

# UNLOCKING THE REVOLUTIONARY POTENTIAL OF KENYA'S CONSTITUTIONAL RIGHT TO FAIR ADMINISTRATIVE ACTION

*by*

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Thesis Submitted in accordance with the  
Requirements for **Master of Laws (LLM)** at the  
University of Cape Town, Faculty of Law

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**September 2017**

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## ABSTRACT

One of the remarkable features of the Constitution of Kenya, 2010 is its explicit recognition in Article 47 of the right to fair administrative action as a fundamental right in the bill of rights and the replacement of parliamentary sovereignty with constitutional supremacy. These aspects of the 2010 Constitution sought to effect broad revolutionary changes to Kenya's administrative justice jurisprudence, which was previously premised in large part on the common law. The constitutional right to fair administrative action has been further elaborated in the Fair Administrative Action Act, 2015 (FAAA), which gives content to the grounds for judicial review and outlines the relevant procedure. But despite this, Kenyan courts have in most cases failed to give meaningful effect to the revolutionary potential of Article 47. In such cases, courts often revert to the limited and outmoded options under the common law, thereby disregarding the broader and more flexible pathways to judicial review of administrative action available under the 2010 Constitution. The main question to be addressed is: *whether* the revolutionary potential of Article 47 of the 2010 Constitution has been realized in Kenyan law and practice; and if so, *how* does Kenya's administrative law jurisprudence compare with that in Malawi and South Africa, comparable jurisdictions where the right to administrative justice has similarly been constitutionalized. The central argument to be made in this study is that considerable scope exists for unlocking the revolutionary potential of Article 47 by way of: i) clarifying the meaning of 'administrative action' and the new grounds for judicial review; ii) elaborating how common law-based judicial review relates with Article 47 and provisions of FAAA; and iii) articulating the horizontal effect of Article 47. Using a comparative law approach, the case is made that much can be gained by examining the best practices from jurisdictions, like South Africa, with more progressive jurisprudence that can be adopted in those, like Kenya and Malawi, which still experience problems in giving meaningful effect to the right to fair administrative action.

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## **Acknowledgement**

Grateful acknowledgement is made to all those who provided support to me during the course of my research. I am particularly grateful to staff at the Oppenheimer Law Library, University of Cape Town (UCT) and at Kunini& Company, Advocates, who assisted me in collection of the volumes of reading material and court decisions. The friendship, encouragement and intellectual guidance provided by my supervisor, **Prof.Danwood M. Chirwa**, is appreciated. I equally owe a debt of gratitude to my family and friends whose various endeavours and contributions have made my studies possible.

# Chapter 1

## FAIR ADMINISTRATIVE ACTION IN THE CONSTITUTION OF KENYA, 2010: A REVOLUTION DEFERRED

### 1. INTRODUCTION

Kenya's administrative law has long been significantly influenced by principles of the common law.<sup>1</sup> In particular, the judicial review of administrative action was premised on the doctrine of *ultra vires* and the rules of natural justice.<sup>2</sup> Thus, the legal basis and grounds for judicial review rested almost entirely on the illegality, irrationality or procedural impropriety of the relevant administrative action.<sup>3</sup> As for the procedure, the power of judicial review derived from the provisions of the Law Reform Act<sup>4</sup> and Order 53 of the Civil Procedure Rules.<sup>5</sup> Under Order 53, which specified the formal procedure for judicial review, three key issues had to be determined by the court before allowing a judicial review application: i) that the applicant had the requisite legal standing; ii) whether a *prima facie* case existed; and iii) whether or not the matter was time barred.<sup>6</sup> These key requirements were often construed strictly, hence restricting access to administrative justice in Kenya.<sup>7</sup> In terms of remedies in a judicial review application, these were limited to the prerogative orders of *mandamus*, *certiorari* and prohibition.<sup>8</sup>

In August 2010, Kenya adopted a new constitution that expressly articulates its supremacy<sup>9</sup> and also recognizes among the national values and principles of governance the rule of law, good governance, integrity, transparency and accountability.<sup>10</sup> It also has a progressive bill of rights

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<sup>1</sup> JT Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis* (2016) 57; SF Joireman, 'The Evolution of the Common Law: Legal Development in India and Kenya' (2006) 44(2) *Commonwealth and Comparative Politics* 190, 201-202.

<sup>2</sup> *Rita Biwott v Council of Legal Education* High Court misc app 1122 of 1994 & CACA 238 of 1994.

<sup>3</sup> PLO Lumumba, *Judicial Review of Administrative Actions* (2007) 70.

<sup>4</sup> Chapter 26 of the Laws of Kenya.

<sup>5</sup> Civil Procedure Act, Cap 21 of the Laws of Kenya.

<sup>6</sup> P Kaluma, *Judicial Review: Law, Procedure and Practice* (2012) 65.

<sup>7</sup> *Wangari Maathai v The Kenya Times Media Trust* [1989] 1 KLR (E&L).

<sup>8</sup> *R v Judicial Service Commission* misc civil application No. 1025 of 2003 (unreported).

<sup>9</sup> Constitution of Kenya, 2010, article 2.

<sup>10</sup> *Ibid*, article 10. The Supreme Court of Kenya has held that these are transformative principles and values that should guide judicial interpretation of the 2010 Constitution. See *Speaker of the Senate and Another v Attorney General and Others* [2013] eKLR, para 53; *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Advisory Opinion No. 2 of 2012 [2012] eKLR, para 49.

that expanded the scope of existing fundamental rights and also introduced new rights.<sup>11</sup> One of the new rights is the right to fair administrative action, which is articulated in Article 47 of the 2010 Constitution:

- (1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

The provisions of Article 47 of the 2010 Constitution significantly alter both the conceptual bases and grounds for judicial review in Kenya's administrative law.<sup>12</sup> First, it substitutes parliamentary sovereignty for constitutional supremacy,<sup>13</sup> thus shifting the foundation of judicial review and extending the scope of reviewable conduct.<sup>14</sup> Secondly, it establishes new grounds for judicial review, including the right to written reasons for administrative action, and also expands the existing common law grounds.<sup>15</sup> Thirdly, it extends the benefit of the right to written reasons to persons likely to be affected by administrative action; this is a notable advance from the restrictive common law position under which judicial review of administrative action was mostly available to persons who had already suffered injury.<sup>16</sup> Fourthly, it provides for the possibility that Article 47 may apply to private actors in respect of private legal relations.<sup>17</sup>

Article 47 is bolstered by Article 23 of the 2010 Constitution which empowers courts to review the constitutionality of legislative and administrative action.<sup>18</sup> In particular, Article 23 grants the High Court original jurisdiction to hear and determine applications for redress arising

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<sup>11</sup> 2010 Constitution, Chapter Four.

<sup>12</sup>Gathii (n 1).

<sup>13</sup> 2010 Constitution, article 2: "This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government. ... No person may claim or exercise state authority except as authorized under this Constitution."

<sup>14</sup>*Judicial Service Commission v Speaker of the National Assembly and Others* [2014] eKLR, para 151.

<sup>15</sup>*Speaker of the Senate and Another v Attorney General and Others* [2013] eKLR paras 25, 31.

<sup>16</sup> M Akech, *Administrative Law* (2016).

<sup>17</sup> Brian Sang YK, 'The Reach of the Bill of Rights into Private Legal Relations in Kenyan Constitutional Law and Jurisprudence' (2016) 16(2) *Oxford University Commonwealth Law Journal* 235-261.

<sup>18</sup> 2010 Constitution, article 23(2); *MumoMatemu v Trusted Society of Human Rights Alliance and Others* [2013] eKLR.

from a denial of, violation of, or threat to, a fundamental right. The High Court is also empowered, in the event of an application to vindicate fundamental rights under Article 22, to grant appropriate relief, including orders of judicial review.<sup>19</sup> Read together, these provisions mean that Kenyan courts now have a firm basis on which to justify their powers of judicial review; in stark contrast to previous reliance on inherent jurisdiction, there is now a much more robust constitutional basis for judicial review.<sup>20</sup> In *Nancy MakokhaBaraza v Judicial Service Commission and Others*, the court reinforced this basis of its judicial review jurisdiction as well as the power to grant effective remedy.<sup>21</sup>

Pursuant to Article 47(3), the Fair Administrative Action Act (FAAA) was enacted in 2015 to give effect to the provisions of Article 47. The Act makes important reforms to Kenya's administrative law system, including: i) expanding the scope of judicial review to include the review of actions of public and private bodies;<sup>22</sup> ii) elaborating the right to be given written reasons for administrative action; iii) giving effect to the constitutional right of access to information regarding administrative action;<sup>23</sup> iv) codifying the grounds for judicial review, including common law principles;<sup>24</sup> v) outlining the procedure for judicial review;<sup>25</sup> and vi) clarifying the relationship between the Act and the common law.<sup>26</sup>

## 2. STATEMENT OF THE PROBLEM

Article 47 of the 2010 Constitution and the provisions of FAAA jointly sought to effect broad revolutionary changes to Kenya's administrative justice law and practice, which was previously premised in large part on the common law. The constitutional right to fair administrative action has been elaborated in FAAA, which gives content to the grounds for judicial review and outlines the relevant procedure. But despite this, Kenyan courts have in some cases failed to give meaningful effect to the revolutionary potential of Article 47.<sup>27</sup> A recent review of the emerging

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<sup>19</sup>*Law Society of Kenya v Centre for Human Rights and Democracy* [2013] eKLR, para 39.

<sup>20</sup>Gathii (n 1) 31.

<sup>21</sup> [2012] e KLR.

<sup>22</sup> Fair Administrative Action Act, section 3.

<sup>23</sup> Ibid, section 6.

<sup>24</sup> Ibid, section 7(2).

<sup>25</sup> Ibid, section 9.

<sup>26</sup> Ibid, section 12.

<sup>27</sup>*Njeru Njagi v Gabriel Njue Joseph and Attorney General* [2015] eKLR; *Paul MafwabiWanyama v Jacinta Papa and Amagoro Land Disputes Tribunal* [2013] eKLR.

jurisprudence on fair administrative action indicates an inconsistency in judicial practice.<sup>28</sup> In some cases, the respective courts have taken cognizance of the transformative effect of the 2010 Constitution on Kenya's administrative law.<sup>29</sup> In other cases, courts have conflated constitutional provisions with common law principles with the result that they prevent the full impact of Article 47 from being realized.<sup>30</sup> In addition, there are post-2010 cases in which courts ignore Article 47 and instead rely on the restrictive provisions of the Law Reform Act as the substantive law of judicial review.<sup>31</sup>

Kenyan courts have also not clarified the implications for Kenya's administrative law of the possibility of horizontal application of Article 47; that is, its application in the context of private legal relations.<sup>32</sup> This is particularly problematic because government functions are increasingly being privatized with the consequence that private actors are exercising certain powers in ways that have adverse consequences on the rights and interests of individuals.<sup>33</sup> The critical legal issue is whether and, if so, on what basis actions or decisions of private bodies can be subjected to judicial review.<sup>34</sup> Article 20(1) of the 2010 Constitution provides that the Bill of Rights, which includes in Article 47 the right to fair administrative action, 'binds all State organs and all persons.' Thus, in appropriate cases, Article 47 can impose constitutional obligations on private entities; indeed, Kenyan courts have in some cases been willing to subject decisions of private bodies that affect the administrative rights of other private persons to judicial review.<sup>35</sup>

In *Rose Wangui Mambo and Others v Limuru Country Club and Others*, the High Court quashed the decision of a private club that had expelled the petitioners without due process.<sup>36</sup> However, there are instances where Kenyan courts have been unwilling to review the decisions of private bodies arising from contractual arrangements.<sup>37</sup> For instance, in *Paul Orwa Ogila v St.*

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<sup>28</sup>Gathii (n 1) Chapters 3 and 4.

<sup>29</sup>*Judicial Service Commission v Mbalu Mutava and Another* [2015] eKLR

<sup>30</sup>*Republic v Public Procurement Administrative Review Board and Others ex parte Seven Seas Technologies Ltd* [2015] eKLR.

<sup>31</sup>*Republic v Kahindi Nyafula and Others ex parte Kilifi South East Farmers' Cooperative Society* [2014] eKLR.

<sup>32</sup>Sang YK (n 17).

<sup>33</sup>Gathii (n 1) 36.

<sup>34</sup>Akech (n 16) 360-379.

<sup>35</sup>*Republic v Kenya Association of Music Producers (KAMP) and Others ex parte Pubs, Entertainment and Restaurant Association of Kenya* [2013] eKLR.

<sup>36</sup>[2014] eKLR, para 123.

<sup>37</sup>*Republic v Kenya Association of Music Producers (KAMP) and Another ex parte Nakuru Municipality Pubs, Bars, Restaurants and Hotel Owners Association* [2015] eKLR.

*Joseph Medical Training College* the court declined to quash the disciplinary proceedings and decision of a private college leading to the suspension of the petitioner.<sup>38</sup> While accepting that the respondent performed the public function of training medical officers, the court reasoned that private bodies should be allowed to run their affairs without the interference of courts except if they overreach their mandates as per their constituting documents or are in breach of law.<sup>39</sup> The discrepancy of reasoning between the *Mambo* and *Ogila* cases indicates that the issue of the availability of private actions for judicial review in Kenya is unsettled and unresolved.<sup>40</sup>

The concept of reasonableness as espoused in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>41</sup> can also illustrate how Kenyan courts have not fully appreciated the effect of constitutionalizing administrative justice rights. *Wednesbury* unreasonableness refers to ‘something so absurd that no sensible person could ever dream that it lay within the powers of the authority’ or ‘something so unreasonable that no reasonable authority could have ever come to it.’ In contrast to the standard of reasonableness in Article 47 of the 2010 Constitution, which has a broader meaning and thus offers wide avenues for judicial review, the *Wednesbury* view of reasonableness focuses narrowly on the gross nature of an action as the main basis to determine irrationality and thereby limits availability of judicial review. In spite of this, Kenyan courts have continued to use the *Wednesbury* notion of gross unreasonableness as the standard for testing the validity of administrative action.<sup>42</sup>

In *Kevin K Mwiti and Others v Kenya School of Law and 2 Others*, for instance, the court disregarded the constitutional standard of reasonableness as a ground for judicial review and opted instead to rely on *Wednesbury* unreasonableness.<sup>43</sup> A similar approach was adopted in *R v Public Procurement Administrative Review Board and Others ex parte Seven Seas Technologies Limited*.<sup>44</sup> Relying on the *Wednesbury* unreasonableness and the reasoning in *Kevin K Mwiti*, the court held that in order to justify interference with the decision of an inferior tribunal the relevant decision must be so outrageous in defiance of logic or acceptable moral standards that it may be

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<sup>38</sup> [2011] eKLR.

<sup>39</sup> Ibid.

<sup>40</sup> Akech (n 16) 388.

<sup>41</sup> [1948] 1 KB 223 (CA).

<sup>42</sup> *Republic v Commissioner of Customs Services ex parte Africa K-Link International Limited* [2012] eKLR.

<sup>43</sup> Petition 377, 395 & JR 295 of 2015.

<sup>44</sup> Misc Civil Application 168 of 2014.

found to have met the irrationality test for the purposes of *Wednesbury* unreasonableness.<sup>45</sup> The example of how Kenyan courts have interpreted reasonableness demonstrates how little regard has been given to the meaning and significance of Article 47 of the 2010 Constitution. Consequently, much of the revolutionary potential of Article 47 remains unjustifiably curbed, impatiently waiting to be unlocked. In this context, it is useful to learn from the experience of comparable jurisdictions which have faced the challenges that attend the constitutionalization of the right to administrative justice.

### **3. THE RESEARCH QUESTIONS AND OBJECTIVES**

As has been stated above, the present study seeks to enquire into the legal implications of the constitutionalized right to fair administrative action in Kenya, with a special focus on how and, if so, the extent to which it has revolutionized the country's administrative justice jurisprudence vis-à-vis experiences from comparable jurisdictions. The principal question around which the enquiry of this study will be based is: whether the revolutionary effect of Article 47 of the 2010 Constitution has been given effect in Kenyan law, policy and practice; and if so, how Kenya's post-2010 administrative law jurisprudence compares with the practice in comparable common law jurisdictions where the right to administrative justice has similarly been constitutionalized.

The key objective of this study is to assess and justify, by way of systematic analysis and comparative review of case law, whether and, if so, the extent to which the revolutionary potential of Article 47 of the 2010 Constitution has been or can be realized in Kenya. Accordingly, this study will assess both the arguments for and against the realization of the revolutionary potential of Article 47. These arguments will then be compared with experiences from common law African contexts where: i) the right to administrative justice has only been articulated in the bill of rights without further statutory guidance; and ii) that right is constitutionalized and further codified by legislation meant to give effect to that right. By examining these comparable African jurisdictions, the study seeks to elaborate a principled basis for reconciling the right to administrative justice as set out in the provisions of the respective constitutions with the common law.

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<sup>45</sup> Ibid.

As regards its relevance, this study has potentially positive contributions which it can make to the field of comparative administrative law. First, the study offers a systematic and contextual analysis of the effect of the constitutionalizing the right to administrative justice in Kenya; this will likely prove very useful as there is scant literature on the subject.<sup>46</sup> Secondly, for the first time, this study will provide a comparative review and detailed assessment of the little examined Kenyan experience vis-à-vis that of Malawi and South Africa, which have been explored at length.<sup>47</sup> Thirdly, the study will also outline a substantive and procedural administrative law framework on which to assess how the common law principles of judicial review can (or should) influence the content of constitutional rights to administrative justice; this can provide a normative model to be used in comparable common law jurisdictions confronted by the difficulty of reconciling the two bases of judicial review.

The 2010 Constitution sought, among other things, to institute revolutionary changes to Kenya's administrative law, which was previously premised on the common law. By replacing parliamentary sovereignty with constitutional supremacy, the 2010 Constitution ensured that the power of judicial review was based not on principles of the common law but on the constitution itself.<sup>48</sup> Also, Article 47 of the 2010 Constitution has expanded the limited common law grounds for judicial review and the resulting legal remedies.<sup>49</sup> However, case law emerging from Kenyan courts suggests that there has been incomplete judicial appreciation of the implications of Article 47 for Kenya's administrative law jurisprudence.<sup>50</sup> The revolutionary potential of the right to fair administrative action therefore remains under-utilized in, at least, three areas.

First, there has been little elaboration of the grounds for judicial review under Article 47, namely expedition, efficiency, lawfulness, reasonableness and procedural fairness. These grounds may resemble some common law grounds but, as will be shown, they have broader import.<sup>51</sup> Secondly, Kenyan courts have not paid much attention to the significance of clarifying the meaning of administrative action and thus the availability of judicial review. As will be

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<sup>46</sup> O Sang, 'The Right to Fair Administrative Action in Kenya: Lessons from South Africa's Experience' (2013) 1(2) *Africa Nazarene Law Journal* 83.

<sup>47</sup> DM Chirwa, 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' (2011) 55(1) *Journal of African Law* 105-127; C Hoexter, 'Administrative Action in the Courts' (2006) *Acta Juridica* 303.

<sup>48</sup> See above, Section 1.

<sup>49</sup> Akech (n 16).

<sup>50</sup> OJ Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the *Odumbe* Case would be Decided Differently Today' (2015) 29 *National Council for Law Reporting Bench Bulletin* 18.

<sup>51</sup> See below Chapter 3.

shown, Kenyan courts have erroneously tended to adopt an approach that emphasizes on the nature of the decision-making body rather than the nature of the function to determine what constitutes administrative action. Thirdly, Kenyan courts have not reconciled the right to fair administrative action as enunciated in Article 47 with the common law, nor has there been any sustained analysis of the legal implications for Kenya's administrative justice jurisprudence of interactions between Article 47, the Fair Administrative Action Act (FAAA) and the common law

#### **4. RESEARCH METHODOLOGY**

The qualitative research methodology will be used in the present study, whereby the research activities will entail a review of the existing legal literature. Most of the primary material that will be relied on in the study will be drawn from the constitutions, acts of parliament and executive policy documents of the selected states. Also, this information will be derived from the case law of the courts in the selected jurisdictions as well as the decisions of quasi-judicial and regulatory bodies. Secondary sources of information that will be used in the study will be obtained from scholarly articles, manuals on judicial practice, textbooks and, where appropriate, international instruments.

As is the case with Kenya, Malawian and South African administrative law prior to the adoption of new constitutions was significantly influenced by the common law.<sup>52</sup> Courts in particular used the principles of natural justice and the doctrine of *ultra vires* as a basis to exercise their inherent jurisdiction to review the exercise of public power.<sup>53</sup> Due to the limited avenues for securing redress, among other reasons, there was agitation for new dispensations. This resulted in new constitutions, the 1994 Malawian Constitution and the 1996 South African Constitution, which expressly recognized administrative justice as fundamental rights in their respective bills of rights. Also, in both countries the courts had occasion to discuss the content and implications of the respective constitutional rights to fair administrative action.

In light of the numerous similarities that are evident in the experiences of Malawi and South Africa to those of Kenya, this study argues that much can be gained from a comparative review

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<sup>52</sup>Chirwa (n 47); H Corder, 'Administrative Justice in the Final Constitution' (1997) 13 *South African Journal of Human Rights* 31.

<sup>53</sup>Chirwa, *ibid*; C Hoexter, *Administrative Law in South Africa* (2012) 13-18.

of the impact of constitutionalized administrative justice rights in the respective jurisdictions. Particular attention is given to the practice of courts and the legislature. It is further contended that critical insights can be drawn from the process examining the best practices from jurisdictions, like South Africa, with more progressive jurisprudence as well as the mistakes that have been made in Kenya and Malawi. In the final analysis, it is shown that by learning from one another's mistakes and successes, it is possible to set out a unitary model of best practice that can significantly promote administrative justice in Africa.

## **5. SCOPE AND LIMITATIONS OF THE STUDY**

This study aims to present a contemporary account of the current state of the law, but it acknowledges that not all matters can be resolved in the limited space of a thesis. Thus rather than pretending to offer exhaustive solutions to intractable problems that have long troubled practitioners, adjudicators and scholars of administrative law, this study restricts its scope to a very specific objective: that is, to provide a contextual analysis of the significance and effect of constitutionalizing administrative justice rights in general, and its implications for statutory and common law rights. This study also limits the scope of its comparative legal analysis to three countries: Kenya, Malawi and South Africa. These countries have been selected on the basis of their similarity of legal system and more so their overall comparability as representative African common law jurisdictions.

## **6. STRUCTURE OF THE STUDY**

Chapter 1 provides a general outline of the subject of the study, highlighting the background of judicial review in Kenya before the promulgation of the 2010 Constitution. It discusses the implications of the constitutionalization of the right to fair administrative action for Kenya's administrative justice jurisprudence and specifies the problem for inquiry. Chapter 2 discusses the conceptual and theoretical underpinnings of the conception of judicial review as a legitimate democratic institution as well as the persistent tensions that surround it. As a constitutional means for the regulation of political power of elected or democratically accountable officials by an unrepresentative minority, judicial review has been criticized as incompatible with democratic institutions. It thus becomes necessary to first address some of the critiques of judicial review before examining the outcomes of constitutionalized administrative law in Kenya. Chapter

2 offers a foundational analysis of role of judicial review in constitutional democracy as the basis for outlining a cogent framework for evaluating how Article 47 of the 2010 Constitution has revolutionized Kenya's administrative law.

Chapter 3 offers an overview of the concept of judicial review of administrative action as has been developed in Kenya. Its discussion places the common law principles of judicial review in Kenyan administrative law in its historical and contemporary context in order to demonstrate how the judiciary and legislature have progressively expanded both the conceptual grounds and bases of judicial review to better supervise the exercise of administrative action. It also critically discusses how some Kenyan courts have sought to mediate the relationship between the common law-based judicial review with Article 47 of 2010 Constitution and FAAA. The analysis of the Kenyan experience is carried out in three phases: the period before the 2010 Constitution; the post-2010 period; and the period after FAAA.

Chapter 4 discusses how courts in Kenya have sought to implement Article 47 of the 2010 Constitution, which articulates the right to fair administrative action. It shows that despite the explicit provision of this constitutional right and clear articulation of the doctrine of constitutional supremacy, some courts in Kenya have continued to dispose of judicial review applications almost entirely on the traditional common law grounds. In other cases, Kenyan courts have had due regard to the grounds for judicial review in Article 47 but have not clarified what the new grounds mean for Kenya's administrative law. This trend, which is also evident in comparative case law, is identified as one of the greatest barriers to realizing the full import of constitutionalized administrative justice rights. By way of comparative review of Kenyan, South African and Malawian case law, this chapter seeks to draw some key lessons for Kenya from the critiques of Malawian courts and the progressive developments in South African administrative law jurisprudence. Chapter 5 concludes the study by summarizing the main research findings, recommendations for legal and policy reform, and the areas for further research.

## Chapter 2

### JUDICIAL REVIEW AND ITS ROLE IN CONSTITUTIONAL DEMOCRACY: CONCEPTUAL AND THEORETICAL ANALYSIS

#### 1. INTRODUCTION

Constitutional democracy is founded on the premise that the people's power, which is entrusted to elected representatives, must be exercised according to the will of the people, and this constituent power of the people turns on majoritarian rule.<sup>54</sup> This conception of democracy views political power as deriving from the people via a social contract under which the people ceded individual autonomy to a select minority on the basis that the latter would protect them.<sup>55</sup> Cast in this light, constitutional democracy is at once a system of government, a pre-commitment to rational limits on collective power, and a form of sovereignty.<sup>56</sup> This becomes more apparent when considered in light of the initial social contract moment when a free people willingly 'binds itself in a constitution to the protection of fundamental rights and freedoms and to a form of representative democracy which leaves ultimate political power in the people as a whole to govern through regularly scheduled elections and ... public participation in government decision-making.'<sup>57</sup> Thus understood, constitutional democracy stresses the collective autonomy of the people to directly take part in processes that allow them to be self-determined while also protecting their individual rights.<sup>58</sup>

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<sup>54</sup> H Kliemt, 'Constitutional Optimism and Scepticism in Buchanan and Jasay' in H Kliemt & H Bouillon (eds), *Ordered Anarchy: Jasay and His Surroundings* (2016) 167, 169.

<sup>55</sup> SCR McIntosh, *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (2005) 34.

<sup>56</sup> S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990-91) 9 *Law and Philosophy* 327; C Lebeck, *Pre-Commitments, Disagreement, and the Limits of Constitutionalism* (1957-2000) 134-156.

<sup>57</sup> Freeman (n 56) 24.

<sup>58</sup> CF Consani, 'Constitutional Precommitment and Collective Autonomy: Can they Be Reconciled?' (2015) 7(3) *RECHTD* 235-242.

Judicial review is a constitutional mechanism for regulating public power which is normally exercised by elected or democratically accountable officials.<sup>59</sup> Judicial review, and particularly its restraints on legislative or executive power, raises problems for democracy.<sup>60</sup> Some critics of judicial review rely on ‘separation of powers’ as the basis for arguing that judicial enquiry into the functions of other arms of government is inappropriate and will likely beget the spectre of judicial despotism.<sup>61</sup> Judicial review has also been dismissed as illegitimate and even elitist because it subjects the actions of democratically accountable bodies or persons to the scrutiny of the courts, thereby effectively transferring ‘political power from the executive and legislature to the judiciary.’<sup>62</sup> Yet there is an alternative, and more preferable, conception of judicial review: that is, as a legitimate democratic institution. The conceptual and theoretical underpinnings of this progressive understanding of judicial review and the persistent tensions about it are analyzed in this chapter.

This study considers Kenya’s constitutional right to fair administrative action, with a special focus on the extent to which its potential has been realized. This exercise will invariably touch on the role of judicial review in a constitutional democracy. Context thus becomes critical to the subsequent enquiry of the conceptual ways and institutional mechanisms through which such power can be constrained. It would be exceedingly ill-fitting to begin examining the implications of constitutionalizing administrative law in Kenya before providing a foundational analysis of judicial review and its role in constitutional democracy. This is because a conceptual and theoretical analysis is the only way that a cogent framework can be articulated to advance the argument that Article 47 of the 2010 Constitution has revolutionized Kenya’s administrative law but is yet to be fully implemented.<sup>63</sup>

## **2. CONSTITUTIONAL DEMOCRACY AND JUDICIAL REVIEW**

### **2.1 Attributes of Constitutional Democracy**

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<sup>59</sup> J Ely, *Democracy and Distrust* (1980) 4-5: ‘The central problem of judicial review is: a body that is not elected or otherwise politically responsible is telling the peoples’ elected representatives that they cannot govern as they’d like’. See also SB Prakash, ‘Zivotofsky and the Separation of Powers’ (2015) *Supreme Court Review* 1.

<sup>60</sup> CR Sunstein & A Vermeule, ‘The New Coke: On the Plural Aims of Administrative Law’ (2015) *Supreme Court Review* 41.

<sup>61</sup> S Hook, *The Paradoxes of Freedom* (1962) 5.

<sup>62</sup> KD Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 *Modern Law Review* 79.

<sup>63</sup> Akech (n 16).

Constitutional democracy denotes a system of government by the people (democracy) which enforces constraints on those who exercise public power on behalf of the people while allowing people to participate in determining the way that they are governed through regular, free and fair elections.<sup>64</sup> It gives priority of the will of the people, commits the people to the rule of law, and places limitations on the exercise of public powers in accordance with the constitution.<sup>65</sup> A defining feature of constitutional democracy is the fact that the constitution—and no other source—conclusively defines, distributes and limits governmental power. Having the constitution as the touchstone for determining the legitimacy of political authority serves the dual functions of placing rational constraints on the discretionary power of public decision-makers and protecting the rights of citizens. The role of the constitution in establishing the basis for governance in a society can be elaborated as follows:

In its broadest sense a constitution represents the basic structure of any organized society. Formal or informal, written or unwritten, its existence is inevitable. One may or may not be able to touch it as a document or to read it as a series of documents, but as social structure it is there. When one speaks of a modern constitution, however, notions of formality emerge, and in post-colonial Africa this has come down to a single document, a charter for the exercise of political power called the constitution.<sup>66</sup>

Besides defining how political power is to be shared and exercised, constitutional democracy is also characterized by inherent yet justifiable limitations on governmental power. Accordingly, constitutions serve the crucial purpose of limiting the legitimate exercise of political power. This is accomplished through the identification of certain fundamental values of national importance that should guide the process of crafting and executing public policy decisions, reviewing such (proposed) decisions and ensuring that those exercising public power adhere to the rule of law. In this manner, the constitution ceases to be a document that ‘mechanically defines the structures of government and the relations between the government and the governed’, but transforms into ‘a “mirror of the national soul,” the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government.’<sup>67</sup>

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<sup>64</sup> WF Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (2007).

<sup>65</sup> Hoexter (n 53) 140.

<sup>66</sup> MB Ndulo & RB Kent, ‘Constitutionalism in Zambia: Past, Present and Future’ (1996) 40(2) *Journal of African Law* 256.

<sup>67</sup> *S v Acheson* 1991 (2) SA 805 (Nm) at 813A-B (Mahomed AJ).

While there is contestation on the minimum requirements for the effective legal regulation of democratic forms of government,<sup>68</sup> there is consensus on the following: '(i) the recognition and protection of fundamental rights and freedoms; (ii) the separation of powers; (iii) an independent judiciary; (iv) the review of the constitutionality of laws; the control of the amendment of the constitution; and (v) institutions that support democracy.'<sup>69</sup> These form part of the minimum requirements of constitutionalism.<sup>70</sup> Legal processes such as judicial review, which evaluates the conformity of governmental decisions with the constitution, afford both the courts and individuals an opportunity to regulate the powers of democratic institutions (parliament and the executive) within the parameters set out in the constitution. This, however, raises the opposition of some who question the legitimacy of judicial power to call into question the decisions of such institutions or decision-makers, particularly the president.<sup>71</sup>

## 2.2 Contested Democratic Character of Judicial Review

Judicial review is a unique public law remedy devised to fairly resolve disputes resulting from unlawful or harmful exercise of public power, or to prevent or stop unlawful conduct. It refers to the jurisdictional mandate of 'courts to pass on the constitutional validity of the policies or enactments of the democratically accountable institutions or decision makers'.<sup>72</sup> Judicial review raises a fundamental tension with that conception of democracy that has majority rule as its central feature.<sup>73</sup> By empowering the judiciary to declare as legally (in)valid an executive policy or legislative enactment, the power of judicial review may appear contrary to constitutional democracy because it sometimes operates to constrain or subvert the will of the people.

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<sup>68</sup> M Darrow & P Alston, 'Bills of Rights in Comparative Perspective' in P Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999) 465; L Henkin, 'Elements of Constitutionalism' (1998) 60 *Review* 11-22.

<sup>69</sup> CM Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007, 1014.

<sup>70</sup> Constitutionalism refers to those legal and political processes used to hold governmental actors and others actors exercising public powers accountable for failing to adhere to the substantive rules of procedures set out in the constitution.

<sup>71</sup> IM Rautenbach, 'Policy and Judicial Review – Political Questions, Margins of Appreciation and the South African Constitution' (2012) 1 *TSAR* 20-34.

<sup>72</sup> McIntosh (n 55) 34.

<sup>73</sup> *Ibid* 34.

Critics of judicial review have argued that it is incompatible with democracy.<sup>74</sup> One of the more notable ones, Jeremy Waldron, has summarized the core of the democratic argument against judicial review in two theses.<sup>75</sup> The first is the substantive argument, which holds that it is difficult to conclusively prove that judiciaries are better placed than legislatures to protect the individual rights of the citizens. The second is the procedural argument, which maintains that because legislatures are more egalitarian and participatory processes, they are more legitimate than courts in terms of their democratic persuasiveness. Both arguments form the basis for the case against judicial review which has been presented as follows:

[Judicial review] does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights .... And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality.<sup>76</sup>

The fundamental inconsistency posed by judicial review in this regard has been immortalized by Bickel in his classic formulation of ‘the counter-majoritarian difficulty’:

The root difficulty is that judicial review is a counter-majoritarian force in our system ... when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones is what actually happens ... [I]t is the reason the charge can be made that judicial review is undemocratic ... Although democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal.<sup>77</sup>

The concern raised by Bickel and other commentators on constitutional democracy point to the fact that majoritarian rule is the most fundamental feature of democracy.<sup>78</sup> But it also raises serious doubt as to whether majority rule, as the fountain of democracy, should be the principal method of formulating all governmental policy decisions. Liberal democratic theory as well as constitutional law theory indicates that inherent limitations of majority rule make it inappropriate as the determining factor in all decisions on the legitimacy or validity of exercises of public

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<sup>74</sup> R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007) 5; LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

<sup>75</sup> J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346.

<sup>76</sup> *Ibid* 1353.

<sup>77</sup> A Bickel, *The Least Dangerous Branch* (1962) 16-17.

<sup>78</sup> S Macedo, ‘Against Majoritarianism: Democratic Values and Institutional Design’ (2010) 90 *Boston University Law Review* 1029, 1031.

power.<sup>79</sup> Individual rights have been devised as a counterpoint to majority rule; fundamental rights are entrenched in constitutional documents, but their institutional protection and enforcement is not subject to popular choice or control.<sup>80</sup> Rather, it is regulated by certain foundational norms and values that are not a product of democratic choice, including the rule of law.<sup>81</sup>

Constitutional democracy can and should therefore be best understood as a means of upholding a society's political culture to be governed by representatives of their choice while accepting the necessity of and pre-commitment to fundamental values that may, in appropriate cases, override popular choice.<sup>82</sup> In order to be sustainable, constitutional democracies must be founded on some widely agreed upon mechanisms for legal regulation of the very powers that derive from the constitution. Judicial review, perhaps the most potent form of governmental regulation, achieves this in two ways. First, it enables individual citizens to approach the courts to challenge the legality of decisions or actions of parliament or the executive.<sup>83</sup> Secondly, it empowers courts to pass judgment on the legal validity or statutory propriety of actions of administrators, including private actors.<sup>84</sup>

These two outcomes of judicial review are supported by a political culture that is founded on the basic values and objectives of the society, which are often articulated as national values, including supremacy of the law and equality before the law.<sup>85</sup> Other forms of legal regulation of governmental power are likewise founded on political consensus, sometimes even predating the present society, on the need for legal-rational limitations on political power, legitimate means for dispute resolution, and guiding principles on which the institutions and practices of constitutional democracy can be nurtured and maintained.

### **2.3 Judicial Review as Part of Constitutional Democracy**

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<sup>79</sup> McIntosh (n 55) 33.

<sup>80</sup> Ibid.

<sup>81</sup> C Beitz, *Political Equality: An Essay in Democratic Theory* (1989) 55-67.

<sup>82</sup> Freeman (n 56).

<sup>83</sup> T Raine, 'Judicial Review under the Human Rights Act: A Culture of Justification' (2008) *North East Law Review* 81, 91.

<sup>84</sup> T Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 *Oxford Journal of Legal Studies* 697.

<sup>85</sup> JE Fleming, 'The Natural Rights-Based Justification for Judicial Review' (2001) 69(5) *Fordham Law Review* 2119.

Judicial review is one of the constitutional mechanisms for courts to regulate and oversee how democratically accountable institutions and decision makers perform their functions. It thus raises a fundamental conflict with the majoritarian conception of democracy. This fundamental tension between judicial review and constitutional democracy has been termed by Bickel as ‘the counter-majoritarian difficulty’.<sup>86</sup> As stated above, Bickel considers judicial review as an aberrant institution of constitutional democracy because it diminishes ‘the central function that is assigned in democratic theory and practice to the electoral process’ and denies that the policy-making and legislative power of the two representative branches of government forms the unique characteristic of the system.<sup>87</sup> Judicial review has long been criticized as a creeping form of judicial oligarchy,<sup>88</sup> but a more purposive analysis may refute this narrow conception.

Yet in his exposition of the problem of judicial review in a constitutional democracy, Bickel also refers to some cogent arguments that can rebut the counter-majoritarian charge that is frequently levelled at judicial review. What follows below is an excerpt that illustrates this:

There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of “the people”, the limits that they have ordained for the institutions of a limited government. And it has been done ever since in much the same fashion by all too many commentators. Marshall himself followed Hamilton, who in the 78th Federalist denied that judicial review implied a superiority of the judicial over the legislative power – denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority. “It only supposes”, Hamilton went on, “that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”<sup>89</sup>

What is clear from Bickel’s assessment of the ways of overcoming the counter-majoritarian difficulty of judicial review is that the people, by acceding to the terms of the social contract, agree that it is necessary to place some limitations on governmental power. The above quote shows that Bickel relies, inter alia, on the traditional defence of judicial review, as explicated by Hamilton<sup>90</sup> and Marshall,<sup>91</sup> which asserts that: a) the courts’ adjudicative functions are a

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<sup>86</sup> Bickel (n 77) 16-17.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 16-17.

<sup>89</sup> Bickel (n 77) 16-17.

<sup>90</sup> A Hamilton, *Federalist Paper No. 78: The Judiciary* (1788).

<sup>91</sup> *Marbury v Madison* 5 U.S. 137 (1803) per Marshall CJ.

prerequisite for the protection of individual rights; and b) the courts must have the final say in both statutory and constitutional interpretation.

Another notable argument is premised on constitutional supremacy. It recognizes the priority of the will of people who, by acceding to the terms of the social contract, invest their collective power in the constitution and accept the necessity of inherent limitations on governmental power. Any act or conduct of government that is contrary to the constitution, as determined by courts, then becomes contrary to the will of the people. By entrenching human rights in a constitution, the individual's rights are placed in 'a higher law beyond tampering by ordinary politics'.<sup>92</sup> In this scheme, judicial review becomes a necessary enforcement tool that enables courts to effectively protect the individual rights by enforcing the limits on executive and legislative power. Thus, judicial review is part of the pre-commitment by free and equal citizens to maintain their sovereignty by having the constitution as the repository of their basic rights and the basis for principled limitations on public powers.<sup>93</sup>

Besides the supremacy of the constitution, there are other equally cogent arguments for the necessity of judicial review in a constitutional state. The decentralization of governmental power to constituent self-governing units is one of them. Federalist or devolved systems of government are characterized by the systemic division of legislative and other forms of public power among several governments.<sup>94</sup> This results in a shift of public power away from the executive branch to the grassroots. But it also leads to some unintended and undesirable outcomes: maladministration and abuse of power by the devolved units. Experiences from many nations with devolution as their main system of government indicate a tendency for conflicts between the national and federal governments; South African<sup>95</sup> and Kenyan experiences in this regard are instructive.<sup>96</sup>

On the other hand, it has been argued that the scope of judicial review must itself be limited lest it becomes an anti-democratic force which may threaten liberal democracy. This has in turn given rise to two distinct models of judicial review: a) the majoritarian model; and b) the rights-

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<sup>92</sup> McIntosh (n 55) 35.

<sup>93</sup> Freeman (n 56) 329.

<sup>94</sup> Ibid 367.

<sup>95</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC); *Minister of Police and Others v Premier of the Western Cape and Others* 2013 (12) BCLR 1365 (CC).

<sup>96</sup> *Martin Nyaga Wambora v Speaker of the Senate and Others* [2014] eKLR; *International Legal Consultancy Group v Senate and Clerk of the Senate* [2014] eKLR.

protection model.<sup>97</sup> Adherents of the majoritarian model insist that popular will is the central and legitimate source of law in a democracy that justifies the exercise of public power:

A sophisticated understanding of the majoritarian process can adapt to rights protection because its political aspirations are consistent with the constitutional value system that rights protection reflects. This view rests on the idea that political choice embodies not just the successful conclusion of a process but the general striving of numerous elements of the common good to prevail based on their intensity, duration and numerical support. The strength of such an approach lies in the legislature's institutional capacity, based in its representational nature and public responsiveness, to take a global view of the needs and desires of all concerned and thereby to maximize the benefit to society as a whole.<sup>98</sup>

Thus, on the majoritarian model, judicial review must function primarily as a means to balance individual rights against governmental concerns such as state interests and the common good.<sup>99</sup> This essentially entails institutional deference of the courts to other branches of government.<sup>100</sup>

By contrast, the rights-protection model accords primacy to individual rights and demands justification for their limitations. Instead of opposing majoritarianism, judicial review corrects its inherent defects by inculcating justness into public decision-making. This rights-centred conception of judicial review has been explicated as follows:

On this view, judicial protection of individual rights is consistent with a view of the constitution as a form of higher lawmaking in a democratic society, in which the people settle certain matters of constitutional fundamentals, "once and for all", thereby taking them off the agenda of ordinary politics. On this view, entrenched fundamental rights function critically as substantive moral constraints on the political branches of government. ... Judicial review raises a "sobering second thought" as to the justness of legislative and executive deliverances.<sup>101</sup>

These conceptions of the role of judicial review in a constitutional democracy may appear mutually contradictory. However, a more nuanced assessment would suggest that they are complementary and mutually supporting.<sup>102</sup> As has been stated above, the institutional dynamics of a constitutional democracy require both judicial constraints on the exercise of public power

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<sup>97</sup> L Weinrib, 'Limitations on Rights in a Constitutional Democracy' (1996) 6 *Caribbean Law Review* 428, 430.

<sup>98</sup> *Ibid*, 430-31.

<sup>99</sup> McIntosh (n 55) 43-44.

<sup>100</sup> KS McLean, *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (2009) 70.

<sup>101</sup> McIntosh (n 55) 44-45.

<sup>102</sup> *Ibid* 45.

and principled limitations on judicial powers so as to maintain popular sovereignty.<sup>103</sup> Hence, judicial review has a unique function: to reconcile the competing claims of majoritarian rule, institutional separation of powers and the protection of individual rights.

Courts have thus been urged to adopt a cohesive interpretive approach that mediates the respective contested interests. In this regard, courts are accepted as the final authority to interpret the constitution, to enforce individual rights and to hold the people and their representatives to the pre-commitments to limitations on public power. How this judicial authority should be exercised is a more complex issue that courts have to continually articulate so as to best adapt the scope of judicial review to contextual developments in their respective jurisdictions.

### **3. CONCEPTUAL FRAMEWORK FOR ANALYSIS**

#### **3.1 Constitutional Democracy and Its Discontents**

At its broadest and simplest, constitutional democracy refers to a system of government in which the power to govern derives from the people, is defined in and limited by a constitution, and provision is made for regular elections as a means to hold elected representatives to account. The merits of constitutional democracy as a system of government are widely accepted the world over. It is often characterized as the most effective bulwark against authoritarian tendencies, even in spite of some limitations.<sup>104</sup> It has, however, been rejected as impractical and ill-suited to African conditions; but despite such criticism it has been held to be the most viable option currently available.<sup>105</sup> One commentator captures both the travails and hopes of constitutional democracy in Africa as follows: ‘Democracy is often costly, messy, and difficult, but it is also the best hope for building sustainable settlements to most conflicts in most communities.’<sup>106</sup> The more critical commentaries on the legitimacy of democracy as a form of government can be found in early writings on post-independence governance in Africa, where law and democracy were frequently cast as impediments rather than facilitators of much needed development: ‘the two basic goals of African politics – development and legality – seem inherently contradictory

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<sup>103</sup> J Waldron, ‘Precommitment and Disagreement’ in J Arthur & WH Shaw (eds), *Readings in the Philosophy of Law* (2001) 535, 538.

<sup>104</sup> JK Tulis & S Macedo (eds), *The Limits of Constitutional Democracy* (2010).

<sup>105</sup> FM Deng et al *Identity, Diversity, and Constitutionalism in Africa* (2008).

<sup>106</sup> MB Ndulo, ‘Ethnic Diversity’ in FM Deng (ed), *Self-Determination and National Unity: The Crisis of Divided Nations* (2009).

... Constitutions can never achieve a balance between those two poles to match the values of every strata of society.’<sup>107</sup>

The discontents of constitutional democracy that arise from the difficulty to reconcile the will of the people with the powers of unelected officials have been partly resolved by the rise of independent state actors, including the ombudsman. Many African nations that adopted new constitutions in the mid-1990’s created constitutionally-entrenched independent institutions to enhance constitutional democracy and accountability.<sup>108</sup> Institutions of this nature that are established in the respective constitutions often have corresponding provisions which prescribe ways of ensuring their effectiveness while limiting potential counter-democratic process and practices.

### **3.2 The Diminishing Public-Private Divide**

One of the consequences of the social contract between individuals and their representatives is the emergence of the state which exercises enormous public power over individuals, which in turn creates an unequal parity of power between the right-bearing individual and the state. In contrast, relations between individuals in the private sphere are presumed to be governed by nominal equality and freedom. This is the root of the distinction between the concerns of public and private law. Public law is concerned with limiting state power by distributing among various organs and institutions, as well protecting the rights of individuals.<sup>109</sup> Private law aims to promote individuals’ capacity to interact with one another in their private relations, in conditions of freedom and equality, and without state interference. Consequently, liberal theory maintains that public or governmental bodies have duties under public law to make decisions that are rational, reasonable, fair, participatory, and just whenever they exercise institutional power capable of affecting rights and interests. Private bodies are similarly obliged when they exercise public or governmental functions.<sup>110</sup>

While it is increasingly accepted that both public and private bodies have duties to ensure that their actions or decisions do not impact adversely on rights or vital interests of individuals, it

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<sup>107</sup> RB Seidman, ‘Constitutions in Independent, Anglo-phonetic Sub-Saharan Africa: Form and Legitimacy’ (1969) *Wisconsin Law Review* 83, 91.

<sup>108</sup> Fombad (n 69) 1040

<sup>109</sup> D Oliver, *Common Values and the Public-Private Divide* (1999) 34.

<sup>110</sup> J Freeman, ‘Extending Public Norms through Privatization’ (2003) 116 *Harvard Law Review* 1285.

is less clear whether such duties can form the basis for a judicial review application.<sup>111</sup> In simpler terms, there are easy cases where public and private bodies perform functions of a public nature and are thus subject to judicial review; but there are hard cases where private bodies exercise *defacto* private power, making it debatable whether such actions are available for judicial review.<sup>112</sup> Recent developments in the privatization of state functions and the emergence of the ‘contracting state’, whereby private actors are increasingly affecting vital interests, have given substantial force to the argument that actions or decisions, whether public or private, that may affect rights or interests should be subject to judicial review.

Two arguments in support of this expansion of the regulatory scope of judicial review into the private sphere are most persuasive and relevant for the present study. First, it has been argued that what is decisive in determining whether a particular decision should be subjected to judicial review is not the public or private character of the decision-maker, but the propriety of the exercise of power.<sup>113</sup> Secondly, the progressive trend of extending the effect of constitutional rights and values to private relations which are otherwise governed by private law has impacted on the scope of judicial review. Recognizing the limits of the liberal theory approach which insisted on a formal ‘public-private division’ that left private power under-regulated, judicial review has been modified to protect the individual rights which may be threatened by powerful private actors and institutions.<sup>114</sup> These two arguments emphasize the need to reconfigure the tools available under public law so as to better regulate the growing province of private institutional power in accordance with constitutional norms.

### **3.3 Merits versus Process Review**

An important conceptual development in modern judicial review theory and practice is the shift from exclusively reviewing the process by which a decision is made to reviewing, in appropriate cases, the merits of the decision in question. The traditional position focused on the decision-making process rather than the decision itself in order to distinguish judicial review from appeal

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<sup>111</sup> P Craig, ‘Public Law and Control over Private Power’ in M Taggart (ed), *The Province of Administrative Law* (1997) 211

<sup>112</sup> Akech (n 16) 353.

<sup>113</sup> Oliver (n 109) 639.

<sup>114</sup> S Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 *Michigan Law Review* 394, 395.

or review.<sup>115</sup> This view was well stated in the English case of *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw*,<sup>116</sup> where the court stated that in the exercise of its judicial review jurisdiction, it does not substitute its own views for those of the tribunal as an appeals court would; rather, it leaves it to the tribunal to reconsider the case again and, if appropriate, compel it to do so. Hence, the scope of judicial review was restricted to providing remedy for improper exercise of power at the decision-making stage, leaving out the questions about the merits of the decision itself.

More recently, however, the scope of judicial review has been expanded to include merits of the decision by way of the principle of legality.<sup>117</sup> Courts have observed that constitutionalized judicial review extends the scope of enquiry to cover both procedural and, in appropriate cases, substantive issues.<sup>118</sup> In *Maasai Mara (SOPA) Limited*, the High Court held that since the coming into effect of the 2010 Constitution, a conjunctive reading of Article 47 and Article 23(3) means that there is now substantive constitutional judicial review of administrative action.<sup>119</sup> This has also been the trend in the United Kingdom after the coming into force of the Human Rights Act, which also codifies administrative justice rights.<sup>120</sup> In particular, the doctrine of proportionality introduces a standard of judicial review that is more intense than its common law equivalent.<sup>121</sup> Remarking on this crucial difference, it has been observed that proportionality demands a more exacting degree of justification, on the part of decision-makers, to show why it was necessary to take the challenged action and how they went about balancing any competing interests.<sup>122</sup>

## **4. THEORETICAL APPROACHES**

### **4.1 Transformative Constitutionalism**

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<sup>115</sup>*Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155.

<sup>116</sup> [1952] 1 KB 339, 347.

<sup>117</sup>*Gathii* (n 1) 33.

<sup>118</sup>*KhadkhaTarpa Urmila v Cabinet Secretary Ministry of Interior and Coordination of National Government* [2016] eKLR at 43.

<sup>119</sup> [2016] eKLR.

<sup>120</sup> P Craig, 'Unreasonableness and Proportionality in UK Law' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 95.

<sup>121</sup>*R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26.

<sup>122</sup>*De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] AC 69 (PC).

As discussed above, constitutions of nations do more than just outlining the institutional structures of government or defining the power relations being the government and the governed; they articulate the sources and limits of legitimate power and specify how the respective nations are to govern themselves.<sup>123</sup> In order for the constitution to function in a practical and efficient manner it is necessary to have mechanisms of self-regulation by which its norms and standards can be operationalized. Constitutionalism provides the rational-legal means for explaining: i) the relationship between the people, from whom legitimate state power derives, and the government; ii) tensions that arises between different branches of government in the discharge of their respective mandates; and iii) how conflicts between coordinate branches of government may be resolved and the conceptual tools that may be deployed towards this end.<sup>124</sup> Constitutionalism therefore offers the theoretical context within which a reasoned account can be given of how constitutional powers are apportioned to which branches, how these branches interact with one other, and how their powers can be exercised in a complementary (common but differentiated) manner.<sup>125</sup>

Constitutionalism is, however, the subject of some conceptual contestation, and this makes it crucial to unpack it and advance the most reasonable understanding of that has emerged from comparative literature. On the one hand, constitutionalism is considered a ‘commitment to limitations on ordinary political power’.<sup>126</sup> This has led to its criticism as illegitimate or anti-democratic because it whittles down the power of ‘the people’ in whom all political power resides.<sup>127</sup> On the other hand, constitutionalism is articulated on the basis of an interpretation of democracy as ‘never simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain pre-arranged procedures.’<sup>128</sup>

Perhaps as a partial consequence of historic affliction of African peoples by self-serving post-colonial regimes, the 1990’s witnessed the resurgence of constitutional democracy. The causal factors of the increased agitation for democratic and constitutional reform have been

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<sup>123</sup> FM Deng at al, (n 105) 10-11.

<sup>124</sup> BO Nwabueze, *Ideas and Fact in Constitution Making* (1993) 189.

<sup>125</sup> M Ndulo, ‘Judicial Reform, Constitutionalism and Rule of Law in Zambia: From a Justice System to a Just System’ (2011) *Zambia Social Science Journal* 3-4.

<sup>126</sup> D Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) xxi.

<sup>127</sup> RA Dahl, *Democracy and Its Critics* (1989) 188.

<sup>128</sup> S Holmes, ‘Precommitment and the Paradox of Democracy’ in J Elster & R Slagstad (eds), *Constitutionalism and Democracy* (1988) 231.

explained as follows: ‘Without the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and no notion of rights. ... Wherever oppression occurs ... there must come into being a conception of rights.’<sup>129</sup> Indeed, after years of autocracy, kleptocracy and cynical misrule, many African nations began the process of changing the entire structure and ideology of governance in their respective countries. This signalled a desire to build definite bridges between the dark, painful past characterized by oppressive, despotic and inequitable exercise of power by those in authority and a progressive future in which the exercise of public power is constrained by rational principles entrenched in the legal instrument that at once confers authority and limits it.<sup>130</sup>

Most African constitutions adopted in the mid-1990s or subsequently thereafter have a shared feature: the institutionalization of constitutional democracy as the basis for a collective pursuit of socio-political and economic transformation.<sup>131</sup> As aptly observed by Mamdani in the period immediately preceding the move towards consolidation and constitutionalization of democracy in Africa, the sickly and enchained body politic that had so scarred post-colonial Africa gave rise to that determined brand of agitation for wholesome, organic, holistic and rational democracy.<sup>132</sup> Constitutions came to be seen as essential foundation stones for the construction of a future of authority as service rather than privilege; and governance as the key embodiment of rule of law as opposed to rule by law.<sup>133</sup>

A good number of the constitutions adopted during this period show a demonstrated desire to set out and operationalize an organizational ethic of socio-political and economic transformation to better reflect the aspirations of the respective citizens.<sup>134</sup> In the 1994 Constitution of Malawi, for instance, the values of ‘unity, loyalty, obedience and discipline’ which were previously the cornerstones of government were replaced by a stated commitment to the rule of law, legality, openness, transparency, accountable government, and democracy.<sup>135</sup> In South Africa, both the Interim and Final Constitutions recognize that they are instruments adopted by the will of the

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<sup>129</sup> M Mamdani, ‘The Social Basis of Constitutionalism in Africa’ (1990) 28(3) *Journal of Modern African Studies* 359.

<sup>130</sup> E Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31.

<sup>131</sup> HK Prempeh, ‘Africa’s “Constitutionalism Revival”: False Start or New Dawn?’ (2007) 5 *International Journal of Constitutional Law* 469, 485.

<sup>132</sup> Mamdani (n 165) 359.

<sup>133</sup> Akech (n 16).

<sup>134</sup> Chirwa (n 47).

<sup>135</sup> Ibid 105-106.

people and intended to operationalize the legal and cultural shift from a past of deep racial divisions and systemic discrimination to a future of respect for human rights, democracy and peaceful co-existence of all peoples.<sup>136</sup> Kenya's 2010 Constitution was likewise promulgated to inaugurate, inter alia, a radical transformation in the manner in which public and private power was derived and exercised.<sup>137</sup>

A common feature of the constitutions shown above is the transformative aspect by which the respective instruments are seen as charters of socio-political revolution or as the democratic cornerstones for a post-autocratic era.<sup>138</sup> They all seek to change the system as well as the actors within the system.<sup>139</sup> The 'transformative' has been described by commentators in diverse ways: contradictory, promissory in the context of betrayal, diagnostic and therapeutic, or progressively creative.<sup>140</sup> But contestation over the specific meaning of transformation should not obscure the fact that the central role of constitutions is the establishment of sustainable structures of legitimate democracy.<sup>141</sup> This objective is not fulfilled by the mere promulgation of the constitutional document; instead, it is a continuing pursuit whose ultimate achievement 'must be safeguarded by the political project of transformative constitutionalism',<sup>142</sup> which is defined as follows:

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.<sup>143</sup>

Judicial review power in general and its progressive revolution in particular is one of the many ways in which transformative constitutionalism can be implemented. When courts exercise the power to review the legality of the discharge of certain public powers, it ingrains the rule of

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<sup>136</sup>Hoexter (n 53) 173-74.

<sup>137</sup>Gathii (n 1).

<sup>138</sup> U Baxi, 'Preliminary Notes on Transformative Constitutionalism' in O Vilhena et al (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 19, 20.

<sup>139</sup> D Cornell, *Transformations, Recollective Imagination and Sexual Difference* (1993) 1.

<sup>140</sup> Ibid, 20-24.

<sup>141</sup> T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 20 *Stellenbosch Law Review* 258.

<sup>142</sup> T Roux, 'A Brief Response to Professor Baxi' in Vilhena et al (n 85) 48, 49

<sup>143</sup> K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.

law in the ethos of administration by affirming that none of the branches of government is superior to the constitution, and ‘the rights of citizens are not dependent upon the will of rulers; rather they are established by law and protected by independent courts.’<sup>144</sup> By subjecting all types of public power to potential review, there emerges a progressive shift away from authority towards justification as the basis for the exercise of such power. In this way, judicial review operationalizes the commitment of a people to ‘transforming political, social, socio-economic and legal practices in such a way that it will radically alter’ previous assumptions relating to law, politics, economics, and society.<sup>145</sup>

What is particularly relevant to the conceptual understanding of judicial review as a function of the transformative constitutionalism project is its theoretical coherence and consequent persuasiveness. Unlike other types of constitutional regulatory mechanisms, judicial review is intrinsically wedded to the process of transformation because it covers all spheres in which public power is exercised.<sup>146</sup> When considered in light of the generic values and norms that ought to guide public power holders, judicial review is unique because it simultaneously offers a means to and the desired end of disciplining the system of public administration.<sup>147</sup> Transformative constitutionalism is therefore presented in this study as a key component in the tools available to unlock the revolutionary potential of the constitutionalized judicial review in Kenya. This requires, inter alia, the application and interpretation of overriding constitutional norms and values in a manner that best promotes the transformative ends, particularly while discharging judicial or oversight functions.<sup>148</sup>

## **4.2 Interpretive Guidance in Dworkin’s Law as Integrity**

A recurrent theme which is carefully developed and consistently refined in the works of Ronald Dworkin is the implication of the concept of ‘law as integrity’ for constitutional interpretation.<sup>149</sup> From his earlier books to his more recent offerings, Dworkin persuasively sets forth a critical

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<sup>144</sup> HK Pitkin, ‘The Idea of a Constitution’ (1987) 37 *Journal of Legal Education* 167

<sup>145</sup> K Van Marle, ‘Transformative Constitutionalism as/and Critique’ (2009) 2 *Stellenbosch Law Review* 286, 288.

<sup>146</sup> P Langa, ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351, 352.

<sup>147</sup> YP Ghai & J Cotrell, *Kenya’s Constitution: An Instrument for Change* (2011) 5.

<sup>148</sup> M Pieterse, ‘What do We Mean When We Talk about Transformative Constitutionalism?’ (2005) 20 *South African Public Law* 155, 156.

<sup>149</sup> R Dworkin, *Law’s Empire* ().

account of integrity as an interpretive ideal to which all adjudicators must aspire.<sup>150</sup> This bears significant implications for the way in which courts should go about passing on the constitutional validity of the exercise of public powers by elected officials or administrators appointed by such officials. It requires, among other functions, courts to interpret the law in the course of resolving constitutional conflicts in a manner that is consistent with their proper mandate in a democracy, which is to protect individual rights without subverting the will of the people as exercised by the politically accountable branches of government.<sup>151</sup> An interpretive approach of this kind should give effect to the rational limitations on the exercise of public power within the constraints of what the constitution requires them to do.

Ultimately, the question of the proper approach to constitutional interpretation resolves itself into a consideration of the scope of judicial review in a liberal democracy. As regards how the broadly defined constitutional administrative justice rights should be construed so as to rationally limit public power, Dworkin argues that such rights must be viewed as abstract commands for authorities to respect elemental principles of liberty and equal treatment of citizens.<sup>152</sup> This, he contends, will establish a ‘constitution of *principle* that lays down general, comprehensive moral standards that government must respect but leaves it to statesmen and judges’ to construe their meaning in concrete circumstances.<sup>153</sup> It is in the adjudicative function as opposed to legislative or policy-making roles, his argument goes, that courts most acutely enforce the original will of the people.

What is of primary relevance to the present study is Dworkin’s conception of democracy as an enterprise and process through which the collective decisions of a political society are made by institutions which have been empowered by law.<sup>154</sup> The judiciary is given special mention in the works of Dworkin which emphasize that of all the branches of government the judiciary is best placed to provide the final say on matters of legal interpretation. Conceptualizing law as an interpretive concept and adjudication as a normative process of giving content to the concept, Dworkin argues that judges have an obligation to develop the best possible construction of the

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<sup>150</sup> R Dworkin, *Justice for Hedgehogs* (2011).

<sup>151</sup> McIntosh (n 55) 37.

<sup>152</sup> *Ibid* 62.

<sup>153</sup> R Dworkin, ‘Principle, Policy, Procedure’ in R Dworkin (ed), *A Matter of Principle* (1985) 72, 99-101.

<sup>154</sup> *Ibid*.

law, even in cases where the law is silent.<sup>155</sup> This aspect is relevant to the developing area of administrative law in Kenya which may require principled judicial innovation to fill in gaps.

Dworkin further develops the notion of accuracy, which refers to the power of state officials such as judges to exercise their coercive powers in a just way, as the framework for encouraging integrity in judicial work. Legality, argues Dworkin, will be more likely to be upheld if disputes are governed by established standards than if they are to rely on the contemporary judgments of an official.<sup>156</sup> This speaks to the necessity of a principle-driven system of administrative law as a bulwark against arbitrariness. By upholding true propositions of law in the context of conflicting understanding, judges formulate a coherent system of values in which principle trumps discretion and consistency becomes the basis for justification of law.<sup>157</sup>

## 5. CONCLUSION

This Chapter has examined the conceptual and theoretical foundations of the understanding of judicial review as a legitimate democratic institution as well as the tensions that surround it. As a mechanism for regulating the political power of democratically accountable officials by an unrepresentative minority, judicial review has been criticized as incompatible with democratic institutions. Accordingly, this Chapter has critically discussed some of the critiques of judicial review as the basis for evaluating the outcomes of constitutionalized administrative law. Also, it has outlined a conceptual framework for analyzing the role of judicial review in a constitutional democracy. Some theories have also been identified because they advance the understanding of how judicial review is a core part of the concept of democracy which embraces inherent limitations on legitimate powers. The theory of transformative constitutionalism and Dworkin's concept of law as integrity are both relevant to the research question and, as will be shown, are useful in demonstrating the extent to which the transformative import of 2010 Constitution has been given meaningful effect in relation to administrative justice rights. In addition, these theories will prove useful in the subsequent chapters that address the question of the suitability of a continued role for the common law in the context of constitutionalized administrative law.

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<sup>155</sup> R Dworkin, *Justice in Robes* (2009) 21-25.

<sup>156</sup> *Ibid* 172-173.

<sup>157</sup> R Dworkin, 'Law as Interpretation' (1982) 60 *Texas Law Review* 527, 542.

## Chapter 3

### CONSTITUTIONALIZATION OF ADMINISTRATIVE LAW IN KENYA: AN HISTORICAL CONTEXT

#### 1. INTRODUCTION

The development of administrative law in Kenya is intrinsically linked with the country's socio-political history.<sup>158</sup> All post-independence regimes in Kenya have been criticized for abuse of governmental authority and systemic curtailment of avenues for reviewing the exercise of public power.<sup>159</sup> The legislative process was cynically used to unjustifiably expand the discretionary power of administrators and to limit the scope of judicial review of administrative action.<sup>160</sup> Cases of executive disregard for judicial decisions were also commonplace.<sup>161</sup> In

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<sup>158</sup> JB Ojwang, 'Government and Constitutional Development in Kenya, 1895-1995' in B Ogot & W Ochieng (eds), *Kenya: The Making of a Nation: A Hundred Years of Kenya's History, 1885-1995* (2000) 148-157.

<sup>159</sup> PK Mbote & M Akech, *Kenya: Justice Sector and the Rule of Law* (2011) 7-8.

<sup>160</sup> Gathii (n 1) 37; Akech (n 16) 433.

<sup>161</sup> *Kisya Investments Ltd v Attorney General and Another* [2005] eKLR; Mbote & Akech (n 159) 61; W Mitullah et al, *Kenya's Democratization: Gains or Losses?* (2005) 52-53.

addition, most courts were passive and in many instances, whether by action or selective inaction, elected not to objectively scrutinize abuses of governmental power.<sup>162</sup>

This Chapter offers an overview of the concept of judicial review of administrative action as has been developed in Kenya. Its discussion places the common law principles of judicial review in Kenyan case law in its historical and contemporary context in order to show how the judiciary and legislature have progressively expanded the conceptual grounds and bases of judicial review to better supervise the exercise of administrative action. It then discusses the ways in which the 2010 Constitution has altered the basis of judicial review in light of its interpretation by Kenyan courts.<sup>163</sup> In addition, the chapter critically discusses how Kenyan courts have sought to mediate the relations between the common law-based judicial review and Article 47 of 2010 Constitution and the Fair Administrative Action Act, 2015 (FAAA). Its analysis of the Kenyan experience is carried out in three phases: the period before the 2010 Constitution; the post-2010 period; and the period after FAAA.

## **2. PRE-2010 ADMINISTRATIVE LAW IN KENYA**

### **2.1 Brief Background of Kenya's Legal System**

Kenya's legal system is significantly influenced by English law, a legacy that endures from the colonial period where regulation and administration was effect by ordinances of English law. In the years immediately preceding Kenya's accession to independence, a selected group of local political representatives took part in the negotiations that resulted in the adoption of an independence constitution modelled on the Westminster system of government, where the sovereignty of parliament took pride of place.<sup>164</sup> The Westminster constitutions adopted by Anglophone African nations were not only alien to their respective citizens but were also to a significant degree 'culturally out of context.'<sup>165</sup> By centralizing the organizational authority for legitimate governance in the constitution, the Westminster model inevitably laid the groundwork for constitutional manipulations and a dramatic rise of autocracy that would so characterize African post-independence regimes. In this regard, Yash Pal Ghai observed that:

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<sup>162</sup> GK Kuria & AM Vasquez, 'Judges and Human Rights: The Kenyan Experience' (1991) 35(1) *Journal of African Law* 142, 146.

<sup>163</sup> W Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' (2015) 2 *Transnational Human Rights Review* 63-102.

<sup>164</sup> M Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (2008).

<sup>165</sup> Deng et al (n 105) 17.

The Constitution, which during the colonial period has never been a determinant of power relationship, suddenly becomes the centre of all controversies. A new concept of the Constitution emerges: it is to be effectively and truly the fundamental law, the real basis of the organization of State and power, replacing as it were the ever-brooding authority of the British.<sup>166</sup>

Most, if not all, post-independence administrations in Africa had to choose between the pursuit of development goals and strict adherence to legal regulations. Many, including Kenya, opted for an approach that allowed governmental authorities to act without the need for justifying every decision. There are some good reasons why this was considered the preferred approach, but it is difficult to ignore the tendency of most leaders to minimize or eliminate altogether all forms of accountability for their actions. In the Kenyan case, subsequent post-independence regimes have pursued the path of centralizing governmental power with dismantling frameworks for legal challenges to governmental power. This led to the repression of administrative justice rights and contributed, among other factors, to the strident clamour for constitutional reform in the 1990's.

## **2.2 An Imperial Presidency and Constrained Constitutionalism**

The first constitutional amendment in newly independent Kenya was the replacement of the title of 'Prime Minister' with that of 'President', an amendment that commenced the process of systematic accumulation of power by the executive arm of government.<sup>167</sup> By creating the presidency, the 1964 amendment consolidated within the person or office of the President the executive powers of both head of state and head of government.<sup>168</sup> In the context of the time, it was the common for previously colonized peoples to seek symbolic means to delink themselves from foreign powers, including by way of legal means such as constitutional amendments. Yet in retrospect, it was these seemingly innocuous changes that paved way for the more destructive legal developments that constricted constitutionalism.<sup>169</sup>

Indeed, this was cynically used as a pretext for eliminating the authority of a foreign overlord and replacing it with that of a home-grown oppressor. Absolutism quickly followed in wake of

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<sup>166</sup> YP Ghai, 'Constitutions and the Political Order in East Africa' (1972) 21(3) *International and Comparative Law Quarterly* 410.

<sup>167</sup> Constitutional (Amendment) Act, section 8.

<sup>168</sup> C Kago, 'Implementation of the Constitution of Kenya by County Governments: The Significance of Public Participation' in PLO Lumumba et al (eds), *Devolution in Kenya: A Commentary* (2016) 211.

<sup>169</sup> B Sihanya, 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism' (2010) *Law Society of Kenya Journal* 1-35.

post-independence systems of Africa; the merger of the constitutional roles of head of state and government offered an unprecedented opportunity for one person to be an elected leader as well as a monarch. For many African states, including Kenya, this created an ‘imperial presidency’ and with it began the withering of the province of constitutionalism.<sup>170</sup> The Kenyan case offers a unique insight into the evolution of despotic rule from its benign origins to its more malignant presence, which adversely impacted constitutional democracy and the rule of law.<sup>171</sup> In *Njoya and Others v Attorney General and Others*, the High Court noted that the vast majority of constitutional amendments in Kenya have been motivated by a need to expand presidential powers:

Since independence in 1963, there have been thirty-eight amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from parliamentary to a presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of the security of tenure of judges and other constitutional office holders ..., and the making of the Country into a one party state (now reversed). And in 1969 by Act No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in revised form. The effect of all those amendments was to substantially alter the basic structure or features of the Constitution. And they all passed without challenge in the courts.<sup>172</sup>

The successive post-independence changes to Kenya’s Constitution reflect a deliberate move by the executive to accumulate and centralize power while systematically reducing the scope of challenges to the exercise of these powers.<sup>173</sup> Besides constitutional amendments intended to create an all-powerful presidency, there were deliberate steps taken by the executive to ensure that its influence extended to the judiciary as well as the legislature. For instance, one of the early amendments empowered the president to appoint the Attorney-General who would be an ex-officio member of parliament, the head of the prosecution and a key member of the Public Service Commission. In this way the president was able to have the decisive say in the conduct of most governmental affairs.<sup>174</sup>

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<sup>170</sup>Okoth-Ogendo, ‘Constitutions Without Constitutionalism’

<sup>171</sup> D Throup & D Hornsby, *Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election* (1998) 63; Mutua (n 164) 99.

<sup>172</sup> [2008] 2 KLR (EP) 696-697.

<sup>173</sup> K Kindiki, ‘The Emerging Jurisprudence on Kenya’s Constitutional Law Review’ (2007) 1 *Kenya Law Review* 153.

<sup>174</sup> PL Onalo, *Constitution-Making in Kenya* (2004) 141.

While it was rarely publicized, it was the view within post-independence African government circles that constitutional limitations on political power were anti-democratic and impediments on development.<sup>175</sup> Accordingly, many African governments had to find ways to pursue their respective agenda without the burden of accountability. In the case of Kenya, constitutional manipulation as a shield to prevent scrutiny of executive decisions was made possible by the fact that both the judiciary and the legislature were deferential to an overbearing executive. It has been stated that although the post-colonial constitution had a justiciable bill of rights and empowered the High Court to exercise judicial review, the impact of constitutionalism was severely restricted ‘by both positivist traditions within the judiciary and the political dominance of the legislature which allowed the 65% required for constitutional amendment to be easily attained.’<sup>176</sup>

[W]e have to look at constitutions not as providing neutral frameworks for political competition, with the right, within fairly recognized and impartial rules, to organize and contest, but instead as a weapon in the political struggle itself ..., a hand-maiden of the party in power, as a means to the retention of power.<sup>177</sup>

## **2.3 Judicial Review in the Pre-2010 Period**

### **2.3.1 Basis and grounds of review**

Before 2010, Kenya’s administrative law was entirely influenced by the common law.<sup>178</sup> Its conceptual basis was derived from the system of parliamentary supremacy.<sup>179</sup> This had the effect of limiting the material scope of judicial review to a determination by the respective court of whether or not a decision had been made in contravention of an empowering statute as legislated by parliament. The substantive basis of judicial review power was rooted in sections 8 and 9 of the Law Reform Act,<sup>180</sup> while the Civil Procedure Act specified its procedural basis.<sup>181</sup> In

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<sup>175</sup>Akech (n 16).

<sup>176</sup> H Klug, ‘Participating in the Design: Constitution-Making in South Africa’ (1996) 3(1) *Review of Constitutional Studies* 18, 30.

<sup>177</sup>Ghai (n 166) 405.

<sup>178</sup>Akech (n 16) 427.

<sup>179</sup> A Oloo & W Mitullah, ‘The Legislature and Constitutionalism’ in L Mute & S Wanjala (eds), *When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya* (2002) 35.

<sup>180</sup> Cap 26 of the Laws of Kenya.

<sup>181</sup> Civil Procedure Act, Cap 21 of the Laws of Kenya.

particular, the bases for judicial review were premised on *ultra vires* conduct on the part of a public body and the breach of rules of natural justice by other authorities.<sup>182</sup>

It is on the strength of these two bases that other grounds for judicial review were devised by Kenyan courts. These include: legitimate expectations; procedural impropriety; abuse of power; bad faith; jurisdictional error; irrelevant considerations; and error of law on the face of the record.<sup>183</sup> As regards legal remedies in a judicial review application, these were exclusively availed through the prerogative orders of *mandamus*, *certiorari* and prohibition; other remedies including declaratory relief or pecuniary compensation were considered to be available under private law.<sup>184</sup>

### 2.3.2 Restrictive procedure

In terms of procedure, the power of judicial review originated from Order 53 of the Civil Procedure Rules under which the relevant applications were made.<sup>185</sup> It is also crucial to note that Order 53 established the procedure for determining which cases would be accepted for judicial review by way of the grant of leave of court. Three key issues were to be determined before the court granted leave for judicial review: i) if the applicant had *locus standi* (the requisite legal standing); ii) whether a *prima facie* case existed; and iii) whether or not the matter was time barred.<sup>186</sup> As regards the issue of *locus standi*, courts adopted a restrictive approach reflected in the common law whereby it is a requirement that applicant has sufficient interest in the matter or that the facts demonstrate the possibility of that applicant's rights being infringed.

In *Wangari Maathai v The Kenya Times Media Trust*,<sup>187</sup> the High Court dismissed the applicant's suit for want of *locus standi* because there was no allegation of damage or anticipated injury.<sup>188</sup> This restrictive interpretation of *locus standi* can be traced to the English case of *Gouriet v Union of Postal Office Workers* where the court found, inter alia, that the jurisdiction of a court to grant remedies in law is confined to litigants whose rights have been infringed or

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<sup>182</sup>*Council of Legal Education and Another v Rita Biwott* Civil App No. 238 of 1994 per Cockar AJ.

<sup>183</sup>Kaluma (n 6) 142-174; Lumumba, 70.

<sup>184</sup> Ibid.

<sup>185</sup> Civil Procedure Act, Cap 21 of the Laws of Kenya.

<sup>186</sup>Kaluma (n 6) 65.

<sup>187</sup> [1989] 1 KLR (E&L).

<sup>188</sup> Ibid at 170.

threatened with infringement.<sup>189</sup> Thus the common law position on *locus standi*, which has influenced Kenyan administrative law for a long time, was restrictive in terms of the ‘procedural competence to litigate by imposing a high threshold of proximate interest in, or relationship with, the subject matter of the relevant claim.’<sup>190</sup>

In *R v Chief Justice of Kenya and Others, ex parte Lady Justice Roselyn Naliaka Nambuye*, the applicant contested by way of judicial review the legality of a judicial disciplinary process established by the Chief Justice.<sup>191</sup> She sought orders to quash the decision that authorized the impugned process. But the court dismissed her application on, among others, the failure to adhere to procedural requirements:

For any alleged breach [of constitutional rights] to be properly articulated an application by way of an Originating Summons is required by the Rules made under the Constitution and this is not what the applicant has done here – where the applicant purports to enforce such rights by way of a Notice of Motion seeking Judicial Review orders of certiorari, mandamus and prohibition. Such an application is clearly defective under law.<sup>192</sup>

Failure to comply with strict procedural requirements was also used by courts as a pretext for excluding many applications for judicial review.<sup>193</sup> Time limit clauses which precluded the legal validity of proceedings instituted after the lapse of a specified period are one the ways in which procedural rules were cynically used to exclude judicial review.<sup>194</sup>

### 2.3.3 Limited scope of judicial review

A signal feature of pre-2010 judicial review in Kenya is the restrictive nature of its scope. It was, in the majority of cases, only available against public bodies or statutorily empowered bodies and additionally required the satisfaction of two mandatory conditions: ‘First, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve *claims based on public law principles* not the

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<sup>189</sup> [1977] AC 435 at 500.

<sup>190</sup> B Sang, ‘Tending towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects within the New Constitutional Order’ (2013) 57(1) *Journal of African Law* 29, 33.

<sup>191</sup> [2004] eKLR.

<sup>192</sup> *Ibid* at

<sup>193</sup> *Kaluma* (n 6) 282.

<sup>194</sup> Section 9(3) Law Reform Act.

enforcement of private rights.’<sup>195</sup> As a result, judicial review was only available as a legal remedy against actions deriving their authority from statute and discharged in the ordinary course of public duty. The prescriptive test for determining whether an action could be challenged by way of judicial review has been described by Visram AJ as follows:

The traditional test for determining whether a body of persons is subject to judicial review is the *source of power*. Judicial review is concerned with the activities of bodies deriving their *authority from statute*. If the duty is a public duty then the body in question will be subject to public law and *judicial review as a public law remedy* will only be invoked if the person challenged was performing a public duty.<sup>196</sup>

The source of power test had the effect of excluding certain powers of political branches from judicial review. In *Lady Justice Roselyn Naliaka Nambuye*,<sup>197</sup> the court’s judicial review jurisdiction was invoked to challenge, inter alia, the constitutional powers of the President and the Chief Justice. The challenged powers related to the establishment of a tribunal that subsequently investigated the applicant’s conduct,<sup>198</sup> and the judicial review application sought to quash the decision authorizing disciplinary proceedings against the applicant. In dismissing the application, the court held, among other things, that:

The exercise of presidential power under the Constitution cannot be challenged by way of judicial review at all because judicial jurisdiction is derived from an Act of Parliament and is not entrenched in the Constitution unlike India and the United States where judicial review jurisdiction has been specifically conferred under the respective constitutions. In Kenya the jurisdiction is statutory.<sup>199</sup>

This was also the view advanced by the High Court in *Patrick Ouma Onyango and Others v Attorney General and Others*.<sup>200</sup> Other mechanisms including statutory ouster clauses, time limit clauses and the alternative remedy requirement also contributed to the narrow scope of judicial review in pre-2010 administrative law. Judicial attitudes towards challenging the executive were also overly deferential and in most cases courts sidestepped their duty to scrutinize public power on the basis that the executive or parliament has monopoly over the challenged function.<sup>201</sup>

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<sup>195</sup> A Visram, ‘Review of Administrative Decisions of Government by Administrative Courts and Tribunals’, 10th Congress of the International Association of Supreme Administrative Jurisdictions, Sydney, March 2010.

<sup>196</sup> Ibid.

<sup>197</sup> *Lady Justice Roselyn Naliaka Nambuye* (n 45).

<sup>198</sup> Repealed Constitution, section 62.

<sup>199</sup> *Lady Justice Roselyn Naliaka Nambuye* (n 45).

<sup>200</sup> [2005] eKLR.

<sup>201</sup> *Republic v Registrar of Societies and Others ex parte Kenyatta and Others* [2008] 3 KLR (EP) 521.

## **2.4 Constitutional Review and Institutional Change**

As discussed above, Kenya's administrative law from the post-independence era to the period just before the comprehensive constitutional reform process was characterized by systematic abuse of governmental authority. Both the first Kenyatta and Moi regimes exhibited tendencies of executive excess bordering on institutionalized autocracy; there was a dramatic expansion of executive discretionary power and a concomitant whittling down of the scope of judicial review.<sup>202</sup> The greater majority of courts were subservient to the executive or, at best, indifferent towards the need to explore the outer limits of their residual jurisdictional competence to check governmental power.<sup>203</sup> Concerned that this was antithetical to the tenets of constitutional democracy, a group of stakeholders began the process of wholesale replacement of the Kenyan Constitution.

One of the key reform objectives relating to Kenya's system of administrative law was to secure the independence of the judiciary and to insulate judicial review from legislative and executive interference.<sup>204</sup> A related aim was the establishment of a constitutional right to fair administrative action, supported by generous rules of access to justice and guided by principles of good governance.<sup>205</sup> It was also considered critical to preclude the possibility of subsequent legislative action that may undermine these provisions. Thus various drafts of proposed constitutions were prepared and debated; although their respective provisions differed in some respects, an essential similarity is found in clauses promoting the constitutionalization of rational and institutional constraints on the lawful exercise of administrative power.

## **3. CONSTITUTIONALIZATION OF KENYA'S ADMINISTRATIVE LAW**

### **3.1 Overview of Kenya's Constitutionalized Administrative Law**

The entrenchment in the Bill of Rights of constitutional provisions governing Kenya's administrative law undoubtedly heralded an unprecedented revolution in normative as well as organizational terms. It altered not only the foundation of administrative law, but also the

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<sup>202</sup>Kaluma (n 6).

<sup>203</sup>Mutua (n 164) 96.

<sup>204</sup>Gathii (n 1) 23.

<sup>205</sup> Constitution of Kenya Review Commission, The Main Constitution of Kenya Review Commission Report, 18 September 2002, 84

grounds for judicial review.<sup>206</sup> Where the power of judicial review was rooted exclusively in the common law and subject to legislative controls, the 2010 Constitution grounded it in: i) the notion of constitutional supremacy;<sup>207</sup> ii) the constitutional right to fair administrative action;<sup>208</sup> iii) national values and principles of governance;<sup>209</sup> and iv) the rights to have disputes determined by law<sup>210</sup> and access to information.<sup>211</sup> In addition, where the grounds of reviewing administrative action were restricted to common law, the 2010 Constitution recognized some new grounds and expanded the scope of existing ones.<sup>212</sup>

The constitutional basis for the right to administrative justice in Kenya is found in the content of Article 47 of the 2010 Constitution which provides:

- (4) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (5) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (6) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (c) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (d) promote efficient administration.

These provisions do more than just clothe in constitutional text and form the English common law principles of administrative law.<sup>213</sup> They constitutionalize Kenya's administrative law, casting both the rights and duties in terms of constitutional norms. Both the grounds for and scope of review are fundamentally altered by Article 47. It thus makes it possible for the legal validity of contested administrative actions to not only be challenged, but also evaluated on the basis of constitutional standards.<sup>214</sup>

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<sup>206</sup> O Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the *Odumbe* Case Would be Decided Differently Today?' (2013) *Kenya Law Bench Bulletin* 11.

<sup>207</sup> 2010 Constitution, Article 2.

<sup>208</sup> *Ibid*, Article 47.

<sup>209</sup> *Ibid*, Article 10.

<sup>210</sup> *Ibid*, Article 50.

<sup>211</sup> *Ibid*, Article 35.

<sup>212</sup> *Akech* (n 16) 431.

<sup>213</sup> *R v KNEC ex parte Ian Mwamuli* [2013] eKLR.

<sup>214</sup> *Geothermal Development Company Ltd v Attorney General and Others* [2013] eKLR; *Republic v Kenya School of Law and Others, ex parte Juliet Njoroge Wanjiru and Others* [2014] eKLR.

Article 47(1) of the 2010 Constitution establishes a fundamental right for every person to fair administrative action that is, among others, ‘lawful, reasonable and procedurally fair’. This reflects the essence of the rule of law which is one of the bases for judicial review at common law. It reflects the notion of fairness (recognized also in the principles of natural justice) which requires that: a person be afforded an opportunity to be heard in the context of a fair hearing; no person be the judge in a matter in which they have a private interest; and decisions be made on the basis of evidence.<sup>215</sup>

Other grounds for judicial review not recognized under the common law are also introduced. Article 47(1) requires that administrative action be expeditious, indicating that courts and other quasi-judicial bodies must ensure that the quickest method of resolving disputes or reviewing administrative action must be the preferred choice. Article 47(2) establishes the unprecedented requirement that reasons be given for administrative action. What is remarkable in this provision is the extension of the benefit of written reasons to persons likely to be affected by administrative action; this is an improvement from the restrictive common law position where applications for judicial review were mostly only available to persons who had already suffered injury and no specific right existed relating to receipt of written reasons for adverse administrative action.<sup>216</sup> This limited the possibility of securing sufficient and effective remedy because in certain cases the apprehended harm had already occurred and its adverse effects were impossible to reverse. Reasonableness is another significant ground for review which will be discussed further in the following section.

As for jurisdiction to exercise judicial review, Article 23 of the 2010 Constitution empowers the judiciary to issue rulings concerning the constitutionality of legislative and administrative action.<sup>217</sup> Article 23 grants the High Court jurisdiction to hear and determine applications for redress arising from a denial of, violation of, or threat to, a fundamental right. The High Court is also empowered, in the event of an application to vindicate fundamental rights under Article 22, to grant one or more of the following reliefs: a) a declaration of rights; b) an injunction; c) a conservatory order; d) a declaration of invalidity of any law that denies, violates, infringes, or

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<sup>215</sup> *Republic v Council of Legal Education and Another, ex parte Uganda Pentecostal University* [2014] eKLR.

<sup>216</sup> *R v Commission for Higher Education ex parte Peter Soita Shitanda* [2013] eKLR.

<sup>217</sup> 2010 Constitution, Article 23(2).

threatens a right or fundamental freedom and is not justified by the limitations clause; e) an order for compensation; and f) an order for judicial review.

In sum, the most significant features of Article 47 of the 2010 Constitution are that it has altered the conceptual bases for judicial review and expanded the grounds for judicial review. No longer is judicial review confined within the narrow limits that were provided under the common law. The impact that these changes have had on Kenya's administrative law are discussed in more detail in the following section.

### **3.2 Altered Conceptual Bases for Judicial Review**

#### **3.2.1 Constitutional supremacy**

Before the promulgation of the 2010 Constitution, Kenya's administrative law was based on the concept of parliamentary sovereignty, which meant that courts could only review such actions as parliament stipulated by law. Those exercising public powers were only authorized to act in the manner prescribed by enabling law and within the limits of their stipulated mandate (*intra vires*); acting outside the statutory powers was considered *ultra vires*, and consequently such action would be invalid.<sup>218</sup> Thus *ultra vires* was the principal conceptual basis for judicial review of administrative action.<sup>219</sup>

By contrast, the 2010 Constitution replaced parliamentary sovereignty with constitutional supremacy, a move that in turn fundamentally alters the conceptual basis of judicial review in Kenya. Article 2 of the 2010 Constitution provides that 'the Constitution is the supreme law of the Republic and binds all persons and State organs at both levels of government.'<sup>220</sup> It also states that state authority may only be claimed or exercised as authorized by the Constitution,<sup>221</sup> and further that: 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.'<sup>222</sup>

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<sup>218</sup>Kaluma (n 6) 132-36.

<sup>219</sup>*Maina v Nairobi Liquor Licensing Court* [1973] EA 319; *Koinange Mbiu v R* [1951] KLR.

<sup>220</sup> 2010 Constitution, Article 2(1).

<sup>221</sup> *Ibid*, Article 2(2).

<sup>222</sup> *Ibid*, Article 2(3).

In its preamble, the 2010 Constitution articulates the aspirations of all Kenyans for a system of government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.<sup>223</sup> Article 10 also lays down similar national values and principles of governance to provide a binding guide for public power holders and all persons when applying or interpreting the Constitution or any law, enacting any law, or formulating or implementing public policy decisions.<sup>224</sup> These national values and principles of governance include ‘good governance, integrity, transparency and accountability’.<sup>225</sup> The supremacy of the Constitution is further reflected in Article 19 which provides that the rights and fundamental freedoms in the Bill of Rights, including the right to fair administrative action, ‘belong to each individual and are not granted by the State’<sup>226</sup> and are only subject to the limitations contemplated in this Constitution.<sup>227</sup> The entrenchment of administrative justice rights in Article 47 of the Bill of Rights is of particular significance since it now ‘forms an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.’<sup>228</sup>

This means that it is the Constitution’s standards as opposed to statutory regulations that must supply the touchstones against which the exercise of public powers are to be evaluated. Courts have recognized the way in which this shift in conceptual basis has diminished the centrality previously accorded ultra vires. In *Dry Associates Limited v Capital Markets Authority and Another*, the court held that the power of judicial review in Kenya is now firmly rooted in and regulated by the 2010 Constitution.<sup>229</sup> Majanja J stated that ‘Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances ... is to be measured against the standards established by the Constitution.’<sup>230</sup> A similar view has been adopted by the Supreme Court of Kenya in *CCK v Royal Media Services Ltd.*<sup>231</sup>

Constitutional supremacy is therefore the organizing basis for how and the extent to which the action of administrators can be reviewed. Inevitably this raises some tensions between the judiciary and parliament, with the later frequently accusing the former of overstepping its

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<sup>223</sup> 2010 Constitution, Preamble, para 5.

<sup>224</sup> Ibid, Article 10(1).

<sup>225</sup> Ibid, Article 10(2)(c).

<sup>226</sup> Ibid, Article 19(3)(a).

<sup>227</sup> Ibid, Article 19(3)(c).

<sup>228</sup> Ibid, Article 19(1).

<sup>229</sup> [2012] eKLR

<sup>230</sup> Ibid, para 62.

<sup>231</sup> [2014] eKLR.

mandate or contravening the idea of separation of powers.<sup>232</sup> It is easy to see why this may be the case; courts are now become more capable of reviewing actions of elected officials. While the charge may be, and often is, brought that the judiciary is not competent to countermand actions of elected officials as this contravenes the will of the people, a closer analysis of constitutional democracy indicates otherwise.<sup>233</sup> Courts have been regarded as invaluable component in ensuring a functioning democracy.<sup>234</sup> In *Judicial Service Commission v Speaker of the National Assembly and Others*, the High Court upheld the power of courts to ensure that administrators function in conformity with constitutional standards:

We have entered a new constitutional era in which it is the Constitution which is supreme; in which none of the arms of government can claim supremacy; and which vests the High Court with the onerous responsibility of being the watchdog for the new Constitution. It is in this light we must view the question of separation of powers and the rule of law against the orders issued by Court in this matters.<sup>235</sup>

A critical question that follows logically from the post-2010 Constitution era's entrenchment of constitutional supremacy is what practical implications it has had for judicial review in Kenya. This has been succinctly answered in *Muslims for Human Rights (MUHURI) and Another v Inspector-General of Police and Others*, where the court identified three legal effects.<sup>236</sup> First, it establishes the Constitution as the ultimate source of all legitimate power of public and private persons. Secondly, the Constitution and not the decree of Parliament becomes the touchstone by which the legal validity of challenged action is tested. Thirdly, it empowers courts to exercise a supervisory role to ensure compliance by the executive or legislature at all levels of government with the Constitution.

### 3.2.2 Separation of powers

The concept of separation of powers generally denotes the formal division of governmental roles between the constitutive branches – the legislature, executive and judiciary – so that specific functions can be discharged by the respective branches without interfering in those of other

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<sup>232</sup>Gathii (n 1) 69-76.

<sup>233</sup>Freeman (n 56).

<sup>234</sup>*R (Cart) v Upper Tribunal* [2012] 1 AC 663; *Pengarah Tanah dan Galian v Sri Lempah Enterprise* [1979] IMLJ 135: 'Every legal power must have legal limits, otherwise there is a dictatorship ... the courts are the only defence of the liberty of the subject against departmental aggression.'

<sup>235</sup>*Judicial Service Commission v Speaker of the National Assembly* [2014] eKLR para 151.

<sup>236</sup>[2015] eKLR.

coordinate branches.<sup>237</sup> Its rationale lies in the need for an institutionalized system of checks and balances that ensures cohesive and efficient performance of governmental functions while preventing conflict.<sup>238</sup> The 2010 Constitution sets out a clear framework for the separation of powers between the judiciary, the legislature and the executive. In the case of the latter two, the Constitution further specifies the division of functions at both the national and county levels.<sup>239</sup>

This is a significant development from the previous situation under the repealed Constitution, where executive authority was less restrained and was frequently abused to interfere or otherwise unduly influence the coordinate arms of government.<sup>240</sup> Article 1(3) of the 2010 Constitution provides that the peoples' sovereign power shall be delegated to the legislature, the executive and the judiciary. The law-making function is conferred exclusively upon Parliament and other organs authorized by the Constitution or by legislation.<sup>241</sup> The executive function is the preserve of the President,<sup>242</sup> the Deputy President<sup>243</sup> and the Cabinet, as outlined in Chapter Nine of the Constitution. As for the judicial function, this is vested in courts and other tribunals that are authorized to hear and conclusively determine disputes.<sup>244</sup> Additional provisions are made in Article 160 to protect the judiciary's independence and integrity from unwarranted interference.

The power of judicial review is a unique mechanism through which the judiciary checks the respective legislative and executive powers. It is also an aspect of the rule of law which requires that all governmental power should be exercised in accordance with the law. This has important implications for Kenya's administrative law because it provides grounds to justify as well as denounce judicial oversight over the functions of the executive and legislature.<sup>245</sup> In some cases, separation of powers has been interpreted by courts as a corrective means to ensure adherence by all those who exercise public powers to the Constitution. In *NjengaMwangi and Another v Truth Justice and Reconciliation Commission and Others*, the court upheld its authority to pronounce

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<sup>237</sup> R Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2010) 11.

<sup>238</sup> T Campbell, *Separation of Powers in Practice* (2004).

<sup>239</sup> Art 1(3).

<sup>240</sup> JB Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990) 41.

<sup>241</sup> Article 94(5).

<sup>242</sup> Article 132.

<sup>243</sup> Article 147.

<sup>244</sup> Article 159.

<sup>245</sup> *Teachers Service Commission v Kenya National Union of Teachers and 2 Others* [2013] eKLR.

on the constitutionality of actions of members of the legislature.<sup>246</sup> This view has been restated by the High Court in *Trusted Society of Human Rights and Others v Attorney General and Others*, where it was affirmed that ‘courts have an interpretive role – including the last word in determining the constitutionality of all governmental action.’<sup>247</sup>

It is, however, important to emphasize that while courts are empowered to pronounce with finality on the legal validity of governmental action, it remains crucial that courts do not overstep their bounds in striking down legislative or executive actions.<sup>248</sup> Judicial review jurisdiction is often challenged on the basis that it contravenes the separation of powers doctrine. A pertinent example is *Martin Nyaga Wambora v Speaker, County Assembly of Embu and Others* where the issue arose as to whether the internal workings of parliament are subject to judicial scrutiny.<sup>249</sup> The court reiterated that it can only interfere with the respective mandates of the legislature or executive ‘if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of the constitution.’<sup>250</sup> More specifically, the *Wambora* court clarified that it was only concerned with whether the impeachment process was constitutionally valid.

### **3.2.3 Transparency and accountability**

There is ample evidence from the case law to indicate that courts take them into account when interpreting the content of the constitutional right to fair administrative action. In *Republic v Kenya Revenue Authority ex parte LAB International Kenya Limited* the court emphasized, *inter alia*, the interpretive value of the principles of transparency and accountability:

[B]y Article 47 of the Constitution of Kenya, 2010 persons such as the applicant have a right to fair administrative action, which must not be denied whether by the respondent, or by the other Government agencies and mechanisms to which the respondent may happen to be operationally attached; the whole set of those agencies, which are statutory and public bodies, are subject to Article 10 of the Constitution which, under the head “national values and principles of governance”, requires “good governance, integrity, transparency and accountability.”<sup>251</sup>

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<sup>246</sup> [2014] eKLR.

<sup>247</sup> [2012] eKLR.

<sup>248</sup> JB Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 39.

<sup>249</sup> [2014] eKLR.

<sup>250</sup> *Ibid.*

<sup>251</sup> [2010] eKLR.

The role of the Article 10 principles has been recognized by the Supreme Court of Kenya which observed as follows in *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*:

A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. *Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions.* Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.<sup>252</sup>

National values and principles have also been held to play a significant role in the way that the executive and legislature exercise their respective constitutional powers relating to appointments to and dismissal from public service positions. A case in point in *Centre for Rights and Education Awareness (CREAW) and Others v Attorney General and Others* where the criticality of public participation in the process of decision making was emphasized.<sup>253</sup> In this regard, Ngugi J observed that:

With regard to public appointments, I take the view that it is critical to have public participation and consultation. This does not require that there is a round table at which the public is allowed to air their opinion on a proposed appointment, but that an appointment is given to all who may be interested in the position to apply, and for anyone who may have a view on the suitability of a proposed appointee, particularly with regard to integrity and competence, to be heard should they wish to be heard.<sup>254</sup>

### **3.2.4 Independent constitutional institutions**

The 2010 Constitution establishes a number of independent constitutional institutions mandated to oversee and supervise the compliance with constitutional obligations.<sup>255</sup> As was discussed in the previous chapter, constitutional democracy theory recognizes the need for independent regulatory mechanisms to ensure that the representative branches of government remain true to

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<sup>252</sup> Ibid.

<sup>253</sup> [2013] eKLR.

<sup>254</sup> Ibid para 53.

<sup>255</sup> CM Fombad, 'Designing Institutions and Mechanisms for the Implementation and Enforcement of the Constitution: Changing Perspectives in Africa' (2016) 25(1) *African Journal of International and Comparative Law* 66, 73.

their constitutional obligations.<sup>256</sup> This has seen the rise of non-majoritarian institutions of accountability across emerging democracies.<sup>257</sup> Kenya's 2010 Constitution creates such institutions as 'commissions and independent offices'.<sup>258</sup> Two of these have the most direct interaction with administrative law: i) the Auditor-General; and ii) the Ombudsman.

#### **4. REVOLUTIONARY IMPACT OF ARTICLE 47**

As noted earlier, Article 47 of the 2010 Constitution revolutionizes Kenya's administrative law by rooting the right to judicial review of administrative action in the Constitution as opposed to the common law or statute. In addition to being entrenched in a Constitution that is supreme and enforceable by a judiciary with express judicial review powers, Article 47 fundamentally alters Kenyan administrative law by introducing a new unified pathway to judicial review and expanding the grounds of judicial review. This limits the extent to which judicial review power can be restricted or ousted by legislation, and also expands the opportunities of access to justice for persons wanting to challenge adverse decisions. Understanding the specific changes brought about by Article 47 and the extent to which it has changed the landscape of judicial review in Kenya requires an appreciation of what 'administrative action' means. The following sections assess the meaning and significance of administrative action in Article 47 and the grounds for judicial review, as illustrated by Kenyan case law.

##### **4.1 Centrality and Significance of 'Administrative Action'**

Article 47 can only be triggered if the challenged decision or conduct falls within the class of exercises of public power which comprise administrative action; thus its material scope of application turns on the definition of this term. Only then can the right-holder set forth the constitutional grounds on which the challenged action should be stopped, reversed, quashed or declared invalid. 'Administrative action' refers to a category of exercises of public power that are available for judicial review. Article 47 of the 2010 Constitution does not define the term, and this makes it unclear what it means. However, read as a whole and having regard to the fact that Article 47 constitutionalizes the principles of the common law it becomes clear that it refers,

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<sup>256</sup> See Chapter 2.

<sup>257</sup> CM Fombad, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa' in CM Fombad (ed), *Stellenbosch Handbooks in African Constitutional Law Vol I: The Separation of Powers* (2016) 325-344.

<sup>258</sup> Constitution of Kenya, 2010, Chapter 15.

with appropriate modification, to all exercises of public power by state organs except: i) the executive when exercising its constitutional powers or engaging in broad policy-making; ii) the legislature when exercising its law-making functions; and iii) the judiciary when exercising its adjudicative functions.

The significance of ‘administrative action’ is that it is not only the actions of the executive that may be administrative. Certain actions of the legislature and the judiciary may also be included if they are administrative in nature. Furthermore, the actions of private actors could also be administrative action where they impinge on the legal rights of individuals. A progressive argument for the propriety of judicial review in the event of the curtailment of legal rights or interests was advanced in *Mirugi Kariuki v Attorney General*, where the Court of Appeal held:

It is not the absoluteness of the discretion nor the authority exercising it that matter but whether in its exercise some person’s legal right or interests have been affected. This makes the exercises of such discretion justifiable and therefore subject to judicial review.<sup>259</sup>

The reasoning in *Mirugi Kariuki* indicates that Kenyan courts are no strangers to the preferred functional approach to determining judicial review. Administrative action is recognized as the principal path to judicial review of the exercise of public powers. Thus by using a functional approach, courts can extend the scope of judicial review to include private conduct or actions not specifically regulated by statute. However, some actions may not constitute administrative action but may still adversely affect the fundamental rights of individuals. How such actions may be subjected to, at least, some form of constitutional regulation is discussed below.

## **4.2 Constitutional Grounds for Review**

Besides transforming the conceptual foundations of judicial review in Kenya, the 2010 Constitution expands the grounds for subjecting administrative action to judicial review. Article 47 constitutionalizes some of the common law grounds for review; it modifies the form and content of existing grounds and also introduces new ones.<sup>260</sup> An example of a modified ground for review is lawfulness which is derived from ‘illegality’ under common law but which is more

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<sup>259</sup> Civil Appeal No. 70 of 1990 (Unreported).

<sup>260</sup> Gathii (n 1) 35.

expansive in its scope.<sup>261</sup> New grounds for judicial review include expedition and efficiency, both of which are not expressly recognized at common law.<sup>262</sup>

#### 4.2.1 Expedition

The introduction of expedition as a new ground for review is significant because one of the risks that face people adversely affected by administrative action is the possibility of irreparable harm occasioned by passage of time.<sup>263</sup> It is also a means for the court to judge on a merit-based approach whether an administrator has delayed in the discharge of a duty required by law or whether an application has been filed within a reasonable time-frame.<sup>264</sup> The transformative implication of expedition as an independent ground for judicial review of administrative action can best be appreciated by contrasting pre-2010 judicial approaches with contemporary ones. In many pre-2010 cases, courts took the position that where an order of mandamus had been sought there was no further requirement that the relevant action be discharged immediately.

In *Kenya National Examination Council v Republic ex parte Geoffrey GathenjiNjoroge*, it was held that because a general duty had already been imposed on the respondent to allow the applicant to retake his examination, delayed implementation by was not a ground for review as the ‘times and frequency of examinations are left to the discretion of the Council and it cannot be forced by mandamus to hold an examination at any particular time of the year.’<sup>265</sup> This restrictive view cannot be more different than how courts now emphasize the need for administrative action to be performed within a reasonable time and without inordinate delay. A few cases below are instructive to illustrate this.

While Article 47 of the 2010 Constitution does not define the word ‘expeditious’, it is clear from a reading of other constitutional provisions that it denotes promptitude and avoidance of undue or unjustified delay. Article 259(8) of the Constitution is clear that if ‘a particular time is not prescribed by [the] Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.’ Read conjunctively with Article 47, this provision makes clear that administrative action must always be discharged without delay. In *R v*

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<sup>261</sup> Ibid 57-59.

<sup>262</sup> 2010 Constitution, Article 47(1).

<sup>263</sup> HWR Wade & C Forsyth, *Administrative Law* (2014) 450.

<sup>264</sup> *Lady Justice Joyce Khaminwa v Judicial Service Commission* [2014] eKLR.

<sup>265</sup> [1997] KLR.

*Cabinet Secretary for Ministry of Interior & Coordination of National Government ex parte Patricia Olga Howson*, the court found that the respondent's six-month delay in processing a citizenship application constituted inordinate delay and contravened provisions of Article 47.<sup>266</sup> This approach was upheld in other immigration-related cases where the respective courts reinforced the view that absence of expedition was a ground for judicial review of administrative action.<sup>267</sup>

#### **4.2.2 Efficiency**

Efficiency is one of the new grounds for judicial review that is recognized in Article 47 of the 2010 Constitution. It is related to and expands the common law ground of delay as a basis for challenging administrative action. What 'efficient' means for Kenya's judicial review is that there is now a self-standing right to receive administrative justice by way of decisions that are feasible, implementable and effective. This bears significant implications for the whole system of administrative law which must now shift from a narrow focus on formalist restrictions to a more substantive fairness oriented approach. The new regime of administrative law should thus be more accommodating of necessary departures from the previous system. This is supported by *CCK v Royal Media Services Limited*, where the Supreme Court of Kenya noted that the 2010 Constitution has 'elevated the process of judicial review to a pedestal that transcends the technicalities of common law'.<sup>268</sup>

#### **4.2.3 Lawfulness**

The common law position which prevailed in Kenya's pre-2010 was that public powers could only be properly exercised within the limits of a statutory or other enabling legal instrument.<sup>269</sup> Hence, any exercise of public powers beyond the scope envisaged by the authorizing legislation or in a manner contrary to the prescribed procedure was termed *ultra vires* and therefore unlawful.<sup>270</sup> It follows that what was considered lawful was that which accorded closely with the

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<sup>266</sup> [2013] eKLR

<sup>267</sup> *Kamal Jadvavekaria v Director General, Kenya Citizens and Foreign Nationals Management Service* [2016] eKLR; *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Coordination of National Government* [2015] eKLR; *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR.

<sup>268</sup> [2014] eKLR.

<sup>269</sup> Gathii (n 1) 32; P Craig, *Administrative Law* (2012) 5.

<sup>270</sup> *IrunguKangata and Others v University of Nairobi Misc Civil App 40 of 2001*.

powers prescribed by the legislative branch of government, i.e. parliament. Kenya's pre-2010 administrative law was primarily based on the concept of parliamentary sovereignty, which meant that the question as to what comprised lawfulness was one to be decided in large part on what the legislature said it was.<sup>271</sup>

Decisions considered being in contravention of substantive law or procedure as laid out in statute would then be challenged on the common law ground of illegality.<sup>272</sup> Pre-2010 case law illustrates that courts narrowly interpreted illegality in terms of whether the challenged authority had acted without or in excess of the statutory power accorded it by the respective enabling legislation.<sup>273</sup> By contrast, the ground of lawfulness in Article 47 of the 2010 Constitution is much broader; it not only requires compliance with Acts of parliament, but also with other fundamental provisions of the Constitution. This means that administrators must adhere to constitutional requirements and have lawful authority to discharge certain actions; otherwise that action will be invalid. This may appear to add little to the common law ground of illegality. But this is inaccurate for lawfulness effectively precludes the use of statutory ouster clauses to limit the review power of courts because this power is now grounded not in the common law, but in the 2010 Constitution.

Kenyan courts have interpreted the ground of lawfulness in a manner that indicates its scope is more expansive than the ground of illegality at common law. In the *MUHURI* case, the court found that where a power is conferred by or under a law, it must be exercised in accordance with that law and further that where a power or discretion is conferred upon a person or body under the Constitution, it must be exercised in accordance with or subject to the Constitution.<sup>274</sup>

#### **4.2.4 Reasonableness**

The requirement that administrative action must be reasonable has its roots in the common law concept of reasonableness. But unlike its common law equivalent, it is grounded in the legal standards of the constitution which are more searching than the *Wednesbury* standard.<sup>275</sup> At

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<sup>271</sup>Gathii (n 1) 33.

<sup>272</sup>*Re National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya)* [2006] 1 EA 47.

<sup>273</sup>*Maina v Nairobi Liquor Licensing Court* [1973] EA 319, 321.

<sup>274</sup>*MUHURI* (n 236) para 165.

<sup>275</sup>*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1947] 2 All ER 680; *Council of Civil Service Unions and Others v Minister of the Civil Service* [1985] AC 374, 410.

common law, courts regarded those decisions that were so outrageous that no reasonable authority could have properly made them as having satisfied the ‘*Wednesbury* unreasonableness’ standard of review. Another related test, referred to as ‘symptomatic reasonableness’ inquired whether a challenged decision was so unreasonable that it must point toward the existence of other grounds for review.<sup>276</sup> What is most relevant for present purposes is that the common law standards of reasonableness sought to restrict the scope of judicial review from enquiring into matters of merit. By contrast, the constitutional standard is more expansive and, in appropriate cases, may admit of merit-based judicial review.

#### 4.2.5 Procedural fairness

The requirement in Article 47 of the 2010 Constitution that administrative action must be procedurally fair has roots in the common law rules of natural justice; these include the right to a fair hearing and the rule against bias.<sup>277</sup> The scope of the rules of natural justice at common law was, however, restricted in two ways.<sup>278</sup> First, decisions could only be challenged on the basis of procedural non-compliance with requirements of a fair hearing on the part of a decision-maker; it therefore excluded claims of substantive unfairness.<sup>279</sup> Secondly, the actions of public power holders could only be challenged where they adversely affected an individual’s specified rights as opposed to the rights of the general public.<sup>280</sup> In contrast, Article 47(1) makes no distinction between procedural and substantive fairness. This results in a more expansive and searching level of scrutiny than the common law standards would permit.

Procedural fairness is wider in application than the rules of natural justice in that it applies to decisions affecting the public, and is more flexible and variable depending on the nature of the administrative action. For example, the rules of natural justice apply in disciplinary proceedings where there is a definite number of affected people and hence may entail a wide range of specific principles. However, where administrative action affects the general public the rules of natural justice were never applied to those types of decisions. In such situations, the new ground of

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<sup>276</sup> Ibid 683.

<sup>277</sup> Craig (n 269) 8.

<sup>278</sup> P Leyland & G Anthony, *Textbook Administrative Law* (2013) Ch 17.

<sup>279</sup> Craig (n 269) 6-7.

<sup>280</sup> *Kioa v West* [1985] per Mason J.

fairness might require notice and comment procedures, negotiated rulemaking, public inquiries etc. These are some of the general mechanisms for giving effect to the broader notion of fairness.

#### 4.2.6 Written reasons

The duty to give reasons for administrative action that adversely affects the legal rights or legitimate expectations of its addressee is recognized in common law.<sup>281</sup> Provision of such reasons is considered necessary because they place the decision-maker beyond any suspicion of impropriety or unreasonableness.<sup>282</sup> A cogent common law basis for giving reasons for administrative action is that it enables those affected ‘to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the decision in the courts or elsewhere.’<sup>283</sup>

Kenyan courts have also recognized, in their pre-2010 case law, the necessity of reasons for adverse administrative action.<sup>284</sup> In *Jopley Constantine Ochieng v Public Service Commission of Kenya and Others*,<sup>285</sup> the Court of Appeal allowed an appeal from a High Court decision for which no reason was given.<sup>286</sup> Overruling the High Court, Madan JA held that the ‘learned judge erred in not stating any reason for his decision. The record of proceedings before him is so skimpy that it is impossible for us to determine in what matter his mind was working when he refused the application.’<sup>287</sup> However, the approach to the duty to give reasons was not consistent; there are instances where some courts disregarded it.<sup>288</sup> Nor did the courts specify in what form such reasons should be given to affected parties. The 2010 Constitution provided clarity in this regard.

Article 47(2) offers a clear basis for demanding that decisions of persons exercising public powers must be justified by way of written reasons. It establishes a right of every person who has been or is likely to be adversely affected by administrative action ‘to be given written reasons for

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<sup>281</sup>*Breen v Amalgamated Engineering Union* [1971] All ER 1148; *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] 2 All ER 27, 55.

<sup>282</sup>*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

<sup>283</sup>Committee on Administrative Tribunals and Enquiries (1957), para 98.

<sup>284</sup>*Kaluma* (n 6) 194.

<sup>285</sup>Civil Appeal No. 32 of 1981 (Unreported).

<sup>286</sup>The High Court decision was as follows: ‘Application for leave to apply for an order of certiorari refused, for mandamus granted. Costs in the cause.’

<sup>287</sup>*Ibid.*

<sup>288</sup>*Kenya National Examinations Council v R ex parte GG Njoroge and Others* Civ Appeal No. 266 of 1996.

the action.’ This provision means that a culture of justification must now be an intrinsic part of proper administration and exercise of public powers.<sup>289</sup> It is crucial to note that while the right to reasons for adverse administrative action was recognized in some common law precedents, its scope was not clearly defined nor did it include an additional duty to provide the reasons in writing.<sup>290</sup> Article 47(2) is therefore an innovative provision which casts written reasons both as a right of persons whose rights have been or are likely to be affected by adverse decisions and a means to limit the exposure of prudent administrators to unnecessary challenges.<sup>291</sup>

By requiring written reasons for administrative action, Article 47(2) creates a new ground for judicial review with crucial implications for Kenya’s administrative law. It makes it obligatory for administrators to explain how they have exercised their public powers and why. This in turn offers a logical rationale for a particular decision as well as pointers regarding its reviewability. The implications of the right to reasons for judicial review in Kenya have been acknowledged by some courts. In *Geothermal Development Company Ltd v Attorney General*, the court held that reasons are an important component of natural justice and that ‘information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus any forthcoming inquiry or action will be.’<sup>292</sup> Also, courts have insisted that the reasons must be specific and clear because this enhances: i) the right to procedural fairness by enabling the affected party to know what to explain or rebut; and ii) the observance by administrators of the duty to give adequate reasons for their actions.<sup>293</sup> In *Priscilla Wanjiku Kihara v Kenya National Examination Council*, the High Court observed that failure to provide reasons for administrative action can have substantial bearing on the result of a judicial review application.<sup>294</sup> Kenyan courts now require that written reasons to be given, as a matter of right, to any persons likely to be affected by administrative action to enable them to make representations in their defence.<sup>295</sup>

## 5. STATUTORY ENACTMENT TO GIVE EFFECT TO ARTICLE 47

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<sup>289</sup>Akech (n 16) 41-42.

<sup>290</sup>*Re Hardial Singh and Others* [1979] KLR 18.

<sup>291</sup>G Staszewski, ‘Reason-Giving and Accountability’ (2009) 93 *Minnesota Law Review* 1278.

<sup>292</sup>[2013] eKLR.

<sup>293</sup>*MUHURI* (n 236) para 178.

<sup>294</sup>[2013] eKLR.

<sup>295</sup>*Jeremiah Gitau Kiereini v Capital Markets Authority and Another* [2013] eKLR.

The Fair Administrative Action Act (FAAA) was enacted to give effect to the provisions of Article 47 of the 2010 Constitution. Clause 3 of Article 47 envisaged a legislation that would provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; and promote efficient administration. The FAAA introduces important reforms to Kenya's administrative law, including: i) expanding the scope of judicial review to include action of public and private bodies;<sup>296</sup> ii) elaborating the right to be given reasons for administrative action; iii) giving effect to access of information rights relating to administrative action;<sup>297</sup> iv) codifying the grounds for judicial review, including the common law principles;<sup>298</sup> v) outlining the procedure for judicial review;<sup>299</sup> and vi) clarifying that FAAA provisions are additional to rather than derogations from the rules of common law and natural justice.<sup>300</sup> Statutory regulation of Kenya's administrative law raises the question as to whether and, if so, the extent to which it has had any significant effect on the manner in which section 47 of the 2010 Constitution is interpreted. It is to this that the following section turns.

## 5.1 Statutory Definition of Administrative Action

Besides giving effect to Article 47 of the 2010 Constitution, FAAA was also enacted 'for connected purposes', which include elaborating the substantive content of the constitutional provision. One of the central ideas in the objects of FAAA is the concept of 'administrative action'. This concept is defined as follows:

In this Act, unless the context otherwise requires—

“administrative action” includes—

- (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relate.

An important aspect of this definition is the way in which it expressly states that it is inclusive as opposed to exclusive. The actions listed as consisting administrative action are not exhaustive but merely illustrative. This is significant for three reasons. First, it reaffirms the traditional class

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<sup>296</sup> Fair Administrative Action Act, section 3.

<sup>297</sup> Ibid, section 6.

<sup>298</sup> Ibid, section 7(2).

<sup>299</sup> Ibid, section 9.

<sup>300</sup> Ibid, section 12.

of actions of public authorities that are recognized as administrative action under the common law. Secondly, it does not make a sharp distinction between conduct of public and private actors; this implicitly creates room for the possible recognition as administrative action of certain actions of private authorities, particularly those providing public services. Thirdly, it shifts the test for what constitutes administrative action from the source of power to the nature of function couple with its effect on legal rights and interests.

## **5.2 Statutory Grounds and Procedure for Judicial Review**

As stated above, prior to the enactment of FAAA the Law Reform Act provided the substantive basis for judicial review in Kenya.<sup>301</sup> However, nowhere in FAAA is this statute mentioned. One might have expected that since that Act was the operational law at the time of enactment of FAAA, some provisions in the transitional or consequential parts of FAAA would make direct reference to it. But this is surprisingly not the case. In spite of this curious omission, it may reasonably be argued that a purposive reading of FAAA may suggest an incidental reference to the Law Reform Act. Section 14 of FAAA provides that:

- (1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.
- (2) Despite subsection (1)—
  - (a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and
  - (b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted.

The provisions of section 14 of FAAA clearly bring all pending proceedings under the statutory control of FAAA, requiring that they be henceforth pursued in line with it except for cases where this would be impracticable. FAAA also envisages a narrow set of circumstances in which the Law Reform Act or other relevant law would apply; it only saves the practice and procedure obtaining before FAAA and not the substantive law. It therefore becomes evident that save for the few cases in which the Law Reform Act may still apply, statutory grounds for judicial review in Kenya are now to be found primarily in FAAA.

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<sup>301</sup>Gathii (n 1).

FAAA expounds the constitutional grounds for judicial review and codifies many of the common law grounds. Sections 7(2) sets out circumstances in which administrative action may be challenge, including where: an administrator: i) acted without or in excess of jurisdiction; ii) is biased or there is reasonable apprehension of bias; iii) contravened mandatory procedures; iv) acted unfairly or in bad faith, proceeds on the basis of an error in law, or in pursuit of an ulterior motive calculated to prejudice the legal rights or interests of the affected person; v) denied the affected person a reasonable opportunity to be heard; vi) failed to take into account relevant considerations in making the impugned decision; vii) acted in a manner that does not disclose a rational connection between the action and the purpose for which it was taken, the empowering legal provision, or the reasons given to justify it.

### **5.3 FAAA and the Common Law**

Section 12 of FAAA makes clear that provisions of the Act are additional to and not derogations from the rules of common law and natural justice.<sup>302</sup> The recognition of the supplementary nature of common law principles of judicial review has a significant effect on the manner in which section 47 of the 2010 Constitution should be interpreted. In particular, Article 47 should be read together with Article 20 which requires courts to develop the common law so as to bring it in conformity with the requirements of the bill of rights. Administrative law in Kenya has a strong basis in the common law which indirectly continues to shape the current law; thus courts may do well to consider the ways in which principles of natural justice, among others, can best be developed.

## **6. CONCLUSION**

The first and perhaps most significant implication of the constitutionalization of administrative justice rights in Article 47 and their subsequent elaboration in FAAA is the emphasis that the root of all public power is the 2010 Constitution. By asserting the supremacy of the constitution, courts have pointed out that no person or entity is above or beyond the law, and this has the effect of reinforcing the finality of judicial power to determine the legality of the exercises of governmental power.<sup>303</sup> This may not, however, be a welcome development from the perspective

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<sup>302</sup> Ibid, section 12.

<sup>303</sup>Gathii (n 1) 32.

of the political branches of government. And it is all the more for this reason that the 2010 Constitution situates the basis of judicial review power in the supremacy clause and not on the notion of parliamentary sovereignty. As a result, the judiciary is now properly empowered to scrutinize the reviewable actions of both parliament and the executive, including the president.

Besides altering the basis of judicial review, the 2010 Constitution also strengthens it. In contrast to the previous position where public power was primarily challenged on the basis of *ultra vires*, the new judicial review is more searching and much more robust. Some Kenyan courts have relied on the direct constitutional protection of individual rights, among other factors, to require that all exercises of power by parliament or the executive must have a legal basis in statute or constitutional provisions. In addition, courts have extended the scope of their enquiry to examine not only the procedure by which the decision was made, but also the merits of the decision.<sup>304</sup>

The constitutionalization of the rights to fair administrative action by way of Article 47 of the 2010 Constitution and its statutory elaboration in FAAA have given rise to issues regarding the legal status and role of the common law. As stated above, the provisions of Article 47 subsumed the common law bases and grounds for judicial review in Kenya, a point that is supported by FAAA which recognizes the residual relevance of the common law.<sup>305</sup> The case law, however, indicates inconsistency regarding the normative hierarchy of the common law vis-à-vis Article 47 and FAAA, which is discussed in more detail in Chapter 4. Nonetheless, it is sufficient to make the preliminary observation here that the case law indicates an evolving approach towards the co-application of the common law, Article 47 and FAAA.<sup>306</sup> But this trend is by no means predictable nor is possible to fully rationalize the tensions, contradictions and complementarities that can be seen.

There are some instances where courts rely exclusively on Article 47; others where Article 47 and the common law are equally decisive;<sup>307</sup> and yet others where the common law forms the

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<sup>304</sup>*Maasai Mara (SOPA) Ltd v County Government of Narok* [2016] eKLR.

<sup>305</sup> FAAA, s 12.

<sup>306</sup> *Akech* (n 16).

<sup>307</sup> *R v City Council of Nairobi and Others* [2013] eKLR.

exclusive basis for determining the contested issues.<sup>308</sup> A few cases may illustrate this. In *R v Kenya National Examinations Council ex parte Ian Mwamuli*, the applicant was aggrieved by the respondent's decision to withhold his national examination results and completion certificate.<sup>309</sup> Seeking orders quashing the decision and releasing the results as well as the certificate, the applicant challenged the decision as contrary to Article 47, mainly the right to written reasons, and his legitimate expectations. The court found for the applicant and in its decision relied primarily on Article 47 despite the fact that some common law grounds were pleaded.

The decision in *R v Commission for Higher Education ex parte Peter Soita Shitanda* suggests a move toward joint operation of the common law and Article 47.<sup>310</sup> Contesting a decision not to recognize his university degree, the applicant submitted that this was made in bad faith, contravened the rules of natural justice, and violated his legitimate expectations. In finding the decision unfair, the court relied on both common law principles and constitutional norms. In contrast, the court in *R v District Land Adjudication and Settlement Officer Kilifi District and Others ex parte Alfred Munga and Another* excluded Article 47 from its reasoning.<sup>311</sup>

A more general impact of the 2010 Constitution on administrative law in Kenya is the fact that it specifically lists a number of principles and values which must inform and be taken into account when making decisions. Article 259(1) of the 2010 Constitution also provides that its provisions should be interpreted in a manner that best promotes its national principles and advances the rule of law and good governance. Kenyan courts have pronounced these as having established a value system that must be considered when interpreting the law. More significantly, is the observation by the Supreme Court of Kenya that the foundational values and principles in Article 10 are 'transformative ideals' meant to entrench a culture of justification to the way in which public power is exercised.<sup>312</sup>

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<sup>308</sup>*R v Public Procurement Administrative Review Board and Another ex parte Avante International Technology Inc.* [2014] eKLR.

<sup>309</sup> [2013] eKLR.

<sup>310</sup> [2013] eKLR.

<sup>311</sup> [2013] eKLR.

<sup>312</sup>*Speaker of the Senate and Another v AG* [2014] eKLR Advisory Opinion, para 53.

## Chapter 4

### COMPARATIVE CLARIFICATION OF JUDICIAL REVIEW STANDARDS: THE ACTIONS, GROUNDS, AND REMEDIES

#### 1. INTRODUCTION

Thus far, it has been shown that the constitutionalization of the right to administrative justice has transformed both the conceptual basis and grounds for judicial review in Kenya<sup>313</sup> as well as consolidated the procedure and expanded the remedies available for judicial review.<sup>314</sup> This Chapter discusses how the courts in Kenya have sought to implement this right. It seeks to show that despite the clear provisions of this right and articulation of constitutional supremacy, some courts in Kenya have continued to dispose of judicial review applications almost entirely on the traditional common law grounds. In other cases, courts have had due regard to the grounds for judicial review under Article 47, but they have not systematically

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<sup>313</sup> J Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and* (2014) 57-58.

<sup>314</sup> *John Kabui Mwai and Others v KNEC and Others* [2011] eKLR.

clarified what the respective grounds mean for Kenya's administrative law. This trend, also evident in comparable experience, is identified as one of the greatest institutional impediments to realizing the revolutionary import of the constitutionalized administrative justice.<sup>315</sup>

Accordingly, by way of comparative analysis of Kenyan, Malawian and South African case law, this chapter seeks to draw key lessons for Kenya from the critiques of Malawian courts and the progressive legal developments in South African administrative law jurisprudence. Reference to South African case law is relevant because of the remarkable similarity of shared provisions, and also because Kenyan courts explicitly acknowledge how heavily the drafters of the 2010 Constitution borrowed from South Africa.<sup>316</sup>

## **2. ACTIONS SUBJECT TO JUDICIAL REVIEW**

### **2.1 Legislative Action**

As already discussed in Chapter 3, the Kenya's pre-2010 administrative justice jurisprudence was characterized by limited scope of judicial review of parliamentary action.<sup>317</sup> This changed after the constitutionalization of administrative law, which brought actions previously not subject to judicial review within its remit.<sup>318</sup> One of the consequences of this is that, where appropriate, legislative action can be subjected to judicial scrutiny.<sup>319</sup> In the pre-2010 period, parliamentary supremacy and the separation of powers were cited as reasons for excluding judicial review of legislative process. By contrast, courts now assert that 'the doctrine of parliamentary supremacy, which once gave Parliament the unbridled power to regulate and conduct its business as it pleased, is no longer central in the Constitution of Kenya.'<sup>320</sup> It has also been held that the 'doctrine of separation of powers and checks and balances' in the 2010 Constitution obligate the

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<sup>315</sup>Chirwa (n 33); M Akech (n 16).

<sup>316</sup>*JSC v Speaker of the National Assembly*, para 165: 'We need not emphasize how closely our constitutional provisions reflect those contained in the Constitution of South Africa and how heavily we borrowed therefrom.'

<sup>317</sup>*Trusted Society for Human Rights Alliance v Attorney General and Others* [2012] eKLR.

<sup>318</sup>*MUHURI* (n 236).

<sup>319</sup>*Speaker of the Senate and Another v Attorney General and Others* [2013] eKLR.

<sup>320</sup>*Judicial Service Commission v Speaker of National Assembly*, para 120.

High Court to determine whether any law is inconsistent with or in contravention of the Constitution.<sup>321</sup> This reflects an expanded scope of judicial scrutiny of parliamentary action.

However, the extension of the scope of judicial review to include legislative action is not unlimited. On the contrary, it is subject to some rational restrictions. This point was adverted to in *OkiyaOmtatah and Others v Attorney General and Others*, where the court observed that the judiciary may only interfere in parliamentary work by way of judicial review in cases where such work violates the Constitution.<sup>322</sup> To the extent that it conducts its business within the confines of the Constitution of Kenya, 2010 the normal parliamentary immunity applies. This view was outlined in *Judicial Service Commission v Speaker of the National Assembly and Others*, where the court held that:

Members of Parliament, the Speaker and officers in his office can only enjoy immunity from court action if their decisions or actions are made in accordance with the letter and spirit of the Constitution. We therefore find that sections 12 and 19 of the National Assembly (Powers and Privileges) Act on parliamentary privilege do not oust the jurisdiction of this Court to inquire into the legality of the 1st, 2nd, 5th and 6th Respondents actions.

This is also the view adopted by the Supreme Court of Kenya, as evidenced in *Speaker of the Senate and the Senate v Attorney General and Others*.<sup>323</sup> In its advisory opinion on the matter, the Supreme Court clarified that 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’ and further that the Court ‘cannot invoke institutional comity to avoid its constitutional duty’.<sup>324</sup> Restating the shift from parliamentary to constitutional supremacy, the High Court in the *CREAW*<sup>325</sup> elaborated the new power of review of legislative action by stating that while the court cannot prevent parliament from discharging its core functions, the court has an obligation to make a declaration to stop parliamentary action where it is shown to be unconstitutional.<sup>326</sup>

Kenyan courts have in general shown willingness to scrutinize parliamentary decisions on the basis that it is unconstitutional. But the case law has not yielded a clear answer for the type of

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<sup>321</sup> Ibid, para 138.

<sup>322</sup> [2014] eKLR.

<sup>323</sup> [2013] eKLR.

<sup>324</sup> Ibid, para 61.

<sup>325</sup> *CREAW* (n 253).

<sup>326</sup> *Gathii* (n 1) 49.

parliamentary action that should be subjected to judicial review. For instance, in *Kenya Youth Parliament and Others v Attorney General and Others* the court stated that it would be hesitant to undertake a merit review of parliamentary actions that had been discharged according to the stipulated procedure.<sup>327</sup> In order to strengthen the legitimacy of judicial review it is crucial to clearly delimit the types of parliamentary actions that amount to administrative action. Courts in Malawi have been criticized for slipshod reasoning because of the inconsistency with which they subject legislative action to judicial review.<sup>328</sup> This contrasts with the case in South Africa where courts have generally been more methodical in their approach. The comparative practice from these jurisdictions is analyzed below.

Like their Kenyan counterparts, there are instances in which Malawian courts appear to contradict their own determinations on whether and why certain types of legislative action can be reviewed. *In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Sections 89(1)(h) and 86(2) of the Constitution and In the Matter of Impeachment Procedures under Standing Order 84*, the High Court found that the challenged parliamentary procedure was a legislative act not subject to judicial review.<sup>329</sup> Yet in *Attorney General v SG Masauli*, reviewed a parliamentary resolution and declared it, inter alia, ultra vires and illegal.<sup>330</sup>

By contrast, South African case law provides a more consistent model and principled basis for explaining the permissible reach of judicial review into legislative actions. For instance, in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* the view was advanced that whenever legislative bodies exercise their original, deliberative law-making powers this does not amount to administrative action.<sup>331</sup> This is instructive for Kenyan judges for they can be guided by the fact that decisions taken by elected officials in their original capacity as members of a deliberative assembly are legislative actions not subject to judicial review.<sup>332</sup>

## 2.2 Executive Action

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<sup>327</sup> [2012] eKLR.

<sup>328</sup> Chirwa (n 35) 117.

<sup>329</sup> Constitutional Cause No 13 of 2005 (Unreported).

<sup>330</sup> MSCA Civil Appeal No 28 of 1998 (Unreported).

<sup>331</sup> 1999 (1) SA 374 CC.

<sup>332</sup> 2001 (3) SA 640 (C).

The 2010 Constitution expressly demands that all executive action conform to the Constitution and also that all executive actions must be exercised within it.<sup>333</sup> Executive decisions amounting to administrative action are thus susceptible to Article 47 judicial review. The majority of cases in which executive decisions of the president have been challenged have, however, dealt more with constitutional compliance than violation of Article 47. In *Centre for Rights Education and Awareness (CREAW) and Others v Attorney General*, the petitioners contested the president's appointment of county commissioners on the basis that it was unconstitutional on a number of grounds.<sup>334</sup> The court held that the petition raised critical issues relating to the reviewability of presidential powers, namely 'the constitutional benchmark for the exercise of executive power and the right of citizens to question and challenge any deviation or perceived deviation from the letter and spirit of the Constitution.'<sup>335</sup> In this case, the court found that the relevant presidential appointments were subject to judicial review.

It is however important to note that not all types of executive action are subject to judicial review. A notable shortcoming of Kenyan administrative justice jurisprudence is the absence of a specific test for determining whether or not a particular executive action or decision amounts to administrative action subject to judicial review. In *CREAW*, there was no detailed discussion of why the presidential powers of appointment, which are traditionally associated with prerogative powers of head of state, could be judicially reviewed.<sup>336</sup> But for the insistence on a constitutional benchmark for regulating executive power, the court did not specify whether the challenged decision was an administrative action. Likewise, in *Brian Weke and Another v AG and Another*, the court upheld a challenge on the president's appointment powers on the basis that he had acted outside the Constitution.<sup>337</sup> Also, in *JSC v Speaker of the National Assembly* the court reviewed and reversed a presidential appointment without a detailed enquiry into whether that action was a political decision or administrative action.<sup>338</sup> This is certainly an area where Kenyan courts can draw lessons from comparative law.

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<sup>333</sup> *Mohammed Balala and Others v AG and Others* [2012] eKLR.

<sup>334</sup> *CREAW* (n 253).

<sup>335</sup> *Ibid*, para 33.

<sup>336</sup> *CREAW* (n 253).

<sup>337</sup> [2014] eKLR.

<sup>338</sup> [2013] eKLR, para 27.

South African case law provides some principled guidance on the range of executive actions that can be challenged by way of judicial review. In *SARFU*, the Constitutional Court held that what matters is not so much the functionary as the function, and the critical question is whether the task itself is administrative or not.<sup>339</sup> Hence, ‘the focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’<sup>340</sup> This means that the fact that a public power is exercised by the executive is, in and of itself, not determinative of its susceptibility to judicial review. It has been held that a purely institutional test is not a reliable methodology for determining whether or not a particular action is administrative or not. In the specific case of executive action, the general rule is that the core functions of the executive – formulating policy, initiating legislation and political tasks – are not administrative actions for purposes of judicial review. What is most instructive from the *SARFU* decision is that courts should distinguish between

The South African courts have further refined the *SARFU* test for determining which types of executive functions may be subject to judicial review.<sup>341</sup> In *Edu-U-College* the Court expanded the explanation for the *SARFU* test to better delimit which instances may justify judicial review of executive functions:

Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.<sup>342</sup>

What South African courts have articulated in *SARFU* and *Ed-U-College* may provide Kenyan courts with a more determinate method of justifying perceived intrusions into the domain of the political branches.

### **2.3 Certain Types of Private Action**

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<sup>339</sup>*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 (CC).

<sup>340</sup> *Ibid*, para

<sup>341</sup> 2006 (2) SA 52 (C).

<sup>342</sup>*Edu-U-College*, para 18.

Having constitutionalized administrative law, the 2010 Constitution intended to expand the scope of judicial review to include certain types of private action that affect the legal rights or interests of other persons. Article 20 provides, *inter alia*, that the bill of rights binds all state organs and all persons. Read together with Article 47, this means that certain actions of private or non-state actors can be the basis of judicial review applications. The impact of imposing constitutional obligations related to administrative justice rights on private entities is undoubtedly a positive development, but it comes with the challenge of determining which types of private action can found judicial review applications. Two tests have been used by Kenyan courts to determine whether private actions are amenable to judicial review. First, there is the source of power test, according to which only those actions performed pursuant to powers conferred by statute are subject to judicial review. Secondly, some courts have focused more on the nature of the action performed and its effect on the rights of others. A critical legal question that Kenyan courts have grappled with is whether and, if so, the circumstances in which private power can be subjected to judicial review. The case law thus far has neither provided a consistent nor conclusive answer. Comparative case law, analyzed in Section 4 below, can therefore offer some useful insights.

### **3. THE PLACE OF THE COMMON LAW**

#### **3.1 The Role of the Common Law in Kenya's Administrative Law**

Common law grounds for judicial review and the rules of natural justice have long been influential in shaping the administrative law jurisprudence of common law jurisdictions, but this has been altered somewhat by the constitutionalization of administrative justice rights. While most constitutional provisions which articulate the right to administrative justice codify most of the common law principles on point, they also introduce new and more expansive grounds for judicial review. An example is the right to written reasons that can be found in constitutional provisions, but which is not recognized as a general duty of decision-makers at common law.<sup>343</sup> Even so, the common law has evolved to close this regulatory gap by implying the duty to give reasons, particularly in the case of decisions of judicial or quasi-judicial bodies.<sup>344</sup>

One of the key intentions of Article 47 of the 2010 Constitution was to incorporate the common law principles that had long formed the basis of judicial review in Kenya in order to

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<sup>343</sup>*R v Secretary of State for the Home Department ex parte Doody* [1993] 3 All ER 92.

<sup>344</sup>*R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310.

bring them into conformity with the constitutional bases for administrative law. It also sought to reform Kenya's administrative law jurisprudence by outlining explicit and expansive bases for judicial review. However, Kenyan courts have faced difficulties in terms of the actual process of reconciling the content of the constitutional right to administrative justice and the traditional grounds and bases of judicial review under the common law.<sup>345</sup> Indeed it was observed in the early days of the coming into force of the 2010 Constitution that:

The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.<sup>346</sup>

Even so, as will be demonstrated by case law, there has been a mixture of proper interpretation of the constitutional right to fair administrative action as well as judicial misapplication of the common law grounds for judicial review.

In *Republic v Kenya Revenue Authority Ex parte Funan Construction Limited*, the court summarized the framework for judicial review orders in Kenya without having regard to the expansive constitutional bases under Article 47 of the 2010 Constitution.<sup>347</sup> As a result, the court proceeded to review the relevant administrative action on the narrow grounds available under the common law. Another remarkable aspect of this ruling is the fact that the court did not refer to the FAAA, which was already operational and which recognizes statutory grounds for judicial review that reflect the unity of the constitution and the common law.<sup>348</sup> A further weakness of this case is the fact that authority for the court's judgment were premised on case law that predates the 2010 Constitution and accordingly focus exclusively on the common law.<sup>349</sup>

The concept of reasonableness as espoused in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>350</sup> can also illustrate how Kenyan courts have failed to fully appreciate

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<sup>345</sup> OJ Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the *Odumbe* Case would be Decided Differently Today' (2015) 29 *National Council for Law Reporting Bench Bulletin* 18.

<sup>346</sup> JT Gathii, 'The Incomplete Transformation of Judicial Review in Kenya' (2011) *Nairobi Law Monthly*.

<sup>347</sup> [2016] eKLR.

<sup>348</sup> Dudley (n 37) 51.

<sup>349</sup> *Republic v Kenya Revenue Authority Ex Parte Yaya Towers Limited* [2008] eKLR; *Municipal Council of Mombasa v Republic and Umoja Consultants Ltd*, Civil Appeal No. 185 of 2001; *Republic v Kenya National Examinations Council Ex Parte Gathenji and Others* Civil Appeal No. 266 of 1996.

<sup>350</sup> [1948] 1 KB 223 (CA).

the effect of constitutionalizing the right to fair administrative action. In answer to the query as to what ‘unreasonable’ means in the context of judicial review, Green LJ stated that it is ‘something so absurd that no sensible person could ever dream that it lay within the powers of the authority’ or ‘something so unreasonable that no reasonable authority could have ever come to it.’<sup>351</sup> This reflects the common law notion of *Wednesbury* unreasonableness, which was later abandoned because of subsequent developments in English law and the emphasis on justification as a key basis for the validity of administrative action.<sup>352</sup>

As has been discussed above, prior to the 2010 Constitution Kenya’s administrative law had its basis in principles of the common law and was significantly influenced by the jurisprudence from English courts.<sup>353</sup> The constitutionalization of administrative justice by way of Article 47 of the 2010 Constitution and its statutory elaboration in the FAAA has, however, introduced a new and inclusive basis for judicial review. In the specific case of the idea of reasonableness, Article 47 establishes a methodology for testing legal validity and section 7(2) of the FAAA clarifies this by insisting that courts should review administrative actions on the basis of its reasonableness, proportionality and rationality.

However, Kenyan courts continued to rely explicitly on the common law concept of gross unreasonableness as the methodology of testing the validity of administrative action. For instance, in *Republic v Commissioner of Customs Services ex parte Africa K-Link International Limited*, the court held that unless it can be shown that the decision-making process by a statutory body is ‘so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court.’<sup>354</sup>

The notion of ‘gross unreasonableness’ clearly refers to the *Wednesbury* doctrine which is distinct and more restrictive than the constitutional standard of reasonableness enshrined in Article 47. In *Kevin K Mwiti and Others v Kenya School of Law and Others*, the court similarly

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<sup>351</sup> Ibid.

<sup>352</sup> *R v IRC ex parte Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

<sup>353</sup> See above, section 4.2.

<sup>354</sup> HC Misc JR No. 157 of 2012.

disregarded the constitutional standard of reasonableness as a ground for judicial review, opting instead to rely on *Wednesbury* unreasonableness.<sup>355</sup> In particular, the court held that:

Whereas the Petitioner's contention is that to charge the said amount is unreasonable, it is my view and so I hold that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. ... In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision.<sup>356</sup>

A similar decision was arrived at in *Republic v Public Procurement Administrative Review Board and Others ex parte Seven Seas Technologies Limited*.<sup>357</sup> Relying on the *Wednesbury* unreasonableness and the same reasoning in *Kevin K Mwiti*, the court held that in order to justify interference with the decision of an inferior tribunal:

such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the *Wednesbury* test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of *Wednesbury* unreasonableness.<sup>358</sup>

The example of how Kenyan courts have interpreted reasonableness demonstrates how little regard has been given to the meaning and significance of Article 47 of the 2010 Constitution. The constitutional standard of reasonableness has two conceptual components: proportionality and rationality. Unlike the *Wednesbury* view of reasonableness which focuses narrowly on the gross nature of an action as the principal basis for determining irrationality, the constitutional standard of proportionality in the notion of reasonableness requires that a balance be struck between the beneficial and adverse effects of administrative action.<sup>359</sup> It also demands that an inquiry be made into the necessity of administrative action and the availability of less adverse alternatives. For its part, the rationality aspect demands that administrative action be supported by evidence, written reasons for such action and the capacity to further the objective purpose for the relevant action.

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<sup>355</sup> Petition 377, 395 & JR 295 of 2015.

<sup>356</sup> Ibid.

<sup>357</sup> Misc Civil Application 168 of 2014.

<sup>358</sup> Ibid.

<sup>359</sup> *R v Home Secretary ex parte Daly* [2001] 2 AC 532.

It is submitted that if Kenyan courts would appreciate the extensive scope of the new grounds for judicial review there is a high likelihood that the nature of conduct subject to judicial review will expand. This is because both constitutional and common law grounds for judicial review will operate side by side. By contrast, reliance on narrow common law grounds as the exclusive basis for judicial review misses the point of Article 47 of the 2010 Constitution as read with provisions of the FAAA. A case in point where the court took the preferred view is *Suchan Investment Limited v Ministry of National Heritage and Culture & Others*,<sup>360</sup> where the court demonstrated an appreciation of the joint effect of Article 47 and the FAAA by holding that:

The test of proportionality leads to a ‘greater intensity of review’ than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision plays a much greater role. ... In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making administrative decisions; Section 7 (2) (j) identifies abuse of discretion as a ground for review while section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1984] 1 KB 223 on reasonableness as a ground for judicial review.

Perhaps the most remarkable feature of the *Suchan Investment Limited* decision is the fact that the court recognized how the common law grounds for judicial review have been codified in both constitutional and statutory law provisions. By conceding that the *Wednesbury* dicta and its related common law principles have been subsumed under section 7(2)(k) which derives from Article 47, the court implicitly acknowledged that there is need to integrate the common law and the constitutional standards for review of administrative action.

A more explicit decision that underscores the necessity for the unity of the common law and constitutional standards for judicial review and interpretation is to be found in *Republic v Director of Public Prosecutions ex parte ChamanlalVrajlalKamani*.<sup>361</sup> Drawing the basis of his

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<sup>360</sup> Civil Appeal 46 of 2012.

<sup>361</sup> [2015] eKLR.

finding from the fact that provisions of the Fair Administrative Justice Act, 2015 are additional to rather than derogation from the general common law rules,<sup>362</sup> Odunga J observed that:

the grounds in judicial review applications [should] be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity ... But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the Law Reform Act and Order 53 of the Civil Procedure Rules have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution.<sup>363</sup>

Nonetheless, some legal commentators have criticized the approach of Odunga J, arguing that it may 'result in a two-tracked system of judicial review'<sup>364</sup> or confusion.<sup>365</sup> Also, the Supreme Court appears opposed to the complementary application of common law and constitutional standards for judicial review. In *CCK v Royal Media Service Ltd*, the court held that the origin of the power of judicial review of legislation is currently derived from the 2010 Constitution<sup>366</sup> and not the common law principles established in *Marbury v Madison*.<sup>367</sup> The court additionally discouraged the uncritical deference to interpretive rules at common law, contending that this can subvert the organic approach to constitutional interpretation. This view has been restated in *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy*.<sup>368</sup>

Both the *CCK* and *Judges and Magistrates Vetting Board* decisions express a fear that if common law is allowed to continue forming the basis of judicial review or the interpretive approach to law then the fundamental changes sought to be instituted by the 2010 Constitution will have little effect,<sup>369</sup> a fear that is reflected in comparable jurisdictions and the works of some scholars.<sup>370</sup> However, it is doubtful whether this fear is well founded, if at all. A more persuasive

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<sup>362</sup> Fair Administrative Justice Act, 2015 section 12.

<sup>363</sup> Supra note 65.

<sup>364</sup> W Mutunga, 'The 2010 Constitution and Its Interpretation: Reflections from the Supreme Court Decisions', 16 October 2014, University of Fort Hare Inaugural Lecture Series.

<sup>365</sup> Gathii (n 1).

<sup>366</sup> [2014] eKLR.

<sup>367</sup> 5 US 137 (1803).

<sup>368</sup> [2014] eKLR at 206: '... the Constitution should be interpreted in a holistic manner; that the country's history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution.'

<sup>369</sup> D Davis & K Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal of Human Rights* 405.

<sup>370</sup> K Prempeh, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80(1) *Tulane Law Review* 72.

view is to have the essential principles of the common law-based judicial review be incorporated into the Constitution from which they will derive their normative force. This will likely ensure a unitary system of judicial review that is grounded in the constitution and also informed by the common law. As will be shown in the following section, this approach has been successful in South Africa.

### **3.2 Comparing Judicial Approaches in Kenya, Malawi and South Africa**

The provisions that constitutionalize the right to administrative justice in Malawi, Kenya and South Africa are relatively similar; all of them contain the essential aspects of lawfulness, procedural fairness, reasonableness, and the right to be given reasons in writing for any adverse administrative action. Section 43 of the Malawian Constitution differs slightly from the others in that it explicitly identifies legitimate expectations as one of the triggers for judicial review and bases for being furnished with written reasons in the event of adverse administrative action.<sup>371</sup> The wording of the Kenyan provision is also unique to the extent that it introduces new grounds for judicial review, including expeditiousness and efficiency. It further recognizes that the apprehension of negative effects from administrative action can be an independent ground for judicial review. But as will be shown by the review of case law, the content of these provisions is similar and they ought to have the same effect in their respective jurisdiction.

However, in terms of the role that common law principles of administrative law have in informing the application of constitutional rights to fair or just administrative action, the circumstances vary across the jurisdictions. In the case of Malawi, the courts have not fully appreciated the legal import of the provisions of section 43 of the 1994 Constitution.<sup>372</sup> These provisions offer a clear and expansive basis for reviewing administrative action, but Malawian courts prefer to conduct judicial review administrative action exclusively under the common law grounds thus ignoring the new constitutional grounds.<sup>373</sup> An example is *State v Attorney General ex parte Abdul Pillane*,<sup>374</sup> where Mkandawire J held that since section 43 merely restated the principles of natural justice, the classical common law grounds for judicial review (illegality, irrationality and procedural impropriety) should form the primary grounds for judicial review in

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<sup>371</sup> 1994 Constitution, sections 43(a) and 43(b).

<sup>372</sup> Chirwa (n 35) 109.

<sup>373</sup> Chirwa (n 33) 460.

<sup>374</sup> Constitutional Case No. 6 of 2005 (Unreported).

Malawi. As a result of this over-reliance on the common law as the exclusive basis for judicial review, there has been little appreciation of the impact of section 43 of Malawi's Constitution and the need to reconcile it with the common law bases for judicial review.

Unlike Malawi, Kenya has enacted specific legislation to implement the provision of the Constitution that constitutionalizes administrative justice rights. The Fair Administrative Act, 2015 is a welcome legislative development that was expected to elaborate the scope and content of the constitutional right as well as its relation to the common law principles of administrative justice.<sup>375</sup> But despite this, some courts ignored the Act and opted instead to render sweeping statements on the limited, even negative, role of the common law in the age of the 2010 Constitution.<sup>376</sup>

What is also ironical is that while most courts sought to minimize the potential role of common law principles either as supplementary grounds for review or as interpretive aids to Article 47, there was increased conflation of *Wednesbury* unreasonableness under traditional common law and constitutional reasonableness.<sup>377</sup> In one case, the relevant court summarized the framework for judicial review in Kenya without having regard to the expansive constitutional bases under Article 47 of the 2010 Constitution.<sup>378</sup> Nonetheless, there is Kenyan case law to support the utility of common law grounds as additional and complementary to the constitutional and statutory grounds for judicial review.<sup>379</sup>

Kenyan courts have not been consistent in their approach to the role of the common law principles of judicial review and their normative status vis-à-vis the constitutional right to fair administrative action.<sup>380</sup> A further observation, which is supported by case law, is the fact that Kenyan courts have not systematically provided conceptual guidance on the distinction between the common law, statutory and constitutional bases for judicial review; this has resulted in conflation of these grounds which makes it most difficult to elaborate a general approach from the emerging jurisprudence.

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<sup>375</sup> Section 12.

<sup>376</sup> *CCK v Royal Media Service Ltd* [2014] eKLR.

<sup>377</sup> *Kevin K Mwiti and Others v Kenya School of Law and 2 Others* Petition [2015] eKLR.

<sup>378</sup> *Republic v Kenya Revenue Authority Ex parte Funan Construction Limited* [2016] eKLR.

<sup>379</sup> *Suchan Investment Limited v Ministry of National Heritage and Culture & 3 Others* Civil Appeal 46 of 2012.

<sup>380</sup> Gathii (n 1).

South Africa, like Kenya, has specific legislation (PAJA) to ensure the implementation of the constitutional right to just administrative action pursuant to section 33 of the 1996 Constitution. In like manner to the Kenyan experience, PAJA was expected to give effect to the constitutional right to administrative action. However, case law on point shows that PAJA has fallen short of this expectation. In some cases, courts have even opted to ignore it because it has been found to be complicated and parsimonious. Even so, PAJA has had the effect of making the courts more creative in terms of developing grounds for judicial review and attendant remedies.

What is remarkable about the South African experience and which can guide Kenya and Malawi which are still facing difficulties in reconciling the constitutional right to administrative justice and the common law principles of judicial review is the South African Constitutional Court's decision in *Pharmaceutical Manufacturers* which clearly recognized that both sources of administrative law can coexist in a complementary manner.<sup>381</sup> This reflects the unity of the Constitution and the common law, which will lead to a consistent and harmonious development of administrative law jurisprudence.

#### **4. ROLE AND SIGNIFICANCE OF THE PRINCIPLE OF LEGALITY**

Under the common law tradition, judicial review has long been made available only to those persons whose legal rights or interests have been affected by public actions based on public law. However, recognizing the increasing swathe of private power, some jurisdictions have sought to expand the scope of judicial review to regulate both public and private power. Kenya's 2010 Constitution makes it possible for certain private actions to be amenable to judicial review; this means that there is a category of private decisions that cannot be subjected to judicial review. Yet the 2010 Constitution, including Article 47, binds all state actors and all persons. Courts are thus required to ensure that, at the very least, all actions capable of affecting the rights or interests of individuals should conform to the requirements of the constitution.

The approach of Kenyan courts in relation to the judicial review of private actions has not been uniform. In *Rose Wangui Mambo*, the High Court quashed a decision of a private golf club on the ground that it violated the petitioners' right to fair administrative action.<sup>382</sup> By contrast, in

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<sup>381</sup>*Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South African and Others* 2000 (2) SA 674 (CC).

<sup>382</sup>*Rose Wangui Mambo* (n 36).

*Paul OrwaOgila* the High Court declined to compel a private college to readmit a student who had been suspended from the institution on the basis that judicial review is not a proper remedy for actions of private bodies.<sup>383</sup> The selected cases suggest that Kenyan courts have not advanced a principled basis for determining the conditions in which the exercise of private power can be subjected to judicial review. In turn, certain actions of private bodies may be excluded from the scope of judicial review thus barring access to judicial review remedies without providing an alternative remedy.

The principle of legality is a unique ground for judicial review that has been developed to provide a ‘safety net’ which ensures that all exercises of public power – be they public or private – are subject to some form of constitutional review.<sup>384</sup> It gives courts a basis to scrutinize action that may not be administrative action.<sup>385</sup> Identified as an aspect of the rule of law, the court in *Fedsure* held that the principle of legality implies that a body exercising public power must act within the authority lawfully conferred on it.<sup>386</sup>

## 5. LEGAL REMEDIES ON JUDICIAL REVIEW

Prior to the coming into force of the 2010 Constitution, Kenyan courts primarily granted one of the three common law prerogative writs – certiorari, prohibition and mandamus – as reliefs for successful applicants for judicial review. Orders of certiorari invalidate decisions already made, while prohibition is ordered to prevent a holder of public power from performing an action or making a particular decision.<sup>387</sup> Mandamus orders are issued to compel the performance of a specific act required by law. The 2010 Constitution retains these orders but also expands the available remedies for judicial review to include declaratory orders, injunctions, conservatory orders, and compensation for loss incurred because of wrongful administrative action.<sup>388</sup> This is significant because pre-2010 case law shows that Kenyan courts were reluctant to issue any other

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<sup>383</sup>*Paul OrwaOgila* (n 38).

<sup>384</sup>*New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Minister of Health and Another*, 2005 (2) SA 530 (C) para 97.

<sup>385</sup>Hoexter (n 53) 124.

<sup>386</sup>*Fedsure* (n 331) paras 56 and 58; Hoexter (n 53) 122.

<sup>387</sup>C Ford, ‘Dogs and Tails: Remedies in Administrative Law’ in C Flood & L Sossin (eds), *Administrative Law in Context* (2012) 31.

<sup>388</sup> Article 23; *Gaitaru Peter Kimunya v Dickson Mwenda Kithinji and Others* [2014] eKLR para 85.

remedies save for certiorari, prohibition and mandamus.<sup>389</sup> Instead, courts directed applicants to seek for additional remedies, such as declarations or injunctions, through separate civil suits.<sup>390</sup>

The expanded scope of remedies under the 2010 Constitution intended to provide broader access to redress for maladministration than was previously available. However, the decisions of some courts are contrary to this transformative intent. For instance in *Republic v Director Public Prosecutions and Another ex parte ChamanlalVirajKamani and Others*, the court declined to issue declaratory orders on the basis that such orders were outside the remit of judicial review.<sup>391</sup> Such instances are, however, rare. In the majority of cases, courts have shown a willingness to afford applicants with appropriate relief, including by way of modifying common law remedies to better reflect constitutional standards.<sup>392</sup>

Kenyan courts have also issued declaratory orders as a means to clarify legal obligations of public bodies or to determine the legality of administrative actions.<sup>393</sup> In addition, declaratory orders have been used to remedy defective statutes by reading-in certain words into that statute to ensure its overall consistency with the 2010 Constitution.<sup>394</sup> An illustrative example is *Kenya Magistrates and Judges Association v Judges and Magistrates Vetting Board and Another* where the court held that statutory investigatory powers were not invalid but could only be properly exercised in accordance with the Constitution.<sup>395</sup>

With the expansion of remedies for judicial review also came the challenge of determining which criteria should be decisive for courts in deciding the appropriate orders to give. This has been pointed out by the Supreme Court, where it was observed that the constitutionalization of civil remedies had the effect of introducing competing standards on whether or not a specific remedy should be awarded.<sup>396</sup> Kenyan case law on the content of and conditions for awarding conservatory orders offers a pertinent example. In *CREAW*, the High Court held that a party seeking a conservatory order needs only to show a prima facie likelihood of success for his case

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<sup>389</sup>*Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison* [2007] EA 354.

<sup>390</sup>*Director of Pensions v Cockar* [2000] 1 EA 38, 51; *Raila Odinga v Nairobi City Council* [1990-1994] EA 482, 487.

<sup>391</sup> [2015] eKLR para 145.

<sup>392</sup>*Michael Mungai v Registrar of Companies and Another* [2013] eKLR.

<sup>393</sup>*Martin Nyaga Wambora and Others v Speaker of the Senate and Others* [2014] eKLR.

<sup>394</sup>*Gilbert Hezekiah Miya v Advocates Disciplinary Committee* [2015] eKLR, para 19.

<sup>395</sup> [2014] eKLR.

<sup>396</sup>Akech (n 16) 496-97.

and a real danger that his fundamental rights may be violated if the order is not granted.<sup>397</sup> This rights-centred approach is also evident in *Centre for Human Rights and Democracy*, where the High Court emphasized the need to ensure that an affected party can exercise their rights.<sup>398</sup> By contrast, in *Gaitaru Peter Kimunya* the Supreme Court upheld a more restrictive test.<sup>399</sup>

New remedies such as compensation have also been added to the list of awards that Kenyan courts may make to remedy maladministration in the context of a judicial review application. But the wider implications of monetary compensation have not been systematically evaluated in the case law thus far. While Kenyan courts appear to have adopted a case-by-case approach to the issue of compensation, some cases dealing with large claims of financial loss resulting from administrative action shows the need for reform in this area. For instance, in *Attorney General and Another v African Commuter Services Limited* the respondent's commercial flight business license was suspended leading to an action, inter alia, for violation of fair administrative justice rights and special damages for loss of revenue.<sup>400</sup> The court found that the maladministration on the part of the appellants had caused serious and irreparable harm to the respondent's business and thus justified the award of compensation, including damages for lost revenue. While this was a private action, the court maintained that one cannot claim damages by way of judicial review.<sup>401</sup>

This shows the reticence of some Kenyan courts on the issue of compensation as a judicial review remedy. However, it is to be expected that in the near future courts may be persuaded to find that compensation can be justified in certain circumstances. But what is more important is the fact that Kenyan courts should be guided by principled factors when considering whether or not to award damages. The paucity of Kenyan case law on point makes it necessary to draw from comparative case law. Good examples can be found in South African case law where courts have adopted a cautious approach to awarding compensation.<sup>402</sup>

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<sup>397</sup>*CREAW* (n 253).

<sup>398</sup> [2012] eKLR (Ruling).

<sup>399</sup>*Gaitaru Peter Kimunya* (n 388).

<sup>400</sup> [2014] eKLR.

<sup>401</sup>*Akech* (n 16) 505.

<sup>402</sup>*Hoexter* (n 53).

## Chapter 5

### CONCLUDING OBSERVATIONS AND SOME PROPOSALS FOR REFORM

#### 1. INTRODUCTION

The 2010 Constitution recognizes the right to fair administrative action in Article 47 and replaces parliamentary sovereignty with constitutional supremacy.<sup>403</sup> These, among other, changes have revolutionized Kenya's administrative justice. Article 47 has been further elaborated in the Fair Administrative Action Act, 2015 (FAAA), which gives content to the grounds for judicial review and outlines the relevant procedure.<sup>404</sup> Yet Kenyan courts have in some cases failed to give full effect to the revolutionary potential of Article 47. As shown in this study, courts at times revert to the limited and outmoded options under the common law,<sup>405</sup> thereby disregarding the broader

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<sup>403</sup> *MUHURI* (n 236) para 143.

<sup>404</sup> *R v Public Procurement Administrative Review Board ex parte Syner-Chemie Limited* [2016] eKLR.

<sup>405</sup> See discussion in Chapter 3 above.

and more flexible pathways to judicial review of administrative action available under the 2010 Constitution.<sup>406</sup>

This imperfect reception of the new administrative law by courts and other governmental branches in turn raised critical legal questions that have been addressed throughout this study: whether and, if so, to what extent the revolutionary potential of Article 47 has been realized in Kenyan law and practice; and how Kenya's administrative law jurisprudence compares with that in Malawi and South Africa.<sup>407</sup> The central argument advanced in this study is that considerable scope exists for unlocking the revolutionary potential of Article 47 by way of: i) clarifying the meaning of administrative action; ii) explicating the new grounds for judicial review and their legal implications; iii) elaborating how common law-based judicial review relates with Article 47 and provisions of FAAA; and iv) articulating the horizontal effect of Article 47. This Chapter summarizes the key findings and comparative observations of this study, as well as its proposals for reform.

In the following sections, this Chapter will revisit the question of how best the revolutionary potential of Kenya's new administrative law can be fully achieved. As discussed throughout the study, judicial officers, administrators and litigants alike have shown an incomplete appreciation of the extent to which the 2010 Constitution altered the administrative law landscape in Kenya. A number of conceptual oversights have been identified as key contributors to the incomplete transformation of Kenya's administrative law.<sup>408</sup> These include ambiguity over the type of conduct that constitutes administrative action, the meaning and legal implications of the new grounds for judicial review, the interplay between the common law and Article 47, and the impact of the new administrative justice rights on private relationships.

## **2. KEY FINDINGS OF THE STUDY**

The present study sought to enquire into the legal implications of the constitutionalized right to fair administrative action in Kenya, with a special focus on how and, if so, the extent to which it has revolutionized the country's administrative justice jurisprudence. In particular, it investigated whether the revolutionary effect of Article 47 of the 2010 Constitution has been given effect in

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<sup>406</sup>*David Njenga Ngugi v Attorney General* [2016] eKLR.

<sup>407</sup> See Chapter 4 above.

<sup>408</sup>Gathii (n 1).

law, policy and practice; and if so, how Kenya's post-2010 administrative law jurisprudence compares with the practice in comparable common law jurisdictions. One of the key findings of this study is that there are indeed gaps in the conceptual understanding of certain aspects of the new administrative law and also in their practical implementation. While the reception of Article 47 is generally positive, its full revolutionary potential remains under-explored and consequently unrealized.

It has been suggested that the concept of transformative constitutionalism can be useful in providing a coherent theoretical and conceptual approach to the progressive development of the new system of administrative justice in Kenya. In Chapter 3, this study specified the changes to Kenya's administrative law that were brought about by the 2010 Constitution. It also showed the ways in which some courts have been mindful of and adaptive to these fundamental changes to the scheme of Kenyan administrative law while others have been less so.<sup>409</sup> In cases where courts are more aware of the significant ways in which Article 47 of the 2010 Constitution as read with provisions of FAAA have transformed Kenya's administrative law, the resulting decisions have been better reasoned and more legally compliant. By contrast, the judgments in which courts have misapplied the law or failed to properly interpret it have resulted in confusion and impeded the

These trends are relevant to illustrate the broader need for an approach to judicial review that is premised not exclusively on the common law but more broadly on constitutional ideals. In contrast to the previous system of administrative law that was based on restrictive common law doctrines, the 2010 Constitution makes administrative justice rights far more accessible, less formalist and more flexible. This speaks to a revolutionary turn from an administrative system of bureaucratic primacy to a right-based culture of justification.<sup>410</sup> Transformative constitutionalism thus becomes useful in two ways. First, it offers a conceptual basis for shaping the new judicial review in line with the transformative project of the 2010 Constitution. Second, it provides a means to systematically develop the common law principles so as to include rather than exclude them in the process of testing the legal validity of administrative action.

Provisions of the 2010 Constitution as well as FAAA implicitly uphold the fundamental aims of transformative constitutionalism relating to administrative justice rights. In the specific case of

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<sup>409</sup> See Section 3.5.

<sup>410</sup> Mbote & Akech (n 159).

the interaction between Article 47 and the common law, FAAA is explicit that the common law is complementary to rather than in derogation of statutory and constitutional provisions. Hence, this study has found that there is need for a new constitutionally-grounded approach to judicial review in order to unlock the full potential of constitutionalized administrative law.

### **3. CONCLUSIONS AND COMPARATIVE OBSERVATIONS**

#### **3.1 Administrative Action**

Administrative action is the primary route to judicial review because it defines the subject matter of judicial scrutiny for constitutional compliance. Although not defined in the 2010 Constitution, the FAAA provides a broad definition of administrative action which includes the powers of authorities or quasi-judicial tribunals; or actions of persons or entities that affects the legal rights or interests of any person.<sup>411</sup> This study has established that administrative action within the meaning of both Article 47 and FAAA refers to the exercise of public power or performance of a public function by state organs or statutorily empowered bodies except by the legislature when discharging legislative functions, the executive when making political decisions or exercising political power and the judiciary when exercising judicial functions. Administrative action also includes the performance of a public function or exercise of a public power by a private person which in turn adversely affects the rights of any person.

This definition is supported by comparative law and practice in South Africa as well as the critiques of the judicial practice of Malawian courts.<sup>412</sup> Proper definition of administrative action is not only useful for conceptual clarity, but it also serves a more practical function of delimiting the proper scope of judicial review.<sup>413</sup> It also promotes cohesive functioning of the coordinate branches of government because they will be more likely to accept judicial scrutiny of their decisions if there is a clear and principled basis for it.

#### **3.2 Scope and Implications of the New Judicial Review**

This study has shown that the new grounds for judicial review have extended the range of actions that can give rise to legitimate challenge of decisions affecting the rights of individuals. As a result, the scope of judicial review is now broader and encompasses actions that were previously

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<sup>411</sup> Section 2.

<sup>412</sup> Chapter 3.

<sup>413</sup> Chirwa(n 43) 116.

beyond judicial scrutiny. In particular, Kenyan courts can now review certain decisions of the political branches, including the president. However, as discussed in Chapter 4, Kenyan courts have not systematically analyzed the legal criteria for subjecting parliamentary decisions or those of the executive to judicial review. Courts have tended to justify their judicial review jurisdiction on the basis of their constitutional mandate to supervise the conduct of state organs instead of explaining why the challenged action amounts to administrative action. This consequently leads to the conflation of judicial review (which is narrower and more specific) and constitutional review which questions in broad terms whether public power has been exercised in compliance with the constitution. It is critical to bear in mind that judicial review is only concerned with legal consistency of exercises of public power amounting to administrative action with the conditions of administrative justice rights.

#### **4. SOME PROPOSALS FOR REFORM**

In order to overcome some of the obstacles that currently prevent the transformation of Kenya's administrative justice system, there is need for consolidated multi-sectoral reforms. Changes in both law and policy are necessary to unlock the potential of the constitutionalization of the right to fair administrative action, which demands that all actions capable of affecting the rights or interests of individuals should at the very least have a legal basis. This study has shown that in spite of the ways in which Kenya's administrative law has been modernized, some institutional actors have failed to adapt their practices and processes to reflect these changes. As a result, there have been instances where administrative justice has been dispensed in a manner that all but disregards the post-2010 transformation of the law. Three proposals for reform are advanced below as potential means to better secure transformative administrative justice in Kenya.

First, statutory changes are required to strengthen Kenya's administrative law. While the FAAA was enacted to give effect to Article 47 of the 2010 Constitution, some of the older pieces of legislation continue to be relied on by courts and litigants alike. There are many instances in which reference has been made to provisions of the Law Reform Act as the substantive source of law on judicial review. This may appear surprising because FAAA makes provision for how, in applicable cases, the older laws may still apply. More importantly, it has already been held by

the High Court that FAAA should be read as amending or, where appropriate, repealing the Law Reform Act.<sup>414</sup> But confusion continues to reign in practice because the Law Reform Act has not been repealed. It may therefore be necessary to repeal those provisions of the Law Reform Act which provided the substantive basis for judicial review prior to the coming into effect of the FAAA. The same also applies to provisions of Order 53 of the Civil Procedure Rules which set out the procedural basis for judicial review. In those narrow circumstances where these legal rules may still be applicable, they should be construed in a manner consistent with the 2010 Constitution and the FAAA.

Second, courts have an instrumental role to play in terms of interpreting and giving proper meaning to new normative concepts and standards introduced by the 2010 Constitution. This is particularly relevant to grounds for judicial review, including efficiency and expedition, which were not recognized under the common law. As for the other grounds which codify and expand the common law standards, they have to be given the meaning intended by the drafters of the 2010 Constitution. Also, they have to be read together with other constitutional provisions and more specifically those in the bill of rights. Article 20 of the 2010 Constitution requires courts to develop the common law so as to better conform to the provisions of the bill of rights. This means that in appropriate cases where common law grounds may apply, courts have a duty to apply them in the light of constitutional standards set out in Article 47.

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<sup>414</sup>*Martin Wanderi and Others v Engineers Registration Board of Kenya and Others* [2014] eKLR.

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