented the judicialization framework of the Constitution of Kenya 2010. Third, the Work examines the dangers of judicialization of

¹ Constitution of Kenya 2010, Articles 48, 19-59, 10, 1 and 4.

² Article 50 of the Constitution.

³ Article 258 of the Constitution.

⁴ Judiciary Transformation Framework 2012-2016 Page 10.

politics to the principles of separation of powers and democracy in Kenya. Fourth, this Work examines the dangers of judicialization of politics to the institutional integrity of Kenya's Judiciary. Lastly, it makes recommendations on jurisprudential standards which Kenya's Judiciary could adopt to avert the dangers posed by the judicialization of politics

1.1 Background to the Research Problem

An understanding of the concept of judicialization of politics is central to meeting the objectives which this Work seeks to fulfil. Similarly, an understanding of the principle of separation of powers and the concept of judicial institutional integrity would be key to understanding the concept of judicialization of politics and its potential implications and dangers.

This Section of the Work examines the concept of judicialization of politics as generally understood; the principle of separation of powers; the concept of judicial integrity; the concept of moral question and the political question doctrine. Apart from a general discussion of judicialization of politics, this Section also looks at judicialization of politics in the Kenyan context. This is done by drawing a comparison between the level of judicialization of politics in the Pre-2010 Kenyan State and the level of judicialization of politics in the Post-2010 Kenyan State.

1.1.1 Concept of Judicialization of Politics

Judicialization of politics is a collective term referring to the deployment of courts and judicial processes to resolve core political, public policy and moral disputes.⁵ It entails the extension of the mandate of the judiciary beyond traditional judicial province, stretching into public policy formulation and shaping the political and moral landscape. It also entails a broadening of the scope of justiciability to the extent that matters which were hitherto non-justiciable, become

⁵ Ran Hirschl, 'The New Constitution and the Judicialization of Pure Politics Worldwide', Fordham Law Review, Volume 75/Issue 2 Article 14 at page 1.

justiciable. For instance, the Constitution of Kenya 2010 provides for socio-economic rights and their enforcement, rendering them justiciable.⁶ Secondly, the Constitution of Kenya 2010 has expressly rendered justiciable any denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.⁷ Consequently, the net effect of judicialization of politics is the transformation of the judiciary into a key player in politics, public policy formulation, legislation and moral disputes resolution.

The concept of judicialization of politics has developed in the last six decades as a result of the global drift towards constitutionalism and rights protection.⁸ The growth of judicialization of politics has largely been characterized by a major transfer of power from representative institutions such as legislatures to judiciaries.⁹ Ran Hirschl attributes this shift to liberal and egalitarian values that place emphasis on power- diffusion.¹⁰ He further suggests that it is proof of modern democracies' Post-World War II deep commitment to a type of democracy that goes beyond majoritarian rule.¹¹ He argues that it could also be a result of progressive social change or simply a reflection of political leaders' devotion to an elevated vision of human rights.¹²

In the United States of America, partly due to its rich constitutional history, judicialization of politics is a long established tradition. In many other jurisdictions, the judicialization of politics is a late twentieth and early twenty-first century phenomenon. The celebrated case of *Brown - Vs- Board of Education*¹³ best captures the concept of judicialization of politics. In this case, the American Supreme Court made a land-mark judgment declaring that the policy of race-based segregation of children into "separate but equal groups" in public schools violated the Equal

⁶ Article 43 of the Constitution of Kenya 2010.

⁷ *ibid.* at Article 23(1).

⁸ Ran Hirschl, 'The Political Origins of the New Constitutionalism' (2004)11 *Indiana Journal of Global Legal Studies*. At page 2

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ 347 U S 483 (1954).

Protection Clause of the Fourteenth Amendment of the American Constitution and was therefore unconstitutional. The political and policy effect of this judgement was the immediate outlaw of the policy of racial segregation and the introduction of a policy of non-discrimination in public schools in the United States of America.

In modern day United States of America, judicialization of politics is best illustrated by the Federal Supreme Court decision in *Bush -vs- Gore*.¹⁴ The case went to the Federal Supreme Court on a petition for a writ of certiorari brought by George Bush seeking review of the Florida Supreme Court's decision allowing a manual recount of some presidential ballots. George Bush had been certified the winner in Florida and Al Gore contested the proclamation under Florida law. The Federal Supreme Court overturned this decision and held that the decision violated the Fourteenth Amendment on Equal Protection because it granted more protection to some presidential ballots than to others. Although none of the litigating parties raised the question of justiciability or the political question doctrine, it is largely contended that the court should have allowed the electoral body to complete the democratic exercise of counting votes whether manually or electronically in order to determine who the choice of the voters was in respect of those particular ballots.

In South East Asia, the Constitutional Court of South Korea has embraced and entrenched judicialization of politics more than any other court in the region. Jonghyun Park contends that the Constitutional Court of Korea has faced harsh criticism because of its determination of highly political controversies.¹⁵ For instance, in March of 2004, the National Assembly of Korea, controlled by the opposition party, impeached President Roh Moo-Hyun for allegedly violating the Public Official Election Act of Korea.¹⁶ The President was therefore temporarily suspended

¹⁴ 121 Supreme Court 525(2000).

¹⁵ Jonghyun Park, 'The Judicialization of Politics in Korea' (2008) 10 Asian-Pacific Law & Policy Journal at Page 64

¹⁶ibid.

from office. The Constitutional Court of Korea decided that the impeachment motion by the National Assembly of Korea was unconstitutional and Roh was reinstated to his office.¹⁷ This superintendence over a purely political exercise significantly asserted the supremacy of the Constitutional Court.¹⁸

In the African continent, Egypt's nascent democracy that was born of the Arab Spring of 2011 has witnessed litigation illustrative of judicialization of politics. In June 2012, the High Court of Egypt dissolved the House of Parliament because a third of the seats in the Lower House of Parliament had been constituted in contravention of the Country's Constitution. Egypt's Supreme Constitutional Court upheld this decision. The political impact of this decision was heavy on the people of Egypt because that Parliament was the first assembly of elected representatives in the Country. It was also one of the more important fruits of the Arab Spring and it came just two days before a presidential run-off. This decision was seen as a blow to the efforts that sought to democratize Egypt.

In post-independence Kenya, the concept of judicialization of politics is best illustrated by the Case of *Rev Timothy Njoya & Others -Vs- the Attorney General & Others*¹⁹ whose key theme was the constituent power or right of the people of Kenya to be directly involved in the making of the constitution. The legal framework which Parliament had put in place to culminate into the promulgation of a new Constitution did not provide for a plebiscite. The court held that the constituent power of constitution making repose in the people of Kenya and that a plebiscite was necessary for the promulgation of a new constitution. The judgement fundamentally altered the legal framework which parliament had put in place for the promulgation of a new constitution.

¹⁷Impeachment of the President Case, 16-1 KCCR 609, 2004Hun-Na1 (May 14, 2004).

¹⁸Park (n15)

¹⁹ (2004) AHRLR 157.

In the Post 2010 Kenyan state, judicialization of politics and its attendant dangers are best illustrated by the High Court's decision in the case of *Teachers Service Commission (TSC)-Vs-Kenya National Union of Teachers (KNUT) & 3 others*.²⁰ In this Matter, the High Court awarded teachers an increase in basic pay as well as in their allowances. The increase on some of the allowances was backdated to 2013. The Executive held the policy position that a salary increment for teachers would have adverse macro-economic implications. On its part, the Legislature had not voted to allocate any funds to increase teachers' salaries. The Court's decision to increase their salaries was not enforceable because the judiciary cannot compel the other two arms of government to allocate funds for an increase in the salaries.

1.1.3 Principle of Separation of Powers

The principle of separation of powers refers to the philosophy that the powers of government should not vest in the same person, group of persons or one arm of government.²¹ This philosophy is what has informed the popular governance model where most democracies have the key powers of government, i.e the power to make laws, the power to implement those laws and the power to interpret the laws spread between three arms of government.²² The legislature has the law making powers, the executive implements the law, and the judiciary interprets the law. The principle is partly based on John Dalberg-Acton's proposition that "power tends to corrupt and absolute power corrupts absolutely." The rationale behind this principle is that it not only limits arbitrary exercise of power, but it also creates a system of checks and balances which allow democratic governance to flourish. It is therefore both a restraint and a promoter of efficiency.²³

²⁰ Petition Number 3 of 2015 [2015] eKLR.

²¹ Gary J. Schmitt, 'Separation of Powers: Introduction to the Study of Executive Agreements' (1984) 27 American Journal of Jurisprudence.

²² *ibid.*

²³ *ibid.*

Baron Montesquieu and John Locke are the best known proponents of the doctrine of separation of powers. Montesquieu summarized the doctrine in the following words:

There can be no liberty if the judicial powers be not separated from the legislature and the executive. Were it combined with the legislature, the life and liberty of the subjects would be at the danger of being exposed to arbitrary control, for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with violence and oppression.

According to Locke, separation of powers promotes limited government because the government is constrained by the division of its powers.²⁴ For him, the liberties of citizens are more secure under a system of government in which powers are separated.²⁵

The import of the principle of separation of powers in a study of judicialization of politics is that the judicialization of politics is a concept based on the real or perceived accumulation of power by the judiciary. Being one of the three arms of government, an increase in the judiciary's power is bound to upset the balance of power which is sought to be maintained by the doctrine of separation of powers.

1.1.4 Public Policy

An understanding of the concept of public policy is relevant to the scope of this work because judicialization of politics has been explained here to mean among other things, the expansion of the judicial mandate to include the formulation of public policy. It is therefore imperative to know what policy is in order to establish whether, if at all, the judiciary has contributed to policy formulation.

In its simplest form, policy refers to a distinct path of action which is suitable for the pursuit of desired goals within a particular context, directing the decision making of an organization or a government.²⁶ Public policy refers to the plan of action of government and the intentions that

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Melissa Mackay, 'Understanding and Applying Basic Public Policy Concepts' University of Guelph.

determine those plans and ideals,²⁷ or more simply, it is a decision made by government to either act, or not act in order to resolve a problem.²⁸ A policy often comes in the form of general statements about priorities, written regulations or guidelines, procedures and/or standards to be achieved.²⁹

Policy formulation concerns the selection of goals and the means of achieving them within a specified situation where those decisions should be within the power of those actors to achieve.³⁰

The policy making process is a process of balancing different solutions to a cluster of problems.³¹ Policy comes from those who have legitimate authority to impose normative guidelines for action. It is generally made by elected officials acting in concert with advisors from the higher levels of the administration.³² In this regard, policy formulation is generally regarded as a mandate of the political arms of government; namely the executive and the legislature.

1.1.5 Moral Questions

Moral questions refer to questions relating to either the principles concerning the distinction between right and wrong or good and bad behaviour or, a particular system of values or principles of conduct, especially one held by a specific person or society or the extent to which an action is right or wrong.³³ It is widely acknowledged that morality is relative.

The question which therefore arises is; can courts of law assume jurisdiction over matters that lean heavily on the moral perspectives of the society of which it forms part without imposing a

²⁷ Introduction to public policy available at www.google.com/search?q=introduvtion+to+public+policy&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-beta accessed 16 August 2015

²⁸ Mackay (n25).

²⁹ Ibid.

³⁰ Introduction to Public Policy (n.26)

³¹ Ibid.

³² Ibid.

³³ Oxford Dictionaries available at www.oxforddictionaries.com/definition/english/morality accessed 2 September 2015.

moral standard on that society? Does such action take the judiciary outside its mandate which is to apply and interpret the law?

1.1.6 The Political Question Doctrine

The political question doctrine is a concept of justiciability according to which courts will not adjudicate certain controversies because their resolution is better handled by the political branches of government, namely the executive and the legislature.³⁴ The Court in *Baker -Vs- Carr*³⁵ defined six situations, each warranting the application of this doctrine. These are: 1) a constitutional commitment of the issue to a political department; 2) a lack of judicially discoverable standards for resolving the issue; 3) the impossibility of deciding without an initial policy determination reserved for non-judicial discretion; 4) the impossibility of a court's undertaking independent resolution without disrespecting other branches of government; 5) a need for adherence to a prior political decision; and 6) potential embarrassment from non-uniform pronouncements by various departments on one question.

According to the “classical” conception of the political question doctrine, a political question only arises when the constitution itself clearly commits the resolution of a question to another branch of government, and may not be invoked for prudential reasons.³⁶ In invoking the political question doctrine, the judiciary does not abdicate its duty, but interprets the constitution as assigning discretion over an issue to another branch of government.³⁷

In contrast, Alexander Bickel argues that one way of practising the passive virtues of the judiciary is by invoking the political question doctrine to decline to adjudicate a case.³⁸ He

³⁴Jared P. Cole ‘The Political Question Doctrine: Justiciability and the Separation of Powers’ (2014) Congressional Research Service.

³⁵(1962) 369 US 186.

³⁶ Cole (n36).

³⁷ *ibid.*

³⁸ *ibid.*

contends that the political question doctrine could be invoked for prudential reasons and it is founded on

the court's sense of lack of capacity, due to either (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, that although the judicial judgement should be ignored, it will not be; (d) finally, the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.³⁹

This concept is of great relevance to judicialization of politics because, as Rachel Barkow has observed, the rise of judicialization has led to a demise of the political question doctrine.⁴⁰ In other words, the courts have become so emboldened that they seldom see the need to invoke the political question doctrine.

1.1.7 Judicial Institutional Integrity

It is important to understand the meaning of judicial institutional integrity in order to understand what effect judicialization of politics may have on such integrity. The idea of judicial institutional integrity may be viewed in two perspectives. First, it means that an institution has the right professional character.⁴¹ This means that it abides by the values and rules that define the specific profession on which it is established and the values and rules in the social sphere within which it exists.⁴² The persons serving in the institution must be well qualified and of good standing. For a judiciary, prudence is required in order to meet the demands of both the society and the law. In this sense, integrity is an aspect of the internal functioning of the judiciary.

³⁹ *ibid.*

⁴⁰ Rachel Barkow 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2012)2 Columbia Law Review.

⁴¹Jonathan Soeharno 'Is judicial integrity a norm? An inquiry into the concept of judicial integrity in England and the Netherlands' (2007)3 Utrecht Law Review.

⁴² *ibid.*

Secondly, integrity is a norm for external accountability. It is a precondition for legitimacy and public confidence.⁴³ This second sense relates to an external aspect of integrity because it is about how the public perceives the judiciary. It may be established from how effectively a judiciary discharges its mandate and how those serving in it relate to the general citizenry: both collectively as the judicial institution and also individually as officers of the court. The two aspects of judicial integrity are supplementary, the absence of one means a lack of judicial integrity.

1.1.8 Processes of Judicialization of Politics

In its most basic form, judicialization of politics is characterized by the spread of legal discourse, jargon, rules and procedures into the legislative, political and policy making processes. Second, it entails the subjection of executive and administrative decisions to judicial and quasi- judicial review. Article 47 of the Constitution of Kenya 2010 embodies this form of elementary judicialization of politics by providing for a right to fair administrative action and obligating parliament to enact legislation giving effect to this right, including the review of administrative action by a court or, if appropriate, an independent and impartial tribunal.

A more advanced form of judicialization of politics is the expansion of the province of courts and judges to determining public policy questions mainly through judicial review and rights jurisprudence.⁴⁴ This may occur, for instance, when a court is called upon to define the scope of constitutional rights and freedoms.

Judicialization of politics in its raw form is characterized by the reliance on courts and judges to deal with core political controversies that are highly divisive.⁴⁵ This aspect of judicialization of

⁴³ *ibid.*

⁴⁴Hirschl (n5).

⁴⁵*ibid.* Such core political controversies are collectively called mega-politics.

politics comprises a number of sub categories: 1) the judicialization of electoral processes;⁴⁶ 2) judicial scrutiny of executive prerogatives; 3) judicial corroboration of regime transformation; and 4) the judicialization of nation building processes and struggles over the very definition of the polity. The last of these is the most prevalent and is common in deeply fragmented societies.⁴⁷

1.1.9 Factors Favouring Judicialization of Politics

Several factors play a facilitative role in the judicialization of politics. The first factor is the availability of a conducive institutional framework. The structure of a judiciary determines whether it has the capacity to handle an increasing number of judicialized disputes. Its independence and institutional integrity determine whether it can be trusted with matters which have the potential to redefine the political landscape and the public policy of a country.

The existence of a constitutional catalogue of rights also provides a necessary institutional framework. The involvement of the courts in delimiting the scope of constitutional rights expands their jurisdiction to address moral questions as well as political controversies of great significance in a state.⁴⁸

The third factor that facilitates judicialization of politics is judicial behaviour.⁴⁹ A judiciary that shies away from addressing matters of public policy is less likely to facilitate judicialization of politics than a judiciary that prides in its contribution to policy formulation. For instance, Kenya's pre-1992 judiciary to a large extent shied away from judicialization of politics.

⁴⁶Courts sometimes face the burden of making a decision that will determine the outcome of an election. As Willy Mutunga has said before '... it is not in the province of the Chief Justice to speak politics, even though, as Americans are all too aware, he can determine political outcomes, a la *Gore vs. Bush* in 2000.' Speech By Chief Justice Willy Mutunga At The Centre For Strategic And International Studies, September 7, 2012, Washington D.C

⁴⁷An example of this form of judicialization is illustrated by *Reference re Secession of Quebec* [1998] 2 S.C.R in which the Supreme Court of Canada was confronted with the question of whether Quebec could secede and make a unilateral declaration of independence. The Supreme Court of Canada declared unanimously that such a declaration would be unconstitutional.

⁴⁸Hirschl (n8).

⁴⁹ibid.

The fourth factor is the role played by political determinants.⁵⁰ A judiciary may be independent, well-structured and as active as it can be; but it cannot step outside its defined mandate without the receptiveness and support, tacit or explicit, of political actors.⁵¹ It appears that in the de facto and de jure one party Kenyan State, the overbearing influence of the imperial presidency did not countenance judicialization of politics by the then judiciary.

1.1.10 Judicialization of Politics in Colonial Kenya

Kenya's colonial judiciary was an instrument of the colonial executive establishment, designed and constructed for the purpose of advancing the colonial agenda. As such, it was placed under the supervision of the governor, who was at the helm of both the executive and the legislative arm of government. For instance, by the Kenya Colony Order in Council of 1921, it was the governor who picked the seat of the Supreme Court.⁵² Moreover, if the Court passed a death sentence, it had to transmit all the evidence in that matter to the Governor. Such a sentence could only be effected when the Governor had approved of it.⁵³ Section 10 of the Order further expressly provided that a court under the Order could not exercise any jurisdiction whatsoever over the Governor or his official or other residencies, or his official or other property. Given this kind of institutional framework, there was no room for judicialization of politics in colonial Kenya.

Further, the Kenyan Colony never at any point had a bill of rights in any form. A constitutional catalogue of rights made its way to Kenya through the Independence Constitution. Consequently, rights adjudication which is a major contributor to the judicialization of politics was inexistent in Colonial Kenya.

⁵⁰ibid.

⁵¹ibid.

⁵² Section 7 of the Kenya Colony Order in Council of 1921.

⁵³ ibid. at Section 8.

1.1.11 Judicialization of Politics in Post - Independence Kenya

When examined against the factors that promote the judicialization of politics, such as institutional independence and a constitutional catalogue of rights, Kenya's Independence Constitution can be said to have laid a fairly strong framework for the judicialization of politics. It contained an elaborate and justiciable bill of rights at Chapter V.⁵⁴ However, in comparison to the Constitution of Kenya 2010, Kenya's Independence Constitution limited the enforcement of rights and fundamental freedoms by requiring that the person who brought an action alleging the contravention of their right had to have *locus standi* in the matter. This significantly prejudiced the enforcement of group rights or the institution of actions on behalf of the public. It was further limited by the lack of a clear constitutional framework on access to justice.

The constitutional position of Kenya's Judiciary under the Independence Constitution was defined within the separation of powers framework in Chapter IV of the Independence Constitution.⁵⁵ The tenure of judges was secured by Section 62 of the Independence Constitution. The structural strength of the Independence Judiciary was secured partly because of the fear which the white settlers and a significant section of Africans had over the policies of the incoming independence government.

However, the subsequent constitutional amendments made between 1964 and 1969 created an imperial presidency and reduced the powers and influence of the other two institutions whose function was to check the executive. Kenya became a *defacto* one party state in 1969. The executive's pervasive control of public policy and its frequent recourse to detention without trial as a means of dealing with any form of dissent created fear within the populace. Executive and legislative decisions were therefore hardly challenged in court during the *defacto* and *dejure* one

⁵⁴Chapter II of the 1963 Constitution of Kenya [Independence Constitution].

⁵⁵ Chapter IV-The Judicature

party state. Rights litigation was generally perceived as opposition to the regime. Consequently, there was no significant judicialized litigation in the single party post-independence Kenya.

1.1.12 Judicialization of Politics in Post-2010 Kenya

The Post-2010 period has witnessed a transformation of courts into an arena for the resolution of political, moral and public policy disputes. This increased level of judicialization of politics is largely attributable to the judicialization framework contained in the Constitution of Kenya 2010. The Constitution has considerably widened the scope of justiciability by leaving it to the courts to decide what is justiciable and providing no standards for reaching such a determination.⁵⁶ The Constitution of Kenya 2010 has also by virtue of Article 258 conferred *locus standi* on every Kenyan to move the court to protect the Constitution, thus opening itself up to a large number of possible suits.⁵⁷

The Constitution of Kenya's express declaration of supremacy over all other laws in the Republic and over the actions of any person or state organ and state officer also contributes to the judicialization of politics by opening up the actions of other arms of government to judicial scrutiny and potential nullification.⁵⁸ It also extends judicial interpretive powers to the interrogation of the constitutionality of other laws.

Most significant, the Constitution provides for a bill of rights in Chapter Four. The Chapter elaborately enumerates political, social and economic rights. Ran Hirschl has said that the existence of a constitutional catalogue of rights and judicial review mechanisms enables courts to

⁵⁶ Article 50 of the Constitution of 2010 has significantly widened the scope of justiciability by providing that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

⁵⁷ Article 258 provides that every person has the right to institute court proceedings on the basis of real or threatened breach of the Constitution. Such proceedings may be instituted by a person acting for himself, on behalf of another person who cannot act in their own name, as a member of, or in the interest of a group or class of persons, in the public interest, or by association acting in the interest of one or more of its members.

⁵⁸ Article 2(1) of the Constitution proclaims the Constitution as the supreme law of the Republic and binds all persons and all state organs at both levels of government. Article 2(4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

expand their jurisdiction to address vital moral dilemmas and political controversies of crucial significance to a polity.⁵⁹ The reason why elaborately prescribed rights result in a widened scope of justiciability is because all a petitioner has to do is align his complaint under the purview of the bill of rights and he will have an actionable claim.

Equally relevant to justiciability is the right of access to justice granted in Article 48 of the Constitution. Being a right under the bill of rights, a person can also apply to the High Court under Articles 22 as read together with Article 23 arguing that his right of access to justice has been violated or is threatened. The Articles allow more people to access the courts and as a result, more matters are brought before the courts. Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

As a consequence of the judicialization framework contained in the Constitution of Kenya 2010, Kenya's Judiciary has in the course of the discharge of its constitutionally articulated mandate, reached decisions that have significant implications on public policy, politics and the moral fabric of the country. The most prominent judicial decision that reflects judicialization of politics is the decision in *Teachers Service Commission (TSC)-Vs- Kenya National Union of Teachers (KNUT) & 3 others*.⁶⁰ In the matter, the TSC brought a petition together with a Notice of Motion application seeking *inter-alia* orders of a prohibitory injunction to restrain the officials and members of the Respondents from continuing with a strike. The Court decided for the respondents and awarded the teachers a basic salary increment of between 50 – 60%. The Court also awarded teachers an increase in their allowances, including house allowance, leave allowance and hardship allowance. The basic salary increment was backdated to 1st July 2013 while the allowances were to take effect on 1st July 2015.

⁵⁹. Ran Hirschl, 'The New Constitution and the Judicialization of Pure Politics Worldwide', Fordham Law Review, Volume 75/Issue 2 Article 14.

⁶⁰ Petition Number 3 of 2015 [2015] eKLR.

This decision led to a series of events which illustrate the dangers of judicialization. The executive arm of government declared that there was no money to pay teachers. The TSC echoed the same sentiment. Teachers on the other hand maintained that the Court's decision must be honoured. The consequences of this are dire when it is considered that all this was happening in the term during which candidates were expected to sit their national examinations.

The court's decision was a policy statement because a public wage increment cannot be effected without a corresponding legislative framework by the legislature, usually in the form of an appropriation bill. Clearly, the court lacks the wherewithal to implement such a decision.

1.2 Statement of the Problem

The Constitution of Kenya 2010 provides wide ranging powers for the judicial arm of government. It grants the Judiciary the mandate to entertain any matter that can be resolved by the application of law.⁶¹ Secondly, it grants *locus standi* to every person acting on his own or in his representative capacity to institute court proceedings to protect the Constitution.⁶² It also provides an expanded bill of rights with an embedded enforcement mechanism. The platform for enforcement is the courts. The interpretation of the Constitution itself is a central function of the courts. This is interpreted to mean that the arbiter of any and every dispute arising within the context of the Constitution is a court of law. Kenya's Post - 2010 Judiciary appears to have embraced this philosophy by addressing all disputes brought to it. However, some of the decisions reached have far reaching ramifications on the politics, morality and public policy of the Kenyan State.

In adjudicating judicialized politics within the framework of the Constitution of Kenya 2010, the Judiciary has made decisions which do more than settle the rights of the litigants. Some of these

⁶¹ Article 50 of the Constitution of Kenya 2010.

⁶² *ibid.* at Article 258.

decisions are perceived to fundamentally undermine democracy and the doctrine of separation of powers. Besides its potential to undermine democracy, judicialization of politics poses a danger to the integrity of the judiciary. There is an emerging view that assuming jurisdiction over highly controversial matters, whether in the political, moral or public policy arena, may compromise its claim to neutrality, and more so when it reaches decisions that are, in the public opinion, disagreeable.

In light of the Constitution of Kenya 2010's elaborate facilitative framework for the judicialization of politics, the problem that presents itself is how Kenya's Judiciary should juridically define the justiciability principle and the political question doctrine within the framework of the Constitution of Kenya 2010 so as to avert the dangers that judicialization poses to the institutional integrity of the judiciary itself, to democracy, and to the doctrine of separation of powers.

1.2 Broad Argument Layout

The Constitution of Kenya 2010 vests wide interpretive and review powers in the Judiciary. Litigants have since 2010 approached the Judiciary with all manner of disputes, ranging from the highly political controversies to the more ordinary private and public rights disputes. All these disputes are well within the jurisdiction of the courts. However, the Judiciary has, in admitting and adjudicating some of these disputes, arrived at decisions which have a profound impact on the balance of power within the framework of the principle of separation of powers. Second, some of the decisions have had far reaching moral and policy ramifications. This has put the Judiciary at odds with the other arms of government and poses a threat to democracy and the principle of separation of powers. Third, this phenomenon threatens to erode the credibility and sanctity of the judiciary as a non-partisan dispute resolution institution.

1.3 Objectives of the Research

The objectives of this research were:

1. To establish how Kenya's Judiciary has defined the political question doctrine and the concept of justiciability while discharging its constitutional mandate within the framework of the Constitution of Kenya 2010.
2. To establish the dangers that the judicialization of politics poses to the judiciary, to democracy and to the doctrine of separation of powers in Kenya.
3. To explore ways in which Kenya's Judiciary can protect its institutional integrity in the face of increased judicialization of politics.

1.5 Research Questions

1. What dangers does the judicialization of politics pose to the Judiciary?
2. What jurisprudential standards should the judiciary develop to avert the dangers posed by judicialization of politics?

1.6 Methodology

This Work was based solely on secondary research that entailed library and internet information gathering. The researcher drew information from both primary and secondary sources. Primary sources included the Constitution of Kenya 2010, the Independence Constitution and the Kenya Order in Council of 1920. This examination was aimed at first, establishing the scope of the judicial mandate under the Constitution of Kenya 2010. Second, it was aimed at establishing the framework for judicialization of politics under the Constitution of Kenya 2010. Secondary sources of information included books, journals and the internet. These materials were intended to provide the researcher with an understanding of the concept of judicialization of politics, its enabling factors and most importantly, its attendant dangers.

The author's reliance on secondary research was informed by the fact that although there is little that has been done by way of research on judicialization of politics in Kenya within the framework of the Constitution of Kenya 2010, there is a wide availability of information on the general subject of judicialization of politics internationally. The objectives of this research could therefore be satisfied with secondary research alone.

1.7 Limitations

The primary focus of this Work is to introduce the concept of judicialization of politics and the dangers that accompany such judicialization of politics into mainstream academic debate and literature in Kenya. Additionally, this Work is aimed at establishing the role the Constitution of Kenya 2010 has played in entrenching the judicialization of politics in Kenya. To fulfil these objectives, this research depended on secondary research alone because the material needed to compile an introductory piece of work on judicialization of politics was available. Due to its focus on constitutionalized judicialization of politics, this research is limited in the sense that it did not delve into the judicial intricacies that contribute to judicialization such as judicial activism and judicial bias.

1.8 Chapter Breakdown

1.8.1 Chapter 1: An Introduction to Judicialization of Politics under the Constitution of Kenya 2010

This Chapter introduces the concept of judicialization of politics and explains it in the context of Kenya's judicial history and in the context of the Constitution of Kenya 2010.

Besides, it introduces the principle of separation of powers, the political question doctrine and the concepts of moral questions and judicial integrity.

1.8.2 Chapter 2: Theories and Existing Literature on Judicialization

This Chapter presents the theoretical basis of the subject of judicialization of politics. It also includes a survey of various scholarly contributions to the subject of judicialization of politics. The literature review depends heavily on material by scholars from various jurisdictions where judicialization is deeply entrenched. Finally, the Chapter contains the Hypotheses drawn from the literature reviewed and the background outlined in the preceding Chapter.

1.8.3 Chapter 3: The Framework for Judicialization of Politics in the Constitution of Kenya 2010

This Chapter will delve into the question of judicialization of politics in the Constitution of Kenya 2010. It will analyze the provisions of the Constitution that promote judicialization of politics and elaborate on them with a judicial touch where case law is available.

1.8.4 Chapter 4: Definition of the Political Question Doctrine and the Justiciability Concept by Kenya's Post 2010 Judiciary

This Chapter will seek to establish how Kenya's post 2010 judiciary has responded to judicialization of politics by the Constitution and how, if at all, it has contributed to judicialization of politics on its own volition. This will be done in the context of the concepts of justiciability and the political question doctrine, in an effort to establish how the judiciary, in the discharge of its constitutional mandate, has expanded the scope of justiciability in Kenya and to what extent it has conformed to the traditional conception of the political question doctrine.

1.8.5 Chapter 5: The Dangers of Judicialization of Politics to Kenya's Judiciary

This Chapter will focus on the risks that judicialization of politics in Kenya poses to the doctrine of separation of powers and to the institutional integrity of Kenya's judiciary. This will be done by studying the dangers of judicialization of politics that have been identified by scholars, and

more so in literature on countries whose levels of judicialization of politics go beyond the level in Kenya.

1.8.6 Chapter 6: Conclusion and Recommendations

This concluding Chapter will recommend measures the Kenyan Judiciary could take to avert the dangers posed by judicialization of politics.

CHAPTER 2: THEORIES AND EXISTING LITERATURE ON JUDICIALIZATION OF POLITICS

2.0 Introduction

This Chapter explains the theoretical underpinnings of judicialization of politics. It explains the relevant theories and points out their relevance to the subject of judicialization of politics. This Chapter also presents an analysis of the literature available on the subject of judicialization of politics and the dangers that accompany this phenomenon. Lastly, the hypotheses on which this research is built are included in this Chapter.

2.1 Theoretical Framework

2.1.1 Ronald Dworkin's Interpretive Theory

Ronald Dworkin was an American jurist. He was an eloquent critic of legal positivism, particularly the strand propounded by HLA Hart. He proffered a theory called the interpretive theory of law.⁶³ He considered his theory to be a more viable substitute for Hart's theory.⁶⁴

Hart contends that a legal system comprises rules and the recognition of these rules is determined by the existence of a "master rule." This master rule is known as the rule of recognition and it lays down criteria of validity which a rule must satisfy in order to be a legal rule, as distinguished from other kinds of social rules.⁶⁵ According to Hart, in the majority of cases, the rules of a system of law are clear and the judge simply has to apply the rule to the instant facts.⁶⁶

However, there may arise a case with a set of facts which are not covered by a settled rule ("a hard case" or "penumbral case").⁶⁷ In such a case, Hart proposes that the judge would have to

⁶³ Blerk A E *Jurisprudence: An Introduction* (Lexis Nexis Butterworths, 1996) at page 83.

⁶⁴ *ibid.*

⁶⁵ *Ibid* at Page 85

⁶⁶ *ibid*

⁶⁷ Blerk A E *Jurisprudence: An Introduction* (Lexis Nexis Butterworths, 1996) at 85

exercise his discretion in order to arrive at a decision.⁶⁸ In this instance, the judge acts as a kind of legislature. In exercising this discretion, the judge must come up with a forward looking verdict which serves the interests of the society.⁶⁹

Dworkin's theory rebuts Hart's theory that judges possess discretion in hard cases. Dworkin's theory also rebuts the utilitarian view that the welfare of the community as a whole is the ultimate purpose of the law.⁷⁰ In his theory, Dworkin concedes that rules form part of the law and that clear cut cases are decided through the application of those rules. He however rejects the view that judges have discretion when deciding hard cases. He contends that the law does not only consist of rules but also comprises principles and standards.⁷¹ These principles and standards are part of the law. Any analysis of the law in terms of rules alone overlooks the full range of legal material which a judge uses in deciding a "hard case."

Dworkin distinguished between a legal rule and a principle. He argued that a rule applies in an "all or nothing fashion" (if they apply, they must be enforced) while a principle only inclines a decision one way or another.⁷² In this regard, a judge is entitled to invoke a principle to "justify a political decision by showing that the decision respects or secures some individual or group right."⁷³ Principles survive and remain intact even when they do not apply to a specific set of facts.⁷⁴ Additionally, principles are not products of legislative action but of a sense of appropriateness developed in the profession and public over time.⁷⁵ Examples of principles are fair hearing, procedural fairness, and the procedural principle that no one should be allowed to benefit from his wrongdoing.⁷⁶

⁶⁸ibid.

⁶⁹ibid.

⁷⁰Ibid at page 86

⁷¹ Blerk A E *Jurisprudence: An Introduction* (Lexis Nexis Butterworths, 1996).

⁷²ibid. at page 87.

⁷³ Ronald Dworkin, *Taking Rights Seriously* (1977) at 282.

⁷⁴ Blerk(n70) at page 87.

⁷⁵ ibid.

⁷⁶ ibid.

The latter principle was applied in *Riggs -Vs- Palmer*⁷⁷ in which a grandson murdered his grandfather in order to inherit the property which his grandfather had bequeathed to him in a valid will. Since the will was valid there was no bar to the grandson benefiting under the will. The grandson sought to enforce the will. At first instance, the court decided in favour of the grandson. On appeal, the court applied the principle that no one should be allowed to benefit from his wrong doing and declared the grandson's inheritance void.

Dworkin argues that the judge did not use his discretion in this case to override the ordinary rule for legacies but instead interpreted the rule in terms of a prevailing principle.⁷⁸ He insists that judges do not decide cases on extralegal grounds but rather discover the correct answer in terms of institutional history and community morality.⁷⁹ He argues that if a judge adopts this broad view of the content of the legal system in his decisions, his role will be creative without being legislative.⁸⁰ Dworkin maintains that existing law provides an answer to every hard case and therefore there is no necessity for independent discretion by the judges.⁸¹

Although Dworkin conceptualizes unwritten but widely celebrated principles as the necessary interpretive rules in decision making, the Constitution of Kenya 2010 has enumerated a number of binding national values and governance principles. Article 10(a) of the Constitution provides that the national values and principles enshrined in the Constitution will guide all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution.

Of significance to this work, however, is that although Dworkin advocated the use of principles and not discretion on the part of a judge, he distinguished between principles and policy. He

⁷⁷ (1889)115 N.Y. 506

⁷⁸ Blerk(n74).

⁷⁹ibid.

⁸⁰ibid.

⁸¹ibid.

emphasized that a judge must be guided by principle and not policy. For Dworkin, principles describe rights while policies describe goals. He articulated this view in the following terms:

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. For instance, the argument in favour of a subsidy for aircraft manufacturers, that the subsidy will protect national defence is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. For instance, the argument in favour of anti-discrimination statutes, that a minority has a right to equal respect and concern is an argument of principle.

Dworkin's exposition reveals that although judges can apply standards outside of clear cut rules, care should be taken to prevent judges from entering the realm of policy. This is a call to judges to exercise caution when handling judicialized litigation by maintaining a balance between principle and policy. It follows that although the Constitution of Kenya 2010 provides for principles and values, those values should be applied as a principle should, but not as tools for policy formulation.

One case in which the Judiciary may be perceived to have overshoot the demarcation line between principle and policy is that of *Teachers Service Commission (TSC)-Vs- Kenya National Union of Teachers (KNUT) & 3 others*,⁸² the facts of which are discussed above.

In what may be interpreted as an explicit policy statement, the Court, in *obiter* said the following:

Here is to hope, this Judgment will bring to an end the era of arbitrary remuneration awards to the teachers. The Court desires that the era of acrimony and regular national wide strikes by the teachers will be replaced by an era of guided collective bargaining in a four year cycle. If this scenario comes to pass, the pain felt today, by Government implementing this award would be repaid many fold by the peace and harmony to be experienced in the Education Sector. The annual anxiety by the teachers, children and their parents will equally come to an end. Good Labour Relations, translating into national peace and harmony is a trophy worth investing in today.

⁸² Petition Number 3 of 2015 [2015] eKLR.

Applying Dworkin's theory, the above judicial pronouncement indicates that the court intended that its decision do more than settle the dispute placed before it. It expected that decision to guide policy in the remuneration of teachers. Dworkin's theory can be used to avert such an eventuality because by applying the theory, a judge stands guided on how underlying values and principles, even those that have been constitutionally guaranteed should be applied without overly venturing into policy formulation.

2.1.2 Transformative Constitutionalism

Developed by Dr. Karl Klare, transformative constitutionalism theory explains the tidal change introduced in South Africa by the Country's 1996 Constitution. It connotes an enterprise of inducing major social change through non-violent processes grounded in law.⁸³ In describing this theory, Mashele Rapasta writes that:

Post 1994, a reconstruction and development agenda became a priority, resulting in transformative constitutionalism, a project which adopted the stance of transforming the society by redressing the injustices of the past, to create a much just society grounded in law. It has a foundational mandate to heal the wounds of the past. This entails that the societal challenges can best be addressed using the supreme law in the Constitution, as the basis for societal transformation.

Transformative Constitutionalism is composed of two essential elements; transformation and constitutionalism.⁸⁴ The former denotes change while the latter refers to the aspects that confer legitimacy on governmental action. Kenya's 2010 Constitution has been viewed as heralding a new era of governance and democracy. It establishes organs of government that are structurally and operationally independent to provide appropriate checks and balances. It sets out national values that include democracy, rule of law and human rights, and provides an expansive catalogue of rights with an embedded enforcement mechanism. It also provides for affirmative

⁸³ Mashele Rapasta, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) *Mediterranean Journal of Social Sciences*, at the Abstract.

⁸⁴ *Ibid.* at page 3.

action in order to redress historical inequalities and establishes a National Land Commission whose objectives include dealing with historical injustices in the area of land. In this sense, the Constitution of Kenya 2010 is transformative. It entrenches constitutionalism by providing for forms of representation and for fair administrative action. It also requires compliance with democratic principles such as the rule of law and separation of powers.

While the text and spirit of a constitution can be transformative, this agenda can only be advanced by the tools of application and interpretation of that constitution. It is the judiciary that has the mandate of interpretation and by dint of Article 50(1), it also has the mandate of determining where to apply that law. Transformative constitutionalism therefore places significant emphasis on the role played by the judiciary in actualizing the change envisioned in the Constitution. While the feature of ‘transformation’ calls upon the judiciary to participate in the entrenchment of change, the aspect of ‘constitutionalism’ sets a bar on how far the judiciary should go in effecting such change. Roux recognizes this need to maintain a balance and advises that the judiciary should subject its interpretive approach to the doctrines of a democratic law-driven social change. One of these doctrines would be the separation of powers.

It is necessary, therefore that a judiciary formed by a transformative constitution such as Kenya’s Judiciary discharges its mandate diligently but without interfering with the powers of other arms of government. This is especially relevant to the judicialization of politics because maintaining the proper balance will ensure that the dangers posed by the judicialization of politics are averted.

2.2 Literature Review

Traditionally, a judiciary in a constitutional democracy is expected to perform four functions: dispute resolution, judicial review, administration of criminal justice and protection of human

rights.⁸⁵ More generally, the function of the judiciary is to dispense justice in accordance with the law. The judiciary is responsible for the maintenance of a balance of interests between individual persons *inter se*, between individual persons and the state, and between government organs *inter se*.⁸⁶ Under the Constitution of Kenya 2010, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law.⁸⁷

It is generally agreed that in order for a judiciary to discharge its obligations effectively, it must be independent. Yash Vyas contends that the expression ‘judiciary,’ refers to the ‘judges of a state collectively,’ but it is often used in a wider sense to embrace both the institutions (the courts) and the persons (judges) that comprise them.⁸⁸ So the independence of the judiciary comprises two fundamental elements, namely independence of the judiciary as an organ and as one of the three organs of the state, and independence of the individual judge.⁸⁹ Judicial independence refers to the absence of pressure and influence from any quarters and for whatever reason, in order that a judge may reach a decision that accords with the traditions of the law and the principles of the rule of law, with the ultimate aim of bringing about the attainment of the constitutional goals.⁹⁰

Due to the degree of independence afforded the judiciary, it is necessary that such independence be tempered with the integrity of the judicial institution.⁹¹ It has been stated before in this work that judicial integrity is a prerequisite for judicial legitimacy as well as a function of the internal workings of a judiciary. If the judiciary is perceived as being corrupt, biased, or otherwise

⁸⁵ Pilar Domingo ‘Judicialization of politics or politicization of the judiciary? Recent trends in Latin America’ (2004) 11 Democratization at page 5

⁸⁶ Yash Vyas ‘The Independence of the Judiciary: A Third World Perspective’ (1992) 11 Law, Accountability, and Development: Theories, Techniques, and Agencies of Development at page 12

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ Yash Vyas ‘The Independence of the Judiciary: A Third World Perspective’ (1992) 11 Law, Accountability, and Development: Theories, Techniques, and Agencies of Development at 12.

⁹⁰ *ibid.*

⁹¹ Jeffrey M. Sharman ‘Judicial Ethics: Independence, Impartiality, and Integrity’ (1996) Inter-American Development Bank at 5

unethical, society's confidence in the legal system and its respect for the rule of law will crumble.⁹² Judges must not only avoid impropriety, but also the appearance of impropriety, if public confidence in the judiciary is to be maintained.⁹³

It is recognized that some behaviour pose a threat to judicial integrity. Such behaviour include corruption and nepotism, inefficiency and unbecoming conduct on the part of individual judges. Rarely is it considered that the judicialization of politics-or the assumption by the judiciary of jurisdiction over highly controversial political matters, even though constitutionally mandated, such as questions of public policy, questions of morality and highly political contests may pose a danger to judicial integrity. This work looks at this possibility and endeavours to recommend ways in which a judiciary can guard against hurting its integrity while discharging its mandate.

Rodrigo Yepes argues that partial judicialization of political life has certain advantages and that judicialization is not inherently harmful. The greatest of its advantages is that it prevents abuse of power by political players and by the majority against minorities because the judicialization of politics arises from and also results in increased rights awareness.⁹⁴

On the contention that judicialization of politics vests too much power on unelected individuals, he contends that the judicial enforcement of human rights although performed by non-elected judicial officers should be seen not as a limitation to democracy, but instead as a guarantee of the prerequisites of democracy.⁹⁵ He further justifies a considerable degree of judicialization of politics based on its inevitability when political systems encounter obstacles which rob them of their capacity to respond to particular types of crises, such as corrupt practices. When such

⁹² Sandra Day O' Connor, 'Vindicating the Rule of Law: The Role of the Judiciary' (2008) Chinese Journal of International Law at page 4.

⁹³ *ibid.*

⁹⁴ Rodrigo Uprimny Yepes 'Judicialization of politics in Colombia: cases, merits and risks' (2007) Rev. int. direitos human. vol.4 no.6 São Paulo. Available at

www.scielo.br/scielo.php?pid=S180664452007000100004&script=sci_arttext&tlng=en accessed 3 June 2015 at page 11.

⁹⁵ *Ibid.*

practices are so widespread that they become part of the system's ordinary rules of play, only the judiciary can be depended upon because ideally, it is usually removed from the political arena.

On his part, John Freejohn has argued that the fact that courts frequently intervene in policy-making processes means that other political actors, as well as groups seeking political action, have reason to take the possibility of judicial reaction into account. In other words, the judicialization of politics is important because it places a burden of accountability on bodies that are subject to judicial scrutiny.⁹⁶

Many scholars view the judicialization of politics as a threat to democracy, principally because the judiciary is a non-majoritarian institution. Jeremy Bentham is perhaps the oldest known opposer on this ground. He is known to have asked “why should we prefer the opinion of the few to that of the many?”⁹⁷ In the same breath, James Grant pronounces his opposition in the form of a question and an answer, “in what circumstances should, say, liberty prevail over security and vice versa? By handing such decisions to the judiciary, the judicialization of politics denies citizens their democratic right to participate in the political decision-making process.”⁹⁸

Judicialization of politics has faced similar opposition from the bench. Justice Antonin Scalia of the American Supreme Court insists that judges should not “make” law; they should simply apply and interpret legislation. Judges, he suggests, should not appeal to the idea of a “living constitution” or look to the purpose of the law or the intention of the legislature.⁹⁹ If they do, they will be making a judgment based not on what the law in fact is but on what it ought to be. Instead, judges should look to the original meaning of the text.¹⁰⁰

⁹⁶John Freejohn ‘Judicializing politics, Politicizing Law’ (2002) 65 Law and Contemporary Problems at page 42.

⁹⁷James Grant ‘The Rise of Juristocracy’ (2010) The Wilson Quarterly at Page 3

⁹⁸ *ibid.*

⁹⁹ *ibid.* at page 5

¹⁰⁰ *ibid.*

Rodrigo Yepes concedes that the judicialization of politics poses risks to the judiciary. He however argues that such risks are likely to be realized only where there is excessive judicialization.¹⁰¹ The first challenge he considers is that the judicialization of politics can overburden the judiciary which may find it hard to assume matters that are not entirely within its jurisdiction.¹⁰² This occurs not only as a result of the quantity of disputes that the judicial system ends up having to resolve, but also as a result of the issues involved, since the judiciary may not be the most appropriate place for some conflicts.¹⁰³ As a consequence, the likelihood of judicial error is increased.¹⁰⁴

Second, Yepes contends that the judicialization of political conflicts tends to politicize judicial conflicts, since the courts and judicial processes are transformed into situations and tools to be exploited by political actors, which profoundly destabilizes the role of the judicial system as the guarantor of human rights and the rules of the democratic governance.¹⁰⁵ The law ceases to be the general rule that society recognizes, since it is considered that the meaning of the rules can be manipulated depending on the political interests at play.¹⁰⁶ The consequence is an erosion of the public's confidence in the judiciary. This is of significant impact in fragile democracies where a lot depends on the institutional integrity of the arms of government and more so the judiciary.¹⁰⁷

Third, Yepes argues that the judicialization of politics can inspire the apathy of citizens towards democratic institutions.¹⁰⁸ The use of legal arguments to resolve complex and socio-political

¹⁰¹ Rodrigo Uprimny Yepes 'Judicialization of politics in Colombia: cases, merits and risks' (2007) Rev. int. direitos human. vol.4 no.6 São Paulo. Available at www.scielo.br/scielo.php?pid=S180664452007000100004&script=sci_arttext&tlng=en accessed 3 June 2015 at page 12.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ Rodrigo Uprimny Yepes 'Judicialization of politics in Colombia: cases, merits and risks' (2007) Rev. int. direitos human. vol.4 no.6 São Paulo. Available at www.scielo.br/scielo.php?pid=S180664452007000100004&script=sci_arttext&tlng=en accessed 3 June 2015 at page 14.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

problems may give the impression that the solution to many political problems does not require democratic engagement.¹⁰⁹ This casts doubts on the very democratic principles, because it becomes apparent that it is the duty of judicial officers to defend the virtues of democracy.¹¹⁰ The risks of authoritarian and anti-democratic solutions become considerable, since society would increasingly place their trust in non-elected persons to solve problems.¹¹¹

According to Wachira Maina, the dangers of the judicialization of politics are that as soon as politicians understand that the courts are important political arenas, they will fight to control the power to appoint judges.¹¹²

In an analysis of the dangers of the judicialization of politics, Migai Aketch argues that where courts have entered the political arena, they may be perceived to be making subjective decisions that do not serve the wider public interest.¹¹³ He observes that, in order to avert the dangers of the judicialization of politics, courts in other jurisdictions have redrawn a clear demarcation line between the concept of justiciability and the political question doctrine.¹¹⁴ The concept of justiciability is to the effect that judicial power is to be exercised only in respect of justiciable matters while the political question doctrine requires that matters which impose political duties should be resolved by the political process and not by judicial remedies.¹¹⁵ He urges that Kenyan courts need to appreciate that they exercise a delicate power, and that they will only be accepted by the citizenry if their exercise of the judicial power is restrained and reaches decisions that command public respect since they are seen to be serving the public good.

¹⁰⁹ Rodrigo Uprimny Yepes 'Judicialization of politics in Colombia: cases, merits and risks' (2007) *Rev. int. direitos human.* vol.4 no.6 São Paulo. Available at www.scielo.br/scielo.php?pid=S180664452007000100004&script=sci_arttext&tlng=en accessed 3 June 2015.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Wachira Maina, 'How Drafters of the 2010 Constitution Ensured MPs Won't Abuse it for Political Expediency.'

¹¹³ Migai Aketch 'Ethics of the Rule of Law: Impunity, public perceptions of Justice and Governance in Kenya in *Governance, Institutions and the Human Condition* (2009).

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

A review of the literature on the subject of the judicialization of politics reveals a dearth of literature on the judicialization of politics with Kenya as its focus. This work seeks to fill that gap by making an enriching positive jurisprudence on this phenomenon in Kenya. It also aims at making a statement on the dangers that judicialization of politics poses not only to the judiciary, but also to the doctrines of separation of powers and constitutional democracy. This work may then be used as a reference point by relevant actors when dealing with the challenges of judicialization of politics.

2.2 Hypotheses

This Research was conducted on the basis of the following hypotheses drawn from the foregoing literature review and background outlined in Chapter One.

1. That the judicialization of politics poses a danger to the judiciary's institutional and functional integrity
2. That the Judiciary needs to develop measures to protect its institutional integrity from the dangers that the judicialization of politics poses.
3. That a robust and insightful interpretation and application of the concept of justiciability and the political question doctrine can protect Kenya's Judiciary from the dangers of judicialization of politics.

2.4 Conclusion

The Theoretical Framework, the Literature Review and the Hypotheses presented in this Chapter are the ground on which this research is built. They all present the basis from which the views expressed in the succeeding Chapters proceed. The literature review also reveals that judicialization is not a novel concept, it is well entrenched in many jurisdictions. The next Chapter is a study of the framework for the judicialization of politics under the Constitution of Kenya 2010.

CHAPTER 3: THE FRAMEWORK FOR JUDICIALIZATION OF POLITICS IN THE CONSTITUTION OF KENYA 2010

3.0 Introduction

Constitutional supremacy defines the political landscape of many countries across the globe.¹¹⁶ Many post-authoritarian regimes are usually quick to endorse principles of modern constitutionalism upon their transition to democracy.¹¹⁷ Good examples of these are the countries that experienced the Arab Spring. Although not entirely successful, the post-Arab spring nations claim to establish themselves upon the basis of democracy, constitutionalism or some other related concept. The result is that there is increased constitutionalism the world over. One of the main manifestations of this increased constitutionalism is the judicialization of politics.¹¹⁸

In numerous countries, fundamental constitutional reform has transferred a great deal of power from representative institutions to judiciaries.¹¹⁹ Most of these countries, like Kenya, have new constitutions that have elaborate bills of rights and establish frameworks for active judicial review. National high courts and transnational tribunals have in the process gained prominence in the formulation of policy. The situation in Kenya now resembles the situation in the United States when Alexis de Tocqueville observed that “in the United States, there is hardly any moral, political, or public policy controversy in the world of new constitutionalism that does not sooner or later become a judicial one.”

The global trend towards a general constitutional empowerment of the judiciary, and the emphasis on human rights is collectively called new constitutionalism. The idea of new constitutionalism is used to describe the Post World War II decline in parliamentary sovereignty

¹¹⁶ Ran Hirschl ‘The Political Origins of the New Constitutionalism’ (2004) *Indiana Journal of Global Legal Studies* at 72.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

and the rise to prominence of constitutional courts with broad powers.¹²⁰ Proponents of this concept view courts as an important platform for protecting citizens' rights and the strengthening of the judiciary is thus a positive step toward achieving true democracy.¹²¹ Opponents of judicialization of politics however see the empowerment of the courts as a move away from popular self-determination and away from policy - making in the interest of the masses.¹²²

Hirschl argues that the constitutionalization of rights and the corresponding establishment of judicial review are perceived as power-diffusing measures widely associated with liberal values.¹²³ Consequently, studies of the political origins of the worldwide shift towards constitutionalism portray it as the reflection of modern democracies' post-World War II commitment to the idea that democracy means more than a rule by the majority.¹²⁴

This Chapter will analyze the Constitution of Kenya 2010 with a view to establishing why it has led to a sharp increase in judicialization of politics in Kenya.

3.1 The Constitution of Kenya 2010

The post-2010 increase in judicialization of politics may be attributed to several provisions of Kenya's 2010 Constitution. The following section examines various provisions of the Constitution with the aim of establishing how particular aspects have contributed to the significant increase in judicialization of politics.

It is necessary to start off with Article 258 of the Constitution. Due to its wide applicability, it becomes a challenge to put this Article under any specific topic. The Article provides that every person has the right to institute court proceedings, claiming that the Constitution has been

¹²⁰ Lisa Hilbink 'Beyond Manicheanism: Assessing the New Constitutionalism'(2006) 65 Maryland Law Review at 15.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ Hirschl (n114). At page 72

¹²⁴ *ibid.*

contravened, or is threatened with contravention. It further provides that in addition to a person acting in their own interest, such court proceedings may be instituted by a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.

The Article places the burden of guarding the Constitution on every Kenyan with the requisite capacity, and this through approaching the courts. Given the wide applicability of the Constitution, the first implication of this Article is that a great many matters of diverse characters can be brought under this Article, styled as a contravention of the Constitution. Secondly, it removes the requirement for *locus standi* when bringing such matters, and this opens up the Judiciary to the public in a great way.

3.1.1 Supremacy of the Constitution

Ringera J in *Njoya & 6 others -Vs- Attorney General and 3 Others (no.2)*¹²⁵ explained the philosophical basis of constitutional supremacy in the following terms:

And lest somebody wonder why, the supremacy of the Constitution is proclaimed in Section 3 is not explicable only on the basis that the Constitution is the supreme law, the grundnorm in Kelsenian dictum; nay, the constitution is not supreme because it says so; its supremacy is a tribute to its having been made by a higher power, a power higher than the constitution itself or any of its creatures. The constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves.

In agreement with Justice Ringera's statement, the Preamble to the Constitution proclaims the Constitution as an enactment by and for the people of Kenya. Article 1 of the Constitution declares that all sovereign power repose in the people of Kenya, exercisable by the people directly or through their democratically elected representatives. The sovereign power may also

¹²⁵ (2004) KLR 261.

be delegated to 1) Parliament at both levels; 2) executive at both levels; 3) the judiciary and 4) independent tribunals.

Article 2(1) of the Constitution proclaims that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government. The interpretation of this supreme law to which all persons and state organs must bow is a function of the judiciary. This means that it is the judiciary's role to uphold this supremacy by ensuring that no person and no organ of government operates outside of the Constitution. This in effect renders the actions of those persons and organs subject to the judiciary's scrutiny. This provides the cornerstone for judicialization of politics in post- 2010 Kenya.

In a further declaration of supremacy, Article 2(4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This Article extends the interpretive powers of the judiciary to cover the determination of the constitutionality of legislation, customary laws as well as actions of state actors and all persons.

In playing its role under the above Articles, the judiciary acts as a check on executive and legislative power. This is an important role because it is known in democratic theory that power corrupts, and hence the need for a separation of the organs vested with governmental power in order that each organ may balance and check the powers of the other organs. In the Kenyan context, the danger of absolute power was demonstrated by the imperial presidency of the 60s all through to the late 90s.

The above Articles are of significance to the subject of judicialization of politics because they can be invoked to justify the judiciary's scrutiny over the acts of any person and any organ of government with the objective of establishing the constitutionality or otherwise of such acts. The court may be called upon to do so by way of a constitutional petition or by the invocation of the

court's power of judicial review. Where the court is of the opinion that an act or a law is unconstitutional, it has the power to invalidate that act or law. Although constitutional, such invalidation may have a profound impact on policy formulation and often, opponents of the judicialization of politics view it as an infringement on parliament's legislative mandate.

Constitutional supremacy was invoked in the case of *Council of County Governors -Vs- Senate & 3 others*.¹²⁶ The Petition challenged the constitutionality of the County Government (Amendment) Act 2014 which introduced Section 91A to the County Government Act 2012. Section 91A established for each County a County Development Board. The Boards were meant to: 1) provide a forum for consultation and coordination between the national government and the county government on matters of development and projects; 2) consider and give input on any county development plans and county annual budgets before they were tabled in the County Assembly for consideration and approval; and 3) advise on any other issues of concern that arose within the County. The Council of Governors challenged the establishment of the Boards on the grounds that Article 179(1) of the Constitution vested the executive authority of the County in the Executive Committee and thus it was unconstitutional for the County Government (Amendment) Act 2014 to purport to vest executive powers in County Development Boards. Among the matters the court was invited to determine was whether the proclamation of Senators as Chairpersons of the said Boards undermined the executive powers and function of the County Executive Committees chaired by Governors in terms of identifying and implementing development programmes, projects and budgets with approval by County Assemblies. The High Court nullified the County Government (Amendment) Act 2014 on the ground that the presence of members of the Senate and the National Assembly in the County Development Boards

¹²⁶Petition No. 381 of 2014 Consolidated With Petition No. 430 Of 2014 Formely Bungoma Petition No 11 Of 2014 [2014] eKLR

violated the spirit of devolution and separation of powers espoused in the Constitution of Kenya 2010.

3.1.2 An Expanded Scope of Justiciability

The doctrine of justiciability holds that judicial power is to be exercised only in respect of justiciable matters. Prevailing jurisprudence in Kenya generally considers a matter to be justiciable when the following elements are met : i) the matter is of a legal nature in that it affects a person's recognized individual or public legal rights or relations; ii) the alleged violation or threat of violation injuriously affects that person either individually or as a part of the public; iii) a judicial remedy is available to redress the violation; and iv) it falls within the framework of justiciability under the Constitution of Kenya 2010.¹²⁷

Article 50 of the Constitution of Kenya 2010 provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This may be interpreted to mean that the only determinant of justiciability is whether or not the material dispute is one that "can be resolved by the application of law." This gives a boundless definition of justiciability, leaving it to courts and tribunals to define these bounds by deciding where they can or cannot apply the law. Such a broad definition of justiciability has the potential to widen its scope to an unprecedented level. In search of specificity, a look at the original jurisdiction of the High Court may be of assistance.

Article 165 of the Constitution of Kenya 2010 provides that the High Court shall have 1) unlimited original jurisdiction in criminal and civil matters; 2) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated,

¹²⁷ Migai Aketch 'Ethics of the Rule of Law: Impunity, public perceptions of Justice and Governance in Kenya in *Governance, Institutions and the Human Condition* (2009) at 68

infringed or threatened; 3) jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144; 4) jurisdiction to hear any question respecting the interpretation of the Constitution; 5) a question relating to conflict of laws under Article 191; and 6) any other jurisdiction, original or appellate, conferred on it by legislation.

This paper contends that read together, these matters amount to a wide definition of justiciability because a claim of whatever proportions may be packaged to fit under either of the categories of justiciable matters falling under the jurisdiction of the High Court. In the unlikely event that an action does not fit under either of these, a court has the power to render it justiciable under Article 50 by deciding that it is a matter to which the law can be applied.

3.1.3 Advisory Jurisdiction of the Supreme Court

Article 163(6) of the Constitution of Kenya 2010 provides that the Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government. Supreme Court Judge J.B. Ojwang explains that this provision was necessitated by the complications attendant to the devolution process espoused in the Constitution.¹²⁸ It was also informed by Kenya's history, seeing as the first attempt at devolution right after independence had failed.¹²⁹ This made it imperative that for the devolved governance system, any disputes that arose would be redressable not only by the ordinary judicial mechanism, but, in addition, by the advisory opinions of the apex court.¹³⁰ To date, the Supreme Court has given several advisory opinions and it is apparent that the questions on which its opinion is sought are of a politically delicate nature.

¹²⁸ J.B. Ojwang, 'Supreme Court Of Kenya: Insider's Perspective on the Emerging Groundwork' available <http://kenyalaw.org/kl/index.php?id=4158> accessed 13 July 2015 at 24,25.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

For instance, in *Advisory Opinion Reference No. 2 of 2013*,¹³¹ the Supreme Court addressed the question of whether the Division of Revenue Bill was a bill which concerned the county government in the context of Article 110 of the Constitution of Kenya 2010. If it was, then its passage would require that it be debated and considered by both houses of Parliament. The matter had arisen from the failure by the Speaker of the National Assembly to refer the Bill to the Speaker of the Senate for consideration by the Senate. The court in finding for the applicants said that:

It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the equitable sharing of revenue – which will certainly affect the functioning of county government. We have found no justification in the contention that the Division of Revenue Bill deals strictly with “national economic policy and planning” and so, on this account, it is a measure unrelated to county government. The Bill deals with equitable allocation of funds to the counties, and so any improper design in its scheme will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.¹³²

The legal status of advisory opinions was explained by the Supreme Court in *In the Matter of the Interim Independent Electoral Commission*.¹³³

While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgements, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an ‘idle provision’...

Advisory opinion matters come with an unlimited scope for interpretation of the terms of the Constitution and for the reconstruction of, and reflection upon legal principle.¹³⁴ As such, they

¹³¹ *Advisory Opinion Reference No. 2 of 2013 between the Speaker of the Senate and the Attorney General & Another*.

¹³² *ibid.* at para 114

¹³³ Constitutional Application 2 of 2011.

provide opportunities for charting novel lines of jurisprudence.¹³⁵ In *Advisory Opinion Number 2 of 2012*,¹³⁶ the Attorney General sought the court's opinion as to whether Article 81(b)¹³⁷ as read with Article 27(4),¹³⁸ 27(6),¹³⁹ 27(8), 96, 97, 98 and Article 177(1) (b) of the Constitution required progressive realization of the enactment of the one third gender rule or required that the same be implemented during the general elections scheduled for 4th March 2013. From the submissions before the court, two distinct approaches emerged, one side argued for progressive realization while the other argued for immediate realization of the rule. The majority opinion favoured progressive realization and it was expressed as follows:

the word 'shall' used in Article 81(b) of the Constitution would translate to an immediate command only where the task in question is a cut-and dried one, executed as it is without further moulding or preparation, and where the action is disposable by action emanating from a single agency. But this word 'shall' may be used in a different context, to imply the broad obligation which is more institutionally spread out, and which calls for a chain of actions involving a plurality of agencies; when used in this sense, it calls not for immediate action, but for the faithful and responsible discharge of a public obligation.

3.1.4 Bill of Rights

It has been argued that the main vehicle by which judicial activism has been brought about is the language of rights.¹⁴⁰ Ran Hirschl observes that the existence of a constitutional catalogue of rights and judicial review mechanisms not only provides the necessary institutional framework for courts to become more vigilant in their efforts to protect the fundamental rights and liberties

¹³⁴ Ojwang J.B (n 125).

¹³⁵ *ibid.*

¹³⁶ The Matter of the Principle of Gender Representation in the National Assembly and the Senate

¹³⁷ Not more than two-thirds of the members of elective public bodies shall be of the same gender;

¹³⁸ The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

¹³⁹ To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

¹⁴⁰ James Grant (n95) at page 2

of the citizenry; it also enables them to expand their jurisdiction to address complex moral dilemmas and political controversies of crucial significance to a nation.¹⁴¹

The Constitution of Kenya 2010 provides an elaborate Bill of Rights in Chapter Four. It provides for the application, the implementation as well as the enforcement of those rights. Under Article 23, the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The Bill of Rights has contributed to increased judicialization of politics in several ways.

First, it provides additional and alternative grounds upon which people can bring matters to court. Kenya's Bill of Rights is a broad one with rights and freedoms that touch on almost every aspect of a person's existence. This makes it possible to package any grievance and bring it within the purview of the Bill of Rights. By introducing rights that were not provided for in the previous constitutional dispensation, the Constitution has in effect made previously non-actionable claims actionable. Such rights include socio-economic rights, political rights, consumer rights and environmental rights. Rights apply as alternative grounds where a person decides to bring their action as a violation of their rights even if such an action would be supported by other laws outside the Bill of Rights.

Bringing an action under the Bill of Rights is always a viable option because the institution of claims under it is relatively easy. Article 22(3) provides that the Chief Justice shall make rules providing for court proceedings with regard to rights provided for in the Bill of Rights, which shall satisfy the criteria that 1) the rights of standing provided for in Article 22(2) are fully facilitated; 2) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary,

¹⁴¹Hirschl (n103) at page 129

entertain proceedings on the basis of informal documentation; 3) no fee may be charged for commencing the proceedings; 4) that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and 5) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court. Moreover, Article 20(3)(b) provides that in applying a provision in the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

This explains why, for example, a person aggrieved by a decision of the IEBC in a nomination dispute may opt to go to the High Court under a constitutional petition alleging a breach of their political rights and not under judicial review.¹⁴²

Second, the Bill of Rights has made the courts more accessible to citizens. Article 48 expressly provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Eliminating the financial burden that court cases impose facilitates access to courts. Being under the Bill of Rights, this right is enforceable against the state under Article 22 of the Constitution where a petitioner may argue that his or her right of access to justice has been violated or is threatened.

Further, the Bill of rights has increased access by allowing representative actions. Article 22(2) provides that in addition to a person acting in their own interest, court proceedings for the enforcement of a right under the Bill of Rights may be instituted by 1) a person acting on behalf of another person who cannot act in their own name; 2) a person acting as a member of, or in the interest of, a group or class of persons; 3) a person acting in the public interest; or 4) an

¹⁴² In the case of *Wachira Martin Ngiri & 3 others -Vs- IEBC & 5 Others*, Petition no. 2 of 2013, (2013) eKLR, the petitioners alleged violation and contravention of fundamental rights and freedoms under Articles 20, 22, 23, 24, and 38 of the Constitution. They prayed that the court substitute their names for those that appeared in the list of TNA nominees to the Embu County Assembly. The court declined to take up jurisdiction over the matter arguing that the decision of the IEBC tribunal still stood as it had not been challenged and that it would be unpleasant if the two conflicting decisions were made on the same matter by constitutionally constituted bodies.

association acting in the interest of one or more of its members. In effect, this Article removes the hitherto restrictive requirement for *locus standi* for an action under the Bill of Rights.

The import of this provision is clear when looked at in the light of *Maathai -Vs- Kenya Times Media Trust*,¹⁴³ which was brought at a time when there was no provision for environmental rights and when the requirement for *locus standi* was strict. In this case, Prof. Wangari Maathai took the Kenya Times Media Trust Ltd to court in order to prevent the latter from constructing a high rise building in Uhuru Park. She alleged breach of Local Government Laws. Her suit was struck out on the grounds that it disclosed no cause of action and that she had no *locus standi* in the matter because only the Attorney General could bring a suit on behalf of the public. If this matter were to be brought today, it would fit properly under environmental rights. For purposes of enforcement, Wangari Maathai would have had capacity under Article 22(2) as acting in the interest of the public.

Apart from the above, Article 47 of the Constitution provides for fair administrative action. Article 47(3) obligates Parliament to come up with legislation giving effect to the right to fair administrative action and such legislation shall provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal. This Article allows the Judiciary to exercise oversight powers over administrative and executive actions by the exercise of judicial review or a constitutional petition where appropriate. Although this is generally viewed as an attempt to entrench the culture of fair administrative action in decision making, this Article also vests in the courts the power to influence public policy by making determinations that require the executive to act in a particular way. Such an eventuality is illustrated by the case of *Randu Nzai Ruwa & 2 Others -Vs- Internal Security Minister & Another*.¹⁴⁴ The petitioners sought a declaration that a gazette notice published by the Minister for Internal Security proscribing the

¹⁴³ Civil Case 5403 of 1989(1989) eKLR.

¹⁴⁴ Misc. Application 468 of 2010 [2012] eKLR.

Mombasa Republican Council (MRC) was unconstitutional. The petitioners argued that the proscription contravened their rights to the freedom of association, the freedom of assembly and peaceful demonstration, and fair administrative action based on the fact that the proscription was an administrative act. The Respondents argued that in proscribing the organisation, the Minister had acted on the advice of the Commissioner of Police and intelligence reports that the MRC had been involved in the post-election violence and that it trained militia and conducted oath-taking. Ultimately, the court declared that the proscription was unconstitutional because the allegation that MRC engaged in criminal activity was not sufficiently proved. These case raised questions as to who in the scheme of government was responsible for the security of citizens, and could the rights of an individual outweigh the need to ensure the security of the wider majority?

The enforcement of the Bill of Rights through the court room has sometimes inspired a shift in policy. While some changes are welcomed as a positive contribution to policy, others face open hostility. It should be remembered, however, that whether positive or negative, a decision impacting on policy amounts to judicialization of politics. An example of a decision that is generally considered to have impacted positively on policy was the decision in the case of *Organisation for National Empowerment -Vs- Principal Registrar of Births and Deaths & 2 Others*.¹⁴⁵ This matter concerned the government's practice of not granting adopted children birth certificates. The petitioners argued that every child has the right to a name and nationality from birth and a child's best interests are of paramount importance in every matter concerning the child. As such, denial of a birth certificate to adopted children had no meaning at all and any legislation that attempted to do so contravened Article 27 of the Constitution. The Court held that whereas adopted children must indeed be registered in the adoption register, there was absolutely no reason why a certificate of birth could not be issued to them. The Registrar of Births and

¹⁴⁵ Petition No. 289 of 2012.

Deaths was therefore ordered to issue all adopted children appearing in the Register for Adopted Children with birth certificates.

The decision in *Eric Gitari -Vs- Non- Governmental Organisations Co-ordination Board & 4 Others*¹⁴⁶ provoked intense debate as to the role of the Courts in moral disputes. In this case, the petitioner sought to register a non-governmental organisation for the advancement of human rights with the 1st respondent. The proposed NGO would seek to address the violence and human rights abuses suffered by gay and lesbian people.¹⁴⁷ He argued that in seeking to register the NGO, he was exercising his constitutional right to freedom of association as enshrined in Article 36 of the Constitution of Kenya 2010. The High Court held that Article 36 grants “every person” the right to form an association “of any kind.” The court further held that the acts of the Board in rejecting the petitioner’s names for the proposed NGO and its refusal to register the proposed NGO was a limitation of the Petitioner’s right to freedom of association which the Board was not able to justify in accordance with the requirements of the Constitution.¹⁴⁸ The judgement in this case is widely considered as having declared homosexuality legal by implication.

3.1.5 Enhanced Judicial Independence

Yash Vyas contends that traditionally, judicial independence means that the judicial arm of government and individual judges are left free to operate without any undue pressure or interference from either the legislature or the executive.¹⁴⁹ This independence also includes independence from political influence, whether exerted by the political organs of the government or by the public or brought in by the judges themselves through their involvement in

¹⁴⁶Petition number 440 of 2013 [2015] eKLR.

¹⁴⁷ibid at para.1.

¹⁴⁸ibid. at para 125.

¹⁴⁹Yash Vyas, (n66) at Page 12.

inappropriate conduct. Vyas quotes Sir Kenneth Ray as having said the following concerning judicial independence:

To the question how the independence of the judiciary is preserved, I suggest a fourfold answer: First, by appropriate machinery for appointment of judges; secondly, by giving judges security of tenure of office; thirdly, by such general acceptance of, and respect for, judicial independence that the members of the judiciary can rest assured that it is not likely to be challenged and has not continually to be fought for; fourthly, by the terms of service of members of the judiciary.

Article 160 of the Constitution of Kenya 2010 provides for judicial independence in the following terms.¹⁵⁰

In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority...The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office...The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund... Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge...A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

When read in light of Sir Kenneth Ray's statement, it is apparent that the Constitution of Kenya 2010 designs and constructs a politically, administratively, juridically empowered and independent judiciary.¹⁵¹ Judicial independence is reinforced to guard against the influence and manipulation of other organs of government, especially the executive.¹⁵² Prof. Ben Sihanya

¹⁵⁰It will be remembered that institutional independence is a prerequisite to judicialization.

¹⁵¹ Ben Sihanya, 'The Role of the Judiciary in the Accountability and Governance of the Devolved Government Structure' Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20th Economic Symposium at the Hilton Hotel, Nairobi, February 24, 2012 at Page 2.

¹⁵² *ibid.*

argues that the Judiciary in its new state will be instrumental in adjudicating the constitutionality and legality of executive, parliamentary and even judicial processes and the exercise of power.¹⁵³

Ran Hirschl notes that judicial independence is a prerequisite to judicialization of politics. The reasons for this is twofold, one is that an independent judiciary inspires confidence in the public. The public is therefore willing to bring political and public policy disputes to court because it has demonstrated the institutional capacity to determine such disputes. Second, the judiciary is able to determine such disputes competently without fear of victimization. The fact that the judiciary has the confidence of the public also ensures that judicial decisions are more readily complied with.

3.1.6 Judicial Jurisdiction over Electoral Disputes

Elections are a cornerstone of democracy because they legitimize a regime. The importance of an election lies in its nature as an avenue that allows the public to participate in the election of its leaders. Ideally, an election is a zero-sum game where one either loses or wins. However, the recent trend in Kenya and the world over is that sometimes elections do not produce a clear winner and it falls to the courts to decide who won the particular election through the determination of an election petition. In a sense, this vitiates the ideal of public participation because the outcome of an election is supposed to be a function of the public vote and not the decision of a judge in a courtroom, however independent he may be. The Constitution of Kenya 2010 provides the framework for resolution of election petitions. The court that hears and determines an election petition is determined by the elective post from which the petition arises. The Constitution at Article 163(3)(a) grants exclusive original jurisdiction to hear and determine disputes relating to

¹⁵³ Ben Sihanya ‘ Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects’ (2012) FES Kenya Occasional Paper No.5

the elections to the office of president arising under Article 140 to the Supreme Court. The Supreme Court's determination of the matter is final.¹⁵⁴

According to Article 105(1) of the Constitution of Kenya 2010, The High Court shall hear and determine any question concerning whether a person has been validly elected as a Member of Parliament or whether the seat of such a Member has become vacant. Article 163(3) of the same Constitution provides that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President. Section 75(1) of the Elections Act which was enacted pursuant to Article 105 (3) of the Constitution then provides that a question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county. Section 75 (1A) further provides that a question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

Election petitions are mechanisms through which election battles are fought in the courts and they sometimes result in contestations over the loyalty and integrity of the courts themselves.¹⁵⁵ They therefore not only undermine the role of public participation, they also have the capacity to undermine the sanctity of judicial integrity. Indeed if electoral disputes are perceived not to have been determined fairly, this can have a negative impact on the integrity of the judiciary and could cost the judiciary its public confidence.

¹⁵⁴ In Presidential petition No.5 of 2013, the Supreme Court referred itself to its own advisory opinion with regard to this matter. In Opinion No. 2 of 2012, *In the Matter of an Application for Advisory Opinion under Article 163(6) of the Constitution of Kenya*, it said that no Court other than the Supreme Court has the jurisdiction to hear and determine disputes relating to an election for the office of President. In this case, it went further to explain that this jurisdiction, however, is not boundless in scope: it is circumscribed in *extent* and in *time*. Limited in *extent*, in that it relates only to an inquiry into the legal, factual and evidentiary questions relevant to the determination of the validity or invalidity of a Presidential election.

¹⁵⁵ Siri Gloppen 'Elections in Court: the Judiciary and Uganda's 2006 Presidential and Parliamentary elections' (2006) at page 10.

3.1.7 National Values and Principles of Governance

Ronald Dworkin argued that when reaching a judgement, judges are not guided by legal rules alone. They are equally guided by societal principles and standards. While legal rules apply in an all or nothing fashion, principles only incline a decision one way or another, but not conclusively.¹⁵⁶ Of most significance to the present work is that a judge is entitled to invoke a principle to “justify a political decision by showing that the decision respects or secures some individual or group right.”¹⁵⁷ The Constitution of Kenya 2010 provides for national values and principles in Article 10. These principles are to bind every state officer, state organ and any other person in the interpretation and application of the Constitution.

The values and principles are patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency, accountability and sustainable development.

These principles are an embodiment of Kenya’s vision as to the kind of society it aspires to become, not only in the legal sector but in its entire fabric. They are not judicial principles, rather, they are social values and standards that courts are expected to apply as they interpret the Constitution. In a way, they are likely to carry judicial opinions further away from legal bounds and bring them into the social sphere of society. This is because, by virtue of these principles, the judiciary has a role to play in shaping Kenya’s social and political transformation through progressive interpretation and application of the Constitution. For it to do so effectively, the

¹⁵⁶ Adrienne E van Blerk *Jurisprudence: An Introduction* (Lexis Nexis Butterworths, 1996) at page 86.

¹⁵⁷ This point is well illustrated in the case of *Republic -Vs- Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* Judicial Review number 147 of 2013 [2014] eKLR. The High Court before issuing an order of mandamus to compel KNEC to change the applicant’s particulars held that “in Article 10 of our Constitution, human dignity is one of the national values and principles of governance which must be applied in interpreting the Constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions.”

courts must be ready to move from behind the judicial mask and engage actively in the social and political discourse, and this is the essence of judicialization of politics.

In the same breadth, the provisions of Chapter Six on leadership and integrity give the judiciary an especially significant role in scrutinizing the character and conduct of state officers. It is inevitable that in enforcing the provisions of Chapter Six, the court will find itself immersed in political debate, especially when it has to determine whether a person already appointed by the Presidency and cleared by the Legislature is suitable to hold office. A finding that the person is unsuitable will significantly undermine executive action. In turn, this kind of pronouncements may transform the judiciary into a ground for political witch hunt where political opponents seek to undermine each other by invoking Chapter Six against each other.

The case of *Trusted Society of Human Rights Alliance -Vs- Attorney General & 2 others*¹⁵⁸ illustrates that the principles of leadership and integrity can justify the setting aside of a constitutional appointment. The case concerned the appointment of Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission. The petitioners alleged that although the appointment complied with the constitutional formalities, the appointee did not qualify for the position because his conduct fell short of the integrity and suitability test set out in Article 73(2) of the Constitution. This allegation arose from some actions of the appointee when he was a Legal Officer at the Agricultural Finance Corporation which were yet to be resolved.

The High Court held that the appointee had failed the integrity test as well as the suitability test on the ground that there were serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment and his commitment to the national values enumerated in the Constitution. His appointment was therefore set aside. The Court of Appeal however set aside the High Court's decision on the grounds, *inter alia*, that the

¹⁵⁸ [2012] eKLR.

High Court misapplied the rationality test in adopting a standard of review antithetic to separation of powers and further that while the petition before the High Court had referred to Articles 1, 2 4, 10, 19, 20 and 73 of the Constitution, it provided little or no particulars as to the allegations and manner of the alleged infringements and hence did not meet the requirement that constitutional petitions be pleaded with reasonable precision.¹⁵⁹

3.2 Conclusion

The foregoing is an examination of the constitutional framework for judicialization of politics in post-2010 Kenya. It provides a clear picture that the root of increased judicialization of politics in Kenya is the Constitution of Kenya 2010 because it has not only broadened the scope of justiciability; it has also redesigned and reconstructed the judiciary and created an enabling environment where people are free to bring any matter to court and where the courts are independent and therefore ready to determine disputes presented before them. It may also be concluded that the Constitution of Kenya 2010 is an embodiment of new constitutionalism as explained at the beginning of this Chapter.

The next Chapter will be an examination of how the Judiciary, in its role as the interpreter and guardian of the Constitution, has responded to judicialization of politics by the Constitution of Kenya 2010.

¹⁵⁹ *Mumo Matemu-Vs- Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal no. 290 of 2012.

**CHAPTER 4: DEFINITION OF THE POLITICAL QUESTION DOCTRINE AND
THE CONCEPT OF JUSTICIABILITY BY KENYA'S POST-2010
JUDICIARY**

4.0 Introduction

There has been a marked increase in the judicialized litigation in Kenya since the promulgation of the Constitution of Kenya, 2010. As established in Chapter Two, the major force behind the increased level of judicialization of politics is the framework within the Constitution of Kenya 2010. It is generally agreed that a Constitution or any law for that matter is not self-actualizing. The Constitution's role in judicialization of politics is brought to life by the judiciary when it sits to interpret and to apply the provisions of the Constitution during adjudication. This makes the judiciary a key player in the judicialization of politics to the effect that it may be correctly stated that while the Constitution of Kenya 2010 lays down the legal framework for the judicialization of politics, the Judiciary is the institutional mechanism through which the judicialization of politics is achieved.

This Chapter will establish the role that the judiciary has played in judicialization of politics by analysing various cases whose determination has had significant impact on policy formulation, politics, legislative action, morality and electoral dynamics in Kenya. The areas of public policy, moral, political and election dispute resolution are especially important to the subject of judicialization of politics because it will be seen that court action in any of these areas is often the substance of the judicialization of politics. Whether such action results in judicialization of politics is only a question of degree.

The analysis of the judiciary's role in the judicialization of politics is done within the framework of the political question doctrine and the concept of justiciability. Both of these phenomena are imperatives of judicial interpretation. They seek to ensure that the judiciary remains within its

constitutionally defined bounds. The two phenomena are not constitutionally provided for, rather, they are a judicial creation meant to steer the course of the judiciary. It is also true that although both the political question doctrine and the concept of justiciability serve the purpose of guiding judicial jurisdiction, they occur in inverse proportion in that when the scope of justiciability expands, the political question doctrine declines and vice versa

4.1 The Political Question Doctrine

The political question doctrine suggests that courts should abstain from resolving questions that are better left to other arms of government, mainly the legislature and the executive branches.¹⁶⁰

It has its roots in *Marbury -Vs- Madison*,¹⁶¹ but its most authoritative enunciation since

Marbury was in *Baker -Vs- Carr*¹⁶² where it was defined as follows;¹⁶³

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

Scholars have expressed the view that the political question doctrine is in decline because it is clearly at odds with the notion of judicial supremacy adopted by courts in recent years.¹⁶⁴

The political question doctrine is not imposed upon the courts. Courts reach up to it to justify their refusal to take up jurisdiction in certain matters. Jesse Chopper defines the political question as a substantive ruling by a court that a constitutional issue regarding the scope of a

¹⁶⁰ Jesse Chopper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 Duke Law Journal at page 1458.

¹⁶¹ (1803) 5 US 137.

¹⁶² (1962) 369 US 186.

¹⁶³ Chopper(n153) at page 1458, 1459

¹⁶⁴ *ibid.*

particular provision or some aspects of it should be authoritatively resolved not by the Supreme Court but rather by either the legislature or the executive or both.¹⁶⁵

For Professors Wechsler and Henkin, the application of the political question doctrine is no different from any other constitutional decision, because the decision to defer to the political branches is itself an interpretation of the constitutional commands.¹⁶⁶ Professor Bickel not only believed that the doctrine exists but that it should be used readily when the court faces issues that are too monumental or beyond the court's capacity.¹⁶⁷

4.2 Justiciability

The concept of justiciability limits the reach of the judiciary by defining where a judiciary cannot go. It is a function of judicial interpretation because it is the judiciary's interpretation of law that determines whether or not it has jurisdiction in a certain matter. McCormack contends that justiciability imposes the narrow requirement that courts handle only judicial proceedings.¹⁶⁸ He further argues that to say a case is non-justiciable is to say that the plaintiff has no judicially enforceable right.¹⁶⁹ To say that the plaintiff has no judicial right is to make a conclusive statement about the nature of the law on which the plaintiff is relying; it is necessarily an exercise in interpretation and application of that law to say that the law applied by the court does not protect the plaintiff.¹⁷⁰

Justiciability imposes constraints on judicial jurisdiction. These constraints include the principles that courts will act only on a matter involving adverse parties, courts will not act unless their decision is final and not revisable by another branch of government, courts will reject a feigned or collusive case, courts will decide only the issues actually presented by the matter before them,

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ Wayne McCormack, *The Justiciability Myth and the Concept of Law*, (1987) 14 *Hastings Constitutional Law Quarterly* at 594.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

courts will not consider political questions, courts will not act until a matter is ripe for decision, and courts will not act on a matter brought to them by a plaintiff who lacks standing to bring it.¹⁷¹

A proper definition of justiciability is key to stable governance because separation of powers concerns arise when it is not evident which branch of the government has the authority to act on a particular matter.¹⁷² The concept of justiciability also limits the possibility of usurpation, unnecessary judicial review powers and conflicts with political branches. Often times, a dispute is non-justiciable because another branch of the government has the authority to resolve the matter.¹⁷³ Justiciability also relates to prudent judicial administration. A matter may be justiciable but the court may feel that due to certain policy concerns, it should not assume jurisdiction.¹⁷⁴

Kenya's Post-2010 Judiciary has responded robustly to the expanded scope of justiciability in the Constitution of Kenya 2010. Case law illustrates that the Judiciary has in most cases embraced its constitutionally grounded jurisdiction even when such jurisdiction extends to matters of policy, moral questions and electoral politics. In fewer cases, the courts have, although not in as many words, invoked the political question doctrine. The role of Kenya's judiciary in the judicialization of politics is especially enhanced by its jurisdiction over certain categories of matters which are considered below.

4.3 Election Petitions and Impeachment Proceedings

Election petitions and impeachment proceedings are an avenue through which a court of law can determine a representative of the people while ideally, that representative should be popularly elected. This amounts to the judicialization of politics because it involves the judiciary stepping

¹⁷¹ Jonathan R. Siegel, 'A Theory of Justiciability' (2007) 86 Texas Law Review at 73.

¹⁷² Justiciability Doctrines available at <http://faculty.ils.edu/manheim/cl1/echarts/justice.html> accessed 14 September 2015 at page 1.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

into the shoes of the electorate and transforming an election from a public affair to a judicial affair. Even so, it will be observed that it is the constitution that donates the jurisdiction over election petitions to the courts. It follows that if the courts were to decline jurisdiction over a petition or a certain aspect of it, it would be for prudential reasons.

The aftermath of the 2013 general election saw the Supreme Court of Kenya address itself to the question of the validity of the presidential election in *Raila Odinga -Vs- the IEBC and 3 others*.¹⁷⁵ In the matter, the petitioner contended that the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful;¹⁷⁶ that the electoral body failed to carry out a transparent, verifiable, accurate and accountable election as required by Articles 81, 83 and 88 of the Constitution of Kenya 2010¹⁷⁷ and that the electronic systems acquired and adopted by the electoral body to facilitate the General Election were poorly designed and implemented; and destined to fail. It was further contended that due to the failure of the system, the electoral body was unable to transmit the results of the elections, in contravention of Regulation 82 of the Elections (General) Regulations, 2012.

Being the first presidential election petition under the Constitution of Kenya 2010, the court dealt with a number of matters ranging from jurisdiction to burden and standard of proof.¹⁷⁸ Noting that it had original and exclusive jurisdiction, it held that that jurisdiction is not boundless in scope: it is circumscribed in extent and in time. Limited in extent in that it relates only to an inquiry into the legal, factual and evidentiary questions relevant to the determination of the validity or invalidity of a presidential election.¹⁷⁹ The prescribed timeline is 14 days. The provision for a time frame was construed strictly with the court holding that the rigid time-frame

¹⁷⁵ Election petition no. 5 of 2013.

¹⁷⁶ *ibid.* at 5.

¹⁷⁷ *ibid.* at para 17.

¹⁷⁸ Standard held to be higher than a balance of probability but not beyond proof of reasonable doubt.

¹⁷⁹ *ibid.* at para 206.

for the resolution of presidential-election disputes was not conceived in vain at the time of the constitution making process. This interpretation was given in an effort to explain why the Supreme Court had rejected further affidavits filed by the petitioners. This rejection of additional affidavits elicited mixed reaction from the public, a section of which perceived such rejection as an ill-conceived attempt to weaken the petitioner's case.

The Supreme Court in its final holding observed that although the election could not be said to have been perfect it could not be invalidated. In the words of the Court:

It does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.

Counsel for one of the Respondents in the petition did raise the issue of the political question doctrine but under the head of judicial restraint. He contended that:

what is before the court is a political contest; for all politicians, their business is to offer themselves for elections; that of IEBC is to conduct elections; that of the people is to decide. Counsel submitted that in an electoral contest such as the instant one, the Court should have a very limited role.

The Court decided that in such a case, its guiding principle would be fidelity to the terms of the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution.

The decision of the Supreme Court in the Presidential Petition and more so its strict interpretation of the 14 day timeline has been criticized severely in some academic circles. Godfrey Musila describes this interpretation as rather conservative.¹⁸⁰ He explains that at the beginning of the process, the Supreme Court ordered a scrutiny of all Forms 34 and Forms 36

¹⁸⁰ Godfrey Musila (ed) *Handbook on Election Disputes in Kenya Context, Legal Framework, Institutions and Jurisprudence*, (Law Society of Kenya 2013) at Page 11.

which were used in the country's 33,400 polling stations on its own motion.¹⁸¹ This was so as to better understand the details of the electoral process and to gain impressions on the integrity of the process.¹⁸²

He proceeds to argue that allowing objections as to late filing of further evidence that was in any case reportedly already part of material ordered to be scrutinized by agents of the parties under supervision, excluding evidence that could have impacted the outcome if it were considered and by apparently failing eventually to reflect the scrutiny report in its final decision, the Supreme Court reverted to a conservative, formalistic and non-consequentialist approach of the past thus failing to respond to the call of the new constitution that set out to transform the electoral system, laws and procedures relating to handling of petitions and evidence.¹⁸³ He concludes by saying that the Supreme Court's claim of lack of time and the suggestion that allowing evidence would occasion injustice to and would be unfair to respondents was unconvincing.¹⁸⁴

Newspaper reports following the March 2013 ruling also indicated that jurists and legal scholars in the East African Region had dismissed the ruling as one with a lot of flaws and one that should not be emulated in were similar cases to come up.¹⁸⁵

The Court in the matter of *Martin Nyagah Wambora & 4 Others -Vs-Speaker of the Senate & 6 Others*,¹⁸⁶ interrogated the questions of justiciability and separation of powers, both of which are relevant to judicialization of politics. The petitioner in this dispute had been impeached from the office of County Governor of Embu County pursuant to Article 181 of the Constitution of Kenya 2010. On 16th January, 2014 the County Assembly had without giving the 1st Petitioner an

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ Bernard Sanga, 'Jurists fault Supreme Court ruling on presidential petition' *Standard Digital News* Sept. 6 2013 also available on www.standardmedia.co.ke/article/2000092900/jurists-fault-supreme-court-ruling-on-presidential-petition.

¹⁸⁶ Petition Number 3 of 2014.

opportunity to be heard tabled a motion of impeaching the 1st Petitioner from office on the grounds that he had refused and/or neglected to act on its recommendations regarding the face lifting of the Embu Stadium and a tender issued for the supply of maize in the county. In the motion, it was alleged the aforesaid neglect and/or refusal amounted to a gross violation of the Constitution and also amounted to an abuse of office.

On 22nd January 2014, the Petitioner filed before the High Court in Embu, Petition No. 1 of 2014 together with an application dated 22nd January, 2014 under certificate of urgency seeking orders restraining the 5th and 6th Respondents from proceeding with any motion for his removal pending hearing of the Petition; and an order restraining the Respondents from holding any proceedings under Article 181 of the Constitution and Section 33 of the County Government Act, 2012 on removal from office of the 1st Petitioner and his Deputy. Conservatory orders were granted restraining the 1st, 2nd and 3rd Respondents from holding any impeachment proceedings without having first served the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed and without giving him an opportunity to be heard. Despite having been served and notified, the County Assembly of Embu in blatant and wilful disobedience of the orders of the Honourable Court convened the proceedings where the motion for the impeachment of the 1st Petitioner was debated and passed.

On 31st January, 2014, the 1st Respondent acting on the patently unlawful resolution, issued and/or caused to be issued a Gazette Notice Number 627 purporting to convene the Senate for purposes of hearing the complaints against the 1st Petitioner and appointing a special committee to investigate the conduct of the Petitioner. Despite having been served with the orders of the Court to the contrary, the 1st and 2nd Respondents unlawfully proceeded with

impeachment proceedings and unanimously purported to impeach the 1st Petitioner from his position as the Governor of Embu.

The Petitioner sought to challenge the constitutionality of the process leading to his removal, alleging among other grounds, that the impeachment proceedings in the County Assembly of Embu and in the Senate were in contravention of a court order and were therefore invalid and that the threshold required under Article 181 of the Constitution or the standard of proof under Section 33(3) of the County Government Act 2012 had not been met. He sought a declaration that the entire impeachment proceedings conducted by the 1st and 2nd respondents and consequential gazette notices, actions and any communication issued were in contravention of a valid court order and were therefore null and void.

Among other arguments, counsel for the respondents argued that the High Court lacked jurisdiction to interfere with the mandate of the senate in the impeachment process owing to the doctrine of separation of powers. In dealing with this matter, the court referred itself to the judgement of the Supreme Court in *Speaker of the National Assembly -Vs- Attorney General & 3 Others*¹⁸⁷ where it stated as follows:

Parliament must operate under the constitution which is the supreme law of the land. The English tradition of parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the constitution decrees a certain procedure to be followed in the enactment of legislation, both houses of parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning parliamentary procedures that are formulated by the houses to regulate their internal workings as long as the same do not breach the constitution. Where however, as in this case, one of the houses is alleging that the other has violated the

¹⁸⁷ (2013) eKLR.

constitution, and moves the court to make a determination by way of an advisory opinion, it would be remiss of the court to look the other way.

Based on the foregoing, the Court held that (the Judiciary) being the only arm of government vested with the power to interpret, safeguard and protect the Constitution, it has a duty to intervene in the duties of other arms of government where it is alleged that the Constitution has been violated or threatened with violation. As such, the doctrine of separation of powers did not inhibit the Court's jurisdiction to address the petitioner's grievances.

The Respondents also raised a question of justiciability, arguing that the petition was not justiciable because impeachment was a political question and the court could therefore not intervene. In settling this matter, the Court referred itself to the decision of the High Court in *Trusted Society of Human Rights -Vs- Attorney General & Anor*¹⁸⁸ where the Court stated with regard to justiciability that:

the justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand.

In defining the political question, the Court referred itself to the American case of *Nixon -Vs- The United States*¹⁸⁹ where Justice Stevens said the following:

the issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches...Rather, the issue is whether the constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.

The court held that the petitioner was not asking it to conduct his impeachment trial, which would have been a political question. The Petitioner was asking the court to determine whether

¹⁸⁸ (2012) eKLR.

¹⁸⁹ 506 US 224- Supreme Court,1993

his impeachment was tried by the county assembly and the senate by following the Constitution and the County Government Act. The Court also took cognizance of the fact that the 1st Petitioner had alleged a violation of his fundamental rights and freedoms as provided for in the Bill of Rights. The Court therefore held that it had jurisdiction to adjudicate the matter.

The Court concluded that the petitioner's removal from office was invalid because it had been done in contravention of a court order. The entire impeachment proceedings conducted by the 1st and 2nd respondents and consequential gazette notices, actions and any communication issued were held to have been null and void. On appeal,¹⁹⁰ the Court of Appeal agreed with the High Court decision that the County Assembly and the Senate were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution. The appellate court however held that the High Court Judges erred in law by failing to exercise the supervisory jurisdiction of the High Court under Article 165 (6) to determine the specific question whether the constitutional threshold for removal of the 1st appellant as Governor of Embu had been met.

The decisions of the High Court and the Court of Appeal in this case were commendable for a number of reasons. They established that disputes which are apparently political can be judicially resolved without delving into the political quagmire by applying an insightful constitutional interpretation. The Courts were able to do so in this matter by steering off the political aspect of impeachment. In doing so, they applied the appropriate measure of hesitance and caution that Kenyan courts should adopt when presented with political disputes. In as far as coping with judicialization of politics is concerned, these decisions were a positive step towards the development of sound jurisprudence on justiciability and political question doctrine within the framework of the Constitution of Kenya 2010.

¹⁹⁰ *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR Civil Appeal No.21 of 2014, (2014) eKLR.

Notwithstanding their robust exercise of jurisdiction in judicialized disputes, courts readily concede that it is the voters and not the courts that should determine people's representatives. In *Dickson Mwenda Kithinji -Vs- Gatirau Peter Munya & 2 others*,¹⁹¹ a petition was filed by a registered voter challenging the declaration of the first respondent as the elected governor for Meru County. He sought the immediate scrutiny and recount of the votes cast in some constituencies; a declaration to the effect that the 1st Respondent was not validly elected as the Governor of Meru County and a declaration to the effect that the election for the Governor of Meru County was a sham and, to that extent, void and/or invalid. The court held that the voters of Meru County elected the 1st respondent in an election that in the opinion of the court was free, fair and transparent and whose results reflected their will. The court could not interfere with the right of the voters to elect their representative in Meru County, unless it was established that the election was marred with irregularities to an extent that a tribunal reviewing the conduct of the said election was unable to reach a finding that the results reflected the will of the electorate.

4.3 Scrutiny of Parliamentary Action

The scrutiny of parliamentary action is a central function of the judiciary as one of the arms of government. Indeed, it is one of the hallmarks of the principle of separation of powers that the different organs operate as checks on each other. However, courts ought to strike a balance so that their scrutiny does not become a form of interference. In case of the latter, a court ought to invoke the political question doctrine. The case of *International Legal Consultancy Group -Vs- Senate & Clerk of the Senate*¹⁹² is illustrative.

In the matter, the Petitioner filed a Petition to challenge the decision of the Senate to summon the nine County Governors and County Executive Members responsible for finance to appear before it and produce various documents and respond to various issues with regard to county finance

¹⁹¹ Election petition no. 1 of 2013 at the High Court in Meru. [2013] eKLR.

¹⁹² Petition no.8 of 2014 (2014) eKLR.

and fiscal management within their counties. The Petitioner argued that the Senate's oversight role over nationally collected revenue is not identical to the County Assembly's role over the County Executive Committee which is the executive arm of the County Government. Consequently, the Senate could not scrutinize county expenditures in the same way the committees and general assemblies of the county legislatures could. The Petitioner averred that the Senate's power is limited to oversight over national agencies which manage national revenue allocated to counties such as the National Treasury. Among other remedies, the Petitioner sought a permanent injunction to restrain the Senate from summoning County Governors to appear before it to answer questions on public financial management.

The Court affirmed its right to intervene in the action of other arms of government where there exists a violation or a threatened violation of the Constitution. It rejected the argument by the Petitioner that the Senate's power was limited to oversight over national agencies which manage national revenue allocated to the counties such as the National Treasury. It held that holding otherwise would be against the spirit and letter of Article 96(3) of the Constitution which vests wide powers in the Senate to oversee both the provision and expenditure of the national revenue allocated to the Counties. The Court concluded that since the Senate was properly seized of the matters with regard to the issues raised by the Controller of Budget in the County Implementation Report, it had power to summon any person under Article 125 for purposes of giving evidence or providing information concerning the issues raised in that Report.

In the case of *Council of County Governors -Vs- Senate & 3 others*,¹⁹³ the Petitioner challenged the constitutionality of the County Government (Amendment) Act 2014 which introduced Section 91A to the County Government Act 2012. Section 91A establishing in each County a County Development Board. The Boards were meant to: 1) provide a forum for consultation and

¹⁹³Petition No. 381 of 2014 Consolidated With Petition No. 430 Of 2014 Formely Bungoma Petition No 11 Of 2014 [2014] eKLR.

coordination between the national government and the county government on matters of development and projects; 2) consider and give input on any county development plans and county annual budgets before they were tabled in the County Assembly for consideration and approval; and 3) advise on any other issues of concern that arose within the County. The Council of Governors challenged the establishment of the Boards on the grounds that Article 179(1) of the Constitution vested the executive authority of the County in the Executive Committee and thus it was unconstitutional for the County Government (Amendment) Act 2014 to purport to vest executive powers in County Development Boards.

Among the matters the court was invited to determine was whether the enactment of the position of Senators as Chairpersons of the said Boards undermined the executive powers and functions of the County Executive Committees chaired by Governors in terms of identifying and implementing development programmes, projects and budgets with approval by County Assemblies. The High Court nullified the County Government (Amendment) Act 2014 on the ground that the presence of members of the Senate and the National Assembly in the County Development Boards violated the spirit of devolution and separation of powers.

In the case of *Robert N. Gakuru & Others -Vs- Governor Kiambu County & 3 others*,¹⁹⁴ the petitioners alleged that the Kiambu Finance Act, 2013 was unconstitutional on the grounds that no consultations took place and no invitations were made by the Respondents before the said Act was enacted. It was further contended that the provisions of the said Act contravened the provisions of the Constitution as it contained levies and/or taxes which the Respondents were not empowered to impose. The Petitioners alleged that because they did not participate, the Respondents passed an Act with unreasonable provisions which were punitive with some amounting to double taxation.

¹⁹⁴ Petition no. 532 of 2013 [2014] eKLR.

The Petitioners contended that under Article 209 of the Constitution of Kenya 2010, only the National Government may impose Income Tax, Value Added Tax, Customs and other duties and Excise Tax while a County Government may impose Property Tax, Entertainment Tax and any other Tax authorized by an Act of Parliament. Both Governments may impose charges for the services they provide such as parking, trade licences etc. They further contended that although the taxation and other revenue raising powers of a County cannot be exercised in a way that prejudices national economic policies, economic activities across the county boundaries or the national mobility of goods, services, capital or labour. It was the petitioners' view that the levy of Kshs 1/= on every stone transported from the members' quarries as stipulated under Schedule I part VII of the Act qualified as a production tax since it was not shown that the Respondents were providing any service. Secondly to impose taxes on the goods as they were being transported as stipulated in Schedule I Part VII of the Act was a contravention of Article 209(5) which prohibits counties from prejudicing economic activities across county boundaries since the effect of the said action would be to discourage the sale of quarried stones to persons outside the County.

In holding that there was lack of participation in passing the Act, the Court held that:

public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public

barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.

The High Court further observed that to levy charges on the stones quarried unless authorized by an Act of Parliament or any services rendered by the County Governments towards that end would be clearly illegal. It further emphasized that the levying of such taxes should not be prejudicial to national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. The Court however held that it was not entitled to interfere with the tariffs and pricing of services because that would be tantamount to substituting its opinion for that of the County Government.

4.4 Public Policy Disputes

The Courts, either as a direct result of their Constitutional mandate or a new wave of judicial activism have reached decisions whose effect goes beyond settling a dispute between the litigants. Such decisions often direct or interfere with policy decisions that have already been taken or that are likely to have been taken by the agencies responsible. In the South African case of *Minister of Health -Vs- Treatment Action Campaign*,¹⁹⁵ the court addressed the role of courts with regard to policy issues as follows:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications.... In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”

¹⁹⁵ (2002) 5 SA 721.

The recent decision of the Industrial Court in *Teachers Service Commission -Vs- Kenya National Union of Teachers (KNUT) & 3 others*¹⁹⁶ is one that has already had social consequences and which may have economic consequences in future. In the matter, the Teachers Service Commission brought a petition and sought *inter-alia* orders of a prohibitory injunction to restrain the officials and members of the Respondents (KNUT & KUPPET) from continuing with an industrial strike. The petition was triggered by a nation-wide strike that had been called by the respondents in January 2015 that had paralyzed learning in primary, secondary and in tertiary public institutions. The Court decided for the respondents and awarded the teachers a basic salary increment of between 50 – 60%. The Court also awarded teachers an increase in their allowances, including house allowance, leave allowance, hardship allowance, and this was to take effect on 1st July 2015.

The potential budgetary implications if the Court's decision were implemented would be significant. A decision with such ramification should ideally be arrived at by policy makers who have the tools to enable them reach an informed decision and one whose implementation is not as onerous. Other than that, the decision had already triggered a strike by the teachers who demanded payment while the executive maintained that it had no money to effect such a large pay hike. In what may be interpreted as an explicit policy statement, the Court expressed hope that the judgment would bring to an end the era of arbitrary remuneration awards to the teachers. This statement indicates that the court considered its decision not only as a settlement of the dispute in question but also as a tool to change the remuneration structure adopted by the Teachers Service Commission. This is despite the fact that the judiciary has no role to play in the determination of salary structures.

¹⁹⁶ Petition Number 3 of 2015 [2015] eKLR.

In *Kituo cha Sheria -Vs- Independent Electoral and Boundaries Commission & 2 Others*,¹⁹⁷

the petitioners challenged the exclusion of prisoners from the voter registration process. They sought, inter alia, a declaration that prisoners in Kenya possess the inalienable right to be registered as voters and consequently vote. The issue before the court was whether prisoners had the right to vote under the Constitution of Kenya, 2010 and whether their exclusion from the voter registration exercise amounted to a violation of their right to vote. The petitioners also wanted the respondent compelled to register the prisoners as voters in the general elections. It was contended that the Independent Electoral and Boundaries Commission (IEBC) had the obligation to facilitate the registration of prisoners as voters as a matter of right.

The Court held that the right to vote was fundamental to a system of government such as Kenya's and the Constitution did not exclude prisoners from being registered to vote and consequently voting in an election. It was further observed that apart from merely guaranteeing the right, the Constitution placed upon the State and its agencies the positive responsibility to ensure that all the people of Kenya and particularly those who are marginalized or vulnerable were able to exercise this fundamental right. The court observed that this responsibility is not a passive duty but an active one imposed by the Constitution and particularly the Bill of Rights on the State and all its instrumentalities. Thus the breach of the prisoner's right to vote entailed failing by the respondents to take positive steps to facilitate, promote and fulfill that right.

The Court further held that prisoners were vulnerable persons in society and they did not have access to information, documentation, electronic media and means to voluntarily register as voters like other free citizens. To facilitate voting, the IEBC had to co-ordinate with other institutions to ensure the right to vote was realized at least within the context of what could be realized within the realm of prisons. The court ordered the IEBC to take necessary administrative arrangements even after the General Elections to ensure registration of prisoners like other

¹⁹⁷ Petition 574 of 2012 (2013) eKLR.

citizens as mandated of it under the Constitution. The Court further directed IEBC, in conjunction with the prison and other government institutions, to facilitate the exercise of the right of prisoners who had already registered to vote to do so in the March 2013 General Elections.

In *Consumer Federation of Kenya (COFEK) suing through Stephen Mutoro & 2 Others -Vs- Minister for Information & Communications & 2 Others*,¹⁹⁸ the Petitioners sought conservatory orders preventing the respondents from switching off analogue television signals pending the hearing and determination of their Petition. According to the Petitioners, the 1st respondent had threatened to switch off analogue television signal transmission which was contrary to the set global deadline of 2015. The issue thus was whether the planned switch off was inappropriate, unreasonable and expensive to consumers and whether the conservatory orders sought met the requisite conditions.

The High Court observed that the Petitioners had established that Kenyan citizens would be prejudiced by the digital migration and they would suffer irreparable injury which would never be adequately compensated in damages. The citizens' freedom of information would be limited by the digital migration. The Court further noted that it was not enough for the respondents to contend that they had fully sensitized the public on the importance and created awareness of digital immigration. It was not also sufficient to allege that they had cushioned the customers by subsidizing the costs of the set top-boxes to affordable amounts in order to make them accessible to a common Kenyan.

The Court took notice of the fact that the country was at a crucial electioneering period and accordingly the consumers had the right to benefit from the information available in the broadcast media as well as information available in other media forums to enable them make

¹⁹⁸ Petition number 563 of 2012.

informed decisions. The Judge concluded that there was no hurry for the migration. This was because the global deadline switch off for digital migration was in the year 2015 thus there was no legal, economic and moral basis to impose on the Kenyan consumers an earlier deadline. The global deadline switch off of 2015 could thus be easily negotiated. The application was allowed.

In *Kituo Cha Sheria -Vs- Attorney General*;¹⁹⁹ an application was made to restrain the government of Kenya from stopping the reception, registration and shut down of all refugee registration centers in the urban areas. The Petitioners argued that the Kenyan government had an international obligation with respect to protection of refugees. There was a further contention that the refugees qualified as vulnerable persons under the Constitution of Kenya 2010. In order to secure a hearing of the grievances, a conservatory order prohibiting any state officer from implementing the decision evidenced through the press release was thus granted pending further orders of the court. This decision clearly had policy implications because it interfered with the implementation of policies on the registration of refugees which the government had already put in place.

There are decisions which, although reached by the Court in its capacity as a check on the legislature, end up being policy statements. In *Samuel G Momanyi -Vs- the Hon. Attorney General & Another*,²⁰⁰ the Petitioner challenged the constitutionality of Section 45(3) of the Employment Act, 2007 which provides that an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. The Petitioner argued that this section violated his right of access to justice under Article 48, right to fair administrative action under Article 47 and the right to a fair hearing under Article 50(1) of the Constitution because he had been employed for only 11 months and 27 days.

¹⁹⁹ Petition no. 19 of 2014.

²⁰⁰ Petition no. 341 of 2011.

The Court observed that the Employment Act was enacted before the promulgation of the new Constitution in 2010 and that it needed to be aligned with the provisions of the latter. Moreover, neither the Act nor the Petitioner's employer gave an explanation as to why a person who had been employed for 13 months was the only one who could claim unfair termination of his employment. Consequently, the Court held that Section 45(3) of the Employment Act was discriminatory and it denied the petitioner equal protection and benefit of the law. The Section was therefore held to be invalid to the extent of its inconsistency with the Constitution. This decision might have a long term effect on employment policies in Kenya because it concerns a key provision with regard to bringing actions based on unfair termination. Even in the absence of an amendment, employers would be required to align their actions and expectations to this interpretation.

In the more recent case of *Coalition for Reform and Democracy (CORD) & Another -Vs- Republic of Kenya & Another*,²⁰¹ the High Court was called upon to determine the constitutionality of several sections in the Security Law (Amendment) Act of 2014. The petitioners sought conservatory orders to stay and/or to suspend the coming into force or implementation and or operation of the Security Law (Amendment) Act, 2014. It was alleged that the Act was a violation of the Constitution of Kenya 2010, specifically the Bill of Rights and Article 110 of the Constitution of Kenya 2010. With regard to the Bill of Rights, it was contended that for instance, the Section of the Act capping the number of refugees that Kenya could accommodate to 150,000 would cause Kenya to flout its obligations under international instruments dealing with the rights of refugees which formed part of Kenyan law under Articles 2(5) and (6) of the Constitution of Kenya 2010. Article 110 on the other hand required that the Speaker of the National Assembly and the Senate confer on whether the Security Law (Amendment) Bill of 2014 was a Bill concerning counties. As this had not been done, the

²⁰¹ Petition number 628 of 2014[2015] eKLR.

petitioners argued that the Bill had not been passed in accordance with the procedures for enacting legislation. As such, it was not fit for presidential assent. The petitioners also alleged that the Act was passed without public participation because the period for publication of the Bill was reduced from the required 14 days to just one day.

The court proceeded to suspend the operation of some sections which were deemed unconstitutional, or as the court mentioned, those which if implemented, presented a danger to life or limb or to the rights and freedoms provided for in the Bill of Rights. An example of these is the Section that introduced a cap on the number of refugees Kenya could accommodate.

4.5 Advisory Opinions

Article 163(6) provides that the Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county governments. An advisory opinion in the context of this Article has been interpreted by the Supreme Court to mean legal advice rendered by the Court to the public body or bodies seeking the same. Such an opinion does not flow from any contest of rights or claims disposed of by regular process, it does not fall in the class of judgement or ruling or decree.

Besides, the use of the word ‘may’ in Article 163(6) of the Constitution implies that the jurisdiction to give advisory opinions is purely discretionary. In *Re the matter of the Interim Independent Electoral Commission*,²⁰² the Supreme Court clarified that while the advisory opinion jurisdiction was exclusively entrusted to itself, the Constitution did not provide that the Court while rendering an opinion may not interpret the Constitution. This clarification arose from the need to address the question of whether the Supreme Court’s constitutional interpretation while exercising the advisory opinion jurisdiction conflicted with the jurisdiction of the High Court to deal with matters of constitutional interpretation in the first instance.

²⁰² Constitutional Application Number 2 of 2011.

In *Advisory Opinion Reference No. 2 of 2013*,²⁰³ the Supreme Court addressed the question of whether the Division of Revenue Bill was a bill which concerned the county government in the context of Article 110 of the Constitution of Kenya 2010. If it was, then its passage would require that it be referred to the Senate for debate. The Bill had originated in the National Assembly. The matter had arisen from the failure by the Speaker of the National Assembly to refer the Bill to the Speaker of the Senate.

The court in finding for the applicants held that:

It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the equitable sharing of revenue – which will certainly affect the functioning of county government. We have found no justification in the contention that the Division of Revenue Bill deals strictly with “national economic policy and planning” and so, on this account, it is a measure unrelated to county government. The Bill deals with equitable allocation of funds to the counties, and so any improper design in its scheme will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.²⁰⁴ It is also clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of Article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of Article 113 of the Constitution.²⁰⁵

In *Advisory Opinion Number 2 of 2012*,²⁰⁶ the Attorney General sought the court’s opinion as to whether Article 81(b)²⁰⁷ as read with Article 27(4),²⁰⁸ 27(6),²⁰⁹ 27(8), 96, 97, 98 and Article

²⁰³ *Advisory Opinion Reference No. 2 of 2013 between the Speaker of the Senate and the Attorney General & Another.*

²⁰⁴ *ibid.* at para 114

²⁰⁵ *ibid.* at para 116.

²⁰⁶ *The Matter of the Principle of Gender Representation in the National Assembly and the Senate*

²⁰⁷ Not more than two-thirds of the members of elective public bodies shall be of the same gender;

²⁰⁸ The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

177(1) (b) of the Constitution required progressive realization of the enactment of the one third gender rule or required that the same be implemented during the general elections scheduled for 4th March 2013. From the submissions before the court, two distinct approaches emerged, one side argued for progressive realization while the other argued for immediate realization of the rule. The majority opinion favoured progressive realization and it was expressed as follows:

the word ‘shall’ used in Article 81(b) of the Constitution would translate to an immediate command only where the task in question is a cut-and dried one, executed as it is without further moulding or preparation, and where the action is disposable by action emanating from a single agency. But this word ‘shall’ may be used in a different context, to imply the broad obligation which is more institutionally spread out, and which calls for a chain of actions involving a plurality of agencies; when used in this sense, it calls not for immediate action, but for the faithful and responsible discharge of a public obligation...if the measures contemplated to ensure the crystallization of Article 81(b) are not taken before the elections of 04/03/2013, then Article 81(b) will not be applicable to the said elections... bearing in mind the terms of Article 100 on promotion of representation of marginalized groups and of the fifth schedule prescribing timeframes for the enactment of required legislation, legislative measures for giving effect to the one-third-gender rule under Article 81(b) should be taken by 27th August 2015.

Sound as this opinion was, the Supreme Court may be faulted for placing a deadline for when Parliament should have set up an implementation framework. This is because the Supreme Court had no means of ensuring that Parliament met that deadline. This inability to enforce its decisions was exposed in April 2015 when the Two-Third Gender Rule Laws (Amendment) Bill seeking to extend the deadline set by the Supreme Court was introduced in the National Assembly. The Bill was greeted with protest, especially from female Members of Parliament and a judicial determination of the question of the implementation of the one third gender rule was sought for the second time.

²⁰⁹ To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

In *Centre for Rights Awareness and Education -Vs- The Attorney General & Another*,²¹⁰ The petitioner alleged that the Attorney General and the Commission on the Implementation of the Constitution had failed to exercise their constitutional mandate and that the Court therefore had the jurisdiction to compel them to exercise their statutory power by the issue of an order of Mandamus. They contended that the two were legally bound to originate the requisite Bills and they had failed to do so. The High Court ordered that an order of Mandamus be issued directed at the 1st and 2nd Respondents directing them to, within the following Forty (40) days from the date of the order, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012. The Bill(s) are yet to be introduced.

The series of events detailed above illustrates that Kenyan courts have sometimes made decisions which they have no power to enforce. This may jeopardise the public esteem in the courts by watering down the legal force that judicial pronouncements are perceived to possess.

4.6 Conclusion

This Chapter establishes that the Judiciary as an institution subject to the Constitution has embraced the wide framework of justiciability provided by the Constitution of Kenya 2010. It also illustrates that the political question doctrine still has a role to play although it has been shrunk by the expanded scope of justiciability. An expanded scope of justiciability generally results in a corresponding decline in the applicability of the political question doctrine, and Kenya is no exception to this scenario. The Judiciary has contributed to the increased judicialization of politics by taking its rightful place in the Constitution. This does not however make it immune to the dangers attendant to the judicialization of politics. The next chapter will present an account of the dangers posed by the judicialization of politics.

²¹⁰ Constitutional Petition No. 182 of 2015.

CHAPTER 5: THE DANGERS OF JUDICIALIZATION OF POLITICS TO KENYA'S

JUDICIARY

5.0 Introduction

Generally, the judicial institution has evolved from what was known in most polities to be the weakest arm of government to an organ whose influence is today felt across the moral and policy spheres as well as the executive and legislative arms of government. The transformation of the Judiciary has been so tremendous that it has attracted the attention of legal scholars and sociologists and unsettled political actors. Moreover, it has inspired the coining of terms such as the judicialization of politics, juristocracy, judicial supremacy and eurolegalization, the latter being specific to Europe. All these concepts attempt to establish what the traditional role of a judiciary is and explore the ways in which judiciaries today have expanded their influence beyond their traditional roles.

Opinions abound as to the merits and demerits of the judicialization of politics. It is however agreed that the judicialization of politics comes with benefits and dangers. This Chapter focuses on the dangers of the judicialization of politics. The first section presents a brief picture of the various arguments advanced in favour of the judicialization of politics.

5.1 Benefits of Judicialization of Politics

The benefits of the judicialization of politics arise from an extrapolation of the arguments in favour of an independent judiciary. Essentially, they support the notion that if a judiciary plays a positive role, a stronger and more active judiciary can only be better.

First, proponents contend that the judicialization of politics prevents abuse of power by the government, and to a lesser extent, by the majority against the minorities.²¹¹ This argument is a corollary of the argument that a judiciary acts as a check on the exercise of power by the

²¹¹ Rodrigo Yepes, *Judicialization of politics in Colombia: cases, merits and risks*, (2007) 4 Rev. int. direitos human. At page 11
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executive and the legislature. An empowered judiciary that has jurisdiction to examine and adjudicate policy and political disputes has a better chance of ensuring that power is exercised as precisely provided for in the law. This acts not only as a tool to prevent abuse but also as a means of increasing transparency and accountability in the government, which in turn boosts democratic governance. The case discussed above of *Robert N. Gakuru & Others -Vs- Governor Kiambu County & 3 Others*²¹² where the High Court nullified the Kiambu County Finance Act, 2013 for lack of public participation in its formulation is illustrative of this point.

Professor Kelemen has opposed the idea that judicialization of politics is a non- democratic process, contending that judicialization of politics is merely a modification of the nature of democracy.²¹³ He argues that this proposition should be rejected on the grounds that courts do not act on their own accord. Rather, they do what the Constitution has empowered them to do.²¹⁴ Subsequent conflicts between courts and legislators are not evidence that courts are overstepping their role, but that they are merely doing what they were asked to do, stopping parliaments from violating the constitution.²¹⁵ Conflicts between courts and parliaments are a sign of a healthy democracy, not of anti-democratic behaviour by courts.²¹⁶

In Kenya, Kelemen's view that courts and court processes are not antidemocratic finds constitutional backing in Article 159(1) of the Constitution which provides that judicial authority is derived from the people and vests in , and shall be exercised by, the Courts and tribunals established by the Constitution. Besides, among the institutions to which the sovereign power of the Kenyan people is delegated by Article 1(3) of the Constitution is the Judiciary and Independent Tribunals. These provisions may be interpreted to mean that the Judiciary, though

²¹² Petition no. 532 of 2013 [2014] eKLR.

²¹³ Dan Kelemen, 'The Rise of Eurolegalism and its Implications for Democracy in Europe' in Cristina Parau(ed), *Courts and the Making of Public Policy: The Role of Courts in a Democracy*, (The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies, University of Oxford, 2011) at page 13

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.*

not elected, is also a representative institution. It cannot therefore be said to be entirely anti-democratic.

He has also argued that one cannot say that courts are undemocratic, because litigation is a form of political participation.²¹⁷ For him, democracy entails more than voting. Voting is not enough, as it occurs infrequently.²¹⁸ One way of holding the administration accountable between elections is through participation and litigation.²¹⁹ One of the effects of judicialization of politics is to push for greater transparency; greater administrative accountability. Administrations have to give reasons for their decisions and justify and explain their acts, which in turn enriches democracy.

5.2 The Dangers of Judicialization of Politics

The dangers of judicialization of politics could be clustered into five key arguments. The first and most common is that the judicialization of politics creates a judicial autocracy or a rule of an unrepresentative minority elite. In this regard, judicialization of politics threatens democracy. Second, a judiciary that is too strong dominates governmental processes and as a consequence, threatens the concept of separation of powers. Third, it is argued that judicialization of politics encourages the concentration of power in a privileged minority and fourth, that the judicialization of politics may rob the public of their faith in democratic processes. Lastly, it is argued that the judicialization of politics poses a threat to judicial legitimacy.

With regard to the first argument, judicialization of politics presents the court as the ultimate decision maker in all matters, including matters that are traditionally set aside for the legislature or the executive. In most democracies, members of the legislature are elected and are the direct representatives of the people. As such, their actions embody the will of the people. It is therefore

²¹⁷ Dan Kelemen, 'The Rise of Eurolegalism and its Implications for Democracy in Europe' in Cristina Parau(ed), *Courts and the Making of Public Policy: The Role of Courts in a Democracy*, (The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies, University of Oxford, 2011) at pages 13, 14

²¹⁸ *ibid.*

²¹⁹ *ibid.*

contended that it is improper for the judiciary to purport to invalidate an act passed by the will of the majority because the judiciary lacks the backing of that majority. When courts are allowed to invalidate acts of the legislature and the executive, rule by the popular majority, which is the lifeblood of democracy, is replaced by a rule by an elite few.

Professor Kelemen contends that the major criticism against the judicialization of politics is the counter-majoritarian difficulty whereby courts, non-majoritarian institutions, substitute their will for that of democratically elected representatives.²²⁰ In the same breath, Paul DeHart argues that if the proponents of the judicialization of politics are right, then modern democracies which embrace judicialization of politics are neither republics nor constitutional regimes. Instead, we have rules by an elite few, aristocracies or oligarchies.²²¹ He adds that if the courts have the last word as to what counts as law just because they have the powers of constitutional interpretation, then these courts are not constrained by the constitution. Rather, they constrain the constitution. The consequence is that we have the rule of men rather than the rule of law. Such a regime is, as a matter of definition, non-constitutional.²²²

The situation postulated by Hart is exacerbated by the finality that comes with decisions of the highest courts in a particular country such as the Supreme Court in Kenya. The Supreme Court has the power to declare an act of Parliament null and void if in the Court's opinion, it contravenes the Constitution. In a sense, the Supreme Court watches the Parliament. There is, however, no institution that ascertains the constitutionality or otherwise of the Supreme Court's decisions. This goes beyond creating an aristocracy to creating judicial tyranny.

²²⁰Dan Kelemen, 'The Rise of Eurolegalism and its Implications for Democracy in Europe' in Cristina Parau(ed), *Courts and the Making of Public Policy: The Role of Courts in a Democracy*, (The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies, University of Oxford, 2011).

²²¹ Paul R. De Hart, 'The Unsoundness of Judicial Supremacy'(2015) The Witherspoon Institute: Public Discourse at page 5.

²²² *ibid.*

With regard to the second argument, the judicialization of politics is viewed as a threat to traditional democratic concepts such as separation of powers. Ran Hirschl agrees that wholesale judicialization of politics reflects the demise of the political question doctrine, and poses a serious challenge to the traditional separation of powers doctrine.²²³ It encroaches upon policy areas where courts have neither the institutional capacity nor the legitimacy to decide.²²⁴ Professor Kelemen's argument that eurolegalisation is not a challenge to democracy but rather a modification of it is perhaps an acknowledgement that the judicialization of politics does indeed interfere with the traditional conception of democracy.²²⁵

Often, judicial interference with the legislative or executive mandate results in disharmony between the judiciary and the offended arm of government. Such disharmony causes the offended arm of government to retaliate against the judiciary. In *Institute of Social Accountability & Another -Vs- National Assembly & 4 Others*,²²⁶ the Petitioners challenged the constitutionality of the Constituency Development Fund Act No. 30 of 2013 (CDF Act) on two grounds; the process leading to its enactment and the substance of the legislation including the nature, administration and management of the CDF. The petitioners contended that the CDF Act contravened the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and county government and the public finance management and administration. The court declared the Act unconstitutional on, among other grounds, its violation of the principle of separation of powers. Parliament was given 12 months within which to align the Act with the Constitution of Kenya 2010, failure to which the Act and the Fund would be fully invalidated.

²²³ Ran Hirschl, 'the New Constitutionalism and the Judicialization of Pure Politics World Wide' (2006)75 Fordham Law Review at page 15.

²²⁴Kelemen (n205).

²²⁵ ibid.

²²⁶Petition no. 71 of 2013 (2015) eKLR.

In the wake of this decision, the Judiciary was heavily criticized by Parliament, with the latter alleging that the Judiciary had intentionally done that to deprive Parliamentarians of the responsibility of handling the Constituency Development Fund. While many legal scholars fully agree with the court's interpretation of the Constitution, it is clear that the National Assembly retaliated by cutting down the judiciary's budget.

By embracing wholesale policy formulation, moral and political engagement, the judiciary runs the risk of undermining its authority. This is because although a judiciary has the power to make legally binding decisions, it sometimes lacks the means to enforce those decisions. For instance, in the controversy surrounding the decision of the Industrial Court in *Teachers Service Commission (TSC)-Vs- Kenya National Union of Teachers (KNUT) & 3 others*,²²⁷ the judiciary is out of its depth because it cannot make the legislature pay the teachers. Should this judgement never be implemented, the Judiciary will appear like a toothless bulldog that makes hefty pronouncements without the wherewithal to implement them. Subsequently, teachers and other civil servants will seek other avenues of demanding for pay increments without having to go through the courts. Such loss of confidence in the judicial system is detrimental not only to the judiciary's institutional integrity but also to the country because as it may be remembered and although in differing circumstances, such distrust of the judiciary contributed a great deal to the post-election violence witnessed in Kenya after of 2007 general elections.

Thirdly, it has been argued that the judicialization of politics promotes the consolidation of power by the privileged elite. This is because, unlike normal fora for public participation such as voting which is free of charge, one requires more than identification documents to take advantage of the benefits a judicial process promises.²²⁸ Judicial processes require technical knowledge and financial capability. Besides, it is generally accepted that the judicial

²²⁷ Petition Number 3 of 2015 [2015] eKLR.

²²⁸ *ibid.*

environment with its lengthy procedures and legal jargon is more intimidating than it is accommodating. Only those knowledgeable in the legal ways or those who can buy the services of such persons are able to take full advantage of legal remedies. The consequence is that the judicialization of politics undermines the rights of the poor majority while promoting those of the rich minority.

An offshoot of the above argument is that the emphasis on rights adjudication and enforcement in judicialized societies makes it difficult for policymakers to pursue interests that would serve the public interest in cases where public interest is trampled by individual rights. At this point, it is important to remember that it is the financially strong that are able to litigate. This leaves the poor vulnerable to policies that undermine their interests because they were made in response to a particular court decision. A judicial process, unlike a political one often does not balance the rights of individuals in a utilitarian way. The former deals with the enforcement of individual rights. An illustration of this point lies in the case of *Coalition for Reform and Democracy (CORD) & Another -Vs- Republic of Kenya & Another*.²²⁹ While the High Court did nullify some sections of the Act which were said to contravene the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010, the arguments proffered by the Respondents in support of their case indicated that the Act had been enacted in order to cater for Kenya's urgent security needs in the face of increased terrorist attacks. In a way, the High Court was called upon to decide between individual rights and security which calls for a balancing of interests that can only be achieved in a policy framework but not in a judicial determination.

What may be interpreted as a long term effect of the judicialization of politics is that it may diminish the importance of other democratic institutions while exaggerating the importance of the judiciary.²³⁰ Once the ordinary citizen believes that the judiciary is best suited to deal with

²²⁹Petition number 628 of 2014[2015] eKLR.

²³⁰Uprimny Yepes (n203) at page 13

political and moral controversies and social problems, democratic engagement may lose much of its appeal. In such a case, authoritarian rule may be considered as an alternative to majoritarian rule.²³¹

The judicialization of politics overburdens the judiciary, which may find it difficult to assume tasks that are not traditionally within its jurisdiction.²³² Therefore, the transfer of an excessive number of political questions to be resolved by judges could end up affecting the very legitimacy of the administration of justice, which does not in the long-term have the capacity to respond to such a challenge. This occurs not only as a result of the quantity of problems that the judicial system ends up having to resolve, but also as a result of the issues involved, since the judiciary may not be the most appropriate forum for some conflicts. An overburdened judiciary takes a longer time to reach decisions on matters before it, to the detriment of ordinary citizens.

Moreover, judicialization of political issues may transform the Judiciary into an avenue for political competition. Judicial interpretation and rights adjudication will be invoked where it favours an individual against political opponents. Ultimately, judicialization of politics will result in politicization of the judiciary, this time to the detriment of the institutional integrity and legitimacy of the judiciary. As Maina Wachira explains, as soon as politicians understand the courts are important political arenas, they will fight to usurp or control the power to appoint judges.

Lastly, court verdicts do not always provide conclusive or lasting solutions to socio-political disputes. The settlement of some of the challenges facing the Kenyan Society such as corruption and nepotism requires societal resolve and action that goes beyond judicial enunciation and enforcement of law. In the face of increasing judicialization of politics in Kenya, it is important

²³¹ibid.

²³²ibid.

to appreciate the fact that the judiciary does not have solutions to all kinds of problems. In some cases, the search for solutions must go beyond the judiciary.

5.3 Conclusion

This Chapter establishes that the judicialization of politics is not inherently harmful. It has both disadvantages and advantages. It is therefore safe to conclude that the judicialization of politics should be handled carefully, just as one would handle any double edged sword. The judiciary should always bear in mind that its decisions can make or break. Foresight, caution and moderation are the virtues to invoke whenever a judicialized dispute is presented to court. Foresight should be utilized in establishing and interrogating the possible long term effects of a decision. Moderation and caution should be exercised to prevent the possible ills of judicialization of politics as explained in this Chapter. The next Chapter is the concluding Chapter. The Chapter will make recommendations on steps that may be taken to enable a country to embrace judicialization of politics without falling into its pitfalls.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.0 Introduction

This Chapter summarizes the conclusions that can be drawn from the foregoing Chapters. Being the final Chapter, it also wraps up the discussion by recommending solutions to the dangers associated with judicialization of politics as illustrated in Chapter 5. Chapter 3 outlined the constitutional framework for the judicialization of politics in post 2010 Kenya while Chapter 4 explored ways in which this constitutional framework is reflected in judicial decision making. It is therefore an established fact that the Constitution of Kenya 2010 has contributed significantly to the judicialization of politics.

6.1 Conclusion

Chapters Two, Three and Four allow the drawing of a number of important conclusions. The first is that increased judicialization of politics in Kenya is a phenomenon of the Constitution of Kenya 2010. It is the Constitution of Kenya 2010 that has led to increased judicialization of politics in Kenya by providing a stable framework for judicialized litigation.

The second conclusion is that constitutionalized judicialization of politics, if not moderated with judicial prudence, is harmful to democratic harmony because it undermines democracy and the doctrine of separation of powers. Judicial decisions that impose on the legislative mandate of Parliament or the executive prerogatives undermine democracy because the opinion of the public which is represented by the elected persons in the legislature and the executive is subordinated to the opinion of the unelected judicial elite.

The third conclusion is that judicialization of politics can be harmful to the judicial institution; first because it opens it up to politicization and second, because the decisions of the judiciary in matters of public policy, morality or politics open the judiciary to intense public contestation and

polarized protestation. This puts judicial sanctity and integrity at risk because where majority public opinion on deeply controversial judicialized litigation conflicts with that of the judiciary, then public confidence in judicial decision making may begin to fade. Third and last is that judicial pronouncements in matters of public policy or matters of a political nature are sometimes so momentous that their implementation would destabilize the overall functioning of other sectors for which policy makers are also responsible. Such policy makers and political actors may sometimes be constrained to disregard court decisions in order to maintain stability in the polity. In such a scenario, the court is portrayed as being incapable of enforcing its own decisions. In the long run, such a perception of courts may harm their credibility. A case in point is the court decision in *Teachers Service Commission (TSC)-Vs- Kenya National Union of Teachers (KNUT) & 3 others*²³³ in which the court gave a backdated salary award to teachers employed by the Teachers Service Commission. Parliament had not made any budgetary provision for that award. The executive too had not made any provision to cater for that court award. In the absence of a parliamentary budgetary appropriation, the award is unenforceable. The Judiciary cannot compel Parliament to vote to allocate public funds in a particular way because allocation of public funds is a democratic prerogative.

If the Kenyan Judiciary were to lose credibility because of constitutionalized judicialization of politics, then the Judiciary would become a victim of its own constitutional mandate. It is therefore conceivable that the framework for judicialization of politics under the Constitution of Kenya 2010 has placed Kenya's Judiciary in a difficult position. It is expected to discharge its constitutional mandate fully without suffering the dangers posed by that mandate. The following section recommends how this can be done.

²³³ Petition Number 3 of 2015 [2015] eKLR.
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6.2 Recommendations

6.2.1 Reconstruction of the Political Question Doctrine

The political question doctrine allows courts to decline jurisdiction. A court may invoke this doctrine for purposes of prudence when it feels that the court lacks the capacity to decide due to (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, that although the judicial judgement should be ignored, it will not be; and (d) the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.²³⁴ Viewed from this perspective, the political question doctrine is a flexible tool that the Kenyan courts can employ to decline jurisdiction in matters of political delicacy or economic policy.

The approach adopted by Bickel in defining the political question differs substantially from the approach adopted by the court in *Baker -Vs- Carr*.²³⁵ In the latter, the court in a word ‘domesticated’ the political question doctrine by providing six criteria that could be used to establish the existence of a political question doctrine.²³⁶ Unlike Bickel’s more flexible definition, the court’s definition limited the doctrine to a couple of criteria, thus limiting the number of matters where the doctrine is applicable to those where any of the six criteria was existent. In adopting the approach in *Baker -Vs- Carr*, a court would have to provide reasons for invoking the political question doctrine. Doing this would convert the political question doctrine into a series of rigid rules intractable to invocation for prudential reasons, because ideally, the character of prudential judgement cannot be captured in rules.²³⁷ This Work recommends that the Kenyan courts adopt the more flexible approach developed by Bickel where when faced with a controversy that is too monumental or beyond the court’s capacity, the court should invoke the

²³⁴ Jared P. Cole ‘The Political Question Doctrine: Justiciability and the Separation of Powers’ (2014) Congressional Research Service at page 7.

²³⁵ (1962)369 US 186.

²³⁶ Mark Tushnet, ‘Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine.’(2002)80 North Carolina Law Review at 1203

²³⁷ *ibid*.

political question and down its tools. This approach can be applied to a wide variety of matters. Secondly, this approach is especially relevant to a case of constitutional judicialization of politics like Kenya's. This is because a court cannot decline its constitutional mandate. It can, however, decide that the facts or circumstances surrounding a case, or the remedy sought render a matter non-justiciable. In other words, the invocation of the political question doctrine as an exercise of judicial prudence would be an appropriate solution to judicialization of politics in Kenya.

6.2.2 Judicial Caution and Restraint

Judicial restraint means one of three things at any one time.²³⁸ First, it refers to the notion that judges apply law, they don't make it.²³⁹ Second, it refers to the notion that judges defer to decisions by state organs and administrative agencies,²⁴⁰ and third, the notion that save in clear circumstances, judges are reluctant to declare legislative or executive action unconstitutional.²⁴¹

This Work recommends that the Kenyan Judiciary should adopt judicial caution and restraint when faced with highly politicized litigation. The exercise of restraint should however be resorted to when the court has reasonable cause to believe that deciding one way and not the other may have undesirable consequences either for the Judiciary itself or for the other arms of government. It is important to insist that calling for judicial restraint here does not refer to a form of judicial subservience. The kind of judicial restraint referred to here is one born of judicial prudence and foresight. Moreover, such restraint should not be exercised because the Judiciary feels constrained to do so because of pressure from other quarters but rather because it feels that it ought to restrain itself in the matter in question because the dispute demands a political solution.

²³⁸ Richard A. Posner 'The Rise and Fall of Judicial Self-Restraint' (2012) California Law Review at page 520.

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

Exercising such judicial restraint would involve taking into consideration two factors: 1) the court's constitutional ability to enforce the prayers sought; and 2) the effect that a decision rendered in a matter involving the parties before the court would have on other people outside the court room. Where it is apparent that enforcement of any of the prayers would call for the exercise of democratic or executive prerogatives by other arms of government, the courts should restrain themselves from exercising jurisdiction. In rights adjudication, the Kenyan Judiciary will have to consider what the granting or denial of one person's prayer will mean for the rights of the millions of people outside that courtroom.

In a nutshell, Kenya's post-2010 Judiciary should adopt the theory of principled constitutionalism. At the core of this theory is the philosophy that in a self-governing society, courts must generally defer to the preferences of the majority.²⁴² Although courts ought to review governmental action whenever petitioned, to guard against arbitrariness or unreasonableness, the starting point must be the exercise of judicial restraint in judicialized litigation.²⁴³ Further, the judiciary should not be concerned with achieving specific desired outcomes without regard to the plain or intended meaning of the constitutional text.²⁴⁴

6.2.3 Development of Standards of Justiciability in Judicialized Disputes

The Constitution of Kenya 2010 does not expressly define justiciability. Consequently, it is not clear from the text of the Constitution what is and what is not justiciable in Kenya. Article 50(1) of the Constitution of Kenya 2010 merely provides that the courts have jurisdiction to determine

²⁴² Geoffrey R. Stone and William P. Marshall 'The Framers' Constitution: Toward a Theory of Principled Constitutionalism' 2011 American Constitution Society for Law and Policy Issue Brief.

²⁴³ Ibid.

²⁴⁴ Ibid.

matters to which the law is applicable.²⁴⁵ This may be interpreted to mean that the courts may determine what is justiciable and what is not.

It is recommended that the judiciary should use the lack of a constitutional definition of justiciability to develop guiding principles of justiciability that safeguard the institutional integrity of the judiciary. In developing these principles, the courts should, from the outset, be guided by the two recommendations discussed above.

The Judiciary can develop principles of justiciability in a number of ways: a) in as far as is practically possible, the judiciary should endeavour to take a standard approach when defining justiciability and the political question. Such a stand should be guided by an insightful interpretation of the Constitution tempered with an appreciation of the worldwide shift towards the judicialization of politics and the dangers attendant to such a shift. Such uniformity once established would become a standard by which the courts would abide; and b) the Supreme Court and the Court of Appeal should pay special attention to the nature of their decisions in judicialized disputes. This is because their decisions bind lower courts by the doctrine of *stare decisis*. When precedents are set that clearly define justiciability, then it is likely that a clear delimitation of the scope of justiciability and political question within the framework of the Constitution of Kenya 2010 will emerge.

It may not be possible or even advisable to have clear cut rules for the type of disputes that are non-justiciable for the danger of turning the doctrine of justiciability into a number of rigid criteria. However, courts may over time develop guiding principles that a court faced with a judicialized dispute may apply to determine the justiciability or otherwise of such a dispute. This will go a long way in ensuring the uniformity of judicial decisions in judicialized disputes.

²⁴⁵ Article 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

6.2.4 Abstention in Matters where Special Tribunals or Agencies/Organs of State have Jurisdiction.

Courts should abstain from entertaining disputes in which other state institutions, organs and special tribunals have been granted primary mandate to handle. This approach should be borne in mind when courts set out to develop standards of justiciability and to reconstruct the political question doctrine. In this regard, it will be within the court's power to decline jurisdiction when it is clear that another body has jurisdiction. This will entrench the doctrine of separation of powers and ensure that the balance of power is maintained. It will also protect the judiciary from possible retaliation and maintain a harmonious working relationship between the arms of government. However, courts must not hesitate to intervene where the decision made by the tribunal, agency or organ is outrageous or clearly unlawful.

Kenyan courts may draw inspiration from the approach adopted by American courts towards questions of foreign affairs. American courts treat foreign affairs issues as unique and requiring very strong, sometimes absolute, deference to the executive.²⁴⁶ As early as 1803 when the American Supreme Court adjudicated on the case of *Marbury -Vs- Madison*,²⁴⁷ foreign affairs have largely remained off limits to the courts in the United States. Chief Justice Marshall observed then that the foreign affairs acts of an executive officer can never be examinable by the courts. While this view has been challenged in various scholarly works and even judicial decisions, it still holds water. This view is attributed to the flexibility, speed, accountability, political savviness, and uniformity of executive decision making.²⁴⁸

The case of *Goldwater -Vs- Carter*²⁴⁹ is illustrative of this deference. The United States of America and the Republic of China, located in Taiwan, had a mutual defense treaty, which the

²⁴⁶ Jide Nzelibe, 'The Uniqueness Of Foreign Affairs' (2004) Chicago Public Law And Legal Theory Working Paper No. 68. At page 6

²⁴⁷Ibid.

²⁴⁸Ibid.

²⁴⁹(1979) 444 U.S. 996

American Senate had ratified. The People's Republic of China insisted that the United States abrogate the treaty if the United States and the People's Republic were to have diplomatic relations. Acting without the participation of the Senate, President Jimmy Carter announced that the United States would abrogate the mutual defense treaty. Senator Barry Goldwater challenged the abrogation, arguing that the Constitution, in giving the Senate a role in creating treaties, also gave it a role in abrogating them.

The Supreme Court rejected Senator Goldwater's claim. Justice Rehnquist and three others found that Senator Goldwater's claim raised a political question. In part that was because of the foreign affairs setting. But, in addition, Justice Rehnquist said that the Constitution committed the question of who must participate in a treaty abrogation to the political branches. It is however important to observe that while American courts defer to the executive in foreign policy disputes, such deference rarely occurs in domestic disputes.

6.2.5 Reliance on and Development of Alternative Theories of Justice

Kenya's judiciary subscribes to the liberal theory of justice which postulates that each person has an equal right to the most basic liberties and generally that justice is when every person gets what they need. This is perhaps in line with the notion that judicial decision making is most appropriate for the determination of private rights where it is one party seeking the enforcement or declaration of their right against that of another person or against the state. The rise in judicialized litigation has come with an increase in a class of disputes which require more than private rights adjudication. In such disputes, a liberal approach produces a controversial decision. A case in point here is when the High Court decided to enforce the rights of teachers in *Teachers Service Commission (TSC)-Vs- Kenya National Union of Teachers (KNUT) & 3 others*.²⁵⁰ If implemented, Kenyan tax payers will bear the burden of the increased wage bill. For this reason, democratically elected institutions are best placed to resolve such disputes.

²⁵⁰ Petition Number 3 of 2015 [2015] eKLR.
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This study therefore, recommends that the judiciary develops other theories of justice that are more appropriate for the settlement of judicialized disputes. This calls for a wider application of the law to the facts presented before the courts so that the courts may arrive at a decision which takes into account the decision's ramifications on the wider society.

6.2.6 Courts to Embrace Alternative Dispute Resolution

Article 159(2) (c) of the Constitution of Kenya 2010 requires courts to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms in exercising judicial authority. While this can serve to reduce the judicial work load, it can also provide a solution to increased judicialization of politics. When the courts of law feel that a matter is not amenable to judicial determination, it should be within their power to refer the matter to settlement through a form of alternative dispute resolution which is more suitable for the resolution of that kind of dispute. Before this happens, it is recommended that a proper framework for alternative dispute resolution be set up and be operationalized. The framework should take into account judicialized disputes.

6.2.7 Courts to Promote Administrative Law Remedies

Administrative law is that branch of public law which deals with the organization and powers of administrative and quasi-administrative agencies and prescribes principles and rules by which an official action is reached and reviewed in relation to individual liberty and freedom. In other words, it deals with the exercise of state power and its impact on individual rights and liberties. A significant role of administrative law is to limit the abuse of state power while also facilitating the operation of state agencies. Administrative remedies are an expedient way of balancing individual rights and the operational needs of state agencies. Courts exercise oversight over administrative decisions by way of judicial review. In Kenya, the area of judicial review acquired special force and meaning with the introduction of the right to fair administrative action in

Article 47 of the Constitution of Kenya 2010. Administrative actions can therefore be challenged by way of judicial review or a constitutional petition under Article 47.

This work recommends that whenever faced with administrative law disputes, courts should exercise caution when granting prayers outside the traditional administrative law remedies of mandamus, prohibition and certiorari. This approach would allow state organs and agencies undertake their respective mandates without undue interference by the Judiciary. In the long run, this would promote the principle of separation of powers.

6.2.8 Incorporation of the Bigger Picture Doctrine in Judicial Determinations

Sociological theories of law suggest that law is a social phenomenon.²⁵¹ It is a reflection of human needs and desires. It is an embodiment of the basic values of a society.²⁵² According to Jhering, law exists to protect the interests of society and of the individual by balancing these interests. Closely related to these interpretation of law is the interpretation by Friedrich Carl Savigny of the Historical School. To his mind, law arose out of custom and popular feeling.²⁵³ Law came from the people and not the state.²⁵⁴ Based on these theories, this work recommends that the Kenyan Judiciary should have great regard for societal or wider public interest in making their determinations.

Judicial institutions in adversarial systems such as Kenya's are created to primarily adjudicate adversarial disputes. When a matter is finally determined, the rights of one party are enforced while those of the other are denied. Additionally, courts only decide a matter as between the litigating parties before it and the interests of any person not enjoined in that suit are not subject to the jurisdiction of the Court in that matter. While this is the traditional perception of the judicial function, this work recommends that general public importance should be taken into

²⁵¹ L.B Curzon, *Jurisprudence- Lecture Note Series* (Cavendish Publishing Limited 2nd ed. 1995) at pg.149

²⁵² Ibid at pg.150

²⁵³ *ibid.* at pg. 137.

²⁵⁴ *Ibid.*

account as a determining factor in public interest suits even if the public is not a party in a suit. This is because, while the Judiciary is not an elected arm of government, the sovereign power of the people of Kenya is vested in it as one of the arms of the government. As such, it should consider the protection of the wider public interest as one of its functions. This way, the Judiciary will avoid making determinations that offend public policy or the moral perceptions of the society.

6.2.9 Sensitization of Judicial Officers

It is important that judicial officers serving in Kenya's Post 2010 Judiciary be sensitized on the subject of judicialization of politics. This is necessary because it is they that are faced with the challenge of protecting the judiciary from the dangers of judicialization of politics. They cannot be expected to do so without a proper understanding of the concept and its dangers. Such sensitization should target at informing and not deterring. This is because judicialization of politics is potentially but not inherently harmful. Such knowledge is expected to act as a guide

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