

**Developing Progressive African Jurisprudence: Reflections from Kenya’s
2010 Transformative Constitution**

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Preliminary Remarks

Chair of SAIPAR

Members of the Institute

I thank the Southern African Institute for Policy and Research (SAIPAR) for inviting me to give the PROFESSOR LAMECK GOMA ANNUAL LECTURE 2017. The late Professor Goma was a great scholar, the first Zambian Vice-Chancellor of the University of Zambia. He was also a great researcher and a patriotic public servant.

¹ Dr. Willy Mutunga is the former Chief Justice of the Republic of Kenya and the President of the Supreme Court of Kenya. A major part of my remarks are taken from a speech I gave to Judges and guests of the Kenyan Judiciary on the occasion of the launching the Judiciary Transformation Framework on May 31, 2012. That speech has been published in the Socialist Lawyer: Magazine of the Haldane Society of Socialist Lawyers, Number 65, 2013,20. The journey of my thoughts since then and now reflected in this Lecture owes a great debt of intellectual, ideological and political gratitude to the following mentors and friends: Professors Jill Ghai, Yash Ghai, Sylvia Tamale, Joel Ngugi, James Gathii, Joe Oloka-Onyango, Issa Shivji, Makau Mutua, Obiora Okafor, Yash Tandon, David Bilchitz, Albie Sachs, Duncan Okello, Roger Van Zwanenberg, and Shermit Lamba. My Law Clerks at the Supreme of Kenya, namely, Atieno Odhiambo, Sam Ngure and Maxwell Miyawa helped with research. The theme of this Lecture is drawn from three articles I have published. The first one “*Dressing and Addressing the Kenyan Judiciary: Reflecting on the History and Politics of Judicial Attire and Address*” in Buffalo Human Rights Law Review 2012 is now a chapter in Ed; Sahle, Eunice N, Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Developments and Dilemmas (Palgrave/Macmillan, 2017); “*Human Rights States and Societies: A Reflection from Kenya*” is published in The Transnational Human Rights Review, Volume 2 (December 2015), 63-102; and “*The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions*” is published in SPECULUM JURIS VOLUME 29 PART 1 2015, 1. The theme is also drawn from my concurring and dissenting judgments while I served as President of the Supreme Court of Kenya. In this lecture I acknowledge the contribution of Professor Eunice N Sahle who has closely read my three articles and published two of them in two books she has edited and are published by Palgrave/Macmillan.

In Matthew 13:57 Jesus had the occasion to comment on “A Prophet Without Honour.” He said “Only in his home town and in his own house is a prophet without honour.” In creating the Lecture Series SAIPAR has not contradicted Jesus, but agreed with his critique. SAIPAR is nurturing a culture of glorifying a Zambian who would perhaps otherwise been a prophet without honour. I believe Africa must build such cultures in identifying and protecting our interests in this age of neoliberalism.

Still reflecting on Jesus’ prophecy I want to thank three sons of Zambia who outside their “home town” and their “houses” are prophets with honour. Professor Muna Ndulo has been my mentor since the 1970s when he came to the University of Nairobi as external examiner in the Faculty of Law. In critiquing my examination questions I was able to find a great balance between the mastery of legal rules and their consequent critique. “You cannot critique rules you have not mastered” was his repeated advice. I have kept in touch with him through his writings and teaching abroad, and his work on the continent. Professor Ndulo also advised the Committee of Experts that crafted the Kenyan Constitution.

Professor Chaloka Beyani was in the Committee of Experts that wrote our 2010 Constitution. We in Kenya all know that in that committee Professor Beyani was one of the intellectual, ideological, and political leaders that gave us a progressive Constitution. He has been very active in coming back to Kenya to ensure the essential pillars of that constitution are not destroyed. He has been active in the training of our judges.

Judge Chomba served in the Judges and Magistrates Vetting Board set up under a statute decreed by the Constitution to vet judges and magistrates who were serving in the Judiciary before the promulgation of the Constitution. Using a criteria that sought the suitability of such judicial officers under the new constitution Judge Chomba, Albie Sachs and others helped Kenya create a new Judiciary under our Constitution.

It now gives me great joy in delivering the 2017 LAMECK GOMA LECTURE whose title is ***Developing Progressive African Jurisprudence-Reflections from Kenya's 2010 Transformative Constitution***. The theme of this lecture is drawn from three published articles that I give their citations in footnote one of this lecture. You will also find in that footnote the intellectual, ideological, and political debt I owe to some of Africa's celebrated jurists.

In 2010 Kenya created a new modern transformative² constitution that replaced both the 1969 Constitution and the past Colonial Constitution in 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform Kenya's economic, social, political, and cultural spheres. The emergence of a democratic constitutional framework has provided political opportunity structures³ for the reimagining pivotal political institutional arrangements.

My presentation today will focus on the emergence of what I refer to as a robust (rich), decolonizing, patriotic, progressive, indigenous, and transformative jurisprudence. Its conceptualization and description both come from the Constitution itself and the Supreme Court Act as it will

² As Karl Klare states, "Transformative constitutionalism connotes an enterprise of inducing large-scale social change and through non-violent political processes grounded in law." Klare 'Legal culture and transformative constitutionalism' (1998) 14 SAJHR 146-188 at 150. Such transformative constitutions as the ones of India, South Africa, and Colombia reflect this vision of transformation. If revolution is to take place it will be in part on the basis of the implementation of these transformative constitutions. See Samir Amin, The World We Wish to See: Revolutionary Objectives in the Twenty-First Century (New York: Monthly Review Press, 2008) at page 17: "The 'great revolutions' are distinguished by the fact that they project themselves far in front of the present, toward the future, in opposition to others (the 'ordinary revolutions'), which are content to respond to the necessity for transformation that are on the agenda of the moment." I believe we also need to debate the viability of ordinary revolutions being the basis of the great ones, revisiting the old debates on reforms or revolutions.

³ For more details on this concept see, McAdam, Doug. 1996. *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings.*; New York: Cambridge University Press.

eventually become clear when I reproduce and discuss the provisions below.

In the first part of the presentation, I will briefly offer the history of judiciary. The second part will offer a vision of the kind of jurisprudence I am envisioning in the context of Kenya's 2010 democratic constitutional framework. Drawing on decisions from the Supreme Court, part three, will illustrate the emergence of such jurisprudence and its theory of interpretation, which is embedded in Kenya's current constitution. My concluding remarks will, among other things, highlight some challenges underpinning the role of the judiciary, as an institutional political actor, in contemporary Africa. These remarks will also be the basis of the imagining of the development of progressive African jurisprudence in our Continent.

I: KENYA'S JUDICIARY: A BRIEF HISTORY

Before presenting my thoughts on the robust (rich), decolonizing, patriotic, progressive, indigenous, and transformative, jurisprudence that I have been envisioning for a while, let me offer brief highlights of Kenya's judiciary prior to 2010. In sum, like other judicial systems with similar historical roots, we are the heirs to a tradition that gives a very powerful place to the judiciary: the common law system. It is a flawed inheritance

because it came to us via the colonial route. The common law as applied in Kenya, at least to the indigenous inhabitants, as in other colonies generally was shorn of many of its positive elements. During the colonial era, for example, we were not allowed freedom of speech, assembly or association.

Additionally, our judiciary was not independent, but was essentially a civil service, beholden to the colonial administration and very rarely minded to stand up to it. Indeed, administrative officers made many judicial decisions. There was no separation of powers. And institutions of the people that they trusted were undermined or even destroyed. Indeed the common law was a tool of imperialism. The late Patrick McAuslan, upon whose book with Yash Ghai⁴ most lawyers in East Africa, and indeed, other parts of Africa, have cut their constitutional teeth, wrote satirically (plagiarizing the late nineteenth century poet, Hilaire Beloc⁵) “Whatever happens, we have got the common law, and they have not.”

We can recall the trial of Jomo Kenyatta: a masterful display of juristic theatre in which the apparent adherence to the rule of law substantively

⁴ Ghai, Y. & McAuslan, P., *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, Oxford University Press, (1970).

⁵ “Whatever happens, we have got The Maxim gun, and they have not.” See, Beloc, H., *The Modern Traveler:- 1898*, Cornell University Library, (2009).

entrenched the illegitimate political system in power at the time.⁶ In essence, the colonial judicial system was marked by what my colleague Professor Obiora Okafor of Osgoode Hall Law School (Canada) has termed as **“the rule BY law” rather than “the rule of law.”**⁷

Unfortunately, practices of “the rule BY law” and overall, colonial mind-sets persisted, in the executive, the legislature and even in the judiciary, after independence. As such, Kenyans continued to yearn for the rule of law. By the rule of law, I do not mean the sort of mechanical jurisprudence we saw in cases like the *Kapenguria* trials. It was mechanical jurisprudence that led the High Court in independent Kenya to reach an apparently technically sound decision that the election of a sitting President could not be challenged because the losing opponent had not achieved the pragmatically impossible task of serving the relevant legal documents directly upon the sitting President.⁸ Again it was this purely mechanical jurisprudence that fueled the decision of a High Court that the former section 84 of the independence Constitution (that mandated the

⁶ My trusted colleague, Professor Obiora Okafor of Osgoode Hall Law School (Canada) was kind enough to provide the following comment:

“What happened to Jomo Kenyatta and the ‘Kapenguria Six’ in the colonial courts was, in reality ‘the rule BY law’ and NOT “the rule OF law. I guess that I have always had some sympathies with Lon Fuller’s notion of an internal morality of law that renders certain kinds of legality so beyond the pale as not even to qualify ‘as legality.’ I think my point here ties into your well-argued notion of a mechanical jurisprudence.”

⁷ Ibid.

⁸ Election Petition No 1 of 1998, *Kibaki v Moi & 2 others* (No 2) (2008) 2 KLR (EP) 308

enforcement of Bill of Rights) rendered the entire Bill of Rights inoperative because the Chief Justice had not made rules on enforcement as he was obligated by the self-same Constitution to do.⁹

That oppressive constitutional outlook was dismantled in 2010, with the emergence of a democratic constitutional order following a referendum many years after the first political opening in 1992. At the heart of it, the making of the Kenyan 2010 Constitution is a story of ordinary citizens striving *and succeeding* to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order. Some have spoken of the new Constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 54 years of independence.

I now turn to a mapping of a vision of what I term as a robust (rich) decolonizing, patriotic, progressive, indigenous, and transformative jurisprudence in the context of Kenya's democratic constitutional

⁹ This practice was endemic under the reign of CJ Cecil Miller (1986-1989) and championed vigorously by Justice Norbury Dugdale. See, Vaquez, 'Is the Kenyan Bill of Rights Enforceable after 4th July 1989?', in 2: *Nairobi Law Monthly* (1990), p. 7-8. Also see, Ghai Y., "The Kenyan Bill of Rights: Theory and Practice," in Alston, P., (Ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, (2000), p 221-222.

framework. Before doing that let me briefly digress and comment on the new judiciary, the makers and developers of this jurisprudence.

The new Judiciary comprises the vetted judicial officers that were serving the Judiciary before the promulgation of the Constitution on August 27, 2010; and new judicial officers recruited under the Constitution. In both cases the issues of competency, integrity, independence, leadership, and intellectualism have been taken into account. The new Judiciary is no longer anti-intellectual as many judges now are recruited from the academy, the civil society, and the corporate sector. It is a judiciary that is not afraid of other disciplines and has ceased to celebrate its ignorance of these other disciplines under the rubric of the “learned profession.”

We can believe that to be a judge has always been the pinnacle of ambition of any lawyer who actually takes pride in her or his work. So it should be possible to take for granted that a judge is of high intellectual calibre, with mastery of legal principles and techniques, hard working, and committed to applying these qualities in the task of judging.

As regards integrity, it is to banish above all that any judicial officer would dream of accepting any sort of bribe. The jurisprudence we envision will not succeed if there is doubt in the minds of Kenyans, or for that matter

all judges, about our impartiality and integrity. I believe, too, we cannot imagine developing a progressive African jurisprudence if African judiciaries defer to the executive, bend law to suit long term associates or their clients. Or if they allow their independence to be compromised by the executive, parliament, political parties, invisible governments, corporate and civil society interests, communities, families and friends.

I wish to add here that the Constitution creates an independent and broadly representative Judicial Service Commission that ensures accountable and transparent recruitment. It also robustly undertakes disciplinary actions to preserve the integrity of the judicial officers. This, of course, continues to be one of its fundamental challenges. The Constitution also decrees the creation of the Judiciary Fund, signaling financial independence of the Judiciary. Parliament has since come up with a statute that sets up this Fund.

Let me, however, flag a debate that continues in and outside the Kenyan Judiciary. This is what constitutes judicial activism in transformative

constitutions. Upendra Baxi states that all judges are *active* but not all judges are *activist*.¹⁰ He makes the following distinction:

An *active* judge regards herself, as it were, as trustee of state regime power and authority. Accordingly she usually defers to the executive and legislature; shuns appearance of policy-making; supports patriarchy and other forms of violent exclusion; and overall promotes 'stability' over 'change.' In contrast, an *activist* judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived. She does not regard adjudicatory power as repository of the reason of state; she constantly re-works the distinction between the *legal* and *political* sovereign, in ways that legitimate judicial action as an articulator of the *popular* sovereign. This opposition implies at least one irreducible characteristic of activist adjudication: namely, that a judge remains possessed of *inherent* powers to mould the greater good of the society as a whole.¹¹

¹⁰ "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice" in Ed; S. K. Verma Kusum, Fifty Years of the Supreme Court of India: Its Grasp and Reach (New Delhi: Oxford University Press, 2000), 156-209.

¹¹ *Ibid*: 166

Baxi at the time he wrote expressed the limitations requiring “further conceptual refinement”¹² and acknowledged that “the notions I deploy are themselves contested sites.”¹³

In the case of Kenya my view has been that the Constitution itself is *activist* and I believe our judges and other judicial officers are all expected to be *activist in their quest to implement an activist Constitution*. Their collective Oath of Office decrees this loyalty to the Constitution’s *activism*. The nature and content of their respective *activisms* can only be gauged by their loyalty to the decreed transformation pillars, values, objectives, and vision of our transformative Constitution. Going forward one clear tool of that inquiry could be how judges and magistrates show in their adjudication that they are bound by the mainstreaming of the Supreme Court’s theory of interpreting the Constitution.

II: MAPPING A ROBUST (RICH),DECOLONIZING, PATRIOTIC, PROGRESSIVE ,INDIGENOUS, AND TRANSFORMATIVE JURISPRUDENCE: THE KENYAN VISION

¹² *ibid*

¹³ *ibid*

The robust (rich), decolonizing, patriotic, progressive, indigenous, and transformative jurisprudence that I have been envisioning under the new democratic constitutional framework in Kenya is one that shuns a mechanical approach to jurisprudence. Additionally, such jurisprudence should not be insular and inward looking. After all, the values of the Kenyan Constitution are anything but inward looking. We can and should of course learn from other countries. As such, my invoking and charactering such jurisprudence as “indigenous” is simply meant to signal that we should grow our jurisprudence out of our own needs, without uncritical deference to that of other jurisdictions and courts, however, distinguished. And, indeed, the quality of our progressive jurisprudence would command respect in these distinguished jurisdictions. After all, our constitution we are proud to argue, is one of the most progressive in the world having borrowed great constitutional values from all over the world.¹⁴

While developing and growing our jurisprudence, Commonwealth and international jurisprudence will continue to play a role. However, the

¹⁴ Some of the key elements to this claim are: the most modern Bill of Rights in the world; uniquely provides for a theory of its interpretation; it reflects a social democratic transformation in a world still dominated by contemporary capitalism called neo-liberalism; and it calls for a progressive jurisprudence that shuns staunch positivism and its backwardness in a world that has to change. There has been a challenge as to whether the Bill of Rights in the Constitution can be described as modern. Arguments are that it is vague on gay rights as human rights; it bans abortions, and decrees the death sentence. All these arguments will have to wait for court decisions. I believe the drafters of the Constitution avoided clear positions on these arguments and left enough room for courts decide on what the nation was clearly politically divided.

Judiciary will have to avoid mechanistic approaches to precedent. It will not be appropriate to reach out and pick a precedent from India one day, Australia another, South Africa another, the US another, just because they seem to suit the immediate purpose. Each of those precedents will have its place in the historical context of the jurisprudence of its own country. Overall, a major negative side of a mechanistic approach to precedent is that it tends to produce a mind-set: “If we have not done it before, why should we do it now?” Kenya’s 2010 Constitution does not countenance that approach.¹⁵ Our jurisprudence must seek to reinforce those strengths in foreign jurisprudence that fit our needs¹⁶ while at the same time rescuing the weaknesses of such jurisprudence so that ours is ultimately enriched as decreed by the Supreme Court Act.

The Constitution took a bold step and provides that “The general rules of international law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.¹⁷ Thus Kenya seems to have become a monist state rather than dualist as in common law tradition and Kenya’s history.

¹⁵ As a guidance to the emerging tests by which we should judge the relevance of foreign precedents an example is where we adopt foreign precedents but explain the parallels between that country and Kenya and its Constitution.

¹⁶ The criteria for determining our needs can be based on the discussion on the values, vision, objectives and purpose of our Constitution.

¹⁷ Art. 2 (5) and (6).

The implications of this will have to be worked out over time, as cases come before the courts. Even in the past, Kenyan judges have not ignored international law. They have often quoted the Bangalore Principles on Domestic Application of International Human Rights Norms not as binding but merely as a useful guide.¹⁸ Now, however, the courts have greater freedom. Many issues will have to be resolved. Indeed, we now have great opportunity to be not only the users of international law, but also its producers, developers and shapers.

In some ways our task is rather easier than that faced by some other court systems struggling to establish the validity of their place in the constitutional scheme. The principle of *Marbury v Madison*, that established the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the US Constitution, is enshrined in our Constitution (Articles 23(3)(d) and 165(3)(d)).

The 2010 Constitution constitutionalizes public interest litigation¹⁹ which in India was judicially created.²⁰ Our path has been smoothed: we do not have to strive to establish our role as guarantor of the supremacy of the

¹⁸ Principles 7,8

¹⁹ See Articles 22(2) and 258(2).

²⁰ S. Muralidhar, “The Expectations and Challenges of Judicial Enforcement of Social Rights” in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008) 108-109.

Constitution, or of the rights of the downtrodden.²¹ We are indeed clearly mandated to fulfill these roles.

Beyond moving away from a mechanistic approach to law and in order to grow a progressive jurisprudence, there needs to be a partnership between other judiciaries, the profession and scholars. I hope that the bar, too, will respond to the challenge. Standards of advocacy need to improve, the overall quality of written and oral submissions needs to improve. We have so far found the jurisdictions of India, South Africa and Colombia to be great partners as our respective constitutions are similar in many respects. Besides, decolonizing jurisprudence requires South-South collaboration and collective reflection.

In efforts to achieve the vision of a progressive jurisprudence, we are trying to move away from excessively detailed written submissions by ordering a limit in our rules. Of course, this development makes sense only if the judges read the written submissions in advance. And do so with a critical eye, prepared to interrogate the arguments of counsel, and being prepared also to put forward alternative ideas. It is a questionable practice

²¹ It is a pillar of the Judiciary Transformation that the courts in Kenya will truly be viewed as the courts for all Kenyans, and the salvation of the Kenyan oppressed and bewildered. This will happen when informal forums for the administration of justice are connected to the formal court systems under the supremacy of the Constitution. See the *Socialist Lawyer*, note 1 at page 23.

to come up with ideas and authorities in the privacy of Judges' chambers when writing a judgment, if counsel had no chance to put forward argument on those ideas and authorities. The very purpose of written submissions is to try to prevent that happening by enabling the judge to be well prepared in advance. If the judge is well prepared, he or she is in a much stronger position to criticize counsel for not being prepared. In this way the bench can help encourage higher standards of advocacy and in the long run, this will also speed up the work of the court and help to clear backlog.

We are trying to make this new approach to judicial decisions easier for us by enhancing the quality and quantity of legal materials available to the bench by appointing legal researchers. It continues to be a learning experience for judges as well as legal researchers to work out how the cause of justice can best be served by Kenya's innovative judicial ideas as decreed for example by the Judicial Service Act, 2011.²² The emergence of the latter marks an important development as we continue our efforts of enhance the quality of the jurisprudence in the courts of Kenya.

I want also to add that these efforts in improving the quality of jurisprudence in our courts can be amplified if we improved our collegiality

²² Section 7

and ability to co-educate each other so that the decisions coming out of our courts will reflect the collective intellect of the Judiciary distilled through the common law method as well as through regular discourses and learning by judicial officers. From my perspective, to be a good judge must involve continuous training and learning and regular informal discourses among judges without compromising the right of a judge to give a dissenting judgment. Dissenting judgments have their own purpose, but consensus building is also equally important.

Further, creating institutions that provide learning opportunities for judicial actors is imperative for the emergence of a progressive jurisprudence. Along these lines, our Judiciary Training Institute (JTI) is emerging as our institution of higher learning and the nerve centre of our progressive jurisprudence. JTI co-ordinates our academic networks, our networks with progressive jurisdictions, our training by scholars and judges, starting with our own great scholars and judges. In order to breathe life into our constitution, our training and jurisprudence cannot be legal-centric; it must place a critical emphasis on multi-disciplinary approaches and expertise.

The jurisprudence, I am envisioning here must also pay attention to what I call “lost jurisprudence.” The latter, is the jurisprudence that emerged

during the years when law reporting did not exist. The National Council on Law Reporting is solving this issue while reporting on current decisions. The Website of the Council is a great research engine that also partners with other African and global jurisdictions. I am confident there will emerge gems and nuggets of progressive jurisprudence from that search. Such a project is important if we are to have a comprehensive historical rendering of our jurisprudence. To that end establishment of a program of researching “the lost jurisprudence” is welcome development.

Finally, and a pathway to a decolonized judiciary system, Article 159 (2) of the Constitution has restored “traditional dispute resolution mechanisms” with constitutional limitations.²³ The fact is, we live in our country where courts are not the only forums for the administration of justice. Indeed, only 5% of Kenyans access the formal courts. The other 95% access these other forums for the administration of justice. Access to justice must encompass both formal and informal justice systems. Traditional dispute resolution mechanisms keep these institutions as free

²³ Under Article 159(3) of the Constitution traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results to outcomes that are repugnant to justice and morality; or (c) is inconsistent with this Constitution or any written law.

as possible from lawyers, 'their law,' and the 'law system of the capital.'²⁴

The development of the "Without the Law" jurisprudence is a critical nugget in our robust (rich), decolonizing, patriotic, progressive, indigenous, and transformative jurisprudence. It is critical to observe that since traditional dispute resolution mechanisms will be conducted in the various national languages of the various communities in Kenya the collective outcomes of such ventures must but enrich our progressive jurisprudence, breathe life into the implementation of the Constitution as well as strengthening our diversity and democracy. This linguistic approach to traditional dispute resolution will also help in the translations that have to be undertaken of the Constitution thereby enriching the languages of the community through new vocabulary that is borrowed from around the globe that is reflected in our Constitution. I believe our other national language, Kiswahili, will be enriched making it worthwhile to translate the Constitution from its Kiswahili version to the national languages. These experiences and outcomes will be unique and will definitely have their own comparative niche in the world.

I am not going to claim I have mapped all elements of progressive jurisprudence under our Constitution. I could have said more about other

²⁴ Arthurs, H., *Without the Law: Administrative Justice and Legal Pluralism in the Nineteenth-Century England*, University of Toronto Press (1985) at p.10. Several passages found between p. 1-12 and p. 188-214 are extremely useful in the development of the "Without the Law" Jurisprudence.

elements: progressive common law under the constitution; electoral jurisprudence; problematize what the sovereign will of the Kenyan people means in this jurisprudence; participation of the people in the devolution of political power and how it is reflected in concessions made on their economic demands; equitable distribution of resources under devolution; the emerging jurisprudence on land, integrity and leadership, criminal justice, security, and generally human rights jurisprudence. The chain for the administration of justice, namely, investigations by security organs, DPP, and courts must operate seamlessly to promote and protect the rule of law and human rights of the citizens. The Constitution provides for the independence of each of the institutions in this chain for the administration of justice;²⁵ and very important the emerging jurisprudence on devolution of political power and national resources. I have said enough to emphasize how fundamental and pivotal the institution of the Judiciary is in the making and development of the envisioned jurisprudence.

To what extent does Kenya's judiciary in the post-2010 period reflect elements of the progressive jurisprudence that I have mapped out in this section? I believe the major effort has been in the development of the

²⁵ See the provisions on the independence of the judiciary discussed above. As for the DPO and her constitutional independence and obligations see Article 157(4), (10) and (11). As for the security organs and their constitutional obligations to the people of Kenya see Article 238 (2) (b).

theory of interpreting the Constitution under which the elements and various strands of the envisioned jurisprudence would grow and prosper. In efforts to answer this question, I turn to an exploration of some Supreme Court Decisions in this regard.

II: Emerging Robust (Rich), Decolonizing, Patriotic, Progressive, Indigenous, and Transformative Jurisprudence in the Context of the Theory of the Interpretation of the 2010 Constitution: Reflections from the Supreme Court Decisions

Long before the Supreme Court pronounced itself on the issue of the theory interpreting the Constitution several of my colleagues at the Supreme Court and I had, in various fora, addressed its elements as follows: that the Constitution is a transformative Charter of Good Governance;²⁶ that the Supreme Court in guaranteeing the supremacy of the Constitution must implement transformative constitutionalism;²⁷ that our progressive and transformative Constitution, if implemented, would put Kenya in a social democratic trajectory, under a human rights state²⁸ and society, signaling equitable distribution of resources, sustainable

²⁶ Professor Justice Ojwang

²⁷ Judges Tunoi and Mohammed, relying approvingly on Justice Pius Langa's article, Transformative Constitutionalism, STELL LR 2006 3, 351.

²⁸ A variety of a radical liberal democratic state with radical social democratic content

development and prosperity²⁹; and that to implement our Constitution our jurisprudence must reflect social justice.³⁰

In our first case that sought our Advisory Opinion, the case of *Re Interim Independent Election Commission [2011]eKLR*, we pronounced ourselves thus:

“The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.”³¹

In the same case we problematized in the interpretation of the Constitution the combination of rules on one hand, with values and principles, on the other by pointing in paragraph 49 to “*an interpretation that contributes to the development of both the prescribed norm and the*

²⁹ Mutunga, CJ and President of the Supreme Court of Kenya

³⁰ Judge Wanjala

³¹ Para 86.

declared principle or policy; and care should be taken not to substitute one for the other.” Future development will no doubt clarify such a dichotomy as the integration of both prescribed norms, values, principles, purposes, and policy enriches the theory of interpreting our Constitution. The content derived from historical, economic, social, and cultural contexts that we are commanded by Section 3 of the Supreme Court Act to consider will invariably bring about this integration and fusion without subverting either the prescribed norm or the non-legal phenomena.

The High Court of Kenya has reflected this approach of interpreting the Constitution that has been adopted by the Supreme Court even though the Supreme Court Act does not apply to it. It has appreciated that non-juristic aspects, such as the historical context of Kenya’s electoral practices is key to giving effect to the constitutional command of standards and integrity in electoral rights and systems;³² appreciated the historical background underlying the constitutional value of affirmative action;³³ and stated that a constitution should not be interpreted with “an overly legalistic

³² Johnson Muthama v. Minister for Justice and Constitutional Affairs and Another in Petition No 198 of 2011: “The Constitution did not arise in a vacuum. It is the expression of the wishes and aspirations of the people of Kenya with regard to their governance. In enacting any legislation required under the Constitution therefore, Parliament is deemed to have been conscious of the milieu in which the legislation was to operate, and to make due consideration of the social circumstances and the context within which it will be applied. Before embarking on an analysis of the issues raised in this matter, therefore, I will first consider the socio-economic context in which the Elections Act was enacted and within which it is to operate.” Per Mumbi Ngugi J.

³³ Milka Adhiambo Otieno & Another v Attorney General and 2 Others, High Court Kisumu, Civil Petition no 33 of 2011. Per Ali-Aroni, Chitembwe and Chemitei JJJ.

approach” according to the whims of a judge but in a manner “constrained by the language, structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society.”³⁴ This view is shared by the Court of Appeal which has recognized that “in interpreting the Constitution, the historical perspective, purpose and intention of the constitutional provision must be ascertained to appreciate the rationale behind its inclusion in the Constitution, *ab initio*.”³⁵

It is unusual for a constitution to be as pre-occupied by the question, scope, methodology of its own interpretation as Kenya’s 2010 Constitution.³⁶ The Court of Appeal of Kenya is, therefore, right in its depiction of the principles of interpretation embodied in Articles 10 and 259 in *Centre for Human Rights and Awareness v. John Harun Mwau and 6 Others*.³⁷ At paragraph 21 Githinji JA summarises these principles as follows:

³⁴ *Joseph Mbalu Mutava v Attorney General and Another* [2014]eKLR para 80.

³⁵ Per Murgor JA in *Law Society of Kenya v Centre for Human Rights and Democracy and 13 Others* (2013) eKLR

³⁶ *Ibid*; Per Kiage JA at page 33, “When it comes to interpreting the Constitution, the proper approach is first a faithful adherence to the interpretative blueprint set out in Article 259; per Odek JA: “Article 10 of the Constitution enjoins all State organs, State officers and all persons to abide by the national values and principles of governance in applying or interpreting the Constitution or any law. Article 259 of the Constitution provides guidelines on how to interpret the Constitution...”

³⁷ (2012) eKLR

The Constitution should be interpreted in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights and fundamental principles and permits the development of the law and contributes to good governance;

That the spirit and tenor of the Constitution must provide and permeate the process of judicial interpretation and judicial discretion;

That the Constitution must be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism;

That the entire Constitution must be read as an integral whole and no one particular provision destroying the other but each sustaining the other so as to effectuate the great purpose of the instrument (harmonization principle).

These principles are derived from national and comparative case law that borrow from common law or from various indigenous constitutions of different jurisdictions. Care has to be taken, however, that such principles do not subvert or supplant the clear text of the Constitution.

The Kenya Constitution is also unusual in setting out a theory of interpretation. What is this theory? I believe it is a theory that shuns staunch positivism; that accepts judges make law; that by invoking non-

legal phenomena in its interpretation it decrees the judiciary “as an institutional *political actor*;³⁸ a theory that is a merger of paradigms and that problematizes, interrogates, and historicizes all paradigms in building a radical democratic content that is transformative of the state and society;³⁹ it is a theory that values a multi-disciplinary approach to the implementation of the Constitution; its neither insular nor inward looking and seeks its place in global comparative jurisprudence and seeks equality of participation, development, and influence; and it denies resort by judicial officers to the common law canons of interpreting statutes and constitutions that allow judicial officers, in so doing, to routinely reflect their intellectual, ideological, and political biases.⁴⁰ In the same vein the Kenyan Parliament, in enacting the Supreme Court Act 2011, (Supreme Court Act) has in the provisions of Section 3 of that Act reinforced this aspect of constitutional pre-occupation in its theory of interpretation.

³⁸ Upendra Baxi, “Demosprudence Verus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies,” in (2014) MACQUARE LAW JOURNAL, Volume 14, 3 at 10.

³⁹ Willy Mutunga,, “Relational Contract Theory Outside National Jurisdictions,, (1993) Doctor of Jurisprudence Thesis at Osgoode Law School, York University Chapters II and III.

⁴⁰ The US Supreme Court is perhaps the best example of this. Such tool or approaches of interpretation as originalism or original intent; modernism/instrumentalism; literalism-historical; literalism-contemporary; and democratic/normative or representative reinforcement have given rise to such categorizations as conservative, liberal, and radical approaches. Judges have had their biases so categorized.

This is what I recognized, and signaled in my opinion **In the Matter of the Principle of Gender Representation in the National Assembly and Senate Supreme Court Application No. 2 of 2012** when I stated:

“...Fortunately, to interpret the Constitution we need not go further than its specific Articles that give us the necessary guidance into its interpretation.

It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles achieve this collective purpose.⁴¹

The Constitution and the Supreme Court Act both set out a theory of our interpretation of the Constitution.⁴² Article 259 of the Constitution provides:

259. (1) This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles;⁴³

⁴¹ Para 8.1 and 8.2

⁴² Professor Yash Ghai in an unpublished article has stated that “Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenya Constitution sets, through the judiciary, its barricades against the destruction of its values and the weakening of its institutions by forces external to itself. Such is the responsibility of Kenya’s judiciary.”

⁴³ Under Article 10 of the Constitution the national values and principles are: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protections of the marginalized; good governance, integrity, transparency, accountability; and sustainable development.

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits development of the law; and

(d) contributes to good governance.

...

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...

Section 3 of the Supreme Court Act provides:

3. The object of this Act is to make further provisions with respect to the operation of the Supreme Court as a court of final authority to, among other things-

a. ...

b. ...

c. develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;

d. enable important constitutional and legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.⁴⁴

⁴⁴ See also the Preamble, Article 1 as read with Article 159 (1) to decree the sovereignty of the Kenyan people; and Article 10 that provides for the values and principles.

We have pronounced ourselves on what we mean by a holistic interpretation of the Constitution in ***In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR*** thus (at paragraph 26):

“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.”

As the eminent retired Chief Justice of Israel, Aharon Barak has observed, “...one who interprets a single clause of the constitution interprets the entire constitution.”⁴⁵ In ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR***, I had the occasion to revisit this theory of the interpretation of the Constitution in my Concurring Opinion. I stated as follows (paragraphs 155-157):

“[155] In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct

⁴⁵ Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) 308.

Appl No 2 of 2012; and Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

“[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the

searchlight for the illumination and elimination of these legal penumbras.”

And I observed as regards the provision of Section 3 of the Supreme Court Act:

“In my opinion, this provision grants the Supreme Court a near-limitless, and substantially elastic interpretative power. It allows the Court to explore interpretative space in the country’s history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment.”

This call by the supreme law for and the Supreme Court Act reinforces the fact that to foster robust (rich), decolonizing, patriotic, indigenous, progressive, and transformative jurisprudence that recognizes Kenya’s history and traditions ‘our Constitution cannot be interpreted as a legal-centric letter and text.⁴⁶ On this account, Githinji JA’s supposition that interpretation methods in Articles 10 and 259 can be equated to statutory

⁴⁶ Even before the Constitution 2010 was enacted and the Supreme Court created, the Court of Appeal had recognized in **Njoroge & 6 Others v Attorney General and 3 Others No 2 [2008] 2KLR (EP)** that: **“The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it.”**

modes of interpretation is, with respect, an erroneous view unsupported by an earlier dictum of the same court.⁴⁷

It is a document whose text and spirit has various **content**, as amplified by the Supreme Court Act that is not solely reflective of legal phenomena. This content has historical, economic, social, cultural, and political contexts of the country and also reflects the traditions of our country. References to Black's Law Dictionary will not, therefore, always be enough and references to foreign cases will also have to take into account these peculiar Kenyan needs and contexts.⁴⁸

In a recent appeal⁴⁹ in my concurring opinion I related this theory of interpreting the Constitution to electoral jurisprudence thus:

“Electoral jurisprudence as one of the strands or streams of our jurisprudence must also reflect this theory of the interpretation of the Constitution. The Constitution is the constant north as clearly stated in our finding in this appeal that...*the Elections Act, and the Regulations thereunder, are the normative derivatives of the principles embodied in...the Constitution, and*

⁴⁷ Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others above note 44 at para 21.

⁴⁸ *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014 (Munya 2B)

⁴⁹ *Ibid.*

*in interpreting them, a court of law cannot disengage from the Constitution.*⁵⁰

Under Article 163(7) of the Constitution **all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.** Thus, this theory of interpretation of the Constitution will bind all courts, other than the Supreme Court. It will also undergird various streams and strands of our jurisprudence that reflect the holistic interpretation of the Constitution. The gist of my contribution in ***Munya 2B*** was therefore that:

‘Ultimately, therefore, the Supreme Court as the custodian and protector of the Constitution shall oversee the coherence, certainty, harmony, predictability, uniformity, and stability in the various interpretative frameworks that the Constitution and the Supreme Court Act provide. The overall objective of this theory of interpreting the Constitution is in the words of the Supreme Court Act to “facilitate the social, economic and political growth” of Kenya.⁵¹

In a recent judgment delivered on September 29, 2014 ***The CCK Petition 14 as Consolidated with Petitions 14A, 14B and 14C*** the Supreme Court revisited this critical issue of the theory of the interpretation of the 2010 Constitution. This judgment has clearly mainstreamed the theory of interpreting the Constitution by making it a decision of a full bench of the

⁵⁰ Ibid, para 243.

⁵¹ ***Ibid para 233.***

Supreme Court. The courts below are now bound by this theory of interpreting the Constitution. Below are the relevant paragraphs:

[356] We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

[357] We begin with the concurring opinion of the CJ and President in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

“[232]...References to Black’s Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.

“[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the

strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks duly authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.”

[358] The words in Article 10(1)(b)“applies or interprets any law” in our view include the application and interpretation of rules of common law and indeed, any statute. There is always the danger that unthinking deference to canons of interpreting rules of common law, statutes, and foreign cases, can subvert the theory of interpreting the Constitution. An example of this follows.

[359] The famous United States Supreme Court case of Marbury v. Madison, 5 U.S. 137 (1803) established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the U.S. Constitution. This principle is enshrined in our Constitution (Articles 23(3)(d) and 165(3)(d)). A close examination of these provisions shows that our Constitution requires us to go even further than the U.S. Supreme Court did in Marbury v. Madison (Marbury). In Marbury, the U.S. Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in the Constitution. Article 23(3) grants the High Court powers to grant appropriate relief ‘including’ meaning that this is not an exhaustive list:

- **A declaration of rights;**
- **An injunction;**
- **A conservatory order;**

- ***A declaration of invalidity of any law that denies violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights;***
- ***An order for compensation;***
- ***An order for judicial review.***

[360]Article 165(3)(d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of the Constitution “including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (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; (iii) any matter relating . . . to the constitutional relationship between the levels of government.” These provisions make clear that Kenyan courts have a far-reaching constitutional mandate to ensure the rule of law in the governance of the country.

[361] The eminent Kenyan Professor James Thuo Gathii in “The Incomplete Transformation of Judicial Review,” A Paper presented at the Annual Judges’ Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014 warns that:

“The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution’s principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.”

[362] Kenya’s distinguished constitutional lawyer, Professor Yash Pal Ghai in one of his unpublished reflections has stated that: “Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against the destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya’s judiciary.”

[363] It is clear from the facts and the legal argumentation in this case that it is a complex one. Besides, this is an important case in terms of the Constitution’s principles and institutions of governance, as it involves the modernizing information and communications sector. It behoves this Court to focus its attention not only on the progressive development of such institutions, but also on the evolving parallel course of fundamental-rights claims. The task transcends the conventional framework of interpretation of law as a plain forensic engagement.

In this decision the Supreme Court confirmed that our Constitution cannot be interpreted as a legal centric document. For the first time the Supreme Court was faced with interpreting some of the values under Article 10 of the Constitution, namely, participation of the people, sustainable development, integrity, inclusiveness, non-discrimination, and patriotism in the context of media establishment, licensing, independence and freedom. The interpretation of these values was again informed by the historical, economic, political and cultural contexts of the country’s constitution-making processes over decades. Some of the paragraphs in the unanimous decision of the Supreme Court are illustrative:

[375] The use of sustainable development as a vision and a concept in the Constitution requires that we at least link it to the vision of the Constitution which is transformative and mitigating.

[376] Sustainable development is associated with the transformative potential of social, economic, political and cultural rights. This vision is in part linked to Amartya Sen's work which embraces the view that long-term sustainable development requires an autonomous, active, and participatory democratic citizenship, endowed with minimum levels of social economic welfare best articulated in the form of rights. (See Development as Freedom, Anchor Books, 2000).

[377] Sustainable development has found stable constitutional and legal frameworks in what we have come to call transformative constitutions. Transformative constitutions are new social contracts that are committed to fundamental transformations in societies. They provide a legal framework for the fundamental transformation required that expects a solid commitment from the society's ruling classes. The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law. As Karl Klare states, "Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law." Such transformative constitutions as the ones of India, South Africa, Colombia, Kenya and others reflect this vision of transformation.

[378] As already stated the Kenyan Constitution under Article 10 provides that sustainable development is a national value and principle to be taken into account when the Constitution is interpreted as well as a guide to governance.

[379] It is clear that sustainable development under the Constitution has the following collective pillars: the sovereignty of the Kenyan people; gender equity and equality; nationhood; unity in diversity; equitable distribution of political power and resources; the whole gamut of rights; social justice; political leadership and civil service that has integrity; electoral system that has integrity; strong institutions rather than individuals; an

independent Judiciary, and fundamental changes in land. Public participation is the cornerstone of sustainable development and it is so provided in the Constitution.

The Supreme Court's interpretation of two of the values in question is captured in the paragraphs below:

[381] Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did [not] the word and spirit of the Constitution would both be subverted.

[382] Patriotism means the love of ones country. The regulator, the State, the Government, the national broadcaster and national private broadcasters have a national obligation, decreed by the Constitution to love this country and to not act against its interests. The values of equity, inclusiveness and participation of the people are similarly anchors of patriotism. Integrity too means we are patriotic when we do not take bribes and commissions thereby compromising the national interests of the Motherland. The values of inclusiveness and non-discrimination demand that State, Government, and State organs do not discriminate against any stakeholder. The regulator in particular must seek to protect the interests of the national and international investors in an equal measure. Indeed, there cannot be sustainable development in the country if the State, State organs, and Government fail to protect and promote the public interest in all its projects.

Overall, Kenya's 2010 Constitution decrees a theory of its interpretation. It is a theory of interpreting a transformative constitution and its ingredients have been stated at the conceptual level, but also practically by the superior courts in interpreting the Constitution in live cases. This theory clears and guards the Constitution from the subversion of its vision by other canons of interpretation. Although the consolidation of this theory has now been upheld at the apex court it remains to be seen how other superior and subordinate courts will uphold and enrich it going forward.

IV: CONCLUDING REMARKS: Imagining Developing Progressive African Jurisprudence

In this presentation, I have highlighted aspects of Kenya's emerging robust (rich) decolonizing, patriotic, progressive, indigenous, and transformative jurisprudence by highlighting constitutive features of its vision and illustrative examples from significant decisions by the Supreme Court. From my perspective, a transformative Constitution and its attendant transformative constitutionalism are both about change from a status quo that is neither acceptable nor sustainable. Transformative constitutions are not revolutionary, but transformative. Transformative constitutionalism is anchored by progressive jurisprudence from the judiciary and observance of the Constitution by other state organs, indeed all Kenyans. This jurisprudence is not insular. It is the basis of African, South-South, and global collaboration. It is a jurisprudence that allows us to be producers, developers and shapers of international law. At the

economic, social, cultural and political levels transformative constitutions and constitutionalism aim at societal change that can put a nation in a social democratic trajectory and a basis of democratic sustainable development. In the case of Africa developing progressive African jurisprudence is the judiciary's contribution to the struggle of the liberation of Africa.

Be that as it may, the following questions, and I am sure others that will emerge during the Q & A need to continue being asked: What are the challenges of the generating and implementing the robust (rich), patriotic, decolonizing, progressive, indigenous, and transformative jurisprudence that I have outlined here drawing on the Kenyan experience? What are the national and global trajectories within which transformative constitutions, the new rule of law, decolonized progressive jurisprudence are to be viewed, analyzed, problematized, and historicized? What does or can jurisprudence do apart from disposing of a particular case- or outside the juridical field?

Implementing the Constitution of Kenya has been, and continues to be a struggle. Forces that were opposed to this constitution, its vision, values, and objectives continue to resist its implementation. Parliament, for example, has used its legislative power to subvert the Constitution. In some

cases the Judiciary has struck down statutes that subvert the sovereign will of the people. The Executive continues to struggle for its imperial presidency and its centralization of national resources. The Chapter of the Constitution on leadership and integrity, Chapter 6 is the centre of furious struggles to strangle its import and spirit. Its fate now lies with the Supreme Court of Kenya. The High Court in my opinion in interpreting the chapter and complying with the theory of interpreting the Kenyan Constitution (long before the Supreme Court mainstreamed it) came up with the correct decision. The Court of Appeal reversed that decision. Both the Treasury and the Central Bank of Kenya continue with the old mindset of being the institutions that undertake the will of the Executive.

The implementation of devolution of political power and equitable distribution of national resources is, in my opinion, irreversible. Although there is evidence that we have decentralized corruption, but the imagination of the people in the counties, particularly the hitherto marginalized counties, their consciousness that their material interests could improve with the resources coming from the centre, suggest fierce resistance against corruption and wastage of these resources. I believe alternative political leadership, and indeed, leaderships at all societal levels, (and social movements to breathe life into the constitution) will

emerge from the marginalized counties. With more resources going to the counties going forward, the allure of the Presidency will most likely be dimmed, and governors of the counties will become the mainstay of the political competition at the counties and at the centre.

I also see institutions that are embryonic growing in strength. The Judiciary is one of those institutions. The Judicial Service Commission is another as, indeed, is the Commission for the Administration of Justice. The Auditor-General has since independence remained a strong institution although its reports have been routinely ignored. I believe a political leadership will emerge to implement the reports of the Auditor-General.

Kenyan civil society has been vibrant. I believe in future it will be the basis of alternative social movements and alternative leaderships. This will only happen if a strong bridge is built to consolidate the struggles of the middle class civil society and its grassroots compatriots. At the moment in Kenya the secular civil society, which is not as perfidious as its religious component, is engaged in the struggle to implement the constitution. I am optimistic that it will continue to be the engine for resisting claw backs on the vision of the Constitution while consistently breathing life into the implementation of the Constitution.

As a preliminary response to these questions that I have posed above, I begin with the following urgent conclusion about our world by Eric Hobsbawm: “Our world risks both explosion and implosion. It must change.”⁵² Since the end of the Cold War debates have raged on the subject of this change underpinning Hobsbawm’s conclusion. In the case of The World Social Forum, it has stated that a new world is possible. Its vision of such a world is informed by a range of progressive ideas drawing from human rights, social justice, indigenous thinking and others. One of our great scholars, organic intellectual, African Marxist revolutionary, Samir Amin has written extensively on neoliberalism and how the world must change. He has also been in the forefront of imagining what this new world will look like. With the late Professor Dani Wadada Nabudere, he has written about the socialism that failed in the Soviet Union and other countries that were supposedly in the socialist camp.⁵³ These writings are critical as we witness new undogmatic debates on socialism since the financial meltdown in the West from 2008.

As we envision progressive African jurisprudence based on our transformative constitutions, what is also called the gospel according to the

⁵² A History of the World, 1914-1991: The Age of Extremes (New York: Vintage Books, 1996), page 585

⁵³ Samir Amin, Russia and the Long Transition from Capitalism to Socialism (New York: Monthly Review Press, 2016); Dani Nabudere, A Critique of the Political Economy of Social Imperialism, an unpublished manuscript, Helsingor, Denmark, 1989.

Africans, we cannot forget that Africa is still dominated, exploited and oppressed. We cannot forget that our political elites have hardly formulated an economic, political, and ideological template that reflects African interests in the context of global imperialism.⁵⁴ In the main, diverse as continent is, modes of “coloniality of power”⁵⁵ or what Derek Gregory has termed as “the colonial present”⁵⁶ continue to mark economic and political trajectories in various parts our continent including Kenya. Overall, like in the historical period of formal colonialism, our era of “the colonial present” is characterized by practices of “accumulation by dispossession” (Harvey 2005, 145). The renowned economic geographer, David Harvey defines practices of accumulation by dispossession as:

commodification and privatization of land and the forceful expulsion of peasant populations; the conversion of various forms of property rights (common, collective, state, etc.) into exclusive private property rights; the suppression of rights to the commons; the commodification of labour power and the suppression of alternative (indigenous) forms of production and consumption; colonial, neo-colonial, and imperial

⁵⁴ Ernesto Screpanti, Global Imperialism and the Great Crisis: The Uncertain Future of Capitalism (New York: Monthly Review Press, 2014) 48-67; 202-208.

⁵⁵ For extended discussion of this historical and contemporary modalities of colonial of power see Quijano, A. (2007) ‘Coloniality and modernity/rationality’, *Cultural Studies*, 21 (2–3): 168–178 and Eunice N. Sahle, *World Orders, Development and Transformation*. (2010) *World Orders, Development and Transformation* ((Basingstoke [England]: Palgrave Macmillan).

⁵⁶ See, Gregory, Derek. 2004. *The Colonial Present : Afghanistan, Palestine, Iraq*. Malden, MA: Blackwell Pub.

processes of appropriation of assets (including natural resources; the monetization of exchange and taxation, particularly of land; the slave trade; and usury, the national debt, and ultimately the credit system as radical means of primitive accumulation.⁵⁷

In light of these practices, which have increased inequalities⁵⁸ and led to a lack of hopeful future for most of our youth and other marginalized groups, you may conclude that my focus on African judiciaries that struggle to transform their institutions for all their citizens is a futile one. Overall, in light of the inherent limitations of implementing transformative constitutions in the context of contemporary forms of imperialism are aspirations of progressive jurisprudence such as those outlined in this presentation enough? Moreover, given that African elites invariably lack the political will to support transformation how is judicial transformation to be aligned to⁵⁹ challenges that such lack of political will pose? And further, given that African elites have failed to identify African interests in the context of exploitation and domination from both the West and the East what future does this jurisprudence promise? What is the impact of the China-Africa

⁵⁷ See Harvey, D. (2005) *New Imperialism* (Oxford: Oxford University Press), p. 145.

⁵⁸ See Monthly Review vol 67 No 3, July-August, 2015 entitled The New Imperialism-Globalized Monopoly-finance capital. From page 23 Samir Amin has an article, "Contemporary Imperialism." Boaventura de Sousa Santos teaches us that "The world's eight richest people own as much much wealth as the poorest half of the world population (3.5 billion people) <http://www.other-news.info/2017/05/horizons-needed/>

relations, for example, when African interests continue to be unidentified and fought for? With the AU not pursuing some of the reforms the late Gadhafi suggested, particularly on the creation of an African currency, we can only assume that Africa has to prepare itself to resist a recolonization by both the West and the East. PanAfricanism and African unity has never been so critical as it is now. We must resurrect Mwalimu Nyerere, Kwame Nkrumah and all other PanAfricanists whose messages African political leadership has paid lip service to.

Ultimately, we must concede that the project of transformation in jurisprudence is fundamentally a political project. In countries where the transformation of the judiciary has irreversible support from the political elites much progress can be quickly made. Nonetheless, although, significant progress has been in our continent, the struggle for the implementation of progressive constitutional and judicial frameworks remains. As such, it is imperative that judiciaries in Africa continue to transform their practices and to embrace their role as crucial political actors in the ongoing struggles of decolonizing our minds and the continent in general.

Thank you!

