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**JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS
REGARDING POLITICAL PARTIES IN KENYA**

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1. INTRODUCTION

Democratic traditions prescribe periodic elections to transfer political power within the modern nation-state. Political parties are quasi-public bodies which serve various critical functions to facilitate policy-making within multiparty constitutions. Myriad disputes potentially arise in the life of the party. Prior to 2008, two Kenyan statutory bodies, the Registrar of Societies (RS) and defunct Electoral Commission of Kenya (ECK) regulated political party operations. This paper examines the judicial review of administrative decisions regarding leadership and nomination disputes in Kenyan political parties. To what extent can aggrieved officials, frustrated voters or unsuccessful aspirants challenge decisions by statutory bodies that wrongly recognize irregular party elections?

Instrumental theory argues that administrative decisions should allocate procedural rights to citizens, voters or aggrieved aspirants if doing so increases the administrative efficiency to determine electoral outcomes. Public interest favours suppressing internal party wrangles. One variety, public choice theory, assumes that political markets are analogous to economic markets. If voters each choose their individual self-interest, then electoral outcomes reflect voter choices. Conversely, in non-instrumental theory, administrative decision-making prioritizes individual autonomy and self-determination. Expressive voting instead assumes that voters choose from behind a 'veil of insignificance'.

Assuming partial validity of both propositions, it follows that, in order for electoral outcomes to reflect voter choices, instrumental administrative decisions should be indirectly associated with non-instrumental voting behavior. Correspondingly, non-instrumental administrative decisions should vary inversely in relation to instrumental voting. A comparative study is made to test the validity of this hypothesis. Two recent decisions from the Kenyan high court are analyzed to determine the principles upon which judges review administrative decisions from public bodies regarding political parties.

In *Kenyatta's Case* where aggrieved party officials complained of being irregularly ousted from leadership positions, the court quashed the RS's *passive* refusal to hear the dispute. Yet, arguably, the unstated rationale was that although party leadership is traditionally a private affair, in the Kenyan reality, eligible successors are anointed by elders along ascriptive lines. Thus party voting is merely *expressive* of ethnic demography, which generates macro-

political disputes and is to this extent *instrumental*. However the RS's and hence instrumental decision was reversed.

In *Aroko's case* the court was constrained by legislative ouster of jurisdiction, from interfering with the defunct ECK's mandate to complete the nationwide general election timetable. Here the unstated rationale was arguably that at the nomination phase of elections, because ethnicity is relatively neutral, therefore self-interested or *instrumental* voting is predominant. The proportionality principle predicts that at party primaries, administrative decisions should be *non-instrumental*, and thus unsuccessful aspirants need not await the outcome of a general election to petition anomalies arising. Therefore, the judge called for legislation prescribing internalization of intra-party dispute resolution. The paper does not directly address inter-party election petition law.

Section 2 outlines the historical and cultural context of socio-economic contradictions in Kenya which give rise to autocratic leadership and ethnic voting patterns. Section 3 contrasts instrumental and non-instrumental theories guiding administrators, politicians and voters. Sections 4 and 5 each present case studies. Section 6 shows that the proportionality principle informs protection of substantive political rights, while section 7 illustrates design of institutions for arbitration under the new Kenyan Constitution promulgated in 2010.

2. CAUSES OF INTRA-PARTY DISPUTES IN KENYA

2.1 *Gerontocratic Leadership, Patriarchy and Ethnic Voting Patterns*

African customary law knew no elections.¹ Leadership in most of Kenya's forty-two tribes was acephalous, without any king. For example, Duncan Ndegwa explains how:

The government and social organization of the Agikuyu recognized that shutting out change would lead to atrophy...The great *Itwika*, a once in a generation event, was an all inclusive constitutional review convention. It solemnized the handing and taking over of the responsibility of ruling the community, thus marking the devolvement of power by the older generation to the younger one after a period of about 30 to 40 year....The generation on the handing over power would do so at about the age of 55 years ...A council of elders

¹ Charles Khamala *Without Kenyatta and Moi: Voting for a Change* in James Shikwati (ed) *Reclaiming Africa* (Nairobi, Inter Region Economic Network, 2004) pp 287-328.

whose tenure of office changed during *Itwika* oversaw the day to day governance guardianship.²

This gerontocratic selection method was exploited by British “indirect rule” policy to exclude Africans from participation in the Legislative Council in the early 20th century.³ Instead customary norms applied to natives confined to reserves,⁴ without right of appeal to the Supreme Court. Contradictions between legal theory and practice created social tension. While the African nationalist struggle sought democracy, human rights, equality and social justice, the Mau Mau waged a guerrilla war in Central Kenya for land and freedom. Upon the colonial government outlawing and quelling the Mau Mau, leadership of the state was transferred to the ‘homeguards’ who defended the white settlers during the emergency.⁵ Ethnic political parties⁶ were organized using similar ‘divide and rule’ strategies to exclude extremist revolutionaries in favour of foreign-educated, urbanized, ideological ‘counter-revolutionaries’. Given Jomo Kenyatta’s pivotal international profile and symbolic role in the freedom movement, the Kenya African Union insisted upon his release from detention and installation as the country’s first president.⁷ At the 1961 pre-independence election, KAU’s successor, the Kenya National African Union’s (KANU) big tribes (Kikuyu and Luo), defeated the Kenya African Democratic Union’s (KADU) small tribes (Luhyia, Kalenjin and Mijikenda), 64% to 16%.⁸ KADU then abandoned its preference for a *majimbo* (federalist or devolved) governance model and was subsequently dissolved when its leaders joined KANU which changed the Westminster Constitution to suit its own unitary governance preference. Overcoming the triple enemies of illiteracy and poverty and disease, inspired Kenyatta’s independence pledge.⁹ However, he immediately abandoned African socialism.¹⁰ Instead, in continuation of capitalist exploitation, colonial racial discrimination was substituted by authoritarian ethnic patronage. Perpetuation of an irrational class structure by primitive

² Duncan Ndegwa, *Walking in Kenyatta’s Struggles: My Story* (Nairobi, Kenya Leadership Institute, 2006) 15-17.

³ Yash Ghai and J. P. W. B. McAuslan, *Public Law and Law and Political Change in Kenya* (Nairobi, Oxford, University Press, 1970).

⁴ Native Land Ordinance 1930.

⁵ Mahmoud Mamdani, *Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism* (London, James Currey).

⁶ Oanda Ongachi, *Economic Reform Economic Reform Political Liberalisation and Economic Ethnic Conflict in Kenya*, *Africa Development* vol . XXIV, nos 1&2, 1999, pp 85-107 at 95.

⁷ Patrick Chabal, *Power in Africa: An Essay in Interpretation* (Palgrave MacMillan, 1993).

⁸ Bennet and Rosberg, *The Kenyatta Election* (Oxford University Press, 1961), Nick Wanjohi *Political Parties in Kenya: Formation, Policies and Manifestoes* (Nairobi, Views Media, 1997).

⁹ *Ibid.* Kenyatta’s inaugural address.

¹⁰ Sessional Paper no. 10 of 1965 African Socialism and its Application to Economic Planning.

accumulation resulted in protests against political elites, mainly Kikuyu, thus polarizing KANU. In a bid to sustain unity, Parliament passed a law requiring MP's who defect from their party to seek re-election. In 1966, Luo leader Jaramogi Odinga nevertheless formed the Kenya Peoples Union. However, in 1969 it was banned.

2.2 *Development through Autocracy*

Michael O'Brien,¹¹ recalls the 'development first' approach to building democracy. Initially, Martin Lispet¹² explained the intellectual logic relating democracy and development. He opined that wealth accumulation generates a country's capacity to sustain democracy. That where countries lack a minimum income level, political pluralism cannot take root. Development entails formation of a strong middle-class through accessible, widespread, popular education. Therefore he prescribed enhancing literacy rates so as to surpass the requisite income threshold. Subsequently, Samuel Huntington¹³ postulated that military reinforcement has a positive unifying influence. Further, that command fosters stability. Hence, single-party institutions are advantageous for developing countries. Together with Joan Nelson, his governance logic justified 'an autocratic regime that suppresses political participation and promotes economic equality through land reform and other measures make possible...the subsequent expansion of political participation'.¹⁴ Thus Jomo Kenyatta's *de facto* political monopoly systematically reduced political space through increased repression? including draconian detention, exile or assassination of political opponents. Simultaneously, KANU insiders received government support at general elections. For instance, upon nullification of Paul Ngei's election¹⁵ in 1974, Parliament changed the constitution to extend the Presidential prerogative of mercy to include election offences. Ngei was pardoned and won the ensuing by-election.

2.3 *KANU's Monopoly*

¹¹ Mitchell O'Brien, *The Nexus Among Parliaments, Poverty Reduction and Conflict Prevention* in Mitchell O'Brien, Rich Stapenhurst and Niall Johnston (eds), *Parliaments as Peace Builders in Conflict-Affected Countries* (Washington, The World Bank, 2008) 11-26.

¹² Seymour Martin Lispet, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy* (Mar., 1959) *The American Political Science Review*, Vol. 53, No. 1, 69-105.

¹³ Samuel P. Huntington, *The Political Order in Changing Societies* (New Haven and London, Yale University Press, 1968).

¹⁴ Samuel P. Huntington and Joan M. Nelson, *No Easy Choice: Political Participation in Developing Countries* (Harvard University Press, 1976).

¹⁵ *Raphael Samson Kithika Mbondo v Luka David Galgalo and Paul Joseph Ngei* Election Amendment no. 14 of 1975 (*Ngei's Case*). See Winnie Mitullah, *Exercise of Executive Powers in Kenya: The Case of Prerogative of Mercy* in Morris Odhiambo, Osogo Ambani and Winnie V. Mitullah (eds) *Informing a Constitutional Moment: Essays on Constitution Reform in Kenya* (Nairobi, Claripress, 2005) 1-15 at 11.

After Kenyatta's death in 1978, the 'development first' policy was inherited by Daniel Arap Moi through the *Nyayo* (footsteps, symbolizing continuity) philosophy.¹⁶ However, ethnic polarity was reversed with small tribes at the authoritarian centre and large ones at the marginal periphery. In June 1982 the Constitution was amended proclaiming KANU the sole political party.¹⁷ Increasing centralization, repression and exclusion precipitated a coup-attempt spearheaded by some junior Air Force officers. The key perpetrators were arrested, tried and executed for treason.¹⁸ *De jure* one-partyism relied upon four strategies to restrict political competition. First, denial of any platform from which to speak without offending sedition laws. Entry barriers thus prevented outsiders from offering alternative policies to the electorate. One ironic victim of targeted, political exclusion was the country's second most powerful individual, Charles Njonjo, Kenya's first and longstanding Attorney General and later Moi's Minister for Justice and Constitutional Affairs. In 1983 a Presidential Commission of Inquiry found him 'guilty' of smuggling in arms from South Africa with intent to take over the country illegally and branded him a 'traitor,' thereby destroying his reputation, ending his political career.¹⁹ Second, the 1987 general elections were conducted through a *mlolongo* (queue-voting) system with dual disadvantages for voters and candidates. Few voters were willing to be seen queuing behind candidates perceived as government critics. Worse still, unsuccessful candidates, despite blatant rigging, were denied capacity to petition electoral outcomes since queuing was legally presumed to deliver transparent results.²⁰ This procedure was designed to weed-out the few remaining popular critics from within Parliament. Third, political information was controlled through the sole broadcasting station, Voice of Kenya. Fourth, from the mid-80's government intelligence and police actively coerced dissenters by cracking down on various unlawful organizations, principally *Mwakenya*. Under constitutional changes denying bail to persons accused of capital offences, suspected dissidents were arrested on 'trumped-up' charges and confined in custody. In 1986 security of

¹⁶ *Supra* note 1 at 306-7.

¹⁷ Babafemi A. Bajdejo, Raila Odinga: An Enigma in Kenya Politics (Lagos and Nairobi, Yintab Press, 2006); see also *Ibid.* at 307-9.

¹⁸ Hezekiah Rabala Ochuka and Pancras Oteyo Okumu were executed on May 17, 1987 along with seven other members, mainly LuOS, of the "Peoples Redemption Council." http://en.wikipedia.org/wiki/Kamiti_Maximum_Security_Prison (accessed on 8 August 2011). <http://westfm.co.ke/mobile/index.php?page=news&id=2907> (accessed on 8 August 2011).

¹⁹ Report of the Judicial Commission Appointed to Inquire into Allegations Involving Charles Mungane Njonjo" (Republic of Kenya, 1984).

²⁰ Kibe Mungai, *The Law and Leadership: The Post-Colonial Experience in Kenya* in Kimani Njogu (ed) Governance and Development: Towards Quality Leadership in Kenya (Nairobi, Twaweza Communications, 2007) 50-103 at 75-77.

tenure for constitutional officers, including the Auditor General and Attorney General, then in 1988, High Court judges, were repealed. Lawyers were detained alongside political activists they were representing. Kenya became a highly unequal, intense, police state.²¹

However upon the fall of Eastern socialism, the Bretton Woods Institutions—which had supported Western-aligned dictatorships during the Cold War—dramatically changed their aid policies so as to recognize good governance and anti-corruption as preconditions to economic development.²² Recently, Prezworkski²³ refutes ‘development first’ heresy by explaining that investors seeking safe havens in autocracies, tend to flee upon a whiff of instability. Conversely, he shows that although democracies show short-term instability, through protests, strikes and riots—changes in government are nevertheless—economically inconsequential. Hence Kenyan activism combined with international pressure to force the restoration of secure tenure of constitutional officers in 1990 and repeal of section 2A of the Constitution in December 1991, ushering in formal return to multiparty democracy.²⁴

2.4 Multipartism: Electoral Violence, Voter Bribery, Party Fragmentation and Frustrated Petitions

Notwithstanding the requirement under section 1A proclaiming that ‘The Republic of Kenya shall be a multiparty democratic state,’ political party delinquencies persisted. Being from a ‘small tribe’, Moi strategically *inter alia*, changed the Constitution to require Presidential candidates to win—not only an overall majority—but also at least 25% of votes in 5 out of the 8 provinces.²⁵ No guarantee was given to the Condorcet winner.²⁶ Neither was public space immediately created to facilitate participatory, free and fair elections. Nor was the ECK sufficiently empowered to provide neutral management of the electoral system. Instead throughout the 1990’s the provincial administration and the police allegedly acquiesced in ethnic conflicts instigated by KANU politicians.²⁷ The country’s worst

²¹ David William Cohen and E. S. Atieno Odhiambo, *The Risks of Knowledge: Investigations into the death of the Late Hon Minister John Robert Ouko in Kenya 1990* (Ohio University Press and East African Educational Publishers Ltd, 2004).

²² Report on Sub-Saharan Africa: From Crisis to Sustainable Growth (Washington D C, The World Bank, 1989).

²³ Adam Prezworkski, *Democracy and Economic Development* in Edward D. Mansfield and Richard Sisson (eds.), *The Evolution of Political Knowledge* (Columbus: Ohio State University Press 2004).

²⁴ The Constitution of Kenya (Amendment) Act no. 12 of 1991.

²⁵ The Constitution of Kenya (Amendment) Act no. 6 of 1992.

²⁶ *Supra* note 11, the candidate who would win a head-to-head contest against each and every other.,

²⁷ The Akiwumi Report, *The Report of the Judicial Inquiry into Tribal Clashes in Kenya between 1991-1998* (Nairobi, Government Printer, 1998); Amos Wako, *The Attorney General, The Government’s Reply,*

economic crisis was precipitated by theft of kshs 13.8 billion (US\$ dollars 200,000 million) from the Central Bank on the pretext of compensating a local Asian company, Goldenberg International Ltd., for fictitious mineral exports, but in reality to finance KANU's electoral campaigns.²⁸ Hence at both the 1992 and 1997 presidential elections, Moi astutely survived by garnering minority votes of 36% and 40%, respectively. Opposition parties were destabilized by use of several strategies including legal manipulation and subtle gerrymandering, historical 'cult personality' of leaders created and sustained through ethnic polarization and vote-buying, exacerbated by land clashes, amid poverty. The fragmentation of the original 1992 Forum for the Restoration of Democracy into FORD-Kenya, FORD-Asili and later FORD-People characterized ethnicization of immature political parties.

In 2002, Kenyatta's son Uhuru was anointed Moi's preferred successor of KANU.²⁹ By neutralizing the Kikuyu numerical superiority, thus undermining Mwai Kibaki's advantage, while simultaneously alienating KANU's Luo and Kamba leaders—whom Moi predicted would defect and form nascent ethnic parties. This tactic sought to split the opposition for a third time. However, upon KANU's nomination of Uhuru by 'acclamation', disappointed potential aspirants, Raila Odinga and Kalonzo Musyoka, called Moi's bluff. They instead chose to close ranks by supporting Kibaki under the National Rainbow Coalition, a holding party. Historically, NARCs 62%: 30% victory amounts to a reversal of KANU's margin over KADU at the pre-independence election. KANU's defeat is attributable to the Luos' defection, combined with traditionally neutral Kamba support, for NARC together with its absorption of a significant proportion of KADU's small tribes. Conversely, Uhuru's defeated KANU remained mainly Kalenjin, shored up by only 30% of the Kikuyu (Kiambu) vote. Yet despite Kibaki's substantial goodwill to change the autocratic, exclusionist, inequitable constitution, he reneged on his pledge to democratize the country by *inter alia* sharing power. Instead the government's command-driven, proposed new constitutional model was resoundingly rejected (57:43) at the 2005 referendum. NARC disintegrated into its LDP (Luo and Kamba) and NAK (Kikuyu and Luhya) ethnic factions.³⁰ Prior to the 2007 general elections, the "orange" symbol—representing rejection of authoritarianism—was mischievously

Nairobi (The Government Printer, 1998); Wachira Maina and George Kegoro, Impunity: The Law Society of Kenya Report on the Judicial Inquiry into Tribal Clashes (Nairobi, 1998); *supra* note 1.

²⁸ The Bosire Report, The Report of the Judicial Commission of Inquiry into the Goldenberg Affair (Nairobi, Government Printer, 2005); See also ante note.

²⁹ *Supra* note 1 at 317-320.

³⁰ Makau Mutua, Taming Leviathan: Kenya's Quest for Democracy (London, Lynne Rienner Publishers, 2008).

accorded dual registration under Orange Democratic Movement-Party and Orange Democratic Movement-Kenya. This was yet another government attempt to “divide and rule” opposition ethnic blocs and retain centralized power.

3. THE VOTER’S INTEREST: BETWEEN PROCESS RIGHTS AND PUBLIC GOODS

3.1 *Instrumentalism*

3.1.1 *Voter’s Self Interest*

Public choice theory assumes that voters are deciders in political markets, like consumers in economic markets.³¹ Hence voters *instrumentally* choose public policies which satisfy their individual needs or desires. If voters’ choices are free and fair, then electoral outcomes correspond to voter preferences.³² Electoral theory assumes that democratic systems are tailored—depending on demographic distribution—to facilitate voter choice in relation to parliamentary seats, whether by majority, unanimous, candidate ranking or proportional representation.³³ The one-man-one-vote principle is paramount.³⁴ In sum, if MPs fail to deliver public goods which satisfy voter preferences, then the voters’ remedy is to make an alternative choice at future elections. Analogous to perfect economic markets,³⁵ perfect electoral markets require: First, no barriers to registration or cessation of political parties, or impediment on equal membership rights. Second, large numbers of registered voters and nominated candidates at party primaries. Third, wide publication and circulation of party manifestoes through civic and voter education. Fourth, assuming that self-interested voters choose their genuinely held preferences, if each ballot carries equal weight, then voter choices are *decisive* of electoral outcomes. In a presidential system, the candidate with most votes—or in a parliamentary democracy the party with most MPs—forms government and determines

³¹ Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration* (Jun., 1973) 2 J. Legal Studies 399, Vol. 2, No. 2 pp. 399-458. “By public choice theory we mean the application of techniques and methods of mainstream economics to the study of political processes. It is faithful to the individualist method.” quoted in Geoffrey Brennan and Loren Lomansky *post* note 39 at 2.

³² Brennan and Lomansky *post* note 39 at 17 & 21.

³³ *Supra* note 11.

³⁴ ***John Mickuki v Attorney General*** HC Misc App 975 of 2001 Judgment 12 Mar 2002, J V O Juma and Mbogholi Msaga JJ held section 5 of the Districts and Provinces Act void and unconstitutional to the extent it amended the Constitution of Kenya (Amendment) Act (1968) and purported to empower the President with authority to create new districts administratively.

³⁵ Roger D. Blair and David L. Kaserman, *Antitrust Economics*, (Richard D. Irwin, Homewood, Illinois, 1985) 3-4.

collective policies. Mitchell O'Brien³⁶ accuses western countries with only two strong parties of reducing political competition. Similarly, forming coalitions prior to polls should be discouraged since party leaders effectively collude to impose a single candidate, and their selfish political interests, on voters. This principle is problematic within African communities. Furthermore, at national level, it is submitted, power-sharing between ethnic groups of different sizes seems to require proportional representation to expression of cultural diversity. Toleration of ineffective economic leadership may be seen as a lesser evil compared to 'zero sum' political competition which tends to precipitate violent conflicts.

3.1.2 *Administrative Decisions*

Jeremy Bentham's³⁷ utilitarianism holds that efficient laws and morals should effectively satisfy the greatest happiness of the greatest number. P. P. Craig explains that in administrative law, substantive rules have 3 objectives, depending on whether their purpose is to grant welfare benefits, licensing or planning permission. This paper focuses on how licensing rules may 'secure that only those with certain qualities are given certain types of licences'.³⁸ For example, where returning officers issue certificates to recognize successful candidates, they ensure that only those with certain policies are certified as eligible to hold elective positions. Of relevance here, are situations where only those with popular majority votes are recognized as party leaders or duly nominated candidates to contest general elections. The Kenyan cases to be analyzed, consider an administrator—whether the Registrar of Societies, of Political Parties or Electoral Commission—who decides that an aspirant does not come within the prescribed statutory formula and the administrator wishes to reject the claim without hearing the complaint raised by such aspirant. Yet the aspirant feels aggrieved by the administrator's misinterpretation of facts, law or procedure. A judge may apply a *non-instrumental* rationale to review the administrative decision and instead decide that the law provides for hearing rights. By assuming that statutory formulas correspond to substantive outcomes, grounds supporting such judicial review are sustainable. Conversely, Craig's *instrumental* test is that if the administrative cost entailed by granting procedural rights to

³⁶ *Supra* note 11.

³⁷ Jeremy Bentham, *The Principles of Morals and Legislation* discussed in P.P. Craig, *Public Law and Democracy* (1989) PL 407.

³⁸ P. P. Craig, *Procedures and Administrative Decision-making: A Common Law Perspective* (1993) *European Review of Public Law*, (London, Esperia Publications Ltd, 1993) 55-69 at 63. Also generally P. P. Craig, *Administrative Law* (2nd ed, Oxford, 1989) ch 7.

aspirants, exceeds the likely benefits accruing from the substantive outcome, then no hearing rights should be given.³⁹

3.2 *Non Instrumentality*

3.2.1 *Voter's Expressive Interest*

Geoffrey Brennan and Loren Lomansky⁴⁰ refute public choice theory's assumption that voters in large-scale democracies are self-interested maximizers. They agree that in economic markets, private consumer demands are *decisive* of commodity supplies, reflected in the just price. However, in large elections—save in rare cases where there is a tie—an individual voter's choice is not decisive in determining the electoral outcome. Neither the voter's cost of attending at the polling booth, nor marking the ballot paper, entail that likely satisfaction of voter preferences shall accrue.⁴¹ Instead, electoral outcomes depend upon how others vote, rendering individual choice superfluous. Just as cheering for one's preferred football team is not decisive of the score, so also purely expressive voter choices for a preferred candidate are *detached* from electoral outcomes. Recent evidence⁴² from Kenya supports expressive voter theory. In 2007, pre-electoral presidential opinion polls predicted 43% each—for incumbent president Kibaki (PNU) as well as his main rival Raila (ODM-K). The race was too close to call. Despite peripheral candidate Musyoka's (ODM) nil prospects of victory, he nevertheless polled 9%. Hence Musyoka's block was *systemically* decisive in swinging the outcome. Public choice theory predicts that rational, self-interested voters would, rather than 'waste' their vote, instrumentally choose strategically from either of the leading contenders, the candidate considered most likely to secure their 'second best' preferences. Clearly, public choice rationale underestimates the Kenyan voter's purely expressive interest in choosing group or ethnic interest. Rather, according to official results, Musyoka retained approximately

³⁹ *Ibid.*, 57.

⁴⁰ Geoffrey Brennan and Loren Lomansky, *Democracy and Decision: Pure theory of Electoral Preference* (Cambridge University Press, 1993) pp 20-21 'Should *homo economics* be imported into electoral politics? Consumer choice and voter choice are fundamentally different decision-theoretic terms. Hence market behavior and political behavior are likely to be distinctively different. While interests may predominate in market behavior, they are strongly muted in the ballot box. Conversely ethical considerations which are muted in the market-place are likely to play an increased role in democratic elections.'

⁴¹ *Ibid.*, 35.

⁴² Makau Mutua *supra* note 30.

879,903—mainly Ukambami voters—compared to Kibaki’s 4,584,721 and Raila’s 4,352,721, largely from their own respective mutually exclusive, ethnic voting blocs.⁴³

3.2.2 *Administrative Decisions*

Aristotle argued that man is by nature, a political animal.⁴⁴ In relation to others, individuals occupy social positions and play certain roles, thus generating role-expectations and obligations. Criticizing pure reason, it was Immanuel Kant⁴⁵ who first distinguished utilitarian hedonistic need for physical *goods* from the moral human sentiment to appreciate abstract *rights*. He thus rejected the utilitarian prescription of using individuals as means for attaining social goals. Rather, each person should be treated as an end. Each individual should maximize their potential to be the best they can be. Hence universal rules should protect actions which can be performed by everyone.⁴⁶ Thus Craig alternatively justifies the law of giving process rights to guide administrative decisions by the non-instrumental or dignitarian rationale.⁴⁷

Kantian logic gives rise to three varieties of social contract theory.⁴⁸ First, because rational people feel indignation at having their plans arbitrarily interfered with—whether by private persons or public authorities—therefore constraint of power wielders—politicians and bureaucrats—is justified. To facilitate free choice, people require a safe environment. Thus public administration should be predictable. Natural justice process rights guide adjudication by hearing both sides (*audi alteram partem*), not being biased and providing reasons for decisions. This adjudicative approach protects personhood, autonomy and dignity. Second, social contract may be implied, constructive or inferred from conduct. Irrespective of whether such commitments reflect contractors’ actual preferences, freely chosen contractual terms create binding agreements. If promises were broken, then the institution of promising would be abandoned, making social interactions more uncertain.⁴⁹

⁴³ Johann Kriegler, Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.

⁴⁴ Aristotle, *The Nicomachean Ethics*, translated by W. D. Ross (Oxford, Clarendon Press, 1908).

⁴⁵ Immanuel Kant, *The Critique of Pure Reason* (United Kingdom, Cambridge University Press, 1998).

⁴⁶ Barbara Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity* (London: Sage Publications, 2003).

⁴⁷ *Supra* note 38 at 38 ‘process rights are required as part of what it means to be a person. Life necessitates interaction with, and reliance on others...’.

⁴⁸ *Supra* note 39 at 57-58.

⁴⁹ *Ibid.*, 58.

Third, John Rawls⁵⁰ assumes, in heterogeneous societies, that voters have different preferences. If voters are oblivious to their actual positions in present and future society, and if they choose constitutional public goods, then electoral outcomes between competing ideas of public good is impartial. Rational choice is guaranteed by a hypothetical ‘veil of ignorance’. Hence voters are motivated to choose constitutional and institutional rules that satisfy preferences of vulnerable groups. It is reasonable for one to insure against being victimized by repressive rules. Certain ‘merit’ goods such as cultural heritage are underproduced and underconsumed in ideal markets, though intrinsically valuable. Conversely, harmful ‘demerit’ goods, e.g. heroin or gambling are overproduced and overconsumed. Hence for Brennan and Lomansky⁵¹ administrators would be justified in giving procedural rights to aspirants who represent special interests. The previous Kenyan Constitution⁵² for example, provides for nomination of twelve unelected individuals as MP’s in proportion to the Parliamentary strength of political parties, ‘taking into account the principle of gender equality’.⁵³ The current Constitution requires that not more than two thirds of either gender should be appointed or elected as officials to leadership positions in any public body. Yet in practice, political parties do not choose minorities to faithfully balance ideological debate. Under the current Constitution, the Judicial Service Commission nominated only two women to fill the seven the Supreme Court vacancies. Similarly, it does not follow that Rawls’s principles of justice, would be *chosen*, even assuming voters would *prefer* his two principles under extreme uncertainty of the ‘original position.’ Moreso in the African context where voters are acutely aware of their ethnic identify and *choose* kin affiliation even though they may *prefer* ‘rational’ development. Although goods are not valued uniformly by different people or over time, Ronald Dworkin⁵⁴ thus insists that substantive rights are trumps over process rights, since equality is the sovereign virtue.⁵⁵

⁵⁰ John Rawls, *A Theory of Justice* (Oxford, 1971); See also *ibid.*

⁵¹ *Supra* note 39 at 143.

⁵² The Constitution of Kenya, s 33(1).

⁵³ *Ibid.*, s 33(3).

⁵⁴ Ronald Dworkin, *Is Law a System of Rules?* in R. M. Dworkin (ed) *The Philosophy of Law* (Oxford, 1977).

⁵⁵ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000).

4. JUDICIAL REVIEW OF NON INSTRUMENTAL ADMINISTRATIVE DECISIONS AFFECTING POLITICAL PARTIES

4.1 *Anatomy of a Party Coup*

The Kenyan case of *Republic v Registrar of Societies and 5 Others ex parte Kenyatta and 6 Others*⁵⁶ involved a dispute between two rival factions over KANU leadership. On 31 January-1 February 2006, KANU's National Delegate's Conference (NDC) elected Uhuru Kenyatta's faction (Uhuru) as party office bearers. However, the Nicholas Biwott faction⁵⁷ (Biwott) was dissatisfied with the electoral outcome. Later, Biwott accused Uhuru of abandoning KANU and joining ODM-K. On 24 November 2006, at Mombasa, Biwott allegedly held a Special NDC at which fresh elections were held and Biwott was purportedly voted KANU chairman. On 26 November at Nairobi, Uhuru convened an NDC which endorsed KANU's co-operation, but not merger, with ODM-K. Simultaneously, on 27 November both factions wrote letters to the Registrar of Societies (RS) claiming KANU leadership. Additionally, Biwott submitted a notification of change of officials, in form 'H', to which, Uhuru's advocates objected, by a counter-letter. Ignoring Uhuru's objection, however, on 28 November, the RS proceeded to register Biwott's faction as the new officials and wrote to Uhuru communicating the register's new status. Further, on 1 December, the Electoral Commission of Kenya (ECK) upon receiving a letter from Biwott asserting that his faction were the new registered officials, wrote a letter informing Uhuru that ECK 'would from now treat the named persons (Biwott faction) as the official leaders of KANU in the offices listed against their names' (brackets mine). Curiously, on 2 December, the RS wrote to Uhuru's faction recognizing that a dispute between the rival factions had arisen, thus summoning him to attend before her on the morning of 5 December to resolve the dispute. However, on 4 December the RS re-wrote to Uhuru's faction cancelling the scheduled meeting, asserting that she had already acted on the matter and was *functus officio*.

Uhuru's faction, were aggrieved by various decisions of the RS and ECK, and moved to the High Court by way of judicial review seeking to quash these administrative decisions and

⁵⁶ [2008] 3 KLR (EP) 521 (hereafter *Kenyatta's case*).

⁵⁷ *Ibid.* Self proclaimed 'total man' of Kenyan politics, Biwott was Moi's primary school student in the early 1950's and rose to become his right hand man during his 24-year reign. However Biwott lost the Keiyo South parliamentary seat in 2007. His fight for KANU leadership may be seen as an attempt to preserve Moi's legacy and prevent co-operation with proponents of constitutional change. His position in this case is articulated in the Repling Affidavit of purported new KANU Secretary General Dr Josephine Rose Majale Ojiambo.

prohibit Biwott's faction from assuming control of KANU affairs and to compel both the RS and ECK to reinstate the public records to the state in which they were prior to the illegal changes complained of. Uhuru argued that, first, KANU's Constitution permits co-operation and mergers with other parties. Indeed, being Kenya's oldest political party it had a history of such co-operation since 1964 when it merged with KADU, which was subsequently dissolved.⁵⁸ Similarly, in 2000 it co-operated with the National Development Party with which it eventually merged and NDP too was dissolved. Therefore, co-operation with ODM-K did not mean that Uhuru's faction had abandoned KANU and joined ODM-K. Second, political parties are neither defined in the Societies Act nor the National Assembly and Presidential Elections Act (NAPEA), but in the Constitution itself. Further the Constitution provides that 'Kenya shall be a multi-party democratic state'.⁵⁹ Therefore, any purported *administrative* decisions to accept Biwott's alleged notification of change of officials should have had regard not simply to the legislation but also the constitutional role played by political parties. Key constitutional functions by political parties include nominating candidates to vie for general elections, parliamentary political parties not only nominate MP's to parliament but also the members of the East African Legislative Assembly. Opposition parties may also permit appointment of their MP's to government.⁶⁰ Third, that the administrative decisions to register and recognize Biwott's faction contravened KANU's Constitution in various respects: Only the National Executive Committee or Party Chairman can summon a Special NDC—not the National Governing Council.⁶¹ Hence Biwott's purported Special NDC was *ultra vires* KANU's Constitution. Fourth, no proper notices were given to the two thousand KANU branch delegates to attend Biwott's purported Special NDC and the people who attended and voted were not *bona fide* delegates.⁶² Fifth, Biwott's notification of change of officials in form 'H' purported to create a new post of Deputy National Chairman allegedly won by Katana Ngala.⁶³ Yet no change was effected to KANU's constitution establishing such post. Moreover, upon losing the January election Biwott publicly announced formation of New KANU. 'He (Mr. Biwott asked the Kalenjin community to unite, saying it

⁵⁸ See *supra* section 2.1, note 8; *ibid.* 534-5. Uhuru's position is articulated by 'ousted' KANU Secretary General William S. Ruto.

⁵⁹ *Supra* note 24 s 1A; cited *ibid.* at 540.

⁶⁰ *Ibid.*, 540-42. Additionally, customs and usages permit the official leader of the opposition *inter alia*: first right of reply to government motions, access to diplomatic circles, transport and security allowances, right to sit on the Parliamentary Service Commission, option to chair both the Public Investment Committee and Public Investments Committee.

⁶¹ *Ibid.*, 534-6.

⁶² *Ibid.*, 537-8.

⁶³ *Ibid.*, 535.

was the only way they could be assured of success in their political strategy'.⁶⁴ Hence Uhuru submitted that the administrative decisions by the public bodies to register Biwott's faction were unprocedural, biased, illegal null and void, unreasonable and illegal and should be quashed.⁶⁵

4.2 *Passive Bureaucracy*

The Respondents defended the RS's decision on several grounds. First, the Attorney General argued that the Societies Act neither requires an administrative decision to be made by the RS upon receipt of a notification of change of party leadership nor did the RS make any decision. Rather, the registration process involving receipt of form 'H' and issuance of an official receipt upon payment for services rendered was merely a passive updating of records. Uhuru had no legitimate expectation from the RS since his ouster was purely an internal party affair.⁶⁶ Hence, second, the law imposed no legal duty upon the RS to consider objections raised by Uhuru's faction.⁶⁷ Third, letters written by the RS to Biwott's faction did not constitute an administrative decision but were merely a courteous reply to a request for information regarding the state of the public register, which information was available to anyone upon perusal of the public records.⁶⁸ Fourth, Biwott asserted that Uhuru's faction – having abandoned KANU and joined ODM-K – lacked *locus standi* (capacity to sue)⁶⁹ and, fifth, were therefore in contempt of court.⁷⁰ Moreover, sixth KANU's constitution does not approve of collaboration or cooperation with other parties unless in its own interests. Hence Uhuru's fugitive faction was disentitled from receiving notices from Biwott's lot convening of the Special NDC.⁷¹ Seventh, KANU's Constitution does not require its chairman to be the leader of opposition, as the two offices have no nexus.⁷² Eighth, Biwott agreed that political parties are societies *sui generis* which have a special position within the Kenyan constitution. Sections 34(d) and 123 'preserve the integrity and supremacy of party members and the party constitution, to preserve substantive rights to freedom of association and from discrimination. Yet notwithstanding voluntary association, (Biwott) insisted that political parties remain

⁶⁴ *Ibid.*, 539.

⁶⁵ *Ibid.*, 554-5.

⁶⁶ *Ibid.*, 543-5.

⁶⁷ *Ibid.*, 550.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 548.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*, 549.

private clubs'.⁷³ Not only was KANU not a party to the court proceedings but also the court could not substitute its own discretion for the RS's administrative decision.⁷⁴ Lastly, the ECK denied making a decision and claimed to be entitled to rely on the RS's records as conclusive evidence of party leadership.⁷⁵

4.3 *Public Law Remedies and the Right to be Heard*

High Court judges Al Nashir Visram (as he then was), Roselyn Wendoh and Anyara Emuhule JJ adjudged the disputed party leadership as follows: First, Uhuru's faction, being the immediate former KANU officials, was aggrieved by the change effected to the register. They therefore had proper legal standing before the court and, second, were not in contempt.⁷⁶ Third, co-operation between party officials, party leaders and members – with other parties regarding shared ideals, visions or objectives – does not constitute merger or abandonment of a political party. Such cessation of party membership or resignation must be effected officially or formally, not constructively.⁷⁷ Fourth, their Lordships rejected suggestions of non availability of public law remedies. Because the Societies Act requires form 'H' to be submitted within fourteen days of a party resolution purporting to effect any leadership change and to be signed by 3 party officials, therefore the RS's duty extended beyond receiving and filing away notification of change. Specifically, the RS had a duty to inquire into whether Biwott's Special NDC was properly convened with proper quorum, and voting proceeded according to the KANU Constitution. Moreover, the fact that Biwott's form 'H' contained the extraneous position of Deputy National Chairman without KANU's Constitution having been properly amended indicated that the notification was illegal.⁷⁸ The AG's contention that the RS's function is 'passive' imposing no 'positive duty'⁷⁹ was rejected as 'simplistic and pedantic', Since it was the RS's duty to prosecute officials for failure to file form 'H', This implies conducting investigations. Fifth, the RS erred by failing to accord the Uhuru faction two hearings. Initially, upon receiving an objection prior to changing the register. Again, before confirming her administrative decision to register Biwott's faction. 'The whole exercise appeared to have been choreographed and became a charade tainted with

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, 545-6

⁷⁶ *Ibid.*, 556-7.

⁷⁷ *Ibid.*, 557.

⁷⁸ *Ibid.*, 566.

⁷⁹ *Ibid.*, 568.

both procedural impropriety, unfairness, breach of the rules of natural justice, bias and outright illegality on the part of the Registrar of Societies'.⁸⁰ Worse still while cancelling the hearing scheduled for 5 December by writing to Uhuru, the RS admitted being *functus officio* (having discharged a duty) claiming: 'this letter confirms to you, that vide a letter of 28th November 2006, a new set of officials were registered. Therefore, this office is unable to register and or confirm a second set of officials'.⁸¹ Sixth, ECK's suggestion that its letter conveying recognition of the register is superfluous since it had no administrative decision to take was dismissed as a 'Mickey Mouse' argument.⁸² On the contrary, both are public bodies but ECK being a constitutional creature is supreme over and should supervise the RS. It amounted to abdication of mandate for the ECK Chairman to on one hand, rely on Biwott's letter as a basis upon which to treat his faction as the new KANU officials without even verifying the position from the RS, to determine for himself the veracity of its contents, while on the other hand, 'by purporting to convey a decision of the Commission, and later purporting to rescind the same on oath, on the ground that the same was not made in accordance with the Commission's procedures, the Commission has failed itself and acted illegally'.⁸³ Concluding that 'a party is key to democratic governance',⁸⁴ the Court quashed both the RS and ECK administrative decisions and ordered that the register should reflect its state prior to notification of change.⁸⁵

4.4 *Call for a Political Parties Act*

Kenyatta's Case departed from the High Court decision in *Ngare & Others v Registrar of Cooperative Societies*⁸⁶ which held 'as regards the elected officials the order of certiorari cannot apply against them as they hold their present office by virtue of the decision of the Registrar'. It further rejected *Dr Anangwe's Case*⁸⁷ which held that political parties are not amenable to judicial review. In this respect *Kenyatta* rejected the American case of *O'Brien v Brown*⁸⁸ where courts have been reluctant to deal with intra party disputes. Instead *Kenyatta*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 567-8.

⁸² *Ibid.*, 574.

⁸³ *Ibid.*, 576.

⁸⁴ *Ibid.*, 583.

⁸⁵ *Ibid.*, 585.

⁸⁶ *Ibid.*

⁸⁷ *Dr Amukowa Anangwe & Others v KANU & Others* High Court Misc app no 32 of 2005(unreported).

⁸⁸ 409 US 1 (1972).

invoked Lord Denning's English decision in *Regina v Greater London Council ex parte Blackburn* that:

...there is high constitutional principle, if there is good ground for supposing that a government department or public official is transgressing or about to transgress the law in a way which hinders citizens, then any one of those offended or injured can draw attention of the courts of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate.⁸⁹

Conversely, in 1996's when a leadership dispute arose between Kijana Wamalwa and Raila Odinga over control of FORD-K, the courts ordered a re-election. Raila instead dynamically defected accompanied by his ethnic voting bloc to NDP and successfully defended his Lang'ata seat at the ensuing by-election. Instead, the *Kenyatta* court's recent expansion of judicial review of administrative decisions regarding intra-party disputes relied on *Republic v AG and the Registrar of Societies*⁹⁰ where Nyamu and Ibrahim JJ concluded 'that the law of Judicial Review had not yet reached the furthest or the last frontier and that courts must endeavour to expand the grounds of intervention depending on the circumstances before them'. Recognizing the need for innovative law to reflect and regulate emerging Kenyan *realpolitik* *Kenyatta's case* called for radical reform:

There is an urgent need to delink the formation and registration of political parties from the claws of the Societies Act, and by providing legislation, the creation, administration and management of political parties as separate legal entities, with capacities to sue and be sued in their corporate names, and to provide also for their legal cessation of life as such legal entities.⁹¹

Kenyatta asserts that administrative decisions regarding disputed party leadership should be *non-instrumentally* made as the role of public bodies is not merely to 'rubber stamp' letters—which may be forgeries—received from factions contesting leadership. Yet, given that Uhuru was initially anointed as retiring President Moi's preferred successor in 2002, and nominated by delegates by acclamation, therefore the Jan-Feb 2006 NDC choice to elect Uhuru's faction does not reflect—applying Brennan and Lomansky's *non-instrumental* theory—the voter's self-

⁸⁹ [1976] 1 WLR 556 cited with approval by Lord Diplock in *Regina v IRC, ex parte National Federation of Self Employed and Small Business Ltd* [1982] AC 617 at 664.

⁹⁰ (HC Nairobi) Misc app 769 of 2004 (unreported).

⁹¹ *Supra* note 56 at 585.

interest, but rather, their expressive interest. By reinstating Uhuru's faction to the register, the court's judgment effectively endorses the importance of Kenyan voter's *expressive* interest in anointing party leaders.

5. JUDICIAL CONSTRAINT AGAINST INTERFERENCE WITH INSTRUMENTAL ADMINISTRATIVE DECISIONS AFFECTING PARTY PRIMARIES

5.1 Strategic Positioning by Unsuccessful Aspirants

On 16 November 2007 Aroko and his colleague (the aspirants) vied for nomination to contest the 2007 general election for Kasipul Kabondo constituency on an ODM ticket. They were unsuccessful. On 21 November in *Aroko & Another v Kwach and 5 Others*⁹² they sued the party Returning Officer (RO), its National Election Board, the successful candidate and ECK alleging that various irregularities marred the party primaries. They sought a temporary injunction restraining the ECK from recognizing ODM's nominee-elect due on 23 November and demanded a repeat of the party nomination process in respect of their constituency. However, the ECK objected to the court's jurisdiction over the dispute. First, because general elections are regulated by the National Assembly and Presidential Elections Act (NAEPA) and rules thereunder which prescribe election courts as the only forum to determine any election disputes. Such courts are created by special gazette notices after publication of general election results. Second, the avenue for invoking the election court's jurisdiction is by election petition, not by ordinary plaint reserved for civil disputes. However, the aspirants replied that the electoral law and procedures are intended to regulate national 'elections' which are separate and distinct from party 'nominations'. Hence they insisted that election courts have no business organizing and supervising party nominations. High Court Judge Michael Khamoni's ruling on this *preliminary* point of law was delivered on 23 November, when party nomination lists were due to ECK, 27 December having been declared the general election date.

5.2 Conflicting Judgments Regarding Court Jurisdiction

The court was required to weigh conflicting court of appeal decisions regarding whether or not the ordinary high court, not being an election court, can resolve disputed party

⁹² [2008] 3 KLR (EP) 762 (hereafter *Aroko's case*).

primaries. On one hand, in *Richard Chirchir & Another v Henry Cheboiwo & Another*⁹³ Gachuhi, Kwach and Cockar JJA on 24 December 1992 restrained a returning officer from publishing purported nomination results in the Kenya gazette in relation to a general election scheduled for 29 December 1992. Whether or how that court order was enforced is unclear. On the other hand, earlier that year, the Court of Appeal including Kwach and Cockar JJA in *Speaker of the National Assembly v Karume*⁹⁴ held that ‘where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed’. Moreover, in *Wanyoike v The Electoral Commission and Another (no. 2)*⁹⁵ with facts similar to *Aroko*, the court of appeal followed *Karume*. In *Wanyoike*, on 15 August 1995 some disgruntled FORD-Asili members sued their party officials upon which the Nakuru Chief Magistrate’s Court restrained the ECK from recognizing *Wanyoike*’s nomination as FORD-A’s candidate to contest the Kipiripiri constituency Parliamentary election. Later that day, *Wanyoike* obtained a stay of execution order from the Nyeri high court against the subordinate court’s injunction. However, upon arrival at the returning officer’s office the 1:00 p.m. deadline for submission of nomination papers had elapsed. *Wanyoike* therefore returned to the high court seeking to restrain the ECK’s refusal to receive his nomination papers and recognize his candidacy. The high court declined. Unfortunately, because *Wanyoike* had no arguable appeal and because he had an alternative remedy by way of election petition, therefore, the court of appeal refused to stay the High Court’s refusal. ‘The fact that election petitions take long to determine cannot be legal justification for not following clear provisions contained in (NAPEA)’ (brackets mine).⁹⁶ Fatefully, Ford-A fielded no candidate courtesy of intra-party wrangling. Khamoni J cautioned that ‘courts should not be willing to be used to stifle democracy.’⁹⁷

5.3 *The Rule in Ngei’s Case: Costs and Benefits*

Wanyoike’s case asserted full support in authority both local and foreign of the rule in *Ngei’s case*.⁹⁸ The incident occurred during the national or parliamentary election nominations, under the *de facto* one-party state. Ngei and his supporters physically impeded Mbondo from presenting his nomination papers. Mbondo waited until after the results of the

⁹³ H C Civil Application no 253 of 1992(unreported).
⁹⁴ [2008] 1 KLR (EP) 425, per Cockar, Kwach & Muli JJA.
⁹⁵ H C Civil suit no 111 of 1995(unreported).
⁹⁶ [2008] 2 KLR (EP) 44, Omollo, Tunoi & Shah JJA.
⁹⁷ *Ibid.*, 772;
⁹⁸ *Supra* note 15.

general elections were published before petitioning the election court which nullified Ngei's election upon finding him guilty of an election offence. Adopting the rule in *Ngei's case*, Judge Khamoni held that s 42 A (b) and (c) of the Constitution 'confer ECK responsibility for directing and supervising Presidential, National Assembly and local government, elections; promoting free and fair elections'.⁹⁹ Yet the judge was 'not aware whether the Electoral Commission has the power to determine disputes arising from party nominations between competing candidates or between a candidate and his party officials in a manner a court would do when there is no agreement'.¹⁰⁰ Instead s 44 of the Constitution as read with s 2 of the NAPEA confer limited 'jurisdiction' upon an 'election court' merely 'to hear and determine any question...whether (a) person has been validly elected as a member of the National Assembly';¹⁰¹ The judge held that an Election Court only exercises that jurisdiction after an election has taken place and that a person against whom the complaint is made has been elected as a member of the National Assembly. He applied an *instrumental* test to evaluate whether the costs of disrupting ECK's administrative schedule for conduct of elections justified its administrative decision refusing to give Aroko hearing rights, outweigh the likely benefits accruing from delaying his grievances until after the general electoral outcome is published. Such postponement would facilitate challenge of the outcome by a wider constituency of voters. He posed:

...on one hand that situation is bad because a voter who feels offended during party nominations may find waiting upto the outcome of the elections of the National Assembly too long and may even think it too late, on the other hand the situation is good because it allows any person who is a voter, not necessarily a candidate, to challenge the validity of election results and grounds for challenging such an election may include what happened during the party nominations (party-primaries).¹⁰²

The court's cost-benefit analysis determined that the public interest weighed against the ECK giving the aspirants hearing rights. 'It is good that when the Electoral Commission sets the electoral process in motion, that motion is set to run upto the end as required by the National Assembly and Presidential Elections Act'.¹⁰³ Yet regretfully:

⁹⁹ *Supra* note 99 at 770.

¹⁰⁰ *Ibid.*, 770-1.

¹⁰¹ *Ibid.*, 771.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

that Act does not allow sufficient time or space within which to institute, prosecute and determine a suit in court challenging a nomination...without offending the provisions of that Act and its rules, without leading for example, to a conflict of laws or to a situation where the legal effect is to have a particular political party in a particular constituency in the country...have no parliamentary or presidential candidate. Courts should not be used to bring such drastic results instead of voters themselves doing it through the ballot box.¹⁰⁴

5.4 *Call for Arbitration of Disputed Party Primaries*

Recognizing the principle that ‘the rule of law mustn’t bend to expediency’, Judge Khamoni in *Aroko’s case* rebuked the failure by political parties, officials and members to appreciate the effect of existing laws which preclude strategic bargaining by unsuccessful aspirants who should ‘avoid running hopelessly from place to place as majority hope (sic), step and some without enough energy to jump, during party nominations for elections to National Assembly’. He emphasized s 17 (1) of the NAPEA which provides that that a person deemed to be nominated by a political party for election as a member of the National Assembly has to be:

selected in the manner provided for in the *constitution or rules of the political party concerned relating to members of that party who wish to contest parliamentary elections*...so that whether Kenya is having a Liberal or Strict Democracy, there is need for each political party to put its house in order so that intra-party grievances are contained within each party (emphasis in original).¹⁰⁵

The judge simultaneously made a strong social contractarian statement requiring a rule introducing *non-instrumental* administrative decisions to resolve disputed party primaries by giving hearing rights to unsuccessful aspirants so as to facilitate *instrumental* voting:

Let each party have an efficient internal dispute mechanism within a good party constitution and rules regulating intra-party nominations/selections...and resultant grievances, disputes and disagreements, allowing sufficient time for dispute resolution within the party and well before the date to be set or already set for nominations.¹⁰⁶

¹⁰⁴ *Ibid.*, 772.

¹⁰⁵ *Ibid.*, 774.

¹⁰⁶ *Ibid.*

The court specifically called for party constitutions and rules to ‘also provide for quick arbitration clauses...’ Faulting the gap in the law, he conceded that:

there may be need to review the National Assembly and Presidential Elections Act and its rules to give more powers to the Electoral Commission and also to allow political parties ample time like six months, to do and complete, up to and including dispute resolution, their respective intra-party nominations...¹⁰⁷

The *Aroko* court criticized Kenyan law as it stands, including judicial review procedures, since:

...for a case emanating from a dispute in selections or nominations between members of a political party or between such a member and officials of the party, to be in a court of law other than an ‘election court,’ safely and lawfully, that suit has to be instituted, prosecuted and determined before the Electoral Commission sets the process of the anticipated presidential and parliamentary elections in motion...¹⁰⁸

6. PROPORTIONALITY AND SETTLEMENT OF POLYCENTRIC DISPUTES

6.1 *Private Persons and Public Bodies*

We have argued that on one hand, an utilitarian rule which gives procedural rights to *instrumental* administrative decisions establishes direct proportionality connecting *non-instrumental* or expressive voting to substantive justice. Conversely, an universal rule of respect for individual autonomy establishes direct proportionality by connecting *non-instrumental* administrative decisions to *instrumental* voting. Simultaneously, *instrumental* and *non-instrumental* rules are enshrined in the basic principle that a public body enjoys no such thing as unfettered discretion, stated in the English case of *R v Tower Hawkes of London Borough ex parte Chetnick Developments Ltd.* by Lord Bridge of Harwich:

For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification...But for public bodies the rule is the opposite. It is that any action to be taken must be justified by a positive law. A public body has no

¹⁰⁷ *Ibid.*
¹⁰⁸ *Ibid.*, 775.

legal rights which it enjoys for its own sake; at every turn all of its dealings constitute fulfillment of duties which it owes to others; indeed it exists for no other purpose.¹⁰⁹

Therefore while ‘it may be entitled to insist on this or that procedure be followed whether by a private person affected by its decision or superior body...the rule is necessary to protect people from arbitrary interference by those set in power over them.’ Sir William Wade explains ‘the principle which governs the relationship of public bodies and private persons with the law.’

A private person has absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts in good faith and upon lawful and relevant grounds in the public interest...The whole conception of unfettered discretion is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good.¹¹⁰

6.2 *New Frontiers of Judicial Review in Political Party Disputes*

Both *Kenyatta* and *Aroko* involved constitutional and statutory interpretation. In the former, the RS’s administrative discretion under the Societies Act and ECK’s constitutional discretion were construed broadly so as to require *instrumental* administrative decision-making by according process rights. It is submitted that the court’s review of the RS’s decision, by holding that ‘*non-instrumentalist*’ administrative decision-making was required, effectively endorsed the expressive interest, given the African cultural context of anointing ethnic leaders. Hence the overall impact of the decision was inversely proportional. In the latter case, the defunct ECK’s discretion was construed narrowly so as to require *instrumental* administrative decision-making and not to give process rights. It follows that legislation can give rise to contradictory administrative requirements at different stages of intra-party elections by attaching different weight to process rights and achieving different balance between voter choices and electoral outcomes. Which principles guide the control of administrative discretion by Kenyan courts? The *Kenyatta* court applied the famous English case of *Padfield v Minister for Agriculture, Fisheries and Food*¹¹¹ which held: ‘Where a statute does not by express words define the purposes to be exercised, the decision-maker is

¹⁰⁹ [1988] 1 ALL ER 961, 965-66; AC 858, 862; 2WLR 654.

¹¹⁰ William Wade, *Administrative Law* (Oxford, 6th ed, 1988) 399-400.

¹¹¹ [1968] 1 ALL ER 694; AC 994; 2 WLR 924.

bound nevertheless to ascertain and apply the aims intended since no statute can be purposeless'. Earlier, the landmark case of *Associated Provincial Pictures v Wednesbury Corporation* held that:

a decision-maker who fails to take into account all and only those considerations material to his task, or who does not bring a rational mind to bear on what he is to do is in law, no more exercising power within the limbs of his confinement than if he nakedly usurps his power.¹¹²

The court in *Kenyatta* accepted the entire grounds for intervention in judicial review, namely, 'procedural fairness, protected interest and legitimate expectation, irrelevant considerations and illegality, unreasonableness and bias, abuse of power, bad faith and procedural impropriety'.¹¹³ Was the *Kenyatta* court's expansion of judicial review remedies to regulate intra-party disputes instead of leaving the task to voters, justified? In a commercial context, Wade wonders 'what will be the effect if the courts grant legal remedies in non-legal situation. An extraordinarily wide discretion would create a new system for legal regulation of non-legal activity'.¹¹⁴ Similarly, the respondents in *Kenyatta's case* argued that, if political parties are private clubs designed to produce 'club goods' to satisfy the members' preferences and if the court will compel party members to abide by its own constitution and to interpret them correctly, for Wade, 'that amounts to giving them legislative force, so here is a variety of legislation which is generated privately and entirely independent of parliament'.¹¹⁵ Hence the significance of *Kenyatta* is that our courts for the first time recognized the need for administrative decisions to give process rights to aggrieved party leaders so as to attain substantive outcomes of constitutional associative and non-discriminatory freedoms. Yet one wonders why the court did not instead interpret political co-operation between KANU and ODM-K as *instrumentally* stifling political competition thus subverting the core purpose of multi-party democracy since it reduces the number of candidates available for a voter's self-interested choice. *Michuki's case*¹¹⁶ illustrates that electoral markets entailing one-person-one-vote do not facilitate equal parliamentary representation where constituency boundaries are distorted. Moreover in a first-past-the-post winner-take-all system, characterized by

¹¹² [1947]2 ALL ER 680; [1948]1 KB 223.

¹¹³ *Supra*, note 56 at 565.

¹¹⁴ William Wade, *New Horizons in Administrative Law* (1990) European Review of Public Law, vol 2, no 2, winter, 321-335.

¹¹⁵ *Ibid.*, 326.

¹¹⁶ *Supra* note 34.

skewed development policies, voter choices at both party leadership as well as general elections, are highly ethicized, or expressive. Hence optimum administrative decision-making, to confer voter preferences to election outcomes (for party leaders) should be *instrumental*. Conversely, voting at the party primaries nomination of MPs is relatively *non-instrumental*. However, the *Aroko* court was skeptical about judicial expansionism into party primaries. Rather, ‘an aggrieved member of a political party which is properly organized and managing its intra-party affairs can have redress within his party conveniently, quickly, cheaply, quietly and amicably without having to wait for a court of law...’¹¹⁷ Judge Khamoni issued a hypothetical, counterfactual or Rawlsian dictum that:

Siasa ya Tumbo (belly politics), the mother of ‘a deadened political plutocracy’ instead of Government for the people will not do, as in the former, Kenya will have to live with the kind of chaos this suit is the product of; yet Kenya needs the presence of chaosless and disciplined, consistent, transparent, trustworthy, principled and ideologically distinct political parties managing ...a ‘Government for Social Justice’ (brackets and translation mine).¹¹⁸

Is public law then to be brought in to redress the imbalance of power in the Kenyan political parties, where private law has previously reigned supreme?

6.3 From Legitimate Expectations to Proportionality

What then is the significant criterion which distinguishes the court decision in *Kenyatta* from *Aroko*? It is submitted that the proportionality principle, unstated in both cases, accounts for their conflicting viewpoints. Both decisions implicitly recognize and base their findings on the principle of proportionality as a ground for judicial review in Kenya first recognized in *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others ex parte Saitoti*.¹¹⁹ In *Saitoti’s case* the commission’s investigations suspected him of responsibility for payment of export compensation from the exchequer in the infamous Goldenberg scandal. Saitoti argued *inter alia* that not only had parliament, in 1995, exonerated his role in the scam thus creating legitimate expectations against prosecution, but also the commission’s failure to give him process rights in arriving at its decision have substantial direct and irreversible consequences which are wholly disproportionate. The

¹¹⁷ *Supra* note 91, 775.

¹¹⁸ *Ibid.*

¹¹⁹ [2006] eKLR (accessed 18 January 2010).

amount allegedly paid during Saitoti's tenure as Finance Minister was allegedly 225 million out of the subsequent kshs 13.8 billion (US\$ dollars 200 million) or possibly kshs 30 billion (US\$ dollars 500 million) stolen. Quashing the commission's decision touching upon Saitoti and prohibiting his prosecution on Goldenberg related matters, Nyamu (as he then was), Wendoh and Emuhule JJ held:

The principle of proportionality is recognized in our constitution. In 1980 the Committee of Ministers of the Council of Europe did define proportionality as under:- An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the right, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue. In view of our conclusions of irrationality, unreasonableness, illegality, bias and bad faith we find that since the interests of the applicant were not in any way inconsistent with the Commission's fair faithful and impartial findings the ultimate decision, determination or findings concerning the applicant are out of proportion – the Commission struck the incorrect balance.¹²⁰

They innovated:

...where there is a likelihood of breach of fundamental rights and freedoms the courts should adopt a high intensity review in considering the conclusions reached based on this principle. When the high intensity test or a more searching scrutiny by the court is applied as it should be because there is an element of human rights the major conclusions cannot in our view satisfy the test and certiorari would also issue on the ground of *proportionality*. It should be noted that *proportionality* is well entrenched in our Constitution especially in the determination on limitations in chapter 5 (on fundamental rights) of the Constitution (emphasis and brackets mine).

Similarly *Kenyatta* argued against Biwott's interference with the Uhuru faction's constitutional freedom of association and from discrimination. Gordon Anthony shows that proportionality effectively displaces the *Wednesbury* basis of substantive protection of legitimate expectations as a ground of judicial review i.e. that where an individual could demonstrate that a prior practice or representation gave rise to a legitimate expectation of a particular outcome, receipt or benefit, then interests of fairness prevents public bodies from

¹²⁰ *Ibid.*, 61-62.

lawfully resiling.¹²¹ The rationale is that the legitimate expectations principle increases legal certainty and public trust. By contrasting the reasoning in *Kenyatta* and *Aroko* this chapter argues that although the proportionality principle was not expressly invoked as the basis of either decision, in reality it explains each of them. Recall Craig's instrumentality test that courts use proportionality as the reference point against which to balance the cost to the administration from having to give process rights against the likely effect that the giving of such rights will have on the final decision.¹²² Anthony further asserts that 'decisions in the macro-political field will of democratic necessity demand a greater degree of judicial deference'.¹²³ Cases like *Saitoti* or *Kenyatta* will inevitably be highly politicized hence it might be expected that, in such cases, 'changes of policy fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the groups which enjoyed greater expectations of an earlier policy'.¹²⁴ Unfortunately as in *Aroko* conversely, 'of course there may be some cases at the "micro" end of the spectrum, in which judicial intervention is immediately deemed inappropriate'.¹²⁵ A middle way reconciles the inconvenience to the decision-maker with safeguarding of voter autonomy.

6.4 Arbitration of Polycentric Political Disputes

Political parties being quasi-public bodies, give rise to disputes which perhaps lie in between the two extremes on account of what Lon Fuller first called their 'polycentric nature'.¹²⁶ As Kenyan post-2007 voting violence¹²⁷ in an inter-party dispute, following ECK's refusal to accord the opposition candidate, Raila a hearing prior to declaring Kibaki the winner, demonstrates, refusal to recognize elected intra-party officials or nominated candidates may similarly carry with it implications not just of public expenditure but also and thereby for other individuals not party to the proceedings. In complex cases, fair procedures need not be modeled upon the rules of natural justice suitable for adversarial, adjudicative contexts. Numerous other decisional forms exist: mediation, arbitration, voting, resort to chance, contract, managerial direction, and legislations. Each of these modes of decision-

¹²¹ Gordon Anthony, *Procedure, Substance and Proportionality: Legitimate Expectations in United Kingdom Administrative Law* (2003) *European Review of Public Law*, vol. 15, no. 4, winter/hiver. 1171 – 1198 at 1173.

¹²² *Supra* note 39.

¹²³ *Supra* note 121 at 1190.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Lon Fuller, *The Forms and Limits of Adjudication* (1978) 92 *Harv L Rev*, 353.

¹²⁷ *Supra* note 43.

making will generate a set of process rights. Criminal procedure and evidence law are best suited to determining bivalent questions such as guilt or innocence, relevance or irrelevance and admissible or inadmissible. Instead, an administrative law approach is recommended to deal effectively with macro disputes emerging from situations involving a multiplicity of actors with variegated interests which require accommodation. Hence the legal method of reducing a complex dispute into a simple contest between an aggrieved aspirant and his supporters, on one hand, against the successful candidate and political party officials on the other, perhaps falsely obscures the deeper malaise afflicting voters in Kenyan political parties, generally which implicates not mere failure by public administrative officials to apply a high intensity test in exercise of discretion where human rights are violated, but also to adopt either an *instrumental* or *non-instrumental* approach in proportion to the size of the dispute where political parties fail to effective self-regulation mechanisms. On the criteria of scope of adjudication, John Allison concludes that giving of process rights goes beyond macro-political or even quasi-public cases, and extends to micro-private disputes:

The polycentricity of scarcity licensing has implications for judicial review. Scarce public resources are analogous to scarce licences. Their allocation at one point affects their availability at another. The adjudicative court hearing applications for judicial review does not itself make allocations in regard to public-law rights but it does review administrative decisions that have serious repercussions for allocation of resources. Assisted only by partisan arguments of parties the court is ill equipped to determine the nature and extent of those repercussions. Because of its limited competence the court cannot adequately assess the risk of administrative disruption when it quashes administrative decisions and requires their reconsideration...In disputes that are significantly polycentric because they invite the allocation of scarce licences, or affect comparatively scarce public resources, the court has reason to show judicial restraint. Judicial restraint is, then, understandable not only in obviously political cases or those directly affecting the central tenets of government policy but also in everyday administrative disputes.

Dworkin is concerned with the application of the principle of equal liberty and priority of rights over expediency or public interest in actual legal-political issues such as minority rights. Because 'rights are trumps' invoked by individuals who may resist even lawfully made

legitimate administrative decisions, he prefers a Kantian/Rawlsian rights-based rather than utilitarian rule-based model to decisions.¹²⁸

7. POLITICAL RIGHTS UNDER THE NEW CONSTITUTION

This paper postulates a hypothesis that *non-instrumental* administrative decisions are directly proportional to *instrumental* voter choice, and vice versa. A historical journey was taken through Kenyan electoral history to elicit specific variables which condition voter, politicians and bureaucrats. Traditionally, gerontocratic leaders are anointed as party leaders whose membership is ethnically based. Party leadership voting is generally expressive of ethnicity, leading to personalized, autocratic governance. However, voter choices at party primaries, to nominate parliamentary candidates are relatively more self-interested from within ethnic groups. Because party leaders influence the parliamentary nominations in favour of preferred candidates, therefore popular but unsuccessful aspirants tend to engage in strategic positioning. To protest against intra-party rigging they defect to alternative platforms immediately prior to general elections thus fragmenting their parties. At general elections, leaders foster strategic ethnic coalitions which tend to reduce political competition. Voter choices at this stage are not instrumental, but expressive of a '3-piece' formula whereby they choose the presidential candidate of their ethnic leader together with parliamentary and councilors of the same party, irrespective of political ideology.

The schizophrenic approach to regulating political parties proposed by institutional design of the new Constitution¹²⁹ incorporates lessons regarding political rights¹³⁰ from recent jurisprudence. The *instrumental* voting phase of party leadership requires regulation by an *non-instrumental* or expressive Political Parties Commission.¹³¹ This would reflect a response to both *Kenyatta's* and *Aroko's cases*' calls for a Political Parties Act and for an arbitral approach towards regulation of intra-party disputes akin to private, club or micro-party aspects,¹³² To apparently prevent the notorious culture of last-minute defections, rent-seeking or strategic bargaining by unsuccessful candidates at nominations decried in *Aroko*, the new

¹²⁸ *Supra* note 55.

¹²⁹ New Constitution of Kenya (accessed 12 July 2011).

¹³⁰ *Ibid.* Article 55 therein expressly.

¹³¹ *Ibid.* Art 107(b)

¹³² *Ibid.*

Constitution precludes nomination by a registered political party unless a person has been a member for a minimum of 6 months prior to the election date.¹³³ Parliamentary legislation shall provide for *inter alia*, ‘the resolution of disputes between members of a political party including parties forming part of a coalition, and between a party and the Commissioner of Political Parties’.¹³⁴ Similarly, an Act of Parliament shall establish mechanisms for settling electoral disputes.¹³⁵ The significant word is settling, rather than resolving. Hence arbitral mechanisms appear to be envisaged in departure from the adversarial approach reserved for determining civil dispute. Significantly, an *instrumental* CPP must consider the costs and benefits of giving process rights to settle dispute arising from expressive voters or ousted officials dissatisfied by anointment of leaders’ *ultra vires* party constitutions.

The new Constitution deals with overlapping party-cum-parliamentary interaction such as regulating cessation of party membership. Dual party membership is outlawed. While for MPs, resignation is recognized, expulsion for indiscipline requires a fair hearing and becomes effective only after fourteen days upon written notice from the party secretary general to the speaker of the national assembly, within which an aggrieved member has a right of petition to the high court. In recognition of the potential wider impact of delaying polycentric political disputes, such petition for declaration must be determined within ninety days.¹³⁶ The rationale behind the *Kenyatta* decision is adopted in entirety. Hence the new Constitution provides that the existence of the following circumstances only shall not amount to a member leaving the party: ‘(a) the creation or dissolution of a coalition of which a member’s political party forms part; (b) the dissolution of a political party to which the member belongs; or (c) the merger of two or more parties of which the member’s party forms part’.¹³⁷ This provision curtails political competition but reflects the realities of Kenyan political anointment of party leaders and officials and expressive voting patterns endorsing party leaders by acclamation. It is only at the relatively ethnically-neutral nomination stage that intra-party ethnicity is neutral and assuming free and fair procedures, self interested voting is decisive. Negating the *Kenyatta* case, the new Constitution proposes to curtail high court judicial review jurisdiction and instead ultimately, the constitutional court can vindicate voter’s political choices.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, Art 116 pursuant to 117 (b).

¹³⁵ *Ibid.*, Art 110.

¹³⁶ *Ibid.*, Art. 115 (2), (3) (a) and (b).

¹³⁷ *Ibid.*, Art. 115 (4).

The proposed establishment of an Independent Electoral and Boundaries Commission to settle disputed party primaries before the electoral outcome reduces administrative instrumentality under National Assembly and Presidential Elections Act, thus facilitating *instrumental* voting at nomination as predicted by the proportionality principle. The IEBC¹³⁸ is proposed to succeed the discredited ECK with jurisdiction macro or public aspect of political parties. The legislative postponement of nomination disputes pending general electoral outcomes according to the *Aroko* court's interpretation of National Assembly and Presidential Elections Act Cap 7 Laws of Kenya (NAPEA) under the rule in *Ngei's case* is repealed under the new Constitution. Instead, the administrative cost of giving process rights is to aspirants genuinely aggrieved by rigged nominations is less than the benefit accruing from increasing the likelihood that a *non-instrumental* IEBC's administrative decision shall improve substantive rights of citizens. If the intra-party constitutions do not effectively arbitrate over political rights or if the IEBC fails to settle disputed party primaries, then the new Constitution prescribes that notwithstanding polycentric nature of political disputes, citizens have recourse to a proposed constitutional court¹³⁹ to vindicate political rights. Thus, although orthodox judicial review before the high court appears ousted, nevertheless the new Constitution endorses Dworkin's principle that rights are trumps' which override the public interest even assuming administrative decisions are legitimately made, if the discretion does not increase the substantive outcome of a free and fair election.¹⁴⁰ Hence creation of a separate and therefore *instrumental* Commissioner of Political Parties to settle party leadership disputes while establishing a *non-instrumental* (or relatively less instrumental in comparison with the extremely instrumental NAPEA) Independent Electoral and Boundaries Commission to arbitrate over party primaries validates the proportionality hypothesis. Both new constitutional institutions effectively incorporate the dictums of the *Kenyatta* and *Aroko* cases. Uniquely, the new Constitution proposes that Kenyan party leadership disputes are to be arbitrated as macro disputes although parties are technically more 'private'. Conversely, party primaries are regulated as though micro disputes similar to the market, although theoretically nominations more directly affect the general elections and should therefore be regarded as more public. The new Constitution retains adjudicative approaches as a last resort to resolving political party disputes only after exhaustion of internal mechanisms and

¹³⁸ *Ibid.*, Art 112.

¹³⁹ The Parliamentary Select Committee on Legal and Constitutional Affairs, at Naivasha during February 2010, however rejected such Constitutional Court in favour of a Supreme Court.

¹⁴⁰ Under Art (3) (7).

arbitration. It enshrines enhanced political rights and fair administrative rights. Hence its provisions reflect the proportionality principle given the hybrid character of national interest declared in its preamble that: ‘We the people of Kenya...PROUD...of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible and sovereign nation’.