



Electronic Theses and Dissertations

2022

Administrative justice in taxation: an evaluation of KRA's administrative practices.

Gathura, Winnie Wanjiku
Strathmore Law School
Strathmore University

Recommended Citation

Gathura, W. W. (2022). *Administrative justice in taxation: An evaluation of KRA's administrative practices* [Thesis, Strathmore University]. <http://hdl.handle.net/11071/13053>

Follow this and additional works at: <http://hdl.handle.net/11071/13053>

**Administrative Justice in Taxation: An Evaluation of KRA's
Administrative Practices**

By

Winnie Wanjiku Gathura

110148



Master of Laws

2022

**Administrative Justice in Taxation: An Evaluation of KRA's
Administrative Practices**

By

Winnie Wanjiku Gathura

110148

Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws at

Strathmore University

Strathmore Law School

Strathmore University

Nairobi, Kenya



October, 2022

This thesis is available for Library use on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

Declaration and Approval

Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by any other person except when due reference is made in the thesis itself.

© No part of this thesis may be reproduced without the permission of the author or Strathmore University.

Student's Name: Winnie Wanjiku Gathura

Sign: _____

Date: _____

Approval

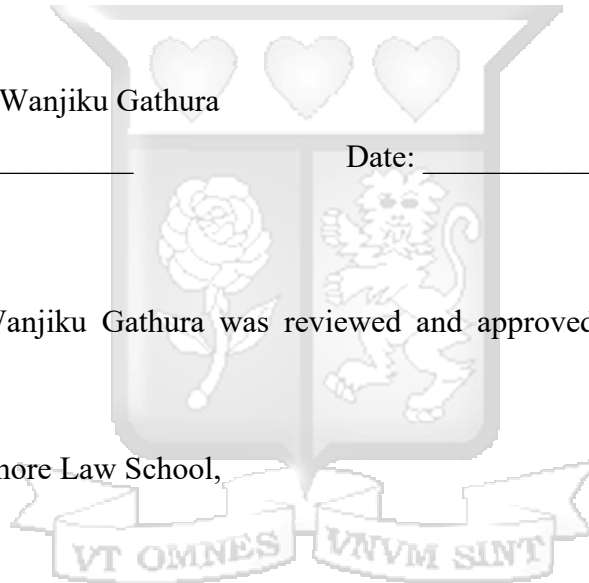
The thesis of Winnie Wanjiku Gathura was reviewed and approved for examination by the following:

Dr Constance Gikonyo
Adjunct Lecturer, Strathmore Law School,
Strathmore University

Dr Daisy Ogembo
Senior Lecturer, Strathmore Law School,
Strathmore University

Dr Peter Kwenjera
Dean, Strathmore Law School,
Strathmore University

Dr Bernard Shibwabo
Director of Graduate Studies,
Strathmore University



Abstract

Administrative justice is a fundamental requirement of a society based on the rule of law. It indicates a commitment to the principle that the government, and its administration, must act within the scope of legal authority. It also signifies the right to seek legal redress whenever rights, liberties or interests are negatively affected when the public administration exercises its duties in an unlawful or inappropriate manner. Given the power and informational advantages that the state possesses relative to the citizen, it is vital that administrative procedure and dispute codes afford the public significant procedural rights and permit decisions and appeals to be dealt with efficiently, fairly and swiftly. A review of several reported cases reveals that even with the developments in Kenya's tax administration regime, taxpayers are far from having their matters determined in a fair, straightforward, affordable, and efficient manner.

This study adopted a doctrinal legal research approach, which included an in-depth review of administrative law, its development process, and legal reasoning. It critically examined Kenya's tax administration system by studying various provisions of the relevant laws to fully grasp what procedural requirements Kenyan law mandates. This research investigated two questions: a) Are administrative law principles relevant in tax administration? and b) Do KRA administrative practices adhere to the principles of administrative law? To answer these questions, this research reviewed and critically analysed Kenya's tax administration regime from an administrative law perspective. To investigate the extent to which KRA adheres to the principles of administrative law, this study analyzed six cases against KRA and observed that the Courts, have on several occasions found fault in KRA's decision-making process.

The study concludes that, notwithstanding administrative law developments, the KRA's decision-making process falls short of administrative law principles' standards. The study highlights the plight of taxpayers and the need to balance the State's and taxpayers' competing interests and ensuring administrative justice. On this basis, it is desired that this research influences Kenya's tax policy and steer it in a direction to ensure that these interests are balanced in practice.

Table of Contents

| | |
|--|------------|
| <i>Declaration and Approval</i> | <i>ii</i> |
| <i>Abstract</i> | <i>iii</i> |
| <i>List of Abbreviations</i> | <i>vi</i> |
| <i>List of Cases</i> | <i>vii</i> |
| <i>List of Statutes</i> | <i>x</i> |
| CHAPTER ONE | 1 |
| INTRODUCTION | 1 |
| 1.1 Background | 1 |
| 1.2 Statement of the Problem | 7 |
| 1.3 Research Aims and Objectives | 8 |
| 1.4 Hypotheses | 8 |
| 1.5 Research Questions | 8 |
| 1.6 Justification of the Study | 8 |
| 1.7 Theoretical Framework | 9 |
| 1.7.1 Red-light Theory | 10 |
| 1.7.2 Green light theory | 11 |
| 1.7.3 Rationale for application of the Red-light theory..... | 13 |
| 1.8 Concepts | 13 |
| 1.8.1 Procedural Justice..... | 13 |
| 1.8.2 Taxpayer rights | 14 |
| 1.9 Literature Review | 15 |
| 1.9.1 Administrative Law | 15 |
| 1.9.2 Administrative law and taxation..... | 17 |
| 1.9.3 Procedural Justice..... | 18 |
| 1.9.4 Taxpayers' Rights | 21 |
| 1.9.5 Conclusion | 22 |
| 1.10 Approach And Methodology | 22 |
| 1.11 Chapter Breakdown | 23 |
| CHAPTER TWO | 25 |
| ADMINISTRATIVE LAW IN TAX ADMINISTRATION | 25 |
| 2.1 Introduction | 25 |
| 2.2 Judicial Review | 25 |
| 2.3 Administrative Law in Kenya | 28 |
| 2.4 Administrative Law principles | 31 |
| 2.4.1 Principle of legitimate expectation..... | 31 |
| 2.4.2 Legality | 36 |
| 2.4.3 Reasonableness | 39 |

| | | |
|--|--|-----------|
| 2.4.4 | Proportionality | 42 |
| 2.5 | Administrative Law Principles in Taxation..... | 45 |
| 2.6 | Conclusion..... | 47 |
| CHAPTER THREE..... | | 49 |
| A REVIEW OF KRA'S ADMINISTRATIVE PRACTICES..... | | 49 |
| 3.1 | Introduction | 49 |
| 3.2 | Tax Dispute Resolution | 49 |
| 3.2.1 | Appeals..... | 50 |
| 3.2.2 | Alternative Dispute Resolution (ADR)..... | 51 |
| 3.3 | Case Analysis | 53 |
| 3.3.1 | Due process rights | 55 |
| 3.3.2 | Right to written reasons..... | 62 |
| 3.3.3 | VAT refunds | 64 |
| 3.3.4 | Legitimate expectation..... | 66 |
| 3.4 | Conclusion..... | 68 |
| CHAPTER FOUR..... | | 72 |
| FINDINGS, RECOMMENDATIONS AND CONCLUSION..... | | 72 |
| 4.1 | Introduction | 72 |
| 4.2 | Findings..... | 72 |
| 4.2.1 | <i>Administrative law in Kenya</i> | 73 |
| 4.2.2 | <i>Administrative law principles are necessary for tax administration.</i> | 74 |
| 4.2.3 | <i>KRA's practices do not adhere to administrative law principles.</i> | 75 |
| 4.2.4 | <i>Taxpayers suffer because of KRA's actions.</i> | 76 |
| 4.3 | Recommendations..... | 76 |
| 4.3.1 | Proper enforcement | 77 |
| 4.3.2 | Continuous Training..... | 78 |
| 4.3.3 | Resolve Disputes as Early in the Process as Possible | 79 |
| 4.3.4 | Effective Communication | 80 |
| 4.4 | Conclusion..... | 80 |
| Bibliography | | 82 |
| Appendices..... | | 88 |
| Appendix A: Similarity Report | | 88 |
| Appendix B: Ethical Clearance Confirmation | | 89 |

List of Abbreviations

| | |
|-------------|--------------------------------|
| FAAA | Fair Administrative Action Act |
| KRA | Kenya Revenue Authority |
| TAT | Tax Appeals Tribunal |
| TPA | Tax Procedures Act |
| VAT | Value Added Tax |
| WHT | Withholding Tax |



List of Cases

India

U.P Awas Evam Vikas Parishad v Gyan Devi [1995] 2 SCC 326.

Union of India v Hindustan Development Corpn. [1993] 3 SCC 499 at 540.

Kenya

Abdi Gedi Amin v Kenya Revenue Authority & 3 others [2020] eKLR.

Anne Wanjiku Kahwai & another v Kenya Revenue Authority & another [2019] eKLR.

Commissioner of Domestic Taxes v Lewa Wildlife Conservancy Limited [2019] eKLR.

Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR.

Council of Legal Education and Another v Rita Biwott, Civil App No. 238 of 1994 per Cockar AJ.
Cyprian Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party) [2021] eKLR.

David Ndi Mwangi v Commissioner of Investigation & Enforcement [2018] eKLR.

Geothermal Development Company Limited v Attorney General & 3others [2013] eKLR.

Geothermal Development Company v AG and 3 Others [2013] KeHC Petition 352 of 2012: *David Oloo Onyango* [1987]; *Aberdare Freight* [2004].

Gibb Africa Limited v Kenya Revenue Authority [2017] eKLR.

Jacqueline Okuta v Attorney General [2017] eKLR.

Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR.

Kenya Data Networks Limited v Kenya Revenue Authority [2013] eKLR.

Kenya Data Networks Limited v Kenya Revenue Authority [2013] eKLR.

Kenya Data Networks Limited v Kenya Revenue Authority [2013] eKLR.

Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR.

Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] eKLR.

Local Productions Kenya Ltd. v Commissioner of Domestic Taxes [2019] eKLR.

Pevans East Africa Ltd v Commissioner of Domestic Taxes & 7 Others [2019] eKLR.

R v Judicial Service Commission [2003] eKLR.

R v Public Procurement Administrative Review Board & Another Ex-Parte Avante International Technology Inc. [2013] eKLR.

Rahab Wanjiru Njuguna v Inspector General Police and Another [2013] eKLR.
Republic and Kenya Revenue Authority ex parte L.A.B. International Kenya Limited [2010] eKLR.
Republic and Kenya Revenue Authority ex parte L.A.B. International Kenya Limited [2010] eKLR.
Republic v Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280.
Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex Parte Applicant) [2019] eKLR.
Republic v Commissioner General KRA Ex Parte Martin M. Mugi [2018] eKLR.
Republic v Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd [1999] 1 EA 245 (CAK).
Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited [2020] eKLR.
Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies [2013] eKLR.
Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies [2013] eKLR.
Republic v Kenya Revenue Authority & another; Equity Bank Limited & 3 others (Interested Parties) Ex Parte Nairobi City County Government [2019] eKLR.
Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR.
Republic v Kenya Revenue Authority Ex Parte L.A.B International Kenya Limited, Misc. Civil Application Number 82 of 2010 (Unreported).
Republic v Kenya Revenue Authority Ex parte Shake Distributors Limited [2012] eKLR.
Republic v Permanent Secretary/Secretary to the Cabinet and Head Of Public Service Office of The President & 2 Others ex-parte Stanley Kamanga Nganga [2006] eKLR.
Samura Engineering Limited and Others v Kenya Revenue Authority [2012] eKLR.
Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR.
Silver Chain Limited v Commissioner Income Tax & 3 Others [2016] eKLR.
Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR.
Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers) [2014] eKLR.

South Africa

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another [2006] ZACC 9; 2007 (1) SA 343 (CC).

Medirite (Pty) Ltd v South African Pharmacy Council & another (197/2014) [2015] ZASCA 27.

United Kingdom

Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223.

Doody v The Home Secretary of State [1993] 1 All ER 151.

R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213 (CA).

R v Secretary of State for Home Department; Ex parte Simms [2002] 2 AC 115 at 131.

R v Goldstein [1983] 1 WLR 151.

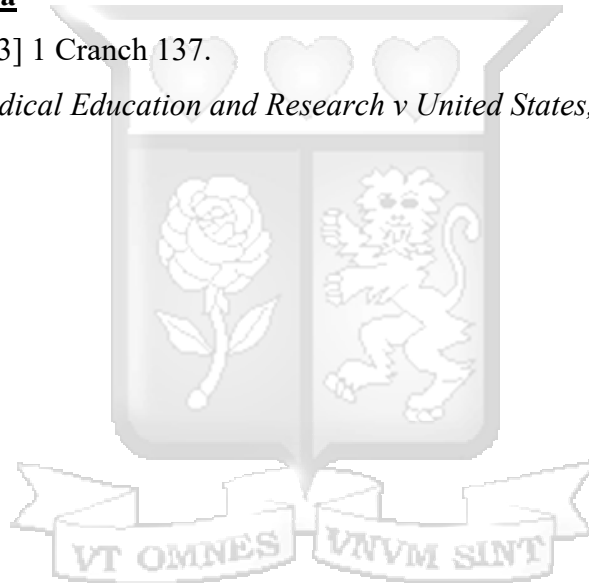
Ridge v Baldwin [1964] AC 40.

Sehmidt v Secretary of Home Affairs [1969] 2 Ch 149; [1969] 1 All E.R. 904.

United States of America

Marbury v Madison [1803] 1 Cranch 137.

Mayo Foundation for Medical Education and Research v United States, 562 U.S. 44 [2011].



List of Statutes

Constitution of Kenya, 2010.

Fair Administrative Action Act, No.4 of 2015.

Income Tax Act, Cap 470 Laws of Kenya.

Kenya Revenue Authority Act, No.2 of 1995.

Tax Appeals Tribunal Act, No.40 of 2013.

Tax Procedures Act, No. 29 of 2015.

Value Added Tax Act, Cap 476 Laws of Kenya.



Acknowledgements

I am deeply grateful to my supervisors Dr. Constance Gikonyo and Dr. Daisy Ogembo for their guidance and support in writing this thesis. I would like to appreciate Dr. John Ambani for his insightful comments, guidance, and encouragement at the onset of this research.

I would like to thank my parents, husband and siblings for their unwavering support, prayers, and encouragement.



CHAPTER ONE

INTRODUCTION

‘Nothing is to be preferred before justice.’

-Socrates

1.1 Background

Taxes provide the means through which states deliver public goods and services, redistribute wealth, and mould behaviour through incentivizing certain activities or deter people from engaging in ‘harmful’ activities by imposing ‘sin taxes.’¹ The core tasks of tax administration are centred around the implementation and enforcement of tax legislation and regulations. These activities include identification and registration of taxpayers, processing of tax returns and third-party information, examination of the completeness and correctness of tax returns, assessment of tax obligations, (enforced) collection of taxes and provision of services to taxpayers.

Adam Smith, in the *Wealth of Nations*, argues that taxation should abide by the principles of fairness, certainty, convenience and efficiency.² The Mirrless review³ provides a much more recent, detailed, balanced view of what a good tax system looks like. According to this Review, a tax system should be simple, transparent, and neutral. The Review’s fundamental principle is that tax systems should be as simple, as transparent and as feasible as possible.⁴ To begin, an effective tax system should be designed to satisfy overall expenditure demands. In general, not all taxes must address all objectives as long as the system as a whole does and, as long as the overall system is progressive, all taxes need not be progressive. Secondly, neutrality: A tax system that treats comparable economic activity similarly for tax reasons will be simpler, prevent unreasonable discrimination between persons, and be more equitable. However, it can sometimes be efficient to discriminate between different activities for tax purposes. Third, progressivity with as much efficiency as possible. Progressivity involves increasing the tax burden with income, based on the ability to pay principle. Nonetheless, it is impossible to tax the wealthy or supplement the incomes

¹ O’Neill M and Orr S, *Taxation: Philosophical Perspectives ed.*, Oxford University Press, 2018, 1.

² Association of International Certified Professional Accountants, ‘Guiding principles of good tax policy: A framework for evaluating tax proposals’, 2017,8.

³ Mirrless J, Adam S, Besley T, Blundell R, Bond S, Chote R, Gammie G, Johnson P, Myles G and Poterba J, *The Mirrless Review: Conclusions and Recommendations for Reform*, Fiscal studies, 32, 2011, 331–359.

⁴ Mirrless et al, *The Mirrless Review: Conclusions and Recommendations for Reform*, 3.

of the poor without influencing behavior.⁵ However, the system may be properly designed to minimize the efficiency loss associated with obtaining progressivity.⁶

These principles form a sound basis for taxation and appear to derive directly from the concept of the rule of law, which according to Hamowy citing F.A. Hayek means that government in its actions is bound by rules fixed and announced beforehand which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.⁷

Administrative law regulates the exercise of power by administrative bodies and provides remedies where these principles and procedures have not been followed. One of the objectives of administrative law is to 'improve the quality and consistency of government decision-making'.⁸ The principles of administrative law are largely considered synonymous with 'good administration' and include: legality, legitimate expectation, reasonableness, good governance, natural justice and accountability. Based on this, a good administrative decision is one that is lawful, reasonable, proportional, respects the principle of legitimate expectations, justified and procedurally fair.⁹ By this understanding, the principles of administrative law are at the core of good administration.¹⁰

Although administrative law, by its very nature, is concerned with ensuring that public decision-makers act within the law and are, on this basis, accountable before the law, its development is due, largely, to a desire on the part of the legal system to ensure the balance of power and to safeguard the rights and interests of citizens. Administrative law aims to ensure that the element of fairness operates in public decision-making and generally to ensure good administration.

Judicial review refers to the power of the court, in suitable proceedings before it, to declare a governmental action either opposed to, or in compliance with, the constitution or other governing legislation, with the result of declaring the action unconstitutional and void or vindicating its

⁵ Mirrless et al, *The Mirrless Review: Conclusions and Recommendations for Reform*, 3.

⁶ Mirrless et al, *Conclusions and Recommendations for Reform*, 333.

⁷ Hamowy R, 'Freedom and the rule of law in F.A. Hayek', 36 *II Politico*, 2, 1971, 351.

⁸ Lane WB & Young S, *Administrative Law in Australia*, Law Book Co of Australia, 2007, 3.

⁹ McMillan J, "Can Administrative Law Foster Good Administration" Commonwealth Ombudsman Council of Australian Tribunals, NSW Chapter, Sydney, 16 September 2009.

¹⁰ McMillan, 'Can Administrative Law Foster Good Administration', 3.

legitimacy.¹¹ Judicial review is also the means through which the courts maintain the other departments of government within the bounds of their jurisdiction. It gives constitutional principles effect and serves as a check on government action. However, in accordance with the theory of separation of powers, the courts must not exceed their jurisdiction.¹² Under the following heads, administrative actions are subject to scrutiny by judicial review:

- I. Illegality, where the decision-making authority has been guilty of an error of law e.g. by purporting to exercise a power which it does not possess;
- II. Irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision and;
- III. Procedural impropriety, where the decision-making authority has failed in its duty to act fairly.¹³

Administrative law principles can be realized through two related approaches, the codification approach and the special accountability institutions approach. We have, in some cases, countries that adopt both approaches. Some administrative justice systems have adopted a 'codification approach' by which administrative law principles are 'made law'. On the other hand, some countries have established special institutions of accountability whose role is to review and correct the errors of administrative bodies. These institutions include the ombudsman, special administrative courts and judicial review.¹⁴ The office of the tax ombudsman for instance has gained popularity over the years which reflects its value and effectiveness. In South Africa for example, the office of the tax ombudsman received a total of 3,637 validated complaints in the year 2017/2018.¹⁵ Many of the complaints comprised of those related to refunds (34.69%), followed by dispute resolution (29.85%), and assessments (10.20%).¹⁶

Although there has been little regard in the past for administrative law in African nations' governance frameworks, there have been positive changes in recent years that potentially strengthen its role in democratic government. The rule of law has been constitutionalized; the right

¹¹ Migai A, 'Judicial Review of Spending Powers: Should Kenyan Courts Entertain Taxpayers' Actions?', 44 *Journal of African Law* (2000), 197.

¹² Migai, 'Judicial Review of Spending Powers: Should Kenyan Courts Entertain Taxpayers' Actions?', 198.

¹³ *Rahab Wanjiru Njuguna v Inspector General Police and Another* [2013] eKLR.

¹⁴ Akech M, *Administrative Law*, Strathmore University Press, Nairobi, 2016, 55.

¹⁵ Office of the Tax Ombud, *Tax ombud annual report 2017/18*, 31 March 2018, 30.

¹⁶ Office of the Tax Ombud, *Tax ombud annual report 2017/18*, 31.

to fair administrative action and social and economic rights have been established; and institutions of horizontal accountability, such as ombudsmen, human rights bodies, and anti-corruption organizations, have been instituted.¹⁷ Kenya for instance has established the Commission on Administrative Justice - Office of the Ombudsman, a constitutional commission established under Article 59(4) of the Constitution,¹⁸ and the Commission on Administrative Justice Act, 2011. The Office of the Ombudsman has a dual responsibility that includes both national and county governments. To begin, the Commission is charged with combating maladministration (improper administration) in the public sector. In this regard, the Commission has the authority to investigate allegations of delay, misuse of power, unfair treatment, obvious unfairness, or discourtesy, among other things. Second, the Commission oversees the enforcement and implementation of the Access to Information Act of 2016.¹⁹ Regrettably, these agencies, often, continue to lack autonomy from the executive, which in many cases retains the unregulated power to appoint and dismiss their members.²⁰

In Kenya, the principles of natural justice are firmly grounded in the Constitution. Article 10(2) provides for national values and principles of governance and lists the rule of law among the values that bind all State organs, State officers and public officers. The Constitution as read with the Fair Administrative Action Act (FAAA)²¹ provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.²² Section 4(2) of the FAAA stipulates that every person has the right to be given written reasons for any administrative action taken against him. It further lists a number of essentials of fair administration including: prior adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision, where applicable; a statement of reasons; a

¹⁷ Akech M, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa: Realities, Challenges, and Prospects', 20 *Indiana Journal of Global Legal Studies*, 1 (2013), 374.

¹⁸ Article 59 (4) of the Constitution of Kenya, 2010 mandates Parliament to enact legislation to give full effect to the bill of rights and implementation of the functions of the Kenya National Human Rights and Equality Commission. The constitution allows parliament to restructure the Kenya National Human Rights and Equality Commission into 2 or 3 separate Commissions. Further, Article 59 (5) empowers Parliament to assign functions to each Commission established under clause (4).

¹⁹ The basic principle of the Access to Information Act, 2016 is that all information held by Government agencies shall be made available to the public, unless reasons exist for withholding it. This Act requires Government agencies to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest.

²⁰ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 374.

²¹ Act No.4 of 2015.

²² Article 47, *Constitution of Kenya* (2010).

notice of the right to legal representation, where applicable; notice of the right to cross examine, or where applicable; information, materials and evidence to be relied upon in making the decision or taking the administrative action. The Court of Appeal in *Judicial Service Commission v Mbalu Mutava & Another*, while acknowledging Article 47 and its place in ensuring a balance, stated:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”²³

Tax administration is a government function carried out by administrative bodies and therefore subject to administrative law principles. The Kenya Revenue Authority (KRA) is the body mandated under the Kenya Revenue Authority Act to collect and receive all revenue as well as administer and enforce tax laws.²⁴ Its administrative duties are governed by the Constitution of Kenya, Kenya Revenue Authority Act,²⁵ Tax Procedures Act²⁶ and the Fair Administrative Action Act.²⁷ Although Kenya's is generally a self-assessment system, the Commissioner has the power to issue assessments. Once such an assessment is issued, the taxpayer could either accept and remit the taxes or object the Commissioner's position by filing an objection notice within 30 days of the assessment. The Commissioner may or may not amend the assessment accordingly. Two issues may arise in this process, a taxpayer may disagree based on the merits of the matter or the decision-making process. A taxpayer may appeal at the Tax Appeals Tribunal (TAT) if dissatisfied with the Commissioner's decision or decision-making process²⁸ and either party may thereafter appeal the

²³ [2015] eKLR.

²⁴ Kenya Revenue Authority Act (Act No.2 of 1995).

²⁵ No.2 of 1995.

²⁶ No.29 of 2015.

²⁷ No.4 of 2015.

²⁸ Section 12, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

TAT's decision at the High Court. A taxpayer may also seek redress against the Commissioner's decision-making procedures by filing an application for judicial review at the High Court.

The relationship between administrative law and tax administration was brought out clearly in the Supreme Court's decision in *Mayo Foundation for Medical Education and Research v United States*, 562 U.S. 44 (2011) where the Court underscored the importance of a uniform approach to judicial review of administrative action; accordingly, the Court clarified that tax administration is generally subject to the same review as other kinds of administrative action.²⁹ As will be illustrated throughout this research, the courts have on several occasions found fault in KRA's administrative practices. In *Republic and Kenya Revenue Authority ex parte L.A.B. International Kenya Limited*,³⁰ for instance, the High Court found that the respondent failed to deal with the applicant's VAT refund claim in the context of fairness, transparency, accountability, or good governance.³¹

While effective revenue collection is without a doubt necessary for the future and sustainability of a country, it is paramount to ensure a balance between the twin objectives of policing the frontiers of legislative intent and protecting the rights of taxpayers. The KRA, in the discharge of its duties, ought to: issue proper assessment notices, process refunds in a timely manner, afford taxpayers an opportunity to respond to any issues raised during audits and generally exercise its taxing power judiciously.

The payment of taxes is generally not voluntary and for taxpayers it is important to be treated in a procedurally fair and respectful manner, especially when being committed to pay their share of taxes. In case of perceived unfair treatment and processes of unfair decision making, taxpayers resist paying taxes.

²⁹ Puckett J, 'Embracing the queen of hearts: Deference to retroactive tax rules', 40 *Florida State University Law Review*, (2013), 350.

³⁰ Miscellaneous Application No.82 of 2010.

³¹ See also: *Commissioner of Domestic Taxes v Lewa Wildlife Conservancy Limited* [2019] eKLR, *Kenya Data Networks Limited v Kenya Revenue Authority* [2013] eKLR and *Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers)* [2014] eKLR, *Local Productions Kenya Ltd. vs Commissioner of Domestic Taxes* [2019] eKLR.

1.2 Statement of the Problem

Administrative justice is a fundamental requirement of a society based on the rule of law. It indicates a commitment to the principle that the government, and its administration, must act within the scope of legal authority. It also signifies the right to seek legal redress whenever rights, liberties or interests are negatively affected when the public administration exercises its duties in an unlawful or inappropriate manner.³² Given the power and informational advantages that the state possesses relative to the citizen, it is vital that administrative procedure and dispute codes afford the public significant procedural rights and permit decisions and appeals to be dealt with efficiently and swiftly.³³

Key principles of administrative law provide that citizens have rights granted by the constitution and specific laws. These include citizens' right to be heard, due notice, review, access relevant information, to receive reasons pertaining to a decision, and to have the opportunity to appeal a decision. Article 47 of the 2010 Constitution and the provisions of the Fair Administrative Action Act jointly sought to effect broad revolutionary changes to Kenya's administrative law and practice, which was previously premised in large part on common law. Despite this, the KRA has on several occasions failed to give meaningful effect to the revolutionary potential of Article 47.

Even with the developments in Kenya's tax administration regime, taxpayers are far from having their matters determined in a fair, straightforward, affordable, and efficient manner which has resulted in an increase in tax disputes. A review of a significant number of cases against KRA in chapter 3 reveals that the Courts, have on several occasions found fault in KRA's decision-making process.

As is highlighted in this study, there is extensive research on administrative law and procedural fairness in general. There is however limited research evaluating tax administration practices

³² The OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Folke Bernadotte Academy (FBA), *Handbook for Monitoring Administrative Justice*, Office for Democratic Institutions and Human Rights (ODIHR), 2013, 4.

³³ Einhorn M, Chlebny J, *Assessment of the Administrative Justice System in Macedonia*, The World Bank Legal and Judicial Enforcement Project, 2011,2.

against standards set by administrative law principles. This research is concerned with the extent to which KRA adheres to the principles of administrative law in light of the developments in law.

1.3 Research Aims and Objectives

In a bid to make a case for administrative justice for taxpayers, this study aims to evaluate KRA's administrative practices.

The following objectives facilitated the achievement of this aim:

- i. Evaluating administrative law principles and their relevance and application in tax administration.
- ii. Investigating whether KRA's administrative practices adhere to the concept and principles of administrative law and highlight any shortcomings.
- iii. Making recommendations to remedy any highlighted shortcomings and propose reforms that could improve tax administration in Kenya.

1.4 Hypotheses

The study was premised on the following hypotheses: -

- i. Good tax administration results from the effective application of administrative law principles in a tax system.
- ii. KRA's failure to adhere to administrative law principles has resulted in increased disputes.

1.5 Research Questions

1. Are administrative law principles relevant in tax administration?
2. Do KRA administrative practices adhere to the principles of administrative law?
3. Will KRA's adherence to these principles impact the number of tax disputes?

1.6 Justification of the Study

Despite recent advancements in Kenya's tax administration framework, taxpayers are still far from having their issues resolved in a fair, transparent, inexpensive, and efficient way. A study of a significant number of cases filed against KRA in Chapter 3 demonstrates that the Courts have, on several occasions, faulted KRA's decision-making process which has resulted in an increase in

disputes. This study highlights the plight of taxpayers and the need to balance the State's and taxpayers' competing interests and ensuring administrative justice. The motivation of this study lies in the need to evaluate KRA's administrative practices and highlight any shortcomings

There are currently limited published studies on administrative law and tax administration in Kenya, specifically an in-depth review of KRA's administrative practices. Findings from this study therefore will provide a valuable reference to the body of knowledge at large as far as this discipline is concerned.

Findings of this study will provide a critical appraisal of the current application of administrative law principles in tax administration and give insight and recommendations into the issue of furthering procedural fairness in the administration of tax. In addition, it is hoped that this project will contribute significantly to an ongoing body of research into the issue of administrative justice for taxpayers. Specifically, this research will benefit the following:

Taxpayers: Through this research, taxpayers will gain insight into their rights and available avenues for dispute resolution;

Revenue authorities and other administrative bodies: This research provides insight into the plight of taxpayers and encourages revenue authorities to take a second look at taxpayers' rights, appreciate their significance and necessity in tax administration;

Legislators and Policymakers: Finally, it is desired that this research influences Kenya's tax policy and steers it in a direction to ensure that legislative intent and taxpayers' interests are balanced.

1.7 Theoretical Framework

This research seeks to establish the role of administrative law principles in tax administration. It also investigates the extent to which these standards are upheld as well as measure KRA's decision-making procedures against these standards and principles.

This study is premised on the Red-Light theory. Harlow and Rawlings, the main proponents of this theory, first introduced the concept of traffic light theories i.e., red and green light theories, in administrative law for the first time in 1984 while examining the purposes of administrative law.³⁴

³⁴ Stott D and Felix A, *Principles of Administrative Law*, Cavendish Publishing Limited, London, United Kingdom, 1997, 29.

These arguments sprang from long philosophical disputes over the importance of judicial oversight of executive conduct. Many questions resulted from this including, what is the role of the law? What is the role of the judiciary? Should administration largely be the responsibility of the courts? Who should be given ultimate power, the government, or the judiciary? Is it permissible to use the private legal adjudication paradigm to settle administrative (public) disputes? Should personal rights take precedence over public interests?³⁵

1.7.1 Red-light Theory

This ideology has a fundamental distrust of executive power and sought to limit the state's intrusion on individuals' rights (particularly property rights).³⁶ Dicey's explanation of legal sovereignty accurately depicts the idea of red-light theory, since he asserts that the government must operate in conformity with the legal standards established by Parliament.³⁷ Thus, if the government does not follow these established standards, the courts have the mandate to control it and guarantee that it operates legitimately. The red-light theory is strongly connected to the premise of 'self-correcting democracy,' in which the rule of law is a central concept.³⁸ The law is viewed as a self-contained and coherent discipline that provides checks and balances.

A key premise of this theory is that when public bodies or executive authorities overstep their authority, judicial intervention serves as a deterrent. This is because the state's and its institutions' bureaucratic and executive authority, if unrestrained, threatens the liberty of all persons. As a result, judicial intervention is necessary in a state's political system.³⁹ This theory maintains that the court has its own criteria of independence and impartiality that may be relied on for determining the constitutionality of executive action. As a result, it may be employed as an effective check and balance mechanism in a state system.

The red-light theory asserts that legislation is a tool for power management and the preservation of individual liberty. It advocates for the courts to intervene in the review of administrative decisions.

³⁵ Stott D and Felix A, *Principles of administrative law*, 30.

³⁶ Stott D and Felix A, *Principles of administrative law*, 29.

³⁷ Dicey, Albert. *Introduction to the Study of the Law of the Constitution (LF ed.)*, Liberty Fund, 1915, xxiv at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1714/Dicey_0125.html#f0125_footnote_nt025_ref on 17 March 2021.

³⁸ Harlow C and Rawlings R, *Law and Administration*, Cambridge University Press, Cambridge, 2009, 8.

³⁹ Olatoye B, 'Functions, Theories And Practice Of Administrative Law In Contemporary Governance', 3 *Administrative And Environmental Law Review*, 2022, 56.

According to Dicey, this idea is based on the concept of the ‘balanced constitution,’ which accommodates judicial supervision of executive power.⁴⁰

This theory justifies judicial intervention in public administration. It amplifies the role of administrative law and the role of the courts as guardians of the rule of law which demands the absence of arbitrary, unmanageable authority. With this theory, administrative law’s significance is immediately apparent. It functions as a regulatory mechanism over the machinery of state authority. It guarantees that the government follows the law. It validates the application of administrative law principles in public administration and in the review of administrative agencies’ conduct.

There is little doubt that the evolution of administrative law in general, and the approach of the courts in exercising its supervisory jurisdiction of judicial review in particular, has highlighted the red-light approach. The law is viewed as a control mechanism designed to prevent the powerholder from abusing his or her position. According to Stott and Felix, this leads us back to the basic issue of judicial review: the judicial power to examine unlawful acts must not be confused with the power to evaluate abuses of power, with that notion influenced not by legal principles but by the judges’ personal opinions of what the ‘correct’ conclusion should be. If the judiciary is the true decision-maker, we are left with the question *sed quis custodiet ipsos custodes?* (‘but who judges the judges themselves?’).⁴¹

1.7.2 Green light theory

The Green light theory, on the other hand, proposes that the exercise of executive power to provide services for the good of the community is completely lawful. As a result, the role of the courts in monitoring executive action is questionable. It does not, however, support the state’s unfettered or arbitrary conduct.⁴² The Green light theory, has a favorable outlook toward the state. It presumes that the government is favorable and that it cannot be accused of wrongdoing. Thus, the green light approach emphasises the importance of administrative law in facilitating government conduct

⁴⁰ Anjana Dhital, Red, green and amber light theories of administrative law, 4 November 2020 <https://blog.iplayers.in/red-green-amber-light-theories-administrative-law/> on 25 March 2021.

⁴¹ Stott D and Felix A, *Principles of administrative law*, 30.

⁴² Stott D and Felix A, *Principles of administrative law*, 30.

rather than interfering with it through judicial or political oversight. It illustrates how legislation might be utilised as an enabler, acting as a weapon against administrative agencies.

This approach is driven by the utilitarian theory linked to Jeremy Bentham and John Stuart Mill, which argues that promoting state participation with less control or interference can achieve the greatest benefit for the greatest number in a state.⁴³ It maintains that the democratic framework may help society realise its collective goals. As a result, this theory's objective is not to undermine individual rights or the fundamental ideals and practices of a democratic society. This relates to the idea that common (public) aims may be attained by handing the executive wide discretion and making it independent of judicial restraints.

Consequently, the primary objective of the green light theory is to decrease the influence of courts on administration since courts, with their legal principles, are regarded as a barrier to administrative development. The democratic type of accountability is preferred by the green light.⁴⁴ The focus point of democratic accountability is that elected representatives attempt to deliver benefits that principals want. If elected officials fail to provide any of these advantages, they will be discarded by voters when they are held responsible in a later election.⁴⁵ Between elections, residents are considered to have transferred responsibility to public assessors (state inspectors, auditors, and the media) and elected representatives. In other words, citizens are rarely given the chance to serve as a principal and accountability holder.⁴⁶

The green light theory, then, is administration-centered, with the goal of administrative law being to support government action rather than to control state function. The role of the courts, which is seen as an impediment to progress as well as unrepresentative and undemocratic, is minimised. The courts' role according to this theory is to make the administration run more efficiently. Laski, Robson, Jennings, and Griffith are all supporters of this school of thought.⁴⁷

⁴³ Leyland P and Anthony G, *Textbook on Administrative Law*, Oxford University Press, Oxford, 2013, 7.

⁴⁴ Stott D and Felix A, *Principles of administrative law*, 30

⁴⁵ Kitschelt H, Democratic Accountability, Workshop on Democratic Accountability Strategies, Durham, May 18 2011, 5.

⁴⁶ Hanberger A, Democratic Accountability in Decentralized Governance, XV Nordiske Kommunalforskerkonference Odense, Denmark, 24 November 2006, 2.

⁴⁷ Stott D and Felix A, *Principles of administrative law*, 30

1.7.3 Rationale for application of the Red-light theory

There is little question that the evolution of administrative law in general and, in particular, the attitude of the courts in exercising their supervisory authority of judicial review has underscored the red-light approach. The law is viewed as a control mechanism designed to prevent the power-holder from abusing his or her position.⁴⁸ Administrative law governs the exercise of power by public officials, it is the body of rules and principles developed to ensure that public officials act in accordance with the rule of law.⁴⁹ It is concerned with: the regulation of the exercise of power by necessitating the application of the principles of legality, reasonableness and procedural fairness; and providing remedies when these principles are disregarded in the exercise of such power.⁵⁰

Administrative bodies, in the discharge of their duties, ought to exercise authority in accordance with administrative law principles, failure to which aggrieved parties may seek redress. Principally, public administration should be weighed against the administrative principles and the rights of individuals. The Red-light theory is preferred and forms the basis for this research as it emphasizes the need for the checks and balances provided by administrative law. Subsequently, this research uses this theory to argue that government power needs regulation and administrative law and administrative law principles play a pivotal role in the regulation of administrative authorities' conduct.

1.8 Concepts

This section highlights the key concepts pertinent to this research. Although these concepts do not form part of the theoretical framework, they inform this research and are vital to understanding administrative justice. Literature on these concepts is discussed under literature review.

1.8.1 Procedural Justice

The major elements of procedural justice were defined broadly by Leventhal (1980) as including both objective structural issues and subjective evaluations in the following domains: the selection

⁴⁸ Stott D and Felix A, *Principles of administrative law*, 29.

⁴⁹ Dyzenhaus D, *The Rule of Administrative Law in International Law*, Institute for International Law and Justice, Working Paper, 2005.

⁵⁰ See Migai Akech, The Commission on Administrative Justice, "Administrative Law and Governance in East Africa in Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions," Nairobi, 19 September 2013.

of rule makers and arbiters, processes for setting ground rules, processes for gathering information, processes for using information to make decisions, processes for appealing decisions, and processes for considering and bringing about change. Although charters for taxpayers do not cover all these areas, they refer to most of them in order to inform citizens of what they can expect in their dealings with the authority.

Procedural justice advocates for fairness in the steps that are used to arrive at a decision if the outcome is to be viewed as just. Procedural justice theorists like Tyler argue that unfair procedures lead to unfair outcomes.⁵¹ The main argument is that the purpose of substantive law is directed towards ends and goals which are set by legal systems, but usually linked to important values within the society. Procedures must therefore ensure that such values in any society are recognised if the procedure is to be seen as fair to all those who seek redress through it. Procedures have the objective of not only accurate application of substantive law to achieve its intended goal but must respect and uphold societal basic values which influence the making of legal standards as the society's expression of its intention to protect all its members who seek redress through procedures.

1.8.2 Taxpayer rights

Taxpayer rights can be defined as rights granted to taxpayers in the legal relationship between the state and the taxpayer throughout the taxation procedure.⁵² In his review of Goranovic's work, Yurtsever explains that the regulation of taxpayers' rights is conditioned by the fact that successful functioning of tax systems involves a sense of fairness with respect to the settlement of their tax obligations on the part of taxpayers.⁵³

It is essential to determine exactly where Declarations of Taxpayers' Rights fit within the rights framework and to understand their purpose. They are concerned with tax administration and collection and aim to enhance the taxpayer/revenue authority relationship. They aim to open up the tax system so that taxpayers have more certainty as to the law, enhance transparency in tax administration which results in improved revenue authority service levels and accountability.⁵⁴

⁵¹ Tyler T, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', 30 *Crime and Justice*, (2003), 293.

⁵² Üyümez M. & Bişgin A, 'A Comparative Analysis of Taxpayer Rights In Turkey And The Usa', 2 *Mecmua* (2016), 68.

⁵³ Yurtsever H, 'Anatomy of Taxpayers' Rights: Case Study of Turkey' 7 *Pakistan Journal of Social Sciences* (2010), 335.

⁵⁴ Bentley D, *The significance of declarations of taxpayers' rights and global standards for the delivery of tax services by revenue authorities, International Symposium on Japan's Tax Reform*, June 2002.

1.9 Literature Review

This section seeks to, briefly but elaborately, review literature on administrative law, administrative law in tax administration, procedural justice, and taxpayer rights. The introduction gives an overview of administrative law. The concepts of taxpayers' rights and procedural justice discussed provide the foundation for the research and further cement the need for administrative law in governance. It has been divided into three sections covering administrative law, procedural justice and taxpayer rights which lays a basis for the need for procedural fairness.

1.9.1 Administrative Law

Banda's review of Bradley and Ewing's work defines administrative law as "a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies."⁵⁵ This branch of law governs relations between government agencies and private entities/individuals that are affected by the power and duties of such agencies.⁵⁶ These include rule making, rule application and rule adjudication.⁵⁷ One of the key functions of administrative law is to ensure that the responsibilities, as well as operations, of public agencies are provided for and supported by law.⁵⁸

Banda in his article describes administrative law as a tool for promoting the rule of law, constitutionalism, and good governance.⁵⁹ This ideology stems from the view that governance is about legality, procedural propriety, rationality and public participation in the exercise of power. Commentators have repeatedly contended that administrative law contributes to the realization of good governance by ensuring that those who make decisions comply with the law and ensure that decisions are fair and rational. Administrative law is thus considered to be an invaluable tool for preventing arbitrary and capricious governance. However according to Banda, the one issue that remains underexplored is whether the principles of administrative justice are reflected in the daily operations of governmental agencies.⁶⁰

⁵⁵ Banda C, 'Administrative Justice, Environmental Governance and the Rule of Law in Malawi', 34 *Maryland Journal of International Law* (2020), 24.

⁵⁶ Banda C, 'Administrative Justice, Environmental Governance and the Rule of Law in Malawi', 24.

⁵⁷ Türk A, Oversight of Administrative Rulemaking: Judicial Review, 19 *European Law Journal* (2013), 126.

⁵⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410.

⁵⁹ Banda C, 'Administrative Justice, Environmental Governance and the Rule of Law in Malawi', 24

⁶⁰ Banda C, 'Administrative Justice, Environmental Governance and the Rule of Law in Malawi', 25.

Administrative law fundamentally focuses on maintaining the rule of law and defending liberty by ensuring that agencies follow fair and impartial decision-making procedures, function within the limits of their power, and respect private rights. Stewart argues that the primary role of administrative law in this regard is negative: to prohibit the illegal or arbitrary exercise of administrative authority over individuals.⁶¹ He, however, proposes that it would be desirable to develop an administrative law that serves both the negative (power-checking) and affirmative (power-directing) functions of administrative law.⁶²

Administrative law, according to Migai, is essential to the realization of everyday democracy, since it demands that government actions not only be subject to checks and balances, but also explained to the people they impact⁶³. Administrative law guarantees that public authorities do not misuse their authority, compromising individuals' freedoms and livelihoods. He explains that administrative law is a vital instrument for establishing a limited government that does not rule arbitrarily but rather follows the rule of law.⁶⁴

Migai asserts that administrative law can be a useful instrument for deepening democracy.⁶⁵ In Migai's view, administrative law principles can be used to regulate the exercise of both public and private power.⁶⁶ He recommends that African countries, establish and implement elaborate regimes of administrative law containing such principles and procedures.⁶⁷ First, the principle of legality, which is part of the rule of law, may enhance judicial regulation of all types of authority, including executive and administrative conduct. Second, administrative law has the potential to democratize political decision-making processes, therefore contributing to the achievement of equity and inclusive citizenship, both of which are essential for democracy to thrive. In this regard, African judiciaries can also help to achieve true democracy by engaging in active judicial administration, particularly in cases involving the enforcement of social and economic rights.⁶⁸ Additionally, administrative law principles such as proportionality can aid in the reconciliation of competing

⁶¹ Stewart R, 'Administrative Law in the Twenty-First Century', 78 *New York University Law review*, 2003, 438.

⁶² Stewart R, 'Administrative Law in the Twenty-First Century', 457.

⁶³ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 357

⁶⁴ Akech, *Administrative Law*, 20.

⁶⁵ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 373.

⁶⁶ Akech, *Administrative Law*, 3.

⁶⁷ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 373.

⁶⁸ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 374.

claims of discrimination which our Constitution seeks to address. Third, administrative law can establish basic criteria that administrative agencies must follow to guarantee that their actions are legitimate, rational, and procedurally fair. Administrative law would further accountability in this way. Fourth, administrative law can assist to democratize the exercise of power in legislatures and courts, increasing its efficacy and credibility as institutions of countervailing authority. Finally, administrative law can help to regulate de facto private authority, notably the power of transnational organizations that operate outside of national and international law.⁶⁹

Migai contends that the degree to which the right to fair administrative action will better the legal governance of power in Africa will be determined, among other things, by judiciaries' willingness to define the phrase "administrative action" broadly. According to Migai, institutions of horizontal accountability are now taking shape in many African countries, even if their effectiveness continues to be undermined by statutory authoritarianism.⁷⁰

The necessity for justification in administrative law has faced criticism. According to Schauer, presenting reasons entails a commitment to the universality of the argument and its applicability in comparable circumstances. He observes that, according to this view, "providing a reason is like laying out a rule," which makes requiring explanations problematic in situations where the influence of particularism is strong – when "case-by-case decision making, and flexibility are regarded vital."⁷¹

1.9.2 Administrative law and taxation

Law benefits society but also presents risks. Some believe that these risks are heightened when courts or administrative authorities define their duties too broadly. In Stack's review of Strauss, he explains that these concerns are heightened when courts and agencies define their functions too narrowly. Agencies and courts, according to Stack, have difficult responsibilities. They are entrusted with making sense of the situation at hand while resolving it in a way that incorporates it

⁶⁹ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa, 362.

⁷⁰ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa, 348.

⁷¹ Schauer F, 'Giving Reasons' 47 *Stanford Law Review*, 633, (1995), 44.

into the greater fabric of law; this usually necessitates considering the intelligibility of statutory law, its link to other legislation, and the current environment.⁷²

Administrative law can be beneficial in the quest for supplementary democratic control mechanisms. Administrative law, among other things, governs the exercise of authority by mandating that all administrative decisions fulfill legality, rationality, and procedural fairness standards. It performs this role by establishing broad principles and procedures that all administrators must follow, as well as by offering remedies for persons who have been harmed by administrative activity.⁷³

Tax administration is a government function carried out by administrative bodies and therefore subject to administrative law principles. The relationship between administrative law and tax administration was highlighted in Puckett's analysis of *Mayo Foundation for Medical Education and Research v United States*,⁷⁴ where the Supreme Court underscored the importance of a uniform approach to judicial review of administrative action. According to this analysis, the Court clarified that tax administration is generally subject to the same review as other kinds of administrative action.⁷⁵

Administrative law principles provide the standard by which tax authorities ought to carry out their duties. Judicial review may be an effective instrument for promoting better tax administration practices. Hickman argues that significant improvements in tax administration in the United States are being driven by key court judgments. She supposes that consequently, the Treasury Department and the Internal Revenue Service will be more transparent and accountable in their implementation of tax laws.⁷⁶

1.9.3 Procedural Justice

In Wenar's review of Rawls' work, he notes that Rawls attempted to distinguish between substance and procedure in his notion of justice. According to this review Rawls argues that justice is the

⁷² Stack K, 'An Administrative Jurisprudence: The Rule of Law in The Administrative State', 115 *University of Columbia Law Review* (2015), 2018.

⁷³ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 346.

⁷⁴ 562 U.S. 44 [2011].

⁷⁵ Puckett J, 'Embracing the Queen of Hearts: Deference to Retroactive Tax Rules', 350.

⁷⁶ Hickman K, 'Administrative Law's Growing Influence on U.S. Tax Administration', 3 *Journal of Tax Administration* (2017), 82.

property of implementation of substantive laws and maintains that it is not enough to declare rights, but there must be provided mechanisms of enforcing the rights. These mechanisms are, according to Rawls, referred to as rules to be followed in implementing the declared rights.⁷⁷ The need to be fair if the outcome is to be seen as just whether or not it is accepted by the parties is of paramount concern as unfair procedures may lead to unjust results.

Allars' review of Galligan's book asserts that Galligan's perception of procedures as means, instruments or mechanisms for giving effect to values pertinent to each form of legal process therefore confirms Rawls' third level of justice notion as strategies of implementing substantive laws.⁷⁸ Substantive laws declare rights and liberties while procedural laws spell out the steps that are to be followed in realizing the rights. Procedural laws are therefore pertinent for the implementation of substantive laws. According to Wenar, procedural justice theorists like Rawls, Solum and Galligan are all in agreement that justice is fairness, and a process is fair if it grants equal opportunities and liberties to the parties in a dispute.⁷⁹

According to Tyler and De Cremer, the openness and fairness of processes is connected to: (a) opportunities for involvement; (b) the efficiency of decision-making - impartiality, accuracy, consistency of rule application; (c) the quality of interpersonal treatment - regard for rights, treatment with dignity and respect; and (d) judging that the authorities have trustworthy and benevolent motives.⁸⁰

D.J. Mullan in his article explores the evolution of procedural fairness and concludes that, 'the parameters of fairness doctrine are very blurred indeed'.⁸¹ Mullan, among other critics, lists lack of coherence, predictability and reduction in administrative effectiveness as criticisms against procedural fairness. He rejects the idea that natural justice affords certainty and instead believes that courts will over time develop principles to assist in the performance of their functions. Some

⁷⁷ Wenar, Leif, "John Rawls", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archives/sum2021/entries/rawls/> on 20 May 2021.

⁷⁸ Allars M, 'Due Process and Fair Procedures: A Study of Administrative Procedures by D J Galligan and Administrative Law: Cases, Text, and Materials by J M Evans, H N Janisch, David J Mullan and R C B Risk', 1997, <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/journals/SydLawRw/1997/23.html?query=> on

⁷⁹ Wenar, Leif, "John Rawls", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archives/sum2021/entries/rawls/> on 20 May 2021.

⁸⁰ De Cremer D and Tyler T, 'The effect of trust in authority and procedural fairness on cooperation', 92 *Journal of Applied Psychology* (2007), 640.

⁸¹ Mullan D.J, 'Fairness: the new natural justice', 2 *University of Toronto Law Journal* (1978), 281.

scholars argue that procedural fairness would result in ‘over-judicialization’ of administrative decision-making to which Mullan responds by citing English cases where procedural fairness has not resulted in extreme activism in judicial review. Mullan advocates for the adoption of an activist informalist approach as a solution to the problem of controlling administrative decision-making processes. This approach allows the court to balance the interests at stake and outlines the procedural protections necessary for a particular decision-making process unhindered by formal classifications.

According to Bemani’s review of Selznick, institutional integrity means principled conduct rather than mechanical or mindless following of rules of procedures without regards for purpose and effects.⁸² Procedural fairness, in taxation, involves elements of fairness and neutrality of procedures used, trustworthiness of tax authorities, and the polite, dignified and respectful treatment of taxpayers as groups or individuals.⁸³ Migai describes administrative justice as entailing the adherence to principles of administrative law including legality, reasonableness, procedural fairness, and fulfilling legitimate expectation.⁸⁴ He, while appreciating both, explains the difficulty in balancing the tax authority’s mandate to collect taxes and fair treatment of taxpayers. His research draws a comparison between administrative law principles and KRA’s decision-making procedure. He, by analysing case law, concludes that our tax administration system fails to adhere to administrative law principles and attributes this to the authority’s far-reaching powers.

In their review of Max Weber’s work, Graaf et al. explained that people in modern society can count on the rule of law because the system of modern, rational law is aimed at reliability and predictability, with the exclusion of arbitrariness.⁸⁵ According to Kirkham’s, Tollenaar and de Ridder go further when they claim that ‘the core of administrative justice is the absence of administrative arbitrariness.’⁸⁶ Kirkham further explains that the element of accountability is central to the concept of administrative justice: persons impacted by decisions should be able to hold those responsible accountable. Administrative justice is concerned with the degree to which

⁸² Bemani J, ‘Do tax authorities abide by their core principles when collecting revenue?:A case of Zimbabwe Revenue Authority,’2 *Quest Journals Journal of Research in Business and Management*, 10 (2014), 4.

⁸³ Pereira da Silva F, Guerreiro R and Flores E, ‘Voluntary versus enforced tax compliance: the slippery slope framework in the Brazilian context’, 63 *Journal of Civil Economy*, (2019), 4.

⁸⁴ Akech, *Administrative Law*, 207.

⁸⁵ Graaf K, Jans J and Marseille B, *Quality of Decision-making in Public Law Studies in Administrative Decision-Making in the Netherlands*, Europa Law Publishing, Zutphen, 2007, 39.

⁸⁶ Kirkham R, ‘Administrative Justice in Context: Mapping the Terrain for Further Study’, 625.

people impacted by decisions are treated fairly and have access to proper redress of complaints. Calling decision-makers to account serves the dual function of ensuring that people are given what they are owed while also promoting greater standards of public service and administration via adequate feedback channels.⁸⁷

Adler proposes two complimentary approaches to enhance administrative justice: one that stresses external forms of accountability and the other that focuses on a considerably higher number of first-instance decisions. External accountability measures are required for achieving justice in administrative decision-making, but they are insufficient on their own to secure administrative justice. As a result, a case is made for the necessity of internal processes, not as a substitute but as a supplement to external mechanisms.⁸⁸

This is an important and pertinent debate: At the centre of the idea of procedural justice is the concept of accountability: individuals affected by decisions should have the ability to call to account those responsible for those decisions. Administrative justice concerns the extent to which individuals affected by decisions are treated fairly and have the ability to ensure adequate redress of grievances. Calling decision-makers to account has the dual purpose of guaranteeing that individuals are afforded what they are due and ensuring, through proper feedback mechanisms, better standards of public service and administration.

1.9.4 Taxpayers' Rights

This section of the review outlines and discuss literature on taxpayer rights as a facet of the broader topic of human rights. It, however, excludes discussions around the origin and evolution of taxpayer rights.

In a review of Creyke's work, Kirkham explains that a developed, well-known, and effective system of administrative law obviates the need for human rights legislation which includes taxpayers rights. Some scholars argue that a debate along these lines would probably identify that the crux of the problem of administrative justice is that the topic cannot be one that focuses on individuals and their rights alone: an element of administrative law encapsulates a competing goal,

⁸⁷ Kirkham R, 'Administrative Justice in Context: Mapping the Terrain for Further Study', 625-626.

⁸⁸ Adler M, 'A Socia-Legal Approach to Administrative Justice', 25 *Law & Policy*, (2003),330.

namely, to maximize the common good. The tension between the protection of individual rights and the need to take account of the interests of the wider community is inherent in the concept of administrative justice.⁸⁹

Bentley's work involves an in-depth analysis of the primary and secondary legal and administrative rights that should be available to taxpayers in conjunction with a comprehensive framework of principles of good governance and good practice. He explores a number of key issues such as: The theory and framework of taxpayers' rights to provide support and reassurance for particular approaches to tax administration design; the updated principles for analysis of any tax system; the classification of taxpayers' rights so that they can understand why tax administration and procedure operates in the way it does; the design of legislative mechanisms to assist in the design and drafting of tax administration; the design and implementation of dispute resolution systems in tax administration; specific detail on the powers and duties of tax administrators and how they should be exercised; the design and implementation of taxpayers' charters and other guidelines on taxpayers' rights; specific detail on the rules and procedures in tax administration, relating in any way to taxpayers' rights, and how they should be applied; and a clear and articulated standard of best practice in tax administration and governance for quality.⁹⁰

1.9.5 Conclusion

The literature on administrative law, administrative law in tax administration, procedural justice, and taxpayer rights as discussed in this section is expansive. There is however limited research evaluating tax administration practices against standards set by administrative law principles in the Kenyan context. To this end, this research will investigate and contain an analysis of the extent to which KRA adheres to the principles of administrative law in light of the developments in law.

1.10 Approach And Methodology

This research relied primarily on the examination of primary and secondary sources of literature through an analysis of the relevant primary legislation, specifically the Constitution 2010, The Fair Administrative Action Act 2015, Tax Procedures Act 2015, Tax Appeals Tribunal Act, 2013, Income Tax Act, VAT Act other relevant statutory provisions. Secondary sources utilized include

⁸⁹ Kirkham R, 'Administrative Justice in Context: Mapping the Terrain for Further Study', 74 *The Modern Law Review*, 4, 626.

⁹⁰ Bentley D, *Taxpayers Rights Theory, Origin and Implementation*, Kluwer Law International, Netherlands, 2007, 112-123.

online journal articles, theses, conference papers, reports and textbooks, scholarly journals, theses, and books. These sources provided an overview of literature in the field.

In terms of approach, this study adopted a doctrinal legal research which comprised of an in-depth analysis of the administrative law, its development process and legal reasoning. This research critically analysed Kenya's tax administration regime by examining various provisions of the statutes outlined above to fully understand what procedural requirements are mandated by Kenyan law.

To achieve the objective of investigating the extent to which the Kenya Revenue Authority practices adhere to the concept and principles of administrative, this study analysed cases brought before the High Court and the Tax Appeals Tribunal. The selection of cases was limited to case law on administrative justice and procedural fairness issues in taxation and narrowed down further to cases filed and determined between 2010 and 2020. Cases between this period enabled this research to establish whether the significant developments in the law have impacted tax administration and administrative justice. Finally, this study carried out an analysis of the selected cases, using the Issue, Rule, Analysis and Conclusion method (IRAC). It highlighted the issues, rulings, discussed the law and reviewed KRA's actions. The research also made reference to cases from other jurisdictions which aided in the understanding of how administrative law principles work in those jurisdictions.

This approach facilitated the collection of sufficient information in a short amount of time. More importantly, this approach provided accurate, detailed illustrations and insight into KRA's practices.

1.11 Chapter Breakdown

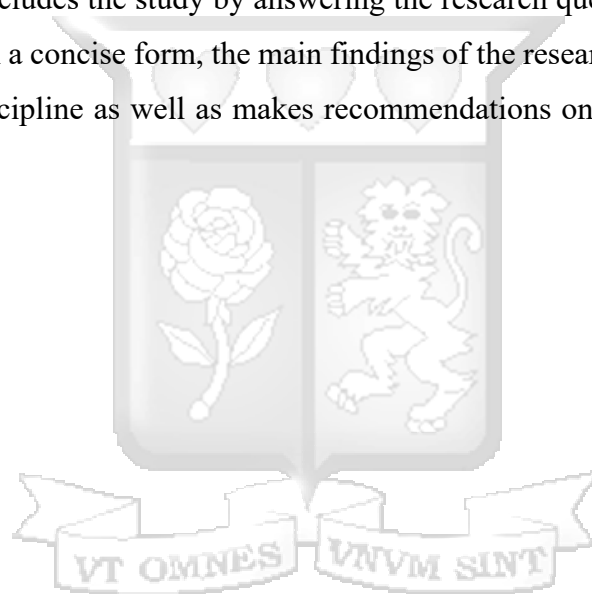
This research is divided into four chapters. Chapter One serves as an introduction to the problem and outlines the purpose of the study. It is deeply entrenched in legal theories and works from other researchers upon which this paper shall be premised.

Chapter Two provides the foundation for this research; it establishes the standard for administrative practices. It gives a basis for asking the question: Does KRA adhere to administrative law principles? This chapter provides a comprehensive look into administrative law, its origin, purpose, and application in tax administration. It begins with an overview of administrative law, followed

by a discussion of judicial review. The next section outlines administrative law concepts before concluding with an examination of their application in tax administration.

Chapter Three investigates the extent to which the KRA's practices adhere to the concept and principles of administrative law by examining case law. It begins by briefly restating the significance of the rule of law, followed by an analysis of reported cases. The selection and analysis of cases was limited to case law on administrative justice and procedural fairness issues in taxation. This selection was further narrowed down to cases filed and determined between 2010 and 2020 as this would establish whether the significant developments in the law have impacted tax administration and administrative justice.

Lastly, Chapter Four concludes the study by answering the research questions and confirming the hypothesis. It presents, in a concise form, the main findings of the research and the implications of this for the topic and discipline as well as makes recommendations on the issues that arise from this research.



CHAPTER TWO

ADMINISTRATIVE LAW IN TAX ADMINISTRATION

‘The King must be under God and the law.’

-Sir Edward Coke.

2.1 Introduction

Chapter one served as an introduction to the problem and outlined the purpose of the study. It gave an overview and the direction of the research as well as a summary of the legal theories and works from other researchers that lay the foundation upon which this paper was premised.

The objective of this chapter is to underscore the significance of administrative law principles, first as a concept in public administration and most importantly as an integral part of tax administration. Having argued, in chapter one, that there is a need to incorporate administrative law principles in tax administration, the first step in answering the research question is to have an in-depth look into administrative law, its origin, purpose, and application in taxation. This chapter begins with an introduction to administrative law by discussing judicial review. The following section discusses administrative law principles and finally concludes by exploring the application of these principles in tax administration. The cases in this chapter will be utilised to demonstrate how administrative law principles have developed and been applied in Kenya and other jurisdictions.

2.2 Judicial Review

Administrative law revolves around the regulation of the relationship between the administration and the public.⁹¹ According to Devenish et al., citing Judge Friendly, administrative law includes the entire range of actions by government with respect to citizens.⁹² Baxter defines administrative law as the ‘branch of public law which regulates the legal relations of public authorities’ with private individuals or organisations.⁹³ Procedure and administrative law establish not only parameters for exercising the powers conferred to public authorities, but also contribute to the quality of the decision-making process. Public administration must be preoccupied not only with

⁹¹ Mbiada C, ‘The Exhaustion of Internal remedies in administrative law: A comparative analysis in administrative analysis of the South African and the Cameroonian requirements and procedure’, 20 *African Journal of International and Comparative Law* (2012), 119.

⁹² Devenish G, Govender K and Hulme D, *Administration Law and Justice in South Africa*, Butterworths Durban, 2001, 7.

⁹³ Baxter L, *Administrative Law*, Juta Publishing, Cape Town, 1984, 2.

efficacy, but with assuring appropriate and equitable treatment of the persons against actions and decisions by public administrative institutions.

Administrative law encompasses all aspects of regulation of governmental agencies. The exercise of legal power often involves the exercise of discretion. The essence of discretion is, however, that it is contained within legal limits. A power not contained within such limits would be arbitrary.⁹⁴ Administrative law serves to set legal limits to the exercise of discretionary powers. One of the ways through which these discretionary powers can be checked is through judicial review. Judicial review is concerned with the legality of the decision made, not with the merits of the decision. Accordingly, the task of the judges is to ensure that the exercise of any authority which has been delegated to administrative bodies is lawful. Under the following heads, administrative actions are subject to regulation by judicial review where there is:

- I. Illegality, i.e., where the decision-making authority has been guilty of an error of law e.g., by purporting to exercise a power which it does not possess.
- II. Irrationality, i.e., where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision.
- III. Procedural impropriety, i.e., where the decision-making authority has failed in its duty to act fairly.⁹⁵

In *R v Public Procurement Administrative Review Board & Another Ex-Parte Avante International Technology Inc.*,⁹⁶ to establish what constitutes irrationality, illegality, and procedural impropriety, the High Court relied on common law standards. It was held that if the authority whose decision is challenged demonstrates gross unreasonableness in the decision taken or act done, such as where the decision defies logic and acceptable moral standards, the court will intervene even if there is no illegality or procedural impropriety. The court further noted that because the common law principle of proportionality is now part of jurisprudence, it is neither unreasonable nor illogical to consider this principle in arriving at a judicial determination.

⁹⁴ Stott D and Felix A, *The Principles of Administrative Law*, 4.

⁹⁵ *Rahab Wanjiru Njuguna v Inspector General Police and Another* [2013] eKLR.

⁹⁶ [2013] eKLR.

The legislative and executive branches of government have always found it essential to transfer significant authority to administrative bodies to tackle a variety of challenges.⁹⁷ The courts have played an essential role in ensuring that these agents of administrative power carry out their duties as envisaged by the appointing institution and the law, without exceeding their authority or misusing the often, extensive discretion granted to them.⁹⁸

Judicial review is the process through which the courts monitor the exercise of governmental power. It is a means of rectifying the incorrect use of such authority and, as such, is an essential component of successful public administration.⁹⁹ Judicial review generally refers to the evaluation of a subordinate court's judgment or sentence by a superior court. However, in public law, judicial review has a higher technical relevance since it is based on the concept of limited government. In this context, judicial review means that courts of law have the authority to examine the legality of legislative and other governmental actions in light of the requirements of the law.¹⁰⁰

The other foundation of judicial review is based on the role of the court as the guardian of the rule of law. In *Marbury v Madison* although there was no express provision in the American Constitution for judicial review at the time, the Supreme Court made it clear that it had the power of judicial review.¹⁰¹ This duty and jurisdiction of the judiciary according to Marshall J, is, without a doubt, to state what the law is. Marshall's opinion in *Marbury* established the principle that the Constitution is law that courts are to interpret and to apply in cases and controversies before them, and that the Constitution is in fact fundamental and paramount law.¹⁰²

⁹⁷ Berendt G and Kendall W, 'Administrative Law: Judicial Review - Reflections on the Proper Relationship between Courts and Agencies', 58 *Chicago Kent Law Review* (1982), 215.

⁹⁸ Wright, 'Beyond Discretionary Justice', 81 *Yale Law Journal* (1972), 575.

⁹⁹ Alnashir Visram, 'Review of Administrative Decisions of Government by Administrative Courts and Tribunals', 10th Congress of the International Association of Supreme Administrative Jurisdictions, Sydney, March 2010.

¹⁰⁰ Ochiel Dudley, The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today, *Kenya Law Reports*, 5 October 2015 <http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/> on 5 May 2021.

¹⁰¹ [1803] 1 Cranch 137 at 177; 5 US 87 at 111.

¹⁰² *Marbury*, 5 U.S. (1 Cranch) at 177.

2.3 Administrative Law in Kenya

Prior to 2010, Kenya's administrative law was heavily influenced by common law concepts. Its conceptual foundation stemmed from the parliamentary supremacy system.¹⁰³ There was a limited scope for judicial review. It was generally available only to public bodies and it required two basic prerequisites to be satisfied: First, the contested body must be a public entity which is subject to judicial review. Secondly, claims must be founded on public law principles not on the enforcement of private rights.¹⁰⁴ Sections 8 and 9 of the Law Reform Act¹⁰⁵ established the substantive basis for judicial review authority, while the Civil Procedure Act established the procedural foundation.¹⁰⁶ In particular, judicial review was premised on ultra vires conduct by public bodies and the breach of rules of natural justice by other authorities.¹⁰⁷ It is on these two foundations that Kenyan courts developed additional grounds for judicial review including legitimate expectation; abuse of power; bad faith; procedural impropriety; and error of law on the face of the record.

The High Court of Kenya in *Republic v Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of The President & 2 Others ex-parte Stanley Kamanga Nganga*¹⁰⁸ took the position that the objective of judicial review is to ensure that public bodies do not overreach their authority or carry out their responsibilities in ways that are detrimental to the public. In *R v Judicial Service Commission*, the High Court stated that the judicial review remedy is concerned with examining not the merits of the judgment in question, but the decision-making process itself. It is critical to remember that the purpose of judicial review is to ensure that the individual is treated fairly by the authority to which he has been subjected, and that substituting the opinion of the judiciary for that of the authority constituted by law to decide the matter in question, is not part of that purpose.¹⁰⁹

In August 2010, Kenya promulgated a new constitution that recognizes the rule of law, good governance, integrity, transparency and accountability among the national values and principles of

¹⁰³ Oloo A and Mitullah W, 'The Legislature and Constitutionalism' in L Mute & S Wanjala (eds), *When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya* (2002), 35.

¹⁰⁴ Visram A, 'Review of Administrative Decisions of Government by Administrative Courts and Tribunals', 10th Congress of the International Association of Supreme Administrative Jurisdictions, Sydney, March 2010.

¹⁰⁵ Cap 26 of the Laws of Kenya.

¹⁰⁶ Civil Procedure Act, Cap 21 of the Laws of Kenya.

¹⁰⁷ *Council of Legal Education and Another v Rita Biwott*, Civil App No. 238 of 1994 per Cockar AJ.

¹⁰⁸ [2006] eKLR.

¹⁰⁹ Civil Application No.1025 of 2003.

governance.¹¹⁰ It contains a progressive bill of rights that introduced ‘new’ rights and expanded the scope of existing fundamental rights.¹¹¹ Among these new rights is the right to fair administrative action under Article 47 of the Constitution.¹¹² This article fundamentally alters both the conceptual foundation and the grounds for judicial review in Kenyan administrative law. First, it replaces parliamentary sovereignty with constitutional supremacy, altering the premise of judicial review and broadening the scope of reviewable action. Second, it creates new grounds for judicial review, such as the right to written explanations for administrative actions and expands existing common law grounds. Third, it extends the benefit of the right to written explanations to anyone who is likely to be impacted by administrative action; this is a significant improvement over the previous limited common law stance.¹¹³

Article 23 of the Constitution reinforces Article 47 as it empowers courts to review the constitutionality of legislative and administrative action. Specifically, Article 23 grants the High Court original jurisdiction to hear and determine applications seeking remedies for violation of a fundamental right. The High Court is also empowered, in the event of an application to uphold fundamental rights under Article 22 and to grant appropriate relief. With these provisions, Kenyan courts have a firm basis on which to justify their powers of judicial review; in stark contrast to previous reliance on inherent jurisdiction, there is now a much more robust constitutional basis for judicial review.¹¹⁴

The Fair Administrative Action Act (FAAA)¹¹⁵ significantly altered the realm of judicial review in Kenya in three ways: a) subjecting private body decisions to judicial review;¹¹⁶ b) allowing subordinate courts to issue judicial review orders;¹¹⁷ and c) broadening the available remedies beyond the customary mandamus, prohibition, and certiorari.¹¹⁸ The FAAA was enacted pursuant

¹¹⁰ Article 10, *Constitution of Kenya* (2010).

¹¹¹ Chapter 4, *Constitution of Kenya* (2010).

¹¹² (1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action; (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

¹¹³ Mayani T, ‘Unlocking the Revolutionary Potential of Kenya’s Constitutional Right to Fair Administrative Action’, 7.

¹¹⁴ Mayani T, ‘Unlocking the Revolutionary Potential of Kenya’s Constitutional Right to Fair Administrative Action’, 7.

¹¹⁵ *Fair Administrative Action Act* (Act No.4 of 2015).

¹¹⁶ Section 3, *Fair Administrative Action Act* (Act No.4 of 2015).

¹¹⁷ Section 9, *Fair Administrative Action Act* (Act No.4 of 2015).

¹¹⁸ Section 5(2), *Fair Administrative Action Act* (Act No.4 of 2015).

to article 47(3)¹¹⁹ of the Constitution¹²⁰ to give effect to rights under article 47(1). This article provides that every person has the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.¹²¹ Where a right or a fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, such a person has the right to be given written reasons for the decision.¹²² It is on this basis that the Act was enacted as evident from its preamble which reads; “An Act of Parliament to give effect to Article 47 of the Constitution, and for connected purposes.”

The FAAA defines an administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.¹²³ Under the Act, an administrator is defined as a person who takes an administrative action or makes an administrative decision. It applies to decision makers whether in the private or public sector.¹²⁴

FAAA elaborates on the constitutional grounds for judicial review and codifies several common law grounds. Section 7(2) specifies the circumstances under which administrative action may be challenged, such as when an administrator: i) acted without or in excess of jurisdiction; ii) is biased or there is a reasonable suspicion of bias; iii) violated mandatory procedures; iv) acted unfairly or in bad faith, proceeds on the basis of an error in law, or in pursuit of an ulterior motive calculated to prejudice the legal rights or interests of the affected person; or v) denied the affected person a reasonable opportunity to be heard; vi) failed to take into account relevant considerations in making the decision; vii) made a decision that is irrational, disproportional, in breach of legitimate expectations, unjust, or the outcome of abuse of authority.

The constitutionalization of the right to fair administrative action under Article 47 of the Constitution and its legislative elaboration in the FAAA have raised questions about the legal

¹¹⁹ Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

¹²⁰ Constitution of Kenya, 2010

¹²¹ Article 47(1), *Constitution of Kenya*, 2010.

¹²² Article 47 (2), *Constitution of Kenya*, 2010.

¹²³ Section 2, *Fair Administrative Action Act* (Act No.4 of 2015).

¹²⁴ Section 3, *Fair Administrative Action Act* (Act No.4 of 2015).

position and role of common law.¹²⁵ The provisions of Article 47 integrated the common law grounds for judicial review in Kenya, a position reinforced by the FAAA, which recognises the residual importance of common law.¹²⁶

2.4 Administrative Law principles

Defining administrative law principles is, as some scholars describe, a subject on which few commentators can agree, because it ultimately hinges on what they seek from administrative law.¹²⁷ With this description, Aronson, Dyer and Groves set out their own standing, describing administrative law as a legal system which addresses the ideals of good governance according to law. These ideals include openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality, and impartiality.¹²⁸

The legitimating principles of any administrative law system are found in the twin ideals of democracy and the rule of law. These twin ideals should form the foundation of every system of administrative law. Over time, these 'ideals' have matured into constitutional principles, firmly embedded in the political arrangements.¹²⁹ At constitutional level, for instance, the rule of law creates the principle of right of access to justice;¹³⁰ administrative law expands this right to encompass due process principles, including the right to be heard by or make representations to an impartial adjudicator; reasoned, written decisions, and so forth.¹³¹ This process allows the ambit of the principle to be extended (or contracted) and later reformulated as an administrative procedure by extending a measure of due process to all decision-makers.

2.4.1 Principle of legitimate expectation

Legitimate expectation can broadly be defined as the anticipation of receiving a benefit, relief, or remedy because of a promise or an existing practice.¹³² The word 'existing practice' refers to the

¹²⁵ Mayani T, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action', *Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action*, Unpublished LL.M Thesis, University of Cape Town, September 2017, 62

¹²⁶ Section 12, *Fair Administrative Action Act* (Act No.4 of 2015).

¹²⁷ Harlow C, 'Global Administrative Law: The Quest for Principles and Values', 17 *European Journal of International Law*, 1, 2006, 193.

¹²⁸ Aronson M, Dyer B, and Groves M, *Judicial Review of Administrative Action*, 1.

¹²⁹ Harlow C, 'Global Administrative Law: The Quest for Principles and Values,' 190.

¹³⁰ Article 48, *Constitution of Kenya* (2010).

¹³¹ Article 47, *Constitution of Kenya* (2010).

¹³² Groves M, 'Substantive Legitimate Expectations in Australian Administrative Law', 32 *Melbourne University Law Review*, (2008), 471.

decision-making authority's routine, systematic, predictable, and specific conduct, procedure, or activity. Perry defines legitimate expectation as an expectation generated by a public body's promise to exercise its discretion in a particular way.¹³³ The expectation should be legitimate, that is, reasonable, logical, and valid, therefore, the reverse cannot be a legitimate expectation. It is not an enforceable right, but a concept fashioned by courts, for judicial review of administrative action. It is procedural in nature based on the requirement of a higher degree of fairness in administrative action, as a consequence of established practices.¹³⁴

The development of the doctrine of legitimate expectation in the Common law jurisdiction can be traced to an obiter dictum of Lord Denning M.R in *Schmidt v Secretary of Home Affairs*.¹³⁵ Lord Denning observed, in *Schmidt*, that the reasoning in *Ridge v Baldwin* demonstrates that an administrative body may, in appropriate circumstances, be required to provide an affected party with an opportunity to make arguments. It depends on whether he has a right, an interest, or, or a genuine expectation, of which it would be unjust to deny him without hearing his side of the story.

In *Schmidt v Secretary of Home Affairs*, alien students at Hubbard College of Scientology had been given leave to enter the United Kingdom before July 1968, initially for a period of a month. This period had been extended to the end of August and September 1968, respectively. Applications were made on behalf of the plaintiffs to the Home Office for extensions of their stay until November and December 1968, to complete their studies. The Home Secretary, the defendant, rejected the applications but extended their stay to September to let them make arrangements to leave. They were denied an extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to this sect. They had no legitimate expectation of extension beyond the permitted time and so no right to a hearing. It is important to note that revocation of their permits within that time would have been contrary to legitimate expectation.¹³⁶

Legitimate expectations may be revoked by official statements of policy just as easily as they can be created.¹³⁷ No order should be passed without hearing a person if it entails civil consequences.

¹³³ Farrah A and Perry A, 'The Coherence of the Doctrine of Legitimate Expectations', 73 *Cambridge Law Journal*,1 (2014), 67.

¹³⁴ *Ram Pravesh Singh and Others v State of Bihar and Others* [2006] (8) SCJ 721.

¹³⁵ [1969] 2 Ch 149; (1969) 1. All.E.R. 904.

¹³⁶ *Schmidt v Secretary of Home Affairs* [1969] 2 Ch 149; [1969] 1. All.E.R. 904.

¹³⁷ Wade R and Forsyth C, *Administrative Law*, Oxford University Press, Oxford, 2009, 522.

Where even though a person has no enforceable right, yet he is affected or likely to be affected by the order passed by a public authority, the doctrine of legitimate expectation comes into play.¹³⁸

Legitimate expectation may arise if:

- I. There is an express promise given by a public authority;
- II. There is a regular practice which the claimant can reasonably expect to continue;
- III. Such an expectation is reasonable.¹³⁹

Legitimate expectation being less than a right operates in the field of public and not private law and to some extent such right ought to be protected not guaranteed.¹⁴⁰

In *Re Civil Service Salaries: E.C. Commission v E.C. Council*¹⁴¹ the European Court of Justice expanded the scope of protection to include substantive legitimate expectation. A substantive legitimate expectation is one that is fostered by a public authority that an individual will be awarded or maintain some substantial advantage.¹⁴² A failure by a public authority to act in accordance with the expectation is deemed a violation of the rule of law, which necessitates predictability and clarity, and is therefore ultra vires.¹⁴³ To be regarded as reasonable, the expectation must be founded on either an express undertaking or prior action on the part of the public authority.¹⁴⁴

This principle continues to evolve, with unresolved questions. One of the most relevant questions is: what generates a reasonable expectation? The standard response from case law is that a legitimate expectation is generated by a public body promising to exercise its discretion in some way, or it having a policy or engaging in a practice of doing so.¹⁴⁵ According to Perry, this argument is insufficient as it is unclear what it is about promises, practices, and policies that elicit legitimate expectation. Perry argues that if there is no philosophical reason why these are the only methods to generate a legitimate expectation, there is no principled explanation why it arises in some situations but not others. The principle of legitimate expectation would lose consistency as a result. Many critics share Perry's sentiments. In Perry's review of Mark Elliott, for example, he explains

¹³⁸ *U.P. Awasthi v U.P. State Electricity Board* [1995] 2 SCC 326.

¹³⁹ *Union of India v Hindustan Development Corpn.* [1993] 3 SCC 499, 540.

¹⁴⁰ *U.P. Awasthi v U.P. State Electricity Board* [1995] 2 SCC 326.

¹⁴¹ Case 81/72, 1973 E.C.R. 575.

¹⁴² A Dictionary of Law, 8ed, Oxford University Press, Oxford, 2016.

¹⁴³ *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA).

¹⁴⁴ *AG for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC).

¹⁴⁵ *Attorney-General of Hong Kong v Ng Yuen Shiu*, UKPC 2 [1983] 2 A.C. 629 (PC).

R v Inland Revenue Commissioners, ex parte Unilever plc [1996] S.T.C. 681, C.A. (England & Wales).

that Elliot believes this principle risks becoming an unnecessary shell, justifying judicial intervention on any ground.¹⁴⁶ According to Christopher Forsyth, the principle of legitimate expectation could collapse into an ambiguous rationale for judicial action.¹⁴⁷

This principle emerged as a result of rulings elaborating on the concept of natural justice, and it has evolved largely as a means of expanding the scope of procedural safeguards to administrative decisions that were previously thought to require a hearing. Typically, the principle of legitimate expectation is utilized to determine when the standards of natural justice must be implemented.¹⁴⁸ The principle of legitimate expectation is essentially concerned with compelling public authorities to deliver what they committed. It has become widely utilized in the search for judicial controls of administrative action that promote fairness without substantially impeding the work of government.¹⁴⁹

Prior to August 27, 2010, legitimate expectation was purely an element of the principle of natural justice and the principle of fairness in Kenyan administrative law, which protects an individual's right to a fair administrative hearing.¹⁵⁰ Because the right to fair administrative procedure is included in our Bill of Rights, there has been a significant movement away from this traditional application of the doctrine.¹⁵¹ This concept is constitutionalized under the new system and is no longer a creation of English law. Therefore, Article 47 creates procedural as well as substantive legitimate expectation.¹⁵²

In *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*,¹⁵³ the Supreme Court expounded that legitimate expectation develops when a body, by representation or prior conduct creates an expectation that it is capable of fulfilling. As a result, for an expectation

¹⁴⁶ Farrah A and Perry A, 'The Coherence of the Doctrine of Legitimate Expectations', 62.

¹⁴⁷ Forsyth C, *Legitimate Expectations Revisited*, ALBA Summer Conference, 29 May 2011.

¹⁴⁸ Riggs R, 'Legitimate Expectation and Procedural Fairness in English Law', 36 *The American Journal of Comparative Law*, 3 (1988), 435.

¹⁴⁹ Riggs R, 'Legitimate Expectation and Procedural Fairness in English Law', 435.

¹⁵⁰ *Geothermal Development Company v AG and 3 Others* [2013] KeHC Petition 352 of 2012: David Oloo Onyango [1987]: Aberdare Freight [2004].

¹⁵¹ Article 47, *Constitution of Kenya* (2010).

¹⁵² Nero F, *Doctrine of Legitimate Expectation: A Case Study of Kenyan Government*, 2020,

https://www.academia.edu/36546345/THE_DOCTRINE_OF_LEGITIMATE_EXPECTATIONS_IN_KENYA, on 18 August 2021.

¹⁵³ SC Petition Nos. 14, 14A, 14B & 14C of 2014.

to be valid, it must be based on a promise or practice by the public authority expected to fulfill the expectation.

The High Court in *Republic v Attorney General & Another Ex Parte Waswa & 2 Others*¹⁵⁴ was of the view that the principle of legitimate expectation should be extended to a future promise or benefit yet to be realized as it stems from what is progressively becoming a global yet fundamental concept of law, namely the rule of law and legal certainty. The court further explained that consistency, predictability, and clarity promote certainty which allows for parties to plan their affairs accordingly.

In *Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited*,¹⁵⁵ the Applicant's claim was that the *Simba System* computed all taxes payable which the Applicant duly paid. By a letter, KRA gave the Applicant notice of intention to audit under section 235 and 236 of the East African Community Customs Management Act, 2004 and stated that they would conduct an audit of the Applicant's operations for the years of income between 2004 and 2009. The Applicant complied and facilitated the audit. There was however no information communicated to the Applicants on the findings of the audit. The Applicant was surprised to receive a letter from KRA demanding payment within 30 days thereof of Kshs. 161,833,529.00/- allegedly due from the Applicant on account of import VAT on raw materials and packaging materials for the manufacture of medicament for the period between 1st January 2008 and 31st October 2013.

The applicant argued that KRA had made a representation to the Applicant and other manufacturers of medicaments in the industry that import VAT was not payable on importation of packaging and raw materials for the manufacture of medicaments. The Applicant relied on KRA's representation that import VAT was not payable and took steps and made business decisions including fixing of prices based on that representation. The High Court held that on the ground of legitimate expectation, abuse of or wrongful exercise power and irrationality the Respondent's tax demand would not be allowed to stand. The court stated that to do so would be contrary to substantive

¹⁵⁴ [2005] 1 KLR 280.

¹⁵⁵ [2016] eKLR.

fairness which dictates that a body must not act conspicuously unfairly, nor unfairly as to abuse its power, nor in unjustified breach of legitimate expectation.

Fairness has been fronted as the as the logical underpinning rationale for the principle of legitimate expectation. Professor Allan believes that explaining the concept in terms of fairness is unavoidable since the principle reiterates the principle of fairness in a more sophisticated form.¹⁵⁶ Allan agrees with Bingham L.J., adding that the doctrine's foundation resides in a comprehensive approach of the right to fair treatment at the hands of public authority.¹⁵⁷ Legitimate expectation, according to this viewpoint, is safeguarded since to do differently would be 'unfair'. Because of the doctrine's capacity to foster confidence, it is a critical instrument in ensuring good administration.¹⁵⁸ For there to be a legitimate expectation, the public body's statement must be explicit, unequivocal, and without reservation. Interference with this principle may be justified on the basis of public policy.¹⁵⁹ The cases discussed above demonstrate the courts' willingness to intervene on the grounds of legitimate expectation justified by a public authority's duty to act in good faith and with fairness.¹⁶⁰

2.4.2 Legality

The principle of legality stipulates that every act of government must be justified by a specific law. In this context, it requires that, an administrator's actions must be authorized by law.¹⁶¹ That is, every exercise of governmental power that affects the rights and interests of an individual must be shown to have a strictly legal pedigree. The principle of legality is important from the perspective of the rule of law because it promotes the ideal of governance by law.¹⁶² In the case which established the principle of legality as a unifying principle in English law, Lord Hoffman emphasized on the importance of the legislature using unequivocal language because the reverse could result in infringement of rights.¹⁶³

¹⁵⁶ Allan T, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford University Press, 1994, 197.

¹⁵⁷ Allan T, 'Pragmatism and Theory in Public Law', *104 Law Quarterly Review* (1988), 422 -435.

¹⁵⁸ Reynolds P, *Legitimate Expectations and the Protection of Trust in Public Officials*, *Judicial Review* (2011), 429.

¹⁵⁹ Connal C, Legitimate expectation as a ground for judicial review, *Outlaw Analysis*, 2017 <https://www.pinsentmasons.com/out-law/analysis/legitimate-expectation-as-a-ground-for-judicial-review-> on 10 May 2021.

¹⁶⁰ Otis L and Bonnelly J, *The Protection of Legitimate Expectations in Global Administrative Law*, 2020 <https://rm.coe.int/the-protection-of-legitimate-expectations-in-global-administrative-law/16809a45b6> on 13 May 2021.

¹⁶¹ Wade W and Forsyth C, *Administrative Law*, 8ed, Oxford University Press, Oxford, 2000, 20.

¹⁶² Akech M, *Administrative Law*, Strathmore University Press, Nairobi, 2016, 30.

¹⁶³ *R v Secretary of State for Home Department; Ex parte Simms* (2002) 2 AC 115 at 131.

To solve today's complexities, the concept of the modern welfare state requires the grant of extensive discretionary powers to authorities. As a result, state officials have been given a range of tasks, including quasi-legislative, quasi-judicial, and pure administrative functions.¹⁶⁴In the context of economic or social regulation, for example, administrators are typically granted wide discretionary powers, for example, to pursue the public interest. There are three primary explanations for the grant of such discretion. First, Galligan argues that discretion is a necessity considering mixed regulatory goals. Because various rationales are often proffered for the regulation of any given market, agreement on the exact mandate or priorities of an agency is never easy to attain. There is, therefore, a tendency to throw everything at the agency, which then must decide how to go about undertaking its legislative mandate. Second, there is often a belief that because of their expertise and professionalism, administrators will only do what serves the interests of the wider public.¹⁶⁵

Where law grants administrators wide discretionary powers, it means the sphere of legality will arguably be quite wide, and they can act in any manner they wish so long as they keep within its bounds. A question arises, therefore, as to whether they could violate other principles of administrative law even as they claim to be acting within their lawful power. For example, does the grant of discretionary power mean that they could act unreasonably or without adhering to the principle of procedural fairness? This would go against the rule of law ideal, which entails restricting the exercise of discretionary power.¹⁶⁶

A mechanism to control the exercise of discretionary powers is therefore required. English courts have provided such a mechanism in the form of the doctrine of ultra vires, which they have deployed in two senses. In its narrow sense, the doctrine has meant that 'a person or body acting under statutory power can only do those things the statute authorizes him or it to do it.'¹⁶⁷ Courts have therefore allowed an individual to challenge the legality of an act on the grounds that there was no power to do it. In this sense, the doctrine merely restates the principle of legality, and is

¹⁶⁴ Munir B, Khan N, and Ahmad N, 'Necessity of Discretionary Powers: A Critical Appreciation as a Necessary Evil', *Global Regional Review*, 2020, 183.

¹⁶⁵ Galligan D, *Discretionary Powers in the Legal Order: The Exercise of Discretionary Powers* in Galligan D (ed), *A Reader on Administrative Law*, Oxford University Press, Oxford 1996, 276.

¹⁶⁶ Wade and Forsyth, *Administrative Law*, 21.

¹⁶⁷ Foulkes D, *Administrative Law*, Butterworths, London, 1995, 198.

quite unhelpful in regulating discretionary power for the simple reason that ‘the more widely expresses powers are, the less will there be for the doctrine to bite on.’¹⁶⁸

Accordingly, English courts have deployed the doctrine in a wider sense. Here, it has been used to denote the way power has been exercised. Courts would therefore allow an individual to challenge the legality of an act on the grounds that although there was power to do it, that power was exercised in an unlawful manner. It would therefore be available where an administrator has failed to comply with the rules of fair procedure, acted on irrelevant considerations, acted unreasonably, and exercised its discretion to attain improper purposes.¹⁶⁹ By finding implied limitations in statutes, the courts therefore stretch the meaning of the doctrine, which could then mean anything they wish. For example, if a law empowers an administrator to ‘act as he deems fit,’ the courts would read into this law conditions requiring him to act reasonably, take account only of relevant considerations, and give a fair hearing to anyone who is adversely affected. That is, the courts reason that even though the legislature has granted the administrator wide discretionary power, it could not have intended that this power would, for example, be exercised unreasonably.

In *Kenya National Commission on Human Rights & another v Attorney General*, the High Court determined that the fourth Respondent had no powers to disband a body created by an act of parliament, and consequently, found that the fourth Respondent acted outside his powers, (*ultra vires*) hence declaring the Respondent’s decision null and void.¹⁷⁰ In granting the petitioners prayer to issue an order of certiorari to quash the said decision on grounds of illegality, the court stated that judicial review morphed from the doctrine of *ultra vires* and the rules of natural justice to become a legal vine with branches in irrationality, illegality and procedural impropriety, and has become the most effective enforcement of constitutionalism, one of the greatest endorsers of the rule of law, and perhaps one of the most effective tools against abuse of power and arbitrariness.¹⁷¹

¹⁶⁸ Foulkes D, *Administrative Law*, 199.

¹⁶⁹ Craig P, *Administrative Law*, 5ed, Sweet & Maxwell, London, 2003, 5.

¹⁷⁰ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.

¹⁷¹ See Odunga J in *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* [2014] eKLR.

The applicant in *Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries* was aggrieved by a Legal Notice published by the respondent gazetted Hide Skin and Leather Trade (Cess) Rules imposing cess on processed hides and skins before being cleared for export. The ex parte applicant contended that the Respondent had no power to impose the levy and therefore was acting ultra vires. The High Court while ruling in favour of the applicant explained that no matter how well-intentioned, public agencies can only do what the law permits them to do which forms the core of the principle of legality, the foundation of our constitutional system. As a result, for the contested judgment to be upheld, it needed to be based on law and not reached in violation of the law. The court held that the disputed judgment was tainted with illegality and *mala fides* to the degree that the Respondent acted in complete contempt of a court order.¹⁷²

2.4.3 Reasonableness

No meaningful relationship between a government and its citizens can result from arbitrary, discriminatory, or unreasonable applications of statutory authority. However, reasonableness in the administrative process is not seen as a right of an affected party, but instead as a basis for judicial intervention. Judicial review of the substance of administrative discretion traditionally has involved an analysis of whether the exercise of discretion has exceeded the scope of the decision-maker's statutory authority. This finding could be based on a finding that the discretion was exercised for improper purposes, on irrelevant factors or ignored relevant factors. The scope of discretion could also be found to be exceeded if it was arbitrary or exercised in bad faith. In either case, the decision is said to be ultra vires the jurisdiction of the decision-maker.

In L'Heureux-Dube J.'s view, the scope of judicial review over all administrative decisions should be analysed within the pragmatic and functional approach, which acknowledges the existence of a range of review criteria; Certain decisions are entitled to greater consideration, while others are not.¹⁷³ The honourable justice emphasizes two elements of the use of the reasonableness standard in reviewing administrative discretion: first, whether the authority is within its fields of competence, i.e. whether it has the authority to act; and second, once found to have the authority,

¹⁷² *Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex Parte Applicant)* [2019] eKLR.

¹⁷³ *Baker v Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

how does it exercise the given authority. Judicial review of reasonableness may encompass both features.¹⁷⁴

This principle seeks to ensure that authority is duly exercised or adequately justified, which poses several issues. First, what constitutes a rational or reasonable decision? Secondly, who should be the best judge of reasonableness between the courts and administrators? Third, should we consider the views of the 'public' when establishing standards of reasonableness in administrative decision-making? Fourth, since this principle inevitably entails a review of the substance or merits of administrative decisions, to what extent should the courts or other evaluators interfere with the determination of the primary decision-maker? In other words, what level of scrutiny should be deployed in establishing whether a decision is reasonable?

Mike Taggart argues that proportionality as a ground for review should be applied in rights-based cases fused with low intensity review for other administrative law challenges.¹⁷⁵ Craig contends that to the extent that it entails judicial review of the substance or justification of administrative decisions, the principle of reasonableness raises separation of powers concerns. Among other things, the separation of powers doctrine states that it is not for the courts to substitute their judgment for that of the public body where discretionary power has been assigned to the latter.¹⁷⁶ Lord Cooke observed this most explicitly. He recognised the separation of powers argument that courts ought not to substitute judgments, but he disagreed that this should result in a very restricted type of rationality review, such as that advocated by Lord Greene and Lord Diplock.¹⁷⁷ According to Lord Cooke, it was not necessary to have such an extreme approach to ensure courts stayed within their constitutional limitations as required by the separation of powers.

There is a danger that in undertaking a substantive review of administrative decisions, the courts could undermine their legitimacy. Equally, it is important for courts to effectively play their role of protecting the rights and interests of individuals. Unfortunately, the separation of powers doctrine does not provide definitive guidance to the courts on the degree of review permissible.¹⁷⁸

¹⁷⁴ Bobek M, *Reasonableness in Administrative Law: A comparative reflection on functional equivalence*, Eric Stein Working Paper No 2/2008.

¹⁷⁵ Taggart M, 'Proportionality, Deference, Wednesbury', 3 *New Zealand Law Review*, (2008), 450.

¹⁷⁶ Craig, 'Proportionality, Rationality and Review', *New Zealand Law Review*, 2010, 274.

¹⁷⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

¹⁷⁸ Craig, 'Proportionality, Rationality and Review', 294.

A need therefore arises for courts to develop mechanisms for performing a reasonableness review without being accused of violating the separation of powers doctrine, while effectively protecting the rights and interests of individuals. One such mechanism is the test of Wednesbury unreasonableness, formulated by Lord Greene, M.R. in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,¹⁷⁹ and has been adopted by many courts in other common law jurisdictions. In this case, Lord Greene stated that the courts can only interfere if a decision 'is so unreasonable that no reasonable authority could ever come to it.

Reasonableness in this context, however, is not used to determine whether an exercise of discretion was well reasoned in any sense accessible by the affected parties; rather, it is a standard exclusively used to determine when judges should intervene in the administrative process. The focus of this determination is not whether a decision was appropriate or desirable but whether a decision-maker's interpretation and application of his or her statutory authority was logical. In other words, the more ambiguous the statutory power, the broader the ambit of reasonable interpretation.

The concept of discretionary decision making is one of administrative law's major concerns. This principle expresses the logical relationship that must exist between discretionary decisions and the evaluation of all interests involved in the matter. This assessment, however, involves maximising the public interest on the one side, but, on the other, calls for the not entirely compromising conflicting private interests.

Mayani argues that the example of how Kenyan courts have construed reasonableness shows how little consideration has been devoted to the content and relevance of Article 47 of the 2010 Constitution.¹⁸⁰ Proportionality and rationality are two conceptual components of the constitutional criterion of reasonableness. Unlike the Wednesbury view of reasonableness, which focuses solely on the gross nature of an action as the primary basis for determining irrationality, the constitutional standard of proportionality in the notion of reasonableness necessitates striking a balance between the beneficial and adverse effects of administrative action.¹⁸¹ The rationality component, on the

¹⁷⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223.

¹⁸⁰ Mayani T, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action', 74.

¹⁸¹ *R v Home Secretary ex parte Daly* [2001] 2 AC 532.

other hand, requires that administrative action be supported by facts, documented justifications, and the ability to promote the relevant action's objective goal.¹⁸²

He maintains that if Kenyan courts recognise the vast scope of the new grounds for judicial review, the kind of behaviour susceptible to judicial review would likely broaden.¹⁸³ This is because both constitutional and common law grounds for judicial review will be available. In contrast, relying on narrow common law reasons as the only basis for judicial review misses the meaning of Article 47 of the 2010 Constitution, as read in conjunction with the Fair Administrative Actions Act provisions.¹⁸⁴

2.4.4 Proportionality

Proportionality is a doctrinal instrument for resolving conflicts between a right and a competing interest, at the core of which is the balancing stage which requires the right to be balanced against the competing interest.¹⁸⁵ This principle states that the means used by administrators must be appropriate to achieve the objectives sought and must not go beyond what is necessary to attain those objectives. In other words, governmental action must be a rational means to a permissible end, which end must not unduly infringe protected rights and interests. Therefore, if an administrator has several options to achieve a particular objective, he must choose that which puts the least burden on the individual affected.¹⁸⁶

This German-derived principle not only serves as a significant check on the exercise of discretionary power, but it also plays an important role in the examination of any interference with constitutional rights. Appropriateness, necessity, and balancing are the three sub-principles it encompasses. Appropriateness is concerned with ensuring that there is a correlation between the designated means and the desired objective.¹⁸⁷ This means that after the administrator has selected the appropriate resources, the court must determine if they are required. It requires the administrator to choose the least restrictive means to further the desired ends when equally suitable

¹⁸² Brynard D, 'Reasons for Administrative Action: What are the Implications for Public Officials?' 44 *Journal of Public Administration*, (2009), 644.

¹⁸³ Mayani T, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action', 85.

¹⁸⁴ Mayani T, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action', 84.

¹⁸⁵ Möller K, 'Proportionality: Challenging the critics', 10 *International Journal of Constitutional Law*, 3, 2012, 709-731.

¹⁸⁶ Schroder M, 'Administrative Law in Germany' in Seerdan R and Stroink F (eds), *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Groningen, 2002, 119.

¹⁸⁷ Cianciardo J, 'The Principle of Proportionality: The Challenges of Human Rights', *Journal of Civil Law Studies*, 3 (2010).

means are available. After ascertaining that the administrative tool is necessary, the court weighs the gravity of the infringement on the rights and interests at stake against the urgency or necessity of the governmental justification for such infringement.

It aims to ensure that the government's objective and approach are not out of proportion, and that the urgency or need of the measure truly addresses a pressing social need. As a result, proportionality and reasonableness are inextricably linked since reasonableness often necessitates a fair balance of relevant considerations and prohibits unduly oppressive decisions. A decision that is disproportionate is thus an unreasonable decision. Reasonableness also necessitates a logical connection between means and ends.

Many countries have adopted the principle of proportionality. For its broad acceptance, several explanations were offered. First, it is called a standard doctrine that enables the development of law to be responsive and which does not tie the court to any given path. Secondly, it is effective in conflict management, particularly in fragmented societies, and in reducing political stakes in such societies, since it is effective in reducing ideological discussions to reality.¹⁸⁸ Some contend, however, that it is a vague concept which gives courts too much discretion.¹⁸⁹

Moller argues that the special weight that rights hold grants them total or near-absolute preference over competing concerns, which renders any mention of balance, at best, deceptive. The second line of critique of proportionality leaves open the question of whether rights have absolute or near-absolute precedence over competing reasons but contends that the principle has additional flaws that render it inadequate for resolving rights issues.¹⁹⁰ As in the case of reasonableness, proportionality raises a question as to whether, and the extent to which the courts defer to the decision-maker. In other words, how intensely should courts review administrative decisions on the grounds of proportionality?

In practice, proportionality is applied with varying degrees of intensity, ranging from deferential approach to a rigorous and searching examination of the justification for a measure which has been

¹⁸⁸ Moshe C and Porat I, 'Proportionality and the Culture of Justification,' 59 *The American Journal of Comparative Law* 2, (2011), 466.

¹⁸⁹ Moshe C and Porat I, 'Proportionality and the Culture of Justification', 473.

¹⁹⁰ Möller K, 'Proportionality: Challenging the critics', 10 *International Journal of Constitutional Law*, 3, (2012), 710.

challenged.¹⁹¹ Consequently, much relies on the nature of the measure at hand. For instance, courts consider the discretionary policy decisions of administrators with deference. In such circumstances, they take the position that they should not substitute their judgement for that of the administration and will only reverse the policy decision if it is obviously or glaringly inappropriate, especially where the policy choice requires the balancing of complicated factors.¹⁹²

However, where proportionality is used to challenge the violation of rights, courts will perform an inquiry into the suitability and necessity elements of proportionality.¹⁹³ Courts will also perform a searching inquiry where a claimant uses proportionality to claim that a penalty or financial burden is excessive.¹⁹⁴ Here, the courts reason that such penalties and financial burdens can be struck down without thereby undermining the entirety of the underlying policy.¹⁹⁵ These examples demonstrate that courts will consider various factors in determining how intensely they should review administrative decisions on this basis (or that of reasonableness), including: the nature of the administrative scheme under review, the subject matter of the decision, the importance of countervailing rights or interests, and the extent of the interference with the right of interest.¹⁹⁶

In Lord Diplock's words in the English case of *R v Goldstein*:¹⁹⁷ 'You must not use a steam hammer to crack a nut if a nutcracker would do.' Proportionality therefore requires that in achieving a statutory purpose, the harm to the individual should not be disproportionate to the gain to the community. Public officials ought to exercise a sense of proportion, that they need to consider both the need for the action and the possible use of less drastic, oppressive, or restrictive means to accomplish a desired objective. The purpose of proportionality is therefore to avoid an imbalance between the adverse and beneficial effects of the administrative action.¹⁹⁸ Two of its essential elements, then, are balance and necessity, while a third is suitability, usually referring to the use of lawful and appropriate means to accomplish the administrator's objective.¹⁹⁹

¹⁹¹ Craig, 'Proportionality, Rationality and Review', 268.

¹⁹² Craig, 'Proportionality, Rationality and Review', 269.

¹⁹³ Craig, 'Proportionality, Rationality and Review', 269.

¹⁹⁴ Craig, 'Proportionality, Rationality and Review', 270.

¹⁹⁵ Craig, 'Proportionality, Rationality and Review', 270.

¹⁹⁶ Woolf et al, *De Smith's Judicial Review*, 591.

¹⁹⁷ [1983] 1 WLR 151.

¹⁹⁸ Hoexter C, *Administrative Law in South Africa*, 2ed, Juta Publishing, Cape Town, 2012, 344.

¹⁹⁹ Clive P, 'Disproportionality - the hidden ground of review: *Medirite (Pty) Ltd v South African Pharmacy Council & another*', 136 *South African Law Journal*, 2019,20.

Ultimately, Article 47 is designed to establish constitutional accountability on administrative processes. It also has an implied flexibility that allows administrative entities to meet the needs of modern administration. Further, remedies for administrative grievances are no longer limited to common law but must be assessed against constitutional principles. The acknowledgment of the right to administrative justice in the constitution does not exclude the application of common law. Courts have harmonised the constitutionally guaranteed right to administrative justice with common law.²⁰⁰

2.5 Administrative Law Principles in Taxation

An inherent feature of democratic government is a sound administrative justice structure. The proper control of public administration consists not only of a sound civil service framework and legislative oversight, but empowerment of the public and courts to hold public officials accountable for their decision-making through the application of fair administrative procedural rules and the use of appropriate administrative appeals processes and judicial review.

Administrative law provides that citizens have rights granted by the constitution and specific laws. These rights include the right to be heard, due notice, access to information, to receive reasons pertaining to a decision, and to have the opportunity to appeal a decision. These rights are usually found in administrative procedure and administrative disputes codes, which furnish coherent and consistent rules governing the making of administrative decisions (especially where discretion is involved).

The importance of tax collection to government operation makes a sound system of tax administration imperative. Good tax policy is often said to require efficiency, equity, transparency, simplicity, and administrability.²⁰¹ Although taxation is necessary for sustainability, it is vital to ensure a balance between public good and the rights of individuals. In administrative decision-making, administrative justice calls for a balance between the overall public good and protection of the rights and interests of individuals.

²⁰⁰ Gichuhi J, *What Constitutionalisation of Administrative Justice Means to Kenyans*, August 31 2018 <http://dx.doi.org/10.2139/ssrn.3242005> on 5 May 2021.

²⁰¹ US Government Accountability Office, *Understanding the Tax Reform Debate: Background, Criteria, & Questions 24*, September 2005, 4.

The most crucial effect of the constitutionalisation of administrative justice rights in Article 47 and their further amplification in the Fair Administrative Action Act²⁰² is the focus on the Constitution as the source of all public power. No person or institution is above the law because of the Constitution's supremacy which bolsters the finality of judicial power to evaluate the validity of the government's conduct.²⁰³ The Judiciary now has the appropriate authority to investigate reviewable conduct of both Parliament and the Executive.²⁰⁴ These provisions provide the basis for analysis of cases in this research. The Constitution underscores the importance of fairness and justice as public authorities are carrying out their mandates and gives the Judiciary the authority to review when the converse takes place.

Administrative law principles ensure consistent, lawful application and enforcement of tax laws. It is axiomatic that tax laws must be applied consistently to all taxpayers.²⁰⁵ Without consistent application of tax laws, the tax system is subject to unfairness claims, which undermines the system's effectiveness. Granting taxpayers an opportunity to provide input and participate during collection should increase the perception, if not the reality, that taxpayers receive fair and equitable treatment. The power to tax ought to be exercised judiciously because while taxation provides revenue for a country's sustenance, the ability of the state to collect taxes must be weighed against the taxpayer's right to constitutional and procedural due process. This study reviewed cases around procedural due process (notice and hearing rights), principles of reasonableness and legitimate expectation.

Majanja, J in *Samura Engineering Limited and Others v Kenya Revenue Authority*²⁰⁶ underscored that the Kenya Revenue Authority, as the State body responsible with tax collection, is fully bound by the provisions of the Bill of Rights in the way it executes tax collection regulations. The ideals enshrined in Article 10 must saturate all its tasks and operations, which it is mandated to carry out by legislation.

²⁰² Act No.4 of 2015.

²⁰³ Joireman S, 'The Evolution of the Common Law: Legal Development in Kenya and India', Political Science Faculty Publications (2006), 16.

²⁰⁴ Mayani T, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action', 63.

²⁰⁵ See generally Jeffrey H. Kahn, 'The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity', 57 *Hastings Law Journal* (2006), 645.

²⁰⁶ Petition No.54 of 2011 [2012] eKLR.

In *Republic and Kenya Revenue Authority ex parte L.A.B. International Kenya Limited*, the High Court found that the Respondent failed to deal with the applicant's claim of VAT refund in the context of fairness, transparency, accountability or good governance. The Judge while issuing an order of Mandamus to compel the Respondent to process the VAT refunds asserted that Common law, in its development, has outlined the code of conduct for a public authority taking a public decision, entrusting the overall jurisdiction in the hands of the Courts of law, but for Kenya, Courts are no longer constrained to the terms of statute and subsidiary legislation because Article 47 of the Constitution of Kenya provides the right to fair administrative action while Article 10(2) demands good governance.²⁰⁷

Administrative law's substantive and procedural rules should ideally minimise the courts' intrusions into tax administration and ensure that taxpayers are treated consistently. Although judicial involvement in tax collection slows the process, some judicial intervention has been viewed as necessary to ensure fairness. Additionally, using administrative law in tax administration could increase judicial efficiency. By limiting review to the record created during the administrative proceeding, less fact-finding will be needed, which will allow courts to decide tax matters quicker and more efficiently.

2.6 Conclusion

This chapter set out to answer the research question: are administrative law principles relevant in tax administration? It began with an introduction to administrative law by discussing judicial review. The following section discussed administrative law principles and their application in the adjudication of public administration disputes and finally concluded by exploring the application of these principles in tax administration.

The objective of this chapter was to underscore the significance of administrative law principles, first as a concept in public administration and most importantly as an integral part of tax administration. This was evidently demonstrated by the cases discussed above. Administrative law

²⁰⁷ [2011] eKLR

principles ensure a balance between the the twin objectives of policing the frontiers of legislative intent and protecting the rights of taxpayers.

Chapter three illustrates what is taking place in practice by investigating whether KRA's practices adhere to the principles of administrative law. This was achieved by analysing six reported cases which exhibit KRA's administrative practices.



CHAPTER THREE

A REVIEW OF KRA'S ADMINISTRATIVE PRACTICES

“In the absence of justice, what is sovereignty but organised robbery?”

-Saint Augustine

3.1 Introduction

Chapter two underscored the significance of administrative law principles, first as a concept in public administration and more importantly as an integral part of tax administration. The previous chapter provided an in-depth look into administrative law, its origin, purpose, and application in taxation, and demonstrated that administrative law principles are relevant in tax administration.

Having established that administrative law principles are essential in tax administration, this chapter examines, through case law, the extent to which KRA's practices adhere to the concept and principles of administrative law. This chapter answers the research question: do KRA tax administration practices adhere to principles of administrative law? It begins by discussing Kenya's tax dispute resolution process as it elaborates how tax disputes arise. This is followed by briefly restating the significance of the rule of law, and finally by the analysis of reported cases. In selecting these cases, this research reviewed several cases brought before the High Court and the Tax Appeals Tribunal. The selection and analysis of cases was limited to case law on administrative justice and procedural fairness issues in taxation. This selection was confined to cases filed and determined between 2010 and 2020 as this would establish whether the significant developments in the law have impacted tax administration and administrative justice. The cases have been organised under key categories, such as due process rights, VAT refunds, legitimate expectation etc. This approach was adopted as it provided accurate, detailed illustrations of administrative law concerns in tax administration.

3.2 Tax Dispute Resolution

The Kenya Revenue Authority (KRA) is the body mandated under the Kenya Revenue Authority Act to collect and receive all revenue as well as administer and enforce tax laws.²⁰⁸ Its

²⁰⁸ Section 5, *Kenya Revenue Authority Act* (Act No.2 of 1995).

administrative duties are governed by the Constitution of Kenya, Kenya Revenue Authority Act,²⁰⁹ Tax Procedures Act²¹⁰ and the Fair Administrative Action Act.²¹¹ A tax dispute occurs when a taxpayer disagrees with the Commissioner on the application of tax laws and the finding of a tax audit. Since independence, the settlement of tax disputes has been adversarial, with just two channels for resolution available, a court of law or a tribunal. The Tax Procedures Act (“TPA”), which brought substantial reforms to the tax dispute settlement procedure, was enacted in 2015, overhauling the tax dispute process. These included the consolidation of multiple tax appeals procedures under various tax laws, namely the Income Tax Act, the Customs and Excise Act, and the Value Added Tax Act, as well as the development of a standardised administrative process for filing tax appeals.

Although Kenya’s is generally a self-assessment system, the Commissioner has the power to issue assessments. Once such an assessment is issued, the taxpayer could either accept and remit the taxes or object the Commissioner’s position by filing an objection notice within 30 days of the assessment.²¹² The Commissioner may or may not amend the assessment accordingly. Two issues may arise in this process, a taxpayer may disagree based on the merits of the matter or on the decision-making process undertaken by the Commissioner. A taxpayer may appeal at the Tax Appeals Tribunal (TAT) if dissatisfied with the Commissioner’s decision or decision-making process²¹³ and either party may thereafter appeal the TAT’s decision at the High Court.

3.2.1 Appeals

Section 52 of the TPA provides that if a taxpayer is dissatisfied with the Commissioner’s decision, they may file an appeal with the Tax Appeals Tribunal. If they are dissatisfied with the Tribunal’s ruling, they may appeal to the High Court of Kenya within 30 days, and they may even appeal to the Court of Appeal.²¹⁴

²⁰⁹ Act No.2 of 1995.

²¹⁰ Act No.29 of 2015.

²¹¹ Act No.4 of 2015.

²¹² Section 51, *Tax Procedures Act* (Act No.29 of 2015).

²¹³ Section 12, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²¹⁴ Section 53, *Tax Procedures Act* (Act No.29 of 2015).

The taxpayer must first file a notice of intention to appeal and pay a non-refundable fee of 20,000 shillings.²¹⁵ They must file a Memorandum of Review, Statement of Facts, and the Tax Decision under appeal within 14 days after filing the Notice of Intention to Appeal.²¹⁶ Thereafter, the Commissioner is obliged to reply within 30 days of receiving a copy of the appeal and submit their Statement of Facts, reasons for the tax decision, and any other documents required for the appeal procedure.²¹⁷ The Tribunal has the authority to summon witnesses, declare a stay of execution, postpone proceedings, award costs and mandate that they be taxed according to the scale applicable to High Court suits, issue summonses, order the production of books and documents, and make legally binding rulings.²¹⁸ The Act requires the Tribunal to issue its ruling within 90 days from the day the appeal was filed.²¹⁹ The ruling may either uphold the judgement under review, alter or set aside the decision, or return the case back to the Commissioner with suggestions for consideration.²²⁰ If the taxpayer is dissatisfied with the Tribunal's ruling, the taxpayer may file an appeal with the High Court.²²¹ A taxpayer may also seek redress against the Commissioner's decision-making procedures by filing an application for judicial review at the High Court.

3.2.2 Alternative Dispute Resolution (ADR)

KRA has an internal Alternative Dispute Resolution framework (ADR framework). The ADR framework is not expressly provided for in the tax acts but there is inferred legal backing for the framework under the Tax Procedures Act²²² and Article 159 (2) of the Constitution.²²³ The framework was created to establish alternative dispute resolution (ADR) as a supplemental or alternative method of resolving tax disputes outside of the judicial and quasi-judicial processes. The framework's principal conflict resolution technique is facilitated discussions.²²⁴ A facilitated discussion refers to where parties, after identifying the problems at stake, negotiate a resolution with the help of a neutral third party known as a facilitator. Through this, KRA seeks to boost transparency and create taxpayer confidence, which will hopefully enhance compliance. The objective of ADR is to expedite the resolution of tax disputes and free income tied up in litigation.

²¹⁵ Section 12, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²¹⁶ Section 13, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²¹⁷ Section 15, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²¹⁸ Section 20, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²¹⁹ Section 13, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²²⁰ Section 29, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²²¹ Section 32, *Tax Appeals Tribunal Act* (Act No.40 of 2013).

²²² Section 55 provides for out of court or tribunal settlements.

²²³ This Article provides for the use alternative forms of dispute resolution.

²²⁴ Alternative Dispute Resolution Framework in Tax, 2015.

Through ADR, KRA settled 38% of all tax disputes. By the end of June 2018, 62% of ADR cases had been settled, raising a sum of Kshs.8 billion.²²⁵

Although the ADR mechanism has significantly improved dispute resolution there are a few challenges facing this mechanism. First, the framework lacks an accountability system. A party wishing to send the tax dispute to ADR for resolution must apply to KRA, who will then accept or reject using a mainly subjective suitability criteria.²²⁶ Furthermore, the framework lacks a reporting system to address numerous administrative concerns or to resolve any other conflicts between the parties throughout the dispute resolution process. This raises accountability concerns and discourages usage of the same mechanism that the framework is intended to promote.²²⁷

Secondly, the Framework, although accessible and used by KRA, is not well understood by the public, which limits citizens' use of ADR for tax dispute settlement. There is also concern that the Tax Appeals Tribunal Act, which represents a paradigm change in dispute settlement, has received little attention. As a result, the stated purpose and goal of a less expensive and more rapid method of resolving tax disputes may not be fulfilled. According to Ndegwa,²²⁸ taxpayers feel that using an outside mediator unrelated to KRA would result in a better outcome. His findings were that taxpayers believe that ADR helps to provide clarity in tax issues early and that settling disputes via the ADR process saves money. However, taxpayers believe that the KRA has not done enough to educate taxpayers about the ADR process. The study proposes that the KRA invest in educating taxpayers about the ADR process and instilling in them the necessary skills, motivation, and resources to utilise ADR successfully. As a result, it is critical that the Kenya Revenue Authority hold frequent seminars/webinars/events with taxpayers to educate them on the Framework and its implementation. The Framework should be extensively disseminated, and the institution's employees should be trained on how to use it effectively.

This Framework is fully owned and driven by KRA. KRA's role as envisioned in the ADR Framework is excessive in that, KRA not only decides whether a dispute is suitable for ADR

²²⁵ Kenya Revenue Authority, Seventh Corporate Plan (2018-2021): Revenue Mobilization Through Transformation, 8.

²²⁶ Annex 1, Alternative Dispute Resolution Framework in Tax, 2015.

²²⁷ Mutuma Kenneth, 'Analysis of The Efficacy of the Kenya Revenue Authority's Alternative Dispute Resolution Framework' 10 *Alternative Dispute Resolution (ADR) Journal*, (2022), 58.

²²⁸ Ndegwa M, 'The Adoption of Alternative Dispute Resolution in Kenyan Tax Disputes', Unpublished Master's thesis, University States International University, 2019, 60.

settlement, but also employs and pays the ADR Facilitator.²²⁹ The Commissioner communicates the decision to appoint the ADR Facilitator to both the facilitator and the taxpayer. This raises the possibility of bias during the guided mediation. The appointment of ADR facilitators to participate in and resolve tax disputes is a subject that requires bipartisan cooperation and regulation. According to Kashindi, in the interest of enhancing integrity, it would be preferable to establish an independent Dispute Resolution Unit that is not directly accountable to the KRA.²³⁰

Clearly, there is a need to strengthen the legislative framework around the use of ADR in tax disputes and to streamline the institutions designed to apply these procedures in order to provide access to justice.

3.3 Case Analysis

Constitutionalism and the rule of law are essential components of any democratic society that values human rights. An independent judiciary is the primary custodian of the rule of law and the cornerstone of the system of checks and balances that ensures the separation of powers.²³¹ Thus, the constitution is more than just a wish list; it is the fundamental and sovereign law of the nation, a real and living document that leads, defines, and allows all activities taken by the state. No individual or state official is above the law or has the authority to act in contravention of constitutional provisions. This is what distinguishes democratic from non-democratic nations. It is the distinction between tyranny and liberty.²³²

Globally, there have been positive developments that potentially strengthen administrative law's future role in government. In Kenya for instance, as discussed in chapter two, the right to fair administrative action and social and economic rights have been constitutionalised and implemented, as have agencies of horizontal accountability such as ombudsmen, human rights organisations, and anti-corruption agencies. Another promising trend is that, because of

²²⁹ Regulation 5(1), *Tax Procedures (Alternative Dispute Resolution) Regulations*, 2019.

²³⁰ Kashindi G A, 'Tax dispute resolution in Kenya: viability including alternative dispute resolution mechanisms', Unpublished LLM Thesis, University of Nairobi, 2017, 29.

²³¹ *Guidance for Promoting Judicial Independence and Impartiality*, Technical Publication Series - Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development Washington, 2002, 156.

²³² Mutua M, 'Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya', 23 *Human Rights Quarterly*, 2001, 1, (2001), 97.

constitutional reforms, legislatures and judiciaries are becoming institutions with significant countervailing authority.²³³

As is proposed by the Red light theory, Administrative law's fundamental objective is to regulate governmental power. The premise is that all forms of power corrupt, and absolute power corrupts absolutely. Through judicial control, it seeks to maintain government agencies and administrative authorities within the confines of the law. The relationship between the judiciary and government agencies has evolved, with the courts recently demonstrating a willingness to take a more active role in assessing the substance of agency rulings. Although the administrative entity is a practical need in many instances, it does not have complete freedom of operation. Aside from the constraints set by constitutions, most enabling statutes restrict the agency to a specific sphere of activity. Decisions made by administrative bodies are now examined more closely, including their merits or demerits. Consequently, such entities should ensure that their decisions meet both procedural and substantive requirements.

In Kenya, the judiciary, in recent years, as seen in the cases set out below,²³⁴ has demonstrated an increasing readiness to undertake a full and in-depth investigation of the substance of agency decisions, including those involving technical and difficult issues such as tax administration, formerly thought reserved for agency specialists.²³⁵ The High Court in *Samura Engineering Limited and Others v Kenya Revenue Authority*²³⁶ set the standard for KRA and emphasised that KRA, as the state body responsible with tax collection, is fully bound by the provisions of the Bill of Rights in the way it executes tax collection regulations. The ideals enshrined under Article 10 must saturate all tasks and operations it is obligated to carry out by legislation.

The courts have in many circumstances, as has been demonstrated in this chapter, faulted the KRA's decision-making procedures in a number of respects including: failing to issue proper tax assessment notices, failing to give taxpayers a hearing, making unreasonable decisions such as seeking to enforce agency notices without notice or reason, taking inordinately long to respond to

²³³ Akech, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa', 348-349.

²³⁴ See: *Republic and Kenya Revenue Authority ex parte L.A.B. International Kenya Limited*, Mbs HC Misc Appl. No.82 of 2010.

²³⁵ Berendt G, Kendall W, Administrative Law: Judicial Review - Reflections on the Proper Relationship between Courts and Agencies, 58 *Chicago Kent Law Review* (1982), 215.

²³⁶ Petition No.54 of 2011 [2012] eKLR.

taxpayer objections, failing to process tax refunds in a timely manner, and refusing to consider tax refund claims because taxpayers owe taxes.²³⁷

By undertaking the analysis of the cases below, this study seeks to investigate the extent to which KRA's practices adhere to the concept and principles of administrative law as stipulated in the Constitution, Fair Administrative Action Act, and the Tax Procedures Act. This analysis comprised six cases, three cases before the High Court and three cases before the Tax Appeals Tribunal. The analysis utilises the IRAC method of case analysis which consists of issues, rule, analysis, and conclusion.

3.3.1 Due process rights

*Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies.*²³⁸

The issue before the High Court in this case was whether KRA acted in good faith when it issued agency notices, resulting in a unilateral debit on the applicant's account, without giving the applicant an opportunity to respond to the Commissioner's assessment. Further, the Commissioner issued tax compliance certificates, which the applicant argued, were an indication of compliance with its tax obligation. The Commissioner argued that a tax compliance certificate does not imply that a taxpayer's accounts are beyond reproach and only an audit conducted by KRA can confirm whether an account is beyond reproach. The court agreed with the applicant's argument that, compliance certificates were evidence of final proof of payment. This case is significant mainly for the way in which it raises issues concerning a taxpayer's due process rights and the place of tax compliance certificates.

Analysis

On the issue of compliance certificates, a conflicting opinion was given in *Navcom Ltd v Kenya Revenue Authority and 3 Others*²³⁹ where the judge stated that, given the caveat that KRA reserves the right to withdraw a certificate if there is evidence of non-compliance by a taxpayer, the certificate is not unqualified and can be challenged. The High Court in *Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited*,²⁴⁰ agreed with the *Navcom* case by describing a tax compliance certificate as rebuttable evidence of one's compliance. It however distinguished

²³⁷ Akech, *Administrative Law*, 237.

²³⁸ [2013] eKLR.

²³⁹ Petition No 86 of 2012.

²⁴⁰ [2016] eKLR.

between its circumstances and those in the *Tradewise case*. Whereas there was no evidence in the *Tradewise case* that the applicant was given a chance to deal with the rebuttal of this assumption, the KRA in this case notified the taxpayer of its post clearance audit findings and the tax demand.

Section 3 of the TPA defines a tax compliance certificate as a certificate issued by the Commissioner if the Commissioner is satisfied that the person has complied with the law in relation to filing returns and has paid all tax due based on self-assessment or has established an agreement with the Commissioner to pay any tax due. Section 72 of the TPA provides that the Commissioner reserves the right to withdraw a tax compliance certificate if there is evidence of non-compliance by a taxpayer. According to section 105(2),²⁴¹ KRA is authorised to apply the refund to the satisfaction of any tax due and payable to the extent of such tax, and the amount thus applied must not be repaid. Thus, it defies logic to give a refund while alleging that any tax is owed. KRA's actions went against the taxpayer's legitimate expectation that the authority would have no claim against him upon issuing a refund.

A reading of these sections of the TPA indicate that a tax compliance certificate is prima facie evidence of compliance by a taxpayer but the same is rebuttable. Accordingly, tax compliance certificates are not a final proof of payment of taxes, they do not prohibit KRA from carrying out audits and raising demands for unpaid taxes. However, KRA ought to furnish a taxpayer with the basis for which it believes that the information giving rise to the certificate was incorrect before seeking to recover what in its view is the correct tax due. In this case KRA, continued to issue compliance certificates, issued refunds to the applicant, did not inform the applicant of its audit findings, and did not withdraw the issued compliance certificates. The Court was just in concluding that KRA's actions created a legitimate expectation.

On the issue of the unilateral debit of the applicant's account, KRA issued agency notices without giving notice to the applicant therefore denying them an opportunity to be heard. The Constitution contains a progressive bill of rights that introduced 'new' rights and expanded the scope of existing fundamental rights²⁴² including the right to fair administrative action under Article 47 of the

²⁴¹ Income Tax Act, Cap 470 Laws of Kenya.

²⁴² Chapter 4, *Constitution of Kenya* (2010).

Constitution.²⁴³ Section 42 of the TPA gives the Commissioner the power to collect tax from a person owing money to or holding money for a taxpayer. The Act provides guidelines for when and how this should be carried out. Specifically, section 42(9) provides that the Commissioner ought to serve the taxpayer with a copy of a notice served on a payer under this section.

An ultra vires action is one that is made when the administrator lacks the competence to make a certain decision or conduct a specific action, or when the administrator has the capacity but fails to follow the established procedure for making such a decision or action. Although KRA is mandated to assess and collect revenue, as well as the administrative enforcement of tax laws, it must exercise this power judiciously. The High Court in *Republic v Kenya Revenue Authority (KRA) & 4 others*²⁴⁴ reinforced this when it stated that although the KRA has the right to collect taxes, including unpaid taxes, such powers must be exercised in accordance with the law. In this case, KRA, in exercising their authority failed to follow the proper procedure issuing the agency notices. By failing to provide the applicant with the amended tax assessments and failing to give them an opportunity to respond, the respondents acted ultra vires and failed to follow the due process.

Due process is achieved when a taxpayer is allowed to challenge the legitimacy of a tax at any moment prior to its finalisation.²⁴⁵ The petitioner did not receive notice of the Commissioner's intention to debit their account and received no response upon their inquiry into the decision. KRA's actions in this case demonstrate its failure to adhere to administrative law principles and in particular, its disregard for the petitioner's due process rights.

David Ndi Mwangi v Commissioner of Investigation & Enforcement.²⁴⁶

The issue before the Tribunal in this matter was whether the respondent (KRA) followed due process when it, without notice, registered the appellant for VAT and sought to charge VAT retroactively. KRA carried out an audit and ascertained that the appellant had met the VAT registration threshold.

²⁴³ (1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action; (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

²⁴⁴ *New Flamingo Hardware & Paints Limited & 22 others (Ex Parte)* [2020] eKLR.

²⁴⁵ *Hodge v Muscatine County*, 196 U.S. 276 [1905].

²⁴⁶ Judgement Appeal No.35 of 2018.

In view of this, the KRA, acting on powers donated to it pursuant to section 34 of VAT Act, proceeded to register the appellant for VAT. However, there was no documentary evidence to show that KRA wrote to notify the appellant about the registration. This case is noteworthy because it highlights concerns relating to the right to due process of a taxpayer.

The appeal was hinged on the question of due process on the said registration, assessment, and demand of what was found due as revenue arising from an audit. Due process serves a twofold purpose: as a check on excessive government administration and as a safeguard against the unrestricted deprivation of an individual's protected rights.²⁴⁷ In his renowned commentary in *Joint Anti-Fascist Refugee Committee v McGrath*, Justice Frankfurter said that the purpose of due process is to promote fairness and justice in the resolution of disputes. In *Kenya Anti-Corruption Commission v Lands Limited and Others*,²⁴⁸ a preceding case, the High Court affirmed that constitutional provisions are procedural safeguards designed to provide due process and the right to a hearing before any property right may be revoked. The court asserted that, even though not expressly stated in any statute at the time, the right of hearing was important to our justice system.

Since then, the law has evolved to expressly include due process, therefore, a party engaging in an activity that is likely to impact the other party must inform the other party beforehand to avoid unnecessary dispute. Article 47 of the Constitution guarantees everyone the right to administrative action that is timely, efficient, legitimate, reasonable, and procedurally fair. Notification is a fundamental element of procedural fairness, natural justice, and due process. Based on Article 47 of the Constitution, KRA is always required to inform the taxpayer in writing and with justification of any measures taken against the taxpayer according to the TPA. It follows that the charging of VAT is tied to the notification of registration by KRA. Therefore, the court was just in finding that KRA can only demand and collect due tax after the date of VAT registration and giving the Appellant the notice envisaged under the VAT Act.²⁴⁹

The VAT Act provides that before a commissioner exercises the powers conferred upon him under the foregoing legislation, he has not only to register the said person but notify them in writing. The

²⁴⁷ Elrod S, 'The Effect of Procedural Due Process on State and Local Governmental Decision Making: Beyond Roth and Eastlake', *DePaul Law Review*, 1982.

²⁴⁸ Nairobi Misc. App. 583 of 2006.

²⁴⁹ Sixth Schedule, *Value Added Tax Act*, (Act No.35 of 2013).

TPA provides that the Commissioner may register a person for tax purposes but must notify them, in writing, of the registration.²⁵⁰ The Tribunal noted that the word used in the said section 8(9) of the TPA is “*shall*” which denotes a mandatory process in terms of notification. As part of due process, it is essential that a party get a fair opportunity to learn the basis of claims made against it. Basic justice and the law require that a defendant be given complete information on the charges against him and a fair chance to respond.²⁵¹

On the issue of retroactive charging of tax, the High Court in *Keroche Industries Limited v Kenya Revenue Authority & 5 Others*²⁵² asserted that it would be improper and unreasonable for KRA to use its power to charge tax retroactively. Even in taxation law, the ideals and values of fairness and reasonableness must be protected by the courts. Given that there was no documentary evidence showing that the KRA notified the Appellant about the registration, KRA could not therefore retroactively demand for tax for the period under review.

It is well-established law that fair and reasonable administrative action requires that a taxpayer be informed of the registration and the implications of non-compliance with the same in terms of taxes payable. The notice required by section 8(9) of the TPA is not only a matter of procedural justice and an essential component of natural justice, but also an obligatory legal duty. This study agrees with the Tribunal’s ruling that the KRA in failing to give notice to the Appellant was in breach of the law. Consequently, any action by KRA based on its registration of the Appellant for VAT was null including charging VAT retroactively.

Anne Wanjiku Kahwai & another v Kenya Revenue Authority & another.²⁵³

This Petition was filed after the Petitioner received a default assessment notice from the 1st Respondent (KRA) and a demand for the assessed tax to be satisfied within 7 days. The Petitioners argued that it was issued in contravention of the Tax Procedures Act and further stated that they were denied the opportunity to be heard before the assessment was issued. The Petitioners consequently challenged the notice and KRA’s actions terming them as unfair, unreasonable, un-procedural,

²⁵⁰ Section 8 (9), *Tax Procedures Act*, (Act No.29 of 2015).

²⁵¹ *Geothermal Development Company Ltd v Attorney General* [2013] eKLR.

²⁵² [2007] eKLR.

²⁵³ [2019] eKLR.

irrational, and arbitrary. The High Court in its decision stated that the Petitioners did not have a fair opportunity to contest the actions of the Respondents which affected them; this amounted to a violation of their constitutionally guaranteed right to fair administrative action. The court went further to declare the procedure and process applied by the Respondents illegal and quashed all the notices issued finding them faulty and unprocedural.

Analysis

On the issue of default assessments, section 29 of the TPA requires the KRA to take the following actions after informing a taxpayer of the assessment, specify the amount assessed; specify the due date for payment; ensure that the due date for payment is not less than thirty days from the date of service of the notice, which KRA failed to do; and specify the procedure for objecting to the assessment, which KRA also failed to do. A taxpayer who disagrees with a tax decision may file a written notice of objection with the Commissioner within thirty days of being informed of the decision. The Commissioner shall evaluate the objection and, within 60 days, determine whether to accept it in whole or in part, or to reject it.²⁵⁴ If dissatisfied with the Commissioner's decision, a taxpayer may appeal to the Tax Appeals Tribunal, then to the High Court and finally to the Court of Appeal.²⁵⁵ In this case however, KRA made an assessment but failed to comply with all the requirements under section 29 of the TPA. KRA should have granted the Petitioners no less than 30 days from the date of notice of assessment for the Petitioners to pay instead of the 7 days they were granted. Additionally, according to Section 29, KRA was obligated to inform the Petitioners how they could object the assessment. To this end, KRA's actions were unprocedural.

In a similar case, the High Court in *Republic v Kenya Revenue Authority (KRA) & 4 others; New Flamingo Hardware & Paints Limited & 22 others (Ex Parte)*, explained that from its reading of section 31(8) of the TPA, the proper timeline for the payment of tax due is not less than 30 days.²⁵⁶ Further, KRA is obliged to inform the taxpayer of the manner of objecting to the assessment, which they did not do in both cases. The court emphasised that these procedures are not discretionary as they are expressly provided for under the law.

²⁵⁴ Section 51, *Tax Procedures Act*, (Act No.29 of 2015).

²⁵⁵ Section 52, 53 & 54, *Tax Procedures Act*, (Act No.29 of 2015).

²⁵⁶ [2020] eKLR.

On the issue of fair hearing, Article 47 of the Constitution read together with the Fair Administrative Action Act provide that every person has a right to expeditious, efficient, lawful, reasonable, and procedurally fair administrative action.²⁵⁷ Due process was not followed and the petitioners in this matter were denied the opportunity to be heard, subsequently, their right to administrative action that is lawful reasonable and procedurally fair was expressly violated.

As already established, the respondent failed to meet the first requirement for fair administrative action as the applicants were not given adequate notice to respond to the tax demand. According to Article 50 of the Constitution and the natural justice doctrine of *audi alteram partem*, an individual accused of wrongdoing must be presumed innocent until the contrary is proven; should be informed in detail of the charge against them in order to respond adequately; should have adequate time and amenities to prepare a defence; and should be informed in advance of the evidence the prosecution intends to present. The reduction in the statutory time within which the applicants might object to the tax demands deprived them the opportunity to prepare a defence via objections to the demands. The respondents were also required to serve each applicant with amended assessments. The respondents' failure to give the applicants sufficient notice violated their right to a fair hearing, and the short notice amounted to a total denial of that right. As a result, the applicants were denied the opportunity to present their case.

The right to be heard, a key requirement, may be satisfied in a variety of ways. In the instance of an amended assessment, the taxpayer exercises that right by submitting an objection to the new assessment. This right is limited when the Commissioner shortens the statutory notice time. If the applicants would have ignored the assessment or responded to it out of time, KRA would have been justified to proceed with collection of the due tax via agency notices, recovery via suit and other mechanisms provided for in the TPA. Section 51 of the TPA provides for the process through which taxpayers may object a tax decision, an opportunity that every taxpayer should be afforded. KRA, by failing to respond to the taxpayer's objection but instead issuing agency notices, KRA failed to provide the Appellant with an opportunity to object to the tax demand as provided for under Section 51 of the TPA. From the facts, it is clear that the court was justified in finding that

²⁵⁷ Section 4, *Fair Administrative Action Act*, (Act No.4 of 2015).

the respondents failed to provide the applicants with a chance to be heard therefore infringing on their right to fair administrative procedure.

3.3.2 Right to written reasons

*Local Productions Kenya Ltd. v Commissioner of Domestic Taxes.*²⁵⁸

The issue before the Tax Appeals Tribunal was whether KRA denied the appellant's right to written reasons under Article 47 of the Constitution. Local Production Kenya Ltd (the Appellant), appealed against KRA's decision to reject its refund claim in its entirety without giving reasons. Further, KRA, in its objection decision, disregarded information provided by the appellant to clarify its position. This ruling is significant as it underscores how important it is for administrative bodies, KRA in this instance, to give written reasons for a decision that is likely to impact taxpayers.

Analysis

On the issue of written reasons, the Tribunal relied on Section 49 of the TPA which obliges the KRA to give a statement of reasons for refusal decisions.²⁵⁹ This section ought to be interpreted through the lens of Article 47 of the Constitution that is the pillar of the right to fair administrative action.²⁶⁰ In this regard, the KRA acted in violation of the right to fair administrative action contrary to Section 4 of FAAA which stipulates that every person has the right to be given written reasons if an administrative decision will affect them adversely.

Article 47(2) provides a clear foundation for requiring that decisions of people exercising public authority be justified in writing.²⁶¹ It creates a right for anybody who has been or is likely to be significantly impacted by administrative action to be provided written reasons for the action. This rule requires that a culture of justification be an inherent feature of the administration and exercise of public administration.²⁶² While the right to reasons for unfavourable administrative decision was

²⁵⁸ [2019] eKLR.

²⁵⁹ Statement of reasons: Where the Commissioner has refused an application under a tax law, the notice of refusal shall include a statement of reasons for the refusal.

²⁶⁰ (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall--

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
(b) promote efficient administration.

²⁶¹ Constitution of Kenya, 2010.

²⁶² Akech, *Administrative Law*, 41-42.

recognised in certain common law cases, its extent was not explicitly defined, nor did it entail an extra responsibility to deliver the reasons in writing. Article 47(2) is therefore a novel provision that portrays written reasons as a right of people whose rights have been or are expected to be impacted by unfavourable decisions.

Provision of such justifications is deemed vital because they remove any perception of impropriety or unreasonableness from the decision-maker.²⁶³ A compelling common law justification for providing reasons for administrative action is that it allows individuals impacted to 'confirm that the appropriate procedure was followed and to determine whether to contest the decision. Article 47(2) establishes a new basis for judicial review by demanding written reasons for administrative action, which has significant consequences for authority. This provides a logical justification for a specific choice as well as guidance on its reviewability. In *Geothermal Development Company Ltd v Attorney General*,²⁶⁴ the High Court held that reasons are a critical component of natural justice and that 'information provided in connection with administrative proceedings must be sufficiently precise to inform the individual of the precise subject matter of any pending inquiry or action. Additionally, courts have emphasised on detailed and unambiguous justifications because they promote: a) the right to procedural fairness by allowing the affected party to know what to clarify or dispute; and b) administrators' compliance with the duty to provide proper justifications for their acts.

This study agrees with the Tribunal's finding that by failing to consider the further grounds, the KRA breached by extension the tenets of the rules of natural justice which are fundamental rules that ensure public bodies do not make unreasonable decisions to the detriment of the subject. By failing to give reasons for its decision to reject the refund claim, the KRA acted in complete disregard of Section 49 of the TPA as read with the FAAA which provide that where the KRA has refused an application under a tax law, the notice of refusal shall include a statement of reasons for the refusal.

²⁶³ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

²⁶⁴ [2013] eKLR.

3.3.3 VAT refunds

*Kenya Data Networks Limited v Kenya Revenue Authority.*²⁶⁵

The issue before the High Court was whether KRA was legally justified in withholding tax refunds. This case involved a dispute between the KRA and Kenya Data Networks, after KRA declined to process and pay the petitioner's refund claims on the grounds that they were based on forgeries. The petitioner described KRA's demand for tax and refusal to pay its VAT refunds as unreasonable on the grounds that KRA had not processed the petitioner's outstanding tax refunds, which totalled to over Ksh.585million at the time of filing the Petition, and that the tax refund was significantly greater than the alleged tax arrears claimed by KRA.

Analysis

Although there is no statutory deadline for KRA to process tax refund claims, there can be no justification for inordinate delays. It is trite law that all administrative actions are subject to an implicit responsibility of fairness. When Parliament grants administrative authority to a public authority, there is a presumption that the administrative authority will be exercised fairly. The Court in this case established that VAT refunds ought to be processed in an expeditious, efficient, lawful, reasonable, and procedurally fair manner.

If VAT is not refunded in a timely manner, it exerts pressure on business cash flow (and, in severe situations, contributes to business collapse), increases production costs, and diminishes investment returns. Thus, a well-functioning VAT refund process has a significant impact on the overall competitiveness, productivity, and capital creation of the economy. A dysfunctional VAT refund process may have a detrimental effect on the VAT design itself, reducing the tax's efficiency and neutrality even more.²⁶⁶ In *Republic v Kenya Revenue Authority Ex Parte L.A.B International Kenya Limited*, the High Court affirmed that KRA has a duty to process VAT refunds in a timely manner. Although KRA plays a critical role in collection of taxes, it must recognise the consequences of its actions or omissions in handling taxpayers' issues.²⁶⁷

²⁶⁵ [2013] eKLR.

²⁶⁶ Pessoa M, Swista A, Muyangwa M and Alonso V, *How to Manage Value-Added Tax Refunds*, International Monetary Fund, May 10 2021,3.

²⁶⁷ Civil Application Number 82 of 2010 (Unreported), See also: *Kenya Data Networks Limited v Kenya Revenue Authority* [2013] eKLR and *Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers)* [2014] eKLR.

As mentioned in the cases above, companies who have accumulated large VAT refunds have faced liquidity and cash flow issues. The second issue is that the government has been taking overpayments and using them as extra revenue while delaying payment of tax refunds. When it pays the refund, which may take up to five years, it does so without taking inflation into account, meaning taxpayers get less of what they prepaid. It is technically equivalent to the government obtaining a zero-interest loan, which is unjust to the taxpayer. The TPA addressed this by stating that the KRA has up to two years from the date of application to issue the tax refund, failing which the amount due is subject to monthly interest.²⁶⁸ The purpose of this legislative measure is to address the issue of tax refunds. At the same time, balancing tax refunds with a taxpayer's liabilities implies that the government's revenue collection will be lowered. Prior to Covid-19 pandemic, the government owed roughly Sh.27 billion in VAT rebates to manufacturers and exporters, as well as another Sh.100 billion in withholding VAT.²⁶⁹

For years, as observed in the cases above, KRA has been delaying tax refunds to businesses and individuals, citing audit delays of claims and insufficient funds. However, after an amendment to the Finance Act 2021, the Commissioner can now credit the overpaid tax against a taxpayer's future tax obligation. This amendment will reduce taxpayers' interest burden as KRA will first apply the refund to any outstanding tax and then enforce penalties and interest on the outstanding tax. The amendment provides the taxpayer with the option of receiving a cash refund or allowing the Commissioner to offset the overpaid tax against future taxes. This development will perhaps cure the refund system challenges.

Section 51 of the TPA provides for the procedure for objection to tax decisions which includes the requirement for the Commissioner to make the objection decision and notify the taxpayer in writing. Article 47(1) of the Constitution stipulates that the procedure of verifying, and processing refund claims must be efficient and expeditious. The court's ruling that KRA's actions in this case were a breach of the petitioner's right to fair administrative action under Article 47(1)²⁷⁰ is consistent with the Constitution and the findings of this research.

²⁶⁸ Section 47(5), *Tax Procedures Act*, (Act No.29 of 2015).

²⁶⁹ Watima T, *What new tax refund regime means*, Business Daily, January 4 2022.

²⁷⁰ Article 47, *Constitution of Kenya* (2010).

3.3.4 Legitimate expectation

*Commissioner of Domestic Taxes v Lewa Wildlife Conservancy Limited.*²⁷¹

The issue before the TAT was whether KRA created a legitimate expectation. KRA carried out an audit on Lewa Wildlife Conservancy (the Respondent) and found that the respondent had not accounted for VAT for 5 years and made an assessment. The Respondent's position was that its VAT treatment of Park entry fee was based on the KRA's private ruling and submitted that, being keen to comply with the law, it sought clarity from the KRA on the VAT treatment of its park entry fees. In its response, KRA wrote a letter indicating that the game park entry fees were not taxable. This matter was brought before the TAT and in its ruling, the Tribunal found that KRA did not demand for the taxes for close to a period of twelve years until the VAT Act, 2013 which came into operation in September 2013 which expressly excluded tour operator services.

The Tribunal held that KRA's letter was explicit in its contents and Lewa Conservancy acted on it for over a period of twelve years. KRA's letter was the genesis of the principle of legitimate expectation. The same created an expectation that VAT would not be levied on park entry fees. KRA appealed against the decision by the Tax Appeals Tribunal (TAT) in favour of Lewa Wildlife on the following grounds:

1. The Tribunal erred in law and fact in finding that the appellant did not demand the taxes for nearly twelve years until the VAT Act, 2013 came into effect on September 2, 2013, which expressly excluded tour operator services, and this reinforced the fact that the VAT Act, Cap 476 was not very explicit as to what constitutes tour operator services.
2. The tribunal made an error of law and fact in concluding that the KRA's letter dated February 16, 2001 is unequivocal in its substance and that the Respondent acted on it throughout a twelve-year period.
3. The tribunal erred in law and fact in finding that the Respondent took no action for more than twelve years to address the collection of VAT taxes on game park entry fees and that the law could not aid the indolence; and
4. The tribunal erred in law and fact in finding that the Appellant's letter dated February 16th, 2001 created a legitimate expectation on the Respondent that the taxes were not payable.

²⁷¹ [2019] eKLR.

Analysis

The principle of legitimate expectation which entitles individuals to rely on official practice and statements is rooted in notions of fairness and legal certainty. It serves to promote public trust in government institutions and the quality of public administration. Legitimate expectation is an established principle which operates both to supplement the notion of procedural fairness by ensuring that expectations of fair treatment are satisfied and, in certain circumstances, to preclude departure by decision-makers from the substance of their undertakings.

Prior to 2010, the legitimate expectation was purely an element of the principle of natural justice and the principle of fairness in Kenyan administrative law, which protects an individual's right to a fair administrative hearing.²⁷² Because the right to fair administrative proceedings is included in our Constitution, there has been a significant movement away from the traditional application of the doctrine.²⁷³ This concept is constitutionalised and is no longer a creation of English law. Therefore, Article 47 creates procedural as well as substantive legitimate expectation.²⁷⁴

The fundamental principle behind the safeguarding of legitimate expectations seems to be the preservation of legal certainty. Individuals should be able to depend on government actions and policies. The confidence generated by such dependence is thought to be crucial to the rule of law doctrine. However, legal certainty is not the exclusive principle at work in legitimate expectation theory. Legality's neutrality is particularly significant in the context of substantive protection of legitimate expectations. The danger in substantively preserving valid expectations is that administrators will be compelled to operate outside of their jurisdiction. To this end, Mativo J²⁷⁵ clarified that legitimate expectation only arises within the law, it would not be an expectation against the clear provisions of statute. A decision maker would not be expected to act contrary to the clear provisions of legislation since doing so would be unlawful and a breach of the rule of law.

²⁷² *Geothermal Development Company v AG and 3 Others* [2013] KeHC Petition 352 of 2012: David Oloo Onyango [1987]: *Aberdare Freight* [2004].

²⁷³ Article 47, *Constitution of Kenya* (2010).

²⁷⁴ Nero F, *Doctrine of Legitimate Expectation: A Case Study of Kenyan Government*, 2020, 4.

²⁷⁵ Petition 353 and 505 of 2017 (Consolidated): *Pevans East Africa Limited & Bradley Limited t/a Pampazuka National Lottery v Chairman Betting Control and Licensing Board, Cabinet Secretary, Ministry of Interior, Commissioner General, Kenya Revenue Authority, Cabinet Secretary, Ministry of Finance, National Assembly, Speaker of the Senate, Attorney General, Betting and Licensing Board & National Sports Fund* [2017] eKLR.

More recently in *Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another*,²⁷⁶ the High Court while allowing the applicant's appeal stated that according to the principle of legitimate expectation, if a public authority caused a person or entity to anticipate that the public authority would, in the future, continue to behave in a manner that it has regularly acted in the past or on the basis of a former promise or statement that reflected how it intended to act, then the public authority should not, without a compelling justification in the public interest, backtrack from that representation.

In this case, KRA, via a letter created a legitimate expectation by interpreting/clarifying the legal provision in question and therefore could not be allowed, twelve years later, to give a contrary interpretation. Lewa Conservancy relied on KRA's direction to plan its affairs. It would therefore be unjust to allow KRA to go back on its word. The court's decision in this case underscored the place of legitimate expectation in fair administration. Fairness has been highlighted as the conceptual basis for legitimate expectation. As discussed in chapter two, for a legitimate expectation to exist, the public body's declaration must be unambiguous, unequivocal, and without reservation. The doctrine is based on a broad understanding of the right to fair treatment at the hands of public authority.²⁷⁷ Thus, legitimate expectation is protected since to do otherwise would be unjust.

3.4 Conclusion

The Tax Procedures Act establishes procedures for taxpayers to contest a decision. A tax decision may take many forms, including an assessment of taxes due, a refund decision, or a demand for a taxpayer to pay a penalty. Once an assessment is issued, the taxpayer could either accept and remit the taxes or object the Commissioner's position. Two issues may arise in this process, a taxpayer may disagree based on the merits of the matter or the decision-making process. A taxpayer may appeal at the Tax Appeals Tribunal (TAT) if dissatisfied with the Commissioner's decision or decision-making process²⁷⁸ and either party may thereafter appeal the TAT's decision at the High Court. A taxpayer may also seek redress against the Commissioner's decision-making procedures by filing an application for judicial review at the High Court.

²⁷⁶ [2020] eKLR.

²⁷⁷ See page 34 above on legitimate expectation.

²⁷⁸ Section 12, *Tax Appeals Tribunal Act* (Act No. 40 of 2013).

Even when a taxpayer has initiated the formal legal procedure to challenge a tax decision, it is not unusual for the Kenya Revenue Authority to misuse its broad and often discretionary power to the taxpayer's detriment. This is shown when for instance KRA continues to pursue payment despite the fact that the taxpayer has initiated actions disputing a tax decision, even though the taxpayer possesses a tax credit that could easily be offset against the payment KRA is seeking.²⁷⁹ These wide discretionary powers enable KRA to issue distress warrants,²⁸⁰ issue Agency Notices,²⁸¹ and revoke a Tax Compliance Certificate.²⁸²

A warrant of distress is a formal order issued by KRA ordering the collection of an unpaid tax via distress and the sale of a taxpayer's moveable property. An agency Notice authorises KRA to collect tax from a person who owes money to a non-compliant taxpayer. KRA often issues Agency Notices to banks holding a taxpayer's money, which results in the bank freezing such funds. As regards tax compliance certificates, KRA has the authority to revoke a current certificate or refuse to issue one in cases where the document is necessary for a purpose vital to a taxpayer's operation. It is worth noting that some transactions, such as the clearance of certain kinds of goods at the port, require the taxpayer to possess a valid certificate. It is detrimental to the taxpayer when such powers are utilised to compel a taxpayer to pay a contested tax notwithstanding the fact that the procedure to challenge the decision has commenced.²⁸³

Public finance is critical for facilitating effective governance, upholding the law, promoting peace and stability, facilitating national infrastructure reconstruction, and providing access to social goods (such as, education and social security).²⁸⁴ Tax administration that is efficient and effective is a cornerstone of any successful modern, democratic state. KRA is the government agency charged with collecting revenue, a function that entails administering and enforcing tax laws.²⁸⁵ Like all other public entities, the KRA is duty-bound to discharge all its duties and functions in

²⁷⁹ *Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies* [2013] eKLR.

²⁸⁰ Section 41, *Tax Procedures Act*, (Act No. 29 of 2015).

²⁸¹ Section 42, *Tax Procedures Act*, (Act No. 29 of 2015).

²⁸² Section 72, *Tax Procedures Act*, (Act No. 29 of 2015).

²⁸³ Odongo G, *Legal safeguards availed to a taxpayer where KRA oversteps its powers in demanding disputed taxes*, October 2020, <https://aip-advocates.com/wp-content/uploads/2020/10/Legal-safeguards-availed-to-a-tax-payer-where-KRA-oversteps-its-powers.pdf> on 13 July 2021.

²⁸⁴ Moosa F, 'Tax Administration Act: Fulfilling human rights through efficient and effective tax administration', 51 *De Jure Law Journal*, (2018), 2.

²⁸⁵ Section 5, *Kenya Revenue Authority Act* (Act No.2 of 1995).

accordance with the law. Its conduct should be beyond reproach and is expected to measure up to its policy and legislative prescripts and the correct application of the governing law. As a matter of principle, therefore, the KRA's exercise of its statutory power is subject to the discipline of administrative law.²⁸⁶

Public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another*²⁸⁷ the High Court held that the doctrine of legality, which asserts that power must have a legal basis, applies whenever public power is exercised. Public power can only be legitimately exercised if it is clearly derived from the law. In this regard, KRA is compelled by that doctrine to ensure the legality of its decisions.

Administrative law principles guarantee that tax laws are implemented consistently and lawfully.²⁸⁸ As evidenced above, the tax system is susceptible to allegations of injustice if tax regulations are not consistently applied, undermining the system's efficacy. Allowing taxpayers to provide input and assist in collection should strengthen the perception, if not the fact, that taxpayers are treated fairly and equally. While taxation provides revenue for a country's sustenance, the state's authority to collect taxes must be balanced against the taxpayer's right to constitutional and procedural due process. Administrative justice requires a balance between the broader public benefit and the protection of individuals' rights and interests in administrative decision-making.

This chapter set out to accomplish the second objective of the study by investigating whether KRA's practices adhere to the principles of administrative law. This was carried out by analysing reported cases which exhibit KRA's departure from these principles. In the cases analysed above, courts have ruled in favour of taxpayers citing abuse of power, procedural unfairness and KRA's failure to adhere to administrative law principles. Migai attributes this to revenue officials'

²⁸⁶ *Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited* [2020] eKLR.

²⁸⁷ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

²⁸⁸ See generally Kahn J, 'The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity', *57 Hastings Law Journal*, (2006), 645.

extensive discretionary yet unconstrained powers, as well as internal incentives to collect taxes.²⁸⁹ The KRA has broad and frequently discretionary powers, the exercise of which may have, as evidenced in the cases discussed in this chapter, a detrimental effect on taxpayers' rights and livelihoods. These findings further cement the argument for the consistent application of administrative law principles in tax administration.

Chapter 4 concludes the study by answering the research questions, confirming the hypothesis, discussing in detail the findings of this research and recommend possible solutions to the issues raised in this chapter.



²⁸⁹ Akech, *Administrative Law*, 237.

CHAPTER FOUR

FINDINGS, RECOMMENDATIONS AND CONCLUSION

“True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others.”

-Jonathan Sacks.

4.1 Introduction

The study, premised on the red-light theory,²⁹⁰ sought to establish the role of administrative law principles in tax administration which was done in the second chapter. Chapter three explored, using case law, the extent to which these principles are upheld by KRA as well as measured KRA's decision-making procedures against these standards and principles. This chapter summarises the main research objectives, findings, and recommendations, of the study. The first part summarises the study's main findings, followed by recommendations which if considered may enhance administrative justice for taxpayers and finally the conclusion.

4.2 Findings

This section of the chapter revisits the study's objectives and hypotheses and ascertains whether the author met the objectives of the research. The findings of this study are discussed thereafter. The statement of the problem was that, even with the developments in Kenya's tax administration regime, taxpayers are far from having their matters determined in a fair, straightforward, affordable, and efficient manner. An analysis of a significant number of cases against KRA in chapter 3 reveals that the Courts, have on several occasions found fault in KRA's decision-making process.

The research has fulfilled its intended aims and addressed the problem statement in light of the objectives, statement of the issue, hypotheses, and theoretical framework. The objectives of this study were to: i) Outline and analyse administrative law principles and their relevance and application in tax administration and, ii) Analyse KRA's administrative practices against the concept and principles of administrative law. To achieve the first objective, the author critically

²⁹⁰ Stott D and Felix A, *Principles of administrative law*, Cavendish Publishing Limited, London, 1997, 29.

This theory justifies judicial intervention in public administration. It amplifies the role of administrative law and the role of the courts as guardians of the rule of law which demands the absence of arbitrary, unmanageable authority.

analysed administrative law, its development and incorporation into Kenyan law. The author also analysed administrative law principles, their relevance and application in public administration and specifically tax administration. This objective was achieved. To realise the second objective, the author, through case law, critically analysed KRA's practices against the concept and principles of administrative law to establish the current situation regarding administrative justice for taxpayers. This objective was achieved.

The study was premised on the following hypotheses: -

First, Effective application of administrative law principles such as legality, rationality, procedural fairness, and accountability in a tax system results in good tax administration; The study has established that, as per the Red-Light theory, administrative law principles form an integral part of good public administration and tax administration. These principles ensure a balance between the objectives of policing the limits of legislative purpose and preserving taxpayer rights.

Secondly, KRA's failure to adhere to administrative law principles has resulted in increased disputes. A review of a significant number of cases against KRA in chapter 3 reveals that the Courts, have on many occasions found fault in KRA's decision-making process. As a result of a number of KRA's actions, taxpayers have suffered detriment.

4.2.1 Administrative law in Kenya

Prior to 2010, Kenya's administrative law was heavily influenced by common law principles. Its conceptual foundation stemmed from the parliamentary supremacy system.²⁹¹ There was a limited scope for judicial review. Kenya promulgated a new constitution in August 2010 that includes the rule of law, good governance, honesty, transparency, and accountability as national values and principles of governance.²⁹² It contains a progressive bill of rights that introduced "new" rights and broadened the scope of existing basic rights.²⁹³ Article 47 of the Constitution grants the right to fair administrative action as one of these new rights.²⁹⁴ Both the conceptual framework and the grounds

²⁹¹ Oloo A and Mitullah W, 'The Legislature and Constitutionalism' in L Mute & S Wanjala (eds) *When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya*, 2002, 35.

²⁹² Article 10, Constitution of Kenya, 2010.

²⁹³ Chapter 4, Constitution of Kenya, 2010.

²⁹⁴ (1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action; (3) Parliament shall enact legislation to give effect to the rights in clause (1)

for judicial review in Kenya's administrative law were profoundly altered by this Article. First, it substituted legislative sovereignty for constitutional supremacy, modifying the basis of judicial review and increasing the scope of reviewable action. Second, it adds new grounds for judicial review, such as the right to written reasons for administrative decisions and extends existing common law grounds such as illegality, irrationality, and procedural impropriety.²⁹⁵ Third, it expands the right to written reasons to anybody likely to be affected by administrative decisions, which is a considerable improvement from the prior restricted common law approach.²⁹⁶

Pursuant to Article 47(3) of the Constitution, the Fair Administrative Action Act was enacted in 2015 to give effect to Article 47. The Act introduces significant reforms to Kenya's administrative law system, including: i) extending the reach of judicial review to encompass the review of actions of public and private bodies;²⁹⁷ ii) elaborating the right to be given written reasons for administrative action;²⁹⁸ iii) codifying the grounds for judicial review, including common law principles; iv) outlining the procedure for judicial review;²⁹⁹ v) giving effect to the constitutional right of access to information regarding administrative action; and vi) clarifying the relationship between the Act and common law.³⁰⁰

Chapter 2 concludes that administrative law is well established and forms an integral part of Kenyan law.

4.2.2 Administrative law principles are necessary for tax administration.

As discussed in chapter two, administrative law principles guarantee the implementation and enforcement of tax legislation in a consistent and legal manner. Consistent application of tax rules

and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

²⁹⁵ P.L.O Lumumba, *Judicial Review in Kenya*, 2ed, Law Africa, Nairobi, 2006, 3.

²⁹⁶ Prior to granting leave for judicial review, the court had to evaluate three essential factors: i) whether the applicant had locus standi (the necessary legal standing); ii) if a prima facie case existed; and iii) whether the matter was time-barred. In terms of locus standi, courts have taken a restrictive approach mirrored in common law, requiring that the applicant have a sufficient interest in the case or that the facts establish the risk of that applicant's rights being violated. For instance, in *Wangari Maathai v The Kenya Times Media Trust* [1989], the High Court rejected the applicant's complaint for lack of locus standi since there was no claim of harm or expected injury.

²⁹⁷ Section 3, *Fair Administrative Action Act*, (Act No. 4 of 2015).

²⁹⁸ Section 4, *Fair Administrative Action Act*, (Act No. 4 of 2015).

²⁹⁹ Section 7, *Fair Administrative Action Act*, (Act No. 4 of 2015).

³⁰⁰ Section 12, *Fair Administrative Action Act*, (Act No. 4 of 2015).

to all taxpayers is fundamental.³⁰¹ As demonstrated in Chapter three, without uniform implementation of tax regulations, complaints of injustice are made against the tax system, undermining its efficacy. Granting taxpayers an opportunity to provide input and participate during collection should increase the perception, if not the reality, that taxpayers receive fair and equitable treatment. Although taxation generates revenue for a country's sustenance, the state's power to collect taxes must be measured against the taxpayer's constitutional and procedural right to due process.

Chapter 2, in line with the Red-light theory, concludes that administrative law principles are significant, first as a concept in public administration and more importantly as an integral part of tax administration. These principles establish a balance between the twin goals of policing the limits of legislative purpose and preserving taxpayer rights.

4.2.3 KRA's practices do not adhere to administrative law principles.

KRA is the government agency charged with collecting revenue, a function that entails administering and enforcing tax laws.³⁰² Chapter three underscored that the KRA, like all other public agencies, is required by law to carry out its obligations and tasks judiciously.³⁰³ Its conduct should be beyond reproach and is expected to abide by its policy and legal mandates, as well as accurately execute the governing legislation.³⁰⁴ Consequently, the KRA's use of its statutory authority would, as a matter of principle, be subject to the principles of administrative law.³⁰⁵

As highlighted in chapter three,³⁰⁶ the principle of legality which stipulates that power must have a legal basis, applies whenever public power is exercised. Public power can only be legitimately exercised if it is clearly derived from the law. In this regard, KRA is compelled by this doctrine to ensure the legality of its decisions. The cases discussed in chapter 3 suggest that KRA has, on various occasions, misused its power and disregarded the law while carrying out its mandate. Chapter 3 concludes that, even with the developments in Kenya's tax administration regime,

³⁰¹ See generally Kahn J, 'The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity', *57 Hastings Law Journal*, (2006), 645.

³⁰² Section 5, *Kenya Revenue Authority Act* (Act No. 2 of 1995).

³⁰³ *New Flamingo Hardware & Paints Limited & 22 others (Ex Parte)* [2020] eKLR.

³⁰⁴ *Samura Engineering Limited and Others v Kenya Revenue Authority*, Petition No.54 of 2011 [2012] eKLR.

³⁰⁵ *Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited* [2020] eKLR.

³⁰⁶ See page 35 above on Legality.

taxpayers are far from having their matters determined in a fair, straightforward, affordable, and efficient manner. Courts, have on several occasions, recognised, and continue to identify flaws in the KRA's decision-making process.

4.2.4 Taxpayers suffer because of KRA's actions.

The cases highlighted in chapter three of this study illustrate that KRA's activities are sometimes detrimental to taxpayers.³⁰⁷ The failure to adhere to administrative law principles results in taxpayers suffering losses stemming from KRA failing to issue proper tax assessment notices, failing to give taxpayers a hearing, making unreasonable decisions such as seeking to enforce agency notices without notice or reason,³⁰⁸ taking an inordinately long time to respond to taxpayer objections, and failing to process tax refunds in a timely manner.³⁰⁹

Chapter 3 reveals that taxpayers have suffered detriment because of KRA's failure to adhere to administrative law principles.

4.3 Recommendations

A state cannot run a democracy well without taxation and a taxation system cannot be run well without democracy.³¹⁰ A sound administrative justice system is a crucial component of democratic government. It is also a pillar of second-generation regulatory reforms, which aim to better align the state, market, and civil society in developing countries. Proper public administration regulation requires not only a strong civil service framework and legislative oversight, but also the empowerment of the public and courts to hold public officials accountable for their actions through the implementation of fair administrative procedural rules and the use of appropriate administrative appeals processes, and judicial review. Additionally, it may include ombudsman and monitoring institutions that enable the public to bring concerns of maladministration to the attention of the relevant authority.

³⁰⁷ *Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers)* [2014] eKLR:

KRA in this case owed VAT refunds amounting to Kshs 742,815,181 but declined to pay the refund because the taxpayer had a tax debt. The petitioner claimed that the KRA's inability to pay VAT refunds put it in a vulnerable financial position, compromising its export market position and negatively impacting its client base. It further claimed that if the VAT refunds were not forthcoming, it would be compelled to cut down its activities and, eventually, close shop.

³⁰⁸ *Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies* [2013] eKLR.

³⁰⁹ *Republic v Kenya Revenue Authority Ex Parte L.A.B International Kenya Limited* [2010] eKLR.

³¹⁰ Warris A, 'Taxation Without Principles: A Historical Analysis of the Kenyan Taxation System', *Kenya Law Review*, 2007, 272.

According to the process-based model, people's attitudes towards public authorities are founded, to a remarkable extent, on their perceptions of the fairness of the procedures by which legal authorities make decisions and treat members of the public.³¹¹ The model, which draws on both psychological research on procedural justice and studies of police and courts, suggests that people's willingness to accept the constraints of the law and legal authorities is strongly related to their evaluations of procedural justice.³¹²

The fundamental principles of administrative justice stipulate that persons have their rights guaranteed by the constitution and statutes, as well as the right to have decisions made in accordance with prescribed processes. These include the right to be heard, the right to know the issues impacting their rights, the right to access information, the right to receive reasons for a decision, and the right to appeal a decision.³¹³ These rights are typically codified in administrative procedure and administrative disputes codes, which provide coherent and consistent rules governing the making of administrative decisions and clear procedures for reviewing and appealing those decisions. Given the state's power and informational advantage over citizens, it is critical that administrative processes and dispute resolution regulations provide the public with considerable procedural rights and allow decisions and appeals to be resolved promptly and expeditiously. This rights-based approach to administrative justice necessitates that countries recognise that old legal relations must be reversed: although states previously functioned as a public master, it must now act as an accountable and transparent public servant.

In light of the above, the researcher wishes to make some recommendations, which, if taken into consideration, might bring some positive changes to tax administration.

4.3.1 Proper enforcement

The nexus between taxes and growth is one that society cannot ignore. True development is only sustainable when it is reliant on the nation's own resources, as shown by experience.³¹⁴ In a context

³¹¹ Tyler R, and Huo J, *Trust in the law: Encouraging public cooperation with the police and courts*, Russell Sage Foundation, New York, 2002, 50.

³¹² Tyler R, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime and Justice*, (2003), 292.

³¹³ Article 47, *Constitution of Kenya*, 2010.

³¹⁴ Tax Justice Network, *Taxation and State Building in Kenya: Enhancing Revenue Capacity to Advance Human Welfare*, August 2009, 10.

where increasing tax rates are firmly opposed and a widespread culture of noncompliance exists, greater revenue collection rests heavily on the effectiveness of the tax administration. The persistence of inefficiency despite the adoption of significant administrative changes³¹⁵ implies that there are challenges around administrative processes. One such aspect impacting the efficacy of tax administration, as shown by this research, is tax law enforcement.³¹⁶ Cases discussed in chapter three affirm that KRA must guarantee that such rules and regulations are applied in a transparent, consistent, and fair manner.³¹⁷ Tennant maintains that this promotes higher compliance by increasing confidence in and desire to cooperate with tax authorities.³¹⁸

4.3.2 Continuous Training

Better administrative process training for civil servants should be developed. Every day, administrative law affects us all in a variety of ways. It is critical that decision-makers be properly trained and sensitised. Over time, a cadre of qualified, experienced, and practical experts on the topic should be enlisted to deliver a range of case study-based instruction. This, in addition to problem-solving discussions, might also serve as the foundation for cross-trainings including judges, decision-makers, and practising lawyers.

A well-trained team is required for an effective internal review process. Tax staff need ongoing training due to the complexity of tax systems and the frequency of legislative and administrative changes. Procedural regulations, taxpayer communications, and the use of ICT solutions are all important training issues. Training plans should be developed for each administrative level, and the success of training sessions should be evaluated on a regular basis. Internal tax-review process quality is determined by its efficiency, credibility, openness, and capacity to obtain decisions that

³¹⁵ The Constitution includes the rule of law, good governance, honesty, transparency, and accountability as national values and principles of governance. It contains a progressive bill of rights that introduced “new” rights and broadened the scope of existing basic rights. Additionally, Article 47 of the Constitution grants the right to fair administrative action as one of these new rights. Pursuant to Article 47(3) of the Constitution, the Fair Administrative Action Act was enacted in 2015 to give effect to Article 47. The Act introduces significant reforms to Kenya’s administrative law system, including: i) extending the reach of judicial review to encompass the review of actions of public and private bodies; ii) elaborating the right to be given written reasons for administrative action; iii) codifying the grounds for judicial review, including common law principles; iv) outlining the procedure for judicial review; v) giving effect to the constitutional right of access to information regarding administrative action; and vi) clarifying the relationship between the Act and the common law.

³¹⁶ *Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies* [2013] eKLR.

³¹⁷ *Samura Engineering Limited and Others v Kenya Revenue Authority* [2012] eKLR.

³¹⁸ Tennant S, ‘The Efficiency of Tax Administration in Jamaica: An Introspective Assessment’, *56 Social and Economic Studies* (2007), 74.

are widely viewed as satisfying and fair. However, the ideal technique for dealing with tax concerns is to avoid them altogether.³¹⁹

However, none of these efforts can gain momentum unless there is significant overall public sector management reform and devoted political leadership at the top of each agency, as well as the Government as a whole. More fundamentally, it entails initiating a gradual cultural and political transition – often indicated from the top down – in which it becomes more politically feasible to make difficult decisions and risk alienating specific parties and groups (instead of avoiding such decisions by missing deadlines and providing unclear information, which affects the public as a whole).

4.3.3 Resolve Disputes as Early in the Process as Possible

External accountability mechanisms are essential for establishing administrative justice, but they are inadequate on their own to ensure administrative justice. As a consequence, an argument is made for the importance of internal processes, not as a replacement for but rather as complementary to external mechanisms.³²⁰ Implementing methods to expedite some conflicts or send others to ADR procedures may considerably improve the efficiency of the internal review process.

Although KRA's ADR Framework as discussed in chapter two is a step in the right direction, numerous obstacles stand in the way of the implementation and use of ADR for tax disputes.³²¹ As discussed in chapter three, taxpayers feel that the KRA has not done enough to educate them about the ADR process. The study proposes that the KRA invest in educating taxpayers about the ADR process and instilling in them the necessary skills, motivation, and resources to utilise ADR successfully.

In summary, resolving disputes as early as possible entails actively engaging in dialogue with taxpayers independently or through ADR and ensuring effective communication throughout the tax process which will in turn aid in reducing conflict.

³¹⁹ The World Bank, 'The Administrative Review Process for Tax Disputes: Tax Objections and Appeals in Latin America and the Caribbean', 2019, 39.

³²⁰ See page 20 above on Adler's proposition for internal processes of accountability.

³²¹ See page 51 above on challenges facing KRA's ADR mechanism.

4.3.4 Effective Communication

Effective communication may substantially ease the review process because well-informed taxpayers are more likely to avoid filing claims that lack merit, offer comprehensive documents and other evidence, start the process with realistic expectations, and utilise the available ICT services. Communication is also an important component of institutional transparency and legitimacy. For instance, in *Pevans East Africa Ltd v Commissioner of Domestic Taxes & 7 Others* highlighted in chapter three, KRA, was faulted for failing to respond to the taxpayer's objection and instead issuing agency notices. In this case, KRA failed to communicate effectively and denied the Appellant an opportunity to object³²² to the tax demand resulting in the dispute.

Efficient communication should satisfy the specific information demands of the public, taxpayers participating in the administrative tax-review process, and relevant professionals such as accountants and tax lawyers. According to Gangl, communication may improve trust-based compliance through educating, involving, and engaging taxpayers, as well as promoting the social norm that most taxpayers are indeed compliant.³²³ In a democracy, where the source of power and legitimacy is the citizen, communication is the essential mechanism that connects public institutions with people. The purpose of institutional communication is to guarantee the openness of government actions and to satisfy a citizen's constitutional right to be informed. Thus, a lack of transparency is a violation of the Constitution, the nation's supreme law.³²⁴

4.4 Conclusion

Public finance is critical for facilitating efficient governance, preserving law and order, fostering peace and prosperity, enabling national infrastructure restoration and renewal, and giving access to social goods. A modern, democratic state cannot function without efficient and effective tax administration; therefore, it is in the public interest to collect taxes. However, as emphasised in chapter three, tax collection must be done in accordance with the Constitution and enabling legislation. The rule of law, a fundamental constitutional principle, prevents arbitrariness in tax collection and the use of financial concerns to justify a violation of established rights. Thus, KRA

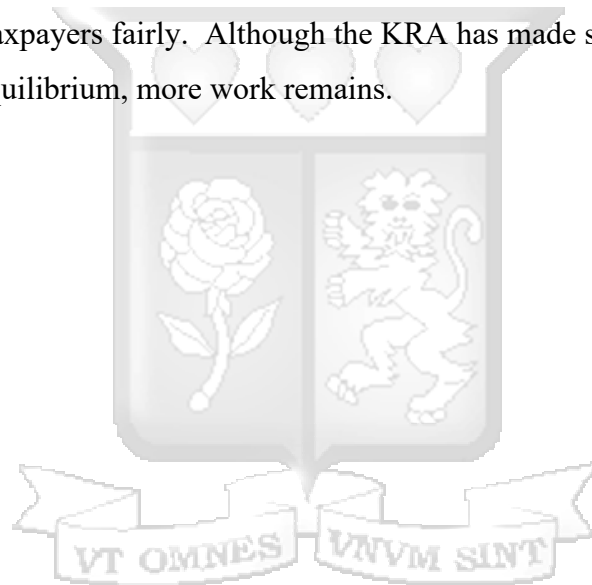
³²² Section 51, *Tax Procedures Act* (Act No.29 of 2015).

³²³ Gangl K and Torgler B, 'How to Achieve Tax Compliance by the Wealthy: A Review of the Literature and Agenda for Policy', 14 *Social Issues and Policy Review*, (2020), 129.

³²⁴ Mitu E, 'Importance of Communication in Public Administration', 69 *University of Craiova Journal of Political Science*, (2021), 137.

cannot, for example, demand that people pay more tax than is legally required, nor can it seek payments in advance of their due dates. There should be no tax collection unless there is a tax obligation due and payable as specified by legislation.

As has been demonstrated, through caselaw discussed in Chapter 3, the courts have found several flaws in the KRA's decision-making processes. The courts have faulted the KRA for, among other things, failing to issue proper tax assessment notices, failing to give taxpayers a hearing, seeking to enforce agency notices in an unprocedural manner, making unreasonable decisions, taking an excessively long time to respond to taxpayer objections, failing to process tax refunds in a timely manner, and refusing to consider tax refund claims because taxpayers owe taxes. This study has established that effective tax administration entails striking a balance between collecting taxes effectively and treating taxpayers fairly. Although the KRA has made significant strides in recent years in achieving this equilibrium, more work remains.



Bibliography

- 1 Halsbury's Laws of England, *Administrative Law*, 64, (1973).
- Adler M, 'Fairness in Context', 33 *Journal of Law and Society*, 4, (2006), 615-638.
- Adler M, 'A Socia-Legal Approach to Administrative Justice', 25 *Law & Policy*, 4, (2003).
- Akech M, 'Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa: Realities, Challenges, and Prospects', 20 *Indiana Journal of Global Legal Studies*, 1 (2013).
- Akech M, *Administrative Law*, Strathmore University Press, Nairobi, 2016.
- Alexander H. Türk, Oversight of Administrative Rulemaking: Judicial Review, 19 *European Law Journal* (2013), 126.
- Alink M and Kommer V, *Handbook on Tax Administration*, 2ed, IBFD, Netherlands, 2016.
- Alnashir Visram, 'Review of Administrative Decisions of Government by Administrative Courts and Tribunals', 10th Congress of the International Association of Supreme Administrative Jurisdictions, Sydney, March 2010.
- Amollo O, 'Constitutional Commissions Under the Constitution of Kenya 2010: The Case of the Commission on Administrative Justice', School of Law, Nairobi, 23 March 2015.
- Anthony W and Keith D, *Constitutional and administrative law*, 14ed, Pearson Education Ltd, Essex, 2007.
- Aronson M, Dyer B, and Groves M, *Judicial Review of Administrative Action*, 3 ed., Law Book Co. Sydney, 2004.
- Badamasiuy J and Bello M, An Appraisal of Administrative Justice and Good Governance in Nigeria, 6 *Journal of Politics and Law*, 2 (2013) 218.
- Banda C, 'Administrative Justice, Environmental Governance, and The Rule of Law in Malawi', 34 *Maryland Journal of International Law*, (2020).
- Baxter L, "Fairness and Natural Justice in English and South African Law", 96 *South Africa Law Journal* (1979), 607.
- Baxter L, *Administrative Law*, Juta Publishing, Cape Town, 1984.
- Bemani J, 'Do tax authorities abide by their core principles when collecting revenue?:A case of Zimbabwe Revenue Authority,' 2 *Quest Journals Journal of Research in Business and Management*, 10 (2014).

Bentley D, 'Revisiting rights theory and principles to prepare for growing globalisation and uncertainty', International Conference on Taxpayer Rights, Washington DC, November 18-19, 2015.

Bentley D, 'Taxpayers Rights Theory, Origin and Implementation', Kluwer Law International, 2007.

Bentley D, *The significance of declarations of taxpayers' rights and global standards for the delivery of tax services by revenue authorities*, 2002.

Berendt G and Kendall W, 'Administrative Law: Judicial Review - Reflections on the Proper Relationship between Courts and Agencies', 58 *Chicago Kent Law Review* (1982).

Bobek M, *Reasonableness in Administrative Law: A comparative reflection on functional equivalence*, Eric Stein Working Paper, 2, 2008.

Boote D and Beile P, 'Scholars before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation' 6 *Educational Researcher* 34 (2005), 3-15.

Braithwaite V- Centre for Tax System Integrity, Research School of Social Sciences, Australian National University, *Are Taxpayers' Charters 'Seducers' or 'Protectors' of Public Interest? Australia's Experience*, June 2005.

Mbiada C, 'The Exhaustion of Internal remedies in administrative law: A comparative analysis in administrative analysis of the South African and the Cameroonian requirements and procedure', 20 *African journal of international and Comparative Law* (2012), 119-131.

Clive P, 'Disproportionality - the hidden ground of review: Medirite (Pty) Ltd v South African Pharmacy Council & another', 136 *South African Law Journal* (2019).

Cohen-Eliya and Porat, 'Proportionality and the culture of Justification', 64 *The University of Toronto Law Journal*, 3, (2014).

Craig P, 'Proportionality, Rationality and Review', *New Zealand Law Review*, 2010, 294.

Craig P, *Administrative Law*, 5ed, Sweet & Maxwell, London, 2003.

Creyke R, 'Administrative Justice-Towards Integrity in Government', 31 *Melbourne University Law Review*, (2007), 705-708.

Devenish G, Govender K and Hulme D, *Administration Law and Justice in South Africa*, Butterworths, Durban, 2001.

Dyzenhaus D, *The Rule of Administrative Law in International Law*, Institute for International Law and Justice, Working Paper, 2005.

Einhorn M R, Chlebny J, *Assessment of the Administrative Justice System in Macedonia*, The World Bank Legal and Judicial Enforcement Project.

Elliott M, 'Legitimate Expectations, Consistency, and Abuse of Power: the Rashid Case', 10 *Judicial Review*, 4, (2005).

Farrah A and Perry A, 'The Coherence of The Doctrine of Legitimate Expectations', 73 *Cambridge Law Journal*, 1, (2014).

Forsyth C, "Legitimate Expectations Revisited", ALBA Summer Conference, 29 May 2011.

Foulkes D, *Administrative Law*, Butterworths, London, 1995.

G. Tieghi, "The Italian Taxpayer Bill of Rights 15 years on 'at the top of the world'. But what about effectiveness?" the 2015 International Conference on Taxpayer's Rights, Washington DC, 2015.

Galligan DJ, *Discretionary Powers in the Legal Order: The Exercise of Discretionary Powers*, Oxford University Press, Oxford 1996.

Galligan J, *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Press, Oxford, 1986.

Gangl K and Torgler B, 'How to Achieve Tax Compliance by the Wealthy: A Review of the Literature and Agenda for Policy', 14 *Social Issues and Policy Review*, (2020).

Gichuhi J, 'What Constitutionalisation of Administrative Justice Means to Kenyans', 2018.

Halliday S and Scott C, *Administrative Justice*, The Oxford Handbook of Empirical Legal Research (Peter Cane & Herbert Kritzer, eds.), 2010.

Hamowy, 'Freedom and the rule of law in F.A. Hayek', 36 *II Politico*, 2 Rubbettino Editore, 1971, 349-77.

Harlow C, 'Global Administrative Law: The Quest for Principles and Values', 17 *European Journal of International Law*, 1, (2006).

Hawken N and Parpworth N, *Introduction to administrative Law*, 1, 1998.

Hoexter C, *Administrative Law in South Africa*, 2ed, Juta Publishing, Cape Town, 2012.

Huscroft G, Miller B and Webber G (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, Cambridge, 2014.

Kahn J, 'The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity', 57 *Hastings Law Journal*, (2006).

- Kaluma P, *Judicial Review: Law, Procedure and Practice*, Law Africa, Nairobi, 2012.
- Kashindi G A, 'Tax dispute resolution in Kenya: viability including alternative dispute resolution mechanisms', Unpublished LLM Thesis, University of Nairobi, 2017.
- Katie E Eyer, *Administrative Adjudication and the Rule of Law*, 60(3) ADMIN. L. REV. 648 (2002).
- Lane W and Young S, *Administrative Law in Australia*, Law Book Co., Australia, 2007.
- Law J, *A Dictionary of Law*, 8 ed, Oxford University Press, 2015.
- Leyland P and Anthony G, *Textbook on Administrative Law*, Oxford University Press, Oxford, 2013.
- Leventhal S, *What should be done with equity theory?* In K. J. Gergen, M. S. Greenberg, and R. H. Weiss, (eds.), *Social Exchange: Advances in Theory and Research*, Plenum Press, New York, 1980, 27–55.
- Mathew G, "Administrative Justice in Australian Administrative Law", Australian Institute of Administrative Law Forum, Sydney, 22 July 2010.
- Mayani T, 'Unlocking the Revolutionary Potential of Kenya's Constitutional Right to Fair Administrative Action', Unpublished LL.M Thesis, University of Cape Town, September 2017.
- McLeod R (Creyke R and McMillan J eds.), "Administrative Justice: The Core and the Fringe," National Administrative Law Forum, 1999.
- McMillan J, "Can Administrative Law Foster Good Administration," Commonwealth Ombudsman Council of Australian Tribunals-NSW Chapter, Sydney, 16 September 2009.
- Möller K, 'Proportionality: Challenging the critics', 10 *International Journal of Constitutional Law*, 3 (2012), 709–731.
- Möller K, 'Proportionality: Challenging the critics', 10 *International Journal of Constitutional Law*, 3, (2012), 709–731.
- Muehlbacher S, Kirchler E and Schwarzenberger H, 'Voluntary versus Enforced tax compliance: The "slippery slope" framework', 32 *European Journal of Law and Economics*, 1, (2018), 89-97.
- Mullan D.J, 'Fairness: the new natural justice', 2 *University of Toronto Law Journal*, (1978) 281.
- Mutua M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya', 23 *Human Rights Quarterly*, 1, (2001), 96-118.
- Ndegwa M, 'The Adoption of Alternative Dispute Resolution in Kenyan Tax Disputes', Unpublished Master's thesis, University States International University, 2019, 60.

Nero F, *Doctrine of Legitimate Expectation: A Case Study of Kenyan Government*, 2020.

O'Neill M and Orr S, *Guiding principles of good tax policy: A framework for evaluating tax proposals*, *Taxation: Philosophical Perspectives ed.*, Oxford University Press, London, 2018.

Ochiel D, 'The Constitution of Kenya 2010 And Judicial Review: Why the Odumbe Case Would Be Decided Differently Today', *Kenya Law*, (2015).

Office of the Tax Ombud, *Tax ombud annual report 2017/18*, 31 March 2018, 30.

Oloo A and Mitullah W, *The Legislature and Constitutionalism in Kenya in L Mute and S Wanjala eds. When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya*, Claripress, Nairobi, 2002.

Puckett M, 'Embracing the Queen of Hearts: Deference to Retroactive Tax Rules', 40 *Florida State University Law Review*, 349 (2013).

R. Kirkham, 'Administrative Justice in Context: Mapping the Terrain for Further Study', 74 *The Modern Law Review*, 4(2011), 617-630.

Riggs, Robert E., 'Legitimate Expectation and Procedural Fairness in English Law', 36 *American Journal of Comparative Law*, 3 (1988).

Rowley J and Slack F, 'Conducting a Literature Review', 27 *Management Research News*, 2004.

Schroder M, *Administrative Law in Germany*, Seerdan R and Stroink F (eds), *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia, Groningen, 2002.

Shauer F, 'English Natural Justice and American Due Process: An Analytical Comparison', 18 *William and Mary Law Review* (1976), 47.

Stott D and Felix A, *The Principles of Administrative Law*, 4, 1ed. 1997.

T Buck, R Kirkham and B Thompson, *The Ombudsman Enterprise and Administrative Justice* Ashgate Publishing, Farnham, United Kingdom, 2011.

Tennant S, 'The Efficiency of Tax Administration in Jamaica: An Introspective Assessment', 56 *Social and Economic Studies* (2007).

The Commission on Administrative Justice, "Administrative Law and Governance in East Africa in Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions" Nairobi, 19 September 2013.

The Law Commission, "Administrative Redress: Public Bodies and the Citizen", Law Commission Consultation Paper, No.187, 3.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Folke Bernadotte Academy (FBA), *Handbook for Monitoring Administrative Justice*, Office for Democratic Institutions and Human Rights (ODIHR), 2013.

Thomas D and Hodges I, *Doing a Literature Review in Designing and Managing your Research Project*, Sage Publications, 2010.

Tychmańska A, *Taxpayer Rights and Protection in the Era of Tax Law Internationalization*, June 10, 2021.

Tyler, Tom R. "What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures." *22 Law & Society Review*,1(1988), 103–35.

US Government Accountability Office, *Understanding the Tax Reform Debate: Background, Criteria, & Questions*, 24 September 2005.

Visram A, 'Review of Administrative Decisions of Government by Administrative Courts and Tribunals', 10th Congress of the International Association of Supreme Administrative Jurisdictions, Sydney, March 2010.

Wade H, *Administrative Law*, 6ed, Oxford University Press, London,1989.

Wade W and Forsyth C, *Administrative Law*, 8ed, Oxford University Press, Oxford, 2000.

Wenar and Leif, 'John Rawls', *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition).

Woolf H, Smith S, Jowell J, Le Sueur A and Donnelly C, *De Smith's Judicial Review*, 6ed, Sweet & Maxwell, London, 2007.

Wright S, 'Beyond Discretionary Justice', 81 *Yale Law Journal* (1972), 575.

Yurtseve H, 'Anatomy of Taxpayers' Rights: Case Study of Turkey', 7 *Pakistan Journal of Social Sciences* (2010).

Appendices

Appendix A: Similarity Report



Document Information

| | |
|-------------------|--|
| Analyzed document | Administrative Justice in Taxation- An Evaluation of KRAs Administrative Justice Practices.docx (D143725524) |
| Submitted | 2022-09-07 18:16:00 |
| Submitted by | |
| Submitter email | Winnie.Gathura@strathmore.edu |
| Similarity | 7% |
| Analysis address | library.strath@analysis.orkund.com |

Sources included in the report

| | | |
|------------|--|----|
| SA | LLB Dissertation 2018.docx Document LLB Dissertation 2018.docx (D43163009) | 12 |
| W | URL: https://nairobiawmonthly.com/index.php/2018/03/08/constitutionalising-administrative-justice-2/ Fetched: 2022-07-31 01:18:01 | 7 |
| SA | Moses.AdoHARN60 - FINAL THESIS-word.docx Document Moses.AdoHARN60 - FINAL THESIS-word.docx (D14604543) | 4 |
| W | URL: https://rm.coe.int/the-protection-of-legitimate-expectations-in-global-administrative-law/16809a45b6 Fetched: 2022-09-07 18:16:00 | 5 |
| W | URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf Fetched: 2021-03-19 21:26:25 | 3 |
| W | URL: http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/ Fetched: 2022-09-07 18:16:00 | 12 |
| ... | URL: https://www.thefreelibrary.com/Home+concrete%3A+the+story+behind+the+IRS%27s+attempt+to+overrule+the...-a0318492585 | . |



Appendix B: Ethical Clearance Confirmation



31st May 2022

Ms Gathura, Winnie
wanjikugathura@gmail.com

Dear Ms Gathura,

RE: Do Kra Practices on Tax Administration Adhere to Principles of Administrative Law?

This is to inform you that SU-IERC has reviewed and **approved** your above **SU Masters'** research proposal. Your application reference number is **SU-IERC1377/22**. The approval period is **31st May 2022 to 30th May 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

for: **Dr Ben Ngoye,**
Secretary; SU-IERC

Cc: Prof Fred Were,
Chairperson; SU-IERC