# Looking into the future: Judicial Review of the Law Reporting Function

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**Abstract**

*Increasingly, the practice of law reporting is emerging as an area that is attracting a considerable amount of scholarly attention.*[1] *And perhaps in the near future it may also begin attracting some litigation too. One of the possible areas that is likely to form the subject of litigation in court is the judicial review of the law reporting function. This may come as a result of the fact that the law reporting function is a public function across many jurisdictions using the common law legal systems. However, in some jurisdictions the law reporting function is also done by private entities. Whichever the case, judicial review is increasingly becoming applicable to both public and private bodies.*[2]

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1 See Teddy Musiga, "Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya (2019) 4 *Southern African Journal of Policy and Development,* p 26; Michael Bryan, "Early English Law Reporting" (2009) *University of Melbourne Collections*, issue 4 <Accessed at https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1529632/Early-English-Law-Reporting.pdf>; Michael Bryan, 'The Modern History of Law Reporting' (2012) *University of Melbourne Collections*, issue 11 <Accessed at https://library.unimelb.edu.au/__data/assets/pdf_file/0010/1379026/07_Bryan-LawReport11.pdf>; Nathaniel Lindley, 'The History of the Law Reports', (1885) 1 *Law Quarterly Review*, pp. 137, 143; Frank Pegues, "Medieval Origins of Modern Law Reporting", (1953) 38 *Cornell Law Review Journal* 491; Susan Barker "Law Reporting in England and the United States: History, Controversy and Access to justice" (2007) 32 Canadian Law Library Rev 178-183; Frans Viljoen "Canonizing cases: The Politics of Law Reporting" (1997) 114 SALJ 318-333; Howard Slavitt, "Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur" (1995) 30 *Harvard Civil Rights-Civil Liberties* LR 109-142; Peter Spiller "The Development of Law Reporting in New Zealand" 1994 New Zealand LJ 75-79

2 Section 3 (1) of the Fair Administrative Action Act; Also see Ochiel Dudley, 'Grounds for Judicial Review in Kenya – An Introductory Comment to the Right

*Particularly in Kenya, the law reporting function is a public function provided for by statute under the National Council for Law Reporting Act.[3] And one of the possible reasons for the probable litigation is that litigants are likely to begin asking the courts several key questions regarding how the publicly mandated law reporting function is being carried out with the view of making that function amenable for judicial review by the courts. Some of those questions may squarely revolve around the central question in law reporting which is why some judicial decisions are reported in the law reports while others are not.[4] This article therefore seeks to explore the possible scenarios in which the law reporting function is likely to be amenable to judicial review processes in the near future and how that is likely to happen. It does so drawing examples from the Kenyan experience.*

## 1.0 Introduction

By way of definition, the traditional conceptualization of judicial review refers to a branch of administrative law that is concerned with control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions.[5] Essentially, administrative excesses must be checked through judicial intervention.[6] However, judicial review has been evolving steadily from the days when it only concerned itself with the question of ensuring that public bodies did not exercise their powers unlawfully. The prevailing view at the moment is that by way of a statutory provision under section 3(1) of the Fair Administrative Action Act, judicial review can now be extended to private entities as well.[7] Other bases for judicial

to Fair Administrative Action Act, 2015' (2015) 31 Kenya Law Bench Bulletin 26

3 Act No. 11 of 1994

4 Teddy Musiga, "Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya (2019) 4 *Southern African Journal of Policy and Development,* p 26*;* Also see Frans Viljoen "Canonizing cases: The Politics of Law Reporting" (1997); Howard Slavitt, "Selling the integrity of the system of precedent: Selective Publication, Depublication, and Vacatur" (1995) 30 *Harvard Civil Rights-Civil Liberties* LR 109-142;

5 Peter Kaluma, *Judicial Review Law Procedure and Practice* (Law Africa, 2009).

6 PLO Lumumba, *Judicial Review in Kenya* (Law Africa, 2nd ed., 2006)

7 Section 3(1) of the Fair Administrative Action Act provides that, "This Act applies to all state and non-state agencies, including any person – (a) exercising administrative authority; (b) performing a judicial or quasi-judicial function under

review action include, article 165(3) (d) which sets out the express constitutional underpinning for judicial review of legislation,[8] executive conduct[9] and conduct of state organs in respect of counties.[10] The other bases are to be found at Article 22,[11] 47[12] and 258[13] of the Constitution of Kenya, 2010. To illustrate how judicial review can be invoked with regards to the law reporting function this paper proposes four hypothetical cases that describe possible judicial review cases.

**Scenario 1: Republic vs Law Reporting Agency ex Parte Justice XYZ**. In this first scenario, let us assume that Justice XYZ files a judicial review application to the courts to compel the law reporting agency to report his/ her decision that in his/her view is very jurisprudential yet the law reporting agency has failed to report that case. Further, the said applicant/ judge argues that his/her alleged decision has been widely quoted by other judges both locally and internationally. He/ She has also won awards based on the same decision. And therefore he/she does not understand why the law reporting agency has failed and/ or refused to publish the said judgment. He/she therefore seeks for the judicial review remedy of mandamus to compel the law reporting agency to have the alleged judgment published. In the alternative the judge may also seek orders to certiorari to quash the decision not the report/ publish the said judgment.

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the constitution; or (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action or decision relates.

8 Article 165 (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution;

9 Article 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

10 Article 165(d) (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;…

11 Article 22 provides for the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

12 Article 47 provides for the right to fair administrative action and to be given reasons for that action.

13 Article 258 provides for the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

**Scenario 2: Republic vs Law Reporting Agency ex Parte a Public Citizen.** In this second scenario, let us assume that a public spirited citizen is apprehensive that the law reporting agency is likely to publish a certain decision which in his/ her view ought not to be published. He/ she therefore files a judicial review application seeking the judicial review remedy of prohibition to prohibit the publication of such a decision.

**Scenario 3: Republic vs Law Reporting Agency ex Parte a Public Citizen**. In this third scenario, let us assume that a public spirited citizen files a judicial review application against the law reporting agency for reporting a decision which in his/her view is not jurisprudential at all. The said decision does not add any practical or legal value at all. And perhaps that decision has probably been reported (i) out of biasness i.e the law reporter has a personal relationship with the law firm that litigated the case; (ii) the law reporter has a relationship with the judge who decided the matter or even (iii) the law reporter has a personal interest in that matter.

**Scenario 4: Republic vs Law Reporting Agency ex Parte a Public Citizen.** In this fourth scenario, let us assume that one of the parties to a case files an application to the court seeking mandamus orders against the Law Reporting Agency to *un-publish (un-report)* a judicial decision which has already been reported. Such an order would have the effect of withdrawing or pulling down the reported decision. In his/ her view, the continued publication of that decision affects his/her interests adversely. Perhaps he/she had been charged in a criminal matter and then later acquitted by an appellate court or even the same court. He/she therefore argues that the continued publishing/ reporting of that case in the law reports imputes a criminal conduct on him yet he/she has since been acquitted of those charges (which formed the subject of the reported decision).

**Is the law reporting function amenable to judicial review?**

In some jurisdictions the law reporting function is a public function while in others it is a private function. Within the jurisdictions following the common law legal systems, countries such as the United Kingdom have very many law reporting agencies, some of them are public organizations while others are

private organizations.[14] Some of them are public organizations while some are also private organizations. In Sub Saharan Africa, countries like Kenya, Uganda, Tanzania, Ghana, Nigeria etc have the law reporting function as a public function while countries like South Africa have the law reporting function as a private function done by agencies in the private sector.[15] Taking the Kenyan experience as an example, this paper seeks to interrogate whether or not decisions of the law reporting agency in Kenya to publish or not to publish can be amenable to judicial review.

In Kenya, judicial review is provided for as one of the foremost remedies available under Article 23(3) (f) of the Constitution to redress any threats to or actual violation of any right or freedom including by private persons.[16] Likewise, Article 47 (1) of the Constitution of Kenya, 2010 also guarantees a right fair administrative action that does not violate or threaten to violate any fundamental right or freedom. That provision also provides an assurance that in the event an administrative action violates or threatens to violate any fundamental right or freedom, then the concerned person is therefore entitled written reasons justifying the rationale for that administrative action.[17]

The emerging scope of judicial review power in Kenya under the Constitution of Kenya, 2010 is that (i) judicial review is applicable to both public and private bodies.[18] (ii) Judicial review is for vindicating purely constitutional

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14 Some of the leading law reporting institutions in the United Kingdom include Incorporated Council for Law Reporting (ICLR) that publishes the official *Law Reports*: *Appeal Cases* (AC), *Queen's Bench* (QB), *Family* (Fam), *Chancery* (Ch); *Weekly Law Reports* (WLR); Butterworths/ Lexis Nexis publishes the *All England Law Reports* (All ER); Westlaw UK; Scottish Council of Law Reporting publishes the *Session Cases Law Reports*; the Council of Law Reporting for New South Wales publishes the NSW Law Reports etc

15 The Southern African Legal Information Institute (SAFLII) is one of the leading law reporting agencies in South Africa. Others include, Butterworths Law Reports publishes the *All South African Law Reports and Pensions Law Reports* etc

16 C/f: Article 47 of the Constitution of Kenya, 2010 guarantees all persons a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

17 Article 47 (2) of the Constitution of Kenya, 2010

18 Section 3 (1) of the Fair Administrative Action Act; Also see Ochiel Dudley, 'Grounds for Judicial Review in Kenya – An Introductory Comment to the Right

rights and not any other ordinary civil disputes. (iii) Judicial review can examine both the merits and the process of the decision in question.[19] (iv) Applications for judicial review need not be brought to court in the name of the Republic because Article 22 and 23 of the Constitution guarantees every person with the right to seek judicial review orders.[20]

Having looked at the nature and scope of the judicial review power in Kenya, we now turn to the law reporting power/ function. The legal mandate of publishing the official law reports for the Republic of Kenya lies with the National Council for Law Reporting (Kenya Law). It is the organization mandated to perform the law reporting functions under section 3 of the National Council for Law Reporting Act.[21] In a nutshell, section 3 (a) and (b) of the National Council for Law Reporting Act provides that, the organization shall be "responsible for the preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of records; and to undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports". Section 19 of the National Council for Law Reporting Act requires judges of the superior courts of record to supply the decisions which they have rendered to the Editor of the National Council for Law Reporting:

> *"Every judge of the superior court of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to*

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to Fair Administrative Action Act, 2015' (2015) 31 Kenya Law Bench Bulletin 26

19 *Republic v Public Procurement Administrative Review Board ex Parte – Sanitam Services (E.A) Limited* [2013] eKLR; *Peter Muchai Muhura v Teachers Service Commission* [2016]eKLR; *Kenya Human Rights Commission v Non-Governmental Organizations Coordination Board* [2016]eklr; *Khadhka Tarpa Urmila v Cabinet Secretary Ministry of Interior and Coordination of National Government* [2016]eKLR. Previous decisions from the Kenyan courts that postulated a contrary view included; *Kenya National Examinations Council v Republic ex parte Geoffery Gathenji Njoroge* [1997] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002]ekLR; *Commissioner of Lands v Kunste Hotels Ltd* (1995-1998)1 EA 1; *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* [2008]eKLR

20 *Margaret Nyaruai Theuri v National Police Service Commission* [2016]eKLR

21 National Council for Law Reporting Act, Act No. 11 of 1994

> *be furnished to the Editor a certified copy of the judgment, ruling or opinion delivered by him."*

Likewise, section 20 of the said Act provides that the Registrar of the superior courts of record should at the end of each month furnish the Editor of the Council for Law Reporting with the list of all judgments, rulings or opinions delivered by the said superior courts of record as the case may be. Section 21 of the said Act also provides that the Kenya Law Reports shall be the official law reports of Kenya and which may be cited in proceedings in all the courts of Kenya.

A close reading of sections 3, 19, 20 and 21 of the National Council for Law Reporting Act therefore makes law reporting a public function, done by public officials[22] and with public resources.[23] At this point, it is therefore imperative to determine whether the function of law reporting amounts to an administrative action or decision thereby amenable to judicial review. From the outset, the straight answer is in the affirmative. The reason for that is that first, there is a general consensus in the field of judicial review that (by their very nature) acts, decisions or omissions of public authorities and quasi-judicial bodies are expressly reviewable by courts.[24] In Kenya, the law reporting function is a public function provided for by statute (the National Council for Law Reporting Act) and is also performed by a public agency specifically established to perform that very function of law reporting.

The second way of looking at judicial review is by looking at actions or omissions of private persons or bodies also being reviewable only where they affect the legal rights or interests of an affected party.[25] In that way, judicial review employs the concepts of *intra* and *ultra vires* as well as the rules of

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22 See sections 4, 7, 8,9, 10, 13, 19 and 20 of the National Council for Law Reporting Act No. 11 of 1994

23 See sections 14, 15, 16, 17 and 18 of the National Council for Law Reporting Act No. 11 of 1994

24 See Migai Akech, 'The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations' (2008) 6 *Entertainment and Sports Law Journal* 1, 4; Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today' (2013) Issue 28 *Kenya Law Bench Bulleti*n 11, 11.

25 *Ibid*

natural justice to ensure that all persons/ bodies act within the law.[26] The end result is therefore that every exercise of power can be subjected to judicial review where the exercise of that power bears the potential to impact the rights and interests of individuals over whom that power is exercised. Therefore, to bring it into its proper context, in the event that a litigant feels that the law reporters have arrived at a decision to report a particular case which in their view they feel ought not to have bene reported for whatever reason, then such litigants may consider instituting judicial review proceedings against the law reporting entity in question.

## 2.0 The Right to Fair Administrative Action Regarding the Law Reporting Function

Article 47 (1) of the Constitution of Kenya provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[27] The central question being interrogated in this paper revolves around the issue of the possible litigation by way of judicial review of the law reporting function. This section will therefore use the four hypothetical scenarios described above to interrogate the right to fair administrative action under Article 47 (1) and (2) of the Constitution. According to section 2 of the Commission on Administrative Justice Act administrative decisions/ actions refers to any actions relating to matters of administration and includes – a decision made or an act carried out in the public service; a failure to act in discharge of a public duty required of an officer in public service; the making of a recommendation to a cabinet secretary; or an action taken pursuant to a recommendation made to a Cabinet secretary.[28] Therefore, the law reporting function qualifies to be an administrative action within the meaning of section 2 of the Commission on Administrative Justice Act.

### (i) Expeditious

The Constitution requires that all administrative decisions ought to be done expeditiously. The requirement for expedition in decision making therefore

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26 Hilaire Barnett *Constitutional & Administrative Law* (5th edn), Australia, Cavendish Publishing Limited 2004) 88

27 Also see section 4 (1) of the Fair Administrative Action Act, No. 4 of 2015

28 Section 2 (1) of the Commission on Administrative Justice Act, No. 23 of 2011

provides that where there are prescribed timelines for performing certain tasks then any decisions made outside those stipulated timelines are considered to having been made with disregard of the law and therefore are deemed to be invalid.[29] The Commission for Administrative Justice has the power under section 8 (d) of the Commission on Administrative Justice Act to inquire into the allegations of delay when carrying out public functions. Inordinate delay when carrying out functions is therefore frowned upon.[30]

However, section 7 (3) of the Fair Administrative Action Act bars the jurisdiction of courts from entertaining applications for the review of administrative actions or decisions premised on the ground of unreasonable delay unless the court is satisfied that (a) the administrator is under a duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; or (c) the administrator has refused, failed or neglected to take action within the prescribed period of time.

Notwithstanding the provision of section 7 (3) of the Fair Administrative Action Act, courts in Kenya have been invoking the constitutional provision at Article 259 (8) to the effect that, "if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion requires."[31]

The National Council for Law Reporting Act does not have any specific timelines for conducting law reporting function. As a matter of fact, section 19 of the said Act is directed towards judges and it provides that every judge of the superior courts of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to be furnished to Editor a certified copy of the judgment, ruling or opinion delivered by him or her. The only other

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29 *Kate Kokumu & Another v University of Nairobi* [2016] eKLR; *Choitram and Others v Mystery Model Hair Salon Nairobi* (HCK) [1972] EA 525; *Wasike v Swala* [1985 KLR 425

30 *Lady Justice Joyce Khaminwa v Judicial Service Commission* [2014]eKLR

31 *Hersi Hasan Gutale & Another v Attorney General* [2013]eKLR; *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Coordination of National Government* [2015] eKLR; *Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government ex parte Patricia Olga Howson* [2013]eKLR; *Bhangra, Kana and Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons* [2014] eKLR

reference to timelines in that statute is found at section 20 which provides that the Registrars of the superior courts of record shall at the end of each month furnish the Editor with a list of all judgments, rulings or opinions delivered by the superior courts of record.

Fortunately however, the National Council for Law Reporting's internal policies provides for timely monitoring and reporting on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports.[32] It also provides for the timely revision, consolidation and publication of the laws of Kenya.[33] This internal commitment to undertake their work in a timely fashion mirrors the prescriptions of the expeditious requirement under article 47 (1) of the Constitution of Kenya, 2010.

### (ii) Efficiency

In a general sense, a decision is deemed to be efficient if such a decision if such a decision is done accurately. It is a decision that is made by looking at the relationship between determined objectives and results that are reached with minimum resources and efforts.[34] Efficiency means doing an action with a minimum cost, effort and fuss.[35] To achieve efficiency with regards to the law reporting function in Kenya, the National Council for Law Reporting has been able to align its mandate to the Constitution of Kenya, aligned its mandate to Kenya's development agenda, aligned its mandate to with the various other stakeholders such as the Judiciary, the State Law Office etc.[36]

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32 See generally, the Strategic Plan 2018 – 2022 for the National Council for Law Reporting. Accessed at < http://kenyalaw.org/kl/index.php?id=9270>

33 *Ibid*

34 Mirlinda Batalli, "Increasing Efficiency in Public Administration Through a Better System of Administrative Justice" (2007) 2 *Pecs Journal of International and European Law,* p54

35 Robert Cornall AO, "The Effectiveness and Efficiency of Administrative Law: The Governmental Perspective". Paper was presented at the AIAL National Administrative Law Forum, June 2007, Canberra. Accessed at <http://www5.austlii.edu.au/au/journals/AIAdminLawF/2008/28.pdf>

36 See generally, the Strategic Plan 2018 – 2022 for the National Council for Law Reporting. Accessed at < http://kenyalaw.org/kl/index.php?id=9270>

**(iii) Lawfulness**

Lawfulness of an administrative action can best be appreciated within the context of the doctrine of *ultra vires*. *Ultra vires* means beyond the scope of power, jurisdiction or authority granted or permitted by law.[37] In Administrative law, an authority is said to be acting *ultra vires* in two instances. Firstly, it refers to a situation where an authority has done or decided to do an act it lacks legal capacity or lawful jurisdiction to do.[38] Secondly, *ultra vires* refers to situations where an authority, while doing something it has legitimate power to do, fails to meet some requirement attached to the lawful exercise of the power.[39] Certainly, the law reporting function in Kenya is lawful under the National Council for Law Reporting Act. However, carrying out any acts outside the express provision of section 3 of the National Council for Law Reporting Act therefore becomes *ultra vires*.[40]

**(iv) Reasonableness**

The classical conceptualization of judicial review power was based on the 3I's namely illegality, irrationality and impropriety of procedure.[41] It is the ground on 'irrationality' that was also popularly referred to as the 'reasonable' test/ ground under common law. One of the earliest moments where the English courts determined the standards of reasonableness/ unreasonableness expected of public body decisions that would make them liable to be quashed on judicial review was rendered in the decision of *Associated Picture Houses Limited v Wednesbury Corporation.*[42] That case affirmed that reasonableness was expected of public officers in the execution of their duties. The test in *Wednesbury* was that a decision was considered to be "*wednesbury*

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37 Peter Kaluma, *Judicial Review Law Procedure and Practice* (Law Africa, 2009).

38 *Ibid*

39 *Ibid*

40 Section 3 of the National Council for Law Reporting Act provides for the mandate of the organization is to monitor and report on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports; to revise, consolidate and publish the laws of Kenya; and to undertake any such other related publications and perform such other functions as may be conferred by law.

41 *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* [1948] 1 K. B. 223, H.L; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375; *R V The Chief Constable of North Wales ex parte Evans* [1982]1 WCR 1155

42 [1948] 1 KB 223

*unreasonable or irrational*" if it was so unreasonable that no reasonable person acting reasonably could have made it.[43]

However, under the Constitution of Kenya, 2010 there is a fundamental shift from the judicial review test captured in the *Wednesbury* unreasonableness to a new test of proportionality.[44] The new standard of proportionality therefore requires that any administrative action with potential impact on rights and freedoms should be proportionate to the public purpose sought to be protected.[45]

The idea of reasonableness therefore envisages justifiability.[46] It is a revolutionary ground because it compels courts to enter into the merits of decisions rather than simply consider the procedural aspects of decision-making.

With regards to the law reporting function, a decision to report or not to report a particular case can be deemed to be reasonable if it can be justified. For instance, the law on jurisdiction of courts in Kenya is a fairly settled issue already reported in the celebrated Court of Appeal case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.*[47] In that case, the Court of Appeal

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43 The facts of the case were that sometime in 1947, Associated Provincial Picture Houses was granted a license by the Wednesbury Corporation to operate a cinema on condition that no children under the age of 15 years, whether accompanied by an adult or not, were admitted on Sundays. Under the Cinematograph Act, 1909, cinemas could be open from Mondays to Sunday but not on Sundays, and under a Regulation, the commanding officer of military forces in a neighbourhood could apply to the licensing authority to open a cinema on Sunday. The Sunday Entertainments Act of 1932 legalised opening of cinemas on Sundays by the local licensing authorities "subject to such conditions as the authority may think fit to impose". Associated Provincial Picture Houses thus sought a declaration that Wednesbury's condition was unacceptable and outside the power of the corporation to impose.

44 Jefrey Jowel and Anthony Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1987) PL 368, 372

45 A W Bradley and K D Ewing *Constitutional and Administrative Law* (12th ed., Longman, 1997) 781

46 E Fox-Decent 'The Internal Morality of Administration: The Form and Structure of Reasonableness' in D Dyzenhaus (ed.) *The Unity of Public Law* (Hart Publishing 2004) 143.

47 *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1

held that jurisdiction is everything and where a court of law finds that it has no jurisdiction, then it should down its tools. Ordinarily, there would be no need to report another subsequent case touching on the question of jurisdiction because owing to the doctrine of precedent '*Lillian S'* case ought to be followed by courts at it level and courts below it.[48] Therefore, a decision not to report any other case touching on jurisdiction of courts can be found reasonable based on that reason.

However, upon the promulgation of the Supreme Court of Kenya, 2010 and the establishment of the Supreme Court of Kenya as the apex court there has been need to publish other decisions touching on the question of jurisdiction of courts from the Supreme Court of Kenya.[49] And the reasons for the same can also be deemed to be perfectly reasonable because under the prevailing circumstances that, the Supreme Court has become the highest court in the land.

### (v) Procedurally fairness

The requirement for procedural fairness when making administrative decisions is at the core of the rules of natural justice.[50] Natural justice has two main building blocks; the first limb touching on the rule against biasness couched in the words that, 'no man shall be a judge in his own cause.'[51] The second limb entitles individuals to notice of the charge against them and to an adequate and fair hearing.[52] It is couched in the words, 'no man shall be condemned unheard.' Both rules are couched in Latin as follows, '*nemo judex in causa sua*' and '*audi alteram partem*' respectively.

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48 As at the time *Lilian S case* was decided, the Court of Appeal was the highest court in the land. Subsequently, under the Constitution of Kenya, 2010; the Supreme Court of Kenya was established as the apex court. Likewise, there are also very many other reported decisions of the Supreme Court of Kenya which have supported the views by the Court of Appeal which was by then the highest court in the land.

49 *Samuel Kamau Macharia & another v KCB & 2 others* [2011] eKLR; *Aramat v Lempaka & 2 others* (2013) 6 KLR (EP) 1177; *Lisamula v IEBC & 2 others* [2013] eKLR

50 PLO Lumumba, *Judicial Review in Kenya* (Law Africa, 2nd ed., 2006)

51 *Ibid*

52 *Ibid*

The recognition of procedural fairness therefore cuts across all cases in which the right of an individual may be adversely affected by administrative decisions.[53] Therefore with regards to the reporting function then a procedurally fair decision is one that is made devoid of any biasness on the part of the law reporter or the law reporting agency.

**(vi) Reasons**

Article 47(2) of the Constitution provides the right to be given reasons where a fundamental right or freedom has been or is likely to be adversely affected by an administrative action or decision. Similarly, section 6(1) of the Fair Administrative Action Act also provides the right to be supplied with information necessary to facilitate his or her application for an appeal or review. The information sought may include the reasons for which the administrative action was taken or even any relevant documents relating to that matter in question. In *Priscilla Wanjiku Kihara v Kenya National Examination Council (KNEC),* the court have affirmed this principle and held that where an administrator fails to give reasons, then the court can infer that there were no good; also that if the reasons given were not the ones the administrator was lawfully and justifiably entitled to rely upon then the court was entitled to intervene.[54]

For every decision to report or not to report a case there ought to be reasons provided for that action. Perhaps the said reasons could be fashioned along Lindley principles for law reporting or even whichever law reporting criteria the law reporting agency elects to use.[55] In Kenya, the guiding criteria for reporting cases include the following;

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53 Peter Kaluma, *Judicial Review Law Procedure and Practice* (Law Africa, 2009).

54 *Priscilla Wanjiku Kihara v Kenya National Examination Council (KNEC)* [2016] eKLR

55 Nathaniel Lindley, 'The History of the Law Reports', (1885) 1 *Law Quarterly Review*, pp. 137. The Lindley principles of cases deserving to be reported in law reports can be summarised into four (i) All cases which introduce, or appear to introduce a new principle of new rule, (ii) all cases which materially modify an existing principle or rule, (iii) all cases which settle, or materially tend to settle a question upon which the law is doubtful and (iv) all cases for any reason are peculiarly instructive.

i. Decisions making new law by dealing with a novel situation or extending the application of an existing principle of law;
ii. Decisions tending to materially settle a point over which the law has been doubtful.
iii. Decisions interpreting the language of legislation;
iv. Decisions in which a judge restates or abrogates an existing principle of law or restates the principle in terms of a particular applicability to local jurisdiction;
v. Decisions in which the court sets out deliberately to clarify the law for the benefit of lower courts and the teaching of law;
vi. Others include; first, decisions in which a judge applies a principle which although well established, has not been applied for many years and may be regarded as obsolete. Second; decisions where a court states its review on a point of practice or procedure. Third; decisions where a court states its review on a point of practice or procedure. Fourth; Occasional judgments interpreting clauses found in contracts, wills, articles, and other documents; Fifth; occasional judgments indicating the measure of awards being with regard to quantum of damages for personal injury, death, defamation, etc. Sixth; Appeals from decisions of lower courts which had been previously reported. Seventh; Judgments delivered in cases raising a matter of public interest or those which are for some other reason, are particularly instructive.[56]

## 3.0 Conclusion

This paper set out to explore the possibility of future litigation by way of judicial review action of the law reporting function. And it established that that indeed under the Constitution of Kenya, 2010 judicial review is one of the foremost remedies available to redress any threats to or actual violation of any right or freedom including by private persons.[57] It also demonstrated how the law reporting function fits in as an administrative action/ decision within the meaning of the Commission on Administrative Justice Act[58] and the Fair Administrative Action Act.[59]

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[56] See the Editorial Policy of the National Council for Law Reporting (Kenya Law) at www.kenyalaw.org
[57] Article 23(3) (f) of the Constitution of Kenya, 2010
[58] See Section 2.
[59] See Sections 2, 3 and 4.

As a result therefore, the paper demonstrated that there is a likelihood of challenging decisions of law reporting entities when conducting the law reporting function by way of judicial review. The basis for this is that courts are increasingly recognizing that where rights of individuals are likely to be affected then then there must be an 'anxious scrutiny' to determine if the decision maker went beyond the scope of his authority.[60] In that sense therefore, the law reporting function as an administrative action/ decision may not be an exception.

The paper used four (4) hypothetical scenarios to demonstrate how the task of challenging decisions of law reporting entities by way of judicial review is likely to be possible. However and admittedly, if and when this happens then it may be up to the courts to determine whether or not the rights of the individuals were affected by the decision of the law reporter.[61]

Ultimately, the paper argues that moving into the future, law reporters should exercise utmost due diligence, professionalism, caution, reasonable care and skill when performing their law reporting duties. That is because the failure to do so may open up their decisions for litigation by way of judicial review. As Neil du Toit argues that "law reporters are the hidden gate keepers of the law because they are the ones who make the interpretative decisions. In his view, determining whether or not a judgment has made a point of law is an interpretative decision. And the persons who make those interpretive decisions are the publishers: the hidden gatekeepers of the law. He further argues that judges sometimes say what is reportable. But it is the legal publishers who

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60 *R v Secretary for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, 531; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. Also see, HWR Wade and CR Forsyth *Constitutional and Administrative Law* (Oxford University Press, 2014) 304

61 Articles 10 and 20 of the Constitution of Kenya imposes an interpretative obligation on courts requiring them to interpret all legislation, primary and subordinate, whenever enacted in a way which is compatible with the Bill of Rights. Particularly, Article 20 (3) (a) & (b) requires courts to always develop the law to the extent that it does not give effect to a right and fundamental freedom; and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

decide what is actually reportable."[62] This therefore underscores the reasons why law reporters ought to perform their task with utmost professionalism and competence.

Another reason for law reporters to exercise due diligence so as to avert any future possible litigation may be drawn from English law's neighbour principle.[63] That principle says that a person should take reasonable care to avoid acts or omissions that s/he can reasonably foresee as likely to cause injury to the neighbour.[64] Neighbour includes all persons who are closely and directly affected by the act that the actor should reasonably think of them when engaging in the act or omission in question.[65] One of the possible ways to avert such eventualities may be to strictly adhere to the editorial policies for law reporting thereby only reporting jurisprudential cases.[66] And in this case,

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62 Neil du Toit, "*On Reportability, and the Hidden Gatekeepers of the Law"(unpublished paper).*

63 The neighbour principle is based on the Christian principle of "loving your neighbour".

64 *Donoghue v Stevenson* [1932] UKHL 100; Also cited as *Donoghue v Stevenson* [1932] AC 562 at 580. H L

65 Lord Atkins in *Donoghue v Stevenson* [1932] UKHL 100 formulated the neighbour principle in the following words: "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour: and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

66 Nathaniel Lindley, 'The History of the Law Reports', (1885) 1 *Law Quarterly Review*, pp. 137. The Lindley principles of cases deserving to be reported in law reports can be summarised into four (i) All cases which introduce, or appear to introduce a new principle of new rule, (ii) all cases which materially modify an existing principle or rule, (iii) all cases which settle, or materially tend to settle a

jurisprudential cases refer to those cases that are of high legal and practical importance (the gold) and not reporting everything that happens at the court rooms. The latter category of cases could be categorised as *dross*.

question upon which the law is doubtful and (iv) all cases for any reason are peculiarly instructive.