

**THE ULTRA VIRES RULE ON ITS DEATH-BED:  
THE RULE OF LAW AS THE BASIS OF JUDICIAL REVIEW IN KENYA**

A THESIS SUBMITTED IN PART FULFILLMENT OF THE REQUIREMENTS FOR  
THE AWARD OF MASTER OF LAWS DEGREE BY THE UNIVERSITY OF NAIROBI

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BY

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**(2008)**


## DECLARATION

I Peter Opondo Kaluma do hereby declare that this is my original work and that it has not been submitted and is not being submitted for the award of a degree or any other academic credit in any other University.

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This work would have been low-grade in form had Mr. Edwins K'Akach not intervened. I sincerely acknowledge his contribution.

Judicial review as a legal practice in Kenya has achieved great progress since the Constitutional & Judicial Review Division of the High Court of Kenya was established in 2003. Principles such as legitimate expectation, proportionality and fairness discussed in this thesis have been refined and accorded recognition as independent heads of review in the period. Although it is never apt to single out judicial officers for recognition in a document such as this, am constrained to specially acknowledge the good work of the Honourable Mr. Justice John Nyamu, the Honourable Lady Justice Roselyne Wendoh, the Honourable Mr. Justice Anyara Emukule and the Honourable Mr. Justice Dulu of the said court division. I have heavily relied on their decisions in this research. Their courage and creativity, both individual and collective, have given judicial review its true meaning and scope in Kenya.

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## **DEDICATION**

To my beloved wife Meresia Adush, son Patrice Lumumba and daughter C.J.S. Andele for the sacrifices made and support given during my postgraduate studies.



## ABBREVIATIONS

AC	-	Appeal Cases
AG	-	Attorney General
All ER	-	All England Report
Anor	-	Another
App	-	Application
Cap	-	Chapter
Ch D	-	Chancery Division
CLJ	-	Common Law Journal
EA	-	East African Law Reports
EACA	-	East African Court of Appeal Reports
Ex p	-	Ex parte
HCCC	-	High Court Civil Case
KB	-	Kings Bench
KLR	-	Kenya Law Reports
Misc	-	Miscellaneous
No	-	Number
NRB	-	Nairobi
PL	-	Public Law (Journal)
QB	-	Queens Bench
Unrep	-	Unreported
Vol	-	Volume
WLR	-	Weekly Law Reports

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- Civil Procedure Act, Cap. 21 of the Laws of Kenya
- Commissions of Inquiry Act, Cap. 102 of the Laws of Kenya.
- Constitution of Kenya
- Constitution of Kenya (Amendment) Act, 2008
- Education Act, cap. 211 of the Laws of Kenya
- Estate Duty Act Cap. 483 of the Laws of Kenya
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## CHAPTER ONE

# BACKGROUND

### 1.1 Introduction

Judicial review has assumed great significance as a field of legal practice in modern times. In Kenya, few fields of legal practice have grown as rapidly in scope and significance over the past decade as that of judicial review. This speedy advancement caused the Chief Justice to create an independent division of the High Court of Kenya in 2003 to deal exclusively with judicial review and constitutional law cases. In the year 2007, some 2,000 applications for judicial review were lodged in the High Court Registry at Nairobi alone.<sup>1</sup>

Further, new grounds for seeking court intervention and redress by way of judicial review constantly emerge while existing grounds evolve over time. For instance, the principles of legitimate expectation, proportionality and fairness have recently emerged as common yet important heads of judicial review in Kenya. The emergence of these principles have widened the scope of judicial review and extended its application to areas, powers and institutions that were traditionally believed to be beyond the reach of the court's supervisory jurisdiction exercised through judicial review.

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<sup>1</sup> *Cases Register, Constitutional and Judicial Review Division, High Court, Nairobi*

The rapid growth of judicial review is however not a legal development that is exceptional to Kenya. In England, for instance, the speed of growth of judicial review has been characterized as “breakneck” by eminent public law scholars.<sup>2</sup>

But, as Sir John Laws cautions, there is a price to pay for so speedy a development as it carries with it the risk that principles are built on a foundation with too much sand and not enough rock.<sup>3</sup> In deed, although spectacular, the growth of judicial review in Kenya is not matched by a corresponding knowledge and understanding of the subject by litigants, the judiciary and the Advocates. To avoid this situation, it is necessary that the basis of judicial review in Kenya be ascertained and appreciated.

## 1.2 Theoretical Framework

Debate about the foundation of a body of law is important in any legal system. This is especially so in relation to judicial review, given its relevance in controlling the ever-increasing executive powers in Kenya today.

Various theories have been advanced in an attempt to explain the basis of judicial review. One school of thought<sup>4</sup> moulded on the English concept of “legislative sovereignty” posits that the basis of judicial review derives from

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<sup>2</sup> Peter Cane, *An Introduction to Administrative Law* (Oxford 1996) 3<sup>rd</sup> Ed, describes the growth of judicial review in such terms at p. v. Dr. Mark Elliott agrees with the characterization in “*The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, Vol. 58 [1999] CLJ 129.

<sup>3</sup> John Laws, *The Ghost in the Machine: Principle in Public Law*, [1989] PL 27

<sup>4</sup> Advanced by Christopher Forsyth and Mark Elliott. See for instance Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 [1996] CLJ 122 and Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, Vol. 58 [1999] CLJ 129

the *ultra vires* doctrine; which holds that the function of the courts in judicial review is simply to police the exercise of power to ensure it accords with the legislative intent of Parliament as the donor of *vires*. This school of thought argues that all the other grounds of judicial review are mere instances, components as it were, of the *ultra vires* doctrine. In curtailing abuse of power by executive authorities, it has been argued, for example, that Parliament did not intend that powers it grants to the authorities be exercised on the basis of irrelevant considerations or for improper purposes, in bad faith or unreasonably.<sup>5</sup>

To the proponents, the strength of the *ultra vires* doctrine derives from its deemed capacity to reconcile the existence and exercise of judicial review jurisdiction by the courts with the legislative sovereignty of Parliament. In recent years, however, the *ultra vires* doctrine has been subjected to a great deal of criticisms the result of which has undermined its ability to supply a convincing justification for the entirety of judicial review.

Orthodox theory holds that *ultra vires* was developed as "an institution to police the boundaries [of public power] which Parliament had stipulated"<sup>6</sup> and therefore constitutes "the vehicle through which the courts effectuate the will of Parliament".<sup>7</sup> But the scope of judicial review today extends beyond the traditional concern with control of statutory powers.

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<sup>5</sup> See Chapter 2

<sup>6</sup> Paul Craig, *Administrative Law* (London: Sweet and Maxwell, 1999) at p.5

<sup>7</sup> *Ibid.* at p.16

The ultra vires theory is of no relevance in justifying judicial control of the exercise of powers not emanating from Parliamentary legislation. This is because it is not possible to rationalise judicial review of non-statutory powers through the idea that courts are delineating the ambit of Parliament's intent.<sup>8</sup> The point, simply put, is that if judicial review of statutory power is justified by reference to the notion that the courts are enforcing the express and implied limits contained in enabling legislation, then, that justification cannot be extended into spheres in which enabling legislation is absent and in which, *a priori*, the courts cannot be said to be engaged in enforcement of any express or implied statutory restrictions.<sup>9</sup>

The scope of modern review extends to regulation of the exercise of non-statutory powers. To the extent that it implies that all administrative power is derived from a specific statutory source, it is doubtful that the ultra vires doctrine should be considered the basis or the sole basis of judicial review.

In addition to its apparent incapacity to justify review of non-statutory powers, the ultra vires doctrine appears unable to rationalise the jurisdiction Kenyan courts have and exercise to strike down statutes; specifically for inconsistency with the Constitution. Since it assumes the function of courts in judicial review is limited to enforcing the intention of Parliament, the ultra vires concept would be transformed if it were to be applied to justify the exercise of court jurisdiction to annul Parliamentary enactments.

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<sup>8</sup> Ibid.

<sup>9</sup> Mark Elliott, "The Constitutional Foundations of Judicial Review" (Oxford – Portland) 2001, p.5



Most importantly, the ultra vires theory is irreconcilable with the courts' traditional reluctance to uphold ouster clauses. It is unable to justify judicial review on the ground of error of law on the face of the records and, on the face of it, appears unable to justify the growth of judicial review across time.

The above matters considered together cast serious doubts on the capacity of the ultra vires doctrine to justify judicial review, especially in Kenya.

In England, a different school of thought, from that advanced by the ultra vires doctrine, has emerged seeking to explain the existence and justification for judicial review. This latter jurisprudence posits that the basis of judicial review derives not from the ultra vires doctrine explained in terms of effectuating legislative intent of Parliament but from "the common law" requirement of probity in administrative actions and decisions, particularly in situations where individual rights, privileges, liberties or livelihoods are involved. The jurisprudence opines that the juridical basis of judicial review springs from the common law and that the various heads of review, including the ultra vires doctrine, are norms developed by the courts from time to time to ensure even-handedness in administrative actions.<sup>10</sup>

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<sup>10</sup> As will be seen, the strongest advocates of the new jurisprudence are *Professor Dawn Oliver, Sir John Laws* and *Paul Craig*. See for instance, Dawn Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review" [1987] PL 543; Paul Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] CLJ 63

The latter jurisprudence rejects the idea that the root of judicial review draws from the ultra vires doctrine or that the (ultra vires) doctrine is the benchmark with reference to which the courts' inherent supervisory jurisdiction over administrative actions is validated. Rather, it asserts that the norms of judicial review are a body of judge-made legal principles of good administration which operate independent of any recognisable parliamentary will. The common law jurisprudence does not deny the relevance of the ultra vires doctrine but treats it as one among the several control mechanisms courts have developed over time to control abuse of power by executive authorities.

However, just like the ultra vires doctrine, the common law faces several jurisprudential limitations in terms of its ability to found the basis of judicial review in Kenya. The place of the common law as a source of law in Kenya is expressly affirmed by section 3 of the Judicature Act.<sup>11</sup> Under the said provision, the common law is prescribed as a source of law after the Constitution and Parliamentary legislations and is stated to apply "so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".<sup>12</sup>

At once, it is doubtful that judicial review, considering its nature and significance, would derive its foundation from a source as low in the hierarchy of laws applicable to Kenya as the common law.

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<sup>11</sup> Cap. 8, Laws of Kenya

<sup>12</sup> Ibid, section 3 (1) (c)

Most importantly, only that part of the substance of the common law that was in force in England on 12<sup>th</sup> August, 1897 has the force of law in Kenya.<sup>13</sup> This means that all developments in the sphere of administrative law arising from judicial pronouncements in England after the stated reception date do not apply to Kenya. It is difficult, if not impossible, to reconcile the stated reception clause for application of the substance of the common law in Kenya with the continued emergence and evolution of new grounds of judicial review in Kenya. This is more so considering the fact that the growth of judicial review in Kenya is to a large extent informed by and borrows heavily from developments in administrative law in England.

It is argued here that the substance of the common law, with the limitations imposed upon its application as a source of law in Kenya, cannot plausibly justify the exercise of judicial review jurisdiction by Kenyan courts. This is not to deny that the courts play a vital role in the development of administrative law in Kenya. As a matter of fact it is tacitly acknowledged that the growth of judicial review in Kenya derives mainly from case law.

It is argued in this thesis that the two schools of thought: the ultra vires doctrine and the common law, cannot justify the exercise of judicial review jurisdiction by Kenyan courts. As already stated, the theories advanced by the two schools of thought seek to explain the basis of judicial review in England.

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<sup>13</sup> Ibid.

As a parliamentary democracy, England operates under an unwritten constitutional setting defined by "legislative sovereignty" of Parliament. Parliamentary democracies operate on the idea that Parliament is supreme, or sovereign in the law-making process. This readily lends itself to the ultra vires doctrine.

To the contrary, Kenya is a constitutional democracy. Constitutional democracies are based on a hierarchy of laws, with the Constitution as the supreme form of law, to which all other laws passed by the legislature must conform. The constitutional order of constitutional democracies is defined by and accentuates the doctrine of "constitutional supremacy".

The Constitution of Kenya is supreme to all other laws and arms of government; including the legislature. The three main branches of government in Kenya: the executive, the judiciary and the legislature, are created and given powers by the Constitution. Except that the Constitution of Kenya vests in them separate functions and powers, the three arms of government enjoy coordinate and equal constitutional status. None of the branches is superior to the other(s). Instead, each branch of government enjoys supremacy within the scope of its core powers delineated by the Constitution and informed by the doctrine of separation of powers.

Accordingly, while Parliament enjoys sovereignty in law-making, the other branches of government have supremacy in their respective constitutional spheres: the judiciary over judicial functions and the executive over public administration.

The concept of legislative sovereignty is thus limited and bears a different juridical meaning in Kenya from that it does in England. Within the Kenyan constitutional context, legislative sovereignty does not mean that Parliament enjoys general supremacy over the other branches of government. Instead, legislative sovereignty has a restricted meaning and simply underscores the idea that Parliament, subject to such constitutional limitations as may exist, enjoys supremacy in the sphere of law-making.

One limitation imposed by Kenya's constitutional order is that legislative authority of Parliament does not extend to and cannot be applied to enable Parliament to make the Constitution or to make law that is inconsistent with the Constitution. The justification for this lies on the fact Parliament is a creature of the Constitution - it thus cannot make or create the Constitution; which is its creator. Kenyan courts have previously asserted that the power to make the Constitution and constitute government - referred to as constituent power - lies with the people of Kenya as an indispensable constituent of their sovereignty.<sup>14</sup>

Therefore, unlike the case with England where legislative sovereignty defines the constitutional order, parliamentary legislation is not the supreme source of law in Kenya. The Constitution is the supreme source of law in Kenya. It not only validates all other laws but also constitutes and specifies the limits of government power: legislative power, executive power and judicial power.

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<sup>14</sup> *Njoya & 6 Others v. AG & 3 Others* (No 2) [2004] 1KLR 261

The power of the courts to control executive actions derives from and must always be alive to the constitutional setting operative and prevailing in Kenya. Thus, Kenyan courts unlike their English counterparts have jurisdiction to determine the validity of parliamentary legislations and to strike them down if they are found to be inconsistent with the Constitution.

On account of the differences in constitutional settings between Kenya and England outlined above, it is argued herein that the basis of judicial review in Kenya is to be found within the constitutional order itself; and specifically under the doctrine firmly engrained in the Kenyan constitutional system and embodied in the phrase "the rule of law".

The rule of law, though a much talked about good governance ideal, is a very broad and problematic public law concept. Though easily perceived, the rule of law is one of those concepts whose exact meanings invite a great deal controversy.

In common parlance, the rule of law simply connotes "supremacy of law".<sup>15</sup> In public law, however, the rule of law is a very rich and, at times, malleable good governance norm. It not only embraces the supremacy of regular law over arbitrary or naked power but also underscores equality of all persons before the law and underpins the ideals that anchor procedural justice including but not limited to access to justice and due process.

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<sup>15</sup> Bryan A Garner, *Blacks Law Dictionary*, 8<sup>th</sup> ed. p.1359

Supremacy of law as opposed to arbitrary power is itself a very broad normative component of the rule of law. While emphasizing the absolute dominance of law over arbitrary power, it anchors respect for the rights and freedoms of the individual and underpins constitutionalism which is the idea that government should be legally limited in its powers, and that government authority depends on observing the limitations. In a constitutional democracy like Kenya, the law is the instrument for creating and limiting government power and the Constitution is the supreme source of law.

Whenever an authority acts beyond its lawful powers, the rule of law sanctions due process and secures access to justice for appropriate remedy. Under the doctrine (the rule of law) all are equal before the law and the law has indiscriminate authority over all.

This thesis argues that the rule of law avails judicial review the most cogent explanation within the constitutional setting prevailing in Kenya. It is argued that the rule of law as a tool for regulating the exercise of power limits government arbitrariness and abuse of power by ensuring that government not only acts within the law but also complies with the principles of good administration and is fair and rational in its policies, decisions and actions.

It is argued that the rule of law furnishes a rationale for judicial review that is consistent with the constitutional order. The rule of law, it is argued, does this by relating judicial review to the constitution which, if the theory of

constitutional supremacy is accepted, would cloth this special court jurisdiction with an unassailable juridical justification. This follows from the fact that if the doctrine of constitutional supremacy is embraced, the courts' constitutional duty would be to uphold the law; with the constitution as the supreme law and the other laws, to the extent that they are consistent with the constitution.

Secondly, the rule of law provides the location of the principles which the courts apply in exercising judicial review jurisdiction. It achieves this by placing the principles of good administration within the constitutional order. In this sense, the rule of law treats power as a phenomenon created and regulated by law.

It will be argued that the rule of law as a device for regulating power not only obviates administrative arbitrariness and ensures government acts in accordance with the law but also underpins individual right to access courts to vindicate their rights and interests especially when subjected to administrative excesses.

### **1.3 Statement of the Problem**

The basis of judicial review in Kenya remains uncertain despite its growing significance in controlling administrative actions. This study is purposed to investigate, establish and present a sound justification for the exercise of judicial review jurisdiction by Kenyan courts.



## **1.4 Research Objectives**

The debate concerning the foundations of judicial review has been intense in foreign jurisdictions for quite some time. In Kenya, no serious scholarly debate has been undertaken on the subject. As a consequence, the juridical foundation of judicial review in Kenya remains uncertain. This is notwithstanding the fact that it (judicial review) currently stands out as one of the most robust fields of legal practice in the country.

This has not helped the course of justice in public law matters in the country as judges have, as a consequence of the ensuing uncertainty, tended to deliver contradictory decisions on similar facts and circumstances pertaining to individual cases presented for their determination. It is the object of this thesis to ascertain the basis upon which Kenyan courts exercise judicial review jurisdiction over executive actions.

## **1.5 Research Justification**

Supervision of the executive was traditionally the work of Parliament. But legislative control of executive actions has been greatly undermined by developments of modern times. Executive powers over matters affecting the lives of the people have steadily grown in recent times. Today, very few are the instances when the individual is not in contact with the government. And, even in the rare cases where direct governmental regulation may be lacking, individuals are still subject to controls and decisions by entities

which though “non-governmental or private in nature engage in “public enterprises” and perform “public functions”.

While the administrative machinery continues to grow, the capacity of Parliament to provide adequate check on the administration is, instead, on the decline. Firstly, legislative control is patently unsuitable for regulating the “non-governmental” part of the administrative machinery underscored above. Secondly, the legislature has become increasingly dominated by organized political parties and partisan social, economic and political interests. This is more so the case since Kenya reverted to multi-party democratic system of governance following the repeal of section 2A of the Constitution in 1991.<sup>16</sup> These factors have significantly undermined the utility of legislative control over administrative actions.

To seal the vacuum in which the citizen would be left without protection against arbitrary exercise of executive powers, the courts have intervened to fill the space left by Parliament in areas of public life not foreseeable in the past. In so doing, the courts require – through judicial review – that the administration must exercise its powers in conformity with the legislative scheme, fairly and in full accord with the principles of good administration.<sup>17</sup>

Judicial review has grown to the extent that courts have themselves become the “third giant” to control the mastodon legislator and the

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<sup>16</sup> Section 2A of the Constitution had made Kenya a *de jure* one-party state under the independence party KANU. With its repeal, Parliament enacted section 1A of the Constitution which proclaims that Kenya is a “multi-party democratic State”.

<sup>17</sup> Mark Elliott, “*The Constitutional Foundations of Judicial Review*” (Oxford – Portland) 2001, p 1-2. See also “The Purpose and Scope of Judicial Review” in M Taggart (ed.) *Judicial Review of Administrative Action in the 1980s* (Auckland: Oxford University Press, 1994) at 19

leviathan administrator".<sup>18</sup> As Stephen Sedley rightly comments, the judiciary has today secured a firm and commanding position from which it directs withering fire on administrative excesses.<sup>19</sup> This development is welcomed because scrutiny and control of governmental action and the capacity of individuals to challenge abuses of executive power are indispensable prerequisites of a progressive society. It is not therefore the purpose of this thesis to question the desirability of the court's judicial review jurisdiction. Rather, the thesis is focused to establish the constitutional legitimacy of this important jurisdiction in the hands of the Kenyan courts.

The existence and exercise of judicial review jurisdiction also raise important issues vis-à-vis the constitutional balance of power. In exercising judicial review jurisdiction, courts arrogate to themselves considerable powers over the executive and assume constitutional functions which, traditionally, were exercised by the legislative arm of government. Judicial review involves a shift in emphasis from Parliament to the courts concerning responsibility for oversight of the executive. This calls into question the proper demarcation of legislative and judicial functions.

In addition, since review is concerned with judicial control of the administration, it requires consideration of the proper relationship between the judicial and executive branches and the extent to which the former can

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<sup>18</sup> M Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989) at 14 - 19

<sup>19</sup> Stephen Sedley in "Governments, Constitutions and Judges" in G Richardson and H Genn (eds.), *Administrative Law and Government Action* (Oxford: Clarendon Press 1994) at 37- 8

legally and justly interfere with the latter.<sup>20</sup> The issue becomes exceptionally critical when considered against the fact that judicial decisions are enforceable by committal to jail for contempt of court. This makes the relationship between the judiciary and the executive personnel who are subject to their judicial review decisions peculiarly sensitive. This is even more the case where the respondents in judicial review proceedings are reprimanded for improper exercise of powers conferred by a democratically elected Parliament.

Lastly, by developing principles of good administration for control of executive powers, judicial review courts exercise considerable law-making functions. The principles once developed are applied extensively to cover not only powers that emanate from statutes but also non-statutory powers which, traditionally, were not amenable to either legislative or judicial control. Although it has been stated that judges are in some sense law makers,<sup>21</sup> judge-made law lacks democratic legitimacy and requires justification. More over, the extension of judicial review to control the

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<sup>20</sup> Mark Elliott, *"The Constitutional Foundations of Judicial Review"* (Oxford – Portland) 2001, at P.18. Prof. P Craig in his article *"Ultra Vires and the Foundations of Judicial Review"* (1998) 57 CLJ 63 at 86-7 refers to this as the need to ensure "structural compatibility of judicial review with the constitutional framework." In the case of *Nottinghamshire County Council v. Secretary of State for the Environment* [1986] AC 240 at 250-1, Lord Scarman observed that "judicial review is a great weapon in the hands of judges: but the judges must observe the constitutional limits set ... upon their exercise of this beneficent power."

<sup>21</sup> Lord Radcliffe, *"Not in Feather Beds"* (London Hamilton, 1968) at 271. See also A. Lester, *"English Judges as Law Makers"* [1993] PL 269

exercise of non-statutory powers and functions makes it necessary that court intervention in the exercise of administrative functions be explained.<sup>22</sup>

This study is, therefore, necessitated by the need to examine and explain the constitutional basis for the exercise of judicial review jurisdiction by Kenyan courts. This is the only way to ensure that the exercise of this vital jurisdiction rests on a firm foundation.

## 1.6 Research Questions

This study revolves around one main research question, namely: What is the basis of judicial review in Kenya? To focus the research, the study will examine the following specific research questions:

- a) Can the amenability of non-statutory powers, institutions and functions to judicial review be justified by the ultra vires doctrine?
- b) Can the ultra vires doctrine explain the continued emergence of new heads of review and the expansion of the scope of judicial review in Kenya?
- c) Can the courts' power to annul or strike down statutes be justified under the ultra vires doctrine?
- d) Can ultra vires explain judicial review on the ground of error of law on the face of the records?

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<sup>22</sup> In *R v. Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513 at 567 -8, Lord Munstall states that "As the judges themselves constantly remark, it is not they who are appointed to administer the country. ... The boundaries between the proper functions of the different branches of government remain; they are of crucial significance in our public and private lives ..."

## **1.7 The Research Hypotheses**

As can be noted from the theoretical framework outlined above, this study will argue that the ultra vires doctrine, though a relevant judicial control mechanism, is not the basis of judicial review in Kenya. It will be argued that the basis of judicial review in Kenya rests within the constitutional order in general and the rule of law in particular.

## **1.8 Research Methodology**

This study by its nature will rely to a large extent on secondary sources of data, which include: authoritative texts, articles, journals and case law on the subject of study. In the nature of the subject under inquiry and required data, the study will mainly rely on library and internet research.

Unstructured interviews will be conducted with the personnel in charge of the Registry, Constitutional and Judicial Review Division, High Court of Kenya at Nairobi to assess the utility, extent and intensity of application of judicial review as a field of legal practice in Kenya.

## **1.9 Literature Review**

Much has been written on the subject of study by foreign experts in administrative law. For some writers, the ultra vires rule is the basis of judicial review, without which judicial review would rest on uncertain foundations.<sup>23</sup> For others, the ultra vires doctrine constitutes at best a

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<sup>23</sup>The principal proponents of the ultra vires doctrine are Christopher Forsyth and Dr. Mark Elliot. See Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the*

harmless fiction, which is incapable of explaining the entirety of judicial review.<sup>24</sup> To this latter group, the basis of judicial review derives from the common law.

The search for literature on the subject of study so far reveals there is no local article on the subject. The relevant literature on the subject of study will be analysed separately for better appreciation.

### **1.9.1 Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review?*<sup>25</sup>**

Professor Dawn Oliver is a renowned publicist in administrative law. In the above article published in 1987, Dawn Oliver while conceding the relevance of the ultra vires doctrine as a head of judicial review denies that it is the basis of judicial review.

In granting the relevance of the ultra vires doctrine as a ground for judicial review, the article begins by defining judicial review as the rules applied by courts when exercising supervisory jurisdiction, through an application for judicial review. The article adopts D. J. Galligan's broad characterisation of the grounds of judicial review as "principles of good administration"<sup>26</sup> and assumes Lord Diplock's broad classification of the grounds of judicial review

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*Sovereignty of Parliament and Judicial Review* 55 [1996] CLJ 122; and Dr. Mark Elliott "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law, Vol. 58 [1999] CLJ 129.

<sup>24</sup> The main Advocates of common law as the basis of judicial Review are Dawn Oliver, Paul Craig and Sir John Laws.

<sup>25</sup> [1987] PL 543; reprinted in Christopher Forsyth, *Judicial Review and the Constitution*, p.3 - 27

<sup>26</sup> D J Galligan, *Judicial Review and Textbook Writers*, (1982) 2 OJLS 257

as “illegality”, “irrationality”, “procedural propriety” and possibly “proportionality”.<sup>27</sup>

The article defines instances in which an authority would be regarded as having exceeded its powers and acted *ultra vires* as either where it has done or decided to do an act that it does not have the legal capacity to do or if in the course of doing or deciding to do something *intra vires*, it acts improperly or unreasonably in various ways including: disregard of the rules of natural justice, unfairness, taking into account irrelevant considerations, ignoring relevant considerations, bad faith, fettering discretion and so on.

In denying that the *ultra vires* doctrine is the basis of judicial review, Dawn Oliver opines that the argument in favour of the centrality of the (*ultra vires*) doctrine is founded on the principle of parliamentary sovereignty and the underlying presumption that Parliament as the donor of the powers (read *vires*), is presumed not to have intended the exercise of the powers in contravention of the principles of good administration.

The article faults this constitutional premise on several accounts. First, it argues that the presumed legislative sovereignty of Parliament cannot be sustained in the face of the traditional and continuing reluctance of courts to uphold statutory clauses seeking to oust court jurisdiction in particular instances of administrative decisions.

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<sup>27</sup>Lord Diplock in *Council of Civil Service Union v. Minister for the Civil Service* [1985] AC 374 p.410 characterised the grounds of judicial review as illegality”, “irrationality” and “procedural impropriety”.



Secondly, Professor Oliver argues that although the relevance of the ultra vires rule in controlling the exercise of powers that derive their existence from statutory provisions is irrefutable, it is inconceivable in the several instances in which non-statutory and at times apparently contractual or private powers and functions are subjected to judicial review. She adduces examples of the royal prerogatives and the powers of institutions and offices operating under charters as examples of non-statutory powers that are subject to judicial review.

Professor Oliver concludes her attack on the claimed centrality of the ultra vires doctrine on this account by asserting that the implication to be derived from judicial control of powers not buttressed by statutes is that judicial review is not based solely on ultra vires which is concerned with implied parliamentary limitations on granted power, but on the application of the "principles of good administration" which includes the requirement of "fairness in its various guises", fettering or delegation of discretion, abuse of power, arbitrariness, capriciousness, unreasonableness, bad faith, breach of accepted moral standards, and so on.

Third, Professor Oliver attacks the claimed supremacy of the ultra vires doctrine by arguing that although the ultra vires rule readily applies to institutions drawing their existence from statutes, the language of ultra vires does not avail for control of non-statutory institutions. She gives the examples of universities and bodies the exercise of whose functions invite

legitimate expectations from members of public that the rules of good administration will be upheld.

The article concludes that the weakness of the ultra vires doctrine as the basis for judicial review, and of the doctrines of parliamentary sovereignty on which the ultra vires doctrine rests, is symptomatic of the absence of workable concepts and of a framework of theory about the nature of power, whether public or private, upon which to found judicial review.

Although the arguments adduced against the centrality of the ultra vires rule accord with the hypothesis herein, the article suffers a geographical gap as it discusses judicial review under the English legal system; and not under Kenyan jurisprudence. In deed, powers such as those defined as royal prerogatives which are used to challenge the centrality of the ultra vires doctrine are English governance concepts not available in or applicable to Kenya.

The article also has theoretical distortions. Professor Oliver's argument that judicial supervision vide judicial review is not about powers or vires, but about the nature and location, the sources and instruments of power<sup>28</sup> contradicts her central theory that judicial control does not concern itself with the sources of powers but the importance of the exercise of the power to the general public and its impact on the rights of individuals. By emphasising the sources and instruments of power as determining factors

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<sup>28</sup> Page 12

for court intervention, the article pushes ultra vires back to the podium of prominence; against the thesis sought to be advanced in the article.

Perhaps the most fundamental gap in the article is its failure to found the basis for judicial review having undermined the notion that court intervention in executive actions derives from the ultra vires doctrine. The article stops at challenging the supremacy of the ultra vires doctrine. It does not proceed and adduce alternative rationale for the exercise of judicial review jurisdiction by courts – if ultra vires rule is not the basis of judicial review, then, on what foundation does judicial review rest? Essentially, Professor Oliver begins but fails to complete the journey of ascertaining the basis of judicial review.

Reading through the article, it clearly appears it is preoccupied with pouring scorn on the centrality of the ultra vires rule as against ascertaining the constitutional basis of judicial review. There remains a real need to ascertain the basis of judicial review, particularly in Kenya.

### **1.9.2 Christopher Forsyth, “*Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*”<sup>29</sup>**

In the above article published in early 1996, Forsyth defends the centrality of the ultra vires doctrine as the foundation of judicial review. In so doing, Forsyth argues that the doctrine provides the constitutional underpinning

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<sup>29</sup> First published in 55 [1996] CLJ 122. Reprinted in Christopher Forsyth, *Judicial Review and the Constitution*, p.29 - 46

for the greater part of judicial review. According to Forsyth, to knock away that underpinning in the absence of alternative support is to undermine the basis of judicial review. The article asserts that to abandon ultra vires is tantamount to abolition of the legislative supremacy of Parliament, which change it emphasizes would be too profound to be left to be undertaken by the judiciary, being an unelected part of the constitutional order.

Although the article concedes that the common law provides the basis of judicial review in some circumstances, it denies that this is in itself an admission of the failure of the ultra vires doctrine. It emphasises that ultra vires retains its central position as far as decisions made under statutory powers are concerned. In a unique demonstration of intellectual honesty, Forsyth denies that the ultra vires doctrine is or has ever been the sole justification for judicial review and identifies error of law on the face of the record as one mechanism of judicial control that never depends on the doctrine for existence or application.

Most importantly, while Forsyth tacitly acknowledges that the modern law of judicial review is a judicial creation and that common law provides the basis for judicial review in some circumstances, he asserts that the common law judicial achievement in creating the modern judicial review law does not take place in a constitutional vacuum but against the background of a sovereign legislature that could have intervened at any moment. He asserts legislative sovereignty and imputes a tacit approval by the legislature to the development by the judiciary of the heads of judicial review.

Contrary to his thesis that recognises the common law as the basis of judicial review besides the ultra vires rule, Forsyth emphasises that the ultra vires doctrine is, and should remain the basis for judicial review as its abandonment would inevitably involve challenging legislative supremacy of the sovereign Parliament.<sup>30</sup>

### **1.9.3 Mark Elliott, *the Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*<sup>31</sup>**

In the above article written in 1999, Dr. Mark Elliott, a strong proponent of the ultra vires doctrine, extensively analyses the intense and often divisive debate amongst public law scholars on the constitutional foundation of judicial review. Based on the analysis, Elliott asserts that the basis for judicial review is to be found neither in the traditional ultra vires doctrine nor in the common law but in the "*modified ultra vires model*" which seeks to uphold the rule of law.

According to Elliott, by locating the interpretative methodology of ultra vires within its proper constitutional setting and by recognising the importance of the rule of law to the process of statutory construction, it is possible to articulate an explanation of judicial review which is consistent with Parliament's legislative supremacy while avoiding the shortcomings of the traditional ultra vires principle.

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<sup>30</sup> See his conclusions at p.45, Ibid.

<sup>31</sup> First published in Vol. 58 [1999] CLJ 129. Reprinted in Christopher Forsyth, *Judicial Review & the Constitution*, p.83 - 109

In developing the modified ultra vires doctrine, Elliott asserts that the task of the courts is not to ascertain and effectuate a crystallised legislative intention regarding the limitation of discretionary power but rather to decide how discretionary power should be limited in order to ensure that its exercise complies with the requirements of the rule of law. Consequently, he argues, instead of relating the development of administrative law to putative changes in legislative intention, the modified ultra vires principle holds that such developments relate to evolution, across time, of the content of the rule of law. As the fluid and dynamic British constitution develops, so do the courts rightly draw on changing constitutional norms in order to fashion new principles of judicial review and reformulate old ones; he argues.

Like Dawn Oliver, Elliott finds the traditional ultra vires rule deficient as it encounters problems in relation to the courts' treatment of legislative provisions which, *ex facie*, seek to curtail or exclude judicial review of particular decision making processes.

Elliott also agrees with Wade that judicial review has burst through its logical boundaries due to its dynamism and vested in courts supervisory jurisdiction over statutory and non-statutory powers. He faults the apparent inability of the traditional ultra vires doctrine to justify review of non-statutory power and argues in favour of "the modified ultra vires rule" which he states does not seek to justify judicial review purely in terms of

upholding some presumed legislative intent but rather recognises that the whole of judicial review rests on one foundation; the rule of law.

Although a good attempt at reconciling the antagonists in the debate, this article is wrought with contradictions for while seeking to undermine the sovereignty of Parliament, Elliott insidiously surmises that courts in exercising judicial review jurisdiction imputes to Parliament an intention to legislate consistently with the rule of law. He, however, does not indicate why this legislative intent should be imputed to Parliament.

Elliott also underscores the common law growth of the rules of good administration and states that in developing the rules, the courts attribute to Parliament an intention that the rule of law should be upheld – while leaving it to the good sense and experience of the courts to determine precisely how this outcome can best be secured.

Perhaps the most fundamental defect in the thesis lies in the fact that it remains cast within mould of the ultra vires doctrine. The thesis merely moves the constitutional premise from legislative sovereignty of Parliament to the rule of law; but maintains that the changed constitutional basis manifests through “the modified ultra vires” doctrine.

While the thesis can be accepted in the context of an unwritten flexible British constitutional order cast in the theory of a sovereign legislature, it is not plausible if considered within the context of a written, rigid constitutional setup as is the case in Kenya. Kenya operates under the

framework of a supreme constitution in which the Parliament, the Executive and the Judiciary are equal and to which all laws are subordinated.

This thesis aims to espouse the foundation of judicial review in Kenya based on the local constitutional setting, which is defined by constitutional supremacy and the rule of law.

#### **1.9.4 Paul Craig, *Ultra Vires and the Foundations of Judicial Review*<sup>32</sup>**

In the above article, which is one of the most comprehensive writings on the subject of study, Craig stresses the need to justify judicial review jurisdiction but denies that this justification is to be found within the ultra vires doctrine conceived in terms of legislative intent. Instead, Craig asserts that judicial review is the creation of the common law; from which it derives its constitutional foundation.<sup>33</sup>

Craig faults the claimed centrality of the ultra vires doctrine on the basis of its inability to satisfactorily explain the persistent derivation of new grounds of review; the courts' rejection of ouster clauses; the development of administrative law across time, and the extension of judicial review to non-statutory powers and private institutions. To Craig, the traditional ultra vires doctrine is unsatisfactory because, *inter alia*, it is unrealistic to assert that

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<sup>32</sup> First published in [1998] CLJ 63. Reprinted in Christopher Forsyth, *Judicial Review and the Constitution*, p.47 -71

<sup>33</sup> Reprint, p. 70



judicial review constitutes nothing more than the implementation of legislative intention.

Craig finds flaws with the theses of writers who have suggested that the ultra vires rule is the basis of judicial review, particularly Forsyth, and articulates the need to recognise that judicial review is the creation of the common law, not the enforcement of legislative intent or a tacit recognition of legislative sovereignty of Parliament by Courts.

But for the fact that the article is based on the English constitutional order and is, therefore, not illustrative of the Kenyan position on the subject, it is a good writing. This work is concerned to close the gap and present a Kenyan explanation for the exercise of judicial review jurisdiction.

### **1.10 Chapters Breakdown**

This thesis is divided into four substantive chapters. As noted, the chapter herein provides the theoretical framework for the study.

The next chapter will discuss the content of the ultra vires doctrine, lay down its philosophical underpinning and consider arguments advanced by those who support the claim that the doctrine is the basis of judicial review. Emphasis hereon will be placed on the claimed compatibility of the ultra vires doctrine with the constitutional order, its deemed centrality in controlling statutory powers, bodies and functions and its utility in controlling subsidiary legislation on *substantive* grounds.

The third chapter will draw together the criticisms of the ultra vires doctrine. In so doing, the courts' approach to ouster clauses, jurisdiction to review delegated legislation on procedural grounds, review of non-statutory powers and functions and the court's power to annul parliamentary statutes will be discussed. This chapter will also discuss error of law as a head of review and evaluate how it relates to the ultra vires doctrine. Lastly, the development of grounds of judicial review across time will be rationalised with the claimed implementation of legislative intent postulated by the proponents of the ultra vires doctrine.

The fourth chapter will investigate and ascertain the basis of judicial review in Kenya. The chapter purposes to place judicial review within the constitutional order prevailing in Kenya. In so doing, the relevance, if any, of the principles of *constitutional supremacy* and *the rule of law* in explaining the exercise of judicial review jurisdiction by Kenyan courts will be ascertained.

In the end, the study will assert its findings and draw its conclusions. In so doing, the thesis will confirm whether the hypotheses have been proved or disproved. The basis of judicial review will at once be ascertained and asserted.

In the nature of this thesis, an evaluation of ultra vires doctrine logically forms the starting point for our investigations on the basis of judicial review in Kenya. This is the preoccupation of the next chapter of this work.

## CHAPTER TWO

# THE ULTRA VIRES DOCTRINE

### 2.1 Introduction

Ultra vires means beyond the scope of power, jurisdiction or authority granted or permitted by law. In administrative law, an authority is said to be acting ultra vires in two instances. Firstly, it refers to a situation where an authority has dealt with a matter it lacks legal capacity or lawful jurisdiction to deal with. The concerned authority is in this sense said to be acting outside or in excess of its lawful power or jurisdiction. This is ultra vires in the *strict* or *narrow* sense also referred to herein as *substantive ultra vires*.<sup>1</sup>

For example, an institution granted power by Parliament to adjudicate upon employment matters cannot, in purported exercise of the power, assume jurisdiction over non-employment matters. By application of the same logic, a tribunal vested with powers to adjudicate upon disputes involving business premises cannot in the exercise of the powers assume jurisdiction over residential premises. Similarly, powers granted to an authority to make rules and regulations to specify areas in which coffee should be grown cannot be used to prohibit Africans from growing coffee in particular areas.<sup>2</sup> Kenyan courts have also held that power to retrench employees who have attained

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<sup>1</sup> Dawn Oliver in her article *Is the Ultra Vires Rule the Basis of Judicial Review*, Chapter 1, supra note 5, aptly defines ultra vires rule in this sense as referring to a situation where an authority "has done or decided to do an act that it does not have the legal capacity to do."

<sup>2</sup> *Koinange Mbiu v. R* (1951) KLR

40 years of age and have served a corporation for at least 10 years cannot be applied to retrench an employee who is below 40 years old and has served the corporation for less than 10 years.<sup>3</sup>

Secondly, ultra vires refers to situations where an authority, while doing something it has legitimate power to do, fails to meet some requirement attached to the lawful exercise of the power. In this sense, although the authority has legal capacity and jurisdiction to do what it is doing - in the strict or literal sense - it is in fact said to be acting ultra vires its lawful authority.

The mandatory requirements ordinarily and logically imposed upon the lawful exercise of power by executive authorities have been aptly set out by the House of Lords in the case of *Anisminic Ltd v. Foreign Compensation Commission*<sup>4</sup> as follows:

... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so

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<sup>3</sup> *Charles Orinda Dulo v. Kenya Railways Corporation* Misc. App. No. 208 of 2000 (Unrep)  
<sup>4</sup> [1969] 2 AC 147

that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.<sup>5</sup>

In *R v. Judicial Service Commission ex p Stephen Parendo*<sup>6</sup> the High Court of Kenya while relying on the case of *R v. Southampton Justices ex p Green*<sup>7</sup> affirmed this latter aspect of the ultra vires rule by stating that “[L]ack of jurisdiction may arise in various ways. While engaged on a proper inquiry, the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction”<sup>8</sup>.

In applying the first limb of the ultra vires doctrine to control administrative actions, courts may be, and are in fact, said to be implementing the will of the legislature. This is because in such a situation, the function of the courts simply involves matching the action or decision of the concerned authority against the provisions of the enabling law. If the action taken or the decision made is found to fit within the boundaries set by the enabling law, the courts have no reason to interfere. But if the concerned action or decision is found

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<sup>5</sup> Ibid. at 171, *per* Lord Reid

<sup>6</sup> Misc. Civil App. No. 1025 of 2003 (Unrep)

<sup>7</sup> [1976] 1 QB 11 at 21

<sup>8</sup> *Supra* note 6. See also *Ronald Muge Cherogony v. Chief of General Staff, Armed Forces of Kenya & Others* Misc. Cause No. 671 of 1999 (Unrep)

to be in excess of the scope of powers granted by law, the court is justified to intervene and interfere. In this sense, the function of the courts may be rightly characterized as that of identifying and policing the boundaries of power(s) granted by Parliament.

But the definitions accorded to the ultra vires doctrine above do not tell us much about what it really entails. This is more so in relation to the second limb of the doctrine presented in the *Anisminic*<sup>9</sup> and the other cases cited above. The nature and content of the ultra vires doctrine is better understood within the framework of theory in which it is cast. This is the focus of the following analysis.

## 2.2 Ultra Vires Theory

In England, the ultra vires doctrine has for long been regarded as the basis of judicial review and the benchmark with reference to which the validity of all claims for judicial review is determined. The assumption persists and is manifest in recent writings and judicial pronouncements. For instance, Professor William Wade, a leading exponent of the doctrine has written that the "simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law".<sup>10</sup> And in the case of *Boddington v. British Transport Police*,<sup>11</sup> the English House of Lords stated that "the juristic basis of judicial review is the doctrine of

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<sup>9</sup> Supra note 4

<sup>10</sup> H W R Wade & C F Forsyth, *Administrative Law* (Oxford: Oxford University Press, 2000) at 35

<sup>11</sup> [1999] 2 AC 143

ultra vires"<sup>12</sup> and that there is "no reason to depart from ... [this] orthodox view".<sup>13</sup>

The ultra vires doctrine holds that in exercising judicial review jurisdiction, courts merely supervise administrative actions and decisions to ensure that the intent of the legislature is upheld. The doctrine, which is moulded within the English concept of legislative sovereignty, posits that the obligations imposed upon executive authorities such as to observe the rules of natural justice; to take all relevant (but not irrelevant) considerations into account in decision-making; to make reasonable (and not irrational or arbitrary) decisions; to act in good faith (and not in bad faith); to exercise power for proper purposes (and not to misuse or abuse power), to uphold legitimate expectations, the principles of fairness and proportionality, *et cetera*, spring from and are mere instances of the ultra vires doctrine.

According to the ultra vires doctrine, the norms are developed by courts from time to time and are applied to enforce the expressed or implied intent of the legislature. Mark Elliott, a leading proponent of the ultra vires doctrine, thus asserts that "In orthodox theory, the principles of good administration which the courts apply in order to secure fairness and rationality in public decision-making ... amount to nothing more than judicial enforcement of legislative intention."<sup>14</sup>

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<sup>12</sup> Ibid, 164, *per* Lord Browne - Wilkinson

<sup>13</sup> Ibid. 171, *per* Lord Steyn

<sup>14</sup> Mark Elliot, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, Vol. 58 [1999] CLJ 129, reprinted in Christopher Forsyth, "Judicial Review and the Constitution" [2000] p.84

The ultra vires doctrine is premised on the supposition that where parliament grants power to an authority, the authority is subject to certain conditions contained, either explicitly or impliedly, in the enabling law. The courts' function, thus, is simply to police the exercise of power by the authority to ensure the authority does not go beyond the boundaries of power granted by Parliament. In so doing, courts do not only ensure power is not abused but also – and more importantly - ensure that the intent of Parliament, as the donor of power – read vires - is upheld by the authority in question.

As already mentioned, the ultra vires doctrine is cast within the English constitutional setting defined by the principle of legislative sovereignty of parliament. The classical definition of legislative sovereignty implies two fundamental ideals. The first of these ideals is that Parliament has absolute supremacy in law-making and may make, alter, change or repeal any law concerning anything. This means that Parliament has and enjoys legislative competence over all matters and that no parliament can bind a future parliament or pass a law that cannot be changed, altered or reversed by a future Parliament.<sup>15</sup>

It also means parliamentary legislation is the supreme form of law within the legal order and that since the issues over which Parliament may legislate are unlimited, no legislation may be unconstitutional.

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<sup>15</sup> Mark Elliot in his text, *"The Constitutional Foundations of Judicial Review"* (Oxford – Portland) 2001, at p.45 argues that "...according to the continuing view of sovereignty, Parliament's competence is "limited" in one important respect because it is incapable of attenuating the scope of its own legislative competence"



The second ideal embodied in the doctrine of legislative sovereignty is that an Act of Parliament cannot be questioned by courts.<sup>16</sup> This means that the courts have no competence to annul or strike down parliamentary legislations. Within a constitutional framework defined by legislative sovereignty, the function of the courts is merely to interpret and enforce the law as laid down by Parliament. Speaking of the English constitutional context, Albert Dicey describes legislative sovereignty to mean that "Parliament ... has... the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament"<sup>17</sup>.

And in the case of *Madzimbamuto v. Lardner-Burke*,<sup>18</sup> Lord Reid asserted the legislative competence of Parliament as follows:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts would not hold the Act of Parliament invalid.<sup>19</sup>

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<sup>16</sup> [en.wikipedia.org/wiki/Parliamentary\\_sovereignty](https://en.wikipedia.org/wiki/Parliamentary_sovereignty) - 36k

<sup>17</sup> *An Introduction to the Study of the Law of the Constitution* (E.C.S Wade, Ed) (London: Macmillan, 1964) at 40. See also HWR Wade, *The Basis of Legal Sovereignty*, (1955) 13 CLJ 172

<sup>18</sup> [1969] 1 AC 645

<sup>19</sup> *Ibid.*

Proponents of the ultra vires doctrine argue that it furnishes a theoretical justification for judicial review which is compatible with the constitutional order in general and legislative sovereignty of Parliament, in particular.<sup>20</sup> The proponents contend that the ultra vires doctrine furnishes an ultimate constitutional rationale for judicial review by relating the court's supervisory endeavour to implementation of the intent Parliament.

Under the theory of the ultra vires doctrine, it is argued; courts in exercising their judicial review jurisdiction merely apply the intent of the legislature to the exercise of power. The proponents argue that where Parliament has found it necessary to grant power, the exercise of such power to be lawful must comply with the conditions contained in the enabling legislation. The courts' function in the scheme of things is to police the boundaries of power granted by Parliament.<sup>21</sup>

As outlined in its definition above, the ultra vires doctrine, it is argued, aids the courts to achieve this end in two ways. In the narrow or substantive sense articulated above, ultra vires captures the idea that the relevant authority must have the legal capacity to engage in the action in question. In the broader sense postulated above, the doctrine has been used as a mechanism to apply the principles of good administration to executive actions.

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<sup>20</sup> Mark Elliot, *The Constitutional Foundations of Judicial Review supra note 15, p.24*

<sup>21</sup> Ibid.

Those who support the ultra vires doctrine thus contend that it provides the basis and establishes the limits of judicial control. If the authority is acting within the scope of powers granted to it, then it is performing the tasks entrusted to it by the legislature and hence not contravening the will and intention of Parliament.

The ultra vires doctrine has thus been considered by its proponents as a necessary and adequate justification for judicial review. It is necessary in the sense that every ground of judicial review must be fitted into it in order to be accepted as a mechanism for controlling exercise of executive actions. It is adequate in the sense that no further inquiry is necessary once a ground of review is found to fit into it (the ultra vires doctrine).

The theory has held sway in England for quite some time. As a consequence the courts, both English and Kenyan, have tended to relate judicial control to the ultra vires doctrine even when proceeding under norms other than the ultra vires rule. Professor William Wade has justified the centrality of the ultra vires doctrine in justifying judicial review as follows:

Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is

by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.<sup>22</sup>

In seeking to uphold the centrality of the ultra vires doctrine and the sovereignty of Parliament it seeks to enforce, the rules of natural justice have been treated by public law courts as implied mandatory procedural requirements to be applied in the interpretation and enforcement of every piece of legislation.<sup>23</sup> Considered in this sense, failure to observe the rules of natural justice have been held to render the resultant decision ultra vires, null and void.

The English case of *AG v. Ryan*<sup>24</sup> illustrates the legal position. In this case, the Privy Council in seeking to place the rules of natural justice within the ultra vires mould asserted that "It has long been settled law that a decision ... which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making body<sup>25</sup>".

Locally, in *Rita Biwott v. The Council for Legal Education*<sup>26</sup>, the High Court in its ruling quashing the decision of the respondent Council denying the Applicant admission into Kenya School of Law for breach of the rules of natural justice emphasised that a decision arrived at in breach of the rules of

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<sup>22</sup> HWR Wade & C F Forsyth, *Administrative Law* (Oxford: Oxford University Press) 2000 at 37

<sup>23</sup> In the case of *David Onyango Oloo v. AG*, Civil Appeal No 152 of 1986 (Unrep), the Late Nyarangi J in affirming this position stated that 'there is a presumption in the interpretation of statutes that rules of natural justice will apply

<sup>24</sup> [1980] AC 718

<sup>25</sup> Ibid, p. 730, per Diplock LJ.

<sup>26</sup> HCCC Misc. App. No. 1122 of 1994 (Unrep)

natural justice is ultra vires the jurisdiction of the decision-making body, is unfair, unjust and "it does not have powers to do so"<sup>27</sup>.

Similarly, mechanisms of control such as those requiring power to be exercised fairly, reasonably, on relevant considerations, against ulterior motives, in good faith and on proper grounds have been treated by courts as components, aspects as it were, of the ultra vires doctrine. In so doing, courts have argued that Parliament never intended that power granted by it be exercised in violation of these principles; and that power so exercised derogates from the ordained legislative intent, is *ultra vires*, null and void.

Influenced by this theory, courts have held that where a decision is challenged on the ground of irrationality, their only task is to determine whether the authority has contravened the law by acting in excess of the powers which Parliament has confided in it. In so doing, courts have held they lack power and would not be justified to interfere if the decision or action is *intra vires*.<sup>28</sup>

The English case of *R v. Commissioner for Racial Equality ex p Hillingdon LCB*<sup>29</sup> accords a succinct and elaborate authority for the position that abuse of power takes the authority in which the power is vested out of its lawful jurisdiction. The court herein stated that "Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or to

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<sup>27</sup> Ibid.

<sup>28</sup> *Associated Provincial Picture House v. Wednesbury Corporation* [1948] KB 223, at p. 231, Lord Greene stated that "provided that they (the local authority) act, as they have acted, within the four corners of their jurisdiction this court cannot, in my opinion, interfere."

<sup>29</sup> [1982] QB 276

abuse its powers<sup>30</sup> and clarified that “[W]hen the court says it will intervene if the particular body acted in bad faith, it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament ... Parliament cannot be supposed to have intended that power vested by it on an authority be open to abuse<sup>31</sup>”.

The court stressed that it must always be assumed that Parliament intended that the authority vested with whatever powers would act in good faith, reasonably, properly and responsibly, with a view to upholding the law and the general public interest and that an “authority bestowed with power by Parliament must act in a manner that is most consistent with the policy and purpose of the enabling statute. Every exercise of power that derogates from the legislative mandate is *ultra vires* the jurisdiction of the authority, unlawful, null and void and will be quashed by the courts<sup>32</sup>”.

In the case *Keroche Industries Ltd v. Kenya Revenue Authority & Others*<sup>33</sup> the High Court in a case involving arbitrary, selective and discriminatory change of tariff regime for a wine business treated abuse of power as an instance of the *ultra vires* doctrine and held as follows:

Parliament did not confer and cannot reasonably be said to have conferred power ... so that the same powers are abused by the decision making bodies. In such a situation even in the

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Misc. Civil App. No. 743 of 2006 reported in [2007] eKLR, *per J G Nyamu J.*

face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion ... Nothing is to be done in the name of justice which stems from abuse of power. *It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power.* Abuse of power taints the entire decision.<sup>34</sup>

The claimed centrality of the ultra vires doctrine has also been justified on the ground that it provides a theory for judicial review that is consistent with the ideals of *democracy* and the doctrine of *separation of powers*.

The principle of legislative sovereignty which the ultra vires doctrine upholds is viewed as both an expression and a consequence of the political sovereignty of the electorate. As Mark Elliott states, parliamentary supremacy represents "the means by which the Constitution reflects the primacy of representative, majoritarian democracy".

On his part, Lord Irvine has underpinned the relationship between the ultra vires doctrine and democracy as follows:

The reforms, during the nineteenth and early twentieth centuries ... demonstrate the emergence of representative and

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<sup>34</sup> Ibid. Emphasis added.

participatory democracy as the primary principle of constitutional and political theory in Britain ... They evidence a paradigm shift in how the relationship between the state and the individual is conceptualized ... Thus the legal sovereignty exercised by Parliament is now viewed as deriving its legitimacy from the fact that Parliament's composition is, in the first place, determined by the electorate in whom ultimate political sovereignty resides.<sup>35</sup>

Proceeding with judicial review other than under the ultra vires doctrine, it is argued, would therefore be counter-majoritarian as the courts represent minorities as against the majorities represented in Parliament. The late Alexander Bickel articulated the principle as follows:

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 ... none of these

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<sup>35</sup> Lord Irvine, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America* (the James Madison Memorial Lecture, New York, 2000)



complexities can alter the essential reality that judicial review is a deviant institution in the American democracy.<sup>36</sup>

On the basis of the above arguments, it has been stated that to abandon the ultra vires doctrine would be to undermine the constitutional order. Whether this claim is correct and whether the theory outlined above rightly characterises the constitutional order prevailing in Kenya will be discussed.<sup>37</sup> For now, the thesis is concerned to discuss the relevance of the ultra vires doctrine in controlling the exercise of powers deriving from statutes.

### **2.3 Review of Statutory Powers**

In the past, judicial review mainly targeted control of administrative powers conferred by or deriving from Parliamentary enactments. Judicial review of statutory powers is legitimated by the ultra vires doctrine which posits that the courts in reviewing the exercise of statutory power merely enforce the express and implied limits which Parliament attaches to grants of such power.

This is particularly the case for review of statutory powers on literal ground or for want of legal capacity. As Professor Paul Craig correctly observes, ultra vires was developed as "an institution to police the boundaries [of public power] which Parliament had stipulated"<sup>38</sup> and therefore constitutes "the

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<sup>36</sup> Alexander Bickel, *The Least Dangerous Branch* (1962) p.16 - 8

<sup>37</sup> Chapters 3 and 4

<sup>38</sup> *Administrative Law* (London: Sweet and Maxwell, 1999) at p. 5

vehicle through which the courts effectuate the will of Parliament”<sup>39</sup> expressed in statutes.

The fact that ultra vires justifies review of statutory powers is recognized even by its strongest critics.<sup>40</sup> Lord Steyn has thus stated that ultra vires is the “essential constitutional underpinning of the statute based part of our administrative law.”<sup>41</sup> And Mark Elliott, a firm advocate of the ultra vires doctrine explains that “so far as narrow review is concerned, the relationship between the legislative scheme (and the intention underlying it) and the endeavour of the court is transparent and straightforward: the courts clearly are policing those boundaries which Parliament intended should apply to the discretionary power created by the enabling legislation. For this reason, the ultra vires doctrine – which holds that review involves precisely such judicial enforcement of the statutory scheme – adequately and convincingly justifies judicial review in its narrow form”.<sup>42</sup>

Another instance of court intervention in the exercise of statutory powers by executive authorities concerns review of delegated legislations for inconsistency with the enabling law. This is evaluated below.

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<sup>39</sup> Ibid. at 16

<sup>40</sup> S A de Smith, Lord Woolf and J Jowell, *Judicial Review of Administrative Action* (London, Sweet & Maxwell, 1995) 250. In “*Droit Public –English Style*” [1995] PL 57 at 65, Lord Woolf accepts that ultra vires “can readily be applied” to explain narrow review. See also Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review*, supra note 1, Paul Craig, *Ultra Vires and the Foundations of Judicial Review, Chapter 1*, supra note 18

<sup>41</sup> *Boddington v. British Transport Police*, supra note 11 at 172

<sup>42</sup> Mark Elliot, *The Constitutional Foundations of Judicial Review*, p.28

## 2.4 Substantive Review of Delegated Legislations

Delegated legislations also referred to as subsidiary or subordinate legislations derive from the exercise of delegated legislative power by the executive branch of government. Several factors have been identified as necessitating the growth and propriety of delegated legislations in modern times.

The modern state exercises wide functions and affects the day to day lives of the people to a very large extent. The wide state functions and the extensive, and in deed intensive, intervention by the state in the lives of the people create a demand for more and more law. This demand for law engenders a great pressure of work on the legislature which not only makes laws but also discharges other functions such as supervising the government, discussing and influencing government policies, discussing national budgets, ventilating people's grievances, among others.

The legislative work needed is too much to be managed by an unaided Parliament. The mechanism of delegated legislation enables the legislature to economize on time and to cope with the legislative demand of modern times.

By delegating part of its legislative functions to the executive, the legislature lays down broad policies and principles in statutes it enacts and leaves the task of providing the necessary details to the concerned administrative agency. As *Professor Jain* explains that "[I]f the legislature were to attempt

enacting comprehensive laws including not only policies but all necessary details as well, its work-load would become so heavy that it may not be able to enact the quantity of law on diverse subjects which the public demands of it. It is, therefore, essential to free the legislature from the burden of formulating details so that it can better devote its time to the consideration of the essential principles and policies.<sup>43</sup>

In addition, modern legislations at times tend to be quite technical and complex. Consequently, it becomes necessary at times that expert knowledge be involved to work out the details of bills for legislation and to make rules to effectively implement the object of statutes. This is better done by specialists in the target fields as against parliamentarians who are more often than not generalists.

There are also circumstances when it is difficult to work out beforehand and include in the bill for legislation all details which may be needed to implement the legislative scheme. When such circumstances arise, it becomes necessary that the task of evolving the necessary details be left to the executive.

Further, it may at times be deemed advisable to hold consultations with the interests affected before all policy details are worked out. In such a situation, the mechanism of delegated legislation enables Parliament to rely upon executive agencies to hold the necessary consultations and come up with detailed rules for enactment.

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<sup>43</sup> MP Jain, *Principles of Administrative Law*, 4<sup>th</sup> Ed. p. 30

Perhaps the most elaborate account of the need for delegated legislations has been presented by *Prof Jain*. He states that:

... many present day socio-economic schemes at the legislative stage are experimental in nature and it is difficult to foresee what problems would arise in future in working them out in practice. Many a time, legislation is rushed through the legislature in a hurry in the hope that through experimentation the executive would be able to find the right solutions for problems at hand. This means that details of these schemes need to be constantly adjusted in the light of experience gained in the course of their operation. It would waste much time, and increase pressure on the legislature, if every time need is felt to effect adjustment in a scheme, the matter is referred to the legislature. The technique of delegated legislation provides for a mechanism of constant adaptation to unknown future conditions, and utilization of experience, without the formality of the legislature enacting amending legislation from time to time ... A modern society is faced many a time with occasions when sudden need is felt for legislative action. There may be threats of aggression, breakdown of law and order, strikes, etc. Such situation cannot be met adequately unless the executive has standby powers. The legislature cannot meet at short notice and turn out legislation on the spur of the moment. It is,

therefore, a desirable expedient to pre-arm the government with necessary powers to take action at a moment's notice by promulgating the needed rules and regulations according to the needs of the situation.<sup>44</sup>

In a nutshell, the system of delegated legislation is in vogue and necessary in the modern democratic states because of its advantages of flexibility, elasticity, expedition and opportunity for experimentation.

But its advantages aside, delegated legislation has its shortcomings. The legislature often uses broad and subjectively worded provisions to vest power in executive authorities to promulgate delegated legislations. Such include situations where a statute grants an executive authority the power to make such rules as may appear to the authority to be "necessary", "convenient" or "expedient" for purposes of the Act; without laying down any standards to guide the determination of necessity, convenience or expediency.

In such an instance, the executive authority essentially gets a blank cheque to make such legislations as it likes. The executive becomes too powerful and overbearing as it secures powers to affect individual rights, liberties and privileges without the democratic restraints of a debate by the elected

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<sup>44</sup> Ibid. p.31. According to Wade and Phillips, *Constitutional Law (1965)* 608, delegated legislation fulfils the need of modern times "that something less cumbersome and more expeditious than an Act of Parliament shall be available to amplify the main provisions, to meet unforeseen contingencies and to facilitate adjustments that may be called for after the scheme has been put into operation."

representatives of the people as happens when a statute is enacted by Parliament.

As a result, though the technique of delegated legislation has definite advantages, sight should never be lost of the dangers inherent in its improper application or use. Delegated legislation should be subjected to suitable controls so that the power to promulgate subsidiary legislation is not misapplied, misused or abused. Judicial review provides this useful means of control of delegated legislation. In so doing, the courts derive useful aid from the *ultra vires* doctrine.

In a narrow or substantive sense, subsidiary legislation is *ultra vires* if it is inconsistent with or goes beyond the scope of the authority conferred by the parent legislation. The principle is that the delegate cannot make a rule which is not authorised by the parent statute. If the authority to which power to make subsidiary legislation keeps within the powers delegated, the delegated legislation is valid and cannot be challenged. But if it does not, the courts if moved will certainly intervene and strike down the resultant delegated legislation.

The case of *Koinange Mbiu v. R*<sup>45</sup> reinforces this point. The Governor in Council was vested with powers by a statute to make rules and regulations pertaining to the areas in which coffee could be grown. While purporting to exercise this power, the Governor made rules prescribing that Africans living in particular areas could not grow coffee.

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<sup>45</sup> *Supra* note 2

Mbiu Koinange was charged and convicted under this regulation. On appeal it was held that the rule was *ultra vires* the powers of the Governor under the parent statute and void since instead of controlling areas where coffee could be grown, it was controlling races that could grow coffee in particular areas. The Governor had no legal capacity to do so.

When courts strike out subsidiary legislation for being *ultra vires* the enabling legislation in the substantive sense, they can be said and are often said to be effectuating the intention of the legislature. In such a situation, it may be perfectly argued that the courts are policing the boundary of powers donated to an authority by Parliament to make rules to ensure the authority does not exceed the confines of the powers donated to it. The task of the court in such a situation is to relate the rules made to the enabling statutory provision(s). The intent of the legislature is deciphered from the parent legislation. In relating the rules made to the enabling statute, courts are no doubt enforcing the intention of Parliament.

The claimed centrality of the *ultra vires* doctrine in justifying judicial review has held sway in the learning and practice of administrative law for a long time. However, the ability of the *ultra vires* doctrine to provide a satisfactory and convincing justification for the entirety of judicial review in Kenya is currently in great doubt. In the following chapter, this work confronts the claimed centrality of the *ultra vires* doctrine.



## CHAPTER THREE

# LIMITATIONS OF THE ULTRA VIRES DOCTRINE

### 3.1 Introduction

The preceding chapter evaluated the content, theoretical underpinning and strengths of the ultra vires doctrine. This chapter examines the inadequacies of the ultra vires doctrine. In so doing, it is not the intention of this part of the thesis to argue that ultra vires is absolutely irrelevant in so far as the exercise of judicial review jurisdiction is concerned.<sup>1</sup> As a matter of fact, the relevance of the ultra vires doctrine for controlling the exercise of statutory powers; particularly in the narrow or strict sense, is acknowledged even by the doctrine's strongest critics.<sup>2</sup>

In order to confront the claim that ultra vires is the basis of judicial review in Kenya, the chapter begins with an assessment of courts' treatment of statutory provisions seeking to oust court jurisdiction, tersely referred to as ouster or preclusive clauses.

The chapter will then interrogate the courts' jurisdiction to strike down unconstitutional legislations, the courts' power to nullify delegated legislations other than for clear-cut inconsistency with the enabling

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<sup>1</sup> It is obvious ultra vires remains a relevant ground for controlling the exercise of executive powers, more so where such powers are created by statutes. This has been discussed in previous chapter.

<sup>2</sup> See Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review, Chapter 1, supra note 5*; Paul Craig, *Ultra Vires and the Foundations of Judicial Review, Chapter 1 supra note 5*.

legislation and the courts jurisdiction to review non-statutory powers, institutions and functions. Towards the end of the chapter, the thesis will analyse whether review on the ground of error on the face of records and the development of the scope and the heads of judicial review across time can be rationalized by the ultra vires doctrine.

### 3.2 Ouster Clauses

It is a common trend today for the legislature to confer decision-making powers on tribunals and administrative authorities and to seek to limit, preclude or oust court jurisdiction to scrutinise those powers. An issue arises as to what extent, if any, the ouster or preclusive clauses affect the courts judicial review jurisdiction.

Statutes use various phrases to express an intention to oust judicial intervention in actions taken under their provisions. Although the scope of this study may not allow us to list all the phrases employed, some amongst the formulations include instances where statutes stipulate that a decision of an authority made under an Act 'shall be final and shall not be questioned in any court'<sup>3</sup> or that an order or decision of a specified body or tribunal made under an Act 'shall not be called into question in any court' or that such decision 'shall not be subject to review in any court'<sup>4</sup> or that the decision of a specified body or tribunal made under the Act 'shall be final and conclusive

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<sup>3</sup> Section 8, *Land Control Act, Cap. 302*. The phraseology has also been applied under section 5(3) of the *Immigration Act, cap. 172* in relation to decisions by the Minister in charge of immigration on appeals for work permits.

<sup>4</sup> See section 33 of *Value Added Tax Act, Cap 476, (1993)*

for the purposes of the Act<sup>5</sup>, or that the award, decision or proceedings of the court or tribunal "shall not be questioned or reviewed and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise".<sup>6</sup>

Howsoever phrased, these statutory formulations manifest, at least on their face, an intention by Parliament to exclude judicial scrutiny of actions undertaken and falling under their prescriptions. There are also instances where statutes may condition the filing of an action in court to some limitations, such as, giving of notice to the authority concerned or the Attorney General before instituting the court action.<sup>7</sup>

Kenyan courts have rejected the proposition that preclusive clauses, in whatever manner or form expressed, can oust the courts' judicial review jurisdiction, *in toto*.<sup>8</sup> Courts have, for instance, held that no statutory provision can limit their jurisdiction to scrutinise administrative actions and grant an appropriate judicial review order against ultra vires, unreasonable, vague or ambiguous decisions.

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<sup>5</sup> Section 88, *Income Tax Act*, Cap 470. In *Ridge v. Baldwin* [1964] AC 40, [1963] 2 All ER 66, the statute used the phrase: 'shall be final and binding'.

<sup>6</sup> Section 17 of the *Trade Disputes Act*, Cap. 234

<sup>7</sup> Such provisions have been held not to affect the courts' judicial review powers in Kenya. See *Jotham Mulati Welamondi v. The Chairman, Electoral Commission of Kenya* Misc. App. No. 81 of 2002. In *Commissioner for Lands v. Kunste Ltd*, Civil Appeal No. 234 of 1995, the Court of Appeal denied that section 136 of the Government Lands Act which required all actions for anything done under the Act be commenced within one year after the cause of action arose and that notice in writing of the action and the cause thereof be given to the defendant at least before the commencement of the action, could not operate to limit the courts' judicial review jurisdiction.

<sup>8</sup> The emphasis has been added to stress the fact that courts do not refuse to uphold preclusive clauses in all cases. As the discussion will confirm, courts only disregard such clauses where the decision in question is in excess of the jurisdiction vested in an authority as to amount to no decision capable of being insulated by ouster.

In England, *Anisminic Ltd v. Foreign Compensation Commission*<sup>9</sup> remains a landmark decision on judicial treatment of ouster clauses. The Foreign Compensation Act, 1950 established a tribunal for adjusting claims on funds paid by a foreign government to the British Government in compensation for the expropriation or destruction of British property abroad. Section 4 of the Act provided that the "determination by the Commission or any application made to them under this Act shall not be called in question in any court of law."

The House of Lords held unanimously that the ouster clause did not give protection to determinations which were ultra vires the powers of the Commission, and that the courts jurisdiction was not ousted with regard to such determinations. The Court emphasised that where one seeks to show that a determination is a nullity, one is not questioning the purported determination but is maintaining that it does not exist as a determination.

In *Anisminic*, the tribunal in question had jurisdiction to enter into the enquiry in question and was acting *intra vires*, in the strict sense. Nevertheless, the House of Lords held by a majority that the error committed by the Commission took it outside its jurisdiction as its decision was based on a matter which it had no right to take into account and so its decision was a nullity. The order of the Commission was thus quashed in spite of the ouster clause.

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<sup>9</sup> [1969] 2 WLR 163. See also *Pearlman v. Keepers and Governors of Harrow School* [1978] 3WLR 736; *Re Racal Communications Ltd* [1980] 2 All ER 634; *South East Asia Fire Bricks Sdn, Bhd. v. Non-Metallic Mineral Products Mfg Employees Union* [1980] 2 All ER 643; *R v. Medical Appeal Tribunal ex p Gilmore* [1957] 1 QB 574.

The *raison d'être* in the *Anisminic case*<sup>10</sup> is that when a statute seeks to protect an administrative decision or act from judicial investigation, it has in mind a decision or act made within, not in excess of the powers of the concerned authority. In administrative law, a decision which is *ultra vires* the powers of the authority is null and void, has no legal effect and is deemed not to exist.

As articulated in *the Anisminic case*<sup>11</sup>, void determinations are not determinations in law and are not capable of being protected by preclusive clauses. Professor Wade succinctly explains that in order "to preserve their control the courts have made it a firm rule to put a narrow construction on the finality clauses which are commonly found in statutes"<sup>12</sup>. He clarifies that preclusive clauses only serve to preclude appeals and not judicial review since "[P]arliament only gives the impression of finality to the decisions of the tribunal on condition that they are reached in accordance with the law."<sup>13</sup>

In *Mike J C Mills & Anor v. The Post and Telecommunications*<sup>14</sup> the High Court of Kenya expressed the approach of the Kenyan courts in dealing with ouster clauses by stating that "judicial review has been held not to have been excluded by Acts of Parliament that purport to say decisions of

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid

<sup>12</sup> *Administrative Law*, 3<sup>rd</sup> ed, (1971), Oxford: Clarendon Press, p 149 - 150

<sup>13</sup> Ibid.

<sup>14</sup> Misc. App. No. 1013 of 1996 (Unrep). See also *R v. Minister for Lands and Settlement & others ex p Robert Musili Mwenzwa*, Misc. Civil Appeal No. 183 of 2004; *Re Marles* [1958] EA 153.

statutory bodies cannot be questioned in any court or that such decisions are final"<sup>15</sup>.

The Court of Appeal also rendered its position on the treatment of ouster clauses in the case of *Nyakinyua & Kang'ei Farmers Co. Ltd v. Kariuki & Gathecha Resources Ltd.*<sup>16</sup> Delivering its ruling on the applicability of ouster clauses, the court stated as follows:

It is submitted to us by Mr. Gautama who appeared for the Appellant on this appeal, that even if the Land Control Board was wrong, its decision cannot now be challenged because section 8 of the Act Provides "the decision of a Land Control Board shall be final and shall not be questioned in any court". Mr. Lakha, who appeared for the Respondent provided us with answers to these submission. He referred us to the English cases of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 1 All ER 208 and *Pearlman v. Keepers & Governors of Harrow School*, [1979] 1 All ER 365. I agree with Mr. Lakha that the effect of those cases, which I consider to represent the law of Kenya also, is that the formulae of words designed to protect a tribunal from interference with its "final" decision ... are not

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<sup>15</sup> Ibid.

<sup>16</sup> Civil Appeal No. 16 of 1979 (Unrep). See also *Rep thro' Olum v. Angungo & 5 Others* [1988] KLR 529

effective to protect a decision which the tribunal had no jurisdiction to make.<sup>17</sup>

In a concurring decision delivered in the case, Kneller J.A. set out the law on the matter as follows:

The Act declares that the decision of the Board, one way or another, shall be final and conclusive and shall not be questioned in any court. Such words ousting the powers of the High Court to review such decisions must be construed strictly. They do not oust this power if the Board had acted without jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is a nullity.<sup>18</sup>

Thus despite the enjoiner that “the decision of a Land Control Board shall be final and shall not be questioned in any court” the court nevertheless intervened, holding that such formulae could not insulate unlawful decisions which the tribunal had no jurisdiction to make.

As stressed by Craig, there would be conceptual difficulties if judicial review were to be justified by reference to the ultra vires doctrine explained in terms of implementation of legislative intent where the legislature has stated in

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<sup>17</sup> Ibid, *per* Potter JA

<sup>18</sup> Ibid

clear terms that it does not wish the courts to intervene in the decisions made by the executive agency.<sup>19</sup>

The cases cited above confirm that such clauses have not in fact served to exclude judicial review. To the contrary, the cases in fact demonstrate that the courts employ various interpretative techniques to restrict the operation of ouster clauses; most notably by holding that the clauses cannot serve to protect decisions that are nullities in law.

Howsoever disguised, the courts in refusing to be constrained by ouster clauses are engaged in an overt contradiction of the expressed legislative intent to exclude court intervention. As *Elliott* points out if judicial review is about nothing more than ascertainment and enforcement of the literal meaning of the words which Parliament uses as presented by the ultra vires doctrine, then cases like *Anisminic* cannot be accommodated within such a model.<sup>20</sup>

The proponents of the ultra vires doctrine have made various attempts to reconcile court decisions against application of ouster clauses with the ultra vires doctrine. The proponents have, for example, argued that Parliament really did not intend ouster clauses to cover decisions which are null and void or, that Parliament as a legislative sovereign acquiesced in the court decisions rejecting the application of the ouster clauses.<sup>21</sup> But such

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<sup>19</sup> Paul Craig, *Ultra Vires and the Foundations of Judicial Review* in Christopher Forsyth, *Judicial Review & the Constitution*, at p. 52

<sup>20</sup> Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, in Christopher Forsyth, *Judicial Review & the Constitution*, p. 83 at p.103

<sup>21</sup> *Ibid.*



arguments cannot obscure what the legislature in fact intended to achieve, nor should it be allowed to mask the defiant judicial response to the expressed legislative intention to preclude court intervention. The reality is that the courts in refusing to heed ouster clauses make decisions against an expressed legislative intention to hold back court intervention. In so doing, the courts draw upon the rule of law principle that access to judicial review and the protection it avails should be safeguarded, and that any legislative attempt to block access to judicial review courts should be given the most restrictive interpretation possible; irrespective of whether this does not accord with the expressed legislative intent.

The reluctance of courts to uphold statutory clauses seeking to oust court jurisdiction in particular instances of administrative actions exposes a conceptual flaw within the ultra vires doctrine articulated in terms of effectuating legislative intent and undermines the claim that the ultra vires doctrine is the basis of judicial review. It is suggested here that since the ultra vires doctrine denies to the courts any role beyond effectuating the expressed intent of statutory enactments, courts must be enforcing some deeper and greater constitutional principle in refusing to be restrained by ouster clauses.

While discussions on this greater constitutional logic is reserved for the next chapter<sup>22</sup>, the thesis now turns to evaluate the exercise of the courts' power to strike down statutes and to question whether the claim that the ultra vires

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<sup>22</sup> Chapter 4

doctrine is the basis of judicial review can be sustained when tested against this fact.

### 3.3 Nullification of Statutes

Kenyan courts have no jurisdiction to inquire into the internal proceedings of Parliament.<sup>23</sup> The courts, however, have jurisdiction to question whether some event or circumstance which is a condition precedent to the validity of a statute has been met and to ascertain whether a law passed by Parliament is in conformity with the provisions of the Constitution. Courts enjoy the power to annul or strike down Acts of Parliament that are inconsistent with the Constitution. This they can do by way of judicial review or through constitutional applications.

In *R v. Kenya Roads Board ex p. John Harun Mwaui*<sup>24</sup>, the applicant filed an application for judicial review under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act<sup>25</sup> seeking a prohibitory order prohibiting the implementation of the Kenya Roads Board Act<sup>26</sup> and declarations that the Act, as legislated is unconstitutional, null and void.

The Applicant contended that the Act was unconstitutional as it contravened the principles of separation of powers embodied in the Constitution by

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<sup>23</sup> *Hon. Kiraitu Murungi & Others vs. Hon. Musalia Mudavadi & Anor.* HCCC No 1542 of 1997; *Samuel Muchiri W'Njuguna & Others v. The Minister of Agriculture* Misc. App. No. 621 of 2000 (Unrep); *Samuel Muchiri W'Njuguna and 6 Others v. The Minister for Agriculture*, Civil Appeal No. 144 of 2000 (Unrep)

<sup>24</sup> Misc. Civil App. No. 1372 of 2002 (Unrep), see also *Kenya Bankers Association & others v. Minister for Finance & Anor* (No. 4) [2002] 1 KLR, 61 and *R v. The Commissioner of Police ex p Nicholas Gituhu Karia*, Misc. App. No. 534 of 2003

<sup>25</sup> Cap. 26

<sup>26</sup> No. 7 of 1999

providing for mandatory membership of Members of Parliament to the District Roads Committees, which the Act established as an executive body.

In opposing the application, the Respondents argued that an Act of Parliament could not be challenged by way of judicial review, as according to them, judicial review was only available against decisions of inferior bodies and tribunals. Overruling this objection, the court stated that:

The remedy of judicial review is available as a procedure through which the applicant can come to court for the determination of any constitutional issue including striking down of legislation which may be unconstitutional. Judicial review has an entirely different meaning in Commonwealth countries, which have adopted the written Supreme Constitutional System. ... Judicial review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be inconsistent with the Constitution ... In countries with written Constitutions, the rule of law implies certain limitations on legislative power and all other organs of state. Parliament can only exercise its powers within certain parameters for acts of Parliament to be Constitutional. The limitation which the law imposes upon the executive and the legislature can only be meaningful where there is a procedure to interpret the law and examine executive actions or decisions

with finality ... This unique power to test the acts of the three arms of the state for consistency is vested in the judiciary. This is what is called judicial review powers. The judiciary in such exercise is also subject to the rule of law.<sup>27</sup>

The issue being investigated in this thesis is not whether Kenyan courts have jurisdiction to strike out Acts of Parliament. This is settled. Instead, the present concern is to examine whether it can be rightly argued that Kenyan courts in striking down statutes derive their basis for so doing from the ultra vires doctrine. The answer to the examination is undoubtedly in the negative.

Under the ultra vires doctrine, the sole function of the courts would be to decipher the intention of Parliament and enforce Acts of Parliament as legislated. Courts would not be justified to go behind the legislations and question their validity or constitutionality, as their jurisdiction would be limited to implementing the will of Parliament expressed in the statutes.

In striking out statutes, courts are not acting as mere delegates or under-workers engaged to effectuate the intention of the legislature in the sense posited by the ultra vires doctrine. Instead, the courts are proceeding against the intent of the legislature sought to be achieved by the statutes. Any contention that the ultra vires doctrine is the basis of judicial review cannot stand, at least on this account.

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<sup>27</sup> Ibid. See also *Amenya Wafula & others v. R*, Misc. App. No. 343 of 2000 (Unrep) for the proposition that courts in Kenya have jurisdiction to nullify unconstitutional statutes.

Another instance of failure of the ultra vires doctrine is evinced by the jurisdiction which courts have and exercise to strike down delegated legislations; other than for direct and clear-cut inconsistency with the enabling law. This is referred to (herein) as procedural review of delegated legislations and will be the next focus of this thesis in analyzing the veracity of the claim that the ultra vires doctrine is the basis of judicial review.

### **3.4 Procedural Review of Delegated Legislations**

The justification for delegated legislation and the fact that delegated legislation if inconsistent with the parent statute is ultra vires and would be quashed by courts is already discussed.<sup>28</sup> The thesis is now concerned to question challenges to delegated legislation on grounds other than for straightforward inconsistency with the parent law; referred to herein as substantive ultra vires. For a better understanding, the analysis proceeds on the following analogy.

Supposing that an executive authority while exercising powers granted by a statute to make regulations, made regulations which are plainly so vague that their meaning cannot be ascertained, the theory put forward by proponents of the ultra vires doctrine would hold that Parliament never intended that powers it grants to make regulations would be employed to make vague regulations, and that the regulations made if vague are ultra vires, null and void. So that although the regulations are *intra vires* the

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<sup>28</sup> Chapter 2

powers of the concerned authority in the sense that the authority is, on a literal reading of the statute, empowered to make regulations, the regulations are nonetheless invalid for being vague.

The analogy belies the claim that the ultra vires doctrine is the basis of judicial review. If Parliament grants power to an authority, that authority either acts within those powers; intra vires, or outside those powers; ultra vires. There is no grey area, at least on its face, between authorisation and prohibition or between empowerment and the denial of power. When Parliament grants power, it is either a condition of the grant that the power should be exercised fairly, reasonably and in consistency with the requirements of good administration; or it is not. If Parliament chooses not to attach such a requirement to a grant of power, such that the authority to which power is granted is free from any obligation to act fairly, reasonably or in good faith, the courts would have no basis to impose such obligations under the ultra vires doctrine since to do so would undermine the intent and authority of Parliament.

The accent is that where Parliament gives an executive authority power to make regulations and conditions the exercise of that power to requirements of clarity, reasonableness, good faith, or fairness, then the authority cannot do the opposite - that is - make vague, unreasonable, *mala fide* or unfair regulations as it does not have the power to do so. But if Parliament grants an unconditioned or unrestricted power to the authority to make such regulations as it may deem fit, necessary or expedient, the authority has

power to make whatever regulations it deems fit, even if vague, unclear or unreasonable. Under classical ultra vires theory, the authority would not exceed its jurisdictions by making vague, unclear or unreasonable regulations.

The authority is, in conventional ultra vires sense, entitled to make vague regulations as it is to promulgate clear regulations; its jurisdiction cannot be undermined simply because it has made vague regulation. If it has jurisdiction to make regulations, it can make clear regulations or vague regulations. Under the ultra vires doctrine, it does not destroy its jurisdiction simply because it has promulgated vague regulations .

The above reasoning has previously found support in the South African case of *Staatspresident en andere v. United Democratic Front en'n ander*, commonly referred to as the *UDF case*.<sup>29</sup> The case concerned a challenge to emergency regulations made by the State President under the *Public Safety Act, 1953*.

The State President made broad and sweeping emergency regulations controlling many aspects of everyday life including in particular, regulations severely restricting freedom of the press. Regulations designed to prevent the dissemination of information about the unrest sweeping the country prohibited the presence of journalist at the scene of "unrest". The United Democratic Front (UDF) challenged the regulations on the ground, *inter alia*,

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<sup>29</sup> 1988 (4) S.A. 830 (A)

that the concept of "unrest" as defined in the regulations was so vague that they rendered the regulations null and void.

The regulation had defined unrest as "any activity or conduct" which "a reasonable bystander" would consider a prohibited gathering (i.e. prohibited under other regulations) a physical attack on a member of the security forces or conduct that constituted a riot or public violence. The particular emergency regulations were protected by an ouster clause prescribed in the 1953 Act that provided that "no court shall be competent to enquire into or to give judgement on the validity of any ... proclamation."

On standard *Anisminic* principles, it was clear that if the regulations were ultra vires, judicial review would not be precluded by the ouster clause as it would have been argued that the ultra vires regulations were not regulations under the Act and were not protected by the ouster clause. The court of first instance proceeded this way and found that the definition of "unrest" was so vague as to be ultra vires and void; and ruled that the ouster clause did not preclude court jurisdiction to quash the offending regulations.

But the appellate court, by majority decision, took a different view of the matter. Allowing the appeal, the Court held that even if the regulations were vague, they were still protected from review by the ouster clause - that is - the regulations even if vague were *intra vires*.

The appellate court rejected the ultra vires approach stating it was unjustified, artificial and false. Most importantly, the Court of Appeal



emphasised that "vagueness" must be seen as a self-standing ground on which subordinate legislation could be attacked, and not merely as an instance of the ultra vires doctrine. The court stressed that unlike in Britain where earlier concepts required that the heads of judicial review be related to the ultra vires doctrine, South African law did not need an all embracing ground rule for the exercise of judicial review jurisdiction.<sup>30</sup>

According to the court's decision, although vague regulations could be struck down by the courts, the concerned regulations were made under the 1953 Act and were thus protected by the said ouster clause and could not be struck down. In the court's view, the regulations were *intra vires* and the ouster clause was effective to shield them from judicial challenge.

Proponents of the ultra vires doctrine have argued that this case evinces what would be the consequence of abolishing the doctrine. They contend that the effect of the court's decision in the *UDF Case* "is to eviscerate judicial review" mostly where there is a clear-cut ouster clause.<sup>31</sup>

But this assertion is not well founded as it cannot, plausibly, be argued that judicial review jurisdiction can only exist and be exercised by Kenyan courts if the various heads of review are related to the ultra vires doctrine.

In a nutshell, when courts exercise jurisdiction to strike down subsidiary legislations on grounds other than substantive ultra vires, they operate under principles divorced from the ultra vires doctrine explained by reference to

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<sup>30</sup> At 867G, 868, as per Hefer, J.A.

<sup>31</sup> Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review* 55 [1996] CLJ 122

implementation of legislative intent. In this sense, the *ultra vires* doctrine cannot be said to be the (sole) basis of judicial review without which judicial review is eviscerated.

The fact that judicial control of statutory power can be justified by reference to the *ultra vires* doctrine is already acknowledged.<sup>32</sup> This is even more the case where the statutory provisions granting the powers clearly spell the conditions upon which the exercise of the powers, to be lawful, is to be proceeded with. In the following heading, the thesis analyses the exercise of court jurisdiction to review non-statutory powers and seeks to test whether the said jurisdiction can be justified under the *ultra vires* doctrine.

### **3.5 Review of Non-Statutory Powers, Institutions and Functions**

In the past, judicial review was limited to controlling the exercise of statutory powers. A vast majority of administrative functions are in fact carried out under statutory authorisation. As already stated, these readily lend themselves to the *ultra vires* doctrine.<sup>33</sup> However, there are significant areas of public administration which are not carried out under statutory command; and yet they have been held to be amenable to judicial review.<sup>34</sup>

A field of power recognised as amenable to judicial scrutiny, but which is not ordained by Parliament or any designated donor whose intentions can be implied and applied are those deriving from executive prerogatives.

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<sup>32</sup> Chapter 2

<sup>33</sup> Ibid

<sup>34</sup> Dawn Oliver, *Is the Ultra Vires the Basis of Judicial Review?* (1987) PL 545

The English case of *R v. Criminal Injuries Compensation Board ex p Lain*<sup>35</sup> also progresses the argument that a decision, whose authority is based on the prerogative, is not, and should not, for that reason alone be immune to judicial control.

The respondent Board was created by the government to decide whether claims by persons suffering personal injuries which could be attributed to criminal accusations could be compensated. The function of the Board was thus akin to that of an ordinary administrative tribunal.

Lain was aggrieved by a decision of the Board and sought an order of certiorari to quash the decision of the Board on the ground of error of law. The court was thus faced with the situation of having to decide whether it had jurisdiction to review the decision of a body established under prerogative powers as opposed to statutory authorization.

Asserting the courts jurisdiction over the matter, *Lord Parker CJ* stated he could "see no reason either in principle or in authority" why the Board should not be amenable to the jurisdiction of the court exercised through judicial review,<sup>36</sup> while Diplock LJ noted that the "jurisdiction of the High Court" to supervise "inferior tribunals has not in the past been dependent upon the source of the tribunal's authority to decide issues submitted to its determination"<sup>37</sup> and that "No authority has been cited which ... compels us

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<sup>35</sup> [1967] 2 QB 864

<sup>36</sup> Ibid. at 881

<sup>37</sup> Ibid. at 884

to decline jurisdiction"<sup>38</sup>. On his part, Lord Ashworth stated, that "I do not think that this court should shrink from entertaining this application merely because the board has no statutory origin."<sup>39</sup>

Further attestation to the amenability of the exercise of non-statutory powers to judicial review is afforded by the case of *Council of Civil Service Union v. Minister for Civil Service*.<sup>40</sup> In this case, the jurisdiction of courts over the decisions of officers deriving their authority not from statutes but from prerogative powers was unequivocally established. Of essence here is the following dictum of Diplock LJ:

For a decision to be susceptible to judicial review, the decision maker must be empowered by public law ... to make the decision that, if validly made, will lead to administrative act or abstention from action ... The ultimate source of the decision making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision, then some of the decision making power may still be the common law itself, that is, that part of the common law, that is given by the lawyers the label of 'the prerogative'.<sup>41</sup>

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<sup>38</sup> Ibid. at 888

<sup>39</sup> Ibid. 891

<sup>40</sup> [1986] AC 374

<sup>41</sup> Ibid

Further illustration is provided by the case of *R v. Panel on Take Over and Mergers ex p. Datafin Ltd.*<sup>42</sup> The case concerned a contested take-over and a complaint to the Panel by one of the contestants that the others had acted contrary to the rules of the Panel. The Panel rejected the complaint, and the complainant thereupon sought leave to apply for judicial review of the panel's decision.

In opposing the application for judicial review, the Panel argued that it was not subject to the court's jurisdiction since judicial review jurisdiction was (according to the Panel) confined to bodies whose power derived solely from legislation or the exercise of the prerogative, and the panel's power did not so derive.

The Court of Appeal rejected this argument and held that in determining whether the decisions of a particular body are subject to judicial review, a court is not only confined to the source of that body's power and duties but the nature of functions performed by the body. Having so found, the court held that judicial review would lie against the Take-over Panel notwithstanding the fact that it was part of the 'self-regulatory' system in the city.

The justification for subjecting the exercise of prerogative powers to the courts' inherent judicial review jurisdiction was articulated by *Lord Denning MR* in *Laker Airways Ltd. v. Department of Trade*<sup>43</sup> wherein he stated that

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<sup>42</sup> [1987] 1 All ER 564, C.A [1987] QB 815

<sup>43</sup> [1997] QB 463

"[S]eeing that the prerogative is a discretionary power to be exercised for the public good, it follows that their exercise can be examined by the courts just as any other discretionary power, which is vested in the executive ... so as to see that they are not used improperly or mistakenly"<sup>44</sup>.

The question thus is not exclusively *where does it derive its authority from?* but more importantly *what does it do?*<sup>45</sup> On the basis of the fact that the panel performed a public function, the Court of Appeal ruled that its actions were amenable to judicial review. Lloyd L.J expressed the change in paradigm by stating that "[T]he express powers conferred on inferior tribunals were of critical importance in the early days when the sole or main ground for intervention by the courts was that the inferior tribunal had exceeded its powers. But those days are long since past"<sup>46</sup>.

The authorities cited indicate that whether the exercise of a particular power is amenable to judicial review depends mainly on its nature and the role which it occupies within public life, and not its source.<sup>47</sup> So long as there is a public interest or expectation in the function of a particular body, be it in the public or private domain, such functions are public functions and are amenable to judicial review.

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<sup>44</sup> [1997] QB 463 at 468.

<sup>45</sup> *Johnson Ajowi Ogendo and 2 others v. Registrar of Trade Unions and Anor.* Misc. Civil App. No. 176 of 1995 (Unrep).

<sup>46</sup> *R v. Panel on Take-Overs* [1987] 2 WLR 699, 724

<sup>47</sup> *R v. The Commissioner of Police ex p. Nicholas Gituhua Karia*, Misc. App. No. 534 of 2003 (Unrep); *R v. Kenya Crickets Association & Others ex p Maurice Omondi Odumbe*, Misc. Application No. 1723 of 2004 (Unrep); *R v. Panel on Take Over and Mergers ex p. Datafin Ltd* [1987] QB 815 at 838, per Sir John Donaldson MR, 846 – 8, per Lloyd LJ; *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374 at 399, per Lord Fraser, 407, per Lord Scarman, 410, per Lord Diplock. See C F Forsyth, "The Scope of Judicial Review: 'Public Function' Not 'Source of Power'" [1987] PL 356.

In Kenya, a good number of cases affirm the legal position advanced by the English cases discussed above. In *Mirugi Kariuki v. AG*<sup>48</sup> the Court of Appeal expressed itself on the matter by stating that "[I]t 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 justiciable, and therefore subject to judicial review"<sup>49</sup>. Some five years before the Court of Appeal delivered its decision in the *Mirugi Kariuki case*<sup>50</sup>, it had stated pronounced in the case of *David Oloo Onyango v. AG*<sup>51</sup> that:

It is clear that the English courts have taken the view that the courts are not bound to abdicate jurisdiction merely because the proceedings are of an administrative character. It is a lead which I think courts in Kenya will do well to follow in carrying out their task of balancing between the executive and the citizen. It is to everyone's advantage if the executive exercised its discretion in a manner which is fair to both sides and is seen to be fair.<sup>52</sup>

The extension of judicial review jurisdiction to non-statutory functions and to control the exercise of particular instances of private powers has been consummated by the development of new norms of control across time, the most recent ones in Kenya being legitimate expectation, proportionality and

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<sup>48</sup> Civil Appl. No. 70 of 1991 (Unrep). See also *Rita Biwott v The Council for Legal Education* HCCC Misc. App. No. 1122 of 1994 (Unrep).

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Civil Appeal No. 152 of 1986 (Unrep), *per* Platt JA

<sup>52</sup> Ibid

fairness. Thus private powers have been subjected to the High Court's inherent and supervisory jurisdiction exercised through judicial review where there is legitimate expectation on the part of those affected that the power will be exercised fairly, on reasonable grounds and on relevant considerations.

The case of *David Onyango Oloo v. AG*<sup>53</sup> is illustrative. David had been convicted of a criminal offence and sentenced to serve a five-year imprisonment sentence. On his admission into prison in 1982, David was entitled under section 46(2) of the Prisons Act<sup>54</sup> to benefit from remission of part of the sentence if he had demonstrated good conduct or industry during his imprisonment. Sometimes in 1983, the Commissioner of Prisons made a decision depriving David of remission stating the deprivation would benefit his reformation and rehabilitation.

In his court papers challenging the legality of the Commissioner's said decision, David contended that prior to the impugned decision, he had not been charged, tried and found guilty or punished for any offence against prison discipline; that he was not informed of what he had done to warrant reformation and rehabilitation beyond the lawful sentence; that he had not been afforded an opportunity to be heard before the Commissioner's decision, that the decision of the Commissioner depriving him of remission

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<sup>53</sup> Ibid.

<sup>54</sup> Chapter 90



was arbitrary, in breach of the rules of natural justice, ultra vires section 46 of the Prisons Act and therefore unlawful, null and void.

David's application to the High Court was dismissed and he accordingly appealed to the Court of Appeal. In a unanimous decision, the Court of Appeal ruled that the Commissioner's decision depriving David of remission was ultra vires, unlawful, null and void and proceeded to quash it. The ruling of Nyarangi JA is, in particular, illuminative of the position that courts should not shirk responsibility to scrutinise decisions simply because the decisions sought to be impugned are administrative in character. He stated that:

The Commissioner's decision was an administrative act. Nevertheless rules of natural justice apply to the act in so far as it affects the rights of the applicant and the appellants had legitimate expectation to benefit from remission by a release from a prison some 20 months earlier than if he had served the full sentence of imprisonment ... I would say that the principles of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly. In the instant case, reasonable people would expect the Commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in

accordance with the provisions of the Prison's Act ... The Commissioner is required to act objectively so as to act fairly.<sup>55</sup>

In Kenya, the scope of judicial review has been extended to non-statutory bodies that do not exercise statutory powers. Judicial control of the decisions of Universities, learning institutions, Churches, societies and private clubs are but the most prominent of several examples of this phenomenon. Such bodies cannot sport away individual rights with impunity. The justification for this predicates on the fact that the individual person or members of the public who deal with these bodies legitimately expect that they should be fair in their dealings in matters touching on individual rights, privileges and liberties.<sup>56</sup>

In subjecting decisions of universities and other learning institutions to judicial review, courts have rejected the often advanced argument that such decisions are (decisions) of "domestic" bodies and should be immune from the intervention of public law courts. In assuming jurisdiction, courts are guided by the principle that disciplinary action against a student may have far-reaching ramifications and may blast the student's career prospects and damage him completely in his future life. On account of the gravity of disciplinary actions and in order to ensure fairness in disciplinary proceedings and decisions, courts have readily imposed upon universities and learning institutions the need to comply with the requirements of natural justice,

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<sup>55</sup> Ibid

<sup>56</sup> *R v. Electoral Commission of Kenya ex p Kimani wa Nyoike & Others*, Misc. Civil Application No 129 of 2003 (Unrep)

reasonableness and all norms developed by courts to ensure justice and fairness in decision-making.

The decision of the Court of Appeal in *Daniel Nyongesa & 4 Others v. Egerton University College*<sup>57</sup> illustrates this point. The Appellants were final year students at the respondent College in the year 1986. During the month of July, 1986, the Appellants sat for their final Diploma examination in the courses each had been prepared for. Although the results of the examination were released in early August, 1986, none of the Appellants received his results.

In justifying the denial of the results, the relevant College authorities contended that the Appellants had not completed an academic year as they had been lawfully expelled from the College on 17<sup>th</sup> July, 1986 and were therefore not entitled to the results.

The Appellants contested this arguing that they were not aware of the alleged expulsions. They contended that they had not been notified of any disciplinary proceedings against them and that their right to be heard before the decision leading to their alleged expulsion had been infringed. The Appellants' application to the High Court for an order of mandamus to

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<sup>57</sup> [1990] KLR 692. See also *Elizabeth Wainaina & 2 Others v. The Board of Governors of Pangani Girls High School* Misc. Civil Case No. 818 of 1992 (Unrep); *Michael Omole Ocharo & 42 Others v. The Council for Legal Education* Misc. App. No. 917 of 1996 (Unrep); *Rita Biwott v. The Council for Legal Education* HCCC Misc. App. No. 1122 of 1994 (Unrep); *R. v. The Board of Post Graduate studies, Kenyatta University Ex P Amarjit Singh* Misc. Civil Case 1400 of 1995; *Churchil Meshack Suba and 2 others v. The Egerton University*, Misc. App. No. 929 of 1996 (Unrep); *Edgar Ogechi & 12 Others v. University of Eastern Africa, Baraton*, Civil Appeal No. 130 of 1997 (Unrep); In *Irungu Kangata & 7 Others v. University of Nairobi*, Misc. Civil App. No. 40 of 2001 (Unrep), it was held that where an act affects the rights of a person and that effect is penal in nature, statutory conditions and procedure should be scrupulously adhered to.

compel the relevant university's authorities to release their results and certificates was dismissed and they, accordingly, preferred an appeal against the decision of the High Court.

Granting the appeal, the late *Nyarangi JA* upheld and asserted the need to uphold the principles of natural justice and fairness in disciplinary proceedings thus:

I wish to rest my decision on the ground that the appellants were not heard. There is no doubt that there was a failure of natural justice. The Board, the Senate and the Disciplinary Committee were not judges in the proper sense of the word. However, each was required to give each applicant an opportunity of being heard before it and stating his case and view. It was necessary for each applicant to be served with a notice that he was being proceeded against. Each organ which dealt with the Applicants was required to act honestly and fairly. In the absence of specific provisions or rules as to how the Board, Senate and the Disciplinary Committee were to proceed to decide the matter, the law of Kenya will imply no more than that the substantial requirements of the law shall not be violated.<sup>58</sup>

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<sup>58</sup> Ibid. 696

On the question as to whether courts have jurisdiction to interfere in decisions of domestic bodies, the judge stated as follows:

... I shall now state that Courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, Courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for any one to question or criticise the particular posture of Courts. It is the duty of Courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that Courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character.<sup>59</sup>

In a concurring ruling in the same matter, *Masime JA* articulated the principle under discussion as follows:

In my respectful view a student who has studied to the completion of a University course and who claims to be entitled to the award of a degree, diploma, certificate or other award

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<sup>59</sup> Ibid. 697 - 8

should not suffer the penalty of deprivation of such award without notice of a hearing. That must be so since such a penalty could clearly take away his 'prize' and future source of academic standing and livelihood and all that appertains to it ... It was conceded that the Appellants were never notified of the allegations against them nor called upon to answer to the allegations. That in my respectful view was not dealing with the matter fairly. I therefore hold that the proceedings of the disciplinary bodies of the respondent college in so far as they concern the matters complained of by these appellants were in breach of the rules of natural justice and are consequently null, void and of no effect.<sup>60</sup>

In the case of *Elizabeth Wainaina & 2 others v. The Board of Governors of Pangani Girls High School*,<sup>61</sup> the High Court rejected challenges to its jurisdiction based on the ground that the dispute was an internal matter for the school to deal with and quashed the decision of the Board of Governors of Pangani Girls High School which had indefinitely suspended the applicants without a hearing. The Court underscored the need for judicial intervention in the dispute and thus:

Breach of the rules of natural justice has been alleged. Breach of procedure under the Education Act has been alleged. Breach of

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<sup>60</sup> Ibid. 699

<sup>61</sup> Misc. Civil Case No. 818 of 1992 (Unrep)

the rights of the individuals (the applicants) has been alleged. Is it right for the courts to close the door of the corridors of justice against the applicants without examining these allegations? Pangani Girls School is not a private club where deliberations on action taken against members may be said to be an in-house matter ... I find that the court has jurisdiction to deal with this matter.<sup>62</sup>

Kenyan courts have consistently enforced the requirement to observe the rules of natural justice and to act in good faith and fairly in cases concerning discipline or dismissal of individuals from service. Proceedings for and steps taken to dismiss an employee from service must accord with the rules or regulations, if any, prescribed by the employing authority and must not violate the rules of natural justice.

The case of *R v. Judicial Service Commission ex p Stephen Pareno*<sup>63</sup> is illuminative. The case concerned the dismissal of a magistrate by the Judicial Service Commission. The magistrate applied to have the decision dismissing him from judicial service quashed on the ground that the decision was made in contravention of *Regulation 26 of the Judicial Service Regulations*<sup>64</sup> which

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<sup>62</sup> Ibid.

<sup>63</sup> Misc. Civil App. No. 1025 of 2003 (Unrep). See also *Charles Orinda Dulo v. Kenya Railways Corp* Misc. App. No. 298 of 2000; *Jopley Constantine Oyieng v. Permanent Secretary, Ministry of Economic Planning And Development*, Misc. Civil Application No. 282 of 1982 (Unrep); *Joseph Mulobi v. AG and Anor*, Civil Case No. 742 of 1985 (Unrep); *The Staff Disciplinary Committee of Maseno University & 2 Others ex p Prof Ochong Okelo*, Kisumu Misc. Civil App. No. 227 of 2003 (Unrep). See also *Ridge v. Baldwin*, [1964] AC 40, [1963] 2 All ER 66; *Ronald Muge Cherogony v. Chief of General Staff, Armed Forces of Kenya & Others* Misc. Cause No. 671 of 1999 (Unrep)

<sup>64</sup> The Regulations have been made by the Judicial Service Commission pursuant to section 13 of the *Service Commissions Act*, Chapter 85 of the Laws of Kenya

prescribed the procedure to be followed in disciplinary actions against judicial officers.

In opposing the application, it was argued that although there was an apparent violation of the Regulations, the relationship between the parties was that of employer and employee and that neither could be forced onto another.

The High Court overruled the objection and outlined the circumstances in which a court would be entitled to exercise jurisdiction over employment matters and the justification therefor as follows:

... where the statutory body purports to discipline or dismiss ... without giving reasons or arbitrarily or without following the procedure outlined in the regulations or without substantially adhering to the procedure and to the rules of natural justice purports to terminate ... services ... the court would be justified in quashing the decision of dismissal in which event it would remit the matter back to the Judicial Service Commission with a recommendation that the victim of such arbitrariness be reinstated. The reason for this would be that the protection given to the magistrates pursuant to the regulations by the fact of making it difficult to sack them is based on the need to protect them because of the nature of their jobs and therefore in the public interest. Thus, while it recognised by the applicable Regulations that a magistrate can be retired in the public



interest, he can equally be protected to retain his office in the public interest because courts of law have a duty to uphold the public interest.<sup>65</sup>

The normal judicial approach in the area of trade, commerce and property rights is to regard denial or cancellation of business licence as a process requiring fairness and due process on the part of the concerned authority. Thus it has been held that it is necessary for an authority to follow the principles of natural justice and strictly adhere to prescribed procedure in cancelling a licence to sell liquor or engage in other trade, or before demolishing a building.<sup>66</sup>

In Kenya, the case of *Maina v. Nairobi Liquor Licensing Court*<sup>67</sup> is apt on the issue. The Liquor Licensing Act<sup>68</sup> required the chairman of the Liquor Licensing Court to give a 30 days notice to a licensee accused of misconduct summoning him to attend a meeting at which his conduct was to be looked into. In this case, the licensee was given a fortnight's notice of the meeting. On the date of the meeting, the withdrawal of the appellant's liquor licence was ordered.

The appellant appealed on the primary ground that he had been denied 30 days notice of the meeting which he was entitled to under the Act and moved the court to find that the fortnight notice was unlawful. The court

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<sup>65</sup> Ibid. *Per Nyamu J.* In this case, the Court refused to quash the dismissal on other considerations.

<sup>66</sup> *R v. Liverpool Corporation ex p. Liverpool Taxi Fleet Op. Association* [1972] 2 QB 299

<sup>67</sup> (1973) EA 319. See also *Dent v. Kiambu Liquor Licensing Court* [1968] EA 80; *Municipal Board of Mombasa v. Kala & Anor* (1955) EACA 319.

<sup>68</sup> Cap. 121

allowed the appeal and emphasised the importance of the 30-days notice requirement as follows:

A report made against a licence may result in cancellation of his liquor licence as in deed it did in the present case which could deprive the appellant of the means of making his livelihood. An individual has the fundamental right to work and make his livelihood. This court always zealously guards citizen's rights. An administrative or executive act which impinges on that right in consequence of some provision in a statute the result of which is or could be punitive in so far as the individual is concerned must be performed strictly in terms of the provision of the statute. That must be the intention of Parliament ...

It is possible that in the instant case in view of what actually transpired, there was not much or any prejudice caused to the appellant. Nevertheless, because the mandatory provisions of the statute were not observed, the decision of the licensing court cannot be allowed to stand. It could become the thin end of an administrative wedge destructive of provisions in the statute which are protective of licences.<sup>69</sup>

Court intervention in decisions of religious bodies has been held appropriate in situations where the decision in question concerns infringement of the

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<sup>69</sup> Ibid. 321

constitution of the body in question or violations of individual rights, liberties and privileges. In the case of *Rep. v. Registrar of Societies, Rev. Silas Yego & 2 Others ex p. Rev David Mulei Mbuvi & Others*<sup>70</sup> a dispute concerning an intended alteration of the constitution of Africa Inland Church, Kenya and a purported excommunication of some church members and leaders was lodged in court for determination.

At the hearing of the case, the Respondents, relying on past court practice and the principle of separation of church and state, challenged court jurisdiction over the matter arguing that the court had no power to intervene in decisions of religious bodies in the exercise of its judicial review jurisdiction.

Dismissing the objections, the court asserted its jurisdiction to interfere in internal decisions of religious organizations to remedy breaches of the rules of natural justice, to enforce the constitution of the bodies and to safeguard individual rights, liberties and privileges from violation.

From very ancient times, English courts have imposed the requirements of reasonableness and fairness on those who exercise monopoly power even where that power simply existed *de facto* on the very basis that the functions performed are of the nature that may properly be characterised as

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<sup>70</sup> Misc. App. No. 155 of 2006 (Unrep), *Hinga & Anor v. PCEA thro' Rev. Dr. Njoya & Anor* [1986] KLR 317; *Mbugua v. Olang & Anor* [1989] KLR 595; *Gathuna v. African Orthodox Church of Kenya* [1982] KLR 356

public functions inviting public interest. In *De Portibus Maris*<sup>71</sup> the principle was set out as follows:

A man for his own private advantage, may in a port or town set up a wharf or crane and may take what rate he and his customers may agree for carnage, haulage, pesage, for he doth no more that is lawful for any man to do, viz. make the most of his own ... But if the King or subject have a public wharf, unto which all persons who come to that port must come and unlade or lade their goods ... because there is no other wharf in that port as it may fall out where a port is newly erected; in that case there cannot be arbitrary and excessive duties for carnage, wharfage, pesage etc. ... but the duties must be reasonable and moderate, though settled by the King's licence or charter. For now the wharf, and crane and other conveniences are affected with a public interest, and they cease to be *jus privati* only ...<sup>72</sup>

The principle that monopolies attach public interest to an engagement was applied in *Alnutt & Anor v. Inglis*<sup>73</sup> the London Dock Company which owned the only warehouse in London in which wine importers could bond their wine was held bound by law to charge only a reasonable hire for receiving wines into bond.

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<sup>71</sup> 1 Harg L. Tr. 78 (1787)

<sup>72</sup> Ibid.

<sup>73</sup> (1810) 12 East 527

All the cases cited above are concerned with imposition upon the owners of monopolies of the obligation to act fairly and to make only reasonable charges for the use of their property or the provision of related services. Such bodies cannot be allowed to proceed arbitrarily, against the rules of natural justice, in bad faith, on extraneous or irrelevant considerations or to abuse their powers. Bodies exercising monopolistic powers in fields that are of importance to the public cannot blast individuals' legitimate expectations or infringe against the principle of proportionality and fairplay.

In the English case of *Nagel v. Fielder*<sup>74</sup>, an application by a woman who had been refused a trainer's licence by the Jockey Club merely because she was a woman was allowed. Lord Denning M.R. refused the Jockey Club's application to strike out the application on the ground that the Jockey Club exercised "a virtual monopoly in an important field of human activity" and was not free to deny the right to work. The court emphasised that the club could not deny a livelihood to the trainer capriciously and unreasonably.

In imposing the duty to act fairly on bodies engaged in monopolies, courts draw no distinction between monopoly powers that exist by virtue of some governmental intervention and those that exist merely as a matter of fact - *de facto*. The importance that the public attach to the function and the factual circumstances which create the monopoly have been held capable of

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<sup>74</sup> [1966] 2 QB 633, approved in later decisions like *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] Ch 591 and *McInnes v. Onslow - Fane* [1978] 1 WLR 1520

transforming what might otherwise be an *ius privati* into a regulated *ius publici*.

Court intervention in decisions of bodies exercising monopolies is further justified on the ground that these bodies, though engaging in private contractual activities advance the policies aimed at the general public good. The bodies cannot therefore be allowed to act in bad faith, arbitrarily or capriciously since to do so would brook unwarranted uncertainty and anxiety in public life and sanction unlawful and unacceptable interference with the lifeline of the people. Judicial review has thus been held to apply against the decision of every tribunal or body of persons vested with power to deal with matters involving civil consequences to individuals.

It is difficult to apply the ultra vires doctrine to non-statutory bodies without substantially altering its meaning. The ultra vires doctrine cannot explain the fact that non-statutory bodies exercising powers that do not originate from statutes are subject to judicial review. These bodies do not derive their power from statute and therefore judicial intervention in their functions and powers cannot be rationalised through the idea that the courts are delineating and policing the boundaries of legislative intent.<sup>75</sup>

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<sup>75</sup> Paul Craig, *Administrative Law*, 5<sup>th</sup> ed. See also Dawn Oliver, "Is the ultra vires Rule the Basis of Judicial Review Reprint, page 5

It is not logical to talk of a body acting in excess of its legal powers when its powers do not derive from a statute. As emphasised by Mark Elliott:

If the boundaries of judicial review are taken to be wholly delimited by the ultra vires rule, then review of prerogative and other non-statutory power is in deed unjustifiable. However, our constitution would be highly defective if it were incapable of legitimising judicial review of non-statutory forms of governmental power. In deed, in the light of its capacity to adapt to changing circumstances – which derives from its unwritten and flexible character – the British constitution should be well-placed to rise to new challenges such as the need to regulate the exercise of different forms of public power.<sup>76</sup>

Thus, some juridical basis, other than the ultra vires doctrine, is needed to justify court intervention in such cases.

Further, although it is conceivable to entertain *ultra vires* as the basis of judicial review of statutory powers, it, on the face of it, appears implausible to found the amenability of non-statutory powers and private institutions upon the ultra vires doctrine. These bodies do not derive their powers from statutes and therefore judicial control of the powers they exercise cannot be

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<sup>76</sup> Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law* Vol. 58 [1999] CLJ 129, reprinted in Christopher Forsyth, *Judicial Review & the Constitution*, p.83 at 106

rationalized through the idea that the courts are purely delineating and policing the boundaries of Parliamentary intent.<sup>77</sup>

As rightly argued by Professor Paul Craig “[I]f judicial review of statutory power is justified by reference to the notion that the courts are enforcing the express and implied limits contained in enabling legislation, that justification cannot be extended into spheres in which enabling legislation is absent and in which, a priori, the courts cannot be engaged in the enforcement of any express or implied statutory restrictions.<sup>78</sup> Undeniably, it need be acknowledged that “the dynamism of judicial review is such that it has burst through its logical boundaries”.<sup>79</sup>

It is emphasized herein that judicial control of the exercise of non-statutory powers does not lend itself to the ultra vires doctrine. Court intervention in the exercise of such powers must be justified by reference to a different principle. This will be examined in the next chapter.

### **3.6 Error of Law on the Face of the Records**

Judicial review on account of error of law on the face of records is long established and is traceable to the 17<sup>th</sup> Century English administrative law history. During the period, the superior court in England could order the production of records of any proceedings which had taken place before an

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<sup>77</sup> Paul Craig, *Ultra Vires and the Foundations of Judicial Review* [1998] CLJ 63, reprinted in Christopher Forsyth, *Judicial Review & the Constitution*, p.47

<sup>78</sup> Mark Elliott, *The Constitutional Foundations of Judicial Review*, p. 5

<sup>79</sup> HWR Wade, *Judicial Review of Ministerial Guidance* (1986) 102 LQR 173, 175



inferior tribunal and proceed to quash the same if an error of law was noted on the face records upon perusal.

This required the inferior tribunals to make detailed records of the facts, law and reasons for their decisions, a practice which went on until 1848 when the Summary Jurisdiction Act was enacted in England. The effect of this legislation was to permit inferior tribunals to give simple statement of conviction instead of detailed records. This piece of legislation significantly reduced errors on the face of the records in cases undertaken under the Act and logically minimised circumstances in which court could intervene on this account.

But, despite its long history, courts initially hesitated to review decisions of administrative bodies and tribunals on the ground of error of law on the face of records stating it amounted to interference with the decisions of inferior tribunals on the merits. The courts maintained was a jurisdiction preserved for appellate authorities.<sup>80</sup> As a consequence, judicial review under the head of error of law on the face of the records only gained prominence in the 20<sup>th</sup> century.

The case of *R v. Northumberland Compensation Appeal Tribunal ex p. Shaw*<sup>81</sup> demonstrates the utility of error of law on the face of the records as a ground for judicial review. The case turned upon the amount of compensation payable to the clerk of a hospital board who had lost his post

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<sup>80</sup> *Racecourse Betting Control Board v. Secretary for Air* [1944] Ch. 114

<sup>81</sup> [1952] 1 KB 338

due to redundancy occasioned by a change in health service policy and legislation in England. In calculating the statutory compensation period of service for the Clerk, the respondent tribunal was required by law to consider not only his work with the Hospital board but also his earlier service with the local authority he previously served. In their decision dismissing the appeal, the tribunal acknowledged that there had been these two periods of service but adjudged that it was only the second period of service which should count. The tribunal's decision contained an obvious error of law and was, on this account alone, declared null and void and of no legal effect.<sup>82</sup> Lord Denning asserted curial jurisdiction to review decisions of subordinate tribunals on account of error of law distinguishing it from appellate jurisdiction thus:

The Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its

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<sup>82</sup> *Ibid*, p. 354

control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction it has always had.<sup>83</sup>

In Kenya, error of law on the face of the records is available both as a ground for review in civil law<sup>84</sup> and as a norm for controlling administrative actions in public law.<sup>85</sup> A decision of an administrative authority can thus be quashed if there is an error of law apparent on the face of the record, even if the error is non-jurisdictional. Error is apparent on the face of the record if it can be ascertained merely by examining the record without having recourse to other evidence. The error must be self-evident, patent or manifest. It must not require in-depth examination or long-drawn process of reasoning or argument to establish.<sup>86</sup>

Instances where the courts will shoot down error of law for being apparent on the face of the records include: where a tribunal arrives at a conclusion insupportable by facts brought to its attention,<sup>87</sup> or, where there is failure to

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<sup>83</sup> Ibid.

<sup>84</sup> See Order 44, Civil Procedure Rules; section 80 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya; *Nairobi City Council v. Thabiti Enterprises Ltd*, Civil Appeal No. 264 of 1996 (Unrep.); *Tom O. Kopere & John M. Njongoro v. Prof. Yash Pal Ghai and the Constitution of Kenya Review Commission*, Misc. Civil App. No. 994 of 2002 (Unrep.); *Kithoi v. Kioko*, (1982) KLR 175; *Bernard Muthuku Kyule v. Dominic Kithome Mutunga*, Civil Appeal No. 38 of 1993.

<sup>85</sup> *Ronald Muge Cherogony v. Chief of General Staff, Armed Forces of Kenya & Others* Misc. Cause No. 671 of 1999 (Unrep); *R v. Northumberland Compensation Appeal Tribunal ex p Shaw*, [1952] 1 KB 338; *R v. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex p George Saitoti* Misc. Civil App. No. 102 of 2006, reported in [2006] eKLR; *R v. AG ex p Biwott* [2002] 1 KLR 670

<sup>86</sup> PLO - Lumumba & Peter Kaluma, *Judicial Review of Administrative Actions in Kenya*, (Jomo Kenyatta Foundation, 2007)

<sup>87</sup> *R v. Medical Appeal Tribunal ex parte Gilmore* [1957] QB 574

apply the correct legal test to the facts,<sup>88</sup> or misdirection on matters of evidence, for instance, admitting legally inadmissible evidence or omission to consider issues put forward for determination, et cetera.

The logic underlying the *ultra vires* doctrine is that an authority cannot deal with or decide a matter over which it has no jurisdiction and that if it purports to do so, courts will intervene and quash the decision. The flipside of this is that if the authority keeps within its jurisdiction, then its decision on matters of fact and law are free from judicial review.

The only exception to this general rule lies in the power of courts to review the exercise of power on account of error of law on the face of record. In this case, courts will intervene and quash the decision notwithstanding the fact that the authority in question is acting within its ordained jurisdiction. Error of law on the face of records is pegged not on the fact that the body had no jurisdiction to do what it did, but on the principle that the authority was, in law, wrong in deciding as it did.<sup>89</sup>

Accordingly, while other review norms such as unreasonableness, natural justice, irrelevant considerations, bad faith, among others, may be rationalized under the *ultra vires* doctrine, error of law on the face of the record cannot be explained by reference to *ultra vires* rule. The fact that error of law on the face of the records cannot be related to the *ultra vires*

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<sup>88</sup> *R v. Minister of Housing and local Government P. Chichester Rural District Council* [1960] 2 All ER 407.

<sup>89</sup> In his article "*Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, reprint p.33, Christopher Forsyth asserts that "*The valuable jurisdiction to quash for error of law on the face of the record, although little used today ... never depended upon ultra vires.*"

doctrine made some writers to argue that the exercise of courts' judicial review jurisdiction derives from two distinct bases: the ultra vires doctrine and error of law on the face of the record.<sup>90</sup>

The basis of judicial review, however, cannot derive from two different foundations: one from the ultra vires doctrine and the other from error of law on the face of the records. The basis of judicial review should justify all norms created and employed by the courts to control the exercise of executive powers. The inability of the ultra vires doctrine to explain court intervention on the ground of error of law manifests a conceptual lapse in the claim that ultra vires rule is the basis of judicial review.

In the foregoing analyses, the centrality of the ultra vires doctrine has been undermined on the grounds, amongst others, that it cannot reconcile the reluctance of courts to enforce ouster clauses with the implementation of legislative intent it is purposed to achieve, that it cannot rationalize courts' jurisdiction to strike down statutes and subsidiary legislations and that it cannot explain judicial intervention in the exercise of non-statutory powers. Perhaps the most critical challenge to the claimed centrality of the ultra vires doctrine arises from the fact that it appears incapable of justifying the development of judicial review across time. This will receive our last treatment in the critique.

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<sup>90</sup> PLO - Lumumba & Peter Kaluma, *Judicial Review of Administrative Actions in Kenya*, (Jomo Kenyatta Foundation, 2007), Chapter Seven

### 3.7 Growth of Judicial Review Across Time

The claim that the ultra vires doctrine is the basis of judicial review is undermined by the continued growth and development of new heads of judicial review across time. The grounds of judicial review are not static. They are exceptionally dynamic. While existing mechanisms for control of executive actions evolve in scope and application, new heads of review constantly emerge and are added to the judicial armoury.<sup>91</sup>

Traditionally, court intervention by way of judicial review in Kenya has in the past proceeded on the following grounds, namely: the ultra vires rule, natural justice, irrelevant considerations, unreasonableness, bad faith and error of law on the face of records. But recently, legitimate expectation, proportionality and fairness have emerged as significant and commonly used grounds of judicial review in Kenya.

The emergence of legitimate expectation, the acceptance of the doctrine of proportionality and the recognition of the principle of fairness as independent heads of judicial review in Kenya is illustrative of the constant growth and development of control mechanisms invented by courts to restrict abuse of executive powers.

The nature and application of the ultra vires doctrine and error of law on the face of the records are already discussed.<sup>92</sup> It is now necessary to discuss,

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<sup>91</sup> Paul Craig, "Ultra Vires and the Foundations of Judicial Review" [1998], CLJ 63, p.64-70

<sup>92</sup> Chapter 2

albeit briefly, the nature, origin and history of the remaining control mechanisms.

### **3.7.1 Natural Justice**

One of the most fundamental tenets of judicial review in Kenya is the requirement that power must be exercised in accordance with the rules of natural justice. The application of the rules of natural justice is presumed in every decision and in every case where the rights of an individual are in issue.

The rules of natural justice are implied mandatory procedural requirements bearing on every authority charged with the responsibility of deciding any matter that affects the rights of an individual. Ideals embodied in the rules of natural have to be complied with in decision making to the end that substantive justice may be realised.

In ordinary parlance, the concept of natural justice is elastic and generally connotes the basic requirement of fairness in decision-making. In public law, however, the concept traditionally entails two due process or procedural ideals, namely: *Audi alteram partem*; the rule that no man shall be condemned unheard, simply referred to as the right to be heard; and *Nemo iudex in re causa sua*; the rule that no man should be a judge in his own cause, simply referred to as the rule against bias.

Natural justice is perhaps the most ancient ground of judicial review. The origin of the right to be heard has been, for instance, traced to the Garden of

Eden episode as narrated in the Bible. In this regard, some courts have asserted that even God did not sentence Adam, Eve and the Snake before hearing their separate defences to the sin of disobedience each had committed. This is notwithstanding the fact that God, in his divine wisdom and omnipresence, had in fact witnessed the sinful proceedings from the very beginning to the end.<sup>93</sup>

### 3.7.2 Unreasonableness

One of the most commonly invoked grounds for judicial review in Kenya is the requirement that administrative actions must be proceeded with reasonably. It is a settled principle in Kenya that administrative authorities have a duty to act rationally in exercising their powers.<sup>94</sup>

As a judicial control mechanism against administrative excesses, unreasonableness became clearly defined in the 20<sup>th</sup> century in the English case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*<sup>95</sup> in which Lord Greene MR defined the principle as follows:

It is true that discretion must be exercised reasonably. Now what does that mean? ... It has frequently been used and is frequently used as a general description of the things that must

<sup>93</sup> *R v. Chancellor of the University of Cambridge*, (1723) 1 Str. 557, 567, famously known as *Dr. Bentley's case*. Note however, that the Bible is also replete with several instances where God did not accord the subject of his punishment a preliminary hearing; See Belshazzar's Feast, Dan. V; Essays in Constitutional Law, 2<sup>nd</sup> ed, 1964 at pg. 185. For detailed study of the tenets of the rules of natural justice, see PLO – Lumumba & Peter Kaluma, *Judicial Review of Administrative Actions in Kenya, Law & Procedure* (Jomo Kenyatta Foundation, 2007).

<sup>94</sup> *R v. The Commissioner of Coop. Ex p. Kirinyaga Tea Growers Coop. Savings and Credit Society Ltd*, Civil Appeal No. 39 of 1997; *Chhaganlal & Others v. Kericho Urban District Council* (1965) EA 370

<sup>95</sup> [1948] 1 KB 223



not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J in *Short v Poole Corporation* (1926) Ch. 66, 90-91 gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another sense, it is taking into consideration extraneous matters. It is also so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.<sup>96</sup>

Taking the lead from the 'Wednesbury's principle' set out above, Lord Diplock latter defined irrationality in the case of *Council of Civil Service Union v. Minister for Civil Service*<sup>97</sup> as follows:

By 'irrationality' I mean what can by now succinctly be referred to as 'Wednesbury's unreasonableness'... It applies to a decision which is so outrageous in its defiance of logic or of accepted

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<sup>96</sup> Ibid, p. 229

<sup>97</sup> [1985] AC 374

moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.<sup>98</sup>

Accordingly, Kenyan courts never hesitate to interfere with the exercise of power whenever satisfied that the decision in question is beyond the range of responses open to a reasonable decision maker.

### **3.7.3 Irrelevant Considerations**

Judicial control on the ground of irrelevant considerations developed contemporaneously and has close connection with review on the ground of unreasonableness.

Simply stated, actions or decisions of administrative authorities are amenable to being quashed by judicial review courts if they are shown to have been based on irrelevant or extraneous considerations, or where it can be proved that relevant considerations were ignored. Administrative bodies must exercise their powers without taking into account any matters which are irrelevant to the subject-matters in respect of which the duty is imposed upon them. If they take into account irrelevant matters, courts ordinarily intervene with appropriate relief.

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<sup>98</sup> Ibid, 410

The exercise of power that ignores relevant considerations or takes into account irrelevant factors is invalid and a nullity at law.

#### **3.7.4 Bad faith**

Power confided in public authorities or whose exercise affects the rights, privileges and liberties of individuals must be exercised in good faith. Decisions resulting from *mala fide* exercise of power are ordinarily quashed by certiorari.<sup>99</sup>

As a judicial control norm, bad faith concerns those cases where the motive force behind an administrative action is personal animosity, spite, vengeance, personal benefit to the authority itself or its relations or friends. The exercise of power in bad faith is, therefore, not only unlawful but also undermines the standing and integrity of public institutions as it amounts to abuse of power.

Bad faith seldom has an independent existence as a ground for judicial control of administrative actions. Wherever it features, it is characteristically an adjunct of unreasonableness, extraneous consideration or the other grounds of judicial review.

#### **3.7.5 Proportionality**

In 1985, Lord Diplock while delivering his decision in the case of *Council for Civil Service Union v. Minister for Civil Service*<sup>100</sup> predicted that

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<sup>99</sup> *R v. The Commissioner of Coop. Ex p. Kirinyaga Tea Growers Coop. Savings and Credit Society Ltd*, Civil Appeal No. 39 of 1997

<sup>100</sup> (1995) AC 374

proportionality would in future crystallize as a concrete ground for judicial review. He stated as follows:

Judicial review has ... developed to a stage when ... one can classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further developments on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality ..."<sup>101</sup>

In Kenya, Lord Diplock's prediction that proportionality would in future fossilize as a control norm only materialized after 2000. As a control mechanism, proportionality seeks to strike and maintain a balance between the adverse effects which a decision or action by an authority may have on the rights, liberties or interests of the concerned individual and the purpose which the authority is seeking to pursue. In so doing, a fair balance should be struck between the general public interest in the action in question and the need to protect the fundamental rights of the Applicant.

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<sup>101</sup> Ibid. p. 410

In *Charles Kanyingi Karina v. TLB*<sup>102</sup>, the High Court held that in deciding whether or not to impose restraint on administrative actions by judicial review, the court should maintain an appropriate balance between the adverse effects which an administrative authority decision may have on the rights, liberties or interests of an individual person and the purpose the authority is seeking to pursue. The court asserted that where greater public demand outweighs the need to safeguard specific individual interest, the concerned public authority should not be restrained by judicial review.

Proportionality, thus, evokes some idea of balance between interests and objectives and embodies the need to strike a fair and appropriate relationship between means and ends. In applying proportionality to executive actions, courts identify and weigh the relevant interests; usually those of the claimant and those of the general public. Taking into account all relevant factors and circumstances, courts determine whether the approach adopted by an executive authority in pursuing its objects are proportionate to individual interests affected. In so doing, courts consider the following:

- a) Whether the measure adopted by the authority was necessary to achieve the desired objective;
- b) Whether the measure or approach adopted was appropriate and suitable for achieving the desired objective;

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<sup>102</sup> Misc. Civil App. No. 1214 of 2004 (Unrep). See also *R v. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex p. George Saitoti* [2006] eKLR, *Martha Karua vs. Radio Africa Ltd T/A Kiss F.M Station & 2 Others* [2006] eKLR; *Keroche Industries Ltd v. Kenya Revenue Authority & Others* [2007] eKLR

c) Whether it nonetheless imposed excessive burdens on the individual.

This last consideration lies at the very core of the doctrine.

By its very nature, the requirement of proportionality is only imposed on authorities once the other forms of control have been satisfied. It is invoked as a ground for judicial review in situations where the authority concerned is entitled to engage in the action in question and is not acting beyond its lawful powers, in the strict sense.

### 3.7.6 Legitimate Expectation

Legitimate expectation as a control mechanism has developed and taken shape in Kenya as part of the wider principle of fairness. As a norm of judicial control, legitimate expectation derives from the need to secure "certainty" and "predictability" in executive actions.<sup>103</sup> In so doing, the principle of legitimate expectation seeks to enforce an express promise or representation given by or on behalf of an authority to an individual to the end that lawful bargains are not thwarted. A claim of legitimate expectation may also arise from the existence of a regular practice or a policy approach which the claimant can reasonably expect to continue.

The case of *R v. Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex p George Saitoti*<sup>104</sup> illustrates the application of the principle in

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<sup>103</sup> Ibid

<sup>104</sup> [2006] eKLR. See also *David Onyango Oloo v. AG*, Civil Appeal No. 152 of 1986 (Unrep); *R v. The Chief Justice of Kenya ex p Roselyne Nambuye*, Misc. App. No. 764 of 2004 (Unrep); *R v. Registrar of Societies ex p Smith Khisa Waswa & Others* Misc. Civil App. No. 769 of 2004; *Chamanlal Kamani v. Kenya Anti-Corruption Commission* [2007] eKLR; *Keroche Industries Ltd v. Kenya Revenue Authority & Others*, Ibid; *R v. Minister for Finance & Anor ex p Peter Anyang*

Kenya. The President of the Republic of Kenya appointed a Judicial Commission of Inquiry under the provisions of the *Commissions of Inquiry Act*<sup>105</sup> to inquire into allegations of irregular payments of export compensation by the Ministry of Finance to Goldenberg International Ltd and into payments made by the Central Bank of Kenya to Exchange Bank Ltd in respect of fictitious foreign exchange claims and related matters.<sup>106</sup>

At the end of its investigations, the Commission delivered its report to the President. In the report, the Commission, amongst other recommendations, listed names of 14 persons it found were criminally responsible for the acts and omissions leading to the massive fraud for possible criminal or civil action by the Attorney General. George Saitoti was among the 14 persons listed for such possible criminal or civil action by the Attorney General. He filed this case seeking an order of certiorari to remove into the High Court the Report of the Commission and to quash the findings, remarks and decisions in the Report that related to him. He also applied for an order of prohibition prohibiting the office of the Attorney General from prosecuting him for criminal charges pursuant to the recommendations of the Commission.

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*Nyongo & 2 Others* [2007] eKLR; *R v. Kenya Revenue Authority ex p. Abardare Freight Services Ltd & 2 Others* Misc. Civil App. No. 946 of 2004 reported in [ 2007] 2KLR; *Charles Kanyingi Karina v. The Transport Licensing Board*, Misc. Civil App. No. 1214 of 2004 (Unrep); *R v. The Staff Disciplinary Committee of Maseno University & 2 Others ex p Prof Ochong Okelo*, Kisumu Misc. Civil App. No. 227 of 2003 (Unrep); *Council for Civil Service Union v. Minister for Civil Service* (1995) AC 374

<sup>105</sup> Chapter 102

<sup>106</sup> See *Gazette Notice No.1237 of 24<sup>th</sup> February, 2003* for the Commissions specific mandates. The government lost billions of money through fraudulent payments made in the fictitious transactions.

The Application was based on the grounds that the Commission had committed errors of fact and law in coming to the findings, had violated the doctrine of proportionality and his legitimate expectations, had acted in bad faith and that it would on the whole be unfair for the Commission's report and recommendations relating to him to stand or to be implemented by such civil suits or criminal actions as the Attorney General determined.

On violation of legitimate expectation, the Applicant contended that the Commission was established as and had expressly stated it would act as a judicial commission of inquiry and would therefore be guided by principles governing judicial proceedings and judicial decision-making. The Applicant argued that as a judicial commission of inquiry, the Commission would not act on errors of fact or on false basis in arriving at its conclusions, would treat all persons before it equally and not act in a discriminatory manner, would not exercise the discretion vested in it in an unlawful manner, would not act in a manner that would frustrate the policy underlying its establishment and would not ignore weighty and cogent evidence in its conclusions.

The Applicant faulted the Commission for having acted contrary to the promise to act as a judicial inquiry in coming to its findings and deciding against his interest. In so doing, the Applicant contended, the Commission ended up violating the stated requirements in coming to the adverse findings and in recommending civil action or criminal prosecution against him.



Allowing the application, the court found and held that “[T]he Commission had clearly indicated that it was a judicial commission of inquiry to be guided by judicial principles. It must be held to its representation on this. The Applicant did submit to its jurisdiction through his Counsel on this understanding”<sup>107</sup>.

In determining whether or not to uphold expectations claimed as legitimate, the court should reconcile the concerned authority’s continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied and have been justified in relying on a current policy or on an extant promise. Courts should also make sure that the power to make and alter policy is not abused to unfairly frustrate legitimate individual expectations. Even more important is the need for the courts to ensure that the power to change stated or established policy is not misused or abused by administrative agencies.<sup>108</sup> Professor Paul Craig has summarized the principles to guide courts in determining whether an expectation was reasonable and legitimate as follows:<sup>109</sup>

- 1) The first consideration relates to the nature of the representations themselves. Reasonable expectations only arise if the representations are clear, precise, unambiguous and unequivocal.<sup>110</sup>

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<sup>107</sup> Supra note 97

<sup>108</sup> *R. v Inland Revenue Commissioners ex p Preston* [1985] AC 835; *Keroche Industries Ltd v. Kenya Revenue Authority & Others* Misc. Civil App No 743 of 2006 reported in [2007] eKLR

<sup>109</sup> Paul Craig, *Administrative Law*, 5<sup>th</sup> ed, outlines all the considerations. For detailed study of the principle of legitimate expectations, see also Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2003)

<sup>110</sup> Soren Schonberg, *Legitimate Expectations in Administrative Law*, Ibid. 120

- 2) There are no strict rules as to form of representation. The representation may arise from words, documents or conduct or from a combination of these. Consistent conduct over a long period of time may give rise to an expectation. Conduct such as prolonged treatment of a person in a particular way, can create a reasonable expectation that the treatment will continue until further notice. In such a case legitimate expectation would be said to arise from established practice or tradition.<sup>111</sup>
- 3) Representation may be based on a variety of sources, including statement, a circular, a report, an agreement or conduct. The more specific and explicit the source of representation, the easier it is to establish the representation in question and to determine its legitimacy.
- 4) An expectation will not be regarded as reasonable or legitimate if the applicant could have foreseen that the subject matter of the representation was likely to alter, or that it would not be respected by the relevant authority. Representation will not be held reasonable or legitimate if it is apparent it was not intended to create an expectation.
- 5) Where representation is required to be made in a particular form or by a particular authority, it has to be so made. A claim for expectation arising from representation other than in the prescribed form will fail.

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<sup>111</sup> *Supra note 97; R v. Devon County Council ex p Baker* [1995] 1 All ER 73, 88 - 89

- 6) Detrimental reliance grants a strong foundation for preventing an authority from going back on a representation. It is unfair to thwart expectations where an individual has suffered detriment as a result of reliance placed on a representation.<sup>112</sup>
- 7) Detrimental reliance is not required where an agency seeks to discriminately depart from an established policy in relation to a particular individual. The principles of nondiscrimination, and the requirement for consistency and equality of treatment are at stake in such cases and these values should be protected irrespective of whether and individual has suffered detriment as a result of reliance on the representation.
- 8) An expectation will not be easily regarded as reasonable or legitimate where it would confer unmerited, bizarre, fanciful or improper benefits which offend against considerations of fairness and justice.
- 9) The claimant to an interest arising from legitimate expectations has a duty of good faith and must disclose all relevant materials in laying the claim. An expectation will not be regarded as reasonable or legitimate if the beneficiary has engaged in deliberate acts of concealment, non-disclosure and distortion of relevant matters.
- 10) Even if the expectation is reasonable and legitimate there may be good reasons why the public body needs to act so as to defeat it. This

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<sup>112</sup> Ibid.

requires that individual assertion to expectation be weighed against the general public interest and the common good. This is the application of the principle of proportionality in determining legitimacy of expectations.

In a nutshell, the High Court of Kenya has summarised the justification underlying the application of the principle of legitimate expectations to executive decisions in *Keroche Industries Ltd v. Kenya Revenue Authority & 5 others*<sup>113</sup> as follows:

... legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all ... which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation ... legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way ... public authorities must be held to their practices and promises by the courts and the only exception is where a public authority

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<sup>113</sup> Supra note 97

has a sufficient overriding interest to justify a departure from what has been previously promised.<sup>114</sup>

### 3.7.7 Fairness

The principle of fairness has an important place in administrative law in Kenya at present and is a ground upon which courts ordinarily intervene to quash decisions made in violation of individual rights, privileges and liberties.<sup>115</sup>

The recognition of fairness as a judicial control mechanism in Kenya has extended the application of the rules of natural justice and expanded the scope of judicial review to bodies, powers and functions previously considered not amenable to judicial review.<sup>116</sup> In *Infant K (H)*,<sup>117</sup> the English Court of Appeal asserted that whether the function being discharged by the administration may be regarded as 'quasi-judicial' or 'administrative', it must nevertheless be discharged with fairness.

In the case of *R v. the Staff Disciplinary Committee of Maseno University & 2 Others Ex p. Prof. Ochong' Okello*<sup>118</sup> the High Court of Kenya dealing with a matter of staff discipline held that the mere fact the decision affects the legal interest or rights of a party makes it judicial and mandatory that it complies with the requirements of natural justice and fairness.

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<sup>114</sup> *Keroche Industries Ltd v. Kenya Revenue Authority & Others*, *supra* note 106

<sup>115</sup> *Ibid*; *Ridge v. Baldwin* [1964] AC 40; [1963] 2 All ER 66

<sup>116</sup> See discussions on review of non-statutory powers under this chapter.

<sup>117</sup> [1967] 1 All ER 226

<sup>118</sup> Kisumu Misc. App. No.227 of 2003 (Unrep)

Kenyan courts have upheld and asserted the requirement of fairness in all cases in which the right of an individual may be adversely affected by administrative decisions. These include cases involving disciplinary action against students,<sup>119</sup> dismissal from public service<sup>120</sup> and all actions that may interfere with a person's right to engage in or practice a particular kind of trade or business.<sup>121</sup>

It is not the purpose of this part of the thesis to discuss the heads of judicial review. It suffices to state that the constant evolution of the existing norms and emergence of new grounds of judicial control cannot be explained by reference to the ultra vires doctrine cast in terms of enforcement of legislative intent. To say that these developments are justified in relation to legislative intent would be to say that legislative intention changes from time to time.

Sir John Laws captures this point when speaking of developments in judicial review:<sup>122</sup>

It cannot be suggested that all these principles, [viz., the modern principles of administrative law in particular, natural justice, improper purposes, the protection of legitimate expectations and Wednesbury unreasonableness], which represent much of the bedrock of modern administrative law, were suddenly interwoven

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<sup>119</sup> Supra note 57

<sup>120</sup> Supra Note 63

<sup>121</sup> Supra note 67

<sup>122</sup> *Law and Democracy*, [1995] PL 72 at 79

into the legislature's intentions in the 1960s and 70s and onward, in which period they have been articulated and enforced by the courts. They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig leaf to cover their true origins. We do not need the fig leaf any more.

But, even where the power in question is established by statute; legislations seldom provide adequate direction to courts as to the application of administrative law principles on the exercise of the power. Very scant guidance, if any, is often derived from enabling legislations as to what should be considered to be relevant as opposed to irrelevant or ulterior considerations, reasonable as against unreasonable decisions or processes, *bona fide* as against *mala fide* exercise of power, or abusive and capricious as against proper exercise of power. Parent legislations are often expressed in broad and sweeping terms. In fact it is not realistic to think of legislative process being conducted in this manner.<sup>123</sup> Courts as a matter of necessity have to and do make their own considered judgment on such matters; without reference to any implied or decipherable legislative intent.

As conceded by Forsyth, a staunch proponent of the ultra vires doctrine, Parliament could never have formed the intention, express or implied, on the

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<sup>123</sup> Sir Stephen Sedley, *The Common Law and the Constitution* in Lord Nolan and Stephen Sedley, *The Making and Remaking of the British Constitution* (1998) at 79.

many, subtle and various principles which form the modern law of judicial review. The content of the rules of natural justice, the concept of unreasonableness and irrationality, the requirement of good faith, legitimate expectations, fairness and the like are judicial and not legislative constructs.<sup>124</sup>

By redefining the existing norms and creating new mechanisms of control, courts are concerned to ensure all administrative wrongs are appropriately remedied. Professor Wade rightly explains that "[T]he judicial instinct is to fight on all fronts against uncontrollable power; and although there will always be a great deal of power in human affairs which no law will ever control, that is no reason for not annexing new territories wherever possible, and for not protecting against public abuse"<sup>125</sup>.

This chapter was focused to confront the claim that the ultra vires doctrine is the basis of judicial review. The analyses confirm that contrary to past thinking the claimed centrality of the ultra vires doctrine is no-longer sustainable in Kenya.

This, however, does not solve the real problem. There still remains a need to establish the basis of judicial control in Kenya. This, it is suggested here, can only be achieved by relating the exercise of judicial review jurisdiction to the constitutional setting operative in Kenya. This will be the focus of the following chapter.

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<sup>124</sup> Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, supra note 82

<sup>125</sup> HWR Wade, *New Vistas of Judicial Review* (1987) 103 LQR 323 at 324



## CHAPTER FOUR

# THE RULE OF LAW AS THE BASIS OF JUDICIAL REVIEW IN KENYA

### 4.1 Introduction

The theoretical basis of the ultra vires doctrine was analysed in Chapter 2 of this work. The ultra vires doctrine presupposes that in exercising their judicial review jurisdiction, courts are basically concerned to implement the intention of Parliament. The doctrine was found to be satisfactory in explaining the exercise of powers deriving from statutes, including substantive review of delegated legislations.

In Chapter 3, the thesis confronted the claim that the ultra vires doctrine is the basis of judicial review in Kenya. In particular, judicial treatment of ouster clauses, court jurisdiction to strike down statutes and to review delegated legislations on procedural grounds, judicial review of non-statutory powers, bodies and functions, the constant emergence and evolution of norms of review and expansion of the scope of judicial review over time together with the inability of the ultra vires doctrine to evince a sound explanation for court intervention on the ground of error on the face of the records have been analysed and presented as realities that are irreconcilable with the ultra vires doctrine.

The current task of this thesis is to interrogate and present a satisfactory and convincing account for the exercise of judicial review jurisdiction by Kenyan courts. Such rationale must not only be able to obviate the shortcomings of the ultra vires doctrine analysed in the previous chapter but also establish a foundation for judicial review that is consistent with the local (Kenyan) constitutional order.

The task is proceeded with in three main stages. At first, Kenya's constitutional order will be defined. In so doing, the concept of constitutional supremacy and the rule of law as principles that underpin the constitutional order in Kenya will be discussed.

Secondly, the rule of law will be defined and its normative content analysed. Thirdly, the link between the rule of law and judicial review and the capacity of the rule of law to furnish the basis for judicial review in Kenya will be discussed.

Lastly, an examination will be undertaken to confirm how placing judicial review within the constitutional order enables one obviate the shortcomings of the ultra vires doctrine detailed in chapter three of this work.

## 4.2 Kenya's Constitutional Setting

Kenya is a constitutional democracy. In constitutional democracies, the powers of the government are limited by law, which are hierarchically ordered with the constitution as the supreme source of law to which all other laws must conform.

The Constitution of Kenya is the supreme law of the land. The Constitution has the force of law throughout the country and validates all other laws. Any law that is inconsistent with the Constitution of Kenya is null and void to the extent of the inconsistency.

In upholding its inherent supremacy, section 3 of the Constitution, as amended in 2008 proclaims:

This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Provided that the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to section 15A (3).<sup>126</sup>

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<sup>126</sup> Section 3 of the Constitution of Kenya. The proviso was inserted vide amendments effected to the Constitution by *The Constitution of Kenya (Amendment) Act, 2008* to enable the enactment of *The National Accord and Reconciliation Act, 2008* to create the positions of the Prime Minister and two Deputy Prime Ministers and establish a coalition Government in Kenya after the 2007 national and presidential elections. The constitutionality of the amendments

The supremacy of the Constitution against all other laws and the need to accord constitutional provisions liberal interpretation has been upheld in several cases in Kenya. In the case of *R v. El Mann*<sup>127</sup>, for instance, it was held that:

We do not accept the proposition that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. When an Act of Parliament is in any way inconsistent with the Constitution that Act of Parliament, to the extent of that inconsistency, becomes void. It gives way to the Constitution. It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally and not in a pedantic ... restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principle and value embodied in

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which were intended to bring the country out of the crisis which followed the 2007 presidential elections is beyond the scope of this work.

<sup>127</sup> [1969] EA 357. In *Michuki & Anor v. AG & 2 others* [2002] 1 KLR, 498, the High Court held that the Constitution is supreme and cannot be amended by an Act of Parliament and that an Act of Parliament that is unconstitutional is void to that extent. In *Njoya & 6 Others v. AG & 3 Others* (No 2) [2004] 1KLR 261, it was held that the "Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it." See also *R v. The Commissioner of Police ex p Nicholas Gituhu Karia* Misc. App. No. 534 of 2003

it, that a Constitution is a living piece of legislation. It is a living document.<sup>128</sup>

In Kenya, it is neither Parliament, nor even the executive or the judiciary, but the Constitution which is supreme. The Constitution creates and is supreme to the legislature, the executive and the judiciary. The Constitution establishes the arms of government and vests in them specific constitutional functions. The arms of Government only act to the extent that the Constitution permits and delegates to them. Every branch of government has and exercises only such powers as the constitutional order permits.

In granting and vesting constitutional functions in the arms of government, the Constitution upholds the doctrine of separation of powers.<sup>129</sup> All the actions of the arms of government must therefore be tested against the constitutional benchmark for consistency and constitutionality.

A government created by the Constitution, must at all times operate within and in accordance with the Constitution. Any exercise of power outside the Constitution is invalid for violating the intent and spirit of the creator; the Constitution. This is what constitutional supremacy is about. In *The Federalist Papers*, Alexander Hamilton explains the principle of constitutional delegation as follows:

There is no position which depends on clearer principles than that every act of a delegated authority that is contrary to the

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<sup>128</sup> Ibid.

<sup>129</sup> Chapters 2, 3 and 4 of the Constitution establish the Executive, the Legislature and the Judiciary and vests in them separate constitutional functions.

tenor of the Commission under which it is exercised is void. No legislative act ... contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than the principle, that the servant is above his master, that the representatives of the people are superior to the people themselves, that one acting by virtue of powers do not only what their powers do not authorize but what they forbid.<sup>130</sup>

The doctrine of parliamentary sovereignty which posits that the legislature can make or unmake any law and reduces the courts to mere under-workers for purposes of effectuating the legislative intent of Parliament, therefore, does not apply to Kenya in the manner and with the intensity it does in England.

England is a parliamentary democracy with the Monarch as the Head of State. The English Parliament is a body of elected representatives. The political party with the strongest representation of members in terms of numbers forms the government and the leader of the party becomes the Prime Minister. The Prime Minister selects his cabinet from members of his political party. The other parties that do not win the election form the Opposition. The Monarch does not intervene in the day to day running of government. As a parliamentary democracy, the English political system is based on the idea that Parliament is sovereign in law-making and parliamentary legislations are considered to be the highest source of law.

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<sup>130</sup> See Alexander Hamilton, *The Federalist Papers*, p.79

In contrast, Kenya as constitutional democracy ascribes to the principle of constitutional supremacy. A fundamental feature of constitutional democracies is that they accentuate the rule of law in government with the constitution as the supreme source of law. Government – the executive, legislature and judiciary – derive their powers from the Constitution and such laws as are valid under and consistent with Constitution. The Constitution is thus the kernel of the rule of law.

The rule of law is one of those much talked about but little understood good governance concepts. What is the rule of law? What is its significance to good governance? How does rule of law differ from “rule by law” or “rule of men”? What are the institutional conditions and cultural content of rule of law? When and how is rule of law achieved?

In the following section of this chapter, this thesis analyses the meaning and entailments of the rule of law and its value in regulating public power. While doing so, the relationship between the rule of law and judicial review will be highlighted.

### **4.3 The Rule of Law Theory**

The rule of law is a very broad and problematic public law concept. Though easily perceived, its contours remain fluid and defy succinct definition and its meaning not only remains controversial but also varies from context to context.

In common parlance, the rule of law simply connotes supremacy of law over arbitrary or naked power.<sup>131</sup> In public law, however, the rule of law is a rich good governance norm and embraces ideals well beyond literal supremacy of law.

The first step in seeking to attach a meaning to the rule of law is, perhaps, to distinguish it from "rule by law". In a rule by law system, law is an instrument of the government, and the government is above the law. It is in reality "rule of men" sanctioned by law. Quite the opposite, under the rule of law all are equal before and subject to the law and no one is above the law; not even the government.

In his treatise, *Introduction to the Study of the Law of the Constitution*<sup>132</sup>, Dicey identifies three principles which together, he opines, establish the rule of law, namely: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts."

In a nutshell, Dicey's definition of the rule of law underscores supremacy of law, equality before the law and procedural or formal justice. The principles embodied in the definition have and continue to heavily influence debates on

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<sup>131</sup> Bryan A Garner, *Blacks Law Dictionary*, 8<sup>th</sup> ed. p.1359

<sup>132</sup> 10<sup>th</sup> Ed., 1959, p. 187, et seq.



the rule of law concept, more specifically in constitutional and administrative law. The ideals are discussed separately below.

By underlining supremacy of law, the rule of law regulates government power and performs two major functions. First, it limits government arbitrariness and abuse of power. Second, it makes the government more rational and intelligent in its policies and actions. In this sense, the opposite of rule of law is "rule of men". A feature of the "rule of men" concept is the idea that what pleases the ruler – read government - is law. Under the rule of men, there is no limit to what the government can do and how the government should do whatever it is to do.

In contrast, a key element of the rule of law is limitation on the powers of the government. At the core of the rule of law concept is the idea that the discretionary power of the government should be limited. Whenever there is discretion there is room for arbitrariness on the part of the government with consequential threat to the rights and freedoms of the subjects.<sup>133</sup> The rule of law abhors caprice and its ethos avail an apt device for constraining whimsical application of power.

First, the rule of law emphasizes the supremacy of law over governmental whims. This is the value captured by Dicey when he states that the rule of law means, "in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the

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<sup>133</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution, Indianapolis: Liberty Fund, 1982, p. 110*

existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".<sup>134</sup> Thomas Paine captures the idea of legal supremacy when he states that, "For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other."<sup>135</sup> On his part, Max Weber simply refers to it as "legal domination".<sup>136</sup>

Second, if government is to be constrained in its exercise of discretionary power, then, government has to follow legal procedures that are pre-determined, pre-fixed and pre-announced. As F. A. Hayek puts it, rule of law "means that a government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge"<sup>137</sup>. For example, in constitutional and criminal law, there is a prohibition against retrospective application of laws. This means that government cannot declare an act a crime and apply this to punish past behaviour.

The rationale for this is threefold. First, prohibition on non-retrospective application of laws inhibits government from abusing its power to conveniently declare particular acts criminal to arbitrarily punish individuals for whatever reasons. Second, it would be grossly unjust and oppressive for

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<sup>134</sup> Ibid. p. 120

<sup>135</sup> Thomas Paine, *Common Sense* (1776), [http://en.wikipedia.org/wiki/common\\_sense](http://en.wikipedia.org/wiki/common_sense)

<sup>136</sup> Max Weber, *Economy and Society*, ed. G Roth and C. Wittich, Berkeley: University of California Press, 1978

<sup>137</sup> F. A. Hayek, *The Road to Serfdom*, Chicago: University of Chicago Press, 1994, p.80

the government to punish someone for behavior that was not known to be criminal at the time of commission; third, to punish individuals in such a manner would result in serious uncertainties as to the conducts prohibited in law that it would create unwarranted anxiety in the lives of the subjects.

As stated above, the rule of law as a constraint on government power not only limits governmental arbitrariness but also makes the government more intelligent and articulate in its decisions and actions. As Professor Stephen Holmes stresses, "only a constitution that limits the capacity of political decision makers to silence their sharpest critics ... can enhance the intelligence and legitimacy of decisions made"<sup>138</sup>.

Without rule of law as a limiting device on discretionary power, government actions and decisions can easily be corrupted by passions, emotions and short-term needs and irrationalities. Accordingly, the rule of law helps government to act and decide according to the states' long-term interest and reason.

The second precept of the rule of law, according to Dicey, is equality before the law. On this ideal, he writes:

"Not only that . . . no man is above the law, but (what is a different thing) that . . . every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. . . .

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<sup>138</sup> Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago: Chicago University Press, 1995, p. 8

Though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen"<sup>139</sup>.

Equality before the law is a widely recognized rule of law principle, although different societies might have different situational or contextual interpretations of what it really entails. It emphasizes the ideal that everyone, regardless of his position in society or status in life, is subject to the law and underpins the indiscriminate force of law over all. Neither government nor common citizens are allowed to break the law. Government officials and politicians are under the same responsibility for unlawful acts and are subject to court jurisdiction as any ordinary or private citizen. As Montesquieu affirms, "law should be like death, which spares no one."<sup>140</sup>

In Addition, all persons accused of wrongdoing, whatever be their station in life, are entitled to equal treatment under and equal protection of the law and to be accorded due process or fair and just treatment or hearing in all proceedings or official actions against them. This requires that procedures if any prescribed for taking such official decisions should be adhered to. But even in cases where procedure is not prescribed, the rules of natural justice should be upheld and applied to secure fairness in the ultimate administrative decisions.

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<sup>139</sup> Dicey, supra note 9, p. 114-115

<sup>140</sup> Charles de Secondat Montesquieu in *Perspectives*, Vol.1 No. 5

Most importantly, the law governs the actions of everyone in a rule of law system. Public officials and the citizenry from the highest to lowest ranks in both government and society are subject to law without distinction. More importantly, all laws and the actions based on those laws must conform to the Constitution as the highest law of the land.

The third meaning of rule of law embraces the idea of formal or procedural justice or due process. Only a formal legal system can achieve and maintain "legal domination" – read rule of law. This is because a formal legal system contains predetermined system of rules for consistent application. As already discussed, the existence of prefixed rules made known before-hand coupled with consistent, indiscriminate and equal application of the same is indispensable for the realization and sustenance of the rule of law.<sup>141</sup> By "formal" is stressed the concept of decision-making according to rule.<sup>142</sup>

A formal legal system results in formal or procedural justice, which "connotes the method of achieving justice by consistently applying rules and procedures that shape the institutional order of a legal system"<sup>143</sup>. More specifically, formal or procedural justice consists of several principles. First, the legal system must have a complete set of decisional and procedural rules that are fair. Second, the fair rules of decision and procedure must also be

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<sup>141</sup> F. A. Hayek, *The Road to Serfdom*, *supra* note 12

<sup>142</sup> For detailed analyses, see Max Weber, *Economy and Society*, ed. G Roth and C. Wittich, Berkeley: University of California Press, 1978. See also Frederick Schauer, "Formalism" *Yale Law Journal* 97 (1988) 509 at p. 510

<sup>143</sup> Shen Yuanyuan, *Conceptions and Receptions of Legality: Understanding the Complexity of the Law Reform in China* in "The Limits of the Rule of Law in China", ed. Karen G Turner, James V Feinerman and R Kent Guy, Seattle: University of Washington Press, 2000, p. 31

pre-fixed and pre-announced. Third, these decisional and procedural rules must be transparently and evenly applied. Fourth, these decisional and procedural rules must be consistently applied. When these four conditions are satisfied, then it can be said that formal or procedural justice has been achieved.<sup>144</sup>

It is to be noted that procedural justice is more concerned with how policies and rules are made and applied rather than with matters of content.<sup>145</sup> In other words, as long as the process is fair, transparent and consistent, procedural justice is achieved.

One example is due to illustrate the concept of procedural or formal justice in contrast to substantive justice. If, in fact, a person has killed another person, substantive justice requires that the killer be punished for the crime. However, before the killer can be punished he must be afforded due process of law and be granted a fair hearing before an impartial court. Despite being known to have killed the victim, he cannot be punished before he is tried and convicted of the offence and before he is proved guilty and convicted, he must be presumed innocent. He enjoys protection of the law and his human rights must be respected.

The demands of due process or procedural justice are such that the killer cannot be forced to incriminate himself. Most importantly, all evidence against him must be lawfully acquired and he must be subjected to court

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<sup>144</sup> Ibid

<sup>145</sup> P. Selznick, *Law Society and Industrial Justice*, New York: Russel Sage Foundation, 1969, as cited in Shen, *supra* note 18, p. 30

within the time stipulated in law. If the killer is illegally tortured by the police to confess to his crime and, as a result of the confession, the police finds conclusive evidence, such as the weapon, the body of the victim, etc., for the court to convict the killer, which would result in substantive justice, there is a breach of procedural justice because the process of ascertaining guilt has violated the basic rights of the killer who, before the conviction, is a citizen entitled to the full protection of the law including the right to be presumed innocent until proven guilty and convicted of the crime.

In this case, based on the criminal procedure, a Kenyan court will not allow the record of confession obtained through torture and anything found as a direct result of the confession such as the weapon and the body to go into the records of the court as evidence. As such, if the prosecutors have no other good evidence, the killer is likely to be acquitted, even though substantive justice would, on the face of it, require that the killer be punished.

Procedural justice would have triumphed over substantive justice in this particular instance. But in the end, the court will claim that justice is done simply because the pre-determined procedural rule that illegally obtained evidence is not admitted in court would have been consistently and indiscriminately applied and the requirement that an accused person is to be presumed innocent until he is proved guilty beyond reasonable doubt in an ordinary court would have been upheld.

Procedural justice is a critical aspect of the rule of law and need be emphasized to forestall administrative arbitrariness. In a system that sacrifices procedural justice for the sake of substantive justice, the danger of arbitrary government power and the threat to individual liberty is grave. Eventually, such system would lead to substantive injustice as well. In contrast, a system that upholds procedural justice checks arbitrary exercise of power, protects individual rights and liberties and, in the long term, preserves substantive justice.

Formal or procedural justice serves three important functions in regulating power. First, procedural justice secures substantive justice in the end. In this sense, procedural justice is a necessary condition for attainment of substantive justice. For this reason, high value is attached to formal or procedural justice as an ideal for good governance.

Second, procedural justice is a device for constraining government arbitrariness and protecting individual rights. When the government is required to follow pre-fixed, transparent and fair procedures before it can deprive a person's life, property or other rights, liberties or privileges, the danger of government arbitrariness is substantially reduced and the prospect for wrongful deprivations of individual rights is significantly diminished.

Third, procedural justice results in consistency, predictability and certainty that are desirable aspects of economic and social life. Professor Giovanni Sartori puts this point in more stark terms and states that, "When we speak of 'juridical form' we are singling out the very requisite of a legal order. The



form of law and the formal nature of law constitute ... the characteristics by virtue of which a law is a law ... Formal is the method, not the result."<sup>146</sup>

In a nutshell, the rule of law embodies the following values:

- a) *Supremacy of the law* - No individual, public officer or private citizen stands above law. Democratic governments exercise authority by way of law and are themselves subject to law's constraints. Laws should express the will of the people, not the whims of the government or rulers. In order to achieve this, the law must be accessible and so far as possible intelligible, clear, certain and predictable. The granting of power by the legislature to the executive should be undertaken within the narrowest possible limits and that legislature should define the extent and purpose of such powers, as well as the procedures by which the power are to be exercised. An independent judicial body should be given the power to review the legislation passed by the executive.
- b) *Legal equality* — Laws should apply equally to all, save to the extent that objective differences may justify unequal treatment of different classes or categories of people. All individuals are entitled to equal treatment before the law and equal protection under the law and should be given the same rights without distinction or discrimination based on their social stature, religion, gender, race, political opinions or otherwise.

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<sup>146</sup> Giovanni Sartori, *The Theory of Democracy Revisited*, Chatham, New Jersey: Chatham House, 1987

c) *Access to justice, procedural justice* or *due process* should be guaranteed to all and fair procedures for resolving disputes established for resolution of disputes. Some procedural justice or due process ideals include:

- 1) *Nullum crimen sine lege* and *nulla poena sine lege* — no crime without law and no punishment without law. The Latin phrases express a prohibition on *ex post facto laws* or non-retrospective application of the laws;
- 2) *Presumption of innocence* — all individuals are presumed innocent until proven guilty and duly convicted. The rules against self-incrimination must be strictly upheld;
- 3) *Natural justice* – the conduct of proceedings and making of decisions affecting individual rights must uphold the ethos embodied in the rules of natural justice. No one should be condemned unheard and the decision makers must be impartial. Those accused must be granted a fair opportunity to confront the allegations made against them.
- 4) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- 5) A system of strong, independent courts should have the power and authority, resources, and the prestige to hold government officials, even top leaders, accountable to the nation's laws and regulations.

For this reason, judges should be well trained, professional, independent, and impartial. To serve their necessary role in the legal and political system, judges must be committed to the rule of law and the principles of democracy.

- d) *Human rights* - the law must afford adequate protection to fundamental human rights and freedoms;
- e) *Principles of good administration* - public officers and all persons who engage in activities of a public nature or that affect the rights, freedoms and privileges of the people must exercise the powers conferred on them for the purpose for which the powers were conferred and without exceeding the limits of such powers, fairly, reasonably, in good faith and in a manner that secures the legitimate and rightful expectations of the those affected;

In his book *The Morality of the Law*<sup>147</sup>, Lon Fuller identifies eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law as follows: -<sup>148</sup>

- a) Laws must exist and should be obeyed by all, including government officials;
- b) Laws must be published;
- c) Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, a court

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<sup>147</sup> Lon Fuller, *The Morality of the Law*, Rev. Ed. (1977)

<sup>148</sup> [http://www.uiowa.edu/ifdebook/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml)

cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed;

- d) Laws should be written with reasonable clarity and avoid unfair enforcement;
- e) Law must avoid contradictions;
- f) Laws must not command the impossible;
- g) Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed;
- h) Official action should be consistent with the declared rule.

These elements are helpful as they aid a better understanding of the rule of law concept by outlining the types of laws, or formal constraints, that societies should develop to solve legal problems in a manner that minimizes abuse of power. However, as underscored above, the rule of law extends beyond these elements.

In liberal constitutional democracies the formal definition of law presupposes constitutionalism. Without constitutionalism, neither substantive justice nor procedural justice, either in lawmaking or in the application of law, can be guaranteed.

Constitutionalism presupposes the existence of a limited government and respect for the rule of law, as embodied in legal documents, institutions, and procedures. Limited government means that government cannot act

arbitrarily when they make and enforce public decisions. Public officials cannot simply do as they please. Rather, they are guided and limited by laws as they carry out the duties of public office.

In Kenya, the Constitution and laws made in conformity with it govern and limit the actions of government officials. Constitutionalism means there is a supreme law by which the people establish and limit the powers of their government. Kenya has a Constitution, which stands above all other laws. All other laws, including those made by Parliament, must conform to the Constitution. As Alexander Hamilton explains “[N]o legislative act contrary to the Constitution can be valid.” On the contrary, a legislative or executive action that violates the Constitution can be declared unconstitutional, unlawful and a nullity by the Courts.<sup>149</sup>

The ultimate purpose of constitutionalism is to secure the rights of all people through a government established by consent of the governed. A good constitution limits the power of a government in order to secure the rights and freedoms of the individual. If a government fails to secure these rights of individuals, then it is a bad government and the people have the right to replace it.

The task of constitutionalism is, therefore, not to completely eliminate the “rule of men”. Instead, its focus is on how to establish a government with sufficient power to rule and maintain order yet with sufficient limitations on its power to prevent tyranny. Literal rule of law has its own costs such as

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<sup>149</sup> *The Federalist No. 78*

rigidity and in some cases it can conflict with justice. After all, laws are not given; they have to be made by certain people and enforced by certain people. Human factors play important roles in shaping traditions, customs and institutional cultures that inform the law and its application in every society.

The issue, therefore, is not how to eliminate the "rule of men". Instead, the real concern is how best to strike a balance between the rule of law and rule of men so as to protect human rights and freedoms and achieve liberty, equality, and justice. In this regard, constitutionalism provides a needed tool.

The rights and liberties of individuals are supposed to be protected by law against abuses of power by government officials. However, if constitutional limits on government are too strict, the government will be too weak to carry out its duties effectively. A government that is too limited by law may not be able to even enforce the laws. And yet it is also a reality that to vest in government unrestricted or unlimited right to use power as it wills, would itself mark the beginning of governmental tyranny and the end of individual liberty. Accordingly, an effective constitutional government is neither too powerful nor too weak.

The rule of law and constitutionalism protect the people from abuses of power by government. Any unrestrained source of power is dangerous to the enjoyment of human rights and freedoms. The power of an unlimited majority of the people is just as dangerous to the rights of the individual as the unconstrained power of a single ruler. The best government is both

strong enough to act decisively and effectively in the public interest and adequately limited by law to protect individual rights.

The problem of constitutionalism - how to combine the contrary factors of power and restraint, order and liberty, in law - was aptly described by James Madison as follows:<sup>150</sup>

But what is government itself but the greatest of all reflections of human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions - limited government based on the supreme law of a written constitution.

Constitutionalism – meaning limited government - is thus a necessary means to the end of securing the human rights of all people. This is the ultimate purpose of government in constitutional democracies. Constitutionalism emphasises government in which power is distributed and limited by a system of laws that must be obeyed by the rulers. In this system, the rights of individuals are determined by legal rules and not the arbitrary whims of

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<sup>150</sup> *The Federalist*, No. 51

public authorities. Everyone, regardless of his position in society, is subject to the law.

One comment on the relationship between rule of law and constitutionalism is due here. Constitutionalism requires a limited government and the rule of law is a regulator of government power. The rule of law is therefore essential for constitutionalism to thrive. As a device for limiting government arbitrariness, the rule of law grants constitutionalism the needed support for achieving its end which is a limited government.

#### **4.4 The Rule of Law and Judicial Review**

As an integral part of the constitutional order, the rule of law underscores the supremacy of law, amongst the other ideals and attributes discussed above. Applied to the powers of government, the rule of law dictates that every action by government must be justified in law. The rule of law thus acts as a safeguard against arbitrary government. Whenever compliance with the law is found lacking the affected person has a right of access to the courts of law to invalidate the act.<sup>151</sup>

Because it prohibits government from arrogating to itself powers it does not possess in law, the rule of law easily vindicates judicial review in the narrow or strict sense or for want of legal capacity postulated by the ultra vires doctrine.<sup>152</sup>

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<sup>151</sup> *Stephen Muteti Mutuku v. The Director of Land Adjudication & Settlement & Others*, Misc. App. No. 246 of 1998 (Unrep).

<sup>152</sup> Defined in Chapter 2



But the scope of the rule of law, as discussed above, does not rest at merely addressing matters of legal capacity. It goes beyond the bare principle of legality postulated by the ultra vires doctrine and not only demands that governmental action should be justified by reference to an enabling legislation but also directs that powers exercised by any person that affects individual rights, liberties and privileges should be exercised in conformity with the principles of good administration. In particular, the exercise of powers that affect the rights and liberties of individuals, whatever their source, must not be abused or applied arbitrarily but must always be exercised in a manner that is fair, proportionate, reasonable and proportionate, in good faith, in accord with the rules of natural justice and in consonance with the legitimate expectations of the subjects.

Most importantly, the rule of law as a governance concept goes beyond matters of legal capacity and imposition of principles of good administration on exercise of power. A critical element of the rule of law is the right to access courts; to remedy failures by government to exercise power as justified in law and in accordance with the principles of good administration.

Speaking of the doctrine in general terms, Lord Steyn has characterized the utility of the rule of law in regulating the exercise of power thus:

By the rule of law we primarily mean the principle of legality, viz. that every exercise of governmental power must be justified in law. But the rule of law also comprehends in a

broad sense a system of principles developed by courts to ensure that the exercise of executive power is not abused.<sup>153</sup>

The rule of law is, therefore, the overarching ethos that legitimates the exercise of judicial review jurisdiction by Kenyan Courts.

The principles of good administration<sup>154</sup> vindicated by Kenyan courts through judicial review are largely drawn from the rule of law theory. Thus, courts give effect to the rule of law by requiring fair procedures including compliance with the rules of natural justice to be adopted in the exercise of powers. The requirements of a fair hearing before an impartial body finely fit within the rule of law concept.<sup>155</sup>

In this sense, Dicey's observation that "wide, arbitrary" powers are anathema to the rule of law justifies the creation by courts of norms and mechanisms for controlling excessive and abusive use and application of power.<sup>156</sup> The grounds of judicial review which are directed towards decision-making processes such as the restrictions on taking into account irrelevant considerations, acting in bad faith, unreasonableness, proportionality and acting for improper purposes neatly fit within the principle that powers to be exercised lawfully must be exercised in accordance with the rule of law.

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<sup>153</sup> Lord Steyn, *The Weakest and Least Dangerous Department of Government* [1997] PL 84 at 86

<sup>154</sup> The phrase has been used by *Galligan* to characterise the control norms employed by courts to control abuse of power. See D J Galligan, *Judicial Review and Textbook Writers*, (1982) 2 OJLS 257

<sup>155</sup> T.R.S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) at 28.

<sup>156</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (E C S Wade, ed.) (London: Macmillan, 1964) at 188.

Similarly, since unpredictability and uncertainty ordinarily result from capricious, abusive and arbitrary exercise of governmental power, judicial control of administrative actions for violation of legitimate expectation, unreasonableness and ill-motive are justifiable by reference to the rule of law. These heads of review rest on the foundational and fundamental values of the constitution which demand that government should occur in a fair and reasonable, rather than an arbitrary and unreasonable way.<sup>157</sup>

The rule of law thus supplies the true foundation of judicial review.<sup>158</sup> In developing the norms of judicial review, courts are concerned to give effect to the rule of law and to ensure that government respects the principles it embodies.

Recent judicial pronouncements in public law demonstrate the centrality of the rule of law to the existence, exercise and development of judicial review jurisdiction in Kenya. For instance, the rule of law has explicitly influenced the courts in their application of the principle of legitimate expectation;<sup>159</sup> the adoption of a restrictive approach to the interpretation of ouster clauses<sup>160</sup>

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<sup>157</sup> Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford - Portland, 2001) at 102. See also *Keroche Industries Ltd v. Kenya Revenue Authority & Others* Misc. Civil App. No. 743 of 2006 reported in [2007] eKLR

<sup>158</sup> T.R.S Allan, "The Rule of Law as the Foundation of Judicial Review" in C F Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Oxford University Press, 2000) at 20. See also L L Jaffe and E G Henderson, "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 LQR 345

<sup>159</sup> *Keroche Industries Ltd v. Kenya Revenue Authority & Others*, *supra* note 15; *R vs. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex p. George Saitoti*, Misc. Civil App. No. 102 of 2006, reported in [2006] eKLR. The High Court while issuing prerogative orders in the two cases on the ground of violation of legitimate expectations of the applicants emphasised the need for certainty and predictability in government actions, decisions and policies. The rule of law seeks to achieve certainty and predictability in government actions.

<sup>160</sup> *Nyakinyua & Kang'ei Farmers Co. Ltd v. Kariuki & Gathecha Resources Ltd*, Civil Appeal No. 16 of 1979 (Unrep). See also *Rep thro' Olum v. Angungo & 5 Others* [1988] KLR 529. The

and other measures intended to inhibit access to courts;<sup>161</sup> determining *locus standi* or what may be considered as "sufficient interest" in order to mount judicial review proceedings;<sup>162</sup> developing principles to inhibit abuse of powers;<sup>163</sup> and prohibiting unfair use and application of prosecutorial powers. In the latter instance, the High Court of Kenya stated as follows in *Floriculture International Ltd & 2 others v. AG*:

From time to time, our Constitution and the administration of the criminal justice system are put on the anvil. Breaches of the law are alleged here and there. The need for prosecutions to be undertaken is almost invariably felt and urged. In the normal course of things, it is as much in the public interest that breaches of the law should be detected, punished, redressed and prevented, as it is to ensure that in the process of redressing wrongs and violations of the law, the people are not bashed about and persecuted, resulting in loss of respect for the law. Where there is a reckless or ill-timed, or an unmeasured indulgence in excessive criminal process, public confidence in the rule of law is gravely undermined; and where

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approach of the courts herein is informed by the need to secure access to justice which is a fundamental rule of law attribute.

<sup>161</sup> *Jotham Mulati Welamondi v. The Chairman, Electoral Commission of Kenya*, Misc. App. No. 81 of 2002. In *Commissioner for Lands v. Kunste Ltd*, Civil Appeal No 234 of 1995.

<sup>162</sup> *Kenya Bankers Association & others v. Minister for Finance & Anor (No.4)* [2002] 1 KLR 61. In *Gouriet v. H.M Att. Gen and Union of Post Office Workers* [1971] AC 435. In making it easy for people to challenge executive actions, the courts in these cases were guided by the need to make justice accessible to all, this being an important rule of law ideal. Lord Denning in his dissenting decision upheld the right to access courts to challenge governmental actions by adopting Thomas Fuller's statement "Be you never so high, the law is above you."

<sup>163</sup> *Keroche Industries Ltd v. Kenya Revenue Authority & Others*, *supra* note 31; *R vs. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex p. George Saitoti*, *supra* note 31.

the law falls into disrepute it has a shattering effect upon the society's sense of security of personal freedoms, peace, order, and possession and enjoyment of property.<sup>164</sup>

Jowell has explained the centrality and utility of the rule of law in administrative law as follows:

The Rule of Law ... disables government from abusing its powers ... Administrative Law is the implementation of the constitutional principle of the Rule of Law ... the implementation of each of (the various grounds of review) ... involves the courts in applying different aspects of the Rule of Law<sup>165</sup>

As emphasized by Sir John Laws what binds the principles of good administration is "a free-standing principle, which is logically prior to all of them ... the rule of law".<sup>166</sup>

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<sup>164</sup> Misc. Civil App. No. 114 of 1997 (Unrep). See also *Stanley Munga Githunguri v. R.* High Court Criminal App. No. 271 of 1985 (Unrep.); *Eliphaz Riungu v. R.*, High Court Criminal App. No. 427 of 1986 (Unrep.); *Kamlesh M.D. Pattni & Goldenberg International Limited v. R.*, Misc Criminal App. No. 322 of 1999 (Preliminary Objection) (Unrep.); *Anarita Karimi Njeru v. R.* (No. 1) (1979) KLR 154; *Kamlesh M.D. Pattni & Anor v. R.*, (Consolidated with Misc. App. No 431 of 1992) High Court Criminal App. No. 431 of 1995 (Unrep.) *R v. AG & Anor ex p. Kipngeno arap Ngeny*, Misc. Civil App. No. 406 of 2001(Unrep); *R. v. AG & 3 Others ex p. Justry Patrick Lumumba Nyaberi*, Misc. Civil App. No. 1151 of 1999; *Jared Benson Kangwana v. AG*, Misc. App. No. 446 of 1995; *Amrik Singh S/O Gurbaksh Singh*, Nairobi High Court Misc. Case No. 117 of 1983 (Unrep). *Koigi wa Wamwere v. AG*, High Court (NRB), Misc. App. No. NAI 382 of 1994; *GBM Kariuki v. R.*, High Court Misc. App. No. NAI 382 of 1994; *Patrick Paddy Ooko v. R.* Court of Appeal Criminal App. No. NAI 2 of 1995. The Courts herein put greater emphasis on the need to guarantee procedural justice as a necessary means to substantive justice.

<sup>165</sup> J Jowell, "The Rule of Law Today" in J Jowell and D Oliver (eds.), *The Changing Constitution* (Oxford: Clarendo Press, 4<sup>th</sup> Ed) at 17-18.

<sup>166</sup> Sir John Laws, "Illegality: the Problem of Jurisdiction" in M Supperstone and J Goudie (eds.), *Judicial Review* (London: Butterworths, 1997) at 4.31

#### 4.4.1 The Rule of Law and Preclusive Clauses

One of the attacks made against the ultra vires doctrine in the previous Chapter is that it cannot be rationalized with the courts' exercise of judicial review jurisdiction against statutory provisions which in their face appear to preclude court intervention. The ultra vires doctrine holds that judicial review is strictly concerned with implementation of legislative intention. If this is the case, then, it is inconceivable to see courts refuse to give effect to the plain and literal meaning of preclusive clauses.

As explained by Elliott, to "the extent that the traditional ultra vires doctrine denies the courts any role beyond the literal implementation of parliament's enactments, it is indeed incapable of accommodating the creative approach to ouster clauses which is evident in such cases as *Anisminic*."<sup>167</sup>

The same conceptual problem does not beset justification for judicial review based on the rule of law. The rule of law recognizes that in the discharge of their constitutional functions of statutory interpretation, courts can rightly ascribe to statutes a meaning which differs from that which it may on its face appear to bear.

Under the rule of law theory, the judiciary is not a mere delegate of Parliament whose duty is limited to effectuating legislative intent. Instead, the judiciary is a delegate of the constitution and is charged with the specific

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<sup>167</sup> Mark Elliott, *The Constitutional Foundations of Judicial Review*, supra note 29, p. 122

constitutional function of interpreting laws in a manner that upholds the rule of law within the constitutional order.

One of the most salient ethos embodied in the rule of law is the citizens' right of access to courts for resolution of legal disputes and protection of the law. In deed, the rule of law would be at an end if tribunals or bodies discharging public functions were to be at liberty to exceed their jurisdiction without any check by the courts.<sup>168</sup>

In dealing with ouster clauses, courts strike a balance between the expressed need to inhibit judicial intervention and the constitutional principle that citizens should have access to courts to vindicate their rights. In so doing, courts attribute to ouster clauses a meaning which does not frustrate; but upholds the rule of law.

Thus, the rule of law provides judicial review with a justification that is compatible with the Kenyan constitutional order. Lord Irvine LC has explained the principle as follows:

... in approaching the issue of statutory construction the courts proceed from the strong appreciation that ours is a country subject to the rule of law. This means that it is well recognized to be important for the maintenance of the rule of law and the preservation of liberty that individuals ... should have a fair opportunity ... to vindicate their rights in court proceedings.

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<sup>168</sup> *R v. Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574 at 586. *per* Lord Denning

There is a strong presumption that Parliament will not legislate to prevent them from doing so.<sup>169</sup>

In the Kenyan constitutional system, any conflict between the intention of parliament which the ultra vires doctrine seeks to enforce and the rule of law is resolved in favour of the rule of law. It is the function of the judiciary to ensure that, so far as possible, legislation is interpreted in a manner which is consistent with the rule of law. This is what the courts seek to achieve in their deemed reluctance to enforce ouster clauses.

#### **4.4.2 The Rule of Law and Nullification of Statutes**

Although Kenyan courts, as a matter of constitutional principle, lack jurisdiction to inquire into the internal proceedings of Parliament<sup>170</sup>, the courts have jurisdiction to determine whether a law passed by Parliament is consistent with the Constitution. Courts in Kenya enjoy the power to annul or strike down Acts of Parliament that do not comply with the Constitution. This they can do either by way of judicial review or through constitutional applications. In doing so, Kenyan courts do not undermine Parliament but seek to uphold a greater constitutional principle - the rule of law.

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<sup>169</sup> *Boddington v. British Transport Police* [1999] 2 AC 143 at 161.

<sup>170</sup> By keeping off the internal workings of Parliament, the courts uphold the doctrine of *separation of powers* implicitly embodied in chapters 2, 3 and 4 of the Constitution. See *Hon. Kiraitu Murungi & Others vs. Hon. Musalia Mudavadi & Anor*, HCCC No 1542 of 1997; *Samuel Muchiri W'Njuguna & Others v. The Minister of Agriculture*, Misc. App. No. 621 of 2000 (Unrep); *Samuel Muchiri W'Njuguna and 6 Others v. The Minister for Agriculture*, Civil Appeal No. 144 of 2000 (Unrep); *R vs. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex p. George Saitoti*, supra note 35.



In the case of *Rep v. Kenya Roads Board ex p. John Harun Mwau*,<sup>171</sup> the applicant filed an application for judicial review under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act<sup>172</sup> seeking a prohibitory order prohibiting the implementation of the Kenya Roads Board Act<sup>173</sup> and declarations that the Act, as legislated is unconstitutional, null and void.

The Applicant contended that the Act was unconstitutional as it contravened the principles of separation of powers embodied in the Constitution by providing for mandatory membership of Members of Parliament to the District Roads Committees, which the Act established as an executive body.

In opposing the application, the Respondents argued that an Act of Parliament could not be challenged by way of judicial review as, according to them, judicial review was only available against decisions of inferior bodies and tribunals. Overruling this objection, the High Court of Kenya stated as follows:

The remedy of judicial review is available as a procedure through which the applicant can come to court for the determination of any constitutional issue including striking down of legislation which may be unconstitutional. Judicial review has

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<sup>171</sup> Misc. Civil App. No 1372 of 2002 (Unrep). See also *Kenya Bankers Association & others v. Minister for Finance & Anor*, supra note 34 and *R v. The Commissioner of Police ex p Nicholas Gituhu Karia*, Misc. App. No 534 of 2003

<sup>172</sup> Cap. 26 at Sections 8 and 9 embody the substantive law on judicial review in Kenya. The procedure for accessing the court's judicial review jurisdiction is prescribed under Order 53 of the Civil Procedure Rules.

<sup>173</sup> No. 7 of 1999

an entirely different meaning in Commonwealth countries, which have adopted the written supreme constitutional system. ... Judicial review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be inconsistent with the Constitution ... In countries with written Constitutions, the rule of law implies certain limitations on legislative power and all other organs of state. Parliament can only exercise its powers within certain parameters for acts of Parliament to be Constitutional. The limitation which the law imposes upon the executive and the legislature can only be meaningful where there is a procedure to interpret the law and examine executive actions or decisions with finality ... This unique power to test the acts of the three arms of the state for consistency is vested in the judiciary. This is what is called judicial review powers. The judiciary in such exercise is also subject to the rule of law.<sup>174</sup>

Having affirmed its jurisdiction, the court examined the provisions of the Act and found that the Act had infringed upon the doctrine of separation of powers envisaged by the Constitution by requiring elected members of Parliament to sit on the Roads Board Committees and held the offending provision null and void.

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<sup>174</sup> Supra note 43

Under the ultra vires doctrine, the sole function of the courts would be to decipher the intention of Parliament and enforce Acts of Parliament as legislated. Courts would not be justified to go behind legislations and question their validity or constitutionality.

In striking out statutes, courts are not acting as mere delegates beholden to legislative supremacy. Instead, the courts operate under the more fundamental principle in which they are only subject to the law and the Constitution itself.

The High Court of Kenya explained the principle in the *Kenya Roads Board case*<sup>175</sup> as follows:

In Kenya the courts have jurisdiction and have been given the mandate by the Constitution to exercise unlimited original jurisdiction to scrutinize Acts of Parliament and the actions of other organs of government and to determine their constitutionality in addition to upholding the rights of the individual. The citizens can therefore come to court and seek judicial review of not only administrative actions but also the acts of the legislature or any other arm of the government ... This obviously is a great departure from the Common Law approach which is based on the supremacy of Parliament where the mandate of the courts is confined to reviewing the manner

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<sup>175</sup> Ibid

in which public authorities exercise the powers which have been conferred upon them by the legislature.<sup>176</sup>

Thus unlike in Britain where the legislature is sovereign and where no person or body is recognized by the law as having the right to override or set aside the legislation of Parliament,<sup>177</sup> the constitutional order in Kenya permits courts to strike down or annul such statutes as are found to be incompatible with the Constitution. In the same breadth, the courts have and never hesitate, if moved, to strike down subsidiary legislation where the same is inconsistent with the law. Arguments of derogation from legislative intent never avail against judicial intervention in such matters.

#### **4.4.3 The Rule of Law and Procedural Review of Delegated Legislation**

The ultra vires doctrine was attacked on the ground that it cannot justify nullification of subsidiary legislation by courts on grounds other than for clear-cut inconsistency with the enabling legislation.

The rule of law as the basis of judicial review does not encounter this difficulty. The rule of law upholds certainty and clarity as against vagueness or ambiguity; reasonable as against unreasonable legislations. Review of vague or unreasonable delegated legislations is thus easily justified under the rule of law.

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<sup>176</sup> Ibid.

<sup>177</sup> See definition of legislative sovereignty in Chapter 2.

#### 4.4.4 The Rule of Law and Review of Non-statutory powers, Institutions and Functions

One of the criticisms leveled against the ultra vires doctrine relates to its inability to justify the entirety of judicial review. As Chapter 3 explained, the fact that courts supervise the exercise of not only statutory power but also non-statutory and de facto powers cannot be justified under the ultra vires doctrine. This is because review of non-statutory power cannot be rationalized through the idea embodied in the traditional ultra vires principle that the courts are delineating the boundaries of Parliament's intent.<sup>178</sup>

The rule of law provides a unified philosophy for review of both statutory and non-statutory powers. As pointed out by Elliott, justifying judicial review in terms of the ultra vires rule or the common law would "mean that the justifications for judicial review of statutory and non-statutory power are entirely distinct, the former being found in judicial vindication of legislative intent, with the latter – of logical necessity – resting on wholly separate foundations."<sup>179</sup> And yet, courts apply very similar grounds of review to all forms of power which have been held amenable to judicial supervision. If it is maintained that wholly distinct constitutional foundations underpin review of statutory and non-statutory power, it becomes difficult to explain why the two regimes are nevertheless, in substance, the same as one another.<sup>180</sup>

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<sup>178</sup> Paul Craig *Ultra Vires and the Foundations of Judicial Review* (1998) 57 CLJ 63 at 70

<sup>179</sup> Mark Elliott, *The Constitutional Foundations of Judicial Review*, supra note 39, p.106

<sup>180</sup> *Ibid.* p. 106 - 107

These shortcomings do not beset the rule of law. As the basis for judicial review, the rule of law does not seek to justify review of statutory power purely in terms of legislative delegation, and control of other types of power under a different basis. It recognizes that the whole of judicial review rests on one unified constitutional foundation – the rule of law.

The rule of law thus provides a coherent framework which embraces judicial review of all forms of power. It encounters no difficulty in relation to review of non-statutory power. Under the rule of law, courts apply the same principles of review irrespective of the source of the power in question. In each situation, judicial review provides for control of discretionary power by reference to the underlying constitutional principle embodied in the rule of law. In this sense, the rule of law grants a cohesive and unified foundation for judicial review of both statutory and non-statutory powers.

#### **4.4.5 The Rule of Law and Review for Error of Law on the Face of the Records**

It is acknowledged even by the proponents of the ultra vires doctrine that it is incapable of justifying review on the ground of error of law. As a result, some Kenyan writers have tended to argue that the justification for judicial review derives from two distinct foundations: the ultra vires rule and error of law on the face of the records.<sup>181</sup>

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<sup>181</sup> PLO – Lumumba & Peter Kaluma, *Judicial Review of Administrative Actions in Kenya, Law & Procedure (Jomo Kenyatta Foundation, 2007), Chapter 7*

The basis of judicial review must be able to explain court intervention on all heads of review. The rule of law upholds the supremacy of the law against all forms of error of law, be they on the face of records or otherwise. Unlike the ultra vires doctrine, the rule of law theory provides a justification for judicial review that comfortably embraces review on account of error of law on the face of the records.<sup>182</sup>

#### **4.4.6 The Rule of Law and Growth of Judicial Review**

Judicial review has developed considerably in Kenya in the past decade. Kenyan Courts have in the period recognised the doctrine of legitimate expectation and the principle of proportionality and have exhibited a profound readiness to impose a requirement of fairness to a wide range of discretionary powers.

As discussed in the previous chapter, the growth of judicial review across time cannot be rationalised under the ultra vires doctrine. As already argued, if judicial review is simply about enforcement of legislative intention, then every change in the controls enforced by the judiciary through judicial review must be related back to corresponding changes in legislative intention. As conceded by Elliott, such reasoning is “highly unsatisfactory and implausible”.<sup>183</sup>

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<sup>182</sup> See *R v. Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex p George Saitoti*, supra note 42

<sup>183</sup> Mark Elliott, *The Constitutional Foundations of Judicial Review*, supra note 38, p.125 - 125

The rule of law does not encounter this conceptual hurdle and is therefore able to justify the development and evolution of principles of good administration across time. Within the rule of law, the task of the courts is not merely to ascertain and effectuate legislative intent of Parliament. Rather, it is for the courts to decide how power should be limited in order to ensure that its exercise complies with the requirements of the rule of law.

Consequently, instead of relating the growth and development of the heads of judicial review to putative changes in legislative intention, the rule of law holds that such developments relate to the evolution, across time, of the content of the constitutional principle of the rule of law. As the constitution develops, so the courts rightly draw on changing constitutional norms in order to fashion new principles of judicial review and reformulate old ones.

Just as the courts' interpretation of legislation changes according to social conditions, so do their view of what limits on discretionary power are required by the rule of law also alter as the constitution develops over time. The evolution of judicial review to date can be related to the constitutional changes which have been prompted by the massive expansion of the administrative state, necessitating the development of safeguards for individuals as they interact with government in order to ensure that citizens are treated in accordance with the rule of law.

Under the rule of law theory, it is therefore possible to appreciate the development of administrative law across time.



## CONCLUSION

The concern of this thesis was to investigate the basis for judicial review in Kenya. It is now necessary that we state the findings of the investigations.

The central principle of administrative law has long been that the court's jurisdiction to review the acts and decisions of public authorities rests on the ultra vires rule. The assumption was found to have held sway in Kenya for quite a long time and its traces can still be seen in recent case law.

The theoretical basis of the ultra vires doctrine was analysed. It was stated that the ultra vires doctrine presupposes that in the exercise of its judicial review jurisdiction, courts are strictly concerned to implement the intention of Parliament. The doctrine was found satisfactory in so far as control of powers deriving from statutes, including substantive review of delegated legislations, are concerned.

The study then went on to confront the claim that the ultra vires doctrine is the basis of judicial review. The attack proceeded on six fronts. First, it was argued that the theoretical underpinning of the ultra vires doctrine which holds that courts in controlling the exercise of executive powers simply effectuate the intention of Parliament is inconsistent with the reluctance of courts to uphold statutory provisions seeking to preclude court intervention in particular instances of administrative actions. If judicial review is strictly concerned with implementation of legislative intention, then, how does one explain courts' refusal to give effect to the plain and literal meaning of

preclusive clauses? This question was found incapable of rationalization within the ultra vires doctrine.

Second, the claimed centrality of the ultra vires doctrine was tested against the jurisdiction Kenyan courts have and exercise to strike down statutes. Under the ultra vires doctrine, the function of the courts would be to strictly enforce Acts of Parliament. Courts would not be justified to invalidate Acts of the sovereign legislature. The jurisdiction of courts to strike down statutes was found clearly irreconcilable with the ultra vires theory.

Third, the claim that ultra vires is the basis of judicial review was tested against the exercise of court jurisdiction to review delegated legislations on grounds other than for direct inconsistency with the enabling law. If judicial review is strictly concerned with effectuation of legislative intent, then, how does one explain court jurisdiction to invalidate subsidiary legislations in instances where they are made under lawful authority? Why would courts impose requirements of clarity, precision, reasonableness on delegated legislations when Parliament has not conditioned their promulgation on such terms or requirements? These questions were found incapable of satisfactory explanation under the ultra vires doctrine.

Fourth, the ultra vires doctrine was found limited and incapable of explaining court jurisdiction to review the exercise of powers and functions not deriving from statutes and court intervention in the actions of non-statutory bodies. In this case, there is no legislation whose boundaries courts would be said to

be enforcing. The ultra vires doctrine was found unable to provide a sound logic for this sphere of judicial control.

Fifth, it was argued that the basis of judicial review should provide a unified logic for the whole of judicial review. The ultra vires doctrine was found wanting in this regard as it is unable to explain judicial review on account of error of law on the face of the records.

Last and perhaps the greatest criticism of the ultra vires doctrine lies in the fact that it can neither explain the development of new norms and evolution of the existing heads of review nor avail a logical justification for the expansion of the scope of judicial review across time. Since ultra vires explains judicial review as merely concerned with implementation of legislative intention, it was found irreconcilable with the growth of judicial review norms over time since to do so would be to suggest that legislative intention evolves and changes from time to time.

On the basis of the deficiencies of the ultra vires doctrine analysed in this thesis and summarized above, it is now confirmed and asserted that the ultra vires doctrine, though a relevant norm for controlling the exercise of statutory powers, functions and institutions, has lost its hold and is not the basis of judicial review in Kenya.

But the objective of the thesis was not to end at challenging the centrality of the ultra vires doctrine. At the very core of the study was the need to afford

judicial review jurisdiction a conceptually sound juridical foundation. This was the thesis' preoccupation in Chapter 4.

In seeking to establish the basis of judicial review, chapter 4 proceeded on the principle that the basis of judicial review is better appreciated by placing this important supervisory jurisdiction within the prevailing constitutional setting. The Kenyan constitutional order was found to be defined by the doctrine of constitutional supremacy and the rule of law.

The rule of law does not have a precise definition; its meaning varies from nation to nation and between legal traditions. Generally, however, it is understood as a legal-political regime under which the law restrains government by promoting certain liberties and creating order and predictability regarding how a state functions. In its basic sense, the rule of law connotes to a legal-political system that seeks to protect the rights of citizens from arbitrary and abusive use of government power.

This study affirms that the rule of law is the basis of judicial review in Kenya. It provides a unified justification for the exercise of judicial review jurisdiction by Kenyan courts. Most importantly, the rule of law provides a theory of judicial review that is consistent with the constitutional order, upholds the creativity of the courts in developing principles to ensure that no administrative transgression proceeds uncontrolled and explains the power of courts to annul statutes and quash delegated legislations on procedural grounds.

The hypotheses herein have been proved since the study has established that the exercise of judicial review jurisdiction by Kenyan courts derives not the ultra vires doctrine but from the rule of law.

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