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ARTICLE

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The Role of Kenyan Courts in Tackling Persistent Inequalities: Navigating Deference and Accountability

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Abstract

Kenya's 2010 Constitution represents a landmark shift towards equality, incorporating diverse conceptions through provisions such as Article 27 on non-discrimination, Article 43 on socio-economic rights, and Article 56 on cultural and religious diversity. This progressive framework seeks to address historical inequalities that marginalized groups—such as women, persons with disabilities, and minorities—have faced in accessing resources, services, and political participation. However, implementation remains the critical determinant of whether these constitutional ideals translate into tangible societal change. This Article examines the role of the judiciary as a constitutional guardian in ensuring the realization of equality-related rights in Kenya's hybrid democracy, characterized by democratic aspirations alongside authoritarian tendencies. It highlights the judiciary's dual responsibility to balance deference to State organs with holding them accountable to constitutional mandates. By analyzing key cases, it identifies how courts have navigated tensions between promoting substantive equality and respecting the separation of powers, especially in the context of socio-economic rights and governance challenges. The Article advocates for an equality-sensitive approach to judicial review that integrates both strong-form and soft-form oversight, depending on the case's circumstances. It emphasizes the application of a contextual and multi-dimensional equality framework—addressing redistribution, recognition, participation, and transformation—to ensure that vulnerable groups are protected. In addition, it proposes a mixed standard of review in socio-economic rights cases, balancing reasonableness with prioritization of the needs of vulnerable groups, and the use of structural interdicts to enforce compliance. Finally, this Article emphasizes the judiciary's pivotal role in fostering constitutionalism and mitigating systemic inequalities. It calls for continued judicial vigilance, collaborative constitutionalism, and active civil society engagement to uphold the transformative promise of the 2010 Constitution, particularly in Kenya's complex hybrid democracy.

Keywords: Constitutional Equality; Judicial Review; Hybrid Democracy; Socio-Economic Rights; Representation-Reinforcing Theory; Vulnerable Groups; Judicial Independence; Collaborative Constitutionalism; Constitutional Supremacy; Structural Interdicts

A. Introduction

Kenya's 2010 Constitution incorporates diverse conceptions of equality, evident in the equality clause, Article 27, and elsewhere in the Constitution. For example, it includes an equal treatment conception of equality through the requirement of non-discrimination on grounds such as sex and disability in Article 27(4); a redistributive conception of equality through the inclusion of socio-economic rights in

Article 43, and affirmative action under Article 27(6); and recognition of cultural and religious diversity in Article 56 and the Preamble. The strong emphasis on equality is in reaction to the previous constitutional order's exclusion of a large portion of Kenyans from governance and the socio-economic system that has led to persistent inequalities.[1] The most affected include the poor, women, persons with disabilities, minorities, and marginalized communities.[2] Such exclusion led to these groups experiencing inequalities in access to socio-economic resources and services, land, jobs and political participation.

While the diverse set of constitutionally enshrined equality rights and the promise of a more equitable society in the 2010 Constitution mark a fundamental milestone in Kenya, more important still is how well—or not—these progressive rights are implemented to alleviate and avoid reinforcing inequality. Recent trends indicate that the enactment of a new constitution, as a marker of democracy, can sometimes serve as a façade of democratic legitimacy without substantial implementation of its progressive dictates.[3] This is particularly relevant in a hybrid democracy like Kenya, which exhibits characteristics of both democracy and authoritarianism.[4]

On one hand, Kenya's post-liberal constitutional framework, established by the 2010 Constitution, goes beyond inclusion of traditional civil rights such as life, liberty, and property by incorporating socio-economic rights and affirmative action, key features of post-liberal constitutions. It also guarantees regular elections, overseen by an Independent Electoral and Boundaries Commission, which has thus far facilitated three peaceful transitions of power, while freedoms of speech and the media are largely upheld. However, on the other hand, it is characterized by a dominant ruling elite with deep-rooted ties to patronage networks and informal power structures. Kenya also faces persistent electoral authoritarianism, endemic corruption, weak rule of law, periodic repression of political rights, and various governance challenges.[5] The government's propensity to disregard court orders further complicates matters, in particular where the government is exacerbating societal inequalities in pursuit of its goals.[6]

This means that, unlike in more democratic countries where the intentions of political leaders and their constituents align most of the time, hybrid democracies like Kenya face a different situation. Recent unprecedented public protests against the unreasonable tax increases on daily goods like bread and sanitary pads in the 2024 Finance Bill, and other governance concerns, highlight the issue.[7] Corruption and the over-centralization of power in the executive over the years, have led to the ruling elite acting despotically, without adequate legislative oversight. This has increased public support for a more empowered judiciary to uphold the Constitution and the rule of law, especially when seen as fair, impartial, and apolitical defenders of democracy.[8] Recent

[1]Constitution of Kenya Review Commission (CKRC), The Final Report of the Constitution of Kenya Review Commission 103 (2005) (having been approved for issue at the 95th Plenary Meeting held on February 10, 2005).

[2]Equal Rights Trust and Kenya Human Rights Commission, In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya I-VIII (2012).

[3]Richard Stacey and Victoria Miyandazi, Constituting and Regulating Democracy: Kenya's Electoral Commission and the Courts in the 2010s, 16 Asian J. Compar. L. 193, 195–197 (2021).

[4]*See* Freedom House, *Interactive Map*, Freedom House (accessed Sept. 7, 2024), https://freedomhouse.org/explore-the-map?type=fotn&year=2023 (profiling of Kenya as a "partly free" country).

[5]*See* Duncan Okubasu Munabi, Real Constitutional Change in Sub-Saharan Africa after the Third Wave of Democratisation: A Comparative Historical Inquiry, 205 (2021) (PhD thesis, University of Utrecht); Andreas Schedler, The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism (2013); Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13(2) J. of Democracy 51, 51–65 (2002).

[6]David Maraga, Chief Justice of the Supreme Court of Kenya, Statement on Failure to Comply with Court Orders (Feb. 7, 2018).

[7]*See* Nanjala Nyabola, *The World is Scrambling to Understand Kenya's Historic Protests – This is What Too Many are Missing*, The Guardian (July 1, 2024), https://www.theguardian.com/commentisfree/article/2024/jul/01/kenya-protests-finance-bill-government-debt; Stephanie Busari, Lauren Kent, Nimi Princewill and Larry Madowo, *Kenyan President Ruto Withdraws Controversial Finance Bill Following Deadly Protests*, CNN (June 26, 2024).

[8]Brandon L. Bartels, Jeremy Horowitz and Eric Kramon, *Can Democratic Principles Protect High Courts from Partisan Backlash? Public Reactions to the Kenyan Supreme Court's Role in the 2017 Election Crisis*, 67(3) Am. J. Pol. Sci. 790, 791–794 (2023).

Afrobarometer surveys illustrate this sentiment: Over 57 per cent of Kenyans trust the courts, 68 per cent believe the president should obey the law and court decisions, and 72 per cent agree that court decisions should be respected by everyone.[9]

In such a context, the way courts interpret their role as guardians of the Constitution and hold duty-bearers accountable for ensuring its proper implementation is crucial. Their actions will greatly determine whether Kenya remains a hybrid democracy or moves towards greater democracy or authoritarianism. This Article explores the constitutional implementation of equality-related rights to address persistent inequalities, focusing on the judiciary's role as a guardian of the Constitution. Section B provides an analytical framework to examine how and to what extent Kenyan courts can balance deference to the State—by not overstepping their mandate into administrative or policy-setting issues—with holding the State accountable for failing to meet its constitutional obligations and thereby avoiding reinforcing inequality. This section also examines constitutional theories on judicial approaches when individual rights and democratic processes are threatened. Alongside this, it considers contextual factors such as abusive constitutionalism in a hybrid democracy and socio-economic barriers that hinder the realization of rights, and how these factors influence the approach to judicial review.

Taking these context-specific elements into account, the Article advocates for the judicial review approach in Kenyan courts championed by James Thuo Gathii, especially in equality and non-discrimination cases. Gathii highlights how Article 165(3)(d)(i) and (ii) of the 2010 Constitution expands judicial review powers, emphasizing constitutional supremacy and legality.[10] Together, these principles foster a culture of justification, requiring all actions to meet constitutional standards.[11] Gathii asserts that Kenyan courts should adopt a rational basis review to ensure that legislative and executive actions are rationally connected to legitimate governmental purposes, fulfilling constitutional objectives. This approach upholds constitutional supremacy and legal justification without undermining the separation of powers.[12] However, while rational basis review is often associated with soft-form judicial review, I argue that it does not fully reflect the broader judicial powers granted by the Constitution, which also permit strong-form judicial review, as demonstrated in the case examples analyzed in Section C.

Section C analyzes key judicial decisions impacting equality rights, highlighting the courts' role and responsibilities in enforcing these rights and their approach to balancing deference and accountability. It also identifies strategies for improving the implementation of constitutional equality rights while enhancing the judiciary's capacity, independence, and strengthening institutional mechanisms for accountability. Finally, Section D summarizes the key findings and arguments, reaffirming the importance of effectively implementing equality rights and the judiciary's ongoing role in safeguarding democratic principles and reducing inequality.

B. Framework for Judicial Review: Balancing Accountability and Deference in Equality Rights Adjudication

The elected legislature and executive, accountable to the electorate, are often argued to be better equipped to determine fundamental issues and detailed policies in order to respect democratic

[9]*Id.* at 794; Afrobarometer, Access to Justice in Kenya: Experience and Perception – Findings from Afrobarometer Round 8 Survey in Kenya (Sept. 12, 2020); Afrobarometer, Summary of Results: Round 6 Survey in Kenya, 2014 (2014–2016).

[10]Constitution, art. 165(3)(d)(i), 165(3)(d)(ii) (2010) (Kenya) (stating that the High Court has jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of: "(i) the question whether any law is inconsistent with or in contravention of this Constitution; and (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution").

[11]Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. Afr. J. Hum. Rts. 31, 32 (1994).

[12]James Thuo Gathii, The Contested empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis 61–77 (2016); Maxwel Miyawa, *The Contested Empowerment of Kenya's Judiciary, 2010-2014: A Historical Institutional Analysis by James Thuo Gathii*, 3 Strathmore L. Rev. 99, 103–104 (2018).

processes.[13] They are also said to be best suited to handle polycentric issues regarding the allocation of public resources and distribution of social benefits as compared to unelected and unaccountable judges.[14] This perspective emphasizes the need for courts to exercise a degree of deference by either refraining from using their power or limiting its extent, particularly on issues related to contestable human rights and social and economic policies, which may be better addressed by the executive or legislature.[15] In Kenya, this principle of deference is, for example, provided for in Article 20(5)(c) of the Constitution, directing courts not to "interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."[16] This position has been affirmed by the Kenyan High Court in *Consumer Federation of Kenya (COFEK) and 3 Others v Attorney General & 4 Others* on the right to food.[17] In the case, Mumbi Ngugi J stated that, as long as the State's measures are sound, it is not upon the Court to enquire as to whether other more desirable or favorable measures could be adopted, or if public money could be better spent.[18] As the judge explained, this is because there is usually a wide range of possible measures open for the State to adopt that could meet the requirement of reasonableness. Once adopted measures are shown to do so, the requirement is met.[19]

However, while Kenyan courts acknowledge the need for deference to State organs, they also assert their duty to protect individual rights and ensure that government policies accord with constitutional requirements. A balance is essential to promote constitutionalism and avoid reinforcing inequalities. This role of adjudication serves to foster equality and prevent discrimination by applying judicial review to correct the shortcomings of pluralism[20] and representative government, especially in cases where the voices of minority and underrepresented groups are either excluded from the political process or when representative democracy fails to function effectively.[21] This is referred to as the representation-reinforcing theory, which justifies judicial review when vulnerable groups are excluded from the political process and their voices are systematically silenced. According to this theory, justiciable human rights enhance democracy by tasking courts with the role of remedying this deficit.[22] The related political process theory asserts that "protection of a system of representative democracy against erosion or degradation by elected representatives cannot be left exclusively in their hands."[23] This is especially true in contexts of authoritarianism or "abusive constitutionalism," where the structures and processes of representative democracy are under attack, elements of which, as previously discussed, are present in Kenya's hybrid democracy.[24]

In instances where public opinion and representative government cannot be relied on, it is important for judges to use their discretion in safeguarding legitimate rights, especially those of minorities, from the tyranny of the majority.[25] As John Hart Ely rightly notes, inclusion of

[13] Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law 18 (2009).

[14] Sandra Fredman, Comparative Human Rights 79–86 (2018).

[15] Alison L Young, *In Defence of Due Deference*, 72(4) The Mod. L. Rev. 554–80 (2009).

[16] Constitution, art. 20(5)(c) (2010) (Kenya).

[17] Consumer Federation of Kenya (COFEK) v Attorney General & 4 Others (2012) KEHC 5492 (KLR) (HC), https://new.kenyalaw.org/akn/ke/judgment/kehc/2012/5492/eng@2012-10-05.

[18] *Id.* at [39] & [40].

[19] *Id.* at [40].

[20] The third paragraph of the Constitution's Preamble alludes to the pluralistic nature of the Kenyan society. It states that the people of Kenya take pride in their "ethnic, cultural and religious diversity" and are "determined to live in peace and unity as one indivisible sovereign nation." Constitution, pmbl. (2010) (Kenya).

[21] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 8, 183 (1980); Fredman, *supra* note 14, at 86–87.

[22] Fredman, *supra* note 14, 87–89.

[23] Stephen Gardbaum, *Comparative Political Process Theory*, 18 Int'l J. Const. L. 1429, 1430 (2020).

[24] *Id.*

[25] Ely, *supra* note 21, at 183.

protected rights such as equality in a constitution put "side constraints on majority rule," which are imposed by the people themselves.[26] Therefore "judges do not check the people, the Constitution does, which means the people are ultimately checking themselves."[27]

Consequently, the judiciary, especially when the government is inattentive or intransigent, finds itself entangled in the political milieu. In such instances, this Article argues that upholding individual rights and providing an effective and meaningful remedy often takes precedence over deferring to the executive and legislature's judgment in fulfilling their institutional roles.[28] This aspect is illustrated by the *Eric Gitari* case discussed in Section C.

On the other end of the spectrum, striving for judicial independence without considering interdependence and the need for some level of collaboration can leave the judiciary vulnerable to political attacks, propaganda, and budgetary cuts predetermined by political institutions, resulting in general incapacitation.[29] This is why Aileen Kavanagh advocates for a collaborative constitutionalism approach. She argues that all three branches of government have distinct but complementary roles in protecting rights, making it a collective responsibility rather than the sole domain of any one branch. This requires the branches to work together with mutual respect and comity, rather than competing for supremacy—who will get the last word.[30] However, there is always the inevitability of disagreement, especially in a hybrid democracy like Kenya. As Kavanagh rightly notes, for the collaborative approach to be effective, there has to be mutual responsiveness, respect and support, and a commitment to the joint enterprise by the three branches. It cannot work well if the branch of government to be partnered with is "devoid of an ethics of constitutional responsibility" in its actions.[31] The cases looked at in Section C, and events unfolding during and after the judgments, for instance the Finance Bill 2023 Housing Levy case, *Victoria Madong Taban v Attorney General & 2 Others* and *Steve Isaac Kawai & 2 Others* v *Council of Legal Education & 2 Others* cases, illustrate how the collaborative approach can be applied as well as its risks.

I. A Rational Basis Review Approach or Beyond?

With the above considerations in mind, this Article advocates for the approach to judicial review in Kenyan courts propounded by James Thuo Gathii, especially in equality and non-discrimination cases. Gathii points out that the 2010 Constitution expanded judicial review powers, emphasizing constitutional supremacy and legality. In particular, Article 165(3)(d)(i) and (ii) grants the High Court jurisdiction to address any questions regarding the interpretation of the Constitution, including determining whether any law or action purportedly taken under constitutional or legal authority is inconsistent with or violates the Constitution. Appeals from the High Court lie with the Court of Appeal.[32] As a matter of right, a further appeal can be made to the Supreme Court in cases involving the interpretation and application of the Constitution.[33] Constitutional supremacy ensures that all public authority conforms to constitutional dictates, while the principle of legality requires all government conduct to be constitutionally and legally valid.[34] Together, these principles establish a culture of justification, where all actions must meet

[26]*Id.* at 8.

[27]*Id.*

[28]Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable*, 122 S. Afr. L.J. 325, 345 (2005).

[29]*See* Victoria Miyandazi & Duncan Okubasu, *Judiciary Chiefs in Hybrid Regimes: Kenya*, Int'l J. Const. L. (forthcoming 2025).

[30]Aileen Kavanagh, The Collaborative Constitution 1–5, 16 (2024).

[31]*Id.* at 4, 17.

[32]Constitution, art. 164(3)(a) (2010) (Kenya).

[33]*Id.* at art. 163(4)(a).

[34]Gathii, *supra* note 12, at 32–33; Miyawa, *supra* note 13, at 101.

constitutional standards.[35] Gathii asserts that Kenyan courts should apply a rational basis review to ensure legislative and executive actions are rationally connected to legitimate governmental purposes, fulfilling constitutional objectives. This approach upholds constitutional supremacy and legal justification without disrupting the separation of powers.[36]

However, while rational basis review is often associated with soft-form judicial review, I argue that it does not fully reflect the broader judicial powers granted by the Constitution, which also permit strong-form judicial review, as demonstrated in the case examples analyzed in Section C. These broader powers are seen as essential to preventing the government from disregarding or rolling back on its constitutional obligations, particularly in hybrid or authoritarian democracies. A more assertive judiciary is better equipped to safeguard democracy and the rule of law while resisting governmental control. Despite this, the executive and legislative branches often view such judgments negatively, perceiving them as judicial overreach when they disagree with the court's interpretation of constitutional provisions.[37]

Consequently, I argue that Article 165(3)(d)(i) and (ii) allows Kenyan courts to utilize either strong-form or soft-form judicial review, depending on the facts of the case. According to Mark Tushnet, strong-form judicial review occurs when courts' reasonable constitutional interpretations prevail over those of the legislature, making their judgments final or unrevisable.[38] The *Eric Gitari* case discussed in Section C is an example of this. However, such interpretations can be overturned, in the *long run*, through constitutional amendments, the appointment of new judges with differing opinions, or when existing judges change their views in related cases.[39] In contrast, soft-form judicial review allows for judicial interpretations of constitutional provisions to be revised by the legislature in the *short term*, using decision rules similar to the everyday legislative process.[40] This approach permits political branches to revise judicial interpretations promptly, with the hope that the courts' discussions on substantive rights and questionable statutes will persuade legislatures to adopt rights-protective interpretations and avoid rights-restrictive policies.[41] This can be seen in the Housing Levy, *Victoria Madong Taban v. Attorney General & 2 Others*, and *Steve Isaac Kawai & 2 Others v. Council of Legal Education & 2 Others* cases discussed in Section C.

The combination of soft and strong-form judicial review aligns with the dialogic theory of justiciable human rights, where courts, the executive, legislature, and the people engage in a dialogue. For example, when a court declares an old legislation unconstitutional, either in whole or in part, it can be amended or replaced with new legislation or constitutional amendment in the *short or long run*. Thus, judges do not necessarily have the last word.[42]

II. A Contextual, Equality-Sensitive Approach to Judicial Review

This Article further proposes that, in equality and non-discrimination cases, the courts should apply a contextual approach that considers aspects of an individual or group's vulnerability and examines how actions or omissions by State organs can either reinforce or mitigate such disadvantages. As I have argued elsewhere, incorporating this approach in equality-related cases is crucial for determining what *treatment as an equal* means for various vulnerable individuals and

[35]Mureinik, *supra* note 11, at 32.
[36]Gathii, *supra* note 12, at 61–77; Miyawa, *supra* note 13, at 103–104.
[37]Tushnet, *surpa* note 13, at 21.
[38]*Id.* at 21, 33–34.
[39]*Id.*
[40]*Id.* at 24–25.
[41]*Id.* at 26–27.
[42]*Id.* at 34; Fredman, *supra* note 14 at 90–91; Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 Osgoode Hall L.J. 74 (1997).

groups.[43] The contextual approach should also encompass four key elements derived from Sandra Fredman's multi-dimensional view of equality: The *redistributive dimension*, which addresses disadvantage; the *recognition dimension*, which tackles social stigma, stereotypes, prejudice, and violence; the *participative dimension*, which facilitates participation and political voice for the vulnerable; and the *transformative dimension*, which accommodates difference and fosters transformative change.[44] These facets of equality are interdependent and work together in addressing the harms of inequality and discrimination in a polity as opposed to each dimension on its own.[45] Therefore, all these dimensions should be considered when addressing equality-related cases.

The analysis in Section C will assess how Kenyan courts have applied this contextual, equality-sensitive approach.

III. A Mixed Standard of Review in Substantive Equality Cases on Socio-Economic Rights

On substantive equality issues involving socio-economic rights, I argue that Article 20(5)[46] of the Constitution, on the implementation of the socio-economic rights in Article 43—health, housing, sanitation, food, water, social security, and education—provides a two-pronged mixed standard of review, incorporating both reasonableness and the value of equality, which is articulated by the need to prioritize the needs of vulnerable groups. Article 20(5)(b) sets out the goal to be achieved, an "ends test"—to prioritize the needs of the most disadvantaged when realizing socio-economic rights. The "means test," on how to progressively realize socio-economic rights as required under Article 21(2) of the Constitution,[47] is concerned with whether the plan the State has put before the court is a reasonable means of achieving the pre-determined end goal. Article 20(5)(c) provides a space for deference by specifying that the court cannot substitute the decision of a State organ with its own. Nevertheless, the court can demand for the State to show what it is doing to meet the goal of prioritizing the needs of the most disadvantaged when realizing socio-economic rights; and that such measures are a reasonable means of achieving this goal. Moreover, where the State relies on shortage of resources to justify falling short of achieving the ends, it must adduce evidence to support its claims, per Article 20(5)(a).

Structural interdicts can ensure effective remedies by requiring a State organ to fulfil its duties, correct unconstitutional policies or legislative provisions within a specified timeframe, in consultation with the relevant interest group(s), and report back to the court. This approach is necessary because, as we will see, many instances of non-compliance with court orders by State organs relate to their responsibility to provide and fulfil obligations, necessitating additional safeguards and court oversight.

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[43] Victoria Miyandazi, Equality in Kenya's 2010 Constitution: Competing and Interrelated Conceptions Ch. 3 (2021). The term is derived from Ronald Dworkin, Taking Rights Seriously 227, 272–74 (1977).

[44] Sandra Fredman, Discrimination Law 25–33 (2nd ed., 2011); Sandra Fredman, *Substantive Equality Revisited*, 14 Int'l J. Const. L. 712 (2016).

[45] *Id.*

[46] Constitution, art. 20(5) (2010) (Kenya), requires that:

In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

Id.

[47] *Id.* at art. 21(2) (providing that "[t] he State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43").

In conclusion, this section advocates for Kenyan courts to adopt a contextual, equality-sensitive approach to judicial review, incorporating both strong and soft-form judicial review. Strong-form review ensures judicial interpretations largely prevail in constitutional matters, while soft-form allows for legislative revision. This dual approach fosters a dialogue between courts and political branches, balancing accountability with deference to State authority. Furthermore, the courts should apply a multi-dimensional equality framework, considering redistribution, recognition, participation, and transformation, to address vulnerabilities faced by marginalized groups and socio-economic inequalities. In socio-economic rights cases, a mixed standard of review, balancing reasonableness and prioritization of vulnerable groups, is essential for advancing substantive equality. We now turn to case studies that illustrate the balance, or imbalance, between deference and accountability in equality rights cases. These case studies will also test the approaches recommended in this section.

C. Balancing Accountability and Deference in Concrete Equality Cases

This Section analyzes various post-2010 cases before Kenyan courts concerning the equality guarantees in Article 27 and related constitutional and legislative provisions addressing persistent inequalities. It scrutinizes the reasoning and judgments of these cases, as well as post-judgment developments, to assess the extent to which Kenyan courts have applied the recommended approaches set out in Section B to address persistent inequalities. The analysis also examines the courts' deference to the executive and legislature when appropriate, and their use of a contextual and equality-sensitive approach to establish what *treatment as an equal* means for various litigants, aiming to mitigate and avoid reinforcing the inequality they face. The cases are analyzed in four sub-sections based on Fredman's aforementioned four-dimensional elements of equality: *Redistributive, recognition, participative,* and *transformative*. However, it is important to note that each of the cases discussed can fit into multiple categories, as the four elements are closely interconnected.[48] It is to this that we now turn.

I. Redistributive Dimension: Addressing Socio-Economic Disadvantages

Questions on the legitimacy of the Court to adjudicate on polycentric issues, which duty, as we have seen, has been argued to mainly lie with the executive and legislature, come to bear in the recent series of litigation surrounding Kenya's Finance Act of 2023, particularly in relation to equality challenges to the introduction of the Affordable Housing Levy (housing levy) in section 84 of the Act. The cases were consolidated in *Okiya Omtatah Okoiti & Others v. The Cabinet Secretary for the National Treasury and Planning & 3 Others*.[49] The government introduced the housing levy to address the housing crisis and improve access to affordable housing as mandated by Article 43(1)(b) of the Constitution. To that end, section 84 of the 2023 Finance Act imposed a 3 per cent levy on employees' gross monthly income, contributed partly by employers, to fund the National Housing Development Fund.[50] The petitioners challenged the levy on three grounds: First, that it constituted an alien tax not covered by Article 209(1) of the Constitution; second, that it was discriminatory, targeting only salaried workers in formal employment, violating Articles 10, 27, and 201(b)(i) of the Constitution; and lastly, that it lacked a legal framework for its imposition, contrary to Article 210 of the Constitution.

The case reveals that the government had based its decision on an assumption regarding the earnings disparity between informal and formal sector workers, thereby justifying a heavier tax

[48]FREDMAN, *supra* note 44, at 25–33.

[49]Okiya Omtatah Okoiti & Others v The Cabinet Secretary for the National Treasury and Planning & 3 Others (H.C.K. at Nairobi) (Constitutional Petition No E181 of 2023) (2023) KEHC 25656 (K.L.R.) (Kenya) [hereinafter *Okiya Omtatah*].

[50]*Id.* at [87].

burden on the latter. However, flaws in Kenya's tax system create avenues for extensive tax avoidance and evasion within the informal sector, potentially resulting in informal workers' higher disposable incomes compared to formally employed individuals within the same income bracket. Moreover, according to Kenya's employment statistics 2015–2022, of the more than 19.1 million people employed in 2022, 15.9 million worked in the informal sector and approximately 3.2 million in the formal sector.[51] Despite accounting for a significant portion of the workforce, economic activities within the informal sector remain largely unregulated and untaxed.[52] In addition, the escalating cost of living, with the economy having suffered a big blow in the aftermath of the 2020 Covid-19 pandemic, juxtaposed with stagnant salaries, prompts more formal sector workers to seek employment opportunities in the informal sector, where tax obligations, especially income tax, are perceived to be lower or easier to circumvent due to lax regulation. Thus, the imposition of an additional 3 per cent housing levy solely on formally employed individuals, aimed at establishing a housing fund for affordable housing nationwide and to benefit all citizens, proved contentious.

The government's response was that, first the housing levy could be considered as taxation on income, which the government has power to impose. Second, that the government intended to set up a Housing Fund, ensuring funding for all citizens, in fulfilment of Article 43(1)(b) of the Constitution.[53] Third, they asserted that the housing levy enjoyed the presumption of constitutionality and was in compliance with equality and fair taxation requirements, it being argued to be "progressive, equitable, and fairly borne through a progressive taxation regime" that applies both vertically and horizontally without exemption of any public or state officers.[54] Lastly, they argued that targeted taxation on specific sectors could be constitutional if sufficiently justified.[55]

Citing comparative jurisprudence, the High Court acknowledged the argument on the need for courts to exercise judicial restraint and be slow to interfere with tax legislation. On this, it cited the principles laid out by the Indian Supreme Court in *State of MP v. Rakesh Kohli & Another*.[56] These require courts in such cases: (1) To have regard for the presumption of constitutionality of legislation; (2) to not strike down a law made by Parliament by merely stating that it is arbitrary or unreasonable or irrational but based on some constitutional infirmity that has been found; (3) to not be concerned with the wisdom or otherwise, justice or injustice of the law in question as Parliament is meant to be alive to the needs of the people it represents and parliamentarians the best judge of the community they represent; (4) to bear in mind that "hardship should not be relevant in pronouncing on the constitutional validity of a fiscal statute or economic law," and (5) that "in the field of taxation, the Legislature enjoys greater latitude for classification."[57] However, applying the rational basis standard of review discussed in Section B, the Court asserted its extensive judicial review powers under Article 165(3)(d)(i) and (ii) of the Constitution to adjudicate questions of an alleged violation of a fundamental right or freedom in the Bill of Rights and whether any law—there being no exemptions—contravenes the Constitution.[58] This therefore meant that, even though Parliament has the power to impose taxes, it has to do so in accordance with the Constitution and *it could not "exercise its power in an arbitrary fashion*

[51]*See* Kenya National Bureau of Statistics, *Total Employment in Kenya from 2015 to 2022, by Sector*, STATISTA (Nov. 6, 2023) (updated May 8, 2024), https://www.statista.com/statistics/1134332/total-employment-in-kenya/#:~:text=In%202022%2C%20around%2019.1%20million,employed%20in%20the%20formal%20sector.

[52]Institute of Economic Affairs, *Informal Sector and Taxation in Kenya*, 29 THE BUDGET FOCUS 1 (2012).

[53]*Okiya Omtatah, supra* note 49, at [180].

[54]*Id.* at [181], [91].

[55]*Id.* at [181].

[56]State of MP v Rakesh Kohli & Another AIR 2012 SC 2351 (2012) (India).

[57]*Id.* at [163].

[58]*Id.* at [165].

without any rational connection to a legitimate purpose," using the language in Article 24 of the Constitution—the limitations clause.[59]

Addressing the issue of the housing levy's selective impact on salaried workers in formal employment, the Court acknowledged the constitutional principle of fairness in taxation under Article 201(b)(i). While recognizing that tax imposition may necessitate distinctions between taxpayer classes, it emphasized that *such distinctions must be justified and rationally related to the government's legitimate objectives*. In scrutinizing the housing levy, the Court found that the national government failed to justify why the burden of providing affordable housing exclusively fell on workers in formal employment, excluding non-formal earners. This contradicted the constitutional responsibility of the national government to establish a broad-based, efficient, and fair tax system. The Court concluded that the tax's imposition lacked rational justification and appeared to be an expedient choice that would lead to the least resistance—as collecting taxes from employees in formal employment was easier—rather than a principled decision.[60] It established the threshold for fairness in the imposition of tax as *"ensuring that everyone bears their fair share of taxation and pays the correct amount and which is seen to be fair by vigorous pursuit of tax avoidance and evasion."*[61] Therefore, the Court declared the imposition of the housing levy unconstitutional. It deemed the imposition unfair, discriminatory, irrational, and arbitrary, in violation of both Article 27 and Article 201(b)(i) of the Constitution.[62]

When the government appealed the High Court's judgment, the Court of Appeal refused to grant interim orders suspending the declaration of invalidity of the housing levy provisions, arguing that the presumption of constitutional validity of the impugned sections of the 2023 Finance Act was extinguished by the High Court's declarations.[63] This decision triggered verbal attacks on the judiciary by the government and ruling elite. President William Ruto publicly accused the courts of complicity in a plot to undermine his government's agenda, including public housing. He further alleged that judges were accepting bribes to issue rulings against his administration's policies, using these claims to justify his declaration to defy court orders, labelling certain unnamed judges as "corrupt." Ruto's political allies have advocated for radical measures against the judiciary, such as the mass sacking of judges.[64]

In response, the Law Society of Kenya and civil society organizations released statements and organized demonstrations in solidarity with the judiciary.[65] Chief Justice Martha Koome (CJ Koome) actively addressed and denounced the verbal attacks, encouraging judges and magistrates to carry out their duties impartially and without intimidation. Applying a collaborative constitutionalism approach, CJ Koome also met with President Ruto, emphasizing that credible complaints against specific judges should be formally presented to the Judiciary

[59] *Id.* at [167] (emphasis added).

[60] *Id.* at [212]–[216].

[61] *Id.* at [217]; Kenya Revenue Authority v Waweru & 3 Others; Institute of Certified Public Accountants & 2 Others (Interested Parties) (2022) KECA 1306 (K.L.R.) (Kenya) (emphasis added).

[62] *Okiya Omtatah*, *supra* note 49, at [220].

[63] The National Assembly & 47 others v Okiya Omtatah Okoiti & 169 others (C.A.K. at Nairobi) (Civil Application No E577 of 2023) (2024) KECA 39 (K.L.R.) (Kenya).

[64] Otieno Otieno, *The Problem with Kenya President Ruto Attacks on Judiciary*, The East African (Jan. 8, 2024), https://www.theeastafrican.co.ke/tea/news/east-africa/the-problem-with-kenya-president-ruto-attacks-on-judiciary-4485416; Carmel Rickard, *Tensions High in Kenya as President Attacks Judiciary*, African Lii (Jan. 11, 2024), https://africanlii.org/articles/2024-01-11/carmel-rickard/tensions-high-in-kenya-as-president-attacks-judiciary; Vivianne Wandera, *Why is President Ruto in a Row with Kenya's Judiciary? A simple Guide*, Aljazeera (Jan. 5, 2025), https://www.aljazeera.com/news/2024/1/5/why-is-president-ruto-in-a-row-with-kenyas-judiciary-a-simple-guide.

[65] Mohammed Yusuf, *Kenyan President's Remarks on Judiciary Condemned*, VOA (Jan. 4, 2024), https://www.voanews.com/a/kenyan-president-s-remarks-on-judiciary-condemned/7426906.html; International Commission of Jurists–Kenyan Section, *Statement Condemning President William Ruto's Attack on the Judiciary, Separation of Powers and the Rule of Law,* ICJ Kenya (Jan. 4, 2024), https://icj-kenya.org/news/statement-condemning-president-william-rutos-attack-on-the-judiciary-separation-of-powers-and-the-rule-of-law/.

Service Commission for proper investigation.[66] However, her actions also illustrate the dangers of such closed-door discussions, in that President Ruto afterwards hinted that during the meeting, there had been an agreement with the judiciary regarding the housing levy program. This alleged misrepresentation cast doubt on judicial independence. During the Annual Conference of the Employment and Labour Relations Court Judges in Naivasha, which followed the meeting, CJ Koome emphasized that in the Affordable Housing Programme matter, the judiciary was and remains independent and impartial, unable to enter into agreements on cases or issues before the court. She clarified that the conversation with President Ruto was taken out of context and that they had only agreed that the executive should follow court directions.[67]

This petition stands out due to the profound issues it addresses. On the one hand, it delves into the question of whether there should be deference to the State on polycentric taxation issues, with the invoking of a presumption of constitutionality that sees the introduction of new taxes by Parliament as a legitimate exercise of governmental power impacting crucial areas. The argument involves assertions that taxation, as a crucial aspect of sovereignty, demands minimal court interference, given its complex polycentric nature, which courts are purportedly ill-equipped or unauthorized to review.[68] Nevertheless, on the other hand, the opposing stance argues for judicial review through heightened scrutiny for potential constitutional violations of the newly imposed taxes, as a tool that would adversely affect people's purchasing power and livelihoods, especially in terms of their potential to exacerbate inequalities. As rightly argued, "Although taxation is . . . necessary, the taxing power needs to be exercised judiciously, lest it threatens the very same individual liberties that government is established to protect. In other words, taxing power can be abused, just like any other power."[69]

In the case, the Court did not prescribe to the national government the form of legal framework on the housing levy that should be adopted. It merely pointed out inconsistencies and omissions flowing from section 84 of the Finance Act 2023's imposition of the levy, which despite setting out its purpose, failed to provide for the constitutional and statutory manner for its achievement, leading to the levy being declared unconstitutional—soft-form judicial review.[70] However, in going a bit beyond soft-form judicial review by unpacking the rationality of the imposition of the levy on persons in formal employment to the exclusion of other non-formal income earners to support the national housing policy, the Court was able to better safeguard the Constitution's equality guarantee and avoid the reinforcement of inequality. It also sets out a standard of review test for scrutinizing the rationality of governmental laws and policies and whether they comply with the Constitution—*whether the government's exercise of power is constitutionally justified and rationally connected to its legitimate purpose*. The threshold is arguably quite broad, accommodating both soft and strong-form judicial review. While the latter can pose challenges in terms of being accused of judicial overreach, I argue that its potency lies in its effectiveness in ensuring the State's accountability in cases of governmental inattentiveness and intransigence, potentially preventing the reinforcing of inequalities.

Barely two months after the Court of Appeal's ruling on January 26, 2024, Parliament enacted the Affordable Housing Act, 2024, on March 19, 2024. This Act addresses the issues flagged as unconstitutional by the High Court and increases the levy. Specifically, section 5 of the Act raises the Affordable Housing Levy to 5 per cent of an employee's gross salary and does not distinguish between formal and informal employees. This demonstrates the application of the dialogic

[66]Republic of Kenya Judicial Service Commission, *Public Statement* (Jan. 3, 2024) (Kenya) (on file with author).

[67]Jason Ndunyu, *Martha Koome Denies Secret Deal with Ruto on Housing Levy*, The Kenya Times (Mar. 22, 2024), https://thekenyatimes.com/latest-kenya-times-news/national/martha-koome-denies-secret-deal-with-ruto-on-monthly-deductions/.

[68]Gautam Bhatia, *Suspension of Primary Legislation through Conservatory Orders: A Commentary on the Kenyan High Court's Finance Act Ruling – II*, Indian Constitutional Law and Philosophy (July 18, 2023).

[69]Migai Akech, Administrative Law 205–207 (2016).

[70]*Okiya Omtatah*, *supra* note 49, at [208].

approach and, applying Tushnet's framework, firmly categorizes the case as one where the court applied soft-form judicial review, given the legislature's swift response to the court's judgment by enacting a statute that addressed the housing levy's constitutionality concerns.

Looking at substantive equality cases involving the right to housing and forced evictions, Kenyan courts have recognized the need to provide urgent relief for some of the most vulnerable groups in the country.[71] They have applied structural interdicts as a pragmatic approach to striking a balance between court deference to the State's stance on polycentric issues involving resource allocation and planning, while ensuring compliance with its constitutional obligations and adherence to court orders. Unlike prescribing specific actions to the State, these interdicts necessitate meaningful engagement with key stakeholders to formulate a plan or amend laws. The court then oversees the alignment of these plans or amendments with constitutional requirements and ensures their implementation.[72]

Typically, the court mandates the Attorney General or the implicated State organ to submit a report, in the form of an affidavit, within a specified timeframe. This report details steps taken to engage with complainants and relevant stakeholders, working towards a mutually agreed resolution of grievances, or the formulation and amendment of laws and policies in compliance with constitutional obligations. This method holds the State accountable without the court delving into complex issues of policymaking and resource allocation.

Such orders compel the State to engage in substantive dialogue with plaintiffs, knowing that the court remains an option for recourse.[73] They provide the State with flexibility in determining how to remedy constitutional breaches to ensure governmental initiatives run smoothly and in compliance with the Constitution, while allowing the court to monitor the protection of vulnerable groups' rights. This approach not only upholds the separation of powers but also safeguards the court from accusations of overstepping its role in functions reserved for other state organs.[74]

However, there are arguments about the right time to apply structural interdicts—at the beginning, just before final judgment or in the judgment of a case—and how they should be framed. This issue arose in *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 Others* when it was appealed to the Supreme Court.[75] At the High Court, Mumbi Ngugi J issued a structural interdict requiring a report to be filed in the form of an affidavit in relation to current State policies and guidelines on how shelter and housing is to be provided to marginalized groups within 60 days.[76] The Court also made an order for meaningful engagement between the parties and relevant stakeholders towards an agreed resolution of the applicant's grievance within 90 days.[77] This gave the State flexibility in deciding how it would meet the claimants' housing needs while also enabling the Court to keep a watchful eye over the protection of the informal settlers' right to housing. Moving on to the Court of Appeal, the judges rejected the application of structural interdicts and retention of supervisory jurisdiction, holding that once a

[71]See Mitu-Bell Welfare Society v Attorney General & 2 Others [2013] eKLR (H.C.K. at Mitu-Bell) (Kenya) [hereinafter *Mitu-Bell High Court decision*, 2013]; Satrose Ayuma and Others (on behalf of Muthurwa residents) v Kenya Railways Staff Benefit Scheme and Others (2011) KEHC 3992 (K.L.R.) (Kenya); Susan Waithera Kariuki & 4 Others v Town Clerk, Nairobi City Council & 2 Others (2011) KEHC 4305 (K.L.R.) (Kenya) [hereinafter *Susan Waithera*]; Ibrahim Songor Osman v Attorney General & 3 Others, High Court Constitutional Petition No. 2 of 2011 [2011] eKLR (H.C. K.) (Kenya) [hereinafter *Ibrahim Songor*].

[72]Christopher Mbazira, Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice 189 (2009).

[73]*Id.* at 182.

[74]*Id.* at 189.

[75]Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae) (2021) KESC 34 (K.L.R.) (S.C.K.) (Kenya) [hereinafter *Mitu-Bell Supreme Court decision*, 2021].

[76]*Mitu-Bell High Court decision*, 2013, *supra* note 71, at [79].

[77]*Id.*

case is closed, no further orders should be given as per the *functus officio* doctrine.[78] Clarifying the issue, the Supreme Court upheld the application of structural interdicts in Kenya stating that Article 23(3) of the Constitution, listing the appropriate remedies a court can grant, uses the word "including" meaning that the reliefs specifically listed are non-exhaustive.[79] Thus, despite the continued validity of the *functus officio* doctrine in the majority of cases, a court can issue orders beyond those listed depending on the circumstances of the case.[80] On further appeal, the Supreme Court noted that, *where necessary, structural interdicts should be issued as interim orders*, indicating to the parties that "the final judgment shall await the crystallization of certain actions."[81] This is an apt observation for equality cases involving the State's responsibility to fulfil its obligations. The lack of reporting requirements and opportunities for continued court oversight on complex polycentric matters, as well as the ability to modify orders as needed, hinders the courts' ability to supervise state compliance with orders and address any intransigence in fulfilling mandated duties. Such an approach also fosters dialogue and applies the collaborative constitutionalism approach.

II. Recognition Dimension: Tackling Social Stigma, Stereotypes and Prejudice

This section looks at the "recognition dimension," focusing on how Kenyan courts address social stigma, stereotypes, and prejudice in cases of discrimination. By recognizing diverse identities, cultures, and religions, courts can help create a more inclusive society where equality is not contingent on conformity to dominant norms.[82] We will discuss how irrational classifications and harmful distinctions based on race, sex, ethnicity, and other characteristics perpetuate disadvantage and inequality, and examine case law that highlights the judiciary's role in confronting these issues. Key examples will illustrate how courts navigate soft and strong-form judicial review while applying an equality-sensitive, contextual approach to discrimination claims.

In the related cases of *Steve Isaac Kawai & 2 Others v Council of Legal Education & 2 Others* and *Victoria Madong Taban v Attorney General & 2 Others*, the constitutionality of section 12(a) of the Advocates Act 1989 was challenged.[83] Although the Act generally permitted citizens from all East African Community (EAC) Member States to be registered to sit for Bar examinations and, once they qualify, be admitted to the Roll of Advocates in Kenya, as outlined in Article 126(2)(a) of the Treaty Establishing the East African Community, section 12(a) listed only the EAC Member States as of 1989: Kenya, Rwanda, Burundi, Uganda, and Tanzania. South Sudan, which became an independent State in 2011 and joined the EAC in 2016, was not listed in the 1989 Act.[84]

Despite this, South Sudanese students and those from other African countries including Cameroon, Malawi, Nigeria, and The Gambia, had historically been admitted to the Kenya School of Law, allowed to sit for Bar examinations, and enrolled in the Roll of Advocates in Kenya.[85] The petitioners, South Sudanese citizens who had moved to Kenya as refugees or immigrants due to

[78]Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others [2016] eKLR, [71]–[72], [112], and [141 (c)–(d)] (C.A.K. at Mitu-Bell) (Kenya) [hereinafter*Mitu-Bell Court of Appeal decision*, 2016]. *Functus officio* doctrine means that once judicial officers have delivered their judgment in a case, the matter is considered closed, and no further orders can be issued, except for minor corrections such as clarifying clerical errors.

[79]*Mitu-Bell Supreme Court decision*, 2021, *supra* note 75, at [120]–[121].

[80]*Id.*

[81]*Id.* at [122].

[82]Nancy Fraser & Axel Honneth, Redistribution or Recognition?: A Political-Philosophical Exchange 7 (2003).

[83]Steve Isaac Kawai & 2 Others v Council of Legal Education & 2 Others [2021] eKLR (H.C.K.) (Kenya) [hereinafter *Isaac Kawai*]; Victoria Madong Taban v Attorney General & 2 Others, Nairobi High Court Constitutional Petition No. 29 of 2019 (unreported) (Kenya) [(hereinafter *Victoria Taban*, 2019]; Victoria Taban & Others v Kenya School of Law & Another, Nairobi High Court Constitutional Petition No. 509 of 2016 (Kenya) [hereinafter *Victoria Taban,* 2016].

[84]*Isaac Kawai*, *supra* note 83, at [5]–[8].

[85]*Victoria Taban*, 2016, *supra* note 83, at 5.

conflicts in South Sudan, had studied in Kenya from nursery through university. After earning their Bachelor of Laws degrees, they were admitted to the Kenya School of Law to pursue the Advocates Training Programme, which qualified them to sit for the Bar examinations and be admitted as advocates of the High Court of Kenya. However, their admissions were subsequently rescinded on the grounds that South Sudan was not specifically listed in section 12(a) of the Advocates Act.

The petitioners argued that the decisions of the Council of Legal Education and Kenya School of Law were discriminatory against South Sudanese students because all other EAC citizens were admitted under Article 126(2)(a) of the EAC Treaty. They also contended that the decisions discriminated against them as refugees, violating, *inter alia*, Article 22 of the 1951 Convention Relating to the Status of Refugees and Article 26 of the 1948 Universal Declaration of Human Rights, which prohibit discrimination against refugees in accessing public education.[86] Further, they argued that the decision was unreasonable given the precedent of admitting South Sudanese students in previous years and violated their legitimate expectations, as they had already paid for and studied in the program and, per a court order, had sat for the Bar examinations and were awaiting admission.[87] The High Court held that section 12(a) of the Advocates Act violated the petitioners' rights and directed the legislature to amend the provision to align with the EAC Treaty and comply with Article 27 of the Kenyan Constitution, which prohibits discrimination based on nationality.[88] This approach demonstrates the High Court's respect for the separation of powers by leaving it to the legislature to amend section 21(a) of the Advocates Act to ensure constitutional compliance—soft-form judicial review. At the same time, the Court avoided reinforcing inequality by declaring the section inconsistent with Article 27 through a rational basis review. During the interim period before amendment of section 12(a), the decision permits South Sudanese students to benefit from it, as the Court ordered their admission to the Bar. This ensures that any legislative amendments *would have to conform* to the Court's judgment, thereby exemplifying strong-form judicial review.

In these two cases, the High Court also applied a contextual and equality-sensitive approach by carefully considering the lived experiences and vulnerabilities of the petitioners, who were South Sudanese citizens residing in Kenya as refugees or immigrants due to conflict in their home country. The Court acknowledged that these individuals had not only invested significant time and resources into their legal education but also faced systemic barriers that stemmed from their classification as refugees. By challenging the rescinding of their admissions based on section 12(a) of the Advocates Act, the petitioners highlighted how such decisions perpetuated inequalities, particularly when contrasted with the treatment of other EAC citizens. The Court recognized that true equality for the petitioners entailed not only the right to access the Bar examination but also the acknowledgment of their status and contributions as residents who had undergone extensive legal training in Kenya. This approach emphasizes the importance of a contextual approach in understanding the specific disadvantages faced by marginalized groups in order to adequately address them and ensure that their rights are upheld.

Notably, even before the High Court's judgment on 20 May 2021, discussions among the parties led to the petitioner in the *Victoria Madong Taban* case and other South Sudanese students being included in the 14 January 2020 Council of Legal Education General Notice No. 1 of 2020 list of qualified students for admission as Advocates of the High Court of Kenya, resulting in their subsequent admission. This case illustrates how engagement and dialogue can help to swiftly address irrational laws and policies, promoting the enforcement of equality rights. This approach also aligns with the theory of collaborative constitutionalism.

[86] *Isaac Kawai*, *supra* note 83, at [5]–[8], [12]–[23], [43]–[51].
[87] *Id.* at [14], [40].
[88] *Id.* at [70]–[73].

The *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others* case is an example of the application of strong-form judicial review.[89] The case concerned the registration of a non-governmental organization (NGO) with the goal of addressing the discrimination, stigmatization, violence, and other human rights abuses suffered by lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in Kenya and to advance their human rights.[90] The petitioner had made at least three applications to the NGO Co-ordination Board proposing the names Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy, and Gay and Lesbian Human Rights Organization, among others, all of which were rejected. In its defense, the Board stated that the rejections, although infringing on the petitioner's freedom of association, were justified because the Penal Code criminalizes homosexual intercourse.[91] It based its decision to reject the registration request on a provision of the NGO Regulations of 1992, which states that the Director of a Board can reject registration applications if "such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable."[92] This was despite the petitioner's efforts to distinguish the fact that his organization sought to further LGBTI equality rights and not to further criminalized conduct.[93] The Board also argued that the proposed NGO would go against Kenyan cultural and religious values. On this, it specifically contended that "homosexuality is largely considered to be a taboo and repugnant to the religious teachings, cultural values and morality of the Kenyan people."[94]

The petitioner therefore sought a determination by the Court of whether he and gay and lesbian persons in Kenya are protected in Article 36 of the Constitution, which provides for freedom of association. He also contended that the refusal to register the proposed NGO violated human dignity and was tantamount to inhuman and degrading treatment, by attempting to ostracize the group and view gays and lesbians as criminals without rights to associate.[95] Further, he stated that the act was a violation of the right to equality before the law and it was a denial of freedom of expression and access to information, based on sexual orientation.[96]

In refusing to consider public opinion or popular morality, the three-judge bench quoted with approval the South African Constitutional Court's holding in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* that "the dictates of the morality which [the court] enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."[97] The judges continued to state further that:

> [W]hile the Constitution recognises the right of persons who for reasons of religious or other belief, disagree with or condemn homosexual conduct to hold and articulate such beliefs, it does not permit the state to " . . . **turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole society.**"[98]

The Court thus made it clear that its duty is not to substitute parties' views and beliefs with constitutional provisions, but to examine the issues and facts presented before it and determine

[89]Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others [2015] eKLR [hereinafter *Eric Gitari*].
[90]*Id.* at [1] & [19].
[91]*Id.* at [4], [10], [11].
[92]The Non-Governmental Organizations Co-Ordination Regulations (1992), KENYA GAZETTE, Vol. 94, No. 24, § 8(3)(b) (Kenya).
[93]*Eric Gitari, supra* note 89, at [14].
[94]*Id.* at [96].
[95]*Id.* at [3], [26], [28].
[96]*Id.* at [29].
[97]*See id.* at [90]; *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999 (1) SA 6 (CC) at ¶ 136 (S. Afr.).
[98]*Eric Gitari, supra* note 89, at [91] (appearing as bolded in the judgment itself).

the constitutionality or otherwise of the Board's refusal to register the proposed NGO.[99] The Court then proceeded to clarify that the petitioner did not seek to promote homosexual intercourse, same-sex marriage, or pedophilia, as the Board and third interested party argued and seemed to be concerned about, but the rights of LGBTI persons to associate in an NGO recognized by law in relation to the protection of their human rights.[100] Thus, it was held that no matter how reprehensible individuals may find other people's sexual orientation or sexuality, they must accord LGBTI persons their human rights as guaranteed to all persons by the Constitution in order to protect their dignity as human beings, per Article 19(2).[101]

Upon appeal, a five-judge bench upheld the right of LGBTI persons in Kenya to associate by a 3:2 majority.[102] In her separate opinion at the Court of Appeal, Koome JA—now Chief Justice—recognized the petitioner's right, as a defender of the gay and lesbian community in Kenya, to register a human rights organization dedicated to "accurate reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights organisations on human rights issues relevant to the gay and lesbian communities living in Kenya."[103] She noted that denying this right would undermine the progress made in promoting respect and tolerance for differences in society, emphasizing constitutional morality over public morality, and stating that public opinion against gays and lesbians is outright discrimination.[104]

On further appeal, the Supreme Court upheld the High Court and Court of Appeal's judgments by a 3:2 majority, affirming that LGBTI individuals have the right to freedom of association.[105] The NGO Coordination Board was consequently held to have violated Article 36 of the Constitution by denying fair treatment to gay and lesbian persons seeking to register an association. The judgments enabled the National Gay and Lesbian Human Rights Commission, established by the petitioner, Eric Gitari, and five other lawyers in December 2012, to continue with its operations.[106]

The *Eric Gitari* case illustrates that, in performing its democracy-reinforcing role, especially in cases involving minorities who lack political power, a strong-form judicial review approach may be essential to avoid exacerbating inequality. The judges rigorously examined the constitutional rights of LGBTI individuals in the face of discriminatory practices. The courts not only rejected the NGO Co-ordination Board's claims rooted in societal morality and public opinion but also emphasized the importance of constitutional protections for marginalized groups. By prioritizing the lived experiences and vulnerabilities of the petitioners, the courts acknowledged that true equality for LGBTI persons involves not only the freedom to associate but also the recognition of their dignity and human rights. Through this contextual and equality-sensitive approach, the courts reinforced the idea that equality must account for the specific challenges faced by marginalized groups, ensuring that their voices are heard and respected. Ultimately, the decision not only enabled the continued operations of the Commission but also set an important precedent for protecting the rights of those who have historically been sidelined.

[99] *Id.* at [98].

[100] *Id.* at [99]–[100].

[101] *Id.* at [104].

[102] Non-Governmental Organizations Co-Ordination Board v EG & 5 Others (2019) 1 K.L.R. 386 (C.A.K. at Nairobi) (Kenya).

[103] *Id.* at Judgment of Koome JA, [50].

[104] *Id.* at [32]–[35], [48], [52].

[105] NGOs Co-ordination Board v Eric Gitari and 3 Others; Katiba Institute (Amicus Curiae), [72], Supreme Court of Kenya Petition 16 of 2019 (Kenya).

[106] *See History of NGLHRC: Our Story*, National Gay & Lesbian Human Rights Commission (accessed June 21, 2024), https://nglhrc.com/history-of-nglhrc/.

III. Participative Dimension: Enhancing Political Voice and Participation for Vulnerable Groups

This section explores how the participative dimension enhances the political voice and representation of vulnerable groups in Kenya, drawing from cases and legislative frameworks that highlight the importance of social inclusion. First and foremost, the cases discussed so far, particularly in the previous section—C(II)—already exemplify the participative dimension. By applying the democracy-reinforcing theory, courts provide politically powerless minority groups with an opportunity to participate and have their voices heard through the filing of constitutional and judicial review petitions claiming violation of their rights and seeking effective remedies.

Affirmative action measures guaranteeing seats in public elective and appointive bodies to women, persons with disabilities, persons from marginalized communities, and the youth fall under this dimension. As Mumbi Ngugi J—now JA—rightly states in *Centre for Rights, Education and Awareness (CREAW) v Attorney General & Another*, at the core of Kenya's 2010 Constitution "is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all hitherto marginalised and excluded groups get a chance at the table."[107]

Things have, however, been at a standstill in relation to the implementation of Article 27(8) of the Constitution which sets the principle that "not more than two-thirds of the members of elective or appointive bodies shall be of the same gender"—"the two-thirds gender rule" or "gender quotas."[108] This principle is also provided for in Articles 81(b) and 100 of the 2010 Constitution on representation of women in politics, including the Senate, National Assembly and County Assemblies. Historically, women in Kenya have been inhibited from participating in politics and other spheres of life because of stigma and socially ingrained stereotypes of what they can or cannot do, which have created obstacles for them.[109] In the process of constitutional reform that led to the adoption of the 2010 Constitution, the Constitution of Kenya Review Commission noted that women's issues were very prominent in the submissions to the Commission, based on the fact that, despite making up almost 51 per cent of the population, women held only 4.1 per cent of seats in Parliament at the time.[110] Yet, as Iris Marion Young propounds, the most effective way to both block discrimination and redress disadvantage caused by past discrimination is through political participation.[111] Indeed, "the political branches of government are the prime movers of policy change through law."[112] Making sure the two-thirds gender rule is implemented is therefore essential for this purpose.

In addition to the two-thirds gender rule, the Constitution mandates specific numerical requirements for the election and nomination of women to the National Assembly and Senate. These numerical requirements aim to help meet the quota set in Articles 27(8) and 81(b) that at least one third of parliamentarians should be women. In this respect, Article 97(1) stipulates that there should be at least one elected woman representative for each of the 47 counties in Kenya in the National Assembly. Because the overall number of members in the National Assembly should be 349,[113] to meet the one-third gender requirement, the gender with the least members—women—should have at least 117 seats. Therefore, if no additional women are elected on top of

[107]Center for Rights Education & Awareness (CREAW) v Attorney General & Another, Petition 182 of 2015 (2015) eKLR [1], [112] (H.C.K. at Nairobi) (Kenya).

[108]Constitution, art. 27(8) (2010) (Kenya).

[109]G.A. Res. 34/180 (Dec. 18, 1979) (comprising the Convention on the Elimination of All Forms of Discrimination Against Women).

[110]Constitution of Kenya Review Commission (CKRC), The Final Report of the Constitution of Kenya Review Commission 103–130 (2005) (having been approved for issue at the 95th Plenary Meeting held on February 10, 2005).

[111]*See* Iris Marion Young, *Equality of Whom? Social Groups and Judgments of Injustice*, 9 J. Pol. Phil. 1, 4 (2001); Iris Marion Young, Justice and the Politics of Difference 56 (1990).

[112]Martin Carcien, *Rawls and Reparations*, 15 Mich. J. Race & L. 267, 269 (2010).

[113]Constitution, art. 97 (2010) (Kenya).

the 47 required women representatives, and the two women nominated to represent persons with disabilities and the youth—raising the total to 49—there would be a gender deficit of 68 members that would need to be addressed. These provisions, along with women parliamentarians elected for ordinary seats, have increased women's representation in Parliament to 19 per cent after the 2013 general elections, 21 per cent in 2017, and 23 per cent in 2022.[114] Despite the steady increase, the relatively small percentage means that female politicians remain largely ineffective in voting against legislation disadvantageous to women, as well as in passing laws that aim to redress problems that directly affect women.[115]

A significant challenge that has raised controversy in the implementation of the two-thirds gender rule is the fact that Articles 81(b), 97(1), and 98(1) do not provide a mechanism for appointing the additional women parliamentarians or Senate members needed to meet the one-third requirement in the National Assembly and Senate. There is also no legislation on the same as required by the 2010 Constitution. The controversy surrounding the implementation of the rule in these two houses of Parliament led to its non-application in the 2013, 2017, and 2022 general elections, even though the Constitution was already in force. This contrasts with the application of the rule in County Assemblies where, in addition to the general principle under Article 81(b), Article 177(1)(b) further provides that County Assemblies should consist of "the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender."[116] This therefore provides a mechanism for the immediate implementation of the rule in County Assemblies.

Despite a Supreme Court Advisory Opinion, several High Court judgments and four court orders—applying both soft and strong-form judicial review approaches such as giving Parliament deadlines to enact the required legislation—Parliament has failed to implement the necessary legislation within the stipulated timeframes.[117] The non-adherence to court orders prompted Chief Justice David Maraga, on September 21, 2020, to issue an advisory to then President Uhuru Kenyatta to dissolve Parliament pursuant to Article 261(7) as read together with Articles 27(8), 81(b), and 100, for failing to enact the necessary law. However, this did not happen. Despite various legislative proposals on implementing the principle being tabled in Parliament, none has passed, and things remain at a standstill.[118]

Considering the shortfalls in implementing the two-thirds gender rule, there is a need to go back to the drawing board and revisit the reasons why this affirmative action measure was necessary in the first place, as earlier discussed, to remind us of their importance and the urgency and immediacy with which they should be implemented. Over and above the need for a restatement of the aims and legitimacy of affirmative action measures in such debates, is the challenge of the lack of political goodwill. This is particularly in relation to the male-dominated Parliament's tardiness and opposition to implementing gender quotas which they obviously view

[114]World Bank, *Proportion of Seats Held by Women in the National Parliament of Kenya*, STATISTA (accessed June 21, 2024), https://www.statista.com/statistics/1248316/proportion-of-seats-held-by-women-in-kenya-national-parliament/.

[115]Fred Oluoch, *More Women Elected in Kenya, but the Numbers Still Fall Short*, THE EASTAFRICAN (Aug. 12, 2017) (updated July 28, 2020), https://www.theeastafrican.co.ke/tea/news/east-africa/more-women-elected-in-kenya-but-the-numbers-still-fall-short–1371468.

[116]CONSTITUTION, art. 177(1)(b) (2010) (Kenya).

[117]In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinions App. No. 2 of 2012) (2012) KESC 5 (K.L.R.) (S.C.K.) (Kenya); Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another [2011] eKLR (H.C.K.) (Kenya); Milka Otieno & Another v Attorney General & 2 Others (Petition 33 of 2011) [2012] eKLR (H.C.K.) (Kenya); Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General (Petition 16 of 2011) [2011] eKLR (H.C.K.) (Kenya); Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR (H.C.K.) (Kenya); Centre for Rights Education & Awareness (CREAW) & 2 Others v Attorney General & Another (Nairobi High Court Constitutional Petition No. 317 of 2016) (Kenya).

[118]*See* Martha Gayoye, *Constitutions without Constitutionalism and Judicial leadership in Kenya*, J. E. AFR. STUD. 1, 8–9 (2024).

as a challenge to their hold on power.[119] Thus, the reason why courts, as guardians of the Constitution, need to be more proactive in giving innovative orders that breathe life into the dictates of the Constitution. It is, however, acknowledged that the authority granted to the judiciary is limited. Consequently, when political goodwill interferes with the enforcement of court orders, civil society and other stakeholders need to step in.

IV. Transformative Dimension: Accommodating Difference and Fostering Change in Equality Jurisprudence

The transformative dimension purposes to dismantle systemic inequalities and accommodate difference. It goes beyond affirmative action changing the gender or ethnic composition in various fields as it requires "substantial change in the economic, social and cultural model which is at the root of the inequalities."[120] This includes aims such as making reasonable adjustments for persons with disabilities and social inclusion through the granting of social funds for the economic empowerment of disadvantaged groups.

A good example of this is the litigation surrounding the Equalisation Fund, established under Article 204 of the Constitution to address the inadequate infrastructure in Kenya's marginalized areas and counties where marginalized communities reside. Article 204 mandates an allocation of 0.5 per cent of all sharable revenue collected by the National Government each year, calculated based on the most recent audited accounts, to the Fund. This allocation is designated to enhance critical basic services such as water, roads, health facilities, and electricity for marginalized communities and areas, aiming to elevate the quality of these services to the standard generally enjoyed by the rest of the nation.[121] The Fund is to last for 20 years from August 2010, when the Constitution came into effect. However, Parliament can enact legislation to extend the duration of its application.[122]

The first marginalization policy operationalizing the Fund faced various challenges. First, it interpreted Article 204(2)'s wording as explicitly narrowing down on four basic services—water, electricity, health facilities, and roads—yet the language used was "including" which is defined in the Constitution as meaning "includes, but not limited to."[123] This meant that the project then erroneously excluded other important basic services besides the four. Second, the policy's utilization of counties as the unit of analysis for marginalization drew criticism for its perceived over-broadness. While it accurately targeted the 14 identified marginalized counties, it inadvertently encompasses areas within these counties that nevertheless had improved services. Furthermore, it overlooked smaller marginalized areas outside these 14 counties, thus failing to address significant pockets of marginalization. The policy therefore failed to apply the principle of genuine need in the Constitution, which stipulates that affirmative action measures to redress disadvantage suffered because of past discrimination "shall adequately provide for any benefits to be on the basis of genuine need."[124] This principle requires that an affirmative action measure should *only* benefit those within a disadvantaged group who really need it. Third, the funds were shared equally among constituencies within marginalized counties and yet, the levels of service provision among them were not homogenous to warrant equal sharing. Lastly, criticism was levelled at the lack of meaningful public participation in project identification within the initial policy. This criticism stemmed from a one-off meeting held solely at the county level, where

[119]Lucianna Thuo, *Is the Two-Thirds Gender Rule Discourse Engendering Double invisibility in Public Life for Other Vulnerable Groups in Kenya?*, OxHRH Blog (Aug. 19, 2016) (accessed Apr. 7, 2024), https://ohrh.law.ox.ac.uk/is-the-two-thirds-gender-rule-discourse-engendering-double-invisibility-in-public-life-for-other-vulnerable-groups-in-kenya/.

[120]ECJ, Case C-450/93, Kalanke v Freie Hansestadt Bremen [1995] IRLR 660, 665.

[121]Constitution, arts. 204(1), 204(2) (2010) (Kenya).

[122]*Id.* at arts. 204(6), 204(7).

[123]*Id.* at art. 259(4)(b).

[124]*Id.* at art. 27(7).

participation was limited to constituency representatives. This approach neglected to adopt a bottom-up strategy that actively solicits input directly from the marginalized communities themselves.[125]

Applying a rational basis standard of review, the High Court on November 5, 2019, declared the Equalisation Fund Guidelines unconstitutional.[126] In response, the Commission on Revenue Allocation formulated a second marginalization policy, rectifying shortcomings of the first policy by shifting focus from counties to smaller administrative units and minority groups—such as the Elmolo, Makonde, Waata, and Dorobo-Salieta—that needed special consideration in improvement of services. This approach, guided by data availability, identified 1,424 marginalized areas across 34 counties, expanding coverage beyond the initial 14 counties.[127] Subsequently, the Public Finance Management, Equalisation Fund Administration, Regulations, 2021 were enacted to govern fund management, designating it as a conditional grant for marginalized areas.[128]

This is thus an example of a case where a soft-form judicial review approach was applied to prevent reinforcing inequalities. The Court did this by issuing a ruling that acknowledged the flaws in the 2015 Equalisation Fund Guidelines while leaving room for the other branches of government to make the necessary adjustments. The case focused on identifying areas where the Guidelines fell short, particularly in terms of the over-broad targeting of marginalized counties, failure to consider genuine need, and the lack of meaningful public participation. By applying a rational basis standard of review, the Court ensured that inequalities were not reinforced, allowing for constructive changes to be made without overstepping its judicial role. In addition, the Court adopted a contextual and equality-sensitive approach, recognizing the lived experiences of marginalized communities and the importance of tailoring affirmative action measures to benefit those most in need. This approach led to the development of a more refined policy that better addressed the real needs of minority and marginalized groups, thus fostering substantive equality and promoting social inclusion.

D. Conclusion

As this Article has shown, Kenyan courts play a pivotal role in navigating the tension between deferring to State organs and safeguarding individual rights, particularly in cases involving vulnerable groups. This role is critical in promoting constitutionalism and ensuring that systemic inequalities are not perpetuated. However, in contrast to the proactive response seen in cases like the Housing Levy, *Isaac Kawai, Victoria Madong Taban,* and *Eric Gitari*, the enforcement of gender quotas has faced significant hurdles. Despite multiple court orders and constitutional mandates, the Kenyan Parliament has repeatedly failed to implement the two-thirds gender rule, reflecting a lack of political will to promote gender equality. The courts have issued judgments requiring action, but these have not been met with the same level of compliance or urgency as in other cases, highlighting the limitations of judicial review when political branches resist enforcement. This disparity illustrates the challenges courts face in a hybrid democracy like Kenya, where democratic and authoritarian tendencies coexist, and the judiciary must step in to protect the rights of underrepresented and marginalized groups. In such a complex political environment, continued judicial vigilance, bolstered by active civil

[125]Commission on Revenue Allocation (CRA) (Kenya), The Second Policy Identifying Marginalised Areas in Kenya and the Criteria for Sharing Revenue from the Equalisation Fund 17–18 (2018) [hereinafter CRA 2018 Second Marginalisation Policy Report].

[126]Council of County Governors v Attorney General & 2 Others; Commission on Revenue Allocation & 15 Others (Interested Parties) (2019) eKLR (Kenya).

[127]CRA 2018 Second Marginalisation Policy Report, *supra* note 153, at 3, 6, 22, 25.

[128]The Public Finance Managemnet Act, No. 18 (2012) Kenya Gazette Supplement No. 69 (including Legislative Supplement No. 29 in this Legal Notice No. 54 of April 29, 2021).

society engagement, remains essential to realizing the transformative vision of equality enshrined in the 2010 Constitution.

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