

## ***Restoring the Limits of Judicial Adjudication: Focus on Impeachments***

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This paper discusses the trend in common wealth countries where courts purport to adjudicate controversies which cannot be fully or substantially resolved by applying the law only i.e. non-justiciable controversies<sup>2</sup>. The paper argues that courts should distinguish and avoid non-justiciable controversies. This view is supported by De Smith who asserts that there are some issues which are inherently unsuited to judicial adjudication. He says that courts should acknowledge that in some cases, the litigation process and the expertise of the courts are unsuited to resolving the question at hand<sup>3</sup>. One of the reasons is that judicial adjudication is futile. Roscoe Pound summarized the scenario as,

*‘... the law should [not] interfere ...in every human relation and in every situation where someone chances to think a social want may be satisfied thereby. Experience has shown abundantly how futile legal machinery may be in its attempts to secure certain kinds of interest’<sup>4</sup>.*

The objective of the paper is to revive the rapidly disappearing distinction between justiciable and non-justiciable controversies. It will also address the further distinction between disputes which are subject to judicial discretion and the others reserved for the non-judicial. Matters reserved for non-judicial discretion include administrative, political, electoral, personal, and moral. As society becomes more and more litigious, it is imperative for courts to demarcate the external limits of judicial power lest they stray into alieno-solo. For example, in *Walter Nixon v United States*, the Supreme Court of U.S was asked to review the decision of U.S Senate to impeach Justice Nixon<sup>5</sup>. The judge was convicted

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\* (PhD Law UON) June, 29th 2020 University of Nairobi

<sup>2</sup> J. Sumption, ‘Judicial and political decision –making: the Uncertain Boundary’ (2011) J.R.301 para. 12.

<sup>3</sup> De Smith, *Judicial Review*, 7<sup>th</sup> Ed. (Sweet & Maxwell 2015)124.

<sup>4</sup> Roscoe Pound, *Philosophy of law* (1954) 42-47.

<sup>5</sup> 506 U.S. 224, 113S.Ct.732 (1993).

and jailed for a criminal offence but refused to resign. Nixon raised a fairly valid complaint that he was tried by a committee of the Senate instead of the whole House contrary to Article I Section 3 Clause 6 of the Constitution of the United States. Dismissing the matter as non-justiciable, the U.S Supreme Court cautioned that subjecting the procedures used by Senate to try impeachment charges to judicial review could 'expose the political life of the Country to months or perhaps years of chaos'<sup>6</sup>. The rationale of the ruling is discussed below<sup>7</sup>. At this stage, the point is that blurring the line between the non-justiciable and justiciable portends constitutional and political chaos. It is therefore necessary to demarcate<sup>8</sup>. The demarcating lines are discussed below.

### Identifying the non-justiciable

The term non-justiciable is often used interchangeably with political question<sup>9</sup>. Therefore in the cases cited, political question means non-justiciable. In *Baker v Carr*, the U.S Supreme Court identified the non-justiciable as below,

*'Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or for a court undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question'<sup>10</sup>.*

Though the decision is not binding on Kenyan courts, it is highly persuasive. In U.S, it is settled and applied to sieve out and dismiss the non-justiciable. Apart

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<sup>6</sup> Ibid.

<sup>7</sup> n .45.

<sup>8</sup> Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 The Cambridge Law Journal 129 JSTOR. <<https://www.jstor.org/stable/pdf/4508533.pdf?refreqid=excelsior%3Aafdd0483dae17ffc7805b5709190c47a>>

<sup>9</sup> Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' (2014) 7 Congressional Research Service 28. <<https://fas.org/sgp/crs/misc/R43834.pdf>>

<sup>10</sup> 369 U. S. 186, 217

from impeachment, other matters held to be non-justiciable include challenges to internal procedures of the U.K Parliament<sup>11</sup>, matters outside territory of U.K<sup>12</sup>, declaration of war and cessation of international hostilities<sup>13</sup>, recognition of foreign governments<sup>14</sup>, status of persons as representatives of foreign governments<sup>15</sup>, recognition of tribes<sup>16</sup>, interests of various communities<sup>17</sup>, enacting statutes inconsistent with others<sup>18</sup>, etc. These decisions follow *Marbury v Madison* in which the US Supreme Court held that where the text of the Constitution, structure and theory indicates that the issue is to be decided by legislative or executive branch of government, courts should in the interest of separation of powers dismiss the suit<sup>19</sup>. *Marbury*, a nominee for the post of a Judge, sought mandamus to compel Madison, the new Secretary of State, to deliver the instrument of nomination to the President for appointment. Ruling that the constitutional discretion of the President in appointment of Judges is non-justiciable, Justice Marshall said,

*'...the President with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience... Questions in their nature political, or which are, by the constitution and laws submitted to executive, can never be made in this court'<sup>20</sup>.*

### **Identifying areas of non-judicial discretion**

De Smith says that the principle of separation of powers confers matters of social and economic policy upon the legislature and executive rather than the judiciary. He says that courts should avoid interfering with the exercise of discretion by

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<sup>11</sup> *R v Chaytor* (2010) U.K.SC.52;(2011)1A.C.684 ; *R v Parliamentary Commissioner for Standards Ex. p Fayed* (1998)1 W.L.R. 669.

<sup>12</sup> *R (On the Application of Majaed) v Immigration Appeal Tribunal* (2003)EWCA civ.516 (2003 A.C.D 70 at 13.

<sup>13</sup> *Commercial Trust Co. v Miller*, 262U.S. 51, 57, 43 S.Ct.484, 490, 46 L. Ed.662.

<sup>14</sup> *Terlinden v Ames*, 184 U.S. 270,22S.Ct.484 490, 46, L. Ed.534.

<sup>15</sup> *Ex parte Hitz*, 111 U.S. 766,4S.Ct 698, 28 L. Ed.592.

<sup>16</sup> *United States v Holliday*, 3 Wall, 407, 419, 18 L. Ed. 182.

<sup>17</sup> *United States v Sandoval*, 231 U.S. 28, 46, 34S.Ct. 1.6,58 L. Ed. 107.

<sup>18</sup> *Georgia v. Stanton*, 6 Wall.50, 18 L. Ed. 721.

<sup>19</sup> 5 U.S. 137 (1803)

<sup>20</sup> *Ibid* at 170.

the legislature or executive<sup>21</sup>. Citing Dworkin's, he asserts that it is not for judges to weigh utilitarian calculations of social economic or political preferences<sup>22</sup>. Distinguishing controversies that are subject to judicial discretion from those that are not, U.S. courts hold that where the question involves action or inaction of the executive arm of government, they will not order the executive to take action unless the duty or action is purely ministerial. In *Swan v Clinton*, the U.S Circuit Court defined ministerial duties as those in which nothing is left to discretion<sup>23</sup>. The Court explained that even where the word shall is used; the duty is discretionary if it involves judgment, planning, or policy decisions<sup>24</sup>. In such cases, the duty of the government official is to exercise the discretion. Courts cannot direct the official to exercise the discretion in any particular way. In *NTEU*, the U.S Circuit Court held that for it to be purely ministerial, the duty must be simple and definite as to leave no room for discretion or 'so plainly prescribed as to be free from doubt and equivalent to a positive command...'<sup>25</sup>. In *Consol. Edison Co. of N.Y. v Ashcroft*, the U.S Court of Appeals, District of Columbia Circuit held that 'where the duty is not thus plainly prescribed but depends on a statute or statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion'<sup>26</sup>. These principles apply to suits seeking orders compelling the executive to take specific actions as well as those seeking declaratory judgments only<sup>27</sup>.

In the more recent *Citizens for Responsibility and Ethics in Washington v Donald J. Trump*, the applicants complained that President Trump violated the Presidential Records Act, the Federal Records Act, and the 'take care' clause of the Constitution by failing to create and maintain records of his interactions with foreign leaders<sup>28</sup>. They sought mandamus and injunction to compel the President to comply with the duties in the said provisions. Citing *Franklin v*

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<sup>21</sup> De Smith, *Judicial Review*, 7<sup>th</sup> Ed. (Sweet & Maxwell 2015) 19..

<sup>22</sup> *Ibid*, 20.

<sup>23</sup> 100 F.3d 973, 977(D.C. Cir 1996)

<sup>24</sup> *Ibid* *CREW v Trump*.

<sup>25</sup> 492 F. 2d at 607-608.

<sup>26</sup> 286 F. 3d 600, 605(D.C. Cir.2002).

<sup>27</sup> *Ibid*.

<sup>28</sup> Civil Action No.19-1333(ABJ) United States District Court for the District of Columbia.

*Massachusetts*<sup>29</sup>, the U.S District Court held that even where the statute employs the word ‘shall’, courts do not have jurisdiction to order the President in the performance of his official duties and that courts have never submitted the President to declaratory reliefs unless the duty imposed is purely ministerial. The court went further to distinguish ministerial from discretionary duties. It defined ministerial as those which admit no discretion so that the official in question has no authority to determine whether to perform the duty. It concluded that even if the plaintiffs suffered injury from the acts or omissions, inability to exclude discretion on the part of the official means that the court had no jurisdiction and judicial process cannot redress the injury.

Earlier in *Armstrong*, the U.S Court of Appeals, District of Columbia Circuit had held that Congress did not intend to allow courts ‘at the behest of private citizens, to rule on the adequacy of Presidential records management practices or to overrule his decisions regarding creating, managing and disposing records’.<sup>30</sup> Further, courts must not attempt to supervise the day to day operations of the White House even when a complaint presents legitimate concerns about ongoing practices that threaten preservation of and public access to Presidential records.

In Kenya, the distinction between the justiciable and the non-justiciable as well as judicial and non-judicial direction is largely overlooked. Courts realize that the controversy cannot be resolved by the law after getting deeply involved instead of investigating justiciability as a preliminary question. When the difficulties identified in *Baker v Carr* arise, they escape by referring the dispute to alternative methods of dispute resolution. A good example is *Council of Governors & 47 others v Attorney General & 3 others*, where the controversy was on the allocation of revenue between the National Government and the County Governments.<sup>31</sup> In other cases, courts disregard *Baker v Carr* and purport to determine, only to be reversed on appeal often with unkind remarks. In *Olive Mwhiki Mugenda v Okiya Omtatah and others*<sup>32</sup> the ELRC directed the Council of Kenyatta University to convene a meeting with stakeholders of the University

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<sup>29</sup> 505 U.S 788, 802(1992).

<sup>30</sup> *Armstrong v the Executive of the President*, 810 F. Supp 335 (DDC 1993)

<sup>31</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR

<sup>32</sup> Court of Appeal (Nrb) Civil Appeal No. 3 & 11 of 2016.

and chat a way forward for appointing the Vice Chancellor. On appeal, the Court of Appeal harshly reminded the ELRC that the ELRC is not the human resource department of any organization and specifically, that the ELRC is not charged with the constitutional or statutory mandate to determine and oversee recruitment of individuals to any employment position. The order directing Kenyatta University Council to convene a meeting with stakeholders to chat the way forward was overturned as ultra-vires. In addition, the Court of Appeal reminded the ELRC that the ELRC could not impose its own procedure for recruiting the Vice Chancellor contrary to the procedure in the Universities Act and specifically, that stakeholder consultation was not required by the Act. Other Kenyan decisions on non-justiciable controversies are discussed below.

### **Other decisions in non-justiciable controversies in Kenya**

Using the test in *Baker v Carr* on non-justiciability and the other cases cited on non-judicial discretion, I demonstrate that in Kenya, courts often stray into non-justiciable controversies and non-judicial discretion.

### **Impeachment charges**

Judicial decisions on impeachment of governors deserve special attention in order to show the true import of the decisions in *Martin Wambora & 3 Others v Speaker of the Senate & 6 others*<sup>33</sup> and *Martin Nyaga Wambora v County Assembly of Embu & 37 Others*<sup>34</sup>. The two decisions are hereafter referred to as Wambora 1 and 2 respectively. They held that the High Court has constitutional and judicial review mandate under Article 165(3) (d)(ii) and (7) to interrogate the grounds and the evidence laid before the Senate in impeachment charges. The decision bears directly on who between the Courts and the other arms of state has the final word on the exercise of all constitutional powers. These include impeachment of the President by parliament, impeachment of Cabinet Secretaries, national budget, parliamentary approval or rejection of appointments to offices of Chief Justice, Cabinet Secretary, approval or rejection of nominees of Governors to the County Executive, appointment of military commanders, choice of individual voter in elections, dismissal of Cabinet Secretaries, declaration of war, withdrawal of troops from war, recognition of foreign powers, accreditation of diplomats, parliamentary

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<sup>33</sup> [2014] eKLR

<sup>34</sup> [2015] eKLR

calendar and every other decision that is made under the Constitution. Left undisturbed, Wambora 1 and 2 mean that the Courts have the final word in the exercise of these powers. I will therefore spend considerable space on Wambora 1 and 2.

The text of Article 181 of the Constitution of Kenya and section 33 of the County Governments Act commits the decision on whether to uphold or dismiss impeachment charges against governors on County Assemblies and the Senate as discussed below. Article 181 provides that a county governor may be removed from office for gross violation of the constitution or any other law, where there are serious reasons for believing that he has committed a crime, abuse of office, gross misconduct, or physical or mental incapacity to perform the functions of his office. Section 181(2) requires Parliament to legislate the procedure for removal. The legislation is the County Governments Act. Section 33(1) of the Act provides that a member of the County Assembly supported by a third of all the members may move a motion for the County Assembly to remove the Governor. Section 33(2) provides that if the motion is supported by at least two thirds of all the members, the Speaker of the County Assembly shall inform the Speaker of the Senate. Section 33(3) (a) provides that the Speaker of the Senate shall convene the Senate to hear the charges. Section 33(4-5) provides that the senate may appoint a committee to investigate the matter and the committee must hear the representations of the Governor. Section 33(7) provides that the Governor shall cease to hold office if the committee finds that the charges are substantiated and the Senate, after giving the Governor a plenary hearing, upholds the impeachment charges by a majority of all members.

The text of these provisions leaves no doubt that the Constitution and statute intended that the decision on whether to uphold impeachment charges against governors be decided by political processes of the County Assembly and Senate. However, in Wambora 1 and Wambora 2, the Court of Appeal crafted a roundabout way of conferring the courts the final say on the impeachment charges and ultimately on whether the governor should be impeached. It held that it is incumbent upon the High Court to go beyond its supervisory jurisdiction and invoke its constitutional mandate under Article 165(3) (d)(ii) and (7) to interrogate the allegations and evidence laid before the Senate and determine if they meet and prove the threshold in Article 181 of the Constitution. Further,

that there must be evidence connecting the wrong doing and the governor. The standard of proof was set at beyond the balance of probabilities but below reasonable doubt<sup>35</sup>. Article 165(3)(d) (ii) provides that the High Court shall have jurisdiction to hear the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent or in contravention of the Constitution<sup>36</sup>.

I disagree with the interpretation for several reasons. First, because in both cases, the Court of Appeal conceded that removal of a governor is a political process. Further, that the process is not about criminality or culpability but about accountability, political governance and policy<sup>37</sup>. In *Wambora 2* the Court of Appeal held that the process lies entirely with the County Assembly where it starts and Senate where it is concluded. That accordingly, the court may only come in purely to confirm that the procedure was followed<sup>38</sup>. I agree entirely that the process is quasi-judicial. Therefore, as argued by De-Smith, the furthest judicial process can venture is to examine whether the procedure was followed<sup>39</sup>. Purporting to examine the evidence on whether the Members of the County Assembly had serious reason for believing that the Governor abused his office, committed a crime or gross misconduct ventures into a question which the text of the law commits unequivocally to the County Assembly and the Senate. The second reason for disagreeing is that although Article III (2) of the Constitution of the United States confers similar powers to U.S courts, courts in U.S follow *Baker v Carr* in interpreting the provision to respect the separation of powers between the courts and the other organs, and hold that exercise of powers committed to the other organs is not justiciable. The Article provides that ‘Judicial power shall extend to all cases, in law, and equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority’.

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<sup>35</sup> *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR at paragraph 47-51 and Paragraph 15-19 of judgment of Justice GBM Kariuki.

<sup>36</sup> Art. 165(3) (d) (ii) Constitution of Kenya, 2010

<sup>37</sup> Court of Appeal (Nyeri) Civil Appeal No.21 of 2014.

<sup>38</sup> *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR at paragraph 33.

<sup>39</sup> De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995).



The third reason for disagreeing is that controversies on impeachment charges fit perfectly in the criteria laid in *Baker v Carr*<sup>40</sup>. As shown above with regard to the first limb, the text of Article 181 of the Constitution and section 33 of the County Government Act commit the final say on the impeachment charges to County Assemblies and Senate. There cannot be a judicially discoverable and manageable standard for determining whether the members of the County Assembly had serious reason for believing that the governor committed a crime, abused office, or engaged in gross misconduct because the threshold in Article 181 is subjective. Article 181 of the Constitution and section 33 of the County Governments Act refers to the 'belief'. In the absence of a conviction by criminal court, there is no legitimate reason for believing that a person has committed a crime including abuse of office, which also happens to be a crime under the Anti-Corruption and Economic Crimes Act. Gross misconduct cannot be objectively established without an investigation report by the responsible commission under section 35 of the Public Officers Ethics Act. Therefore, the High Court cannot objectively determine whether the governor is guilty of the wrongdoing since it is not sitting as the criminal court or other relevant primary tribunal. It has no objective standard for second guessing the subjective opinions of the members of the County Assembly or Senate. It is ultra-vires for the court to substitute its subjective beliefs for those of the County Assembly. After all, a vote of confidence or lack thereof is not a legal term. It is a political opinion. The extrinsic evidence for holding the opinion may be useful but not decisive<sup>41</sup>. In the U.K case of *R v Secretary of State for Trade and Industry Ex.p. Lonhro Plc*, Lord Keith pointed out that 'courts must be careful not to invade the political field and substitute their own judgment for that of the Minister. The courts judge the lawfulness not the wisdom of the decision'<sup>42</sup>.

On prohibition against imposing policies that are beyond judicial discretion, Wambora 1 and 2 overstepped court's mandate by purporting to formulate a policy that Governors do not bear personal political responsibility for the wrongdoings of their officers. Without such a policy, it was not possible for the court to determine whether the County Assembly was entitled to hold Governor Wambora politically responsible for the wrongdoings of the tender committee.

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<sup>40</sup> Ibid 8.

<sup>41</sup> H.W.R.Wade & C.F. Forsyth, *Administrative law* 8<sup>th</sup> ed. (Oxford 2000) 416.

<sup>42</sup> (1989) WLR 525 at 536.

To create a basis for exonerating the Governor from political responsibility, the Court was forced to craft and impose the dubious policy that though section 30(3) of the County Government Act holds governors accountable for the management and use of the County resources, the governor does not bear personal political responsibility for the sins of officers in managing County resources<sup>43</sup>.

On embarrassment by contrary decisions of other organs of government, the High Court was embarrassed in Wambora 1, since the County Assembly commenced fresh process to impeach the Governor on April 16, 2014, the same day that the High Court nullified the decision of the Senate to uphold impeachment charges. Undeterred, the Court of Appeal in Wambora 2 nullified the second decision of the Senate to uphold impeachment charges. Clearly, the courts judicialised the politics of Embu County. In *Hon. Ferdinand Ndung'u Waititu v County Assembly of Kiambu & 4 others*, the High Court was again embarrassed when the Senate voted to uphold the impeachment charges while the suit to nullify the charges was pending before Court<sup>44</sup>. Going by Wambora 1 and 2, it is not unreasonable to expect that the courts will again claim the final say on whether Senate should have upheld the impeachment charges against Governor Waititu.

The fourth reason for disagreeing with Wambora 1 and 2 is that literal interpretation of Article 165(3) (d)(ii), that Courts have power to interrogate the grounds and evidential basis of anything done under the authority of the constitution, creates juristocracy and constitutional chaos in the political life of the country. With respect to juristocracy, the interpretation gives the court the final say on all the matters mentioned above<sup>45</sup>. On chaos, the U.S. Supreme Court in *Nixon v United States* foresaw the dramatic lack of finality where a President convicted by the Senate and who by text of the Constitution must

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<sup>43</sup> *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR at paragraph 47-51 and Paragraph 22 of judgment of Justice GBM Kariuki.

<sup>44</sup> High Court (Nbi) Constitutional Petition No. 29 of 2020

<sup>45</sup> Leslie Friedman Goldstein, 'From Democracy to Juristocracy' (2004) 38 *Law & Society Review* 611 JSTOR.

<<https://www.jstor.org/stable/pdf/1555146.pdf?refreqid=excelsior%3Ab765bf75c9c66432677fbf8a9dd775c5>>

forthwith cease to hold office challenges the conviction in court<sup>46</sup>. The court foresaw that the authority of the sitting president would be severely impaired during the pendency of the judicial process and if the impeachment was nullified, during retrial by perhaps a differently constituted senate. It questioned the reliefs the court could give especially whether the court could reinstate the impeached president, depose the sitting, or create a co-presidency. Upon those concerns, the U.S. Supreme Court held that the word ‘try’ in Article I (3) clause 6 of the U.S Constitution providing that ‘Senate shall have sole power to try impeachments’, does not impose limit on the methods by which Senate may try impeachments. The argument was that the word ‘try’ has multiple meanings including examine, investigate, or test. It does not necessarily require a court-like trial and therefore, there is no judicially manageable standard of reviewing the trial by Senate<sup>47</sup>. Save for substituting the National Assembly for County Assembly, Article 145(1) of the Constitution on removal of the President by impeachment is a replica of the provisions of Article 181(1) and section 33 of the County Government Act on removal of a governor by impeachment. The decisions of the Court of Appeal in Wambora 1 and 2 suggest that under Article 165(3) (d)(ii) and (7), the High Court has jurisdiction to examine the grounds and materials upon which the Senate reached the decision to uphold or reject impeachment charges. On the converse, if the decision of Senate not to uphold the charges is challenged, the High Court has jurisdiction to overturn and order the Senate to uphold the charges and thereby remove the President from office. The possibility of legal proceedings challenging an acquittal is crystallized by the decision of the County Assembly of Kirinyaga County to challenge the acquittal of Governor Waiguru in the High Court<sup>48</sup>. Consequently, courts must now confront the question of the reliefs available in event proceedings in event the challenge succeed. If the High Court substitutes the decision of Senate with its own upholding the charges, it must confront the further question whether the court is really the forum for deciding whether politicians will hold or cease holding political offices.

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<sup>46</sup> 506 U.S. 224, 113S.Ct.732 (1993).

<sup>47</sup> Ibid 2, Judgement of Chief Justice Rehnquist.

<sup>48</sup> Jacinta Mutura, ‘Waiguru ouster row now set for the High Court’, Sunday Standard (Nairobi 28<sup>th</sup> June 2020) 6.

The decisions in Wambora 1 and 2 mean that the decision of Senate to convict or acquit the President of the Republic of Kenya on impeachment charges can be challenged. Such proceedings must start in the High Court since Article 163 refers to the High Court and the Supreme Court does not have original jurisdiction saves in presidential elections disputes. Validity of impeachment of a president being a national matter, the proceedings may be instituted in any registry of the High Court including Garsen, Kapenguria, Migori or Kerugoya. Such proceedings Senate would spark prolonged political uncertainty since Article 163(4) (a) provides a right of appeal all the way to the Supreme Court with conservatory orders, stay of execution, injunctions, suspension of processes along the process. I think opening doors for courts to review impeachments is sure recipe for constitutional cum political chaos if not civil war especially in Kenya. However, this is not to suggest that violations of private personal legal rights in exercise of non-justiciable power are not justiciable<sup>49</sup>. In fact, in *INS v Chadha*, it was held that that the doctrine of political question is not automatically invoked by heavy political overtones in an otherwise constitutional question<sup>50</sup>.

Back to impeachments, jurists including Hart and Sacks agree that courts should keep off, including in other non-justiciable controversies<sup>51</sup>. This suggests that there is a limit to court's constitutional powers in Article 165(3) (d)(ii) and the judicial review jurisdiction in Article 165(7). In my view, the all judicial power ends where the political or otherwise non-justiciable question begins. Impeachments especially should not be judicialised since it is essentially a vote of no confidence. As such, it is a political decision devoid of legal notions such as charges, evidence, trial, conviction, etc. Black's law dictionary defines the no-confidence vote as the formal legal method by which a legislative body forces resignation of a cabinet or ministry<sup>52</sup>. It is really about having or not having confidence in the person and confidence, like other non-justiciable questions, is a subjective quality. It cannot be measured judicially.

However, there are contrary views that judicial intervention is justified in some cases. Justice Souter of the U.S Supreme Court in *Nixon v U.S.A* visualized

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<sup>49</sup> *Boyd v Nebraska ex. rel. Thayer* 143 U.S. 135, 12 S.Ct. 375.

<sup>50</sup> 462 U.S. 919, 942-43(1983).

<sup>51</sup> Henry Hart and Albert Sacks, *The Legal Process* (8<sup>th</sup> ed) p.1994

<sup>52</sup> Bryan A. Garner, *Black's Law Dictionary*, South Asia Ed. 8<sup>th</sup> ed. (2015) 1073.

unusual circumstances such as the Senate determining the trial by tossing a coin. He argued that such would be beyond the constitutional authority of the Senate and undermines public confidence in the Senate<sup>53</sup>. Henkin also argues that courts can review how Senate goes about impeachment trials to prevent what she calls excesses and infirmities<sup>54</sup>. Gerhardt agrees that judicial review<sup>54</sup> may be appropriate in some cases but cautions that it should not be too intrusive. He says that it should be limited to ensuring that the political organ made the particular decision entrusted to it by the Constitution<sup>55</sup>. I would agree with Bickel that although to some extent it is possible to use the principle of law to decide impeachments, the principles of law must yield to other considerations such as political stability, consensus, national security etc<sup>56</sup>.

### **Intimations of the political character of Senate decisions**

The Senate debates on the motion to remove Prof. Kithure Kindiki from the office of the Leader of Majority demonstrate the irrelevance of the law in Senate decisions despite most participants being prominent scholars and practitioners of the law. The Senate Standing Orders provide that the holder of the office may only be removed on grounds of inability to perform his functions. Senator Kindiki, a professor of law, pointed out that the process was unconstitutional because he was not served with specific charges, was denied the right to be heard and the outcome was pre-determined. Opposing the motion, Senator Murkomen, another scholar of law, and Senator Cheruyoit demanded specific charges. Without bothering to explain the lack of specific charges, the overwhelming majority of senators, made it clear that the removal was about politics rather than competence or conduct of Kindiki. Senator James Orengo, a prominent legal practitioner, said that ‘this is all about politics of power not principles’. Senator Ole Kina reiterated that ‘we are here to discuss party politics not your competence’<sup>57</sup>. In the end the Speaker, also a lawyer, upheld the vote to remove Kindiki. Commenting, Prof. Makau Mutua argued that the removal

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<sup>53</sup> Ibid 2

<sup>54</sup> Louis Henkin, ‘Is there a ‘political Question doctrine’?’, 85 Yale .L.J 597, 622 (1976).

<sup>55</sup> Michael J. Gerhardt, ‘Rediscovering non-justiciability: Judicial Review of Impeachments after Nixon’ (1944) Duke L. J. Vo.44, 244.

<sup>56</sup> Alexander M. Bickel , *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 183-197 (2<sup>nd</sup> ed.1986)

<sup>57</sup> The Standard Group, ‘Uhuru Raila rally troops, topple Ruto ally from top Senate Position’ Saturday Standard (Nairobi May 23, 2020)10.

demonstrated that the law is a servant of politics and not the other way round<sup>58</sup>. I agree entirely with Prof. Makau but worry that courts would most probably have followed Wambora 1 and 2 and restrained or nullified the decision of Senate removing Senator Kindiki. In fact, in the contemporary dispute of *Caleb Kositany & 3 others vs Raphael Tuju and 4 others*, the Political Disputes Resolution Tribunal restrained Jubilee Party from entering into a coalition with the Kenya African National Union<sup>59</sup>.

### **Decisions in other non-justiciable areas**

Apart from impeachments, courts get involved in other areas that are either probably non-justiciable or beyond the bounds of judicial discretion. In the *Law Society of Kenya v Cabinet Secretary for Defence & 4 Others*, the Law Society sued the Government for allegedly threatening the right to life of Kenyans by allowing flights from China at a time when China was said to be the epicenter of the outbreak of the corona-virus pandemic<sup>60</sup>. The High Court ordered the Cabinet Secretaries not to allow flights from China. In a separate petition, the Court ordered Cabinet Secretaries to track down all passengers who arrived via a certain flight from China and quarantine them in military barracks until they are declared free from the corona virus<sup>61</sup>. The question in the application was the best measures for preventing corona virus from spreading. No doubt the question turns on policy, logistics, planning and resources. *Baker v Carr* labels such considerations as non-justiciable. The Government Spokesman later commented that to comply with the order, the Government was required to evacuate soldiers from the barracks since military barracks are dormitories for soldiers. A subsequent order directed the Government to file reports indicating the steps taken by Ministries to control the spread of the disease<sup>62</sup>. Whether in reaction or on its own motion, the government took measures that are far beyond contemplation of any court. It suspended all flights into the country, imposed a curfew from 7pm to 5am, closed down all institutions of learning, restaurants, public entertainment spots, ordered employers to release employees at 3 pm, and imposed no-travel into or out of some regions. If we agree that these are some

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<sup>58</sup> Prof. Makau Mutua, 'Purge Against Senate Illustrates why the law is a servant of politics' *The Sunday Nation*, Nation Media Group (Nairobi 24<sup>th</sup> May 2020) 14.

<sup>59</sup> Appeal No.1 of 2020

<sup>60</sup> High Court (Nbi) Petition No. 78 of 2020.

<sup>61</sup> High Court (Nbi) Petition No. 79 of 2020.

<sup>62</sup> *The Standard*, 'Court demands report on foreigners', (Nairobi 4<sup>th</sup> March 2020) 21.

of the measures required to contain spread of the disease, we would perhaps agree that courts ought to leave such decisions to public health officials.

In *Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi*,<sup>63</sup> the High court issued mandamus compelling the Cabinet Secretary for Transport, the Kenya Highways Authorities, and the County Government to within 60 days remove bumps and rumble strips along Thika Superhighway at “Survey of Kenya” and “Homeland/Kenya Breweries” and replace them with footbridges for pedestrians. The question of what between foot bridges, bumps, and rumble strips is appropriate depends on engineering, funding, priority, planning, and other non-legal considerations that are either not justiciable, or beyond judicial discretion or both. The lingering question is the juridical standard for analyzing those non-judicial considerations when choosing between foot bridges, road bumps, and rumble strips.

In *Adrian Kamotho Njenga v Council of Governors & 3 others*, the Environment and Land Court ordered the Cabinet Secretary for transport to constitute and chair a Working Group that includes representatives of all the respondents, to formulate the policy for providing toilets and other sanitation facilities on road network in Kenya in order to give effect to the right to clean and healthy environment on the roads. Further, that the national transport policy should incorporate toilets and other sanitation facilities as part of the roadside developments in road designs for existing and new roads, and designate sufficient number of such facilities on stops on the national and international trunk roads. In addition, that the policy should take into account the need to have the toilets and other sanitation facilities maintained properly by the county governments once constructed. Despite the legal issues involved, it cannot be denied that the decisions of which public amenities are to be prioritized belongs to planning, policy, political manifesto, funding, viability, and other non-legal considerations. The duty, if any, to provide toilets, is not plainly prescribed in those terms by any statute and there is no judicially discoverable and manageable standard for determining where, when, how, or which toilets.

In *Kenya National Union of Teachers v Teachers Service Commission*, the Employment and Labour Relations Court nullified the career progression

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<sup>63</sup> [2017] eKLR

scheme formulated by the Teachers Service Commission on the ground that the scheme was not implemented in accordance with the Code of Regulations for Teachers<sup>64</sup>. The subsequent developments suggest that courts should have not waded into the controversy. Rather than applaud the decision, the teachers who were clearly the winners in the judgment withdrew from the union en-mass. The outcome suggests that the controversy required the evidently non-judicial managerial discretion of the TSC to allow the promotions and other benefits obtained by the member teachers to stand or fall with the nullified scheme.

In *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others*, the ELRC ordered Kenya Airways to re-employ 447 employees terminated by the airline despite its plea that it simply could not afford their salaries<sup>65</sup>. As pointed out in *Armstrong*, the court basically judicialised the managerial discretion of the airline in the day to day management of the human resource. A few months after the decision, the airline collapsed under debts. Not surprisingly, the decision was reversed by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*<sup>66</sup> but after causing near fatal injuries to the financial health of the airline.

Appointments to senior positions in Government including transfers from one station to another and in promotions show up in court styled as employment disputes<sup>67</sup>. In *Republic v Deputy Inspector General of National Police & 32 others*, the Court issued certiorari quashing the decision of the Inspector General to transfer 30 police officers to different stations<sup>68</sup>.

Nevertheless, the distinction between justiciable and non-justiciable is not entirely lost. In *Kiro Wa Ngugi & 19 others v Attorney General & 2 others*<sup>69</sup>, the court held that the issues would be more effectively resolved by diplomatic, legislative, policy and other executive interventions rather than by a constitutional decision. In *Born Bob Maren v Speaker Narok County Assembly*

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<sup>64</sup> [2019] eKLR

<sup>65</sup> *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR

<sup>66</sup> *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR

<sup>67</sup> *Republic v Deputy Inspector General of National Police & 32 others* [2013] eKLR

<sup>68</sup> [2013] eKLR.

<sup>69</sup> [2020] eKLR.



& 3 others<sup>70</sup>, the court held that controversy over removal from the position of the leader of the majority was un-justiciable since one comes into and remains in office through an election which is an expression of the wishes of his party. In *Okiya Omtatah v KRA Board of Directors & 2 others*, the petitioner sought a declaration that it was unconstitutional to appoint John Njiraini as the Commissioner General of Kenya Revenue Authority after attaining the mandatory retirement age. The ELRC observed that retirement was a question of policy, which policy did not bind the government especially where there was a reasonable explanation for departing without violating the law or the constitution<sup>71</sup>.

### **Echoes from other jurisdictions on adjudicating the un-justiciable**

The problem of purporting to adjudicate non-justiciable controversies shows up in other jurisdictions. In the UK case of *R (on the application of Miller) v The Prime Minister of the United Kingdom*, the UK Supreme Court determined that the Prime Minister was not entitled to prorogue the House of Commons<sup>72</sup>. The Prime Minister countered that whether to or not to prorogue Parliament was for politicians, not judges. He told Parliament that his Government did not agree but would respect the decision. The electorate resolved the controversy with finality by electing the Conservative Party of the Prime Minister with an overwhelming majority<sup>73</sup>. Irrespective of the law, the Supreme Court was politically wrong while the Prime Minister was correct.

In *State of Washington and State of Minnesota v Trump*, a U.S District Court nullified the policy of President Trump to deny visas to nationals of certain Islamic countries<sup>74</sup>. President Trump countered that the immigration and security policies of the U.S are the prerogative of the Federal Government. Subsequently, the President issued other orders worded differently but with the same effect. Another court nullified the second decision<sup>75</sup>. At this point, the government evaded further controversies by measures that made migrating into the U.S from

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<sup>70</sup> [2015] eKLR.

<sup>71</sup> ELRC (Nrb) Petition No.103 of 2017.

<sup>72</sup> *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41

<sup>73</sup> World News TV, 'Election Results 2019: Boris Johnson Returns to Power with Big Majority', [www.npr.org](http://www.npr.org). >2019/12/13>.

<sup>74</sup> 847 F.3d 1151 (9th Cir. 2017)

<sup>75</sup> *Arab Americans Civil Rights League v Trump* No.2:17-cv-10310(E.D.Mich.2017)

the countries in question become prohibitively rigorous without formal policy directives<sup>76</sup>.

The common thread across the cases and jurisdictions is that controversies cut across multiplicity of disciplines such that they cannot be resolved satisfactorily by the law alone. The decision of the County Assembly to commence fresh impeachment in the wake of nullification of impeachment in Wambora 1, the landslide of the election of the party of Prime Minister Boris Johnson by an overwhelming majority, and inability of the U.S Courts to give effective relief to the immigrants demonstrate the futility of attempting to resolve non justiciable controversies judicially. Equity is wiser in refusing to act in vain<sup>77</sup>.

## **Conclusion**

The law cannot cure non-justiciable controversies merely because a rule or two says something about some minute aspect of the controversy. Wading into controversies that are essentially or substantially political, moral, religious, economic or cultural risks contradicting the text of the law, deciding without judicially discoverable standard, usurping the policy discretion of other institutions, embarrassing outmaneuver by other institutions, and ultimately undermining the public confidence in administration of justice. As advised by Nairobi Law Monthly, courts would do better leaving such controversies to other process especially politics where voters approve or disapprove and its maker by voting for or against<sup>78</sup>. Indeed, in the controversy over the budget of the County Government of Makueni, the County Assembly voted to impeach Governor Professor Kibwana. In turn, the Governor collected signatures towards dissolving the Assembly. Makueni voters resolved the controversy neatly and with finality in the next election by voting out 29 out of the 30 members of the County Assembly and loudly pronounced their confidence in the decisions of Governor Professor Kibwana by re-electing him with an overwhelming

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<sup>76</sup> Hill, James; Keneally, Meghan; Jacobo, Julia (February 13, 2017). "Court blocks Trump's immigration order indefinitely". ABC News. <<https://abcnews.go.com/Politics/government-lawyers-call-delay-trump-immigration-order-case/story?id=45467116>> Accessed June 13, 2020.

<sup>77</sup> RE Meggary and PV Baker, *Snell's Principles of Equity* (25th edn, Sweet & Maxwell 1966) 528.

<sup>78</sup> Denis Nderitu, *The Nairobi Law Monthly* Vol.11 October 2019 at 85.

majority<sup>79</sup>. I still wonder what would have become of the Makueni controversy had it chanced in courts.

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<sup>79</sup> Edmond Nyabola, 'Makueni MCA's who tried to impeach Kibwana lose seats', (NTV news Nairobi) <https://kenyans.co.ke/news>. Accessed 1 July 2020.