IS THE COMMON LAW METHOD A THREAT TO DEMOCRACY AND THE RULE OF LAW? A CASE FOR AN ADMINISTRATIVE LAW STATUTE IN KENYA.

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DEDICATION

To my mother Christine for instilling in me an ethos of striving to be better, hard work and the humility to acknowledge my shortcomings. For her prayers, her support and encouragement through the years. To my family for their support and encouragement. To my many friends who believe in doing things in the right way. To all that believe in the ideal of justice, its integrity and honesty.

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To the Almighty God for the humbling favour to complete this task.

Abstract

The Greek word nomos translates to Convection, laws of great importance and longstanding[1]. The Constitution of Kenya ably fits within the understanding of nomos for its importance and intended long lastingness. All public authority draws from it and it largely orders our daily lives. Constitutions aspire to establish stable, fixed points of agreement and pre-commitment[2]. The Kenyan constitution through its article 47 (2) has called for the enactment of a statute governing the province of Administrative Law. It is my humble view that this call is timely and should be heeded if we are truly to live by our stated credentials of a Constitutional democracy, governed by the rule of law and in which civil liberties thrive and are accorded protection. An Administrative Law statute will go a long way in ensuring stability, predictability and fostering a culture of Constitutionalism.[3]The enactment of a statute, a marked departure from the Common Law method now contemporary, will not only ensure stability and predictability but also ingrain our cherished ideals of Democracy, Rule of Law and Constitutionalism.

[1] Legal Reason; The Use of Analogy in Legal Argument -Lloyd L. Weinreb at page 153.

[2] A Common Law Theory Of Judicial Review; The Living Tree W.J Waluchow at Page (i)

[3] Constitutionalism is the idea that powers of government both can and ought to be limited and that its political, moral and legal authority depends on its observing these limitations. For this description please see W J Waluchow's text at page 21.

CHAPTER ONE

1.0 Introduction

Administrative law is a nascent but burgeoning field of law in Kenya[4]. Today, fair administrative action finds its pride of place in the Constitution and in specific, the Bill of Rights at Article 47[5].

"The large complex and evolving field of administrative law is of special importance to lawyers and indeed all those concerned with [...] democracy. This is not only because administrative decision making can and increasingly does touch upon almost any aspect of our lives but more fundamentally, because administrative law is one of the primary means by which our commitment to the rule of law is applied. This commitment to the rule of law may be seen at its most direct in the field of Judicial Review"[6]

As a polity, we are dedicated to the Rule of Law[7].Administrative law therefore should be seen as a natural restatement of that belief and commitment. The Rule of Law requires that it guides its subjects in their affairs and that they understand and comply with it. Officials as well as ordinary citizens should be subject to its dictates[8].The dominant requirement of the rule of law is that the exercise of official power, whether legislative .executive or judicial, be supported by Constitutional authority or law made under such authority[9]. In our case however, this province of law continues to be administered through common law principles, an unwritten set of principles;

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[4]The Judicial Review Division was only established in 2003 as a fused part of the Constitutional Division. See Peter Kaluma, Judicial Review: Law procedure and practice at page xv.

[5]The Bill of Rights, Chapter 4, the Constitution of Kenya 2010.

[6]The Hon. M.E. J. Black AC Chief Justice of the Federal Court of Australia, quoted in the foreword of Australian Administrative Law; Fundamental Principles and Doctrine: Mathew Groves and H. P. Lee, Cambridge University Press.

[7]The concept of the Rule of Law is enshrined as part of the Principles and Values of Governance under Article 10 of the Constitution 2010.

[8]United States and the Rule of Law in International Affairs: John F. Murphy, Cambridge University Press at pages 1-2.

[9]Groves and Lee, Australian Administrative Law: Fundamental Principles and Doctrine at page 18

'the law applied by the courts, as developed through the system of precedent without reference to legislation passed by Parliament'[10]. The Common Law method of adjudication has raised several questions with regard to the rule of law, an example being that in democratic settings such as ours, should judge –made law continue to hold sway in the general development of law?

1.1 Problem Statement

The common law as laid out by its doctrinal underpinnings has considerable shortcomings. There are more coherent and predictable alternatives to the Common Law method in the development of Administrative Law.

1.2Research Objectives

The main objective of the study is to evaluate the Common Law method and its deficiencies. Specifically, I intend to highlight some of the frailties manifest in the application of the Common Law method in Kenya such as to afford judge's discretion that has at times been abused.

This wanton application of discretion has presented a dilemma of law being used as a means towards a pre-conceived end, an instrumentalist approach that robs the law of the certainty and integrity requisite in a democratic society guided by the rule of law.

I intend to propose statute based methods of interpretation as better alternatives towards the development of Administrative Law jurisprudence, which I believe narrows considerably the discretionary power afforded to judges and consequently better assures the rule of law.

I intend to highlight the fact that the future of our nascent democracy lies in respecting the separation of powers such as to confine every arm of government to its proper constitutionally designated role.

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[10]Common Law reasoning and Institutions, Adam Gearey and Wayne Morrison, University of London International Programmes at page 25.

1.3 Research Questions

Is the Common Law method a threat to the rule of law and democracy? In employing the Common Law, have judges remained faithful to established methods of analysis and adjudication, settled and understood under the Common Law? In applying the Common Law method, which at times hinges on the individual judge's philosophical leanings, are we assured of conformity to the rule of law, as an overarching concept and the ideal that is democracy? Should there be a rethink in how we develop administrative law in general by using other methods, away from the Common Law method?

1.4 Methodology

My research methodology will be centered solely on qualitative research or the desk based format. The themes I will be looking at are largely based on written works. Legal interpretation and analysis, for example, as a genre of law, being largely theoretical, has a lot of material on it that will help in my research, material that has been primarily been reduced into books and scholarly articles. I intend to compare several of the material in my analysis of the subject.

1.5 Conceptual Framework

The democratic principle is seriously compromised if unelected and politically unaccountable judges are left with the task of fleshing out the contours of the moral rights the charter claims guarantee.[11] Not only are the judges empowered by the charter to thwart the democratic will – they seem now able to do so by imposing their own possibly idiosyncratic and biased moral beliefs and ideologies on the citizens and ultimately, the bodies these citizens elected to represent them.[12] Prof. Waluchow narrates a powerful objection to this state of affairs, from what he calls the 'Argument from Democracy', to display the unease that has been there in the development of charter rights by use of the Common Law method. Indeed, the Common Law

[11] A Common Law Theory of Judicial Review: The Living Tree, W.J. Waluchow at page 3-4.
[12] Ibid

reasoning fits neatly into the understanding proffered by Lloyd L. Weinreb in his description of analogical reasoning[13]

The proponents of the Common Law method have traditionally advocated for a two tiered approach of advancing this legal tool. These approaches are:

(a) The natural model.

(b) The rule model

The natural model entails the court resolving disputes by deciding what outcome is best, all things considered. In the court's balance of reasons for a decision, prior to judicial decisions are entitled to exactly the weight they naturally command[14].

The second variant of common law reasoning is the rule model in which courts treat rules announced by prior courts, as serious rules of decision, but then revert to natural decision making when rules provide no answers[15].These philosophical arguments surrounding the merits of the Common law ideology or the lack of merits for that matter, present a clash of viewpoints, dogma rooted in historical pasts. The clash nevertheless is ably resolved by recourse to the Constitution which neatly divides power pro rata among the three arms of government[16]. Article 94(5) of the Constitution states in clear terms that: 'No person or body, other than parliament has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.' Indeed sub-article 6 of article 94 clearly delineates the contours under which the authority emanating from the Constitution by way of legislation may be exercised.

Article 47(3) of the Constitution fits into the argument on authority advanced by Article 94(5). It states that 'Parliament shall enact legislation to give effect to the rights of fair administrative action.'

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[13]Legal reason: The Use of Analogy in Legal Argument: 'An analytical argument can be described as reasoning by example; finding the solution to a problem by reference to a similar problem and its solutions" – Weinreb at page 4.

[14]See Larry Alexander and Emily Sherwin, Demystifying Legal Reasoning, page 31, quoting Michael S. Moore's 'Precedent, Induction and Ethical Generalization in Precedent law.

[15]Alexander and Sherwin at page 32,quoting their own work 'the Rules of rules'

[16]Under Chapters 8, 9, and 10, authority is granted to the Legislature, the Executive and Judicial arms of government respectively, with their roles specifically defined.

The legislature, by the wording of Article 47(3) is obligated in mandatory and clear terms to prepare legislation governing provisions on fair administrative action. The legislature therefore 'cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others'[17]. By maintaining the Common Law method to advance the regime of Administrative Law, it would appear that the Constitution is not being respected, let alone the rule of law questions that the Common Law methodology poses.

The creed we profess called democracy demands that as a basic, the wishes, dignity and rights of an individual are respected. As a Constitutionally governed democratic state, as we claim to be, we have no choice but to adhere to these ideals that we emphatically bequeathed unto ourselves: The Constitution, its decreed democratic culture and constitutionalism. I will be relying on among others, Charles Secondat Baron de Montesquieu's arguments on separation of powers, such as to justify the reasoning that judges should be tethered to their constitutional role as captured in chapter 10 of the Constitution without them being seen to be encroaching on the turf of the legislature courtesy of their 'judge –made law' which underpins the Common Law notion.
Prof. W. J. Waluchow provides and incisive look at the Common Law dogma[18].He states that the features of Common Law are puzzling and proceeds to highlight some of its salient features[19].
First, the absence of a single authoritative formulation is what distinguishes Common Law rules from legislative ones.
Second, Common Law rules are not made by legislatures. They are created by courts simultaneously with the application of those rules to concrete cases.
Thirdly, all Common Law rules are created in the process of application, but they are also applied in and to, the very case that prompted the rule making. Thus Common Law rules are applied retroactively to facts arising prior to the establishment of the rule.
Lastly, Common Law rule making does not merely make new law where there is no existing law. Instead, the law making power of Common Law courts is more interstitial and extends to

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[17]John Locke, Two Treatises of Government, page 167.

[18] Waluchow, 'A Common Law Theory of Judicial Review – the Living Tree', quoting Fred Schauer's 'Is Common Law? At page 197

[19]Ibid.

modifying or replacing what has been previously thought to be the governing rule when applying that rule would generate a malignant result as relates to the case at hand"[20]–

Loosely put, as brought out by Prof. Waluchow, 'with the Common Law, we seem to have the rule of law without the rules. We seem to have a process whereby rules are either absent or made up as we go along and applied retroactively, only to be changed later when the next case comes along.'[21] This in my view would be a blatant blending of judicial and legislative functions by the Common Law leaning courts.

"Stripped of all technicalities, the rule of law means that government in all its actions is bound by rules fixed and announced before hand; rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of knowledge" [22]

The formative demands of the concept of the rule of law are that law should be announced prior and that in its application, the law should be consistent and apply to all in equal measure. Due to the loose structured nature of the Common Law concept, some judicial officers have taken it upon themselves to develop the law hinged on their individual suppositions. The Common Law has been characterized as the foundation, perhaps the cornerstone of Sociological and Realist schools of jurisprudence which dominated legal scholarship and teaching in the twentieth century[23]. With this in mind, the question then begs, should we remain shackled to notions of Law that held sway at a particular point in time but today debilitates the very foundations of our being- the rule of law and democracy?

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[20]Ibid

[21]Ibid at page 198

[22]Brian Z. Tamanaha, 'Law as means to an End – Threat to the Rule of Law' at page 227, quoting Friedrich Hayek's 'The Road to Serfdom'

[23]Sheldon M. Novick, page iii of 'The Common Law' – foreword, by Oliver Wendell Holmes Jr.

1.6 Assumptions/Limitations of Study

Due to the wide scope of literature that my field of study has spawned, I intend to limit my research to select authored articles and books from the United States and the United Kingdom, being the foremost jurisdictions as far as the debate around Textualism-Formalism and the Common Law methodology emanate[24]. I have also been opposed to wide discretionary powers that judicial officers have had in handling judicial disputes in the guise of advancing Common Law. The literature gathered however is aimed at tempering my views by affording the views of both sides[25]. In the end, I hope to have benefited from the arguments such as to tread the middle ground, even though I would be advocating for the enactment of a statute to guide the province of Administrative Law.

1.7 Work Plan and Chapter Breakdown

The projected time frame to complete the research objectives will be as follows:

September and October 2013-The two months will be dedicated to reading basic materials on the research area such as to gain an understanding, prepare the concept paper as well as the draft Proposal.

November and December-These two months will be dedicated to fine tuning the draft Proposal, by making any amendments for final submission on or before December 21st 2013.In addition, considerable time will be spent on reading more of the texts on the research area.

January and February 2014-These two months will be dedicated to reading the books and articles as well as writing of the first chapter of the dissertation project.

March and April 2014-These two months will be dedicated to writing out the remainder of the chapters and incorporating any amendments arising. I project that the whole task should be finalized by the end of April 2014.

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[24]The doctrinal weight of these clashing doctrines is mostly evident and characterizes the workings of the U.S. Supreme Court, for example.

[25]I will consider those in support of Common Law and those who disapprove of its application.

The chapter structure should meet the following criteria:

Chapter 1 – Introduction

It will focus on explaining the concepts contained in the study.

Chapter 2 – Philosophical Analysis of the ideals of Democracy and the Rule of Law

Will broadly look at the theoretical underpinnings of the concepts introduced in chapter 1, with the focus on the themes of the Common Law, Democracy, the Rule of Law and the need for an Administrative Law statute by looking at Procedural Law as an anchoring method of statute-based law.

Chapter 3-Comparative Analysis

It will also be comparing the Common Law and Procedural Law approaches to regulating discretion by analyzing the Kenyan situation: How has the common law method been handled? I will be looking at the case of R v. Maurice Odumbe, ex parte the Kenya Cricket Association, as case study which involved judicial review to offer an analytical example as to the handling of the Common Law. This chapter wills also be drawing from other jurisdictions that have enacted Administrative Law statutes with the aim of showing that statute based methods are a better way of advancing Administrative Law.

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Chapter 4– Conclusion

Will be focused on the conclusions and any summary points.

CHAPTER TWO

ANALYSIS OF THE IDEALS OF DEMOCRACY, THE RULE OF LAW AND THE COMMON LAW AND PROCEDURAL LAW MECHANISMS OF LAW-MAKING

2.0 Introduction

This chapter intends to look at the ideals of Democracy and the Rule of Law, as well as the common law and procedural law mechanisms of adjudication. It aims at bringing out the salient features of both methods of adjudication, with an intended depiction of the Common Law method as undermining Democracy and the Rule of law, arguing that as an alternative, the Procedural Law mechanisms would be advantageous for the growth of Administrative Law without necessarily undermining the two ideals.

2.2 A Pathology of Common Law

The phrase 'Common Law' is used to denote the law applied by the courts as developed through the system of precedent without reference to legislation by parliament[26].

The open texture of law and in a particular Common Law means that there are indeed areas of conduct where much must be left to be development by courts or officials striking a balance, in light of circumstances between competing interests which vary in weight from case to case[27].Common Law rules are inherently revisable at the point of application. New cases exhibiting hitherto unappreciated features can always prompt revisiting of the rule[28].

The Common Law has some salient features that characterize its working. These are that it allows rules to be remade in the process of application, there are values which guide a Common Law court in modifying what had previously been thought to be a rule of law which are either moral, social or economic, the rules are not made by legislatures but are created by courts simultaneously with the application of those rules concrete cases and the Common Law rulemaking does not merely make new law where there is no new law. Instead the law making

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[26] The Common Law Reasoning and Institutions; Adams Gearey and Wayne Morrison, University Of London International Programmes at page 19

[27] The Concept of Law Hart at page 135.

[28] A Common Law Theory of Judicial Review; The Living Tree; W.J. Waluchow at page 199.

power of the courts is more interstitial and extends to modifying or replacing previously governing rules when applying that rule would generate a malignant result in the case at hand[29].

The Common Law is anchored on the two governing principles which are stare decisis and precedent, which in my view reflect the thought by Max Weber that 'the legitimation of the tradition authority rested on the belief that it had always been that way'[30]. Common Law judges attempt to do justice in the individual case while also understanding and in some sense, proffering the individualized judgment as a statement of a rule or proposition that can be applied through the doctrine of precedent to a generalized category of similar cases[31]. Stare decisis is a doctrine that regulates the extent to which and ways in which later courts may overrule earlier courts. It is a doctrine concerned with the development of case law[32].

The founding myths of common law as a legal tradition tend to present it as a system of custom in pays, meaning that it is a new law that rises up from the general population, as opposed to the statute law which descends upon the population from the king which descends upon the population from the king (sovereign)[33]. The foundational principles that motivate Common Law reasoning are that courts should make law concerning private conduct in ways where the legislature has not acted ....the principles of legal reasoning turn on the interplay between doctrinal propositions and social propositions and consistency in the Common Law depending on social propositions[34].This means that the judicial officer may rely on factors that are informed by the society he lives in so as to reach her conclusions.

Allan Hutchinson extols the Common Law by stating that it is not a static body of norms but it is a flexible and evolving entity; it's nuanced and organic quality is the Common Law's strength not its weakness[35]. The Common Law tradition comprises a whole repertoire of techniques for selection, maintenance, transmission and change for its substantive holdings. It involves an evaluative assessment of what does and does not work and what should and should

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[29] See Fred Schauer's 'Is the Common Law Law? at Page 455-456 and A Common Law Theory of Judicial Review; The Living Tree W. J. Waluchow at page 197.

[30] Quoted in Separation of Powers and Political Accountability; Torsten Person, Gerald Roland And Guido Tabellini at page 1165.

[31] Common Law Theory, edited by Douglas E Edlin at page 1.

[32] Ibid, John Gardiner at page 74

[33] Ibid at page 73

[34] Ibid, Melvin A. Eisenberg at page 81

[35] Evolution And The Common Law at page 3

not persist[36].In the case of Cassell and Co. Ltd v Bloom[37], Lord Diplock stated that' the Common Law subsumes a power in judges to adapt its rules to the changing needs of contemporary society, to discard those which have outlived their usefulness and to develop new rules to meet situations.'

Precedent, which is the bedrock of Common Law reasoning has three varieties; the natural model, the rule model and the result model[38].Under the natural model, courts give prior decisions whatever moral weight they intrinsically have in an all things considered processes reasoning. In other words, courts take into account the reasonable expectations of the actors, including the expectation of parties before them that may have formed on the basis of prior decisions and the expectations of non –parties who have planned their activities around past decision and reasonably expect consistency in future [39].Under the rule model, the method demands that rules announced in past opinions be treated as serious rules; a prescription applicable to a range of cases that exercise pre-emptive authority over decision makers . The role of the court is to identify the rule applicable to the case at hand, deduce the outcome prescribed by the rule and decide accordingly[40]. The result model on the other hand recognizes prior decisions as bindings but also permits courts to distinguish precedent cases that differ factually from cases before them[41].

Stare decisis et non quieta movere, as a governing principle of Common Law, has it that the court should 'stand by things decided and not to disturb settled points'[42].The doctrine of stare decisis was articulated by Rupert Cross and J. W Harris in the text 'Precedent in English Law (1991) in which it was stated that 'the general orthodox interpretation of stare decisis....is stare rationibus decidendis', meaning to keep to the rationes decidendi of past cases[43] .

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[36] Ibid at page 6

[37] 1972 A.C. 1027 at 1127

[38] Larry Alexander and Emily Sherwin quoted in Common Law Theory edited by Douglas E Edlin at Page 30-31.Please also see Larry Alexander Constraint by Precedent at Page 16-17.

[39] Larry Alexander and Emily Sherwin , Common Law Theory , Edited by Douglas E Edwin at Page 30-31; Larry Alexander , Constrained By Precedent At Page 16-17

[40] Ibid at Page 31-31; Larry Alexander, Constrained by Precedent at Page 17-19

[41]Larry Alexander and Emily Sherwin, Common Law Theory, Edited by Douglas E Edwin at Page 35; Larry Alexander, Constrained by Precedent at Page 29-30.

[42]Black's Law Dictionary, Ninth Edition; Bryan Garner.

[43] Ibid quoted at Page 1537

This doctrine is simply that when a principle of la has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new by the same tribunal by those which are bound to follow its adjudication, unless it be for urgent reasons or exceptional cases[44].

Stare decisis manifests in three forms. These are horizontal, super decisis and vertical variants[45]. Horizontal stare decisis means that a court, especially an appellate court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself[46].Super stare decisis requires that courts follow earlier courts decisions without considering whether those decisions were correct and in vertical stare decisis, the court is asked to strictly follow decisions handed down by higher courts within the same jurisdiction.[47]

2.2.1 Threats posed by common law to democracy and rule of law

Having examined the Common Law as a genre of judicial adjudication, the following can be deducted from it as posing a threat to the ideals of Democracy and the Rule of Law. First, it affords judicial officers a wide discretion, which is availed courtesy of multiple principles articulated in several precedent cases. Such discretion is exemplified in the judicial treatment of unreasonableness as a ground for judicial review as relates to exercise of discretionary power. Two senses of unreasonableness were designed to legitimate a courts intervention and to establish limits to any such intervention[48].The court is thus free to choose either of the meanings.

The first meaning of them, the 'umbrella sense' of unreasonableness was used to describe action based on illegality, irrelevance and the like. The second meaning alludes to the fact that unreasonableness has a 'substantive' meaning in its own right, that is, if an exercise of discretion successfully negotiated the hurdles of propriety of purpose and relevancy, it could still be

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[44] Ibid quoting William Lille et al 'Brief Making and Use of Law Books'-1914
[45] Ibid.
[46] Ibid.
[47] Ibid
[48] Administrative law , Paul Craig, Sixth Edition at page 615

invalidated if it was so unreasonable that no reasonable body could reach such a decision[49]. As is demonstrated with this single ground for judicial review, it can be difficult for a court to decide on what principle to employ especially when couched in abstract terms.

It has also been determined that the Common Law jurisdiction allows judges to make laws and apply them to the very same cases that elicit the making of the rule. This in my view does not bode well for the Rule of Law since governance and indeed law- making should be in accordance with 'originally intended and understood meanings of directives of legitimate, democratically accountable law making authorities,'[50]. Such rule making undermines the constitutionally granted authority to politically elected makers who are accountable to the people. In addition the mere fact that the rules are malleable and prone to change by the court at any period of its choosing does not augur well for stability and predictability, key demands of the Rule of Law.

It is also tedious for judicial officers to go through several decided cases in order to deduct the principles enshrined there in as precedent. This exercise is time consuming. Stare decisis as a doctrine of Common Law adjudication ensures dogmatic reverence to a rule which might not necessarily be out of contemporary appeal or necessity. The upshot is that we are saddled with a rule that may be difficult to change and if it is to change, we would place us at the mercy of an unelected and politically unaccountable judiciary, unlike a legislated principle which would be expeditiously amended if need be by far quicker legislative procedures. From a Rule of Law standpoint, individual made legal principles would amount to governance by men and their whims. So as to properly meet democratic demand and Rule of Law credentials, law should be made in parliament whereby it would be the outcome of intense deliberations characterized by political compromise and agreement.

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[49]Ibid. The two tests of unreasonableness are deducted from the case of Associated Picture Houses Ltd v. Wednesbury Corporation (1948) 1K.B. 223

[50] The Rule of Law as a Concept in Constitutional Discourse, Richard H. Fallon Jr., quoted in United States and the Rule of Law in International Affairs , John F. Murphy at page 2

2.2 Democracy

'The Republic of Kenya shall be a multi –party democratic state founded on the national values and principles of governance referred to in article 10'[51].By its very description, the Constitution decrees that ours shall be a state governed by plural democratic ideals. Democracy 'is one of the most diffuse and persuasive ideals in all of history.' It entered the political dictionary early with the ancient Greeks[52]. The classical statement of this ideal draws from Thucydides' 'Funeral Oration of Perides' in which he said , ' Our constitution is called a democracy because power is in the hands not of a minority but of a whole people. When it is a question of settling disputes, everyone is equal before the law.'[53]

Democracy is a fusion of fusion of two Greek terms – demos meaning 'the people' and kratos meaning 'rule' loosely meaning 'rule by the people' and can refer to direct, participatory and representative forms of rule by the people [54].The most fundamental characteristic of any democracy is the idea that citizens should be involved in making of political decisions either directly or through representatives of their choosing. These two approaches can be characterized as direct democracy and representative democracy.[55]By direct democracy it is understood that citizens take part personally in the deliberations and vote on issues. Citizens debate and pass on all laws. Under representative democracy, citizens choose (elect) other citizens to debate and pass on laws[56]. Indeed democracy is desirable to the extent that it fulfils or realizes the principle of autonomy better than any other practicable alternatives[57]. The principle of autonomy argues that everyone has equal rights and duties to participate in constituting the political system which determines their collective life conditions, provided they do not violate other persons' rights[58]. This argument for civic republicanism such as to ensure equal access to participate such as to ensure equal access to participate for all resonates with the declaration under the Constitution

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[51]The Constitution of Kenya Article 4 (2).
[52]Ideals and Ideologies of Modern Politics; Mark N. Hagopian at page 15.
[53] Ibid
[54] Contemporary Political Ideologies L.Y Sargent at page 35
[55] Ibid at page 36
[56] Ibid
[57] Democracy Versus Human Rights; Why Held and Harbermas did not resolve the tension, Johan Karlsson at page 4.
[58] Ibid at page 3

that sovereign power belongs to people and can only be exercised by the people directly or through their democratically elected representatives[59].

There is needed to make a fundamental distinction between two concepts –sovereignty and government. Sovereignty can be described as the possession of supreme (and possibly unlimited) authority over some domain[60]. Government can be described as person or bodies by means of means of which or through whom sovereignty is exercised[61].The net understanding of democracy as conceptualized under the Constitution is that governance is to be exercised for and on behalf of the people within the proper contours outlined by the Constitution.

2.3The Rule of Law

A key element of democratic governance is the principle of the Rule of Law. The Rule of Law has been enshrined as part of our national values and principles under the Constitution[62] . The basic understanding of the concept of Rule of Law was espoused by Chief Justice John Marshall in his dictum in the case of Marbury Vs Madison, in which he stated that its meaning connoted 'a government of laws and not of men'[63].

The Rule of Law requires that it guides its subjects in their affairs and that they understand and comply with it. Officials as well as ordinary citizens should be subject to its dictates[64].Perfectly realized, the Rule of Law should be in accordance with originally intended and understood meaning of directives of legitimate, democratically accountable law making authorities[65] .

It should also be cast in the form of intelligible rules binding on citizens, governments and judges alike[66]. It should be identified and elucidated in any interpretive process by publicly

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[59]Articles 1(1) and 1(2) of the Constitution of Kenya.

[60] Common Law Theory of Judicial Review- The Living Tree by W J Waluchow at page 25.
[61] Ibid
[62] Article 10(2)a
[63]1803 5 US 1 Cranch 137,163.

[64] United States and The Rule of Law in International Affairs; John F Murphy at page 1-2.
[65] The Rule of Law as A Concept In Constitutional Discourse; Richard H. Fallon Jr, Quoted In 'United States and The Rule of Law in International Affairs, John F Murphy at page 2.
[66] Ibid

accessible norms and characterized by reason-giving as well as being consistent with public purposes and sound, shared principles of political morality. In a nutshell, the expression 'rule of law' eschews arbitrariness and comports the ideal of equality of all before and under the law[67]. The Rule of Law resonates well with the understanding of the ideal of constitutionalism[68].

The Rule of Law principle is laden with certain cardinal values. Such values include legal certainty, the protection of fundamental rights, equality not merely in specific sectors but as a principle of general application, proportionality good administration and the rights of access for citizens to official documents.[69] These values associated with the Rule of Law have had a practical impact and have played a part in some remarkable achievements of the European Union[70]. An entity based on law and on values associated with the Rule of Law may benefit in political, diplomatic and even strategic terms[71].

The notion of rule of law conveys the idea that the ultimate source of authority is no longer the sovereign in the shape of a monarch or even in the shape of parliament (or even a court)[72] but rather certain values or certain fundamentals principles which form an inherent part of a well-functioning legal system [73].

2.5 Control of judicial discretion under procedural law mechanisms as a safe guard to the rule of law and democracy

Procedural conception of democracy is expressed as the identification of democracy with a form of government decision making where each is guaranteed equal rights of participation and influence in procedures that determine laws and social policies and where the decisions are reached in accordance with the principle of majority rule[74]. The understanding of the procedural conception is that each member of the society is equally entitled to vote in elections intended to select representatives to the assembly, the results of the elections are determined by majority vote

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[67] Ibid.

[68] In addition to the description by W J Waluchow quoted earlier, F A Hayek in Law Legislation and Liberty , Volume I at Page 1 describes the concept as' Limited Government'

[69]The Sovereignty of Law; the European Way, Francis G. Jacobs at page 50-51.

[70] Ibid at page 52

[71] Ibid

[72] Emphasis mine

[73] Ibid at page 61-62

[74] W J Waluchow, A Common Law Theory of Judicial Review; the Living Tree at page 106-107, quoting Samuel Freeman's Constitutional Democracy and Legitimacy of Judicial Review.

in each instance the choice is a representative who is empowered to act on behalf of the members of a community that elects him. The needs, interests, wishes and convictions of these members are the main factors to which the relevant representatives is responsive when law determining decisions are made and these decisions are made in accordance with majority .voting procedures and that voting in this way for a representative whose role is conceived in this manner, each person participates on equal footing with all other members of the democratic society in the process by which law – determining decisions are made. That is he participates on equal footing with all other members of the democratic society in the process by which law- determining decisions are made. He participates on equal footing in the process of self-governance[75].

Legislation as a product of a procedural democratic process would mean that 'judges are mere mouth pieces of the law. Their fidelity is to the law alone. They are unbiased, neutral, even handed, devoid of non-legal influences'[76]. This position is fortified by the holding by Chief Justice John Marshall in the case of Osborn v Bank of United States[77]in which stated that 'courts are mere instruments of the law and can will nothing else'. Such is the skeptism about judicial objectivity that procedural democratic process intended to address. The fear has been that 'judges are influenced by their own biases and philosophies which to a large degree predetermined the position they will take on a given position. Private attitudes in the other words become public law[78].

To avoid situations where legal pronouncements question the every foundations of a democratic state, governed by the rule of law, 'the legislature would seem a much more appropriate expositor of social values and its determination that a statute is compatible with the Constitution should (generally) prevail[79]. Largely speaking, the goals of statutory interpretation lend themselves to the three possible categories which are; first goals connected to the speaker intent. Secondly, goals connected with enforcing the readers understanding and lastly there are goals external to communication between the speaker and the reader such as promoting sound policy, making the legal system as coherent as possible or keeping the interpretive process within

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[75] Ibid at page 107

[76] Brian Z Tamanaha, Law as a Means to an End. Threat to the Rule of Law at Page 234.

[77] 22 U S (A Wheaton) 736, 866 (1824)

[78] Brian Z Tamanaha, Law as a means to end; Threat to rule of law At Page 234, quoting Lee Epstein and Jeff A. Seagal , ' Advice and Consent; The Politics of Judicial Appointments'.

[79] John F Manning, Justice and the Legislative Process at page 36.

manageable bounds[80]. In this way the statute and methods of its interpretation significantly circumscribe the boundaries within which a judicial decision may be made, By basing adjudication on a legislated statute and accepted methods of interpretation, the court heeds the calls of democracy by deferring to elected decision makers and sticking to its proper designated constitutional role which is adjudication and letting legislation and policy choices be made by the political branches of government. Justice Anton in Scalia in the case of Re Conroy v Aniskoff[81], ably supports this argument by his statement that 'the law was passed is the will of the majority of both houses and the only mode that will is spoken is in the act itself.'

An argument for procedural law methodology was also made by Justice Hugo Black in the case of Sniadach v. Family Finance[82] in which he stated 'the argument that procedural due process is required was in part derived from our Anglo-American heritage and is no more than justice of English speaking peoples or the shock the conscience test. All of these so- called tests represent nothing more or less than implicit adoption of a natural law concept which under our system leaves to judges alone the power to decide. These so called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges in deciding whether laws are constitutional are left only to the admonition of their own conscience, why was it that the founders gave us a written constitution at all?'

Indian jurist M.P. Jain argues that 'a sound judicial system must have two basic elements; a well-planned and regulated system of courts following a simple and orderly procedure and a definite, easily ascertainable and uniform body of law[83]. Without a good system of law, the courts however well planned will administer justice according to the whims, discretion, notion of good and bad entertained by the presiding judge. Since the subjective elements differ from man to man, time to time, justice without law tends to be haphazard, inconsistent and indefinite[84]. A court dispensing justice not according to anybody of principle but according to what the judge

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[80] Caleb Nelson, What is Textualism? at page 351.
[81] 507 U S 511, 519 (1993)
[82] 395 U S 337,345, 1969 , quoted by Howard Ball And Phillip J Cooper of Power And Right ; Hugo Black , William O Douglas and the American Constitutional Prediction qt Page 293-294,
[83] Outlines of Indian legal history , fifth edition (1990) at page 3-4
[84] ibid

deems fit in a particular case, cannot be an efficient tribunal. There would also be chances of corruption and bribery in such a situation[85].

Law imparts uniformity and certainty to the administration of justice and protects the fountain of justice from being polluted by operation of improper motives or errors of individual judgment on the part of the judge. Only good laws, applied soundly and efficiently will provide an impartial justice which is a paramount importance to the progress, stability and well-being society. That is way to promote the rule of law in a democratic country[86]. Consequently, arguments have been made that 'governing statues exert some constraining force on judicial creativity[87]. From a democratic perspective, it is argued that political leadership view is in the modern democratic polity, characterized as the mandate perspective', underscores the logic that the elected political authorities have either a right, an obligation or a legitimate need to pursue their goals and policy proposals and it is essential for the operative instruments of government to be in strict compliance with these.[88]The understanding is that legislative activity being fundamentally a political decision should be left to democratically elected and accountable leaders and that 'judges ought to remember that their office is .... to interpret the law and not to make or give law[89]. Legislations have been said to be norm changing acts that are alike in respect of the agency, their intentionality and their expresses[90].

Features of Procedural law making that distinguish it from other variants are; first legislated law is expressly made. It is articulated law which is expressed in words[91]. Whatever mode of interpretation is employed, the legislative text is always the primary object of interpretation [92],whatever made of interpretation is employed the legislative text is always the primary object of interpretation[93]. Whatever changes to the law one ultimately finds contained in the legislation and however one sets about finding them, one presents them as entailed by an

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[85] Ibid
[86] Ibid
[87]Gillian Metzger, Embracing Administrative Common Law at page 1293.
[88]Joel D, Aberbach and Bertz A.Rockman, Mandates or Mandarins? Control and Discretion in the modern administrative state at page 606
[89] Kenneth Culp Davis, the Future of Judge-Made Law in England; a Problem of Practical Jurisprudence at page 210, quoting Francis Bacon's 'Of Judicature.'
[90]John Gardiner in Common Law Theory, Douglas E. Edlin (Edited) at page 53.
[91] Ibid
[92] Ibid
[93] Ibid at page 53

interpretation of the legislative text (or some part of it such as a phrase or sentence or paragraph)[94]. In case of Re Spectrum plus Ltd[95], Lord Nichols suggests in this case that when courts are interpreting legislation , they cannot be bound by the intervening decisions of other courts because earlier court decisions bind in so much as they effect change in law and that interpretation leaves its object unchanged[96]. Should interpretation of the law in the statute require interpretation of the intervening case law, the legislative text remains the primary object of interpretation[97]. Secondly, legislated law is intentionally made. Just as a promise is made with the intention of creating obligations by the very act of promise, so is legislation enacted with the intention of changing the law by the very act of enacting it [98].

Words of legislating instruments remove ambiguity that would otherwise afflict many of the ensuing legislative texts read literally as reports of legal norms that already exist[99].The attendant result is that the judicial officer is properly restrained when applying the law and any discretion that may avail is made particularly narrow. Thirdly, legislation is always the act of one agent, who may be a human being or an institution like parliament. The actions of an institution like parliament for example, depend on but are not reducible to the actions of those human beings who go to make it up, such that when the institution does act through its members, its acts are distinct from those of its members[100]. The actions are not personalized and hence objective.

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[94] Ibid at page 53-54
[95] 2005 UKHL 41;(2005)A.C. 680
[96] This case is cited in the Common Law Theory, Douglas E. Edlin (Edited) at page 54, foot note 2.
[97] Ibid at page 55
[98] ibid
[99] Ibid
[100] Ibid at page 57.

CHAPTER THREE

COMPARATIVE EXPERIENCE: LESSONS DRAWN FROM OTHER JURISDICTIONS

3.0 Introduction

The previous chapter dealt with the Common Law method of law making , looking at areas of its weakness that undermine Democracy and the Rule of Law, penultimately giving reasons why Procedural Law methods would serve us in greater stead. This chapter intends to look at lessons from other jurisdictions which have enacted administrative law statutes which can serve to us as examples.

3.1Dynamics and complexities of administrative governance- a case for standardization by way of statute

'The Common Law has now , I think , no longer the strength to provide any satisfactory solution to the problem of keeping the executive , with all the powers which under modern conditions are needed for the efficient conduct of the realm , under proper control .the responsibility for that now rests with parliament [101]. The statement by Lord Devlin (Patrick Delvin as he was then known) reflects the reality that confronts the modern state. With the enactment of the Constitution of Kenya 2010, the size of government bureaucracy has increased tremendously[102].

Administrative law is a particular complex province of law that does not easily lend itself to easy definition. 'It may mean the parts of public law that do not include Constitutional law yet never be entirely being separated from Administrative law'[103].

Primarily, administrative law encompasses different mechanisms and principles that enable people to question or challenge decisions of government agencies[104].While courts play a significant role in the enterprise of governmental power control, principally through the exercise

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[101] Patrick Devlin, The Common Law, Public Policy and the Executive at page 14

[102] Please refer to the Constitution of Kenya Articles 3 and 6 as read together with the provisions of its first schedule as well as the fourth schedule.

[103] Mathew Groves and H.P. Lee, Australian Administrative Law, Fundamentals , Principles and Doctrines at page 1

[104] Ibid

of per judicial review jurisdiction and to a lesser extent through their appellate jurisdiction over many administrative decisions, they form only one part of the picture[105].

A defining feature of Administrative law is the important role played by non-judicial bodies such as tribunals and ombudsmen, who receive many more complaints than the court[106].These different bodies may give a tribunal different remedies. Some can provide a new decision i.e. a tribunal, while others can quash or set aside a decision but cannot make a new decision, a hallmark of judicial review. Others can do neither, such as ombudsmen, who have recommendatory power and cannot either set aside or remake a decision however unlawful or unfair[107].

The complexity of administrative law is captured by Paul Craig when he states that there is considerable diversity of opinion concerning the nature and purpose of administrative law[108].In reckoning with this complexity, he states that 'the legislature and the courts will be important in determining the nature and shape of administrative law'[109].

It should not be forgotten that it is the legislature which enacts the policies which are directly constitutive of the administrative state ..... even though courts have a major influence on the nature of the subject, since they decide what particular constraints to impose on administrative action and more generally on the overall purpose of judicial review[110].

Administrative law therefore should be seen as a combination of the political world combined with reactions of the judiciary[111]. The upshot is that a large bureaucracy is governed under a multiplicity of laws. There have emerged specialized agencies under these legal regimes with different competences and with them handling disparate issues. There needs to be a rethinking of the inter branches relationship. This relationship in my view should take the form of respect for the constitutionally designated powers for each branch of government. Consequently, there is need for judicial deference to agency adjudication unless pertinently illegal or unfair. Guidance in this state of affairs, where we have a plethora of agencies and

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[105] Ibid
[106] Ibid
[107] Ibid
[108] Administrative Law, sixth edition at page 3
[109] Ibid at page 4
[110] Ibid
[111] Ibid

multiple principles governing Administrative law would better be offered by way of an umbrella statute.

3.2 STATUTES- GUIDED ADMINISTRATIVE LAW JURISDICTIONS: EXAMPLE BY WAY OF DECIDED CASES.

3.2.1 Republic V. Kenya Cricket Association and two others, Ex Parte Maurice Odumbe (2006) eKLR.-Kenya

This case has been chosen to illustrate the wide discretionary powers enjoyed by judicial officers under Common Law adjudication. The brief facts of the case are that the applicant, a cricket player had brought a case before the court seeking judicial review orders of certiorari and prohibition, in addition to costs of the suits in relation to a five year ban imposed on him over alleged improper conduct that had brought the game into disrepute.

He was charged with coming into contact with an alleged book maker, a Mr. Jagdish Sodha and with receiving money to fix a match in Zimbabwe[112] The court denied the applicant's prayers stating that the tribunal set up in investigation of the applicants conduct was private arbitration and not subject to judicial review'[113]. The court was also of view that the applicant had exhausted his adjudicative rights under contract and that by having submitted to the International Cricket Council's code of conduct and its rules, the applicant was then bound by these rules. These rules, in the court view were sufficient to determine his case and the contract being a private right could not be enforced under public law[114].The court in reaching this conclusion had before it several cases which advanced different principles, argued for and against the application, as is typical of the adversarial system of litigation. The applicant relied on among others the case of R v Criminal Injuries Compensation Board –ex-parte Lain (1967) 2 All E.R. which articulates the principle that provided a body exercise quasi-judicial functions, it

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[112] Please refer to the case summary available as a Republic of Kenya vs. Kenya Cricket Association and two others, Ex-parte Maurice Odumbe (2006) on Kenya law.org/caselaw. Refer also to Migai Akech , the Maurice Odumbe Investigation and judicial review of power of international sports organization available on www.htpp://www.2warwick.ac.uk/fac/soc/law/eslj/issues/volume6/number2/akech, in specific paragraph 30-32

[113] Justice R.V.P Wendoh in the case Republic of Kenya v Kenya Cricket Association and 2 others ex parte Maurice Odumbe (2006) eKLR.

[114] Ibid

was an amenable to judicial review[115]. The applicant also relied on the case of R v. Panel on Take Over and Mergers ex-parte Datafin Plc and another (1987) All E.R.564 where it was stated that in determining whether the decisions of a particular body were subject of judicial review, the court should not be confined to considering the source of that body's power and duties. It could also look at the nature so that if the duty imposed was of a public nature and the body was exercising public law functions, the court had jurisdiction to entertain an application for judicial review[116].

The respondents on their part relied on the case of Patel and other v. Dhanji (1975) E A 301, Law v. National Greyhound Racing Club (1983) All E.R. 300 and R v Football Association Ex-parte Football League (1993) 2 All E.R. 833 which were unified in stating the court's reluctance to interfere in club affairs or domestic tribunals even if the decision involved the public[117]. The court was also presented with the case of David Mugo t/a Manyatta Auctioneers v. Republic C.A. which pronounced the principle that the existence of an alternative a bar to the granting of an order certiorari[118]. In addition , the court also took note of the English case of Republic v. Secretary of State Ex-parte Swati (1986) 1 All E.R. 717 which states the principle that when one has an alternative remedy , judicial review orders could not issue save for special circumstances [119]. As relates to the differences in holdings and in laying a basis for its ruling, the court stated that 'the English case of Swati held differently but I believe it is because judicial review in England has developed and it applicability widened unlike the Kenyan scenario where the orders of judicial review are limited'[120].

3.2.2 Analysis the Odumbe case as demonstrative of common law adjudication

In reaching its conclusion, the court in the Odumbe case was confronted with a variety of principle choices from which it could pick. These principles were drawn from local as well as English cases.

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[115] Ibid
[116] Ibid
[117] Ibid
[118] Ibid
[119] Ibid
[120] Ibid

This in my view afforded the judicial officer a very wide discretion and she could have chosen from any. The understanding is that 'though a system a precedent my produce....a body of rules, a precedent itself might best be described not as a legal rule but as an instance of communication by authoritative example[121]. For this court and indeed for all Common law courts, rules of precedent are rules of practice'[122].

The obligation to follow a practice derives its force from the fact that the practice is followed with a higher degree of uniformity[123]. The judge under Common Law follows precedent not because they fear sanction but because precedent following is regarded as a correct practice, as a norm, deviation from which is likely to be viewed negatively[124]. In the absence of an authoritative expression of what should be binding law governing a particular area, the Common Law judge, like was in the Odumbe case goes on an explorative adventure, one that is akin to trying to find a needle in a haystack. These principles are open textured, such that there is 'no authoritative or uniquely correct formulation of any rule to be extracted from the cases'[125].

For example in the Odumbe case, the court had to grapple with several choices. First, what is the governing principle as relates to the understanding of judicial reviews treatment of power? Secondly should the arrangement between Mr. Odumbe and the cricket authorities be viewed as a private contract? Did it contain some public law elements? It does not help matters that the court did not properly consider the ramifications of the Court of Appeal ruling in David Mugo t/a Manyatta Auctioneers v Republic where it was stated that the existence of an alternative remedy is not a bar to granting an order of certiorari.

This ruling should ideally have bound the Odumbe court, since the Court of Appeal ranks higher in terms of normative principle articulation and rule hierarchy as per Common Law postulations. No reason was advanced in the ruling to effectively justify why the authority of the Manyatta ruling was not considered and if t was considered, nothing in the text shows us in what way it was. Instead, the court went ahead to extol the 'maturity' of English judicial review as

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[121] Neil Duxbury, The Nature and Authority of Precedent at page 21-22, quoting H.L.A. Hart, the Concept of Law 2nd edition.

[122]Ibid at page 16.

[123] Ibid, quoting Cross and Harris, Precedent in English Law.

[124] Ibid at page 21

[125] Ibid at page 22

was, in its view highlighted in the Swati case. Having looked at the Odumbe case, what are the lessons that can be drawn from other jurisdictions whose Administrative Law is governed by statutes?

3.2.3 Judy Lloyd v. Attorney General Civil Appeal No.9 of 1998 Unreported-Barbados

This case was decided on the basis of the Administrative Justice Act, Cap 109 B Laws of Barbados. The facts of the case were that the applicant filed an originating notice motion against the Attorney General seeking judicial relief for alleged unlawful suspension as a clerical officer in the public service. The main issue in the appeal centered on section 8 which governed the court's discretionary power on the grant of any relief, especially where there has been undue delay in making an application for judicial review.

The Chief Justice Sir Denys Williams of the Supreme Court of Judicature, Court of Appeal, for the court, said of section 8, "in my opinion that is (undue delay) the mischief that parliament was minded to exclude when it enacted section 8 of the Administrative Justice Act reaching to the detriment to good administration. It is my opinion that to allow this application to proceed after such a lapse of time would be detrimental to good administration." The court here was tethered to provisions of the statute and rules of interpretation to arrive at its conclusion.

3.2.4Steenkamp N.O v. The Provincial Tender Board of Eastern Cape CCT 71/05-EC 20060 I AII SA 478 S.C.A- South Africa

The applicant filed a case in his capacity as liquidator, alleging that the tender board had acted wrongly against a company placed under him, Balraz Technologies Pty Limited and that the board owed a duty in law to ensure that it is exercised its powers and performed its functions fairly impartially and independently. Secondly, the board ought to have taken reasonable care in evaluation and investigation of tenders. Thirdly, the board ought to have evaluated the tenders within the parameters imposed by the tender specifications and lastly that the award of the tender ought to have been reasonable.

The applicant therefore sought to have the tender board liable in delict for loss suffered by Balraz as a result of reliance on a tender and on steps to fulfill obligations in terms of that tender, only for the tender to be subsequently set aside on review due to the tender board's negligence in performing administrative duties.

Moseneke DCJ, writing for a majority of the court granted the application for leave to appeal while dismissing the appeal itself. He noted that ordinarily, "a breach of administrative justice attracts public law remedies and not private law remedies."

Instructive is the court's statement that , "since the adoption of the interim Constitution , the Common Law principles have been subsumed by a Constitutional dispensation and every failure of administrative justice amounts to a breach of constitutional duty, which raises the question whether under the Constitution , damages are an appropriate remedy. The problem becomes more complex since the adoption of the promotion of justice act (P.A.J.A) which sets out the remedies available for failure of administrative justice.

It may not be without significance that an award of damages is not one of them, although an award of compensation is exceptional circumstances is possible. This could imply that remedies for Administrative justice now have to be found within the four corners of its provisions and that reliance on Common Law principles might be out of place."[126]

3.2.5 The Minster of Health and another V. New Clicks South Africa Pty Ltd and others 2006 17488 C.C.-South Africa

This was a case that came before the courts by way of appeal, stemming from a decision of the Supreme Court of Appeal (S.C.A) which had set aside regulations relating to a transparent pricing system for medicines and scheduled substances.

The question the court was to determine was whether a declaratory relief was incidental to the main relief sought, that is the leave to appeal or should the question be properly considered as a direct access question.

In holding that in substance the application was in substance an application for direct access the court stated , "the Promotion of Justice Act (P.A.J.A) is the national legislation that was passed to give effect to the rights obtained in section 33(of the constitution).It was deeply intended to be and in substance is, a codification of these rights[127].

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[126] Summary obtained from newsletter issue 6th august 2006 available at www.justice.gov.za/paja/docs/newsletters/newsletterisue6august06.pdf

[127] Quoting the case of Bato Star fishing Pty Ltd v Minister of Environmental Affairs and others 2004(4) SA 490 CC)

It was required to cover the field and purports to do so. A litigant cannot avoid the provisions of P.A.J.A by going behind it and seeking to rely on section 33(1) of the Constitution or on the Common Law. That would defeat the purpose of the Constitution in requiring that the rights contained in section 33 to be given effect by means of a national legislation"[128].

3.2.6 David Dunsmuir V. New Brunswick 2008 Scc9- Supreme Court of Canada

In this case contention arose as to which standard of review was to be applied. The applicant was employed by the department of justice for the province of New Brunswick, holding an office at pleasure under the Civil Service Act. His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of employment. On the third occasion, a formal letter was sent to Dunsmuir warning him that failure to improve his performance would result in further disciplinary action up to and including dismissal. He was eventually dismissed, whereby he commenced a grievance process under section 100. 1 of the Public Service Labour Relations Act (P.S.L.R.A.)

Grounds for his action were that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond, that his termination was without due process or procedural fairness. The grievance was denied leading to adjudication.

The adjudicator held that referential incorporation of section 9 (2.1) of the P.S.L.R.A into section 100 .1(5) of that Act meant that he could determine whether Dunsmuir has been discharged or otherwise disciplined for cause. He declared the termination void ab initio and ordered Dunsmuir reinstated.

On judicial review, the court of the Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that he did not have jurisdiction to inquire into the reason for the termination and that his authority was limited to determining whether the notice was reasonable. At the Court of Appeal, it was started that the proper standard in respect to the adjudication authority under the P.S.L.R.A was reasonable simpliciter and not the correctness standard, even though it found the adjudicator's decision unreasonable.

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[128] Summary of the case available on www.justice.gov.za/paja/docs/newsletter/newsletterissue6august06.pdf

The Supreme Court in paragraph 55 of its ruling gave factors to be considered when choosing to apply a reasonableness test to a decision maker. These factors are; first a privative clause which means a statutory direction indicating the need for deference. Secondly, a discrete and special administrative regime in which the decision maker has special expertise and finally the nature of the question of law - a question of law is of central importance to the legal system and outside the specialized area of expertise of the administrative decision maker, actions will always attract a correctness standard.

If these factors, considered together point to a standard of reasonableness, the decision maker must be approached with deference[129].The analysis of standard review must be contextual and is dependent on a number of relevant factors; presence or absence of a privative clause[130], the purpose of the tribunal as determined by interpretation of enabling legislation, the nature of the question at issue and finally, the expertise of the tribunal[131]. The discretion of the court is clearly circumscribed within the framework of legislation.

In relation to deference to administrative agency expertise and to parliamentary authority, the American case of Chevron U.S.A Inc. v Natural Resources Defence Council Inc. [132]provides an insight as to how these concepts can be handled. Chevron 'altered conventional wisdom by asserting that reviewing courts should defer to the policies that agencies adopt unless the courts believe that congress has spoken to the precise question at issue'[133].

The court in Chevron went on the state that "judges are not experts in the field and are not part of either political branch of government. Courts must in some cases reconcile competing political interests, but not on the basis of the judges personal policy preferences.

In contrast, an agency to which congress has delegated policy making responsibilities may rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not accountable to the people, the chief executive is and it is entirely appropriate for this political branch of the government to make such policy choices- resolving

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[129] Paragraph 56

[130] Meaning a statutory direction from parliament or a legislature, indicating the need for deference .this was defined in paragraph 55 as earlier alluded to.

[131] Paragraph 62 of the ruling

[132] 467 U.S. 837(1984)

[133]Ibid, at page 842, quoted in Jerry L Mashaw, Textualism. Constitutionalism and interpretation of Federal Statues at page 5

the competing interests which congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of statute in light of everyday realities"[134] .

The cases from other Administrative Law jurisdictions whose law is governed by statutes reflect a deferential attitude towards parliamentary authority as well as a healthy respect towards agency adjudication within the four corners of their respective statutes. By respecting the authority of parliament, democracy is assured. By keeping within the boundaries of statute, the Rule of Law is enhanced and overall, there is certainty and predictability in terms of litigation.

[134] Ibid, quoted at page 9

CHAPTER FOUR

CONCLUSIONS

This study has endeavored to present the challenges posed to the ideals of Democracy and the Rule of Law by Common Law adjudication. The Common Law need not be lampooned excessively. It has served us in areas of the Laws of Tort and Contract yet in the realm of Administrative law, I dare say it is insufficient to serve in the public sphere and the complexities that come with it.

This is the realization under article 47(3) of the Constitution of Kenya, which is a timely call to us to embrace order and certainty, and to give meaning to the concept of liberal democracy, that is a government for the people and by the people, where rights and civil liberties will be respected. Democracy should not be seen as a vague referent or some nebulous and lifeless concept. The Rule of Law should not be just another footnote in academic papers or a catchword in political speeches. Meaning must be given to these twin ideals and the starting point is by respecting the Constitution, Constitutionalism and the demand articulated under article 47(3).

Due to the loose textured nature of the Common Law principles, judges have a wide discretion that may be employed to the detriment of Democracy and the Rule of Law. The Common Law breeds uncertainty, destabilizing the two formidable ideals. It has afforded judges as a legislative role, powers which slight Democracy and the constitutional principle of separation of powers.

It is my view that a statute and methods for its interpretation are a sure way for adjudication in the sense of taming judicial creativity. This would enhance democratic legitimacy and foster the Rule of Law.

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