A Conceptual Framework for Assessing the Performance of Kenyan Courts Undertaking Judicial Review of Legislative Action

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Abstract: *Article 165 (3) (d) of the Constitution of Kenya 2010 gives the High Court the power of constitutional interpretation and to uphold constitutional supremacy by declaring void any law that is inconsistent with the Constitution or invalid any act or omission contravening it. Within the current Kenyan context, judicial review of legislative action has become the common practice. The courts are constantly drawn into the realm of legislative matters at the national and devolved levels of government established under the Constitution. However, the High Court's role is limited to interpretation only and it cannot compel Parliament to modify the legislative action contravening the Constitution. Conversely, where the Legislature disagrees with the Court's assessment of what the constitutional norms require it cannot substitute the Court's interpretation with its own. The courts are subsequently tasked with the delicate prospect of balancing the legal and political constraints that underlie any case of judicial review of legislative action. This paper develops a conceptual framework for assessing how courts, in general, go about exercising their power of judicial review of legislative action in a way that enables them to adhere to the requirements of the separation of powers doctrine, while considering the legal and political constraints under which they must operate. The resulting framework proposes four possible types of courts that may emerge based on how a court balances the legal and political constraints prevailing upon it.*

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I. Introduction

The proper functioning of government depends upon the protection of the constitutional balance of power amongst the three arms of government; this is at the core of the doctrine of separation of powers. However, there exists neither a universal model of separation of powers nor separation that is absolute. Different states have developed distinctive models suitable to their systems of government and political contexts, but most are built around Montesquieu's tripartite division of government functions.[1] Kenya is a constitutional democracy[2] founded on the principles of the doctrine of separation of powers. The *Constitution of Kenya 2010* (herein *Constitution*) vests legislative authority in

[1] Montesquieu is credited with the establishment of the idea of the three branches of government and formulation of the tripartite division of government functions. See: Vile MJC, *Constitutionalism and the Separation of Powers,* 2nd ed, Liberty Fund, Indianapolis, 1998, 63.

[2] Kenya is a nascent democracy still undergoing evolution. It should be affirmed that democracy is a process aimed at creating a self-determined society of free and equal individuals with equal rights and obligations. See: Haberson J, 'Reflections on a visit: Democratic pluses and minuses' 6 *The Nairobi Law Monthly* 12, 2015, 6.

parliament under Article 94, executive authority in the national executive under Article 129 and judicial authority in the courts under Article 159. This authority is derived from the Kenyan people who collectively exercise their sovereign power to delegate it to these state organs as provided for under Article 1(3). Importantly, these three state organs are meant to be independent and co-equal meaning that none should encroach on the functions of the other and that they are all of same rank. Moreover, in keeping with Montesquieu's concept of partial separation, each branch's exercise of its powers is modified by a system of checks and balances.[3]

Restraint of the legislative power is exercised by the courts through their power of judicial review by which they can evaluate legislative actions and invalidate those they find to be unconstitutional.[4] The extent and manner of exercise of the power of judicial review by the courts in any given context is provided for under the respective laws and institutionalized legal rules, norms, and practices. If a court ignores or deviates from such laws, norms, and practices this may prompt a loss in its legitimacy, and they therefore serve as legal constraints on the courts.[5]

On the other hand, judicial review of legislative action has a direct impact on the implementation of a government's policies and programmes for the benefit of its citizens and consequently entails deliberation on social, political, and economic issues. The resultant outcome can be labelled as the political consequences of judicial review which, if ignored, make the court vulnerable to political attacks that may negatively impact its institutional security. These attacks can be launched through the legislature using its various powers of restraint over the judicial arm of government, which may include the power of approval of appointment to or removal from office of judges; approval of budgets and rules

[3] The concept of partial separation emphasizes the importance of placing judicial and executive power in different hands while at the same time exercising the mutual balancing and restraining of the legislative and executive power. See: Marshall G, *Constitutional theory*, Oxford University Press, Oxford, 1971, 102.

[4] Over time, it has proven to hold the most effective methods of holding state organs to account for the power they exercise. See: Cassie J and Knight D, 'The scope of judicial review: Who and what may be reviewed', Administrative Law Intensive by NZLS CLE, Wellington, August 2007, http://www.laws179.co.nz/2008/09/scope-of-judicial-review-who-and-what.html on 27 August 2021.

[5] Roux T, *The politics of principle: The first South African Constitutional Court, 1995-2005,* Cambridge University Press, Cambridge, 2013, 2.

affecting the courts' financial independence; and changes to laws on security of tenure, remuneration, or courts' jurisdiction and powers. These political outcomes therefore serve as political constraints on the courts.[6]

Consequently, the power of judicial review when exercised without considering its political consequences creates two problems: (a) the dangerous risk of a court to interfere with policy choices that parliament should be allowed to make; and (b) defeating the ends of justice by creating a scenario where courts issue orders against parliament that are not executed thereby acting in vain. The political and legal constraints of judicial review of legislative action require that a court must be able to respond to each constraint without compromising its ability to respond to the other.[7] On the one hand the court must consider a wide range of contextual factors in foresight of the political consequences, and on the other it must consider the nature and permissible scope of judicial review.

Article 165 (3) (d) of the *Constitution* gives the High Court the power of constitutional interpretation, and to uphold constitutional supremacy by declaring void any law that is inconsistent with the Constitution or invalid any act or omission contravening it.[8] Within the current Kenyan context judicial review of legislative action has become the common practice. The courts are constantly drawn into the realm of legislative matters at the national and devolved levels of government established under the Constitution. Parliament also serves as a theatre for politics and politics is a game of one-upmanship, especially in a First Past the Post (FPTP) electoral system such as the Kenyan one. [9] It is therefore common for parliamentarians defeated on the floor of the house to cunningly turn to the courts as an alternative forum for competition. If the court is not keen it can be used in this manner, this threat was observed in

[6] Roux, *The politics of principle*, 2.

[7] This balance has been used as a measure of performance of constitutional courts in legal and political terms. See: Roux, *The politics of principle*.

[8] Omiti H, 'Who guards the guard? The Supreme Court's battered integrity' 6 *The Nairobi Law Monthly* 12, 2015, 32.

[9] A First Past the Post (FPTP) electoral system is the simplest form of plurality/majority electoral system whereby the winning candidate is the one who gains more votes than any other candidate, even if this is not an absolute majority (over 50%) of the valid votes. For the Kenyan context see: Buluma BB, 'Constitutional quotas and women's political representation: A way out of the Kenyan dilemma' Unpublished LL.M Thesis, University of Nairobi, 2012.

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others[10] where the court held that:

> Whereas under Article 165 (3) (d) of the *Constitution* as read with Articles 22(1) and 23 (1), the High Court has wide interpretative powers donated by the *Constitution*, it must be hesitant to interfere with the legislative process except in the clearest of cases … the High Court should not be turned into an alternative forum where losers in Parliamentary debates rush to assert revenge on their adversaries.[11]

However, even when the court exercises its power of constitutional interpretation there is an increasing tendency for the political elite to ignore court orders. For instance, in *Speaker of Senate & Another v A.G. & 4 Others,* despite the advisory opinion of the Supreme Court going further to define 'what a Bill that concerns Counties' means to avoid future conflict between the Senate and National Assembly when dealing with such legislation, the National Assembly continued to debate and enact similar legislation without the Senate's input.[12] Moreover, The Speaker of the National Assembly was quoted lamenting of court orders stating, 'we want to respect court orders, and we have respected very many of them. But I do not understand how we are to obey every order, however idiotic or unconstitutional'.[13]

Considering the above, this paper aims to develop a conceptual framework for how courts, in general, should go about exercising their power of judicial review of legislative action in a way that enables them to adhere to the requirements of the separation of powers doctrine, while considering the legal

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[10] (2015) eKLR.

[11] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

[12] *Advisory Opinion Ref. No.2 of 2013* (2013) eKLR. The advisory opinion was occasioned by the act of the Speaker of the National Assembly reversing his action of referring a legislative matter to the Senate and having the National Assembly solely conclude deliberations on the Division of Revenue Bill (2013) which was then forwarded to the President for assent and thereafter enacted into law. The National Assembly continued to debate and enact laws which clearly concern County Governments without recourse to the Senate. Specific examples are the Livestock and Fisheries Act and the Public Finance and Management Act.

[13] Njagih M, 'Parliament will not honour 'idiotic and unreasonable' court orders says Speaker Justin Muturi', Standard Digital, 3 March 2014 https://www.standardmedia.co.ke/counties/article/2000105985/muturi-parliament-will-not-honour-idiotic-and-unreasonable-court-orders on 27 Aug. 2021.

and political constraints under which they must operate. It is based on the reasoning that although political disputes should ideally be resolved through political process, judicial intervention remains necessary especially when the political process breaks down and is no longer self-correcting. [14] This is so even though intervention by courts may expose them to retaliation by the executive and legislative branches therefore making such intervention measures counterproductive. In this paper, those legal and political constraints are viewed as being conceptually distinct but inter-related. What follows is an attempt to address the question of their interaction in relation to a court's capacity to simultaneously respond to both when exercising its power of judicial review of legislative action. The objective is to develop a conceptual framework to determine the extent to which a court can do so, within the confines of the doctrine of separation of powers.

In developing the conceptual framework, the chapter builds on the Roux model for assessing the performance of constitutional courts in legal and political terms.[15] It seeks a balance between: (a) the legal constraints emanating from institutionalized, legal rules, norms, and practices deviation from which may trigger a loss in legal legitimacy; and (b) the political constraints deriving from the capacity of political actors to attack and undermine the courts' institutional independence. In this conceptualization, the paper adopts and subsequently modifies the Roux model's quadrant-based depiction of the legal and political constraints impacting on courts, modified specifically for courts exercising the power of judicial review of legislative action. Drawing from the theoretical foundations of the doctrine of separation of powers and the functionalist approach to its interpretation by courts', this paper presents four ideal types of courts corresponding to the four sectors of the quadrant and shows how a court can balance the legal and political constraints so as to remain within, or move towards, the normatively preferred model court of judicial review of legislative action.

[14] Clair SP, 'Separation of powers: A new look at the functionalist approach' 40 *Case Western Law Review* 1, 1989, 340.

[15] Theunis Roux developed the model to assess the achievements of the First South African Constitutional Court. See: Roux, *The politics of principle*.

II. Mapping of the legal and political constraints in judicial review of legislative action

Montesquieu's conceptualization of the doctrine of separation of powers emphasized the importance of placing judicial and executive power in different hands as well as the mutual balancing and restraining of legislative and executive powers.[16] From this elementary model there have been many variants of the doctrine, but no standard separation of powers template has ever existed. Three considerations have been noted to suggest the lack of a standard template:[17] first, no single canonical version that could have served as the standard template has been revealed in its intellectual history; second, pre-existing English models from which the doctrine evolved reveal that within a very broad range, a diverse arrangement is consistent with the doctrine; and third, debates on all the diverse institutional arrangements pivoted on political considerations as opposed to overall compliance with some generally agreed upon formulation of the doctrine. It was within this context that all the leading scholars of the founding era of the doctrine developed different formulations of the doctrine and therefore supplied no single formula for the details of a properly composed government.[18]

Although the different models of the doctrine which have emerged are all built around Montesquieu's tripartite division of government functions, they have significant divergence regarding how to characterize and classify the powers to be divided. This divergence has been brought about by variations in focus on at least five distinct, and at times conflicting, purposes associated with different strands of the doctrine:

> . . . (a) to create greater governmental efficiency; (b) to assure that statutory law is made in the common interest; (c) to assure that law is impartially administered and that all administrators are under the law; (d) to allow the people's representatives to call executive officials to account for the abuse of power; and (e) to establish a balance of governmental powers'[19]

[16] Marshall G, *Constitutional theory,* 102.

[17] Manning JF, 'Separation of powers as ordinary interpretation' 124 *Harvard Law Review*, 2011, 1993.

[18] Manning JF, 'Separation of powers as ordinary interpretation', 1993.

[19] Gwyn WB, *The meaning of the separation of powers: An analysis of the doctrine from its origin to adoption in the United States Constitution,* Tulane University Press, New Orleans, 1965, 128.

Judicial review of legislative action falls under the fourth purpose: to allow the people's representatives to call executive officials to account for the abuse of power.

A. Political constraints of judicial review of legislative action

The exercise of the power of judicial review within the context of the doctrine of separation of powers is influenced by the political system in which the doctrine is being applied. Even though Montesquieu's treatise still forms the conceptual basis for the doctrine today, it was written when there was no modern conception of democracy, the role of the state was quite limited, and there were few limitations on the powers of the executive.[20] The political context has significantly evolved with the emergence and dominance of the democratic system of governance.

However, the political economy of democratization varies among states and these political factors influence the application of the doctrine with specific regard to judicial review. Specifically, judicial review of legislative action has a direct impact on a government's ability to implement its envisioned social, political, and economic policies and programs. There is therefore a need for its exercise to be grounded in descriptively accurate accounts of the political contexts in which it is applied.[21] Failure to do so would make the courts vulnerable to attack by political actors in ways that would undermine their institutional independence. If a court chooses to ignore the political consequences of judicial review of legislative action, then the political arms of government can use the following constitutionally valid measures to attack it: instituting processes for removal of judges; reviewing downwards budget approvals; revising rules affecting the courts' financial independence; or amending laws on security of tenure for judges, remuneration of judges, or courts' jurisdiction and powers. These political factors therefore serve as political constraints on the courts exercise of their power of judicial review of legislative action.

Judicial review of legislative action essentially requires a court to consider social, political, and economic issues since they form the basis of such review. As observed by the court in the Indian case of *Mandal Commission*,[22] these issues

[20] Ghai Y, 'Dilemmas for the Judiciary' 6 *Nairobi Law Monthly* 6, 2015, 49.

[21] Friedman B, 'The Politics of Judicial Review' 84 *Texas Law Review*, 2005, 257.

[22] *Mandal Commission* (1992), Supreme Court of India, Supp (3) SCC 501.

are often emotionally charged and may have consequences for future generations. A court's disregard of such political consequences of its judgement can trigger its attack by political actors in the other arms of government who are affected by these consequences. It is this insulation from, or susceptibility to, such political attack that determines the relative weakness or strength of the political constraints under which it must operate.

These political constraints can be represented on a horizontal axis as follows:

The strength or weakness of the political constraints is relative to the court's insulation from, or susceptibility to political attack. In this context political attack refers to constitutionally valid actions that can be undertaken by political actors to undermine the independence of the court and subject it to political control. For example, the executive and the legislature may utilize their powers under the doctrine of separation of powers to: (a) remove from office the concerned judges; (b) reduce the budget allocation granted to the judiciary; and (c) pass constitutional amendments that would remove judges' security of tenure or change the courts' jurisdiction and powers. [23] All these actions serve to undermine the court's independence from political control so as to condense its capacity to act as a check on the abuse of political power by either the executive or the legislature.[24]

The degree of a court's independence is directly related to the degree of its insulation from political attack. Where a court is vulnerable to political attack, such as those courts in weak legal cultures, its institutional security is low and constantly threatened by the political arms of government. [25] This makes it overly dependent on the other arms of government for its very survival; such a court is therefore politically constrained. For instance, in 1988 the Kenyan parliament passed amendments to Sections 61, 62, 69, 72, and 106 of the *Independence Constitution* within a matter of hours which vested the power of firing judges in

[23] Roux, *The politics of principle*, 4.
[24] Roux, *The politics of principle*, 4.
[25] Roux, *The politics of principle*, 4.

the president without recourse to any institutional inquiry.[26] This removal of the judges security of tenure was implemented alongside, 'an opaque system of appointments of judges that engendered loyalty, and began a pattern of intimidating judges who displayed any streak of independence'.[27] This seriously undermined the judiciary's institutional independence as well as the judges' decisional independence.[28] As a result, the Moi era judiciary was criticized for only feebly and often reluctantly exercising its constitutional interpretation and judicial review powers to assert its duty to defend the integrity of the Constitution, and even where it did critics assert that it exercised a weak form of judicial review to check the executive and legislature.[29] This is a good example of a politically constrained court.

Conversely, where a court operates within the context of a strong legal culture with a long tradition of respect for judicial independence, it has a high degree of institutional security and is able to withstand political attacks by other arms of government. This type of court is politically unconstrained. This is possible when there are constitutional safeguards for judicial independence. These structural protections restrict political attacks to politicians' ability to garner enough support and coordination to overcome them.[30] For instance, Article 160 (1) of the *Constitution* promulgated in 2010 expressly provides for judicial independence in stating that, 'In the exercise of judicial authority, the judiciary, as constituted under Article 161, shall be subject only to this *Constitution* and the law and shall not be subject to control or direction of any person or authority'. This constitutional entrenchment of judicial independence provides a measure of guarantee and security against its usurpation by the other arms of government since it cannot be revoked without enacting a constitutional amendment of Article 160, which would require a referendum as provided for

[26] Gutto S, 'Constitutional law and politics in Kenya since independence: A study in class and power in a Neo-Colonial State in Africa' 5 *Zimbabwe Law Review,* 1987, 142.

[27] Murunga GR, Okello D, and Sjogren A, 'Towards a new constitutional order in Kenya: An introduction' in Murunga GR, Okello D and Sjogren A (eds.), *Kenya: The Struggle for a New Constitutional Order,* Zed Books, London, 2014, 4.

[28] *Constitution of Kenya (Amendment Act)*, (Act No.4 of 1988).

[29] Juma D, 'the normative foundations of constitution making in Kenya: The Judiciary past, present and future' in Murungi C (ed.) *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya,* ICJ Kenya, Nairobi, 2010, 224.

[30] Ferejohn J, 'Independent judges, dependent Judiciary: Explaining judicial independence' 72 *Southern California Law Review* 353, 1999, 355.

under Article 255 (1) (g). A referendum would require that at least 20% of the registered voters in each or at least half of the forty -seven counties vote in the referendum, and that the amendments are supported by a simple majority of the citizens voting in the referendum.[31] This requirement ensures that the wielders of sovereign power, the Kenyan people, are invited to vote on any amendment that would curtail judicial independence thereby avoiding arbitrary restriction on the same by the political arms of government.[32]

Consequently, a court that has strong institutional independence and is able to assert its judicial role while withstanding political attack can be said to be strongly insulated and thus politically unconstrained, whereas a court with weak institutional independence and non-assertion to its external political environment can be said to be susceptible to political attacks and is thus politically constrained. [33] It should be noted that a court's relative degree of insulation from political attacks consists not in its ability to avoid such attacks but rather in its ability to withstand such attacks when they do happen.

Under the *Bangalore Principles of Judicial Conduct* a judge is required to avoid inappropriate connections with, and influence by, the executive and legislative branches of government. [34] Therefore, a court that is politically constrained is a court which does not meet the threshold for judicial independence in both its individual and institutional aspects since it is subject to undue political control. This may further lead to a loss in not only its institutional independence but also a corresponding loss in its legitimacy.

B. Legal constraints of judicial review of legislative action

Legally, judicial review of legislative action is based on the principle that where constitutional law places restrictions on legislative power, a duty to declare the law implies a duty to declare when such restrictions have been violated whether by the legislature or anyone else.[35] Courts are therefore obligated to evaluate the decisions of Parliament and to invalidate those actions and decisions they find to be unconstitutional. As noted in the seminal case of *Marbury v*

[31] Article 255 (1) (g) and Article 255 (2), *Constitution of Kenya* (2010).

[32] The executive and legislature which are comprised of members elected to office by the Kenyan people.

[33] This means that the court successfully take on whatever political repercussions its decisions might trigger; it can deal with politically controversial cases and remain independent.

[34] ECOSOC, *The Bangalore principles of judicial conduct*, 2002.

[35] Marshall G, *Constitutional Theory,* 104.

Madison,[36] no legislative act contrary to the constitution can be valid and to deny that is to propose that the representatives of the people are superior to the people they represent.

However, the courts' exercise of their power of judicial review of legislative action must be subject to rules guiding when a court can step in to determine the constitutional validity of legislative action so as to avoid a court being guilty of usurping the law-making role reserved for parliament under the doctrine of separation of powers. There may be questions that are purely political in nature and therefore require political answers as opposed to legal sanctions.[37] However, as held by the majority in *Baker v Carr,* [38] 'the mere fact that the suit seeks protection of a political right does not mean that it presents a political question'. When it comes to these political questions the debate has always centred on whether they should be the subject of judicial review, or whether they are best left for resolution in the political arena which is the domain of the executive and legislature. One of the arguments raised against courts' resolution of political questions is that there might be difficulty in enforcing a judgment on a reluctant executive or legislature.[39] Within the Kenyan context the general trend in the recent past has been for Parliament to ignore any decisions emanating from the court that are against the house. Parliament persists to enact legislation that violates the separation of powers doctrine and undermines the democratic process but does not take steps to amend laws that the courts have ruled to be unconstitutional. [40] This raises the question of the courts' powers to enforce their decisions since their role is limited to interpretation only.

Therefore, in any jurisdiction there are institutionalized legal rules, norms, and practices that govern the manner and extent to which courts can exercise their power of judicial review. These legal rules, norms and practices serve as the legal constraints on the courts' exercise of their power of judicial review of legislative action. Failure to observe them can occasion a loss in the legitimacy of a court's decision.

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[36] *Marbury v Madison* (1803), The Supreme Court of the United States.

[37] Ojwang JB, *Constitutional development in Kenya: Institutional adaptation and social change*, African Centre for Technology Studies Press, Nairobi, 1990, 159.

[38] *Baker v Carr* (1962), The Supreme Court of the United States.

[39] Maina W, 'How drafters of 2010 Constitution ensured MPs won't abuse it for political expediency' Saturday Nation*,* 28 March 2015, 8.

[40] Kameri-Mbote P and Akech M, *Kenya: Justice sector and the rule of law,* Open Society Initiative for East Africa, Nairobi, 2011, 69.

The concept of law as a constraint on adjudication has its origins in the command theory of law, also known as legal positivism, which views laws as the commands of the state sovereign. Legal positivism views every law or rule as a command by the state sovereign to a person in a state of subjection to the sovereign who is therefore obligated to follow that command or face a punishment.[41] The legal positivist tradition of judgement according to law presumes the need for judicial discretion to be constrained by either formal legal rules or principles, or constraints flowing from the nature of the judicial function.[42] Judges are therefore bound by these constraints in so far as they restrict the forms of reasoning they can legitimately use in their arguments while deciding a case. Failure to observe these legal constraints would result in a loss of legitimacy of their judgements.

For purposes of the development of this conceptual framework, all courts having the power of judicial review of legislative action can be thought of as occupying a point on the following vertical axis; vis-à-vis the legal constraints influencing them:

The axis represents the theoretical range of courts in respect of the legal constraints under which they operate. However, it must be emphasized that the position of a court along the axis is a relative position determined by considering the circumstances of the courts in relation to the circumstances of other courts.

The relative strength or weakness of legal constraints varies between jurisdictions. This is primarily due to variations in legal cultures within different states. A legal culture has been defined as '. . . a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and

[41] Harris JW, *Legal philosophies*, 2nd ed, Oxford University Press, Oxford, 2004, 28.
[42] Roux, *The politics of principle*, 5.

the interpretation of legal texts'.[43] Within the context of this paper, it is viewed as the extent to which the rules and concepts of law have been integrated within the society in which they are to be applied.

There are those societies in which these legal rules and concepts are extensively integrated and can therefore be said to have strong legal cultures where the rule of law is supreme. These societies tend to have long established and codified systems of law, whereby their legal rules are consolidated in a legal code or spread over several statutes. Within such contexts, a court's main task is to maintain the existing judicial reasoning surrounding the law and this is achieved through the strict observance of established legal rules, norms, and practices.[44] These courts are thus strictly constrained by the prevailing legal rules, norms, and practices. With regard to judicial review of legislative action, these courts are guided by a formal judicial reasoning. Judges are expected to rely solely on the authority of a settled rule to arrive at their decision on a matter even where there are strong moral, economic, political, institutional, or other social considerations pointing to a different outcome.[45] Such a formalistic court invokes the separation of powers doctrine relying on a background norm of strict separation of powers which is grounded upon the belief that each branch of government operates with and maintains maximum independence.[46] A court like this would therefore favour unyielding enforcement of a strict norm of separation of powers even where this may yield inefficiencies and ignores the reality of political relationships.[47]

On the other hand, there are those societies which do not have a strong rule of law tradition, where the legal rules, norms and practices are not strongly institutionalized and therefore do not constrain judicial decision-making to a significant degree. These societies can be said to have a weak legal culture. They mostly fall into the category of fragile or transitional democracies where there is

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[43] Bell J, 'English law and French law-not so different?' 48 (2) *Current Legal Problems*, 1995, 63, doi 10.1093/clp/48.Part_2.63, on 27 August 2021.

[44] Krygier M, 'Law as tradition' 5 *Law and Philosophy*, 1986, 237.

[45] Atiyah PS and Summers RS, *Form and substance in Anglo-American law: A comparative study of legal reasoning, legal theory, and legal institutions,* Clarendon Press, Oxford,1987, 1.

[46] Clair SP, 'Separation of powers: A new look at the functionalist approach', 331.

[47] It has also been noted that such strict rules have the shortcoming of inflexibility for each branch of government when it must deal with changing political realities and in-fact that the formalist approach often ignores the reality of political relationships. See: Clair SP, 'Separation of powers: A new look at the functionalist approach', 331.

no tradition of respect for judicial independence.[48] The fact that they are in a state of transition from dictatorships to civil democratic governments means that they are still vulnerable to destabilizing levels of violence which has a claw back effect on the gains made towards successful transition. These countries usually receive relatively good ratings for electoral processes, political pluralism, and freedom of association, but achieve very low scores in the area of rule of law and civil liberties.[49]

In such a context, the tension between law and politics during judicial determination does not arise and the overriding expectation from the political arms of government is that the courts will decide politically sensitive and/or controversial cases in line with the desires of the dominant political group.[50] The courts are therefore legally unconstrained and are actually free to participate as blatant political actors, adjusting their decisions to the desired political outcome. Overall, this only serves to further entrench a weak legal culture since a court's political calibration of its decisions towards the policy preferences of the political arms of government does not help build a political culture of respect for judicial independence; neither does it help build a legal culture in which legal rules and concepts exert any meaningful constraints on the exercise of judicial discretion.[51]

The problem to be addressed in any system of government is how a court can strike a balance between the political and legal constraints while maintaining some fidelity to the doctrine of separation of powers. However, formulating a precise definition of executive, legislative, and judicial functions has been a perennial problem for modern governments. Even where this is specifically provided for in the text of a constitution, there is still the hurdle of surmounting the logical difficulties of defining the power of each arm of government and the practical and political consequences of an inflexible application of their delimitation.[52] As earlier discussed and emphasized, the complexities characterizing modern governments make a rigid conception of the doctrine a

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[48] Roux, *The politics of principle*.

[49] 'Breaking the cycle of violence: The role of democracy, rule of law and human rights' https://freedomhouse.org/sites/default/files/inline_images/Taft_World%20Bank_Apr09.pdf on 27 August 2021.

[50] In the context of this paper, 'political arms of government' refers to the executive and legislature who are elected to office and are therefore active politicians Roux, *The politics of principle*, 4.

[51] Roux, *The politics of principle*, 3.

[52] Per Dixon, J. in: *Victorian Stevedoring and General Contracting Co. Pty. Ltd.& Meakes v Dignan* (1931), High Court of Australia.

hindrance that would make modern government impossible.[53]Vile asserts that the more successful varieties of the doctrine have endured because they were grafted with the theory of balanced government, or one of its derivatives such as mixed government, and the concept of checks and balances so as to produce a multi-functional political structure.[54]

III. Application and modification of the roux quadrant model in mapping the legal and political constraints in judicial review of legislative action

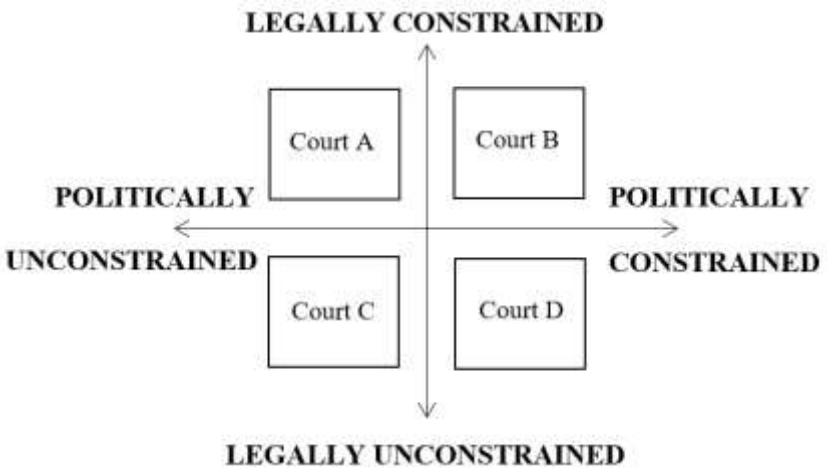
Theunis Roux in his seminal publication, 'The Politics of Principle: The First South African Constitutional Court, 1995-2005' introduced a quadrant-based depiction of the legal and political constraints impacting on constitutional courts and set out the factors according to which a court's position on the quadrant may be mapped.[55] The objective of Roux's work was to measure the achievements of the South African Constitutional Court under Chief Justice Arthur Chaskalson. This paper utilizes a similar approach to map the legal and political constraints impacting on courts with powers of judicial review of legislative action. Having placed the legal constraints on the vertical axis and the political constraints on the horizontal axis, I subsequently derived a quadrant adapted to determination of how courts exercise their power of judicial review of legislative action in relation to their prevailing legal and political constraints.

When the legal and political constraints are plotted on a graph, all courts with a power of judicial review of legislative action can be thought of as occupying a point on the quadrant as illustrated below:

[53] Frankfurter F, *The public and its government*, Yale University Press, New Haven, 1930.

[54] Vile, *Constitutionalism and the separation of powers,* 291.

[55] Roux, *The politics of principle*.



A. Court A: The normatively preferred model court

Court A represents a court that is legally constrained but politically unconstrained. This means that the court is insulated from political attacks and therefore has the independence it requires to carry out its constitutional mandate within the framework of the doctrine of the separation of powers. At the same time, being legally constrained, the court operates within the constraints of legal rules, norms, and practices which when adhered to ensure that its judgements have legitimacy. It is thus proposed as the model and normatively preferred court in regard to judicial review of legislative action.

Courts of this nature exist in mature constitutional democracies where the legal rules, norms, and practices constrain the exercise of judicial discretion to a significant level and all the political actors understand and respect the need for judicial independence.[56] The tension between law and politics in such a system of government recedes into the background only surfacing in isolated cases when an emotionally hyper-charged and controversial case brings it to the fore. However, even in these instances, the courts are often able to justify their decisions in a manner acceptable to both the legal fraternity, thereby retaining legal legitimacy; and to the political actors thereby avoiding political attacks which would otherwise undermine its institutional independence. It follows that, even though Court A is politically unconstrained this does not mean that it should ignore the political consequences of its judgement. Insulation from political attack does not warrant its determining a case in isolation of the political

[56] Waluchow WJ, *A common law theory of judicial review: The living tree,* Cambridge University Press, Cambridge, 2007, 5.

realities since this would result in the earlier highlighted problem of issuance of politically illegitimate and unenforceable orders or the abstract creation of 'paper rights' as discussed in chapter one.

Insulation from political attack is an indicator of a relatively strong and independent judiciary in keeping with the doctrine of separation of powers. In such cases even when the decision of the court eventually suffers from a loss in legitimacy this rarely translates into a loss of judicial independence because the respect of its independence by the political arms of government is such as to make it strong enough to withstand any attempted political attack as a result of such loss.[57] Courts operating within such a system of government would ultimately place emphasis on the functionality of the coordinate branches of government when exercising their power of judicial review of legislative action.[58] Functionalism tends to validate actions by other arms of government as long as they preserve an appropriate balance between the coordinate arms, even if this entails rejection of detailed procedural requirements of a specified rule, norm, or practice. It emphasizes flexibility and balancing of powers by examining the entire framework of relationships between branches with a focus on balance and not separation of their powers. Therefore, Court A would have to adopt such functionalist approach in its determination of such a case within the context of the doctrine of separation of powers.

A functionalist court as described above would in its determination be guided by the fact that a constitution is a 'living' document and should be read as a broad statement of principle rather than as a detailed code. It is on this basis that it is argued that even if one wished to read into it an unwritten separation of powers principle, it would be difficult, if not impossible, to identify a universally agreed upon external template for the appropriate mix of separation and blending of powers amongst the three branches of government. This is the basis upon which it is emphasized that the separation of powers be respected with consideration which is established by the constitution rather than imposing some grand theories upon the document.

Functionalism places emphasis on standards and primarily examines the constitutional purposes as derived from the constitutional text and original understanding of the constitution makers. It thus tends to validate actions by

[57] Roux, *The politics of principle*, 8.

[58] Clair SP, 'Separation of powers: A new look at the functionalist approach', 332.; Manning JF, 'Separation of powers as ordinary interpretation', 1942, 1943.

other arms of government as long as they preserve an appropriate balance between the three coordinate arms. Moreover, in determining whether the core function of a branch has been impermissibly interfered with, the functionalist test emphasizes flexibility and balancing by examining the entire framework of relationships between branches.[59] This is because functionalists view the constitution as emphasizing balance and not separation of powers, thus placing overvaluation on general constitutional purposes.[60] Where the constitution is silent on the manner of exercise of a power by an arm of government, functionalists argue that the law allows the legislature to determine how best the powers in question shall be exercised. [61]Court A would therefore task itself with ensuring that the legislature has respected a broad background purpose to establish and maintain a rough balance or creative tension amongst the three branches.

Under the functionalist approach it is not sufficient to merely demonstrate that a statute regulates or structures the exercise of another branch's power. It must be shown that the challenged branch's action affects those powers in a manner or to a degree that the constitution otherwise prohibits.[62] In its judicial review of legislative action Court A's functionalist analysis would therefore begin by examination of whether the act in question has impermissibly prevented one branch from accomplishing its constitutionally assigned functions. This requires a determination of what functions of each branch are involved with the disputed act and how they are realistically affected.[63] Where the action does not contradict or effectively reallocates power from its specified branch then the court should not invalidate such action by reading abstract notions of separation of powers into otherwise open-ended clauses.

As earlier emphasized, it must also be noted that such determination is always done within a political context and the courts must respect the political realities of the day and not make their determination in isolation of this fact nor subscribe to abstract legal philosophies that would lead them to judgements that

[59] Clair SP, 'Separation of powers: A new look at the functionalist approach', 332.
[60] Manning JF, 'Separation of powers as ordinary interpretation', 1951.
[61] Manning JF, 'Separation of powers as ordinary interpretation', 1951.
[62] Manning JF, 'Separation of powers as ordinary interpretation', 1942, 1943.
[63] Clair SP, 'Separation of powers: A new look at the functionalist approach', 332

may be academically valid but are realistically unenforceable or politically illegitimate. As was noted by Muigai:[64]

> To begin with the courts in constitutional cases face issues that are inescapably 'political' in that they involve a choice between competing values and desires, a choice reflected in the legislative or executive action in question which the court must either condemn or condone.

The doctrine of separation of powers, therefore, reflects many particular decisions about how to allocate and condition the exercise of sovereign power and it is the role of the courts to determine where, how, or to what degree these powers are in fact separated. Functionalism is thus proposed for the normatively preferred court in this chapter, Court A, because it has this inherent uncertainty of outcome which encourages problem-solving negotiations between political actors which in turn helps ensure that political disputes are resolved in the political process, leaving the courts as a last resort measure for times when political processes break down.[65]

When undertaking this role, the courts must exercise their discretion in the knowledge that a constitution is a political compromise and while some articles may speak in specific terms about the locus of a given power and the manner in which it is to be exercised, other provisions are more open ended and indeterminate. No 'one size fits all' theory can do them justice and it has been argued that any approach that tries to elevate a general separation of powers doctrine above the many specifics of the constitution's power-allocating provisions is a contradiction of the background purposes and compromises inherent in a constitution.[66]

B. Court B: The hypothetical zero-sum court

Court B represents a court that is both legally and politically constrained. This creates a relationship in which a gain for one side entails a corresponding loss for the other side, a zero-sum game. The opposite pull of the legal and political constraints influencing a court would make it very difficult for a court

[64] Muigai G, 'The Judiciary in Kenya and the search for a philosophy of law: The case of constitutional adjudication' in Kibwana K, (ed.), *Law and the administration of justice in Kenya*, ICJ Kenya, Nairobi, 1992, 93.

[65] Clair SP, 'Separation of powers: A new look at the functionalist approach', 332.

[66] Manning JF, 'Separation of powers as ordinary interpretation', 1945.

to arrive at a judgement that does not result in a loss in either political or legal terms. Therefore, a decision which complies with the political constraints would result in a loss of legal legitimacy whereas a decision that complies with the legal constraints would result in political attack undermining the judiciary's institutional independence.[67]

Based on the foregoing, it is here proposed that the existence of such a court would be theoretical at best since the relationship between the legal and political factors impacting on a court is one of constant interaction and the push and pull between the two factors cannot be indeterminate. The nature of their interaction is such that at any given point in time the legal factors impacting on a court are specified in relation to the political ones and vice-versa; meaning one set of constraints will always be weaker or stronger in relation to the other. As Roux concluded, '[l]aw and politics cannot be in a permanent state of contradiction'.[68]

Moreover, the nature of politics is one of aligned interests and therefore when a case of judicial review of legislative action is being determined there can be instances when the desired political outcome is justifiable even within a strong legal culture. It is not necessarily the case that a judgement that has the desired political outcome results in a loss of the court's legal legitimacy. Conversely it cannot also be the case that a judgement that strictly adheres to set legal rules, norms, and practices to the exclusion of political factors would automatically result in an attack on the court by political actors. Alternatively, it is also possible for the court to avoid politically controversial cases in order to allow the matter to be settled through the political process, without losing its legal legitimacy.[69] Furthermore, the interaction between the legal and political constraints is both context and case specific. The political context in relation to the legal constraints of any given case can always be distinguished. It cannot be that in all cases the legal and political constraints are in a state of constant contradiction.

It is therefore proposed that the existence of Court B is purely hypothetical and best suited for theorizing on how courts in general should exercise their power of judicial review of legislative action within the confines of

[67] Roux, *The politics of principle*, 12.

[68] Roux, *The politics of principle*, 12.

[69] Perry Jr HW, *Deciding to decide: Agenda setting in the United States Supreme Court,* Harvard University Press, Cambridge, Massachusetts, 1991, 50.

the doctrine of separation of powers. Court B has little or no practicability in terms of its application within modern democratic systems of government.

C. Court C: The dangerous possibility

Court C represents a court that is both legally and politically unconstrained. This court would exist in the context of a system of government that has a weak legal culture where legal rules, norms, and practices are not institutionalized or guaranteed. Judges sitting in this court would therefore not be constrained by legal factors in their determination of a case of judicial review of legislative action and are free to make their judgement according to their own policy preferences. It is in such a court that the problem highlighted in the introduction, '… (a) the dangerous possibility for a reckless court's unwarranted interference with policy choices democratic majorities should be allowed to make…' is most likely to be encountered.

Moreover, Court C is insulated from political attack and is therefore politically unconstrained. In such a context, the court can actually arrive at a decision based solely on the judge's personal policy preferences without the looming threat or consequences of political attack by the legislature. In this case the judge is supreme and is unshackled from legal constraints on the one hand, and from political constraints on the other. The political outcome as well as the legal legitimacy of a judgement from Court C is therefore entirely dependent on the particular judge's policy preferences. Such a judgement can be viewed as a rebuke against the sitting government and is often labelled as judicial activism.

Judicial activism is a term used in public debate about court decisions that are seen to encroach on the jurisdiction of the other two arms of government. However, there is no single definition that has been arrived at that was acceptable to all in legal scholarship mainly because of its multi-dimensional nature. Canon identified and described six dimensions of judicial activism.[70] For the present argument the dimensions that are important are: (a) the degree to which policies

[70] Canon BC, 'Defining the dimensions of judicial activism', 66 *Judicature,* 1983, 239. The six dimensions are: (a) The degree to which policies adopted through democratic processes are judicially invalidated; (b) The degree to which earlier court decisions, doctrines or interpretations are altered; (c) The degree to which constitutional provisions are interpreted contrary to clear language and original intent; (d) The degree to which judicial decisions make substantive policy rather than preserve democratic processes; (e) The degree to which the judiciary eliminates discretion of other governmental actors and makes policy itself; and (f) The degree to which judicial decisions preclude serious consideration of governmental problems by other political actors.

adopted through democratic processes are judicially invalidated; (b) the degree to which judicial decisions make substantive policy rather than preserve democratic processes; (c) the degree to which the judiciary eliminates discretion of other governmental actors and makes policy itself; and (d) the degree to which judicial decisions preclude serious consideration of governmental problems by other political actors. In each of these instances it is evident that the court would be interfering with policy choices that democratic majorities should be allowed to make. Doing so would be an active breach of the doctrine of separation of powers and encroachment on the law and policy making function of parliament.

When judges in Court C take any of the above-mentioned four courses of action they are in essence exercising their discretion to elevate their determination on a given issue above that of either: (i) the people–where democratic processes are judicially invalidated; (ii) other government actors–where the judiciary goes ahead to make policy itself; or (iii) other political actors – where the judiciary precludes serious consideration of governmental problems by other political actors such as opposition parties who don't have a majority in parliament, or are even not represented in the sitting parliament.[71] Court C is therefore proposed as the least preferred court in regards to judicial review of legislative action.

However, it must also be noted that within the context of a democratic system of government the courts play a central role in shaping the processes of legal and political reform to establish a civil, constitutional, and democratic government with the courts as the main guardians of the constitution and the rule of law.[72] The more central role of the courts increases the scope for judicial activism which in some cases leads to increased politicization of the courts to the point of open conflict between political power holders and the judiciary. When this happens, it erodes the insulation from political attack that is otherwise enjoyed by Court C. In order to avoid this and to retain their insulation such a court may therefore seek to consolidate its position through judicial self-limitation.[73] This is also not desirable since it opens up the court to the possibility of its not being free of both individual or institutional connections with, and influence by, political actors in the other arms of government. This scenario

[71] Canon BC, 'Defining the dimensions of judicial activism', 239.

[72] Gloppen S, *How to assess the political role of the Zambian Courts,* Chr. Michelsen Institute, Bergen, 2004, 3, 5.

[73] Roux, *The politics of principle*, 10.

would greatly undermine judicial independence and hinder the effective exercise of its oversight role to guard against the abuse of power by the other arms of government under the doctrine of separation of powers. [74]

D. Court D: The worst deviation from the doctrine

Court D represents a court that is politically constrained but legally unconstrained. In this court, the legal rules, norms, and practices exert relatively little constraint on judges, and they are very vulnerable to political attacks. It can be found in the context of a newly established judiciary in a fragile or transitional democracy with no tradition of respect for judicial independence.[75] This means that any decision by Court D can be rejected by political actors who have both the capacity and the will to attack the court in a manner that results in the deflation of its individual and institutional independence. This is primarily because the political actors have the simple option of removing recalcitrant judges and replacing them with amenable judges. Court D is the court most vulnerable to political attack and eventual capture by political actors.

Generally, this court tends to operate within a political atmosphere that expects the court to decide on politically controversial cases in line with the desired political outcome of the dominant political group.[76] Such a court may therefore be conspicuously dependent on the political arms of government which greatly hinders its exercise of its oversight role over parliament through judicial review of legislative action. Court D is therefore proposed as the worst deviation from the tenets of the doctrine of separation of powers in regard to judicial review of legislative action.

Moreover, a judge in Court D cannot be free from inappropriate connection with, and influence by, the executive and legislative branches of government; without facing the imminent threat of political sanctions. As discussed above, the political actors have the option of appointing agreeable judges to the bench in order to guarantee judgements that are favourable to and supportive of the dominant political regime of the day. Politically controversial cases do not pose a problem for Court D since its determination is guided by the desired political outcome irrespective of the corresponding legal legitimacy,

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[74] ECOSOC, *The Bangalore principles of judicial conduct*, 2002.

[75] Roux, *The politics of principle*, 10.

[76] Helmke G, *Courts under constraints: Judges, generals and presidents in Argentina*, Cambridge University Press, Cambridge, 2005, 28.

or lack thereof. This court evidently does not meet Montesquieu's basic principle of placing judicial and executive power in different hands and of the mutual balancing and restraining of the legislative and executive power.[77]

IV. Implications for judicial review of legislative action

Judicial review of legislative action should not be viewed purely in terms of a contest between the judiciary and the legislature whereby the only available outcome is either the constitutional validation or invalidation of those actions. It should be noted that the courts also have the role of complementing the law making function of parliament by interpreting the laws to ensure they implement their purpose rather than the letter of the law where the two diverge.[78] This is because legislatures enact laws to fulfil a specific purpose within the context of a limited time span and therefore at times they do not have the time to deliberate or foresee how those laws shall be applied over time. [79] The laws thus passed will never perfectly capture the purposes that inspired their enactment within the specific statutes hence the need for judicial interpretation.

Judicial review of legislative action is a necessary check and balance provided for within the framework of the doctrine of separation of powers as applied in modern democratic systems of government. However, in order for it to be effective there is a need for procedural mechanisms that define how the courts can exercise it. This is best achieved when these mechanisms are defined within the constitutional order that grants executive, legislative, and judicial actors their powers and the manner in which they should be exercised.[80] It is these mechanisms that would help a court negotiate the legal and political constraints impacting on it so as to remain within, or move towards, being within the realm of the normatively preferred model court (Court A) as described above.

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[77] Marshall G, *Constitutional theory*, 102.

[78] Manning JF, 'Separation of powers as ordinary interpretation', 1972.

[79] The lifetime of the sitting parliament before the next general elections; this is usually a five-year period in most modern democracies.

[80] Akech M, 'Abuse of power and corruption in Kenya: Will the new Constitution enhance government accountability?' 18 *Indiana Journal of Global Legal Studies*, 2011, 341.

When there is no framework within which judicial review of legislative action is done then the issue of legitimacy arises and parliament can contest the exercise of this judicial power since, when viewed in contrast to the exercise of legislative power, it is exercised by judicial officers who are not elected by, and therefore not accountable to, the citizens.[81] It provides a means of enhancing government accountability within the framework of the doctrine of separation of powers. The doctrine has been interpreted to simply advocate for the prevention of tyranny through the allocation of excessive power on any one person or body, and the check on one power by another.[82]

However, it must always be borne in mind that complete separation of powers with no overlaps or coordination between the branches is not conducive to the proper function of government as a whole. The emphasis should always be on cooperation rather than separation in constant interchange of give and take between the three branches in order to ensure optimum functionality of the government as a whole. Courts operating within the realm of the normatively preferred model court (Court A) should always strive to maintain a balance between stability and flexibility since the law must be stable and yet it cannot be still.[83]

Above all, it is here reiterated that the extent to which a court may intervene in the functions of other branches of government must be clearly delineated and the limits of judicial power acknowledged.[84] This is especially due to the absence of direct proper accountability and safeguarding of the judiciary from political processes and the question always remains: how far is too far? How would judges react if the legislature passed a resolution dictating how the court should construe a piece of legislation, or if the executive directed the way a case has to be decided? These are questions that judges should have at the back of their minds when laying down the dos and don'ts for future action in regard to judicial review of legislative action.[85] This would help in demarcating the point

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[81] Akech M, 'Abuse of power and corruption in Kenya: Will the new Constitution enhance government accountability?', 341.

[82] Vyas Y, 'The independence of the Judiciary: A third world perspective', 11 *Third World Legal Studies*, 1992, 127.

[83] Pound R, *Law finding through experience and reason*, University of Georgia Press, Athens, 1960, 13.

[84] Asher EO, 'Separation of powers in Kenya: The judicial function and judicial restraint; Whither goeth the law?' 35 *Journal of Law, Policy and Globalization*, 2015, 107.

[85] Iyer VRK, *Law and the people*, Peoples Publishing House, New Delhi, 1972, 45.

at which the court's intervention moves from judicial oversight and becomes usurpation of power in breach of the doctrine of separation of powers.

Also, it is not possible or indeed desirable for a court to ignore political and social realities, especially when it comes to judicial review of legislative action. To do so would be self-delusion.[86] The courts must always have regard to the results achieved socially as part of the process of ensuring justice with each individual case. Judicial review is a measure of last resort and courts should be reluctant to go against something that is the express wish of the legislature, especially where these wishes have been subjected to the rules governing the proceedings in Parliament.[87]

The questions around the framework within which the question as to how and when the courts may intervene in legislative action do not have ready answers and appropriate answers can only emerge in the course of time, through the lessons of experience by way of actual cases.[88] The conceptual framework developed in this paper can be used to assess the exercise of the power of judicial review of legislative action by Kenyan courts in specific cases with a view to establishing how they handle the law and politics tensions influencing them and whether they fit within the realm of the normatively preferred model court (Court A) as described above, or any of the other three courts in the quadrant.

[86] Friedman W, 'Judges, politics and law' 8 *Canadian Bar Review*, 1951, 837.

[87] Daintith T and Page A*, The Executive in the coalition: Structure, anatomy and internal control*, Oxford University Press, Oxford, 1999, 248.

[88] Ojwang JB, 'Separation of powers under Kenya's Constitution: Emerging relationship between the Legislature and the Judiciary', Annual Judges Colloquium, Mombasa, August 2016, 8.