

# Emerging Horizons: Transformative Prudentialism and the Renaissance of Judicial Philosophy in the Supreme Court of Kenya

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## Abstract

*After over a decade of extensive work, the Supreme Court of Kenya has built a substantial track record. Consequently, a thorough appraisal of the judges' efforts is undoubtedly warranted, given the Court's crucial role in safeguarding democracy and upholding the rule of law in Kenya. How judges go about deciding cases has consistently attracted considerable scrutiny. Moreover, in the study of judicial behaviour, there are various considerations as to which factors affect the outcomes of judicial decisions. Judicial philosophy, being one such factor, is a chosen, articulable, and rationally defensible method of judicial decision-making that generally includes an explicitly articulated view of many legal concepts, including separation of powers.*

*This paper conducts a hermeneutic analysis of Supreme Court cases to investigate the judicial philosophy of the Supreme Court regarding the concept of separation of powers and evaluate its appropriateness for the post-2010 constitutional dispensation. It is argued that the philosophy the Court has adopted is not clear-cut, it is comprised of excessive restraint and sporadic overreach. Consequently, it is proposed that the Court should embrace transformative prudentialism as a philosophy because unlike judicial restraint or judicial activism, it is not tied down to determined actions irrespective of the circumstances, it seeks to meet the aims of transformative constitutionalism.*

**Key Words:** *Supreme Court of Kenya, Judicial Philosophy, Separation of Powers, Judicial Restraint, Judicial Activism, Transformative Prudentialism.*

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## I. Introduction

Separation of powers as a legal concept has garnered much attention from legal scholars, who have published a plethora of books and articles on the subject. It is a term fraught with ambiguity.<sup>1</sup> However, in a broad sense, it refers to the notion that ideally<sup>2</sup> government should be divided into three branches: the legislature, the executive, and the judiciary. Each branch has a corresponding function (legislative, executive or judicial) and the government is tempered by checks and balances among these branches.<sup>3</sup> It is enshrined in the Constitution of Kenya, 2010 (hereinafter ‘Constitution’) particularly with regard to the recognition of the legislature, executive, and judiciary as different, independent, arms of government.<sup>4</sup> It has been the subject of dozens of books and articles in Kenyan legal scholarship,<sup>5</sup> and it is taught in law schools across the country.<sup>6</sup> Even in the political arena, it seems to have become common parlance as references to the doctrine of separation of powers are recurrent amongst members of the executive and legislature.<sup>7</sup> However, what jurisprudential views

<sup>1</sup> Kavanagh A, ‘The constitutional separation of powers’ in Dyzenhaus D and Throburn M (eds) *Philosophical foundations of constitutional law*, Oxford University Press, Oxford, 2016, 223.

<sup>2</sup> This caveat is added because, in the literature, commissions, and independent offices, such as those under Chapter Fifteen of the Constitution of Kenya, 2010, have been considered a ‘fourth branch’ of government. See generally, Mohammed F, ‘The fourth branch: Challenges and opportunities for a robust and meaningful role for South Africa’s state institutions supporting democracy’ in Landau D and Bilchitz D (eds) *The evolution of separation of powers: Between the global north and the global south*, Edward Elgar Publishing, Cheltenham, 2018.

<sup>3</sup> Madison J, ‘Federalist No 51: The structure of the government must furnish the proper checks and balances between the different departments’ Library of Congress, 8 February 1788– <<https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493427>> on 6 March 2023.

<sup>4</sup> Article 93, 130, and 160, *Constitution of Kenya* (2010).

<sup>5</sup> Kibet E and Wangechi K, ‘A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya’ 1(1) *Strathmore Law Review*, 2016, 220; Oluoch E, ‘Separation of powers in Kenya: The judicial function and judicial restraint; whither goeth the law?’ 35 (1) *Journal of Law, Policy & Globalization*, 2015, 95; Makau M, ‘Justice under siege: The rule of law and judicial subservience in Kenya’ 23 (1) *Human Rights Quarterly*, 2001, 118; Amuhaya A, Namusonge G, and Nthiga P, ‘Influence of separation of powers on performance of governance in county governments in Kenya’ 2 (2) *Journal of Public Policy & Governance*, 2018, 23.

<sup>6</sup> Second Schedule, *Legal Education Act* (Act No. 27 of 2012). This conclusion is arrived at given that the Legal Education Act provides that constitutional law is a core course that must be taught at the degree level. Given that separation of powers is a key concept in constitutional law, it follows that it is probably taught in law schools all over the country.

<sup>7</sup> Sing’oei J, ‘Raila Odinga asks president Uhuru Kenyatta to keep hands off courts and respect separation of powers’ *The Standard*, 2014–<<https://www.standardmedia.co.ke/article/2000105245/raila-odinga-asks-president-uhuru-kenyatta-to-keep-hands-off-courts-and-respect-separation-of-powers>> on 23 September 2022; Shilaho W, ‘A decades old assault on the separation of powers has left Kenya a fractious legacy’ *The Conversation*, 2020–<<https://theconversation.com/a-decades-old-assault-on-the-separation-of-powers-has-left-kenya-a-fractious-legacy-140481>> on 23 September 2022. See also, Sihanya B, ‘Fusion and separation of powers, and checks and balances in Kenya and

does the judiciary hold with regard to this concept? In this case, views pertain to more than the judges' beliefs or opinions; they likewise and primarily refer to their (judicial) *philosophy*.<sup>8</sup>

Judicial philosophy is defined as a:

'chosen, articulable, and rationally defensible method of judicial decision-making that generally includes an explicitly articulated view of such things as the role and proper interpretation of the Constitution, the judiciary's place in a constitutional regime, the function of the law, separation of powers, and how relevant sources are to be interpreted.'<sup>9</sup>

Since the process by which judges decide cases has consistently attracted considerable scrutiny,<sup>10</sup> judicial philosophy is among the various factors that are taken into account in the study of judicial behaviour.<sup>11</sup>

The significance of a judge's articulated view on matters such as separation of powers in shaping decision outcomes cannot be understated. Consequently, it is important to unravel the intricate tapestry of their philosophies before appraising their decisions.<sup>12</sup> The Kenyan Supreme Court (hereinafter 'Supreme Court')<sup>13</sup> has pronounced itself on separation of powers many times, however, its judicial philosophy seems, at the moment, unclear. This is evident from its fluctuating judicial stance in cases such as *Justus Kariuki Mate v Martin Nyaga Wambora*,<sup>14</sup> where it exercised judicial restraint, versus *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties)*; *Katiba Institute & 2 others*

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Africa' in Sihanya B (ed), *Constitutional democracy, regulatory, and administrative law in Kenya and Africa: Presidency, premier, legislature, judiciary, commissions, devolution, bureaucracy and administrative justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi, 2020, 19.

<sup>8</sup> Dane S, 'Ordered liberty and self-restraint: The judicial philosophy of the second Justice Harlan' 51(3) *University of Cincinnati Law Review*, 1982, 548.

<sup>9</sup> Benzoni F and Dodrill C, 'Does judicial philosophy really matter? A case study' 113(2) *West Virginia Law Review*, 2011, 288.

<sup>10</sup> Barak A, 'A judge on judging: The role of a supreme court in a democracy' 116(16) *Harvard Law Review*, 2002, 20-23; Dworkin R, 'Judge Roberts on trial' *New York Review of Books*, 2005, 3—< <https://www.nybooks.com/articles/2005/10/20/judge-roberts-on-trial/>> on 30 June 2023. The discussion of a judge's role is not limited to Kenya but is discussed in many jurisdictions.

<sup>11</sup> Solum L, 'Judicial selection: Ideology versus character' 26(2) *Cardozo Law Review*, 2005, 668.

<sup>12</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 330.

<sup>13</sup> Where there is no ambiguity as to which court is being referred to, the author refers to this court as the 'Court'.

<sup>14</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR; *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR; *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.

(*Amicus Curiae*),<sup>15</sup> where it, arguably, overreached its authority. Furthermore, the Supreme Court has declined to rule on certain key separation of powers issues leading to ambiguity in the area.<sup>16</sup> This paper conducts a hermeneutic analysis of Supreme Court cases to investigate what the judicial philosophy of the Supreme Court with regard to separation of powers is and evaluate its appropriateness for the post-2010 constitutional dispensation. It is argued that the philosophy the Court has adopted is not clear-cut; it is comprised of excessive restraint and sporadic overreach. For this reason, the Court should embrace transformative prudentialism as a philosophy because, unlike judicial restraint or judicial activism, it is not tied down to determined actions irrespective of the circumstances. It seeks to meet the aims of transformative constitutionalism.

The emphasis is on the Supreme Court's judicial philosophy because, first, decisions of apex courts reflect not only how the institution has functioned throughout history, but also how jurists in that legal system think.<sup>17</sup> Second, and in any case, after over a decade of extensive work,<sup>18</sup> the Supreme Court's track record allows for a thorough evaluation of the judges' efforts, and their anticipated impact in safeguarding democracy and upholding the rule of law in Kenya makes such an assessment undoubtedly warranted.<sup>19</sup>

The ongoing academic discourse surrounding judicial philosophy has proved a polarising topic with some scholars, depending on the theory of law they subscribe to, regarding it as essential or inconsequential.<sup>20</sup> Although there is a dearth of scholarship on this matter in Kenya, Gibson Kamau's contribution sheds light on the judicial philosophy of former Chief Justice Robin Hancox as one that rejected the notion of separation of powers.<sup>21</sup> The gap in the existing literature is significant as the author has yet to come across any discourse on what

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<sup>15</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR; See also, Thiankolu M, 'Why Kenya's judge recruiters are skeptical about activism on the bench' *The Conversation*, 2021—<<https://theconversation.com/why-kenyas-judge-recruiters-are-sceptical-about-activism-on-the-bench-160125>> on 23 September 2022.

<sup>16</sup> *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR; *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.

<sup>17</sup> Ferrera G, and Mystica A, 'Appellate judges and philosophical theories: Judicial philosophy or mere coincidence' 14(4) *Richmond Journal of Law and the Public Interest*, 2011, 582.

<sup>18</sup> In October 2011, the inaugural sitting of the Supreme Court was held. —<<http://kenyalaw.org/kenyalawblog/remarks-on-the-inaugural-sitting-of-the-supreme-court/>> on 13 August 2022.

<sup>19</sup> —<<http://kenyalaw.org/kenyalawblog/remarks-on-the-inaugural-sitting-of-the-supreme-court/>> on 13 August 2022.

<sup>20</sup> Segal J and Spaeth J, *The supreme court and the attitudinal model revisited*, Cambridge University Press, New York, 1993, 70; Barak, 'A judge on judging', 116.

<sup>21</sup> Kamau G, 'Confronting dictatorship in Kenya' 2(4) *Journal of Democracy*, 1991, 122.

the Supreme Court's judicial philosophy is with regard to separation of powers. Accordingly, the intervention this study seeks to make is an attempt at putting together what that philosophy is and critically assessing its appropriateness in this post-2010 constitutional dispensation.

Section two of this study examines the importance of judicial philosophy. It begins by responding to the attitudinal theory before arguing for the importance of judicial philosophy. Section three examines how the Court resolves separation of powers issues to unveil its underlying philosophy. Section four assesses the appropriateness of that philosophy. It is argued that what a commitment to the Constitution and separation of powers requires in terms of philosophy goes slightly beyond what the Court is doing, into transformative prudentialism. Section five concludes the study.

## II. Does Judicial Philosophy Really Matter?

It seems prudent to begin by posing a basic question: *why* employ a judicial philosophy in judicial adjudication? What is to be gained by doing so? The relevance of a judge subscribing to a particular philosophy may seem obvious, but some scholars have argued that doing so is inconsequential.<sup>22</sup> It is therefore not entirely manifest that judicial philosophy matters. For this reason, it is essential to demonstrate that judicial philosophy, as a concept, genuinely matters in order to appraise it, or else the entire inquiry will be for naught.

### *i. Response to the attitudinal model*

The Legal Realist movement of the 1920s brought about a significant shift in the way the judiciary's role in decision-making was viewed. The movement rejected the idea that judges are neutral and impartial in their decision-making,<sup>23</sup> instead advocating for the consideration of a judge's personal attitudes, values, and beliefs in the decision-making process.<sup>24</sup> The attitudinal model, which emerged from this movement, incorporates elements of political science, psychology, and economics, and posits that a judge's political ideology is the key determinant in their decision-making.<sup>25</sup>

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<sup>22</sup> Segal and Spaeth, *The supreme court and the attitudinal model revisited*, 116.

<sup>23</sup> Onyango P, 'Judicial activism and disenchantment of legal formalism in Kenya' *Academia*, 2015, 12.

<sup>24</sup> Hudkins J, 'The supreme court's chief umpire: Judging the legal rhetoric and judicial philosophy of John Roberts' Published Doctor of Philosophy thesis, Baylor University, Waco, 2011, 128.

<sup>25</sup> Segal and Spaeth, *The supreme court and the attitudinal model revisited*, 91. While the author intends to explain the significance of judicial philosophy, they recognise that the attitudinal model has gained

According to the attitudinal model, two judges with similar political ideologies but different judicial philosophies would be expected to make similar decisions.<sup>26</sup> Proponents of the attitudinal model assert that a judge's ideology trumps their judicial philosophy when it comes to their decision-making, and that it is the most significant factor in determining how a judge votes.<sup>27</sup> In other words, the political beliefs of a judge play a crucial role in their decision-making process.<sup>28</sup> Of course, the applicability of the attitudinal model would depend on the specifics of every legal system, but if the judges in the Kenyan Supreme Court are sometimes influenced by their personal attitudes, values and attitudes, then this model may be relevant in explaining their behaviour. It, therefore, seems that the place of judicial philosophy when pitted against ideology is in the balance. However, as will be shown later, it is not the only factor that may influence judicial decision making.

Although related, it is imperative to briefly note that the concepts of ideology and judicial philosophy are not identical. Ideology refers to the manner of thinking of an individual, the theorising of *outcomes* and how the world ought to be.<sup>29</sup> It has traditionally been envisioned as falling along the left-right spectrum.<sup>30</sup> Judicial philosophy, however, is concerned with *methods* of decision-making and consists of views about strictly law-related elements such as the role of courts in a democracy, as well as separation of powers.<sup>31</sup> Certain judicial philosophies align with certain political ideologies such as textualism and conservatism in the United States (US), but since ideology entails the view of how the world ought to be while judicial philosophy consists of a specific method of reasoning, it is expected that they could lead to different outcomes.<sup>32</sup>

The problem of outcomes is one area of criticism that the attitudinal model faces. The logic of the attitudinal model leads to the conclusion that a

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popularity in legal philosophy and warrants discussion. Furthermore, it is noted that judicial philosophy is a general philosophy that applies to legal systems worldwide, and thus scholarship beyond Kenya has been influential in shaping this discourse globally.

<sup>26</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 288.

<sup>27</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 288.

<sup>28</sup> Segal and Spaeth, *The supreme court and the attitudinal model revisited*, 91.

<sup>29</sup> Merriam-Webster dictionary, 11<sup>th</sup> ed.

<sup>30</sup> Puthilam A, Kapoor H, Karandikar S, 'Beyond left and right: A scale to measure political ideology in India' PsyArXiv Preprints, 2021, 5.

<sup>31</sup> Young R, 'A judicial traditionalist confronts Justice Brennan's school of judicial philosophy' 33 (1) *Oklahoma City University Law Review*, 2008, 265; Benzoni and Dodrill, 'Does judicial philosophy really matter?', 288. See also, Czarnecki J and Ford W, 'The phantom philosophy? An empirical investigation of legal interpretation' 65 (3) *Maryland Law Review*, 2006, 850-851.

<sup>32</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 289.

unanimous decision should almost never occur (unless all judges share a single ideology), as it insists that judges independently make decisions based on their ideologies.<sup>33</sup> While unanimous affirmances may seem illogical or perplexing from an attitudinal perspective, they have been found to make sense from other non-attitudinal perspectives.<sup>34</sup> For example, the decisions of the Court may be substantially influenced by the law,<sup>35</sup> meaning the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, and/or precedent.<sup>36</sup> Secondly, there may be strategic reasons for unanimous affirmances such as upholding the legitimacy of the court despite differing ideologies.<sup>37</sup> Lastly, and most importantly, the judges 'views of some jurisprudential issues' -or rather their judicial philosophy- may reasonably override their political inclinations in decision-making.<sup>38</sup>

This last reason has been proven empirically, as one study disputing the attitudinal model has found: two conservative judges in the US Fourth Circuit reached differing conclusions on a variety of cases by relying primarily on their judicial philosophies.<sup>39</sup> Admittedly, far-reaching conclusions cannot be made regarding the relationship between ideology and philosophy, given that the study focused on two judges and a small number of cases.<sup>40</sup> However, what it did show was that, at the very least, judicial philosophy and not just ideology (as endorsed by the attitudinal model), matters in some cases and for some judges during adjudication.<sup>41</sup> This underscores the pivotal role of judicial philosophy, which intertwines with and, in some cases, supersedes ideology, unravelling a captivating layer within the intricate fabric of judicial decision-making.

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<sup>33</sup> Roy D and Songer D, 'Does the attitudinal model explain unanimous reversals?' 31 (3) *The Justice System Journal*, 2010, 344.

<sup>34</sup> Roy and Songer, 'Does the attitudinal model explain unanimous reversals?', 345.

<sup>35</sup> Roy and Songer, 'Does the attitudinal model explain unanimous reversals?', 345; See generally, Kritzer H, Pickerill M, and Richards M, 'Bringing the Law Back In: Finding a Role for Law in Models of Supreme Court Decision-Making.' Presented at the annual meeting of the Midwest Political Science Association, Chicago, 1998.

<sup>36</sup> Roy and Songer, 'Does the attitudinal model explain unanimous reversals?', 345. See generally, Dworkin R, *Law's empire*, Harvard University Press, Cambridge, 1986, 1-11.

<sup>37</sup> Roy and Songer, 'Does the attitudinal model explain unanimous reversals?', 345.

<sup>38</sup> Roy and Songer, 'Does the attitudinal model explain unanimous reversals?', 345. See generally, Perry H, *Deciding to decide: Agenda setting in the United States Supreme Court*, Harvard University Press, Cambridge, 1991.

<sup>39</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 330.

<sup>40</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 330.

<sup>41</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 331.



ii. *It matters for its own sake*

So far, it has been established that the attitudinal model does not preclude the use of judicial philosophy, at least in some cases. However, the question asked at the beginning - why employ a judicial philosophy - cannot be answered by conceding that some judges use it in some cases. This section attempts to show that there is something inherent in judicial philosophy that makes it, not just desirable, but also relevant to judicial adjudication. It does not, however, discuss the normative question of whether judicial philosophy matters under certain circumstances only, but it seeks to understand why a judicial philosophy matters in adjudication and in particular, to judges of the apex court.

In *Law's Empire*, Ronald Dworkin asserts that the process of judicial adjudication involves their background, personal experience and philosophy.<sup>42</sup> A case may be made for judges mitigating their biases (or ideologies) through the use of judicial philosophies. Ideologies can at times be animated by profound, pragmatic, consequentialist, concerns,<sup>43</sup> but some scholars argue that when all is said and done, judge-made law is based on reason, not biases, and judges are there to apply the law based on such reason, not make it.<sup>44</sup> Implicit in these insights is that judicial philosophy, as a method of adjudication, must also encompass a modest aspect of inquiry, allowing for a deeper understanding of the complex dynamics between law, reason, and societal dynamics.<sup>45</sup> By engaging in this practice, judges demonstrate maturity, transcending personal biases, and the capacity for thoughtful deliberation, fostering sound decision-making.<sup>46</sup> Judicial philosophy is thus critical in understanding the law-making role of judges in a democracy<sup>47</sup> because, even though judges inevitably rely on their personal views in adjudication,<sup>48</sup> the provenance of the moral authority that they are imbued with is not their predispositions, rather, it is their capacity as guardians and interpreters of the law.<sup>49</sup>

That being said, there is a need for a positive justification for employing a

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<sup>42</sup> Dworkin, *Law's empire*, 10-11.

<sup>43</sup> Galston M, 'Activism and restraint: The evolution of Harlan Fiske Stone's judicial philosophy' 70(1) *Tulane Law Review*, 1995-1996, 142.

<sup>44</sup> Nagan P and Manausa S, 'Judicial philosophy for thoughtful politicians and business leaders' 1(1) *Corporate and Business Law Journal*, 2020, 8.

<sup>45</sup> Nagan and Manausa, 'Judicial philosophy for thoughtful politicians and business leaders', 34.

<sup>46</sup> Nagan and Manausa, 'Judicial philosophy for thoughtful politicians and business leaders', 36.

<sup>47</sup> Poulos J, 'The judicial philosophy of Roger Traynor' 46(6) *Hastings Law Journal*, 1995, 1719.

<sup>48</sup> Segal and Spaeth, *The supreme court and the attitudinal model revisited*, 91.

<sup>49</sup> Allen W, Strine L and Stark L, 'Judge 'the game by the rules': An appreciation of the judicial philosophy and method of Walter Stapleton' 6(2) *Delaware Law Review*, 2003, 270.

judicial philosophy beyond the negative reason of mitigating biases. Can such a justification be found? One possible justification is rooted in the nature of judicial philosophy itself. It has already been established that this philosophy is a *method* and diverse methods can lead to diverse outcomes of decisions.<sup>50</sup> When the contours of these outcomes are studied and explained, it becomes apparent that judicial philosophy is relevant for predicting outcomes and further, for the consistency of these outcomes, as predictions cannot be formulated where consistency is lacking.<sup>51</sup> Admittedly, an insistence on predictions and consistency seems to be an admission as to the certainty of law. This has, in fact, been the basis of the contentious and ostensible conflict between legal realism and legal positivism in the legal arena.<sup>52</sup> For this reason, it is imperative to clarify what is meant here by predictability.

Justice Oliver Wendell Holmes is, quite rightly, considered to be the father of legal realism.<sup>53</sup> Holmes rejected legal fundamentalism that conceptualised law as certain set of rules that function objectively.<sup>54</sup> In *The Path of the Law*, Justice Holmes conceptualised law as the predictions of how judges will adjudicate in fact, and nothing more extravagant.<sup>55</sup> Due to this pithy quip, intellectual concerns and apprehension from academia were fixated on judges -and implicitly judicial philosophy.<sup>56</sup> Holmes was trying to say that judges who are cognizant of the professional value of judicial philosophy would undoubtedly recognise the need to critically assess one's own assumptions as the foundation for logical reasoning.<sup>57</sup>

Justice Benjamin Cardozo also observed in *The Nature of the Judicial Process* that from a judicial standpoint, the law never 'is', it is always 'about to be', and this aided in putting Holmes' understanding of logic and experience into closer perspective.<sup>58</sup> In the political back-and-forth of social life, Holmes argued that an inordinate fixation with certainty was an illusion, and that comfortable repose was not humanity's fate.<sup>59</sup> This presented a serious challenge to accepted knowledge and platitudes on the rule of law, custom, and predictability- the position that

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<sup>50</sup> Cavendish EA, 'The legitimacy of considering judicial philosophy in the nominations process' 27(7) *Nexus - A Journal of Opinion*, 2002, 29.

<sup>51</sup> Benzoni and Dodrill, 'Does judicial philosophy really matter?', 330-331.

<sup>52</sup> Gouch W, 'The judicial philosophy of Justice Cardozo: The basis of a definitive jurisprudence' 6(2) *Maryland Law Forum*, 1976, 53, 57.

<sup>53</sup> Reed T, 'Holmes and the paths of the Law' 37 *American Journal of Legal History*, 1993, 273, 301.

<sup>54</sup> Ferrera and Mystica, 'Appellate judges and philosophical theories', 574.

<sup>55</sup> Holmes O, 'The path of the law' 10(8) *Harvard Law Review*, 1897, 460-461.

<sup>56</sup> Nagan and Manausa, 'Judicial philosophy for thoughtful politicians and business leaders', 4.

<sup>57</sup> Nagan and Manausa, 'Judicial philosophy for thoughtful politicians and business leaders', 4.

<sup>58</sup> Cardozo B, *The nature of the judicial process*, Yale University Press, New Haven, 1921, 126.

<sup>59</sup> Holmes, 'The path of the law', 465.

legal positivists subscribe to.<sup>60</sup> In finding the relevance of judicial philosophy with regard to predictability, it would be fatuous to insist on absolute certainty since: first, speculative conclusions concerning trends of future decisions, regardless of the quantitative nature of the conclusions, are often proved false by time;<sup>61</sup> second, law often reflects both the certitude and the incertitude of human experience, and the implicit philosophy of any given judge will thus reflect their personal views on this law.<sup>62</sup>

Notwithstanding these facts, by examining critically what judges do say, when they say anything, it is quite possible to determine if they possess a consistent, or at the very least, coherent, point of view that may help predict how they are likely to approach major controversies and/or issues as the years go on.<sup>63</sup> This was the same solution given to equity jurisdiction after criticisms were levelled regarding the Lord Chancellor's discretion;<sup>64</sup> equity was formalised into the maxims of equity.<sup>65</sup> The maxims, which eventually secured the stability of equity, were general guidelines, not rules, that could be applied in a great diversity of circumstances.<sup>66</sup> In the same way, the degree of predictability can be understood from a vantage point of Dworkinism even if realism denies that any predictability exists because certain principles will guide judges as they adjudicate and although absolute certainty cannot be achieved, it is possible to know a judge's coherent view on certain matters according to which, their decisions will fall in or along that spectrum.<sup>67</sup> This is the sort of predictability achieved by judicial philosophy, general guidelines and not absolute certainty, and it matters in this context of judicial adjudication because it ensures that judges' decisions are guided by coherent principles, which promotes the legitimacy and effectiveness of the legal system, as well as the polity's confidence in the law. Judicial philosophy as a concept illuminates certain perspectives and provides

<sup>60</sup> Nagan and Manaua, 'Judicial philosophy for thoughtful politicians and business leaders', 4.

<sup>61</sup> Riemenschneider J, 'The judicial philosophy and William Rehnquist' 45(1) *Mississippi Law Journal*, 1974, 245.

<sup>62</sup> Nagan and Manaua, 'Judicial philosophy for thoughtful politicians and business leaders', 16.

<sup>63</sup> Hudkins J, 'The supreme court's chief umpire: Judging the legal rhetoric and judicial philosophy of John Roberts' Published Doctor of Philosophy thesis, Baylor University, Waco, 2011, 124.

<sup>64</sup> One such criticism was levelled by John Selden who averred that: 'Equity is a roguish thing: for law we have measure, know what to trust to, equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. It is as if they should make the standard for what we call a foot a chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another has a short foot, a third an indifferent foot. 'Tis the same with the chancellor's conscience'. See Virgo G, *The principles of equity and trusts*, 3<sup>rd</sup> ed, Oxford University Press, Oxford, 2018, 5.

<sup>65</sup> Virgo, *The principles of equity and trusts*, 23.

<sup>66</sup> Virgo, *The principles of equity and trusts*, 23.

<sup>67</sup> Dworkin, *Law's empire*, 10-11; See generally, Carter S, 'The confirmation mess' 101(6) *Harvard Law Review*, 1988, 1195.

challenges to judges, lawyers, and other stakeholders impacted by the law,<sup>68</sup> but the fact remains that it does matter in judicial decision making.

### III. Understanding the Supreme Court's Judicial Philosophy

This section highlights the Supreme Court's judicial philosophy and jurisprudential tendencies through an objective, hermeneutic, review of majority opinions authored in the last decade. From these opinions, it has been discerned that the Court's philosophy with regard to separation of powers, is guided by excessive restraint and sporadic overreach.

#### i. *Limitations to, and methodology used in, the extraction of the Court's judicial philosophy*

In attempting to define the contours of a judge's judicial philosophy, some scholars have opted to examine three sources: (1) ideas articulated by the Supreme Court Justices (retired or current) in opinions and other academic work, (2) ideas attributed to the judges by others, and (3) values implicit in the judge's pattern of decision-making as extracted from the decided cases.<sup>69</sup> The value patterns revealed by the three sources, namely, *self-articulated* philosophy (as reflected in the judge's writings), *attributed* philosophy (as reflected in the writings of others) and *operative* philosophy (as reflected in the decision record) have then been used to produce a coherent pattern which one may appropriately label as the judge's judicial philosophy on a particular matter.<sup>70</sup>

Some limitations of conducting such an endeavour in this study are that: first, most of the judges who have sat or are sitting on the Kenyan Supreme Court have not written exclusively on their judicial philosophies and those who have, have only done so minimally.<sup>71</sup> Second, the academy has also not scrutinised the philosophies of these judges to a great extent thus, the evidence for the attributed philosophy would mostly come from opinion pieces.<sup>72</sup> Third, some

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<sup>68</sup> Nagan and Manaua, 'Judicial philosophy for thoughtful politicians and business leaders', 3.

<sup>69</sup> Riggs R and Thomas P, 'The judicial philosophy of Justice Rehnquist' 16(4) *Akron Law Review*, 1983, 555.

<sup>70</sup> Riggs and Thomas, 'The judicial philosophy of Justice Rehnquist', 555.

<sup>71</sup> Mboya A, 'Judging the judges: Who are the supreme court justices?' *The Elephant*, 2017 –< <https://www.theelephant.info/features/2017/09/01/judging-the-judges-who-are-the-supreme-court-justices/> - > on 23 September 2022.

<sup>72</sup> Khobe W, 'Rebel without a cause? Justice Njoki Ndungu's dissent and the doctrine of separation of powers' *Nairobi Law Monthly*, 2019 –< <https://theplatform.co.ke/rebel-without-a-cause-justice-njoki-ndungu-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/> > on 23 September

judges seem to have no guiding philosophy at all.<sup>73</sup> In any case, it is worth asking whether the first two philosophies really matter for the purposes of this inquiry. Given that the study attempts to establish the *Court's* philosophy and not that of one individual judge, it will rely only on the operative philosophy to determine the Court's judicial philosophy on separation of powers.

Methodologically, this section is inductive and contains qualitative work as a hermeneutic analysis is conducted on a robust sample of Supreme Court cases. The sample includes decisions from 11 October 2011 until 30 June 2022 in which the Supreme Court was sitting with at least five judges (as laid down by the Constitution)<sup>74</sup> and that contain the term 'separation of powers.' Overall, 33 decisions fit these criteria and search terms but some of those decisions were discarded from the hermeneutic analysis after a careful review indicating that they only use the term 'separation of powers' incidentally, and do not actually assess the problem with regard to separation of powers. Thus, the ultimate dataset contains 29 Supreme Court cases. While it is possible that judges may discuss separation of powers without explicitly using the term, this sample is appropriate for the analysis as judges often use the term 'separation of powers' when discussing matters related to separation of powers, making it a useful and relevant search term for the purposes of this study.

The heart of this empirical analysis concerns the Supreme Court's 29 decisions regarding the separation of powers, for if a collective review of a judge's opinions uncovers a judge's judicial tendencies and philosophies,<sup>75</sup> *a fortiori*, a collective review of the Court's majority opinions will uncover the Court's tendencies and philosophy with regard to separation of powers. To reiterate, although the views of the individual judges themselves are significant, they are not relied on in this study as what matters is the conclusion the majority of the Court arrives at during adjudication for a certain period of time, in this case, ten years. Therefore, the departure and introduction of some judges does not bear on the findings of this study.

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2022; Arori N, 'Kenya's Supreme Court: Past rulings that signify what to expect from justices Martha Koome and William Ouko, Special Report, *Nairobi Law Monthly*, 2021 -< <https://nairobilawmonthly.com/index.php/2021/05/26/kenyas-new-supreme-court-what-we-can-expect-of-justices-koome-and-ouko/>>- > on 23 September 2022.

<sup>73</sup> Khobe W, 'Rebel without a cause? Justice Njoki Ndungu's dissent and the doctrine of separation of powers' 4 *Nairobi Law Monthly*, 2019 -< <https://theplatform.co.ke/rebel-without-a-cause-justice-njoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/>> on 23<sup>rd</sup> September 2022.

<sup>74</sup> Article 163 (2), *Constitution of Kenya* (2010).

<sup>75</sup> Dodson B, '2007 Pennsylvania retention election: An objective analysis of Justice Thomas Saylor's judicial philosophy, methodology and jurisprudential tendencies' 45 *Duquesne Law Review* 2, 2007, 296.

In support of the contentions made herein, many decisions authored by the Supreme Court are cited but lengthy descriptions of particular cases are generally eschewed, in favour of a more impressionistic and holistic approach. The essence of this study lies in distilling the Court's judicial philosophy from the examined cases, transcending their individual narratives. At its core, the examination of how the Court resolves separation of powers issues unveils its underlying philosophy. The objective is to identify and scrutinise the values that drive the Court's judicial decision-making in matters pertaining to or involving separation of powers, which, in the aggregate, contribute to the formation of a cohesive and comprehensive judicial philosophy on the subject.

## *ii. Judicial philosophies on separation of powers*

There are two main judicial philosophies with regard to separation of powers—judicial restraint and judicial activism. The calculus of judicial restraint as a philosophy has as its underpinning the ideas that: First, judges apply the law, not make it thus their decisions must embody careful analysis, follow precedent, and have a juridical character to them;<sup>76</sup> second, judges should defer to the institutional competence of the popular branches of government;<sup>77</sup> third, judges should be hesitant to trespass and, for example, strike down unconstitutional laws unless authorised by the law itself.<sup>78</sup>

The term judicial activism has become more commonplace even as its meaning has become more obscure.<sup>79</sup> It has been proffered that many commentators raise varying concerns when canvassing this matter depending on what courts are doing at the time.<sup>80</sup> This thus makes having a uniform standard of what constitutes judicial activism even more difficult. That being said, there are some connotations of the term that should be mentioned. First, judicial activism has been used pejoratively by those who disagree with the outcome of courts.<sup>81</sup> This use has no ideological disposition. Secondly, some scholars opine that activist judges are those that choose, from the possibilities open to

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<sup>76</sup> Nagan and Manausa, 'Judicial philosophy for thoughtful politicians and business leaders', 8-9.

<sup>77</sup> Nagan and Manausa, 'Judicial philosophy for thoughtful politicians and business leaders', 17.

<sup>78</sup> Mwangi O, 'Judicial activism, populism and counterterrorism legislation in Kenya: Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015]' 26 (7) *The International Journal of Human Rights*, 2022, 1254.

<sup>79</sup> Green C, 'An intellectual history of judicial activism' 58(5) *Emory Law Journal*, 2009, 1197-1198.

<sup>80</sup> Canon B, 'Defining the dimensions of judicial activism' 66(5) *Judicature*, 1983, 238.

<sup>81</sup> Cohn M and Kremnitzer M, 'Judicial activism: A multidimensional model' 18(2) *Canadian Journal of Jurisprudence*, 2005, 334.

them, the possibility that changes the existing law the most.<sup>82</sup> Another view holds that activist judges have a proclivity for certain ideologies while restrained judges have no such predisposition.<sup>83</sup> Another dimension of understanding is that activist judges exemplify a propensity to interrogate the justifications advanced by the government in relation to actions infringing upon individual rights, while concurrently displaying a preparedness to intervene based on rights-based justifications.<sup>84</sup> Lastly, judicial activism has been said to generally involve an overreach, which is ‘judicial participation in law making process or matters relating to policy issues, sometimes leading to overruling of existing law and creating new legal doctrines.’<sup>85</sup>

The examination of these judicial concepts, however, necessitates the acknowledgement that the setting or context plays a pivotal role in defining these terms. In fact, some scholars share the opinion that other jurisdictions provide additional material for conceptual analysis of these concepts.<sup>86</sup> In the specific case of Kenya, determining what constitutes judicial restraint or overreach in the Kenyan context becomes particularly challenging due to the intricate nature of the constitutional framework. Moreover, it appears that even in Kenya, the term ‘activism’ is often employed when individuals express dissatisfaction or frustration with judicial decisions.<sup>87</sup>

However, while providing an exhaustive analysis of what activism or restraint entails within the Kenyan context exceeds the scope of this paper, a preliminary examination of the apex court’s decisions suggests that restraint is characterised by a significant emphasis on upholding precedents and refraining from engaging in policy arguments.<sup>88</sup> Conversely, it seems that ‘activism’ or overreach can be discerned when judges venture at all into addressing policy matters, or when they do so before other branches of government have had an

<sup>82</sup> Barak A, *Judicial discretion*, Yale University Press, New Haven, 1989, 148.

<sup>83</sup> Cohn and Kremnitzer, ‘Judicial activism’, 338.

<sup>84</sup> Roach K, *The Supreme Court on trial: Judicial activism or democratic dialogue*, Irwin-Law, Toronto, 2001, 108.

<sup>85</sup> Chowdhury S, ‘From activism to restraint: Retrograde judicial philosophy or merely controverting judicial overreach’ 3 (2) *Gujarat National Law University Law Review*, 2012, 18.

<sup>86</sup> Cohn and Kremnitzer, ‘Judicial activism’, 338.

<sup>87</sup> Thiankolu M, ‘Why Kenya’s judge recruiters are skeptical about activism on the bench’ *The Conversation*, 2021 –< <https://theconversation.com/why-kenyas-judge-recruiters-are-sceptical-about-activism-on-the-bench-160125> > on 23 September 2022.

<sup>88</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR; *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR; *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.

opportunity to contribute their perspective.<sup>89</sup> Although the Western definitions may not capture the full intricacies of Kenya's constitutional framework, one ought to acknowledge the limited body of scholarly work exploring unique Kenyan definitions of restraint and activism, and thus, in order to facilitate a comprehensive analysis, the definitions put forth above provide a starting point for analysing the philosophies of judges. That being said, the idea of overreach relied on in the analysis below will mainly be that of judicial participation in law making process or matters relating to policy issues, while that of restraint will mainly be a significant emphasis on upholding precedents and refraining from engaging in policy arguments.

### iii. *Judicial restraint: The prevailing judicial philosophy*

The judicial philosophy of the Court has reflected a particular attitude towards the separation of powers and the court's role in defining those boundaries— an attitude of judicial restraint. How the Court has adopted the positions of judicial restraint discussed above, particularly that on avoiding policy discussions, will be demonstrated below but it is important to note that a single case can embody two or more conceptions of judicial restraint.<sup>90</sup>

Scholars have argued, and the Court has acknowledged in many instances,<sup>91</sup> that judicial restraint as a philosophy preserves the virtue of separation of powers.<sup>92</sup> In fact, the Court in *Justus Kariuki Mate v Martin Nyaga Wambora* (*Wambora*) cited the late Justice Ruth Bader Ginsburg on the role of a judge who said, '*...the effective judge, I believe... strives to persuade, and not to pontificate. She speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues.*'<sup>93</sup>

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<sup>89</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR.

<sup>90</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR; *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR; *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.

<sup>91</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR; *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR; *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR; See Alston P, Goodman R and Steiner H, *International human rights in context: Law, politics, morals*, Clarendon Press, Oxford, 1996, 711-712.

<sup>92</sup> Chowdhury, 'From activism to restraint', 19.

<sup>93</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR; Ginsburg R, 'Speaking in a judicial voice' 67 *New York University Law Review*, 1992, 1186; Barnhart R and Deborah Z, 'Twin pillars of judicial philosophy: The impact of the Ginsburg collegiality and gender discrimination principles on her separate opinions involving gender discrimination' 7 (2) *New York City Law Review*, 2004, 275.



Perhaps the clearest expression of the Court's deference to the other arms of government came in *Wambora*.<sup>94</sup> The *Wambora* case concerned the impeachment of the Governor of Embu County, Mr Martin Wambora, by the Embu County Assembly. The Speaker of the Assembly received a motion to remove Mr Wambora on grounds of abuse of office and violations of the Constitution and parliamentary acts. Mr Wambora sought declaratory orders from the High Court that the Assembly's motion was unconstitutional, which the High Court granted. Despite this, the impeachment went ahead, and Mr Wambora was removed from office. He applied for interim orders for his reinstatement and for the Appellants to be found guilty of contempt of court. The High Court granted the application, and the Court of Appeal upheld the decision.<sup>95</sup>

The Appellants challenged the decision in the Supreme Court on grounds that the orders of the lower courts violated Articles 159, 174 and 175 of the Constitution which touched on the doctrine of separation of powers.<sup>96</sup> The Supreme Court set aside the decision of the Court of Appeal and annulled the conservatory orders of the High Court, reasoning that each arm of government must respect the independence of the others, refrain from directing another arm, and that the courts should *exercise restraint* and only intervene in specific circumstances.<sup>97</sup>

In another case, *In the Matter of Interim Independent Electoral Commission*,<sup>98</sup> the Supreme Court was called upon to decide whether it had jurisdiction to issue an advisory opinion. The Court examined the issuing of advisory opinions in other jurisdictions such as the United States, Australia, New Zealand, Canada, and the Republic of Nauru and observed that 'when courts answer legal questions outside the legal dispute-resolution process, they go beyond the judicial role, and assume a quasi-legislative task'. In addition, it held that: 'In view of the practical and legal constraints attendant on advisory opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint.'<sup>99</sup> This view was also shared in other advisory opinions.<sup>100</sup> Although the Court's philosophy includes a willingness to

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<sup>94</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR.

<sup>95</sup> *Justus Kariuki Mate & another v Martin Nyaga Wambora* (2014) eKLR.

<sup>96</sup> Article 159, 174 and 175, *Constitution of Kenya* (2010).

<sup>97</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR.

<sup>98</sup> *In the Matter of Interim Independent Electoral Commission* (2011) eKLR.

<sup>99</sup> *In the Matter of Interim Independent Electoral Commission* (2011) eKLR.

<sup>100</sup> *In the Matter of the National Gender and Equality Commission* (2014) eKLR; *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* (2021) eKLR; *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.

give advisory opinions, it contends that its goal is not to assume ‘the role of general advisor to Government.’<sup>101</sup>

The Court has been consistent in this posture and has seemingly left itself open to charges of failing to decide questions wholly necessary to the disposition of some cases. The Court’s alignment with precedent also reveals the influence of restraint on its judicial philosophy. More importantly, the fact that a case raises a normative jurisprudential question on separation of powers does not lead the Court to conclude that it should hear the matter. For the Court, previous determinations carry a lot of weight even though it is not bound to follow such determinations. Consider the case of *In the Matter of Speaker, County Assembly of Siaya County*.<sup>102</sup> In that case, the Speaker of the County Assembly of Siaya, as the Applicant, had submitted that the County Assembly (CA) had faced challenges with regard to its powers in vetting and approving members of the County Executive Committee (CEC) already serving terms, when the Governor makes the decision to move them from one portfolio to another. Due to the silence in the law, the CA of Siaya had had cases where the Governor moved a member to a different portfolio without presenting the candidate before the CA for approval. The applicant sought the Court’s Advisory Opinion on whether the Constitution and County Government Act empowered the County Governor to transfer a sitting member of the CEC from one portfolio to another, and if so, whether such a transfer amounts to a fresh appointment where the Governor is required to submit the names of the applicants for vetting and approval by the CA.

While this is an area that could use some clarification by the judges of the Court, the Court instead declined to assume its advisory jurisdiction and dismissed the matter. The reason for the dismissal was an acceptance of the position in *Speaker of Senate and Another v The Attorney General and 4 Others* where the Court had previously held that ‘the Supreme Court must guard against the improper transformation of normal disputed issues for ordinary litigation into Advisory Opinion causes, as the Court must be disinclined to take a position in discord with the core principles of the Constitution.’<sup>103</sup> It is worth noting that this decision was an advisory opinion which according to previous determinations of the Court, is binding to the parties but carries no *stare decisis* effect. This hesitation of the Court to evaluate the constitutionality of the workings of other arms of the government has affinities with formalist jurisprudence, mostly characterised

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<sup>101</sup> *Council of Governors & 47 others v Attorney General & 6 others* (2019) eKLR.

<sup>102</sup> (2020) eKLR.

<sup>103</sup> (2013) eKLR.

by highly technical and literalised arguments,<sup>104</sup> and *ipso facto*, has affinities with judicial restraint. This reluctance to exercise its jurisdiction in marginal cases is consistent with judicial restraint's reluctance to decide questions unnecessarily, and the Court has frequently called for restraint in avoiding the encroachment into other arms of government.<sup>105</sup>

Another respect in which the Court's judicial philosophy had affinities with formalist jurisprudence, was its view of the appropriate roles of the legislature and the judiciary in the constitutional balance of power. Take for example the case of *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others*,<sup>106</sup> where the Supreme Court examined the extent to which a Court may inquire into the conduct of parliamentary proceedings. The Court held that, as Article 165(3)(d) clothed it with powers to determine the constitutionality of a given act, the doctrine of separation of powers does not preclude it from examining acts of the Legislature or the Executive. The Court however cautioned itself to 'exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.'<sup>107</sup> It is therefore not in doubt that judges have the competence to pronounce on the compliance of a legislative body or the executive with the Constitution. However, with regards to other interventions, the Court in *Speaker of the Senate and Another* the Court cautioned against undue interference with running processes in other arms of Government since it cannot 'supervise the workings of Parliament' and should not endanger the 'institutional comity between the three arms of government by unwarranted intrusions.'<sup>108</sup> This over-reliance on the *Speaker of the Senate* decision to justify restraint should be kept in mind as an interesting contrast emerges in the section below.

The preceding observations of the Court seem to be fully consistent with a judicial philosophy of deference to legislative initiatives unless where the action taken is in contravention of the Constitution. This great deference to legislative determinations, however, is a mark of judicial restraint; further, it shows that the Court considers its role in separation of powers in very strict terms— to intervene only when pronouncing on the constitutionality of actions taken.

<sup>104</sup> Klare K, 'Legal culture and transformative constitutionalism', 14(1) *South African Journal on Human Rights*, 1998, 170.

<sup>105</sup> *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* (2015) eKLR; *Speaker of Senate and Another v The Attorney General and 4 Others* (2013) eKLR; *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR.

<sup>106</sup> (2015) eKLR.

<sup>107</sup> *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* (2015) eKLR.

<sup>108</sup> *Speaker of Senate and Another v The Attorney General and 4 Others* (2013) eKLR.

iv. *Judicial activism: A hidden contradiction to the paradigm*

At this point, it is evident that the Supreme Court's judicial philosophy, for the most part, has as its centrepiece the integrity of the law from a judicial restraint perspective. This is because, from the cases discussed, it is evident that the Supreme Court: espouses deference to the other arms of government as evident from its hesitation to interfere with policy questions and impeachments; is reluctant to exercise jurisdiction in marginal cases or to decide questions unnecessarily especially regarding its advisory jurisdiction; and, it has a restrictive view of the appropriate roles of the legislature and the judiciary in the constitutional balance of power, all which point to the fact that it leans heavily towards judicial restraint. In some few cases, however, the Court has, as will be demonstrated in the subsequent paragraphs, hewed a philosophy markedly distinct from judicial restraint.<sup>109</sup> In these cases, the Court is seen to be deviating from what it proposes to be the ideal path to tread—judicial restraint. Therefore, the judicial paradigm seems to be restraint in theory, but some judicial pronouncements speak a different story.

Although restraint appears to be the philosophy adopted by the Court, it seems merely a tool for controverting while paradoxically concealing judicial overreach. In the case of *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)*,<sup>110</sup> there was a stalemate with regards to the distribution of revenue in Parliament. The Court was faced with the question of what happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill, thereby triggering an impasse. The Court was, as is the custom, very cautious about the nature of this matter and began by noting that its determination of this matter would be the resolution of a constitutional crisis and not tantamount to judicial overreach. This already indicates that it was trying its best to fend off, or controvert, future attacks made on account of acts of judicial over adventurism. The Court then noted that this matter had been addressed before in *Speaker of the Senate and Another* and boldly claims that the solution preferred therein (urging the two Houses to undertake their Constitutional responsibilities through mediation under Article 113 of the Constitution) was characteristic of 'extreme restraint'.<sup>111</sup> To clarify, the Court here is viewing its own solution to a problem in a previous and similar case as an exemplification of 'extreme restraint'. This admission raises

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<sup>109</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR.

<sup>110</sup> (2020) eKLR.

<sup>111</sup> *Speaker of Senate and Another v The Attorney General and 4 Others* (2013) eKLR.

a perplexing paradox, as it suggests that while the Court consistently advocates for judicial restraint in its decisions, it also recognises that there are limits to such restraint. This juxtaposition of endorsing restraint while acknowledging its potential drawbacks highlights the nuanced and intricate balancing act the Court engages in when interpreting and applying the law, but all the while clinging to the idea that its interpretation is in line with judicial restraint. By this point, then, it seems plausible to anticipate that what the Court would do would certainly not be judicial overreach (in the Court's view) and neither would it be characteristic of *extreme* judicial restraint. Given the Supreme Court's insinuation that a spectrum of judicial restraint exists, it would be some model of restraint, most plausibly, 'relaxed' restraint which falls on the far end of that spectrum- if such a spectrum exists.

The solution found to this problem is even more thought-provoking. The Supreme Court rejected the first option of seeking orders from the High Court, which would fundamentally shift the revenue allocation function from the legislature to the judiciary and thus violate the doctrine of separation of powers. The second option was for the immediate release of 25% of the equitable share of revenue to counties, which the Supreme Court decided was constitutional based on its interpretation of Article 222 of the Constitution. The Supreme Court authorised the withdrawal of 50% of the total equitable share allocated to the Counties from the Consolidated Fund. The Court justified its decision based on resolving the constitutional crisis and preserving the continuity in Government business.<sup>112</sup>

Does this solution fit the 'relaxed' restraint anticipated? It is entirely possible to make the case that this solution violates the principle of separation of powers. First, the Court itself has in previous decisions acknowledged that, according to the Constitution,<sup>113</sup> allocation of revenue is a task that falls squarely on the Executive and the Legislature.<sup>114</sup> Therefore, directing action to be taken by Parliament and what percentage should be allocated to the Counties, is, arguably, not only an attempt to amend the Constitution,<sup>115</sup> but is tantamount to supervising the work of Parliament and endangering the institutional comity between the three arms of government. It follows then that this solution of directing the National Assembly to withdraw 50% of the total equitable share

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<sup>112</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR.

<sup>113</sup> Article 218, *Constitution of Kenya* (2010).

<sup>114</sup> *Speaker of Senate and Another v The Attorney General and 4 Others* (2013) eKLR.

<sup>115</sup> Article 218, *Constitution of Kenya* (2010).

allocated to counties is a possible overreach. It is merely concealed by the fact that the Court paints its endeavour as the fixing of a constitutional crisis, and further, by an overfocus on the effects of this crisis. The Court, therefore, implicitly endorses its overreach, even though it sees itself as conducting some form of ‘relaxed’ restraint.

A similar kind of overreach can be noted in *Raila Odinga v Independent Electoral and Boundaries Commission*.<sup>116</sup> A review of the case between Hon. Raila Odinga and the IEBC after the general elections reveals, as observed by some authors, a certain type of judicial activism in Kenya where the Court opted to uphold the election based on Kenya’s election history.<sup>117</sup> There is a caveat here. The claim is not that there is a pattern of judicial overreach, rather, it is that the Court’s views in some cases constituted a significant departure from the Court’s (fairly consistent) position of judicial restraint. It has, for example, been quite contemptuous of extreme restraint which consists of judicial abdication to popularly elected branches of government as in the *Speaker of the Senate and Another* case;<sup>118</sup> which is clearly not an attribute of restraint. This is probably the most striking feature of the Court’s judicial philosophy: that it can only with great difficulty be made to conform to any of the neat and currently popular classifications of Supreme Court philosophies. The classification of Supreme Courts as advocates of either judicial activism or judicial restraint, and the use of statistical devices to facilitate the process, can be a helpful approach to some problems of constitutional law,<sup>119</sup> but it is inadequate for the task of determining the judicial philosophy of some apex courts. The Kenyan Supreme Court, for one, cannot be so readily pigeonholed. It can only be said to value judicial restraint excessively, but occasionally overreaches to meet some ends.

#### **IV. Transformative Prudentialism: An appropriate philosophy**

This section argues that, from a critical analysis of the Court’s jurisprudential tendencies, the Court’s judicial philosophy, or at least, what it has been trying to do as a philosophy, is prudentialism. Further, it is argued that what a commitment to the Constitution and separation of powers requires in terms of philosophy goes slightly beyond prudentialism, into transformative prudentialism.

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<sup>116</sup> *Raila Odinga v Independent Electoral and Boundaries Commission* (2013) eKLR.

<sup>117</sup> *Raila Odinga v Independent Electoral and Boundaries Commission* (2013) eKLR; Onyango P, ‘Judicial activism and disenchantment of legal formalism in Kenya’ *Academia*, 2015, 12.

<sup>118</sup> Davis S, ‘Justice Rehnquist’s judicial philosophy: Democracy v equality’ 17(1) *Polity*, 1984, 94.

<sup>119</sup> Hellman A, ‘Judicial Activism: The good, the bad, the ugly’ 21(2) *Mississippi College Law Review*, 2002, 253.

i. *On the Supreme Court's actual philosophy*

A possible way out of the difficulty of labelling the Court's philosophy is to abandon attempts to squeeze this specific philosophy into these deceptively precise categories of activism and restraint. From the Court's rulings and explicitly expressed points of view, it can be noted that the judicial mood as of last few years, has been set on exercising restraint.<sup>120</sup> The Court has, however, deviated from what it proposes to be the ideal path to tread when it deemed it necessary.<sup>121</sup> But the question is not really whether the judiciary has kept its word and abstained from divulging in matters of legislative or administrative policy; the real question is whether this Court's philosophy is anything beyond the traditional categorisation of activism and restraint.

This paper contends that what the Court has been trying to do as a philosophy, is prudentialism. To establish this, it is imperative to understand the nature of prudentialism. Prudentialism, as a judicial philosophy, refers to a 'mode of approaching issues that takes full account of their political dimensions, of the need for institutional integrity and the means to attain or maintain it, and of the uncertainty and relativity inherent in any public policymaking process.'<sup>122</sup> Martin Shapiro conceptualises prudentialism in the following way:

'In Renaissance art, there is a wonderful representation of prudence as a three-headed man looking to the left, the right, and straight out of the picture at the viewer. Prudence seeks to look at the present in light of what has gone on in the past and with an eye to the future. Prudence understands that, at any given moment, it must work with the set of limits and opportunities it has inherited from the past to reach future goals that themselves cannot be fully defined now. Our past is not simple enough to be reduced completely to rules or principles. Our present is complex. Our future is uncertain. Mere technical knowledge is not enough. A sense of what is politically feasible and promising is also essential. That sense must be gained by practical experience in politics and in the complexities and uncertainties of the human condition.'<sup>123</sup>

A prudent person, according to Antony Kronman, is characterised by a sense of wonder in the face of complex, historically evolved institutions, a modesty in attempting to reform them, a tolerance for accommodation and delay, an acceptance of the inherent incommensurability between any set of

<sup>120</sup> *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* (2015) eKLR; *Speaker of Senate and Another v The Attorney General and 4 Others* (2013) eKLR; *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR.

<sup>121</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR.

<sup>122</sup> Idleman S, 'A prudential theory of judicial candor' 73 *Texas Law Review*, 1995, 1396.

<sup>123</sup> Shapiro M, *Who guards the guardians? Judicial control of administration*, University of Georgia Press, 1988, 136.

ideas and reality, a value for consent, and a resilience in the face of the irrational compromise that often leads to it.<sup>124</sup>

The Supreme Court's philosophy is thus, at least in part, a prudentialist philosophy. The Court has been sensitive to the potential for judicial activism to distort the province for decision-making that belongs to the political branches of the executive and legislature *ergo* trivialising the separation of powers.<sup>125</sup> However, where it has assessed the circumstances, and considered the history, the court has tolerated overreaching to mitigate the actual and potential crisis.<sup>126</sup>

## ii. *On the definition of transformative prudentialism*

Despite the seemingly logical nature of applying a prudentialist philosophy, it still does not seem appropriate to the Kenyan context if the Court is simply urged to be pragmatic in decision making with no ends that are to be achieved. The Constitution as designed and written supports, as will be shown, a higher, transformative agenda regarding the jurisdictional reach of the court. It is for this reason that this paper advocates for 'transformative prudentialism' as the appropriate philosophy.

What is transformative prudentialism? This question implicates a host of tangential concerns, such as the need to distinguish what is *not* transformative prudentialism from what is properly called transformative prudentialism; the appropriate justification of transformative prudentialism; and the practical importance of transformative prudentialism concerning matters such as justice and fair administrative action as shown towards the end of this section. The author has not come across the use of the term 'transformative prudentialism' in the literature but it can, generally, be construed to mean the application of prudentialism in a manner meant to attain the goals of transformative constitutionalism. In more specific terms, the test for the philosophy that would properly be termed as transformative prudentialism is such that it is characterised by a conceptualisation of separation of powers as independence, interdependence, and interaction in the joint enterprise of governing; and such governance is to meet the goals of transformative constitutionalism.

To understand why this is the case, it is imperative to understand what is meant by transformative constitutionalism. As a result of his poignant essay and

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<sup>124</sup> Kronman A, 'Alexander Bickel's philosophy of prudence' 94(7) *Yale Law Journal*, 1985, 1569.

<sup>125</sup> *Justus Kariuki Mate v Martin Nyaga Wambora* (2017) eKLR.

<sup>126</sup> *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* (2020) eKLR.



strident defence of a shift from formalist legal cultures, Karl Klare is regarded as the father of transformative constitutionalism.<sup>127</sup> Klare defined it as a long-term project of *inter alia* constitutional interpretation committed to transforming a country's political and social landscape in a participatory and egalitarian direction.<sup>128</sup> The Supreme Court has affirmed that the Kenyan Constitution, as designed and written, is a transformative charter arrived at after a lot of effort in order to guard the aspirations of Kenyan citizens.<sup>129</sup> Walter Khobe posits that the doctrine of separation of powers in the context of Kenya's 2010 Constitution must be reconceived and reconfigured in order to align with its transformative goals of promoting social justice, participatory governance, and justification in governance.<sup>130</sup> In this regard, the judiciary must adopt a pragmatic and adaptive approach to the doctrine in order to facilitate the progress of the constitutional project, even if this necessitates departing from a traditional or formalistic understanding of the allocation of constitutional powers.<sup>131</sup> Given that judges interpret the Constitution, it follows that this transformative charter requires them to espouse a philosophy that seeks to achieve the aims of transformative constitutionalism. The Supreme Court ought, therefore, to espouse transformative prudentialism as a philosophy as it seeks to do just that.

### *iii. On the place of judicial activism and judicial restraint in transformative prudentialism*

Indeed, it is an independent judiciary that serves as a linchpin of the scheme of checks and balances through which the separation of powers is assured.<sup>132</sup> Some commentators have argued that a legitimate judicial philosophy is one that has at its core, the absolute separation of the judicial function from the legislative and executive functions.<sup>133</sup> This commitment to judicial restraint is premised on the belief that it is the foremost way to preserve and uphold a

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<sup>127</sup> Hailbronner M, 'Transformative constitutionalism: Not only in the global south' 65 (3) *The American Journal of Comparative Law*, 2017, 532.

<sup>128</sup> Klare, 'Legal culture and transformative constitutionalism', 168.

<sup>129</sup> *Attorney-General & 2 others v Ndii & 79 others* (2022) eKLR.

<sup>130</sup> Khobe W, 'Rebel without a cause? Justice Njoki Ndungu's dissent and the doctrine of separation of powers' 41 *Nairobi Law Monthly*, 2019 –< <https://theplatform.co.ke/rebel-without-a-cause-justice-njoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/>> on 23 September 2022.

<sup>131</sup> Khobe W, 'Rebel without a cause? Justice Njoki Ndungu's dissent and the doctrine of separation of powers' 41 *Nairobi Law Monthly*, 2019 –< <https://theplatform.co.ke/rebel-without-a-cause-justice-njoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/>> on 23 September 2022.

<sup>132</sup> Alston P *et al*, *International human rights in context*, 711-712.

<sup>133</sup> Walton E, 'The judicial philosophy of Chief Justice John Roberts', 431.

constitutional democracy.<sup>134</sup> A response to this contention is that the law does not function as mathematical axioms do, thus judges cannot be expected to resolve competing claims using restraint each time as that would, undoubtedly, be very mechanical.<sup>135</sup> In the same way, judges should respect precedent but avoid the idea that nothing can ever be done for the first time, the converse of a key tenet of judicial restraint.<sup>136</sup>

Additionally, there are stronger responses which take into consideration transformative constitutionalism as the guiding concept of which philosophy is to be employed. It has been noted that constitutional design and practice has evolved and as Nick Robinson has written, ‘good governance courts’ have emerged, especially in the global south, to respond to weaknesses in the political order by seeking to root out corruption and using pervasive levels of political distrust as a justification for taking on a more aggressive conception of the judicial role.<sup>137</sup> Further, these courts have de-emphasised the traditional or orthodox understanding of separation of powers,<sup>138</sup> in order to seek to ameliorate the functioning of political institutions, overcome entrenched social inequalities, and control processes of change against risks to the democratic order.<sup>139</sup> The latter area of criticism intimates that: first, even if restraint were desirable philosophically, it simply cannot work as the sole interpretive tool in this post-2010 dispensation; second, there is a place for judicial activism, properly understood, in transformative prudentialism.

With regards to what is meant by judicial activism, admittedly this is a term fraught with controversy as to its meaning and, as stated earlier, this paper will not attempt to define it,<sup>140</sup> but, the idea of interest here is one where judges make decisions based on their personal views and further, they encroach into the

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<sup>134</sup> Guliuzza F, ‘The practical perils of an original intent-based judicial philosophy: Originalism and the church-state test case’ 42(2) *Drake Law Review*, 1993, 352.

<sup>135</sup> Onyango P, ‘Judicial activism and disenchantment of legal formalism in Kenya’ *Academia*, 2015, 5.

<sup>136</sup> Nagan and Manusa, ‘Judicial philosophy for thoughtful politicians and business leaders’, 9. See generally Czarnezki J, Ford W and Ringhand L, ‘An empirical analysis of the confirmation hearings of the justices of the Rehnquist natural court’ 24(127) *Constitutional Commentary*, 2007, 183.

<sup>137</sup> Robinson N, ‘Expanding judiciaries: India and the rise of the good governance courts’ 8(1) *Washington University Global Studies Law Review*, 2009, 4, 8, 23, 58, 63, 66-67.

<sup>138</sup> Walton E, ‘The judicial philosophy of Chief Justice John Roberts: An analysis through the eyes of international law’ 30(3) *Emory International Law Review*, 2016, 431; Kavanagh, ‘The constitutional separation of powers’, 223-229.

<sup>139</sup> Landau D and Bilchitz D, ‘Introduction: The Evolution of the separation of powers in the global south and global north’ in Landau D and Bilchitz D (eds) *The evolution of separation of powers: Between the global north and the global south*, Edward Elgar Publishing, Cheltenham, 2018, 21.

<sup>140</sup> Kmiec D, ‘The origin and current meanings of “judicial activism”’ 92(5) *California Law Review*, 2004, 1466.

functions of other branches of government by, for example, participating in the law-making process or the formulation of policy.<sup>141</sup> What must be understood is that judicial activism in transformative prudentialism would not connote this prevalent import of the philosophy of judicial decision-making influenced by personal views about public policy, but it would signify a much-needed effort for bringing about social and political reform, in line with the goals of transformative constitutionalism.<sup>142</sup> In Kelsenian dictum,<sup>143</sup> it is the constitutional duty which requires judges to read the grundnorm in a manner that secures social interest and do anything necessary to achieve the objectives of this transformative constitution.

Judicial activism may thus seem an eccentric or even extremist judicial philosophy, but it can be invoked to resist the abuse of power— to achieve the aspirations of Kenyans, and such can be said of judicial restraint save for when extreme judicial restraint appears to condone the tyranny of the powerful.<sup>144</sup> It is therefore permissible, indeed desirable, that two judicial philosophies are used in determining matters, so long as the nature of the dispute and practical social goals to be achieved are considered.<sup>145</sup>

A judicial philosophy, much like a surgeon's toolkit, should have a variety of tools to choose from to properly diagnose and treat a legal issue. Transformative prudentialism's toolkit has a scalpel and a mallet. The scalpel represents judicial restraint, a delicate and precise tool that carefully navigates the boundaries of the law, seeking to preserve the status quo. The mallet, on the other hand, represents judicial activism, for just as it is used in orthopaedic surgery to apply controlled force to a specific area of a bone and manipulate its mechanical properties, it is a more aggressive tool in the toolkit that uses its power to reshape the legal landscape and bring about change. Just as a surgeon must have both a scalpel and a mallet at their disposal to address the varying needs of a patient, a judge must have both judicial restraint and activism in their arsenal to address the complexities of the cases that come before them. The judge, like the surgeon, must determine the best tool to use based on the unique circumstances of each case and the goals they hope to achieve. However, the surgeon's dexterity with these tools must also be of the utmost quality as they must be used with care and precision.

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<sup>141</sup> Posner R, *The federal courts: Challenge and reform*, Revised edition, Harvard University Press, Cambridge, 1996, 318. Chowdhury, 'From activism to restraint', 18.

<sup>142</sup> Klare, 'Legal culture and transformative constitutionalism', 168.

<sup>143</sup> Wenzel N 'Judicial review and constitutional maintenance: John Marshall, Hans Kelsen, and the popular will'<sup>46(3)</sup> *Political Science and Politics*, 2013, 595.

<sup>144</sup> Nagan and Manaua, 'Judicial philosophy for thoughtful politicians and business leaders', 37.

<sup>145</sup> Ferrera and Mystica, 'Appellate judges and philosophical theories', 562.

In the case of transformative prudentialism, the goal is to achieve the aspirations of transformative constitutionalism. It is not a question of whether judicial restraint or activism is the superior tool, but rather which tool is best suited for the job at hand. The judge must assess the nature of the dispute and the practical social goals to be achieved and determine whether the scalpel of judicial restraint or the hammer of judicial activism is needed to secure the social interest and achieve the objectives of the transformative constitution. The aim is to heal the social and political ailments of the society and promote reform, just as the doctor's aim is to heal the patient. In this sense, the author emphasises the importance of having both judicial restraint and activism as part of the judicial philosophy, and that, contrary to the Supreme Court's insistent use of the scalpel for every surgery, the appropriate tool should be selected based on the specific needs of each case and the aims of transformative constitutionalism.

#### *iv. On the desirability of transformative prudentialism*

Pius Langa, the former Chief Justice of South Africa, had a judicial philosophy that placed a strong emphasis not on activism or restraint but on history and redress, a functional approach to substantive equality and the fact that public power must be constrained, accountable and fair— and thus, he was, arguably, a transformative prudentialist.<sup>146</sup> His view is particularly persuasive because: first, both Kenya and South Africa have gone through periods of major social and political transformation, which has been reflected in their respective constitutions, and; second, in both countries, the courts were meant to play a critical role in interpreting and enforcing these constitutional provisions, and in ensuring that the constitutional vision of a transformed society is realised.<sup>147</sup>

From the above, it is judicious to propound that Kenya's Constitution was meant to bring about large-scale transformation, and the Court should not adopt an overly formal account of separation of powers to avoid frustrating the goals of transformative constitutionalism lest it is prepared to perpetuate these retrograde frustrations.<sup>148</sup> It is also imperative that they employ transformative prudentialism as a judicial philosophy so that, as Karl Klare has written, the outcomes of their decisions are explicable and justifiable.<sup>149</sup> This has real implications on the judicial making process as, for example, in the *Wambora* case,

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<sup>146</sup> Bilchitz D, 'Humility, dissent and community: Exploring Chief Justice Langa's political and judicial philosophy' 1 *Acta Juridica*, 2015, 103.

<sup>147</sup> See generally, Klare, 'Legal culture and transformative constitutionalism', 146-188.

<sup>148</sup> Leslie Johnson, 'Frustration: The mold of judicial philosophy' 1(1) *Criminal Justice Ethics*, 1982, 25.

<sup>149</sup> Klare, 'Legal culture and transformative constitutionalism', 168.

a judge subscribing to this transformative prudentialism philosophy would have considered the fact that if they refrain from intervening in the process due to separation of powers, fundamental human rights and freedoms such as the right to fair administrative action may be violated.<sup>150</sup>

Regarding predictability, it is indeed true that the adoption of a multi-faceted philosophy does not guarantee an absolute standard of certainty. However, it is fatuous to demand unwavering certainty in judicial decision-making. Rather, what matters is the existence of guiding principles that shape judges' approach to adjudication, enabling a coherent understanding of their perspectives on specific matters. While attaining this level of coherence may require time and deliberation, it is plausible to envision a future where judges prioritise transformative ideals over political considerations or other extraneous factors. Such a shift in approach could lead to the emergence of a unified and transformative constitutional view within the Court, fostering a more cohesive and progressive interpretation of the law.

Furthermore, the prevailing characterisation of judicial philosophies as a rigid dichotomy between restraint and activism has inadvertently created a confining box within which many tend to perceive and analyse the role of judges. This oversimplification obscures the nuanced complexities and diverse approaches that judges may employ in their decision-making processes. Therefore, it is imperative to shift away from the notion or assumption that the Constitution inherently favours one specific philosophy of separation of powers, be it judicial restraint or activism.<sup>151</sup> It favours none.<sup>152</sup> Instead, the more nuanced approach espoused by this paper dictates that the Constitution primarily upholds the model that best aligns with achieving its underlying goals and objectives. That model, as contended before, is transformative prudentialism as the Constitution itself is a transformative charter. By adopting transformative prudentialism, this flexible perspective prioritises the acceptance and realisation of the Constitution's overarching aims and allows moving beyond rigid dichotomies to recognising the need for contextual adaptation during judicial decision-making.

Finally, the term 'transformative prudentialism' might bring heightened awareness and consciousness to this approach among judges and legal scholars. This is not merely, as some would contend, a matter of creating a fanciful term to advocate for the utilisation of any philosophy at will, but rather a means to articulate the pressing need for a fresh perspective on the dynamics between

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<sup>150</sup> Munyao A, 'Intervention in the impeachment process of governors in Kenya' 5(1) *Strathmore Law Review*, 2020, 143.

<sup>151</sup> *Constitution of Kenya*, 2010.

<sup>152</sup> *Constitution of Kenya*, 2010.

separation of powers and transformative constitutionalism. There is a need to de-emphasise the traditional conception of separation of powers. The Supreme Court's philosophy of excessive restraint and sporadic overreach is overly formal and unsuitable in this transformative era. Instead, the Supreme Court should adopt transformative prudentialism and along with it, a more flexible conception of separation of powers, not to conflict with other arms of government, but to deliver on the goals of transformative constitutionalism such as improving the functioning of political institutions and overcoming social inequalities— goals that cannot be achieved with a convoluted philosophy of excessive restraint and sporadic overreach.

## **V. Conclusion**

In an attempt at explaining the contours of the Supreme Court's judicial philosophy, this paper has derived some of the operative rules that appear to guide the Court's decisions in matters to do with separation of powers. It has highlighted the Supreme Court's judicial philosophy and jurisprudential tendencies through an objective review of majority opinions authored in the last decade. From these opinions, it has been discerned that the Court's philosophy with regard to separation of powers is guided by excessive restraint and sporadic overreach. This has been interpreted as the Court trying to exercise prudentialism as a judicial philosophy. Nonetheless, what a commitment to the Constitution and separation of powers requires in terms of philosophy goes slightly beyond prudentialism. This paper has advocated for transformative prudentialism, a pragmatic philosophy with regard to separation of powers where judges can exercise restraint or activism so long as it is aimed at achieving the goals of transformative constitutionalism.

Future work should consider if indeed transformative prudentialism is applicable in all circumstances or only in certain ones. Furthermore, it is imperative to develop robust mechanisms aimed at safeguarding against the inadvertent pitfalls that may accompany the application of transformative prudentialism. Such precautions are necessary to counteract instances where judges may exploit its conceptual framework to render questionable judgments, as well as instances where well-intentioned judges may inadvertently misapply its principles. However, it is hoped that a philosophy of transformative prudentialism, when brought to bear on concrete cases, will be of salutary rather than a destructive effect on the Court and the Kenyan legal edifice, and that the Supreme Court, just like a surgeon, will operate using the scalpel or the mallet for the sake of healing the society.