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Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts

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Abstract

This paper delves into the doctrine of separation of powers and the notion of judicial overreach in the Kenyan context. It explores legal safeguards against the usurpation of parliamentary powers by the courts, emphasizing the need to strike a balance between judicial independence and judicial overreach. It does this by examining a number of case law and legislations. The paper examines the concept of rational judicial deference, the promotion of a constitutional partnership between the courts and Parliament, the prioritization of constitutionalism, and the distinction between administrative policy and legal rights. Through these insights, the paper aims to strengthen legal safeguards, preserve democratic governance, and uphold the integrity of the Constitution in Kenya.

Key Words: *Separation-of-Powers, Judicial-Overreach, Constitutionalism, Judicial-Discretion, Legislature, Judiciary, Judicial-Independence.*

1. Introduction

In constitutional democracies, the principle of separation of powers stands as the cornerstone, fostering a delicate equilibrium between the three branches of government: the legislature, the executive, and the judiciary.¹ Each branch operates independently, with distinct

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¹ Kibet & Wangeci, 'A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya' *Strathmore Law Review* 2016, 222.

roles and responsibilities, ensuring checks and balances to prevent the abuse of power. While the judiciary plays a critical role in safeguarding individual rights, upholding the constitution, and providing oversight through judicial review, concerns over judicial overreach have emerged.²

This paper delves into the complex dynamics surrounding the doctrine of separation of powers and the notion of judicial overreach, with a specific focus on the Kenyan context. Exploring the delicate balance between the powers of Parliament and the courts, the paper seeks to address the fundamental question of how to strengthen legal safeguards against the usurpation of parliamentary powers by the judiciary while preserving judicial independence and constitutional integrity.

The first section discusses the concept of separation of powers and its relevance in the Kenyan context. Analyzing the distribution of powers among the three branches, the paper highlights the vital role of each institution in ensuring effective governance and democratic accountability.

Moving forward, the discussion centers on the notion of judicial overreach. Through a critical examination of case laws and constitutional provisions, the paper explores instances where the judiciary may have exceeded its constitutional mandate, encroaching upon matters that are inherently the domain of Parliament or the executive. This section also delves into the implications of such overreach, shedding light on its potential impact on democratic principles and the rule of law.

² Ibid

The paper then proceeds to analyze the concept of rational judicial deference, constitutional partnership between the courts and Parliament, constitutionalism and the distinction between administrative policy and legal rights.

This paper seeks to shed light on the multifaceted challenges surrounding the doctrine of separation of powers and judicial overreach in Kenya. By exploring the concepts of rational judicial deference, constitutional partnership, and the prioritization of constitutionalism, the paper aims to provide valuable insights into reinforcing legal safeguards, preserving judicial independence, and upholding the integrity of the constitution in the Kenyan context.

2. The Doctrine of Separation of Powers and the Notion of Judicial Overreach

2.1 Separation of Powers

The concept of separation of powers is a fundamental principle in democratic systems that aims to distribute and balance governmental authority among different branches of government.³ It is based on the idea that concentrating power in a single entity can lead to tyranny and abuse of power. By dividing powers among distinct branches, the separation of powers seeks to establish a system of checks and balances that prevents any one branch from becoming too dominant.⁴ Traditionally, the three branches of government that are subject to separation of powers are the legislative, executive, and judicial branches. Each branch has specific functions and powers, and they

³ Montesquieu, Charles de Secondat. "The Spirit of the Laws." Translated by Thomas Nugent, edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, Cambridge University Press, 1989.

⁴ Ibid

are expected to operate independently while exercising their respective authority.

2.2 Judicial Overreach

Judicial overreach refers to a situation where the judiciary exceeds its constitutional authority or interferes with the powers and functions of other branches of government, such as the legislature or the executive.⁵ It occurs when the judiciary takes actions or decisions that go beyond the proper limits of its role in interpreting and applying the law.⁶

In the context of separation of powers, judicial overreach raises concerns because it can disrupt the balance of power among the branches and undermine the principle of checks and balances. The judiciary's role is primarily to interpret the law and ensure its constitutionality, rather than making or implementing policy decisions that fall within the domain of the legislative or executive branches.⁷

Examples of such overreach include; when courts engage in legislative activism, they take an active role in shaping public policy by making decisions that go beyond mere interpretation of the law. This can involve creating new rights or imposing obligations on the legislature or executive that were not explicitly provided for in the constitution or statutes.⁸ Another example is Judicial Legislation. This occurs when courts effectively legislate by making laws through their decisions. Instead of interpreting existing laws, they go beyond their

⁵ Vermeule, Adrian (2018) "Judicial Review and Judicial Power." *Harvard Law Review*, Vol. 131

⁶ Ibid

⁷ Ibid

⁸ Ibid

interpretative role and establish new legal standards or requirements. This can be problematic because the power to create laws is constitutionally vested in the legislative branch.⁹

Judicial overreach can also involve the judiciary interfering with the executive branch's powers. This can occur when courts issue orders or judgments that directly interfere with executive decision-making or administration, beyond the scope of their judicial function.¹⁰

However, not all judicial decisions that have a significant impact on public policy or government actions should be automatically categorized as judicial overreach.¹¹ Courts may sometimes need to step in to protect constitutional rights or address issues where the legislative or executive branches have failed to act. The key factor is whether the judiciary's actions exceed the boundaries of its constitutional authority and undermine the separation of powers.¹²

2.3 Relevance for the Kenyan Context

In the Kenyan context, the doctrine of separation of powers and the issue of judicial overreach holds significant relevance due to the country's constitutional framework and its history of governance.¹³ Understanding this relevance is crucial for analyzing the relationship between the branches of government and assessing the safeguards in place against judicial overreach.

Kenya has a constitutional framework that explicitly enshrines the principle of separation of powers. As discussed later, the 2010

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Mutunga, Willy. "The Constitution of Kenya: A Commentary." *Strathmore University Press*, 2011.

Constitution establishes a clear division of powers among the three branches of government: the legislature, the executive, and the judiciary. It sets out the functions and powers of each branch and establishes mechanisms for checks and balances.

Kenya has experienced challenges related to governance and abuses of power in the past. Prior to the adoption of the 2010 constitution, Kenya had a history of centralized power and limited checks on executive authority. This history underscores the importance of separation of powers in preventing abuses and ensuring accountability.¹⁴

The independence of the judiciary is crucial for upholding the separation of powers. In Kenya, the judiciary is expected to exercise its powers and functions without interference from other branches. This independence allows the judiciary to act as a check on potential overreach by the executive or legislative branches.¹⁵

The power of judicial review granted to the judiciary is particularly relevant in Kenya. The Constitution empowers the courts to review the constitutionality of laws and government actions, providing a mechanism to safeguard against legislative or executive overreach. Judicial review ensures that the actions of the other branches comply with constitutional provisions and protects individual rights and freedoms.¹⁶

The Kenyan judiciary has been subject to debates and criticisms regarding instances of potential judicial overreach. Some argue that the judiciary has sometimes engaged in judicial activism, going

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

beyond interpretation to make policy decisions or create new rights. These instances highlight the importance of discussing the boundaries of judicial authority and examining the legal safeguards in place.¹⁷

Kenya has mechanisms in place to address concerns of judicial overreach. These include the appellate process, where higher courts can review and correct errors, and the accountability mechanisms for judicial conduct. Analyzing the effectiveness of these safeguards in preventing and addressing overreach is essential to ensure the proper functioning of the separation of powers.¹⁸

3. Separation and Delimitation of Powers Under Kenyan Constitutional Law

3.1 The Constitutional Supremacy Framework

Article 1 (3) - This provision establishes the organs to which sovereign power is delegated under the Constitution. It identifies Parliament, the national executive, and the judiciary as the key state organs responsible for exercising delegated powers. Each organ is expected to perform its functions in accordance with the Constitution.

Article 115

Article 115 of the Kenyan Constitution, which deals with the presidential assent and referral of bills, has implications for the separation of powers in Kenya.

Article 115 outlines the interaction between the executive (represented by the President) and the legislature (represented by Parliament) in the lawmaking process. The provision allows the

¹⁷ Ibid

¹⁸ Ibid

President to exercise influence over legislation by either assenting to a bill or referring it back to Parliament for reconsideration.¹⁹ This interaction reflects the checks and balances inherent in the separation of powers, as it ensures that the executive has a say in the legislative process.

The provision grants the President the power to refer a bill back to Parliament if the President has reservations about it.²⁰ This veto power acts as a safeguard against potential legislative overreach. It allows the President, as the head of the executive branch, to check and balance the actions of the legislature, ensuring that bills align with the government's policies and objectives.

Article 115 also highlights the role of Parliament in the lawmaking process. After a bill is referred back by the President, Parliament has the opportunity to reconsider and amend it.²¹ This emphasizes the importance of Parliament as a separate and independent branch of government with the power to shape legislation and respond to the concerns raised by the executive.

The study argues that the provision establishes a delicate balance between the executive and legislative branches. While the President can refer a bill back for reconsideration, Parliament retains the power to pass the bill without amendment if it chooses to do so, provided it meets the required majority support.²² This balance reflects the principles of separation of powers, where neither branch can unilaterally dominate the legislative process.

¹⁹ Constitution of Kenya 2010, art 115 (1)

²⁰ Ibid

²¹ Ibid art 115 (2)

²² Ibid art 115 (4)

Furthermore, the study posits that article 115 indirectly relates to the prevention of judicial overreach. By allowing the President to refer a bill back to Parliament, it provides an opportunity for executive intervention in response to perceived unconstitutional or problematic provisions. This mechanism acts as a check on potential judicial overreach by ensuring that the President, as the head of the executive branch, can influence the legislative process in cases where constitutional concerns may arise.

Article 131 (3)

It stipulates that 'The President shall not hold any other State or public office'. The study posits that this provision establishes a restriction on the President's holding of any other state or public office. This serves to prevent the concentration of powers in a single individual, ensuring that the President's focus remains on the executive duties and responsibilities.

Article 152 (3)

It stipulates that 'A Cabinet Secretary shall not be a Member of Parliament'. This provision further contributes to the separation of powers by preventing an overlap of roles between the executive and legislative branches.

3.2 The legislature

The Legislature in Kenya plays a critical role in the country's governance and the separation of powers. The Kenyan Legislature consists of two houses: the National Assembly and the Senate.²³ This bicameral structure is intended to ensure representation and balance among different interests and regions within the country. The National Assembly comprises elected representatives known as Members of Parliament (MPs) who represent constituencies. They are

²³ Ibid art 93

responsible for representing the people, making and passing laws, and overseeing the actions of the executive branch.²⁴

The Senate represents the interests of the counties in Kenya. The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113. The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments. The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.²⁵

The primary function of the Legislature is to make laws. Members of Parliament, both from the National Assembly and the Senate, propose, debate, and pass legislation through bills that affects various aspects of Kenyan society.²⁶ This lawmaking function is crucial for governing the country, addressing societal needs, and promoting development and progress.

The Legislature provides a platform for diverse voices and interests to be represented. Members of Parliament, elected through democratic processes, act as representatives of their constituencies and are responsible for voicing the concerns and needs of their constituents. The Legislature also provides an avenue for public participation, where citizens can engage with their representatives and contribute to the lawmaking process.²⁷

²⁴ Ibid art 95

²⁵ Ibid, art 96

²⁶ Ibid, art 109

²⁷ Ibid, arts 118 & 119.

3.3 The Executive

The executive branch in Kenya holds significant power and is responsible for implementing and executing laws.

The President is the head of state and the chief executive officer of Kenya. The President is elected through a general election and serves as both the head of government and the head of the executive branch. The President has various powers and responsibilities, including policy-making, appointing government officials, and representing the country both domestically and internationally.²⁸

The President is supported by a Cabinet composed of Cabinet Secretaries appointed by the President. Cabinet Secretaries head various government ministries and are responsible for implementing government policies and overseeing specific areas of governance, such as finance, health, education, and infrastructure.²⁹

The executive branch is responsible for making decisions and implementing policies that affect various aspects of governance, including economic development, public service delivery, security, and foreign affairs. The executive branch formulates and implements national development plans, annual budgets, and public policies aimed at addressing societal challenges and achieving national objectives.

The executive branch is subject to oversight by other branches of government, particularly the Legislature. Members of Parliament have the power to question Cabinet Secretaries and other government

²⁸ Ibid, art 132

²⁹ Ibid, art 152

officials, hold them accountable for their actions, and scrutinize the executive's performance.³⁰

3.4 The Judiciary

The judiciary in Kenya is an independent branch of government responsible for interpreting and applying the law, ensuring justice, and safeguarding the rights and freedoms of individuals.³¹

The Kenyan judiciary operates independently of the other branches of government, namely the executive and the legislature. This independence is crucial for upholding the rule of law, ensuring impartiality, and preventing undue influence or interference in judicial decisions.³²

The primary function of the judiciary is to adjudicate disputes and resolve legal conflicts. It includes civil, criminal, constitutional, and administrative matters. The judiciary ensures that justice is administered fairly, applying legal principles, statutes, and the Constitution to reach decisions.³³

The judiciary in Kenya has a crucial role in upholding the Constitution. It has the power of judicial review, enabling it to assess the constitutionality of laws, government actions, and the conduct of public officials. This power serves as a check on the other branches of government, ensuring that their actions comply with constitutional provisions.³⁴

³⁰ Ibid, art 152

³¹ Ibid, chapter 10

³² Ibid, art 160

³³ Ibid, chapter 10

³⁴ Ibid, art 165

The judiciary plays a vital role in safeguarding individual rights and freedoms. It ensures that the rights enshrined in the Constitution are respected and protected by interpreting and applying the law in a manner that upholds these rights. This includes the protection of human rights, civil liberties, and access to justice.³⁵

The Judicial Service Commission (JSC) is a constitutional body tasked with safeguarding the independence and integrity of the judiciary. It oversees the recruitment, appointment, and discipline of judges, promoting transparency, accountability, and merit-based judicial appointments.³⁶

The study argues that understanding the role and functions of the judiciary in Kenya is essential for assessing the separation of powers and examining potential issues of judicial overreach. It allows for an analysis of the judiciary's independence, its impact on the protection of rights, and the mechanisms in place to ensure accountability and uphold the rule of law.

3.5 Distinction Between Beneficial Judicial Independence and Harmful Judicial Overreach

The distinction between beneficial judicial independence and harmful judicial overreach lies in the proper exercise of judicial authority within the bounds of the law and the Constitution.³⁷

Beneficial judicial independence refers to the ability of the judiciary to act impartially and free from external influences, ensuring fair and

³⁵ Ibid, art 165

³⁶ Ibid, art 172

³⁷ Githu, Muigai (2013) "The Constitution of Kenya: An Introductory Commentary." LawAfrica Publishing Ltd.

just decisions.³⁸ Judicial independence is crucial for upholding the rule of law, protecting individual rights, and serving as a check on potential abuses of power by other branches of government. It allows judges to make decisions based on their interpretation of the law and the facts presented before them, without fear of reprisal or undue influence.³⁹

Beneficial judicial independence involves judges faithfully interpreting and applying the Constitution, statutes, and legal principles. Judges should interpret the law in a manner that upholds the Constitution and protects fundamental rights and freedoms. By doing so, they contribute to a just and equitable legal system that respects the rule of law.⁴⁰

Judicial overreach occurs when the judiciary exceeds its constitutional authority and encroaches upon the functions and powers of the other branches of government.⁴¹ Harmful judicial overreach occurs when judges engage in policymaking or legislative functions, usurping the authority of the legislature or executive. This can disrupt the balance of powers and undermine the democratic process.⁴²

Beneficial judicial independence involves judges limiting their role to adjudicating disputes and interpreting the law, rather than creating new laws or policies. Judges should exercise restraint and defer to the legislature in matters that require legislative judgment and policy-

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

making. By respecting the separation of powers, judges contribute to the proper functioning of a democratic system.⁴³

Beneficial judicial independence respects the checks and balances established by the Constitution. It recognizes that the judiciary has the power of judicial review to assess the constitutionality of laws and government actions. Judicial decisions that strike down unconstitutional laws or protect constitutional rights can be seen as beneficial exercises of judicial independence. However, such decisions should be grounded in a careful interpretation of the Constitution, guided by legal principles and precedents.⁴⁴

Beneficial judicial independence is compatible with accountability and ethical conduct.⁴⁵ Judges should be subject to codes of conduct and disciplinary mechanisms that ensure they uphold the highest standards of professionalism, integrity, and impartiality. Accountability mechanisms promote public trust and confidence in the judiciary, reinforcing the importance of judicial independence.⁴⁶

4. Problematic Instances of Judicial Overreach in Kenya and its Implications for Criminal Justice

4.1 Focus on Criminal Justice

Judicial overreach can occur when courts overturn criminal convictions without proper legal basis or without following established legal procedures.⁴⁷ Such actions can undermine the

⁴³ Ojienda, Tom (2010) "The Constitution of Kenya: A New Legal Framework." LawAfrica Publishing Ltd

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Oduor, Rose J (2014) "Judicial Activism and the Judiciary in Kenya: A Critical Analysis." *Strathmore Law Journal*, Vol. 2

finality and certainty of criminal verdicts, leading to a lack of confidence in the justice system.

Judicial overreach in criminal justice can involve courts assuming legislative functions by creating new legal standards or requirements through their decisions. This can result in the judiciary effectively making or amending criminal laws, which should be the prerogative of the legislature. It can lead to confusion, inconsistency, and potential infringement on the separation of powers.⁴⁸

Judicial overreach may manifest as an excessive exercise of judicial discretion in criminal cases. This occurs when judges impose sentences or make determinations that go beyond what is reasonable or proportionate according to established legal principles. Excessive judicial discretion can undermine the consistency and predictability of sentencing, potentially leading to unequal treatment of defendants.⁴⁹

Judicial overreach can also involve courts interfering with the prosecutorial powers by imposing obligations on the prosecution that are not provided for in the law. This can impede the effective investigation and prosecution of criminal cases, potentially resulting in a miscarriage of justice.⁵⁰

In addition, when the judiciary goes beyond its role of interpreting laws and imposes its own policy preferences or societal views, it can undermine the original legislative intent behind criminal statutes. This can result in laws being applied in unintended ways or the

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

disregard of specific legislative provisions meant to address certain criminal behaviors.⁵¹

Problematic instances of judicial overreach can erode public trust in the criminal justice system. They can create uncertainty, inconsistency, and unpredictability in the application of criminal laws, which are essential for maintaining law and order. This may undermine the deterrence effect of the criminal justice system and impact the willingness of the public to report crimes and cooperate with law enforcement.⁵²

Important to note, not all judicial decisions that are seen as problematic necessarily constitute overreach. Judicial review and interpretation are essential aspects of the judiciary's function. However, when the judiciary exceeds its constitutional authority or undermines the separation of powers, it can have far-reaching implications for the criminal justice system, affecting both the rights of defendants and the overall administration of justice.⁵³

4.2 The Mandatory Death Sentence

Francis Karioko Muruatetu & another Vs Republic [2017] eKLR

The Court in its Judgement declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases. The court also directed the legislative making bodies to enact

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

legislation to the effect of repealing sections that made provision for the death penalty.⁵⁴

The court averred as follows:

To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless... Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.⁵⁵

We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.⁵⁶ Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.⁵⁷

⁵⁴ Para 112; *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu*)

⁵⁵ Para 45 Ibid

⁵⁶ Para 46; Ibid

⁵⁷ Para 47, Ibid

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.⁵⁸ Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.⁵⁹

If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.⁶⁰

⁵⁸ Para 48, Ibid

⁵⁹ Paragraph 50, Ibid

⁶⁰ Para 53, Ibid

In this context, the paper argues that the court's decision represents a beneficial exercise of judicial independence and discretion rather than judicial overreach.

The court's decision reflects a commitment to upholding constitutional rights, including the right to fair trial and the prohibition of cruel, inhuman, and degrading treatment. The court recognized the significance of allowing mitigating circumstances to be considered, ensuring that the sentence imposed is proportionate to the individual's culpability and the circumstances of the crime.

Furthermore, the court's decision involved interpreting the Constitution and assessing the compatibility of the mandatory death sentence with constitutional provisions. Judicial interpretation and application of the Constitution are essential aspects of the judiciary's role in safeguarding constitutional rights and upholding the rule of law.

By declaring the mandatory death sentence unconstitutional, the court recognized the importance of individualizing justice and considering the unique circumstances of each case. This approach aligns with principles of fairness, proportionality, and human rights, ensuring that the punishment fits the crime and the individual's level of culpability.

In addition, the court's directive for the legislative making bodies to enact legislation to repeal the sections that provided for the death penalty indicates the court's recognition of its role in interpreting the law and clarifying legislative intent. It demonstrates an appropriate exercise of judicial authority within the bounds of the separation of powers, as it does not repeal the laws itself but directs parliament to do so.

4.3 Mandatory Minimum Sentences for Sexual Offenders-Philip Mueke Maingi and five (5) others Vs DPP and Another (2021) KEHC 13118 (KLR)

The court held that the mandatory minimum sentences under the Sexual Offences Act are unconstitutional. There was a need for legislative amendments to the Sexual Offences Act. A strict application of some of the provisions of the Sexual Offences Act may cause injustice. The court further averred that to the extent that the Sexual Offences Act prescribed mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of article 28 of the Constitution. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.⁶¹

In this context, the paper argues that the court's decision can be seen as a beneficial exercise of judicial independence and discretion rather than judicial overreach. The court's decision to declare the mandatory minimum sentences as unconstitutional demonstrates its commitment to safeguarding constitutional rights. In this case, the court recognized the right to fair sentencing and the importance of allowing judges the discretion to determine appropriate sentences based on the specific circumstances of each case.

By striking down the mandatory minimum sentences, the court upheld the rule of law and the principle that laws should be consistent with the Constitution. This decision aligns with the judiciary's role in interpreting and applying the Constitution to ensure the protection of individual rights and prevent potential injustices.

⁶¹ Introduction summary, *Philip Mueke Maingi and 5 others v DPP and another* (2021) KEHC 13118 (KLR) (*Maingi*)

The court's ruling acknowledged that the strict application of mandatory minimum sentences could lead to unjust outcomes. Allowing for judicial discretion permits judges to consider mitigating factors, individual circumstances, and the gravity of the offense when determining sentences, resulting in more just and proportionate outcomes.

The court's decision did not replace or rewrite the law. Instead, it identified a specific aspect of the Sexual Offences Act that was incompatible with the Constitution and called for legislative amendments. This approach respects the separation of powers, as the court clarified its role in interpreting and reviewing laws while leaving the legislative function to the appropriate authority.

The court's ruling struck a balance between recognizing the unconstitutionality of mandatory minimum sentences and acknowledging that courts still had the discretion to impose sentences within the framework of the law. This balance allows for flexibility in sentencing while ensuring adherence to the Constitution.

Edwin Wachira and nine (9) others v Republic; consolidated with Adan Maka Thulu Vs DPP; Robert Mwangi Vs DPP; Kazungu Kalama Jojwa Vs DPP (2022) eKLR

The court made reference to the *Maingi case*⁶² and *Muruatetu*⁶³ and held as follows:

⁶² Para 17; *Edwin Wachira and 9 others v Republic; consolidated with Adan Maka Thulu v DPP; Robert Mwangi v DPP; Kazungu Kalama Jojwa v DPP (2022) eKLR (Wachira)*

⁶³ Para 20; *Wachira*

A court faced with a case where the minimum sentencing provisions apply, will have no choice, but to impose the prescribed sentence. This will happen regardless of what the court might regard as the appropriate sentence in the circumstances and accordingly, the court's discretion in the circumstances is fettered... Sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.⁶⁴

The court formulated five key principles. The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. The second is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.⁶⁵ The third principle is that sentencing remains a discretionary power, exercisable by the court and it involves the deliberation of the appropriate sentence.⁶⁶ The fourth principle is that court's advantage centers on the fact that they try individual cases and they can thus make sentencing decisions based on the particular facts of each case as they possess information pertaining to a particular accused.⁶⁷ The fifth principle is that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case.⁶⁸

The court continued as follows:

⁶⁴ Para 23; *Wachira*

⁶⁵ Para 24; *Wachira*

⁶⁶ Para 25; *Wachira*

⁶⁷ Para 27; *Wachira*

⁶⁸ Para 32; *Wachira*

Lucky for me the Supreme Court in *Muruatetu* one was categorical that mitigation forms an intergyral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused is unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person the full benefit of the law contrary to Article 2.⁶⁹

For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and/or depriving the court the discretion to determine an appropriate sentence.⁷⁰

The court declared that sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. The court added that to the extent that the

⁶⁹ Para 35; *Wachira*

⁷⁰ Para 36; *Wachira*

provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the Sexual Offences Act deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case and mitigation, the said provisions offend the notion of a fair trial contemplated under Article 50 of the Constitution.⁷¹

In this context, the paper argues that the court's decision can be seen as a beneficial exercise of judicial independence and discretion rather than judicial overreach. The court's decision reflects its commitment to upholding constitutional rights, particularly the right to a fair trial as enshrined in Article 50 of the Constitution. By striking down provisions that deprived the court of its discretion and the accused of their right to be heard in mitigation, the court protected the principles of fairness and justice.

The court acknowledged that the legislature has the authority to prescribe penalties for offenses, including maximum or minimum sentences. It did not question the idea of mandatory minimum sentences per se but rather the absence of judicial discretion in determining appropriate sentences.

The court clarified the essential role of the judiciary in sentencing, emphasizing that it is pre-eminently a matter for the discretion of the trial court. By asserting that sentencing remains a discretionary power, the court reinforced the principle that each case should be treated based on its unique facts and circumstances.

In addition, the court highlighted the importance of individualizing punishment, which requires considering the specific circumstances of each accused person. By depriving the court of the discretion to do

⁷¹ *Para 38; Wachira*

so, the mandatory minimum sentences were deemed incompatible with the principles of fairness and proportionality.

The court recognized that the mandatory minimum sentences could be discriminatory, as they did not allow for a lesser sentence informed by the individual circumstances of each offense. This highlights the court's role in preventing unfair treatment and ensuring equal protection under the law.

4.4 Application for Revisions - DPP Vs Milimani Chief Magistrate's Anti-corruption Court 2020 eKLR

The court held that the High Court's power of criminal revision (revisionary jurisdiction) is provided for in Article 165 (6) and (7) of the Constitution, as well as Section 362 of the Criminal Procedure Code, as read together with Section 364 of the same.⁷² An appeal turns largely on the merits of the impugned decision, while revision largely turns on technicalities relating to legality, propriety, regularity or correctness of the decision.⁷³

The court further averred that a revision unlike an appeal, does not deal with the merits of the decision or proceeding but its "legality, correctness, legality, propriety or regularity".⁷⁴ The court added that the freelance and wanton revisions (especially interlocutory revisions), not only interferes with the decisional independence of subordinate courts, and the smooth running of their proceedings, but may in some extreme extents amount to arm-twisting of those

⁷² Para 19 *DPP V Milimani Chief Magistrate's Anti-corruption court (Milimani)*

⁷³ Para 20, *Milimani*

⁷⁴ Para 21, *Milimani*

courts.⁷⁵ Revision unlike an appeal, is a discretionary remedy left to judicial discretion.⁷⁶

The paper argues that this court decision is relevant as it emphasizes the importance of preserving the decisional independence of subordinate courts. The court cautions against freelance and wanton revisions, especially interlocutory revisions, which may interfere with the smooth running of court proceedings and undermine the independence of lower courts.

The discretionary nature of the power of revision also reinforces the idea of judicial independence, as it allows the higher courts to exercise their judgment in determining when and how to intervene in lower court decisions. This discretion is essential for maintaining the balance between the roles of higher and lower courts and preventing unnecessary interference in the judicial process.

Furthermore, the court's distinction between revision and appeal highlights the different roles of these remedies. While an appeal considers the merits of the decision and is based on the substance of the case, revision focuses on the procedural and technical aspects of the decision-making process. This distinction reinforces the notion of fair and just procedures in the administration of justice and prevents the abuse of revisionary powers to re-litigate the merits of a case.

Supervisory Vs Revisionary Jurisdiction of the High Court - Reuben Mwangi Nguri Vs R (2021) eKLR

The court made reference to Section 362 of the Criminal Procedure Code which provides as follows:

⁷⁵ Para 28, *Milimani*

⁷⁶ Para 29, *Milimani*

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.⁷⁷

The court further held that the powers of the High Court to exercise revisionary jurisdiction are provided for under Section 364 of the Criminal Procedure Code which provides for the following:

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may: (a) In the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence. (b) In the case of any other order other than an order of acquittal alter or reverse the order. 2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own Defence.⁷⁸

The court continued as follows:

The prayer of revision vested in this court under Section 362 of the Criminal Procedure Code is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Accordingly, revision is by no means to be taken as an appeal by the aggrieved party to the High Court. In criminal cases where such orders are being sought under Section 364 on

⁷⁷ Para 3; *Reuben Mwangi Nguri v R* (2021) eKLR (*Reuben Mwangi*)

⁷⁸ Para 4 *Ibid*

revision the court should steer clear from trespassing into the realm of appellate jurisdiction.⁷⁹

It is plain from the above passage that the High Court is vested into wide revisionary powers to look into the orders, decisions, proceedings, sentences where any of the following circumstances manifest themselves: (a) Where the decision is grossly erroneous (b) Where there is no compliance with the provisions of the law. (c) Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record (d) Where the material evidence on the parties is not considered. (e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.⁸⁰

It is to be appreciated that the ambit created by the provisions of section 362 of the code empowers this court to exercise discretion as to the correctness, legality and propriety of the order or proceedings... The subordinate court is therefore a subject of supervisory and superintendent by this court in both judicial and administrative function. The court can therefore annul, review, vary or issue further directions on the matter complained of by an aggrieved party or which came into the attention of the court suo-moto. The only rider in the circumstances of this jurisdiction is to ensure the accused has an opportunity to be heard or his legal counsel before any decision is reached.⁸¹

The paper posits that this court decision reaffirms the importance of maintaining a clear distinction between appellate and revisionary jurisdiction, while also emphasizing the supervisory role of the High

⁷⁹ Para 5 Ibid

⁸⁰ Para 9 Ibid

⁸¹ Para 13, Ibid

Court over subordinate courts. This distinction is crucial in preventing the High Court from overstepping its role and encroaching on the functions of the appellate courts. The court also ensures that revision is limited to rectifying errors of law or procedure, maintaining the integrity of the justice system, and protecting the rights of the accused.

The court acknowledges that the provisions of the Criminal Procedure Code empower the High Court to exercise discretion in revisionary matters. This discretion allows the High Court to carefully assess the circumstances of each case and determine the appropriate course of action.

Vincent Echesa Okote Vs Republic (2019) eKLR - Revision Versus Appeals

The court asserted that the High Court is vested with supervisory powers over subordinate courts. Supervisory power is exercised through either appeal or revision. The power to exercise both appellate and supervisory jurisdiction over decisions of subordinate courts is conferred by Article 165(3) (e) (6) (7) of the Constitution,⁸² which stipulates:

3 ... the High Court shall have – (e) any other jurisdiction, original or appellate, conferred on it by legislation. (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in

⁸² Para 5, *Vincent Echesa Okote v Republic* [2019] eKLR (*Echesa*)

clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.⁸³

After considering the constitutional and statutory provisions on appellate and revisionary powers of the High Court, as well the judicial pronouncements, the court viewed that an appeal is broader than a revision, and that a revision is subsumed in an appeal. The court held that a person who approaches a court on revision is only asking the court to take a rather narrow look at the proceedings of the trial court where the focus ought to be on the regularity or propriety or correctness of the proceedings conducted or the decision arrived at. In other words, the challenge is more or less on the regularity or correctness or propriety of the process rather than on the merits of the final determination of the trial court.⁸⁴ By contrast, an appellant invites the appellate court to consider the particular grounds raised, and the law requires the court to have a holistic approach to the matter so as to satisfy itself that the proceedings were conducted properly and regularly, and that the final verdict was supported by the evidence adduced and was within the law. That would mean that on appeal the appellate court looks for the propriety or regularity or correctness of the proceedings or order, as well as the merits of the decision that is the subject of the appeal.⁸⁵

The court held that the applicant ought not to have brought an application for revision, instead he should have lodged an appeal against the decision.⁸⁶ The court noted that the applicant was not raising any questions of lack of correctness nor impropriety nor irregularity with the subject proceedings or decision. Instead, the

⁸³ Ibid

⁸⁴ Paragraph 11, *Echesa*

⁸⁵ Paragraph 12, *Echesa*

⁸⁶ Paragraph 14, *Ibid*

challenge was on the merits.⁸⁷ However, the court decided to proceed to determine the matter on its merits, as if it was an appeal.⁸⁸

The paper argues that this court decision reinforces the importance of adhering to the proper procedures and remedies available to parties, and the need for the court to be mindful of its jurisdictional limits. This decision also underscores the limited scope of revision and the need for the court to focus on procedural matters.

The court also notes that an appeal's broader scope allows the appellate court to conduct a holistic review of a matter. Furthermore, despite the applicant's error in choosing the remedy, the court decided to proceed with the matter on its merits, as if it were an appeal. This flexibility in the court's approach allowed for the proper examination of the issues raised and ensured that justice was served, even if the initial choice of remedy was incorrect.

5. Strengthening Legal Safeguards against Usurpation of Parliamentary Powers by the Courts

5.1 Prioritization of Constitutionalism

Prioritization of constitutionalism is a fundamental aspect of ensuring legal safeguards against the usurpation of parliamentary powers by the courts. Constitutionalism refers to the adherence to and supremacy of the constitution as the highest law of the land⁸⁹. It establishes the framework for the distribution of powers among different branches of government, the protection of individual rights, and the limitations on governmental authority.

⁸⁷ Paragraph 13, Ibid

⁸⁸ Paragraph 16, Ibid

⁸⁹ Makau, M. G (2011) "Judicial Independence and Accountability in Kenya." *Fordham International Law Journal*, Vol. 34

The constitution should be recognized as the supreme law of the land, and all laws, actions, and decisions of government institutions, including the judiciary, must be consistent with its provisions. No branch of government, including the courts, should be above the constitution or act in contravention of its principles.⁹⁰

Prioritizing constitutionalism requires a commitment to the rule of law, which means that all individuals and institutions, including the government, are subject to and governed by the law. The judiciary plays a crucial role in upholding the rule of law by interpreting and applying the constitution impartially and fairly.⁹¹

Adhering to constitutionalism involves respecting the principle of separation of powers, which ensures that each branch of government operates independently and within its allocated sphere of authority. The judiciary, as one of the branches of government, should exercise its powers within the limits defined by the constitution.⁹²

To strengthen legal safeguards against judicial overreach, it is essential to maintain the independence of the judiciary. This means safeguarding judges' tenure, ensuring their freedom from external pressures or influences, and protecting them from unwarranted interference in their decision-making processes.⁹³

Constitutionalism encourages a system of checks and balances, where each branch of government acts as a check on the others to prevent the abuse of power. The courts, as an independent branch, should

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

exercise judicial review to scrutinize the actions of the legislature and executive, ensuring that they conform to constitutional principles.⁹⁴ Furthermore, upholding constitutionalism involves protecting and promoting fundamental rights and liberties enshrined in the constitution. The courts have a vital role in safeguarding these rights and striking down laws or actions that violate them.⁹⁵

Finally, in interpreting the constitution, the judiciary should apply principles such as the purposive approach, taking into account the intention of the framers and the evolving societal norms. This ensures that constitutional interpretation remains relevant and responsive to contemporary issues.⁹⁶

5.2 Clarifying the Distinction Between Administrative Policy and Legal Rights

Clarifying the distinction between administrative policy and legal rights is an important step in strengthening legal safeguards against the usurpation of parliamentary powers by the courts. This distinction helps maintain the separation of powers and ensures that courts do not encroach upon the domain of the legislature or the executive when it comes to matters of policy-making and governance. Administrative policy refers to the decisions, guidelines, and directives formulated and implemented by the executive branch of government to address various administrative and governance issues.⁹⁷ These policies often involve matters of public administration, management of government resources, and the implementation of laws passed by the legislature. Administrative

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Akech, M (2005) "Judicial Review and Judicial Activism in Kenya: The Implications for Constitutional Democracy." *African Journal of Legal Studies*, Vol. 2

policies are within the purview of the executive and are subject to change depending on the government's priorities and goals.⁹⁸

Legal rights, on the other hand, are derived from the constitution, statutes, and other laws. They are enforceable entitlements that protect individuals and groups from government actions that may infringe upon their freedoms, liberties, or interests. Legal rights are inherent and cannot be arbitrarily changed or denied by the government without due process and adherence to the law.⁹⁹

Clarifying the distinction between administrative policy and legal rights is crucial in recognizing the role of the legislature in enacting laws that protect citizens' rights and set the framework for government actions. Courts must respect the legislative intent behind these laws and avoid substituting their judgment for that of the legislature.¹⁰⁰

In addition, the distinction helps maintain the separation of powers among the three branches of government – legislature, executive, and judiciary. The judiciary should not be involved in making or implementing administrative policies, as this falls within the domain of the executive¹⁰¹.

5.3 Use of Rational Judicial Deference

Rational judicial deference is a principle that recognizes the expertise and institutional competence of other branches of government, particularly the legislature and the executive, in certain policy matters. It involves the judiciary showing respect and restraint in

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

cases where the government's actions are based on reasonable and rational grounds.¹⁰²

Rational judicial deference upholds the principles of separation of powers by recognizing the distinct roles and competencies of each branch of government. It acknowledges that the judiciary should not intervene in matters that fall primarily within the purview of the legislature or the executive.¹⁰³

Courts generally presume that laws and policies enacted by the legislature are constitutional and valid. Rational judicial deference respects the democratic process and the accountability of elected representatives to their constituents. Courts refrain from second-guessing legislative decisions unless they are shown to be irrational or unconstitutional.¹⁰⁴

Furthermore, when reviewing governmental actions, the judiciary employs different standards of review depending on the nature of the issue. For matters of policy and socio-economic considerations, courts tend to apply a deferential standard, such as the "rational basis" or "reasonableness" test. This standard gives more latitude to the government's choices, provided they are based on rational and logical grounds.¹⁰⁵

Rational judicial deference recognizes that the legislature and the executive have access to specialized knowledge and expert advice, making them better suited to address complex policy issues. The

¹⁰² Othieno, Caleb O. (2014) "The Role of Courts in Governance: The Case of Kenya." *Journal of African Law*, Vol. 58, 2014.

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

courts, as a general rule, do not interfere in matters that require specialized expertise or administrative discretion.¹⁰⁶

By deferring to the expertise and decisions of the elected branches, rational judicial deference protects democratic accountability. It ensures that the people's representatives are held responsible for their policy choices and decisions.¹⁰⁷ By demonstrating restraint and respect for the functions of other branches, the judiciary maintains its independence and avoids the perception of judicial activism.¹⁰⁸ Rational judicial deference contributes to legal stability and predictability. It reduces the likelihood of abrupt changes in policies due to judicial intervention. It allows the government to function more efficiently and implement policies without undue interference, as long as they are rational and not arbitrary.¹⁰⁹

5.4 Promotion of Constitutional Partnership Between Courts and Parliament

Such a partnership encourages constructive engagement, cooperation, and mutual respect between the two branches of government, while ensuring that each branch operates within its constitutional boundaries.¹¹⁰

A constitutional partnership entails fostering a culture of dialogue and consultation between the judiciary and Parliament. Regular engagement allows both branches to share their perspectives,

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Githu, Muigai. (2013) "The Constitution of Kenya: An Introductory Commentary." LawAfrica Publishing Ltd,

concerns, and interpretations of the constitution and laws, leading to better-informed decision-making.¹¹¹

The courts play a vital role in interpreting the constitution, while Parliament is responsible for enacting laws. By promoting a constitutional partnership, both institutions can work collaboratively to ensure that legislation aligns with constitutional principles and that the courts' interpretations respect the intent of the legislature.¹¹² A constitutional partnership involves a clear acknowledgment of the distinct roles and competencies of the judiciary and Parliament. The courts should respect Parliament's lawmaking authority, while Parliament should recognize the judiciary's role in upholding the constitution and protecting fundamental rights.¹¹³

Furthermore, when dealing with cases involving potential conflicts between constitutional rights and legislative actions, the courts should adopt a proportionality analysis. This approach involves balancing the competing interests and considering the impact of judicial interventions on legislative policy choices.¹¹⁴

6. Conclusion

Throughout this comprehensive exploration of the doctrine of separation of powers, judicial overreach, and legal safeguards against the usurpation of parliamentary powers by the courts in the Kenyan context, the paper has unearthed critical insights into the delicate dynamics of democratic governance. The paper has highlighted the significance of striking a fine balance between judicial independence

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Ibid

and constitutional integrity, ensuring the harmonious functioning of the three branches of government.

The concept of separation of powers has been found to be of paramount importance in upholding democratic principles and preventing the concentration of power. It assigns distinct roles and responsibilities to each branch, ensuring that no single institution becomes dominant or unaccountable. However, instances of judicial overreach have emerged, where the judiciary may have encroached upon the policy-making sphere of Parliament or the executive, raising concerns about the sanctity of the separation of powers. The paper has critically examined various case laws that outline the distinction between beneficial judicial independence and judicial overreach.

To counteract such instances of judicial overreach, the paper has explored various legal safeguards that can be employed. The principle of rational judicial deference emerged as a vital mechanism, recognizing the expertise and competencies of other branches, particularly the legislature and the executive. By exercising restraint and respecting the lawmaking authority of Parliament, the judiciary can uphold democratic accountability and avoid undermining the legislative process.

A constitutional partnership between the courts and Parliament has been proposed as a constructive means of fostering dialogue, cooperation, and mutual respect between the two institutions. Such a partnership would enable both branches to work collaboratively in interpreting and implementing the constitution, thereby ensuring effective governance and respect for constitutional principles.

Furthermore, the prioritization of constitutionalism has been emphasized as a fundamental aspect of strengthening legal

safeguards. By adhering to the supreme law of the land, all branches of government can act within their prescribed boundaries, enhancing transparency, accountability, and public trust in the democratic process.

Additionally, the distinction between administrative policy and legal rights has been underscored to clarify the limits of judicial review. This distinction ensures that courts focus on matters of legality, regularity, and propriety, rather than delving into the merits of policy decisions, which fall within the purview of the legislature and the executive.

The pursuit of a balanced and accountable system of governance in Kenya necessitates a robust understanding of the doctrine of separation of powers, judicial overreach, and the promotion of legal safeguards. By promoting rational judicial deference, encouraging a constitutional partnership, prioritizing constitutionalism, and clarifying the boundaries of judicial review, the nation can strengthen democratic governance, preserve judicial independence, and uphold the sanctity of the constitution. With these safeguards in place, Kenya can continue on its path towards a just, equitable, and democratic society, where each branch of government plays its vital role in securing the rights and aspirations of its citizens.

References

Akech, M (2005) "Judicial Review and Judicial Activism in Kenya: The Implications for Constitutional Democracy." *African Journal of Legal Studies*, Vol. 2

Constitution of Kenya 2010

DPP Vs Milimani Chief Magistrate's Anti-corruption court 2020 eKLR
Edwin Wachira and nine (9) others Vs Republic; consolidated with Adan Maka Thulu Vs DPP; Robert Mwangi Vs DPP; Kazungu Kalama Jojwa Vs DPP (2022) eKLR

Francis Karioko Muruatetu & another Vs Republic [2017] eKLR

Githu, Muigai (2013) "The Constitution of Kenya: An Introductory Commentary." Law Africa Publishing Ltd.

Kibet & Wangeci, 'A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya' *Strathmore Law Review* 2016, 222.

Makau, M. G (2011) "Judicial Independence and Accountability in Kenya." *Fordham International Law Journal*, Vol. 34

Montesquieu, Charles de Secondat. "The Spirit of the Laws." Translated by Thomas Nugent, edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, Cambridge University Press, 1989.

Mutunga, Willy. "The Constitution of Kenya: A Commentary." *Strathmore University Press*, 2011.

Oduor, Rose J (2014) "Judicial Activism and the Judiciary in Kenya: A Critical Analysis." *Strathmore Law Journal*, Vol. 2

Ojienda, Tom (2010) "The Constitution of Kenya: A New Legal Framework." LawAfrica Publishing Ltd

Othieno, Caleb O. (2014) "The Role of Courts in Governance: The Case of Kenya." *Journal of African Law*, Vol. 58, 2014.

Philip Mueke Maingi and 5 others Vs DPP and another (2021) KEHC 13118 (KLR)

Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts **Michael Sang**

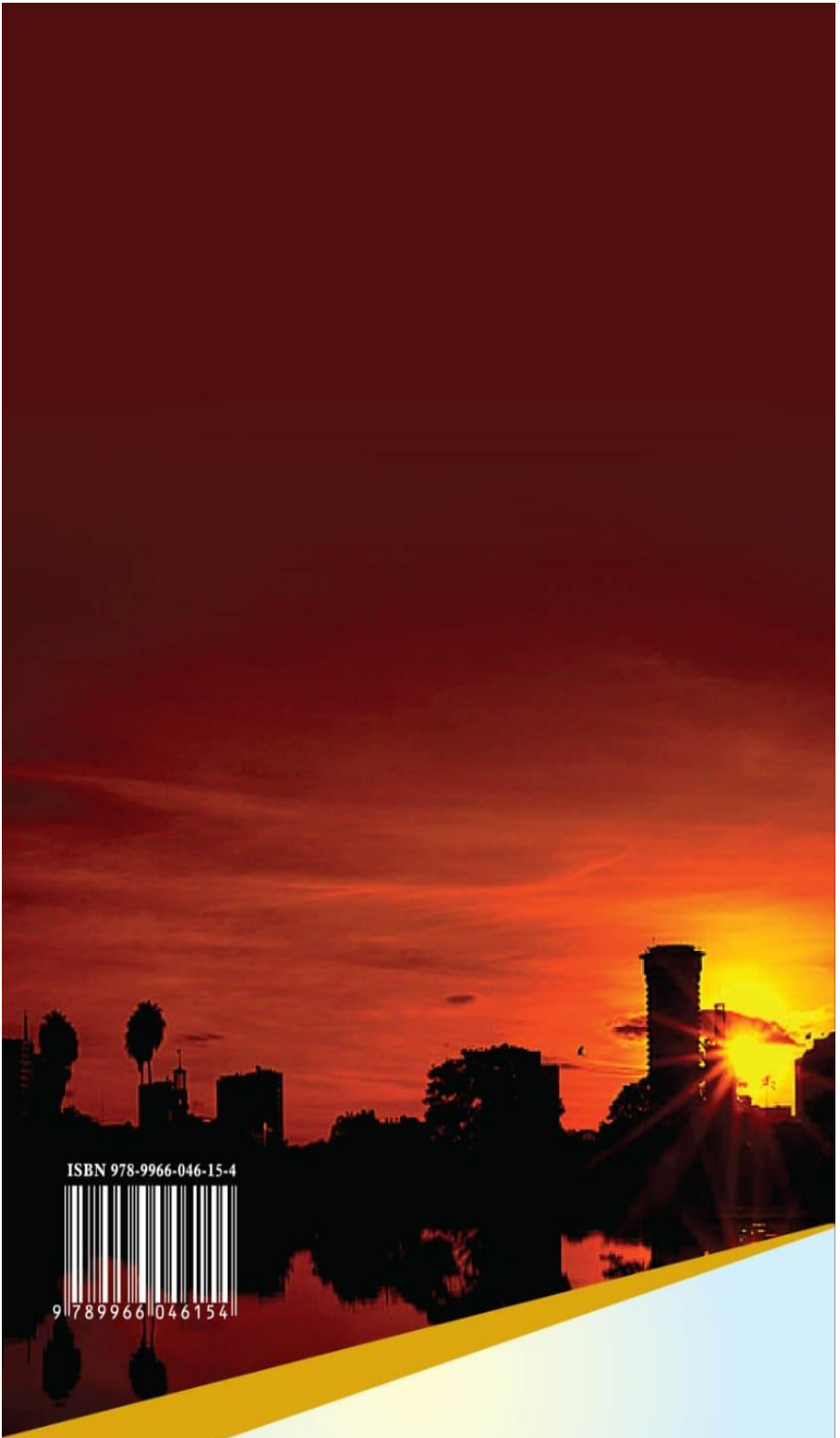
(2023) Journal of cmsd Volume 11(1)

Reuben Mwangi Nguri Vs R (2021) eKLR

Vermeule, Adrian (2018) "Judicial Review and Judicial Power."

Harvard Law Review, Vol. 131

Vincent Echesa Okote Vs Republic [2019] eKLR



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