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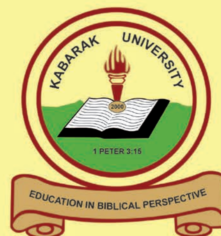

The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the 'Interpretation and Application' of the Constitution

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Abstract

This paper interrogates the vexed question of the jurisdictional limits of the Supreme Court of Kenya under article 163(4)(a) of the Constitution of Kenya, 2010. That provision confers a wide jurisdiction to the Supreme Court whose reach is defined as limited to questions involving the 'interpretation and application of the Constitution'. Contrary to claims by many commentators, this paper asserts that the Supreme Court of Kenya has not usurped jurisdiction that was not conferred upon it, rather, the court has remained faithful to the constitutionally prescribed jurisdictional frontiers in its work.

Key words: Jurisdiction, Supreme Court of Kenya, Interpretation and Application of the Constitution

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1. Introduction

One of the questions that has vexed the Kenyan jurisprudential landscape in the post-2010 dispensation is the question of the jurisdictional limits of the Supreme Court under article 163(4)(a) of the Constitution. That provision confers a wide jurisdiction to the Supreme Court whose reach is defined as limited to questions involving the 'interpretation and application of the Constitution'. This raises questions as to what is meant by the twin concepts of "interpretation" and "application" of the Constitution. Another question that arises is what is the interplay between constitutional norms and legislative norms enacted to give effect to the principles embodied in the Constitution?

This article is divided into three parts. The first part theorises the nature of the 2010 Constitution and the implications of a values/principles-oriented Constitution for construing the constitutional jurisdiction of a court charged with the mandate of serving a "guardianship" role over the Constitution. The second part delves into a critique of the Supreme Court's approach to its jurisdiction and uses the looking glass of the comparative experience drawn from the jurisprudence developed by the Constitutional Court of South Africa to interrogate the cogency of the jurisprudence developed by the Supreme Court of Kenya. The third part is the conclusion that teases out the lessons from the study.

2. Kenya's 2010 Constitution as a Value-Imbued Transformative Constitution

To understand the ambit of the jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution, the starting point is the relationship of the Constitution to the legal system. In approaching and understanding the scope of the Constitution, the Constitution must be understood as establishing a coherent system of both government and law. As the famous constitutional scholar, Charles L. Black Jr., asserted, Constitutions by their very nature, establish systems of government and law that need to be interpreted coherently in the light of the overall structure established: we must bear in mind the *topos* of the document.[1] Thus, in constitutional analysis, understanding the framework and structure of the overall scheme of the Constitution is crucial.

[1] Charles L. Black Jr., *Structure and Relationship in Constitutional Law,* (Louisiana State University Press, 1969) p. 4.

A core assumption of traditional constitutional thought is the argument that constitutional issues are only a relatively small subset of all legal issues.[2] Kenneth Clinton Wheare states in this regard that a Constitution should contain 'the very minimum, and that minimum [should] be rules of law'.[3] However, as pointed out by Kim Lane Scheppele, the *topoi* of new Constitutions, particularly in developing and post-authoritarian countries, eschews this limited conception of what Constitutions do.[4] Thus, citizens of post-authoritarian states tend to adopt "thick" Constitutions, with large amounts of material – including values and principles-beyond just constitutional rules, which are perceived to be the proper remit of a Constitution under traditional constitutional thought.[5] These transformative Constitutions also tend to regulate certain items in great detail. This characteristic brings almost all issues of governance within the remit of constitutional problems.

The logic of thick conception of Constitutions is understandable. Modern Constitutions are aspirational or transformative, that is, they are declarative of an institutional value system that expresses the nation's deepest hopes and highest aspirations.[6] They are drafted in recognition of the need to transform not merely society and the economy, but the state as well. The central goal of transformative constitutionalism is to rebuild the state and society on new principles and values.

The most crucial aspect of the 2010 Constitution of Kenya is its nature. The 2010 Constitution establishes a state bound by a system of fundamental values and principles – thus, establishes a material or substantive constitutional state.[7] Ulrich Karpen distinguishes a formal (structural) constitutional state from a substantive (value-oriented) constitutional state thus: [8]

> [T]he value-orientated, concerned with intensely human and humane aspirations of personality, conscience and freedom: the structure- orientated, concerned with

[2] Kenneth Clinton Wheare, *Modern Constitutions* (Oxford University Press, 1951) p. 32.

[3] Ibid.

[4] Kim Lane Scheppele, 'Democracy by Judiciary: Or, Why Courts can be More Democratic than Parliaments' In Wojciech Sadurski, *et al* (eds.), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (Central European University Press, 2005) chapter two.

[5] Micah Zeller, 'From Preservative to Transformative: Socioeconomic Rights with Liberty and the American Constitutional Framework' (2011) 88 *Washington University Law Review* 735.

[6] David Robertson, 'Thick Constitutional Readings: When Classic Constitutions Are Irrelevant' (2006) 35 *Georgia Journal of International and Comparative Law* pp. 277-331.

[7] Article 4 of the Constitution stipulates that Kenya is a "multi –party democratic state" founded on the values and principles articulated in article 10 of the Constitution. See *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others,* [2014] eKLR paras.364-366.

[8] Ulrich Karpen, *The Constitution of the Federal Republic of Germany* (Baden-Baden: Nomos-Verlag-Ges, 1988) p. 11.

> vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.

The 2010 Constitution is the *lex fundamentalis* of the Kenyan legal order and embodies the values of the Kenyan society as well as the aspirations, dreams and fears of our nation as evident in article 10 of the Constitution and other provisions that articulate principles to guide policy and legislation.[9] This is the most drastic shift in perceiving the function of constitutional law in the post-2010 dispensation. The 2010 Constitution is not focused on presenting an organisation of government, but rather is a value system in itself. Therefore, applying and expounding constitutional law in the post-2010 era is no longer a means primarily to define the rights and duties of individuals and state organs, but to find values and goals in the constitution and to transform them into reality. The Constitution is not a boundary around political action, but a guiding principle to provide for policy goals and means.

The Supreme Court has noted that the 2010 Constitution of Kenya is a Constitution with a value orientation thus distinguishing it from minimalistic and legalistic Constitutions in other jurisdictions *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate.* [10] Underlining its 'thick' conception, the Majority stated thus:

> Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared

[9] Justice J.B. Ojwang' held as follows in this regard in *Joseph Kimani Gathungu v Attorney General & 5 Others,* [2010] eKLR*:* 'A scrutiny of the several Constitutions Kenya has had since Independence shows that, whereas the earlier ones were designed as little more than a *regulatory formula* for State affairs, the Constitution of 2010 is dominated by a "*social orientation*", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.'

[10] [2012]eKLR, at paragraph 54.

> principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.

Thus, like the post-Nazi German Basic Law and the post-apartheid 1996 South African Constitution, the post-authoritarian 2010 Constitution of Kenya, a pristine Constitution that represents a total rupture with our authoritarian past, can be said to embody an "objective, normative value system". The German Federal Constitutional Court in *Lüth Decision BVerfGE, 7*[11] in one of the most famous paragraphs of the court's history, noted as follows with respect to such a Constitution:

> But far from being a value free system the constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: It must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.

Similarly, the South African Constitutional Court in a paragraph that has been hailed by constitutional theorists across the globe as representing the acme of transformative adjudication also weighed in as follows with respect to this model of a Constitution in *Carmichele v Minister of Safety and Security:*[12]

> Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

[11] 198 I. Senate (1 BvR 400/51).

[12] (CCT 48/00) 2001 (4) SA 938 (CC).

Thus, the Supreme Court of Kenya, like the German Federal Constitutional Court and the South African Constitutional Court, has underscored the difference between seeing a Constitution as a value-impregnated document representing a society's core values as is the case with the 2010 Constitution rather than as a formal delineation of authority and power relationships as it was under the earlier Constitutions or Constitutions in other jurisdictions.

A transformative reading of the Constitution responds to legal claims in a way fitting the overall ethical aspiration instantiated in the Constitution. This is in contrast to a classical liberal reading which applies a minimalist textual approach. This has profound effect on the jurisdiction of a court charged with the responsibility over the 'interpretation and application' of the Constitution as can be gleaned from the jurisprudence developed by the South African Constitutional Court and now joined by the Supreme Court of Kenya.

3. Implication of a Value-Impregnated Constitution for Jurisdiction in Constitutional Matters: Lessons for Kenya from South Africa

The chief and final custodian of the 2010 Constitution is the Supreme Court of Kenya. The Court does not have a plenary or last resort jurisdiction in all matters. Rather it has specialist jurisdiction with the most consequential jurisdiction vested in the court being that in article 163(4)(a) of the Constitution, which is an appellate jurisdiction as of right in matters that involve the "interpretation and application of the Constitution". This means that the appellate jurisdiction of the Supreme Court under this provision will not be implicated just due to complaints about garden-variety judicial mistakes, and correction of such mistakes does not, in itself (when no other constitutional commitment is at stake), come within the domain of the Supreme Court.[13]

The frontiers of the jurisdiction of the Supreme Court in matters involving the interpretation and application of the Constitution as provided in article 163(4)(a) of the Constitution was dealt with at length by the Supreme Court in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others,*[14] where the Majority of the court rendered itself thus:

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[13] See in this regard: *Peter Odiwuor Ngoge v Francis Ole Kaparo & 5 Others* [2016] eKLR.

[14] [2014] eKLR.

> **T**he operative words are *"interpretation or application".* Do these words have the same meaning? In our perception, these terms do not mean one and the same thing. Otherwise, the drafters would have simply opted to use either of them. As it is, the Supreme Court will not infrequently be called upon either to *interpret* or to *apply* the Constitution. It emerges from the comparative lesson that judicial approaches in different jurisdictions, do not accord the expressions *"constitutional interpretation",* and *"constitutional application"* the same meaning.

In elucidating the reach of the twin concepts of "interpretation" and "application", the Supreme Court appreciates that the two are conceptually distinct. Interpretation has the more limited reach in that it is the moment a court is asked to expound on the meaning of a constitutional provision.[15] When the Constitution, for instance, recognises that everyone has the right to life, the question arises as to whether this allows for the imposition of a death penalty on murderers. This question inevitably requires legal interpretation of the right to life and how it is to be understood.

In contrast, the remit of application is wider. Application of the Constitution is the recognition that whenever a government functionary invokes the norms or the values of a Constitution in making any policy decision or executing a policy decision; whenever the legislature takes any legislative action to give effect to the intent of the Constitution; whenever the courts apply any legal rules, which must be within the general spirit of the Constitution, then the Constitution is engaged.[16] Thus, the reach of "application of the Constitution" aspect of the "constitutional controversy" jurisdiction of the Supreme Court is very wide, especially, where the value system of the Constitution ought to permeate all decision making. The jurisdiction on application of the Constitution follows to all places where the Constitution reaches.

This approach by the Supreme Court is similar to that applied by the South African Constitutional Court in delineating its jurisdiction in 'constitutional matters'. The Constitutional Court's jurisdiction is governed by section 167(3) of the 1996 South Africa Constitution, which limits the court's jurisdiction to

[15] Paul Ricoeur, *The Conflict of Interpretations: Essays in Hermeneutics* (Northwestern University Press, 1974) at p. 13 notes that: "Interpretation… is the work of thought which consists in deciphering the hidden meaning in the apparent meaning, in unfolding the levels of meaning implied in the literal meaning" while Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, (Oxford University Press, 2009) at p. 47 observes that "an interpretation of something is an explanation of its meaning".

[16] See in this regard: Lawrence Solum, 'The Interpretation-Construction Distinction' (2010) 27 *Constitutional Commentary* pp. 95-118.

'constitutional matters and issues connected with decisions on constitutional matters'.[17] In *S v Boesak,[18]* the South African Constitutional Court recognised that 'the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.'

Subsequently, in *Fraser v ABSA Bank Ltd*,[19] the Court gave a brief summary of the issues that would constitute a 'constitutional matter'. The Court in delineating the frontiers of its jurisdiction in 'constitutional matters' stated thus:

> This Court has held that a constitutional matter is presented where a claim involves: (a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.

This is comparable to the approach by the Supreme Court of Kenya's approach under article 163(4) of the Constitution. Moreover, it also tells us that the Supreme Court of Kenya has not yet fully exploited its jurisdiction and that the reach of article 163(4)(a) of the Constitution is very wide.

3.1 Jurisdiction in Electoral Matters

It is in the area of electoral justice that the criticism of the Supreme Court's jurisdiction with respect to questions over the "interpretation and application of the constitution" has reached its apogee. I tip my hat to Justice J.B. Ojwang' (retired)

[17] See in this regard: Sebastian Seedorf, 'Jurisdiction' in Stu Woolman, *et al* (eds), *Constitutional Law of South Africa* (Juta, 2002) at p. 4; see also Frank Michelman, 'The Interplay of Constitutional and Ordinary Jurisdiction' in Tom Ginsburg and Rosalind Dixon (eds.) *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) pp. 278-298; and Kate O'Regan, 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman, and Michael Bishop, (eds.) *Constitutional Conversations* (Pretoria University Press, 2008) 63.

[18] 2001 (1) SA 912 (CC).

[19] 2007 (3) SA 484 (CC) at para 38.

for aptly framing what is at stake in the criticism of the court. He comments, thus, on the criticism:[20]

> In certain segments of the Bar, the acknowledgement of the Supreme Court as the sole forum for the resolution of presidential-election disputes has run in parallel with a denial of such a status to that court, as regards other national elections. Such a perception arose from a rather literal notion of electoral disputes, which overlooked the more fundamental question as to the interplay between elections to key governance offices, on the one hand, and the Supreme Court's oversight-mandate over the interpretation of the Constitution, on the other hand.

The Supreme Court of Kenya has in setting out its approach to its jurisdiction emphasised that constitutional values and principles must permeate the interpretation of electoral statutes. The Court in *Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others,*[21] stated as follows:

> [W]e would observe that the Elections Act, 2011 enacts in substantive form the constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election. The realization of this goal is partly attainable through universal franchise, expressed in a voting exercise guided by appropriate legislation, that is derived from the premises and values embodied in Articles 38, 81 and 86 of the Constitution. Thus, it is for certain, that electoral contestations will involve constitutional interpretation or application.

Comparative study shows that the South African Constitutional Court has adopted a similar approach under section 167(3) of its jurisdiction in electoral matters. The Constitutional Court of South Africa was faced with the same argument on its appellate jurisdiction in electoral matters where the South African Electoral Act designates the Electoral Court as having "final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review".

[20] J.B. Ojwang', 'Electoral Justice in Kenya: Resolving Disputes in a New Democratic Dispensation' in Kimani Njogu, and Peter Wafula Wekesa, (eds) *Kenya's 2013 General Election: Stakes, Practices and Outcomes* (Twaweza Communications, 2015) at pp. 308, 319. See also Atupare Peter, 'Constitutional Justice in Africa: An Examination of Constitutional Positivism, Fundamental Law and Rights in Ghana and Nigeria' Available at: https://qspace.library.queensu.ca/handle/1974/14620 (accessed on 11th April 2020) for a critique of the contrary approach in the Ghanaian case of *In Re Parliamentary Election for Wulensi Constituency: Zakaria v. Nyimakan (2003-2004).*

[21] [2014] eKLR at para 55. See also *Hon. Lemanken Aramat vs. Harun Meitamei Lempaka and Two Others,* [2014] eKLR at para 107. But see *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 Others,* [2018] eKLR at para 57 where due to docket control reasons, the Supreme Court has added a caveat that an article of the Constitution cited by a party as requiring interpretation or application must have remained a central theme of constitutional controversy, in the life of the cause.

Refusing to accept the ouster of its jurisdiction over constitutional matters conferred by the Constitution and similar in reach to article 163(4)(a) of the Constitution of Kenya, the Constitutional Court of South Africa in *African National Congress v Chief Electoral Officer of the Independent Electoral Commission*,[22] held that, while the Electoral Act clearly designated the Electoral Court as the court of last resort for all electoral matters, this ouster could only be constitutional if it was read as not applying 'where the dispute itself concerns a constitutional matter within the jurisdiction of the [constitutional] court'. The Court stated thus:

> The question we must consider now is whether *section 96(1)* ousts the jurisdiction of this Court in this matter. *Section 96(1)* must be interpreted in a manner that is consistent with the Constitution... It is clear that were section 96(1) to be interpreted to oust this Court's jurisdiction to consider constitutional matters, it would be inconsistent with section 167(3)(a) of the Constitution which provides that this Court is the highest court in all constitutional matters. Accordingly, section 96(1) should in the light of *section 2* of the *Electoral Act be* read in a manner consistent with *section 167(3)(a)*. This can be achieved by reading *section 96(1)* to mean that no appeal or review lies against a decision of the Electoral Court concerning an electoral dispute or a complaint about an infringement of the Code, save where the dispute itself concerns a constitutional matter within the jurisdiction of this Court... Clearly this case raises a constitutional matter within the jurisdiction of this Court, a jurisdiction which *section 96(1)* of the *Electoral Act does* not oust.

In *Kham and Others v Electoral Commission and Another,*[23] the Constitutional Court stated, thus, on its jurisdiction on appeals on electoral matters:

> The issues revolve around foundational principles of our Constitution and the assertion by the applicants of the rights protected by section 19 of the Bill of Rights. In addition, they concern the manner in which the IEC discharges its constitutional function of ensuring free and fair elections. The case is manifestly within this Court's jurisdiction. The issues are important, concerning, as they do, irregularities in the conduct of elections.

The point the two courts are making is that the relation between relevant constitutional provisions and electoral legislation can only be properly understood from a double vantage point. The electoral law is generally an ordinary law and often enjoys a very peculiar status within the legal order. Electoral law has been defined by Giacomo Delledonne as the core of the material Constitution as it determines how the prevalent political forces are represented (and selected) and

[22] [2009] ZACC 13.
[23] Case CCT 64/15, [2015] ZACC 37.

ultimately shape the course of state action.[24] Regardless of its formal status, the electoral law is closely connected to the fundamental principles and values of the Constitution. For these reasons, the electoral law lends itself to being described as part of the constitutional order, whose core is the Constitution, as it deeply affects the functioning of representative government and the exercise of voting rights.[25] What clearly emerges is that electoral legislation influence the way some of the provisions of the Constitution are applied.[26]

3.2 Jurisdiction in Interpreting Statutes Enacted to give Effect to the Constitution

The Supreme Court's "constitutional controversy" jurisdiction extends to the interpretation of statutes enacted to give effect to constitutional principles, rights and values. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,*[27] the question before the judges was whether the Supreme Court had appellate jurisdiction in an election petition under article 163(4) (a) of the Constitution which confers on the court jurisdiction in appeals involving application and interpretation of the Constitution. The court held that the central issue in the petition was whether the election was conducted in accordance with the *principles of the Constitution,* i.e. the provisions of articles 81 and 86. The court observed that:

> …the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81(e) and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.

The South African Constitutional Court has made a similar point in *Electoral Commission v Mhlope and Others,*[28] thus:

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[24] Giacomo Delledonne, 'Constitutional Courts Dealing with Electoral Laws: Comparative Remarks on Italy and Hungary' (2019) DPCE online Journal available at <http://www.dpceonline.it/index.php/dpceonline/article/view/744> accessed on 11th April 2020.

[25] In respect to electoral laws and their implication in the implementation and securing the sanctity of the right to vote, the Supreme Court of Canada has characterised the *Canada Elections Act* as implementing an affirmative constitutional obligation. In *Opitz v Wrzesnewskyj* 2012 SCC 55 at para 12**,** a majority of the court explained that "[t]he Act … sets out detailed procedures for voting that turn the constitutional right of citizens to vote into a reality on election day." This followed a similar earlier holding by Cory J. in a Separate Opinion in *Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995.

[26] Delledonne (as above note 24).

[27] [2014] eKLR at para. 77. See also the Separate Opinion of Njoki S. Ndungu in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others,* [2014] eKLR at para. 205.

[28] (CCT 55/16) [2016] ZACC 15. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others,* 2004 (4) SA 490 (CC) at para 25; *National Director of Public Prosecutions v Elra,n* 2013 4 BCLR 379 (CC) at para 19; *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (CCT2/02) 2003 (3) SA 1 (CC); and *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another,* 2005 (4) SA 319 (CC) at para 20.

> [T]he Electoral Act, of which section 16(3) is a part, is legislation envisaged in section 190(1)(a) of the Constitution. This section provides that "[t]he [IEC] must . . . manage elections of national, provincial and municipal legislative bodies in accordance with national legislation". Support for this view is to be found in the long title of the Electoral Act. It reads, "[t]o regulate elections of the National Assembly, the provincial legislatures and municipal councils". If there is this connection between section 190(1)(a) of the Constitution and the Electoral Act and thus section 16(3) as well, section 16(3) and the obligation it imposes should not be divorced from the Constitution.
>
> This obligation links up with the IEC's obligation in terms of section 190(1)(b) of the Constitution to ensure that elections are free and fair. Surely, the entire exercise of powers and performance of functions by the IEC must be about the freeness and fairness of elections. That must be the focus of the "management" of elections in terms of an Act passed pursuant to section 190(1)(a). Indeed, I think it would be fair to say the IEC exists to deliver free and fair elections to South Africa. So, one cannot split the provisions of section 190(1)(a) and (b) of the Constitution and section 16(3) of the Electoral Act. It is not surprising that the Electoral Commission Act, which must be legislation envisaged in section 190(2) of the Constitution, provides – in section 5(1)(b) – that one of the functions of the IEC is to "ensure that any election is free and fair.
>
> In that context, failure to comply with an obligation imposed by section 16(3) translates to failure to comply with section 190(1)(b) of the Constitution. The interconnectedness is such that section 16(3) cannot be dissociated from section 190(1)(b).
>
> The point being asserted by the two courts that the "normative derivatives" of constitutional principles are connected to the constitution is founded on the argument underlying Ronald Dworkin's interpretivism theory[29] and Robert Alexy's discourse theory of law,[30] which is that legal norms come in the form of rules and standards (principles) - rights are always in the form of principles- and that unlike with legal rules, legal principles influence their normative derivatives thus when interpreting these normative derivatives one cannot disengage from the legal principles that foreshadows the enactment of the derivative rules.[31]

It is now accepted as a virtual axiom in constitutional law that constitutional norms come in two prototypes: rules and standards/principles. In her 1991 Harvard

[29] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); See also Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1986).

[30] See Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2010).

[31] See generally the various chapters in the edited volume in Richard Albert and Joel I. Colon-Rios, (eds.) *Quasi- Constitutionality and Constitutional Statutes: Forms, Functions, Applications* (Taylor & Francis, 2019).

Law Review foreword, Kathleen Sullivan memorably distinguished between a "justice of rules" and a "justice of standards". As Sullivan writes, 'A justice of standards' prefers 'to collapse decision making back into the direct application of the background principle or policy to a fact situation.'[32] Building from the work of Sullivan, Aharon Barak notes that:[33]

> It is also important to distinguish between a statute based on rules and a statute based on principles or standards. My approach is to give great weight to the intention of the legislature in interpreting a rule-based statute and great weight to the principles of the system in a more policy-oriented statute. The reason for this approach is that under a statute establishing rules, adjudication usually must draw a clear line between what the statute forbids and what it permits, and that distinction can be derived from legislative intent. By contrast, a statute that formulates principles or policies prescribes an ideal to be achieved. This ideal operates within the framework of the legal system, is shaped by it, and in turn influences it.

Moreover, constitutional law cannot be treated as a hermetically contained body impervious to effects from other branches of law. Being the fundamental law of the land, constitutional law is in constant interaction with other law streams. For instance, the right of a fair trial in a criminal proceeding is a constitutional matter rather than a criminal law question. There is no neat division between constitutional and other legal issues, and one always finds a constitutional issue inextricably interlinked with banking, electoral, commercial law, company law and customary law disputes.[34]

It should always be recalled that Constitutions have two primary functions. The first is defensive and the second the affirmative functions. The defensive function, limits government's ability to enact legislation that infringes constitutional rights. The affirmative function directs government to implement constitutional rights

[32] Kathleen M. Sullivan, 'The Supreme Court, 1991 Term -- Foreword: The Justices of Rules and Standards', (1992) 106 *Harvard Law Review* pp. 22, at p.57.

[33] Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2008) at p. 144.

[34] See *Simon Gitau Gichuru v Package Insurance Brokers Ltd,* [2020] eKLR paras. 19-24 affirming the notion of normative derivative in the context of the interplay between the constitutional equality and anti-discrimination clause in article 27 of the Constitution and section 5(3)(a) of the Employment Act barring discrimination in the employment context. However, it is noteworthy that the Supreme Court has added the following qualifier to the interplay between constitutional principles and specific clauses invoked in the interpretation and application of the Constitution in *Aviation and Allied Workers Union v Kenya Airways Ltd & 3 Others,* [2015] eKLR, "[36] … the assumption of a task that transcends not just the reference to the rich generality of constitutional principle, it is a task that [must] focus upon specific clauses of the Constitution, and calls for the attribution of requisite meaning, tenor and effect."

and values in particular contexts.[35] The courts have an obligation to supervise the implementation of constitutional rights by the legislature and must determine the disputes that arise under the legislation in terms of the constitutional framework. It should be borne in mind that an important exercise in constitutional 'interpretation' must occur before legislature decides how it intends to satisfy its constitutional obligations. In other words, the legislature must determine what obligations the Constitution imposes upon it. Whenever the legislature implements these obligations then the supervisory role of the court charged with the jurisdiction in the interpretation and application of the Constitution will be engaged.[36]

3.3 Jurisdiction in Administrative Law Matters

The other matter where the Supreme Court has asserted jurisdiction under article 163(4)(a) of the Constitution, but has escaped the attention of the Kenyan legal community, is with respect to administrative law and judicial review. Traditionally, administrative law in Kenya was anchored in the common law. But the constitutional revolution changed all this. The text of the 2010 Constitution explicitly entrenches the values of the rule of law and the supremacy of the Constitution; and the Bill of Rights establishes a right to fair administrative action. The courts' role in protecting the right to fair administrative action now springs directly from the Constitution and not from some implied and inarticulate understanding like under the former constitutional dispensation.[37]

Thus, in Kenya the *grundnorm* of administrative law is now article 47 –the right to fair administrative action – and article 10 –the principle and value of rule of law.[38] This means that administrative law judicial review is now a constitutional matter. The Supreme Court, thus, got it right in *Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 Others,*[39] when it observed that:

[35] See in this regard Dieter Grimm, 'The Protective Function of the State' in Georg Nolte (eds.) *European and US Constitutionalism* (Cambridge University Press, 2005) chapter 6.

[36] See in this respect Mattias Kumm, 'Who's Afraid of the Total Constitution?' in Menéndez Augustin, and Eriksen Erik (eds) Arguing Fundamental Rights (Springer, 2006) pp. 113 -138; see also Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) Osgoode Hall Law Journal pp. 508-539; and Vanessa MacDonnell, 'The Constitution as Framework for Governance' (2013) 63(4) *University of Toronto Law Journal* 624.

[37] See in this regard: Walter Khobe, 'The Architectonics of Administrative Law in Kenya Post-2010' (2016) 2 *Journal of Law and Ethics* pp. 1-12.

[38] Article 47 of the Constitution has been given effect through the Fair Administrative Action Act, No. 4 of 2015.

[39] Petition Number 28 of 2014. See also *Dr. Peter Ayodo Omenda & 6 Others vs. Ethics & Anti-Corruption Commission & 2 Others*, [2020] eKLR.

It follows that for an appeal to lie to this Court, in a matter originated under judicial review, the issues have to fall under the canopy of article 163(4)(a). As judicial review is concerned with process, but for a case where the process is contested as being unlawful, irrational or procedurally unfair – elements falling within the purview of the rule of law (a constitutional principle) – the matter cannot lie to the Supreme Court. Hence, in appealing to the Supreme Court in a matter originated before the High Court by way of Judicial Review, the party concerned should comply with certain principles, as follows:

i. not all Judicial Review matters are appealable to the Supreme Court, as of right;
ii. it is open to the party concerned to move the Court on appeal under Article 163(4)(b) of the Constitution, in which case, the normal certification process applies;
iii. where such an appeal comes under Article 163(4)(a), the petitioner is to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal;
iv. the party concerned should demonstrate that the superior Courts had misdirected themselves in relation to prescribed constitutional principles, and either granted, or failed to grant Judicial Review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional.

The South African Constitutional Court grappled with the same question and similarly asserted jurisdiction in the case of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others,*[40] the court held that:

The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.

[40] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241. See also *Steenkamp NO v Provincial Tender Board of the Eastern Cape*, 2007 (3) SA 121 (CC).

Thus, like Kenya's Supreme Court, the South African Constitutional Court asserted jurisdiction in matters involving administrative law judicial review by concluding that they are constitutional matters.

3.4 Jurisdiction in Developing Private Law

The other area in which the Supreme Court is vested with jurisdiction, and which represents the acme of the pervasive reach of article 163(4)(a) is the implication of article 20(3) of the Constitution to the mandate and jurisdiction vested in courts. The value system expressed by the Constitution, and in particular the system of rights, affects all spheres of law. As a result, every provision of the private law must be compatible with this value system and every such provision of private law must be interpreted in accordance with the Constitution's spirit.[41] When judges fail to develop private law**,** they violate the "objective constitutional law," and the rights of individuals. Thus**,** the Supreme Court has jurisdiction as of right under article 163(4)(a) of the Constitution in questions of the development of law to conform to the spirit, object and purport of the Bill of Rights in private law disputes (for example, contract, tort, property, family, succession disputes, are appealable to the Supreme Court where one alleges that the lower courts failed to develop the law to conform to the spirit of the Bill of Rights).

Justice J.B. Ojwang' (retired) has captured this as follows in his Separate Opinion in *Anami Silverse Lisamula v Independent Electoral & Boundaries Commission, David Lenarum, Returning Officer Shinyalu Constituency & Justus Gesito Mugali M'mbaya:*[42]

> It is my task to demonstrate, in this concurring opinion, that this Supreme Court is not to sidestep meritorious occasions for a decision, by invoking obsolescent concepts: for the Supreme Court is the *fundamental plank of the constitutional order*, bearing the mandate to "develop the law to the extent that it does not give effect to a right or fundamental freedom", and to "adopt the interpretation that most favours the enforcement of a right or fundamental freedom [The Constitution of Kenya, 2010, Article 20(3)].

[41] See Walter Khobe, 'The Horizontal Application of the Bill of Rights and the Development of the Law to give Effect to Rights and Fundamental Freedoms' (2014) 1 *Journal of Law and Ethics* pp.77-90; see also Walter Khobe, 'From Constitutional Avoidance to Primacy of Constitutional Approach to Adjudication' (2016) 18 *The Platform* pp. 50-54; and Walter Khobe, 'Willy Mutunga's Last Cadenza: The Ultimate Rule of Statutory Interpretation' (2016) 20 *The Platform* pp. 18-20.

[42] [2014] eKLR at para. 155.

In *Carmichele v Minister of Safety and Security,*[43] the South African Constitutional Court similarly asserted jurisdiction to develop the law to align the same with the Bill of Rights. It observed thus:

> [U]nder the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.

It is important to emphasise that the 2010 Constitution is not intended as a value-neutral structure. The Constitution establishes an objective system of values, strengthening the validity and application of the rights entrenched in the Bill of Rights. The value system thus established is to be seen as a basic constitutional premise, underpinning the entirety of the legal order and, hence, private law. No private law norm may contradict this value order: each norm is to be interpreted in a way that gives effect to the system of values. Therefore, when applying one of the substantive provisions of private law, judges are to determine whether basic rights might affect it. If this happens to be the case, the judge is to interpret and apply the provision with appropriate modifications.[44]

3.5 Jurisdiction in Interim Rulings with Constitutional Implication

The last area where it has been argued by members of the Kenyan legal community that the Supreme Court lacks jurisdiction is with respect to appeals arising from interim rulings in constitutional issues. Article 163(4)(a) of the Constitution does not distinguish between appeals from interim rulings or final judgments. It simply confers jurisdiction in appeals to the Supreme Court in matters involving the interpretation and application of the Constitution by lower courts. Thus, a constitutional determination in an interim ruling will be appealable to the Supreme Court. The Kenyan legal community's assertions which purport to claim that the Supreme Court should not interfere with interim rulings by lower courts do not take into account the fact that these rulings may at times be anchored in serious constitutional determinations. In *Deynes Muriithi and Others v The Law*

[43] (CCT 48/00) 2001 (4) SA 938 (CC). *See also Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) at para 9; and *Makate v Vodacom (Pty) Ltd* (CCT52/15) [2016] ZACC 13.

[44] See also Christian Starck, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' in Dan Friedman, and Daphne Barak-Erez, (eds.) *Human Rights in Private Law* (Hart Publishing, 2002) chapter 5, for a similar approach to jurisdiction by the German Federal Constitutional Court.

Society of Kenya,[45] the Supreme Court recognised that it would have jurisdiction to hear an appeal where the interim ruling of the Court of Appeal threatened the right to fair hearing of the appellants as enshrined in article 50 of the Constitution.

The South African Constitutional Court has appreciated that serious and grave issues of constitutional dispute may arise in interim rulings by lower courts thus giving rise to a right of appeal to the court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others.*[46] The Court observed as follows:

> ...in the appeal before us, the prominent issue is whether the grant of the interim interdict has impermissibly trenched upon the constitutional tenet of separation of powers. These are constitutional issues of considerable importance... It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule.

Thus, the South African Constitutional Court recognised that significant constitutional questions may arise during interim rulings that implicate the constitutional jurisdiction of the Court.

4. Conclusion

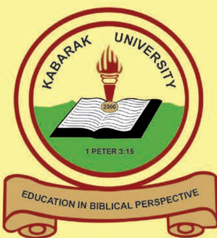
In sum, the claims by the Kenyan legal community about purported usurping of jurisdiction by the Supreme Court is unsustainable from the perspective of seriously grounded constitutional theory and is largely due to the failure to understand the nature and the reach of the Constitution of Kenya, 2010 as a supreme, pervasive and foundational Constitution. It clearly emerges from this study that on the issue of its jurisdiction under article 163(4)(a), the Supreme Court, is way ahead of the Kenyan legal community in appreciating the normative demands of the 2010 Constitution. It must be pointed out that how best to realise an aspirational Constitution challenges traditional understandings of law and the judicial role. Transformative constitutionalism brings many new and multi-faceted questions which necessitate doing new things.[47] Due to new normative demands by the Constitution, courts deviate from the standard forms of judicial process and legal reasoning, because of the necessity that they should spread the values and

[45] [2016] eKLR.

[46] 2012 (6) SA 223 (CC).

[47] See in this regard James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016) on the "newness" hypothesis and its implication for judicial adjudication.

principles of the Constitution throughout the legal system. Due to this change in legal reasoning, courts challenge established legal doctrines and this may appear strange to members of the legal community due to the departure from recognisable legal ways as the legal community may not have adapted fully to the new terrain of adjudication. This explains the failure by the Kenyan legal community to understand the remit of the "interpretation and application of the constitution" jurisdiction of the Supreme Court.



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