



University of Pretoria

TRANSFORMATIVE CONSTITUTIONALISM, LEGAL CULTURE AND
THE JUDICIARY UNDER THE 2010 CONSTITUTION OF KENYA

SUBMITTED BY
FREDA MUGAMBI GITHIRU
STUDENT ADMISSION NO. 11135761

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SUPERVISOR: PROF KARIN VAN MARLE
DEPARTMENT OF JURISPRUDENCE

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*This work is dedicated to my beloved sons Keith and Keenan;
I pray that you may have the courage to follow your hearts' desires*

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ABSTRACT

This thesis is an interrogation of the concept of transformative constitutionalism; an idea developed in South Africa by American scholar Karl Klare. I seek to explore whether a project of transformative constitutionalism may contribute to the transformation process in Kenya under the newly promulgated 2010 constitution. My suggestion of transformative constitutionalism is only as one of various other mechanisms that Kenya could adopt towards the transformation of society.

I argue that even before getting into the issues surrounding transformative constitutionalism, a historical analysis of Kenya's development is necessary. The project must proceed on an understanding and appreciation of this background for it to make meaningful gain. Hence this thesis makes calls for a constitutional conversation that more directly connects between historical experiences and transformative constitutionalism.

I engage with various scholars on their views of transformative constitutionalism and the development of the notion from Klare's discussion. These discussions are important for Kenya to pick up from the scholarly views and ideas that may drive the transformation process. In this regard, from a discussion of South African authors I realise that it would be unwise to insist on a conclusive definition of transformative constitutionalism. Instead, I agree with views expressed that the concept deals with requires a more open acceptance that there may be more than one plausible understanding of transformative constitutionalism so as to ensure that the project remains relevant for future generations. While I argue that transformative constitutionalism has had benefits in South Africa that Kenya can enjoy, I also warn that Kenyans should not take it as fool proof guarantee of legislative transformation. The project suffers from certain pitfalls that render it ill-suited to delivering full and radical transformation. For this reasons I argue that cautious optimism is needed. Amongst these challenges and limitations is the disconnection between a formal conservative legal culture of the Kenyan judiciary and the progressive spirit required by the 2010 constitution. I argue that unless the judiciary in Kenya can transform and rid itself of this conservative legal culture, there is a potential danger in the transformation process slowing down or even failing.

KEY WORDS

Transformative constitutionalism, legal culture, challenges of transformative constitutionalism, limitations of transformative constitutionalism

CHAPTER ONE: INTRODUCTION

“Full implementation of the letter and spirit of the constitution is crucial to realize the promise of a democratically stable and prosperous future for all Kenyans”

Philip J Crowley – US Assistant Secretary, Bureau of Public Affairs (2011)

“As Kenya enters the crucial phase of full implementation of the Constitution, pride of place must be given to constitutionalism. Both the written words of the Constitution and its silences must always be interpreted to enhance the common good, thus avoiding the term political interests”.

*Justice I Lenaola
Presiding Judge Constitutional and Human Rights Division High Court (2014)*

1.1 Introduction

Kenya is one of many African countries struggling to transform from a deep-rooted unjust past.¹ Although the country has in the past squandered several opportunities towards transformation, the hope for a better Kenya was restored by the promulgation of the 2010 Constitution.² The new Constitution marks a crucial step in Kenya's struggle for a new constitutional dispensation that would help to transform the Kenyan society fundamentally.³ The 2010 Constitution has been described as a transformative document because it lays the legal foundation for transformation of the Kenyan society as a whole and introduces a radically different constitutional order from all previous orders.⁴ The Constitution has not only opened new horizons in Kenya's contemporary history but has also created emerging constitutional contestations as scholars, politicians, lawyers and courts go through the process of understanding, interpreting and implementing it.⁵

At the fourth anniversary of this new constitutional dispensation I seek to deal with the disconnection between the 2010 Constitution as a progressive and transformative constitution and the current socio-economic and political situation that is not performing optimally as expected. I argue for a consideration of the framework of transformative constitutionalism as one of the ways that may drive forward the process of transformation in Kenya. The framework of transformative constitutionalism has not been explored within Kenya's constitutional discourse and I intend this thesis to be the beginning of a debate on

¹YP Ghai 'Decreeing and establishing a constitutional order: challenges facing Kenya' <http://www.koffiannanfoundation.org> 1.

² Ghai (ibid). The 2010 Constitution was promulgated on 27 August 2010.

³ W Mutunga 'The vision of the 2010 Constitution of Kenya' Keynote remarks on the occasion of celebrating 200 years of the Norwegian Constitution University of Nairobi 19 May 2014 1.

⁴International Commission of Jurists (Kenya) hereinafter ICJ (K) Report 'Transforming the Kenyan judiciary after 2010' <http://www.kenyalaw.org/klr/fileadmin/pdf/downloads/judiciary> 10; B Sihanya 'Constitutional implementation in Kenya 2010-2015, challenges and prospects' <http://www.innovativelawyer.com> 1-2.

⁵PLO Lumumba & L Franchesci, *The Constitution of Kenya 2010, an introductory commentary* (2010) Foreword *xlvii*.

the possible value of transformative constitutionalism as a framework for more optimal transformation in Kenya.

Guided by the work of American scholar Karl Klare on transformative constitutionalism in South Africa, I focus on the adjudicative role of the judiciary as a crucial ingredient in the framework.⁶ The transformative Constitution of Kenya is one that requires the judiciary to come up with a jurisprudence that resonates with that transformative vision.⁷ Fear has already been expressed over the failure of the judiciary to embrace the transformative potential of the constitution. There have been mixed reactions over the jurisprudence that has emanated since the promulgation of the 2010 Constitution.⁸ It is against this background that I seek to explore and analyze the disconnection between transformative constitutionalism and the legal culture of the Kenyan judiciary and through that to argue for a change in legal culture as a significant way to drive the process of transformation even further. The depth to which the idea of transformation runs as a result of the new constitutional dispensation and the role of the courts in the process has been captured by, amongst others, the Chief Justice of the Republic Kenya in the following words:

Some have spoken of the new constitution as representing a second independence. This is when our institutions, and the people, are to come into their own, when the legislature will truly act as the representatives of the people, and the supervisors of the executive, when the executive will put the interests of the nation first, above the interests of tribe, individual and class and when the curse of impunity will be ended and the rule of law prevails. This

⁶ KE Klare 'Legal culture and transformative constitutionalism' (1998)14 *South African Journal on Human Rights* 146: 146.

⁷ W Mutunga 'Elements of progressive jurisprudence' speech at Judges' dinner on 31 May 2012 <http://www.judiciary.gov.ke/portal/assets/downloads/speeches> 40, 41, 43, 44.

⁸ PLO Lumumba 'Making and breaking the law: justice in the wake of disobedience and judicial cowardice; judicial innovation or schizophrenia? A survey of emerging Kenyan jurisprudence' <http://www.kenyalaw.org/kenyalawblog/judicial-innovation-or-schizophrenia>; W Mutunga 'The 2010 Constitution of Kenya and its interpretation: reflections from the Supreme Court decisions' <http://www.judiciary.go.ke>.

will only happen if we all, *including the judiciary*, play our part, for the forces of resistance are strong.⁹

The engagement with transformative constitutionalism as a core framework in this thesis requires me to clarify from the onset my use and understanding of it. To begin with, the process of transformation is directly related to the idea of legal reform—namely the process by which existing laws are examined and changes implemented within a legal system so as to enhance justice and efficiency.¹⁰ This connection between legal reform and transformation comes about because both processes denote a form of change. While this is so, the major difference between the two is in the nature of change that each process targets. It could be argued that transformation targets more radical change than legal reform. Legal reform even in cases of comprehensive changes mostly remains grounded in an approach to law in a pure and restricted form. I follow Drucilla Cornell's support of transformation as a change not only of a system but of subjects within a system.¹¹ I support a reading of transformation and transformative constitutionalism as a change of framework and not simply as a change that in a way keeps the status quo intact.

The pivotal role of the Constitution in the transformation process is informed by amongst others, the multi-disciplinary nature of the process of transformation and the fact that the constitution is able to traverse all these fields.¹² Although constitutions vary in terms of

⁹Mutunga (n 7 above) 3-4 emphasis mine.

¹⁰ LM Friedman 'Law reform in historical perspective' (1968-1969) 13 *St Louis University Law Journal* 351: 351. The Blacks' Law Dictionary defines law reform as 'the process of, or a movement dedicated to streamlining, modernizing or otherwise improving a body of law generally or the code governing a particular branch of law. BA Garner *Black's law dictionary* 10th ed (2014) 894.

¹¹ I discuss theories by authors like D Cornell, '*Transformations, recollective imagination and sexual difference*', (1993) 1. Although Cornell's book is mainly on feminist theories and the need for transformative interpretation of feminist theories, her understanding of transformation ties up with this discussion.

¹²C Albertyn & B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248: 248; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351: 352, 353.

depth and structure, they are usually more comprehensive and holistic in approach and through their text provide the means for and the end to the transformation process.¹³ The goals of transformation are therefore contained in the norms, values and principles prescribed by the constitution. These are fundamental in dictating the direction of the process of transformation.

It is also crucial to point out that how transformative constitutionalism is conceived depends on the jurisprudential and theoretical vantage point from which it is approached. While it is agreed that the change that results from transformation is significant, there appears to be different and sometimes opposing readings of transformative constitutionalism in South African constitutional discourse. I elaborate on these readings in chapter three.

My argument in this thesis is that after a transformative constitution has been put in place, in order to maximize the potential for constitutional transformation, a 'desirable' approach to reading, interpreting and enforcement of the constitution is a must. Such an approach would be compared to breathing life into the grand text in the constitution, which would otherwise remain lifeless.¹⁴ While I accept that other approaches are tenable, I explore the notion of transformative constitutionalism, a framework that has found some resonance in South African constitutional discourse as one of the ideal interpretive approaches.¹⁵ There is a significant body of literature on the post-apartheid era of South Africa where transformative constitutionalism as an approach to constitutional interpretation and

¹³ Lumumba & Franchesci (n 5 above) 2, 3; YP Ghai & JC Ghai, *Kenya's Constitution: an instrument for change* (2011) 4, 5.

¹⁴ Lumumba & Franchesci (n 5 above) 49; Ghai & Ghai (n 13 above) 13.

¹⁵ S Sibanda 'Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22(3) *Stellenbosch Law Review* 482: 486.

application is depicted as an important framework that continues to achieve development, change and hope for a better society.¹⁶

Transformative constitutionalism for Kenya requires that the 2010 Constitution should be understood and interpreted as a transformative document. This requires historical consciousness and an adaptation of a progressive approach to the letter and spirit of the Constitution.¹⁷ This thesis is an examination of the extent to which this approach would work for Kenya and of the challenges to that, including the main challenge of legal culture to progressive interpretation and application of the 2010 Constitution.

Although the nature of transformative constitutionalism suggests that it is deeply rooted in law, I am cautious not to attempt a classification of it as a strictly legal one.¹⁸ Rather, I proceed on the basis that it is a theoretical framework that transcends multiple disciplines- legal, political and social-, all of which are not necessarily mutually exclusive. I apply it in its different contexts as need may be. In this regard I agree with Van Marle that the very reason that the framework is termed as transformative is that it advocates a break in the traditional link to law only, and traverses other disciplines.¹⁹

Transformative constitutionalism has been termed by many scholars as a constitutional framework mainly because of its direct relationship to constitutional law.²⁰ The achievement of the transformative goals in this respect relies on an interpretation of the

¹⁶ T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258: 259; Sibanda (ibid).

¹⁷ Ghai & Ghai (n 13 above) 13.

¹⁸ Roux (n 16 above) 258, 259; K Van Marle 'Transformative constitutionalism as/and critique' (2009) 20 *Stellenbosch Law Review* 286: 288.

¹⁹ Van Marle (ibid).

²⁰ Sibanda (n 15 above) 483.

constitution that adheres fully to its underlying values and norms.²¹ Although the constitution prescribes the norms, values and principles of transformation, these are often a product of political bargain. Transformative constitutionalism embraces a candid recognition of the extent to which politics and ideology play a role in adjudication. Klare acknowledges this multi-disciplinary nature of transformative constitutionalism, while engaging with it as a theory of interpretation.²² Klare and some of the commentators on his work that I engage with in their approach to transformative constitutionalism adhere to the tensions between concepts such as liberalism, conservatism and a critical legal approach to constitutional interpretation. These approaches are concerned with the theory of transformative constitutionalism and not only possible practical outcomes.

The thesis is underpinned by the following assumptions:-

- i. That the constitutional history of Kenya reveals past injustices and inequalities that justify the need for constitutional transformation through the 2010 Constitution. Although Kenya has made remarkable progress in transforming the society, there are key challenges that also continue to block the process, as a result of which Kenya may consider the experiences of South Africa and the framework of transformative constitutionalism.
- ii. That the meaning of transformative constitutionalism, encapsulating as it does the tension between stability and change is a paradox conceptualized along jurisprudential analysis. Although followed by some in South Africa's constitutional

²¹M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 155: 156.

²² Klare (n 6 above) 146.

circles, transformative constitutionalism suffers serious challenges, such as the prevailing legal culture.

- iii. That the values, attitudes, beliefs and standards that characterize the Kenyan legal profession and the bench are mainly conservative and this legal culture will in turn affect the overall success of transformative constitutionalism.

1.2 Background to the study

My thesis proceeds from a historical background of Kenya's pre-colonial experiences. In chapter two I discuss the history of Kenya before colonialism all the way to the new constitutional dispensation and after 2010. In chapter four I turn specifically to the history of the judiciary. In this section my aim is to give a broad background on Kenya in order to situate the study. The historical experiences are an indication of how colonialism arguably interrupted Kenya's development discourse and steered processes to another direction than would have been the case but for colonialism.²³ I certainly do not turn a blind eye to the fact that, although most colonial experiences led to collapse of our institutions, colonialism also deserves appreciation for creating the possibilities of new social, economic, cultural and political practices.²⁴ However, for purposes of the transformation discussion I argue that it is this colonial history that would lay the impetus for a long struggle, culminating in the 2010 Constitution and the subsequent need for, as I see it, a relevant consideration of the framework of transformative constitutionalism.

²³S Lamba 'A post-colonial theory of justice: towards the new Constitution of Kenya' <http://www.mazinst.org/publication/26> 1.

²⁴ M Mamdani 'Beyond settler and political identity, citizenship and ethnicity in post-colonial Africa' Keynote address given at the Arusha conference on new frontiers of social policy 12 December 2005 to 15 December 2005 3; C Young 'Ideologies of the postcolonial' <http://www.robertjyoung.com/ideologies.pdf> 1; PT Zeleza 'The developmental and democratic challenges of post-colonial Kenya' the James S Coleman Memorial Lecture Series 2010 <http://www.escholarship.org/uc/item/3bh758jz> 4.

The colonial government brought about different political influences, new institutions, laws and administrative processes which were inherited by independent Kenya.²⁵ Many of these practices were not viable for democracy and were the basis on which the quest for transformation begun.²⁶

A major political insight borrowed and developed from the colonial government is the African view of power.²⁷ Power within most African contexts, including Kenya, is still seen as a product of subjectivities and identities.²⁸ This culture of creation of subjects and repression of the subjects was the kind of power that the African natives witnessed and lived with all through the colonial period.²⁹ The colonial government was not representative of the natives' views neither was it responsible.³⁰ It was in fact, a mockery of democracy and sovereignty. Orders and laws made by the colonial administration reflected the wishes of the colonial government and not of the natives' community leaders.³¹

At independence there was a sudden attempt to change from this culture. Britain purported to bequeath on Kenya a responsible and representative government which was a totally different phenomenon from the culture that the Kenyan leaders had been used to.³² This new phenomenon was not going to work in independence Kenya because Kenyan independence leaders lacked a proper grounding in democracy.³³ This would

²⁵ C Hornsby *Kenya: a history since independence* (2008) 5; M Kinyatti 'History of resistance in Kenya' (2008) 363; Ghai & Ghai (n 13 above) 5.

²⁶ BA Ogot & WR Ochieng *Decolonization and independence in Kenya: 1940-1993* (1995) 12-13; Young (n 24 above) 1.

²⁷ R Abrahamsen 'African studies and the post-colonial challenge' (2003) 102 *Journal of African Affairs* 189: 198.

²⁸ Abrahamsen (ibid).

²⁹ Abrahamsen (ibid).

³⁰ G Muigai 'The judiciary in Kenya and the search for a philosophy of law: the case of constitutional adjudication' in K Kibwana (ed) *Law and the administration of justice in Kenya* (1989) 67: 96.

³¹ Muigai (n 30 above) 97.

³² PS Ahluwalia *Post colonialism and the politics of Kenya* (1996) 18.

³³ Ogot & Odhiambo (n 26 above) 1; Abrahamsen (n 27 above) 202.

explain why the Kenyan leaders found the previous autocratic order very tempting and wanted to carry on the same.³⁴ As should have been expected, upon independence, the immediate political rulers took over power and to the dismay of those who fought for that independence the rulers sacrificed the very ideals that they had fought for.³⁵ In the clamor for power, the post-independence constitution was seriously mutilated by the political class so that at the end of the three decades it produced weaker institutions setting the pace for a history of abuse and misuse of power.³⁶

The colonial sovereign political power and administrators wielded immense power and this included the delegated administration which also enjoyed great latitude in the performance of its duties.³⁷ They had a scope of arbitrary authority over their subjects and were not accountable to the natives who were their subjects. This scope of domination and arrangement of power of the colonial government was sufficient for its own interest and not the interests of the Africans.³⁸ The representation of the colony was alien, erected upon a command and revolt relationship and shaped by a vocation of domination over unwilling Africans.³⁹ After independence this political status created an almost similar arrangement which best explains the emergence of autocratic presidential systems that Kenya continues to grapple with.⁴⁰ To date many African leaders continue to face disciplinary challenges in keeping to the representative democracy required of independent democracies.⁴¹ This too

³⁴ Ahluwalia (n 32 above) 18; YP Ghai & JWMP Mc Auslan *Public law and political change in Kenya: a study of the legal framework of government from colonial times to the present* (1970) 174.

³⁵ Kinyatti (n 25 above) 56, 57.

³⁶ C Roschmann et al 'Human rights, separation of powers and devolution in the Kenyan Constitution 2010: comparison and lessons for EAC member states' <http://www.kas.de/rspssa/en/publications/33086> 2.

³⁷ C Young 'The end of the post-colonial state in Africa? Reflections on Africa's changing political dynamics' (2004) 103 *Journal of African Affairs* 23: 31.

³⁸ Young (n 37 above) 30.

³⁹ Young (n 37 above) 27.

⁴⁰ PO Ndege 'Colonialism and its legacies in Kenya'. Paper delivered during the Fulbright-Hays Group project abroad program 5 July 2009- 6 August 2009 Moi University Eldoret (unpublished article on file with author)2.

⁴¹ Abrahamsen (n 27 above) 202.

may be traced back to the sudden and haphazard requirement for democracy by post-colonial agencies without proper grounding and the radical break from the tradition of authoritarian rule and illegitimate government.⁴²

Another serious drawback of the fight for democracy was due to the culture of exploitation that the first leaders of independent Kenya inherited from the colonial government.⁴³ Exploitation for personal gain has been a characteristic of the ruling class so that even today, politicians still face the challenge of weaning themselves of the long established cultures of colonial authoritarian rule.⁴⁴ The same characteristics of extreme remuneration, corruption, economic privileges, impunity and authority continue to thrive.⁴⁵

The challenge of ethnicity within the Kenyan society is an evil that has continued to present challenges to the Kenyan people. This conflict is best brought out by numerous ethnic clashes that continue to rock the nation, notably the post-election violence of 2007.⁴⁶ The issue of ethnicity may be traced back to the political and administrative boundaries introduced during the colonial era. These had the effect of arbitrarily bringing together all the forty plus tribes that were initially independent, into one territorial entity through the use of arbitrary force.⁴⁷ These boundaries, differences in resource allocation and competition for limited resources amongst tribes are responsible for the eventual division amongst tribes and the negative ethnicity and tribalism that have continued to destroy Kenya.⁴⁸ Ethnic issues are so fundamental that they seem to be an integral component of

⁴² Abrahamsen (ibid).

⁴³ Ogot & Odhiambo (n 26 above) 13.

⁴⁴ Zeleza (n 24 above) 8.

⁴⁵ Ndege (n 40 above) 7.

⁴⁶ The 2007-2008 PEV was a political, economic and humanitarian crisis that erupted in Kenya after incumbent President Mwai Kibaki was declared winner of the 27 December 2007 election. It may have been fuelled by the ethnic differences in the country.

⁴⁷ Ndege (n 40 above) 7.

⁴⁸ Ndege (ibid); Zeleza (n 24 above) 10.

every aspect of life.⁴⁹ As a result of this the national collectiveness has been on a continuous decline, in favor of tribal and ethnic collectiveness.⁵⁰ These divisions to date create the daunting task of wielding all the tribes together as a nation for the success of transformation.⁵¹

The effects of colonialism in the justice system are partly explained in terms of the legal system and mechanisms of dispute resolution brought by the colonial government. These disregarded the customary mechanisms of the Africans as primitive and appropriate for Africans only.⁵² The colonial justice system was designed along this unequal relationship between the colonialist and the native.⁵³ The decisions of the courts, the settlement of decisions and their ideas about legitimacy and quality were centered not in a democratic system but in the interest of the colonial power. Hence they were misguided.⁵⁴ This led to the development of a culture where judges and lawyers have always viewed the common law system as being superior particularly to customary law.⁵⁵ The formal and conservative legal culture of the bench in Kenya was a characteristic of a subservient judiciary and was inherited from the British colonialists.⁵⁶

Many of the other challenges within the judiciary arise from the fact that Kenya had to inherit the problematic legal system mainly because it was a system that had taken root throughout the colonial period.⁵⁷ Because of the situation under which the legal system

⁴⁹ FA Yieke 'Ethnicity and development in Kenya: lessons from the 2007 general elections' (2011) 3(3) *Kenya Studies Review* 8: 10.

⁵⁰ Yieke (n 49 above) 13.

⁵¹ Ndege (n 40 above) 3.

⁵² Ghai & Ghai (n 13 above) 6, 7.

⁵³ Ghai & Ghai (ibid).

⁵⁴ Mutunga (n 7 above) 10, 11.

⁵⁵ SF Joireman 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39(4) *Journal of Modern African Studies* 571: 571.

⁵⁶ Mutunga (n 7 above) 10.

⁵⁷ Joireman (n 55 above) 576.

developed, law and state were seen as inseparable, a system that is contrary to the separation of powers in democratic governments.⁵⁸ The history of the Kenyan government shows that the state needed to be part and parcel of the legal system in as far as administration matters were concerned, so as to control the judiciary.⁵⁹ Appointment, removal and financing of the judiciary had always been pegged to the wishes of the executive. This experience of executive interference with the judiciary has also been carried on from colonialism to date where the government continues to feel utterly insecure before the judiciary.⁶⁰ As such, the attempt by the judiciary to completely rid itself of corruption and influence politics in a more democratic fashion continues to be very difficult.⁶¹ The partisan pressure from elites, politicians and the ruling class interested in retaining the status quo remains a major constraint to judicial transformation.⁶²

On the economic front, the colonial economy and policies introduced at colonialism had a lasting impact on Kenya in the sense that they led to a major disarticulation of the economy.⁶³ Colonialism had left an underdeveloped economy characterized by external dependency.⁶⁴ The economy of Kenya is still quite narrow, depending mainly on agriculture and lacks auto-dynamism, a characteristic of the economy introduced to Kenya by the colonial government.⁶⁵ This, amongst other economic policies was not meant to benefit the colonies but to benefit the colonial states.⁶⁶ To date Kenya's economy is still largely dependent on Britain, USA, China and other mainly European countries, especially

⁵⁸ Mutunga (n 7 above) 11, 12.

⁵⁹ Mutunga (ibid).

⁶⁰ Mutunga (ibid).

⁶¹ Joiremann (n 55 above) 591.

⁶² Joiremann (n 55 above) 592.

⁶³ Ogot & Ochieng (n 26 above) 13.

⁶⁴ Zeleza (n 24 above) 8.

⁶⁵ Ndege (n 40 above) 8.

⁶⁶ Ndege (ibid).

through foreign aid.⁶⁷ The influence of Europeans in the economy brought about a weakness in economic management that has been evidenced by heavy borrowing and debt burdens not only for Kenya but many other African states.⁶⁸ These reasons would explain why Kenya has been grappling with the problem of an inherited economy which is not able to lead to sustained growth and development, decades after independence.⁶⁹

The economic policies introduced by the British also brought about a serious inequality and imbalance between the haves and have not's. There still exists in Kenya a difference between the international and domestic bourgeoisie and between the local peasantries and bourgeoisie.⁷⁰ This difference is based on historically accumulated privilege.⁷¹ Other than the effect of poverty, the class system also created high level corruption and a culture of accumulation of wealth and power by the local bourgeoisie who are also the political elites.⁷² Mamdani connects the privileges of history that brought about this inequality to the response of what is today the affirmative action policy.⁷³ Bridging this gap includes equalizing resource allocation in different areas in the country. During the colonial period, development was concentrated in a few urban areas. These few urban areas have continued to grow at the expense of other towns in Kenya that are on the extreme side of under-development.⁷⁴ This built what is today still termed as 'marginalized areas'.

⁶⁷ Ndege (n 40 above) 7; Ahluwalia (n 32 above) 16.

⁶⁸ Young (n 24 above) 45.

⁶⁹ Ogot & Ochieng (n 26 above) 13.

⁷⁰ Ndege (n 40 above) 7.

⁷¹ Mamdani (n 24 above) 20; Ogot & Ochieng (n 26 above) 15.

⁷² Ndege (n 40 above) 7.

⁷³ Mamdani (n 24 above) 20.

⁷⁴ Ndege (n 40 above) 6.

1.3 Transformation, transformative constitutionalism and the judiciary

The brief history captured above explains the background against which there was dire need for constitutional transformation in Kenya. The euphoria as Kenya ushered in the 2010 Constitution was beyond explanation. Coming three years after the 2007 post-election violence that almost saw Kenya join a list of failed states in Africa, such jubilation and optimism were indeed warranted. The fact that Kenya chose a democratic path and passed a radically different constitutional dispensation was like a miracle. The new constitution has since been described as progressive, impressive and one of the best in the world.⁷⁵ Some saw the promulgation of the Constitution as the answer to all of the evils that had haunted Kenya for many years.

In August 2013, as Kenya celebrated the third anniversary of the new dispensation, the mood in the country had already changed. The headline in one of the dailies read, 'Forget all the noise and cheer, we are worse off today than 1990'.⁷⁶ The third anniversary, unlike the day of the promulgation, passed quietly and without notice. It was clearly beginning to dawn on the Kenyan society that their dreams of a new and better society would not come as fast as they had anticipated. The reality that having a new constitution does not automatically create the 'new' Kenya was now being realized.⁷⁷ The grand text of the Constitution had to be implemented and this was the harder part.⁷⁸ The hope for a better Kenya in many spheres of life has now been replaced with despair and disappointment.

⁷⁵ CIC Quarterly Report January-March 2011 <http://www.cic.go.ke>; MK Mbondenyei & JO Ambani (2012) *The new constitutional law of Kenya: principles, government and human rights xv*.

⁷⁶ Daily Nation 30 August 2013 <http://www.nation.co.ke>.

⁷⁷ Zeleza (n 24 above) 18; M Akech 'Institutional reform in the new Constitution of Kenya' a publication of the International Center for Transitional Justice <http://www.ictj.org> 8.

⁷⁸ Zeleza (ibid); Aketch (ibid).

The aim of this thesis is to explore in light of these circumstances, the possibilities of transformative constitutionalism as a framework for the interpretation and application of the new Constitution. I argue that the 2010 Constitution in part because of its far reaching provisions has also created false hopes and expectations for an elusive new society. The over emphasis on law and legal transformation fails to recognize that no matter how well drafted the constitution and other legislation may appear to be, there is need to engage a multi-disciplinary approach to transformation issues. I argue that the option of considering the framework of transformative constitutionalism in Kenya is a viable option. This is because the framework, at least in my own preferred conception of it, acknowledges the limitations and challenges that law as a tool of societal transformation faces and specifically admits the limitations that the idea of a constitution involved in transformation faces. This awareness and a progressive approach to the interpretation and implementation of the 2010 Constitution will be a step in the right direction towards achieving the constitutional goals.

At the forefront in my discussion is the role of the judiciary in transformative constitutionalism. The courts are charged with the crucial responsibility of steering Kenya through the transformation process by overseeing the implementation of the Constitution.⁷⁹ As adjudicators, the challenge is for the judiciary to rise to the occasion and take up the role of the constitution's custodian.⁸⁰ However I argue that the same judiciary is the main stumbling block to such success.⁸¹ The prevailing legal culture and political inclinations within the judiciary, which favor interpretations that subvert the progressive vision of transformation, create potential challenges to the ideals of transformation.⁸² Although not readily admitted by the bench, there is also no doubt that the adjudication

⁷⁹ Mutunga (n 7 above) 6.

⁸⁰ Article 159(2).

⁸¹ Sibanda (n 15 above) 488.

⁸² Sibanda (n 15 above) 489.

process is distinctly political.⁸³ The transformation process therefore requires judges to be candid about the impossibility of separating law from politics as a way to find solutions to transformation impediments.

1.4 Methodology and approach

In this thesis I take a critical legal approach to the framework of transformative constitutionalism. Although some principles are drawn from constitutional theory, the main emphasis is not on the legal theory of already settled doctrines and principles of constitutional law and legislation but more on the ideological and theoretical analysis of these principles and doctrines.

This study is largely argued along a critical idealism approach. The intention of doing so is to accept and to understand failure within the legal system. Although this necessarily means an admission that the world will never be perfect, there is need to seek a direction away from imperfection, towards a relatively less imperfect state by means of a critical understanding of inevitable human failures.⁸⁴ I admit in this study the need for marginal shifts in conventional arrangements and perhaps a little more or a little less regulation.⁸⁵ This study is intended to discredit a purely legal approach or even purely scientific approach to the question of transformative constitutionalism, thereby arguing that legal concepts aimed at transforming society must not be ignorant of other socio-economic and political factors.

⁸³ Pieterse (n 21 above) 165.

⁸⁴ <http://www.criticalidealism.net.au/blogfiles/criticalidealism>

⁸⁵ RW Gordon 'Some critical theories of law and their critics' in D Kairys (ed) 3rd ed *The Politics of Law* (1988) 644: 650; KE Klare 'Social construction and system in legal theory: a response to Professor Preuss' (2011) 12(1) *German Law Journal* 516: 516.

The ideas on transformative constitutionalism as considered are largely from South African scholarship.⁸⁶ Like Kenya, South Africa's road to transformation is a reaction to a legacy of historical injustices, but today, South Africa is hailed as having one of the most progressive constitutions and independent judiciaries in Africa and the world.⁸⁷ By drawing on specific examples from the South African experience, I do not claim to be carrying out a complete and in-depth comparative study and it should be emphasized that the Kenyan situation still remains the chief emphasis of the research. The current Chief Justice of Kenya, Dr Willy Mutunga, has specifically called on judges and lawyers to learn as much as they can from the South African experience but in doing so, to adopt the examples from South Africa only in so far as relevant to Kenya.⁸⁸

1.5 Limitations of the study

The first major limitation of my study is the rapid developments in law. Since 2010 when the transformative constitution was adopted in Kenya, a lot of key changes have taken place and many more institutional and legal developments are still underway. The field of constitutional and judicial transformation also remains in flux. A study of this nature therefore requires that a time limit be imposed on the research material. The time period for which this study was undertaken is therefore restricted up to 1 January 2015.⁸⁹

The other major limitation is with regard to the scope of comparative study. The comparisons carried out in the thesis are done on a small and specific scale. This is because the limitation of time and space makes it impossible to realistically capture an in-depth study on any other jurisdiction except Kenya as the main concern of this study.

⁸⁶Mutunga (n 7 above) 82.

⁸⁷Pieterse (n 21 above) 157.

⁸⁸Mutunga (n 7 above) 82.

⁸⁹Information presented in the thesis is up to date as at this date. It is expected that this thesis will be submitted for examination soon thereafter

Although it is possible that there may be more than one interpretation of situations that I have used as comparison, I am cautious to state that the comparative study should only be taken within the context that I have used it, for purposes of this thesis.

1.6 Overview of chapters

This thesis is based on the following research questions:

- i. What is the political and constitutional history of Kenya? To what extent has that past contributed to the need for constitutional transformation and how does the 2010 Constitution seek to transform the country from the historical injustices? What progress has been made so far under the 2010 Constitution and is this reason enough to seek a framework of transformative constitutionalism?
- ii. What is meant by a framework of transformative constitutionalism? What are the limits and challenges to such a framework?
- iii. What is legal culture and how does the legal culture adopted by the judiciary in Kenya threaten to interfere with the framework of transformative constitutionalism?

In chapter two I respond to the first research question by way of discussing Kenya's constitutional history in phases from the pre-colonial period, the colonial period and the post-colonial era. I also discuss the 2010 Constitution and in particular the transformative provisions of the constitution and the prospects and challenges that have so far been faced after its promulgation.

In chapter three I address the second research question and provide a theoretical analysis of transformative constitutionalism and the key elements of the framework for interpretation and application of the constitution. I trace the origin of the framework from the South African post-apartheid era and explore other contemporary and recent criticisms and commentaries on the framework. In this chapter I also discuss the potential challenges to a framework of transformative constitutionalism as applicable to Kenya.

In chapter four I turn to the third research question and focus on the role of the judiciary in transformative constitutionalism and in particular the challenge posed to transformative constitutionalism by the judiciary's legal culture. I discuss the issue of vetting of judges and magistrates in Kenya and compare this with the South African position after apartheid and the bearing that the choices to the progression of the judiciaries may have had on the legal culture in both benches.

The final chapter is chapter five in which I summarize the main findings of the thesis and make a few modest recommendations for policy consideration.

CHAPTER TWO

THE HISTORY AND DEVELOPMENT OF KENYA: MAKING A CASE FOR TRANSFORMATIVE CONSTITUTIONALISM

2.1 Introduction

The aim of this thesis, as explained in chapter one, is to reflect on the possible contribution of the framework of transformative constitutionalism as conceptualized by American scholar, Karl Klare within post-apartheid South Africa, to Kenya's process of transformation.¹ In order to do so effectively, I begin with a chapter on Kenya's constitutional history. The significance of this history is that it will highlight the origin of key injustices and historical experiences from which Kenya seeks to transform and therefore the spirit behind the enactment of the 2010 Constitution. Indeed, the history is also tied up with the challenges and limitations, legal and otherwise, that may be a stumbling block to the transformative constitutionalism framework as discussed in later chapters.

The discussion in this chapter is organized in four time frames:

- i. Pre-colonial Kenya
- ii. The period between 1895 and 1963, representing Kenya during the colonial era.
- iii. The period between 1964 and 1991, representing post-independence Kenya and its development during a one party era.
- iv. The period between 1992 and 2010, representing the multi-party era until the enactment of the 2010 Constitution.

Against this historical background I discuss the 2010 Constitution as an instrument for transformation by highlighting its transformative content and in particular, major breaks from previous constitutional orders. I argue that the need for constitutional transformation lies in Kenya's history of over 40 years ago and the inherited past but also in the practices

¹ KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146:146.

of pre-colonial Kenya.² A lot of progress has been made after the promulgation of the 2010 Constitution - more than at any other time in the history of Kenya - but it would be a tragedy for Kenya to ignore the lessons of history in the quest for transformation.³ In order to substantiate this claim I end the chapter by a discussion of the prospects and challenges of constitutional transformation in Kenya.

2.2 History and development of Kenya

The Constitution regulates all aspects of societal interactions whether social-economic, cultural, legal or political. These aspects are co related and mutually dependent on each other, such that the overall level of development or democracy in Kenya is a wholesome result of all of these.⁴ The frequent overlap between the various areas means that I would rather not present a separate sequence on each of them, but a historical narrative that looks at all these aspects in combination. A discussion on the history of the judiciary is deliberately omitted at this point but will be tackled in chapter four.

2.2.1 Pre-colonial Kenya

Before the British came to Kenya, the people of Kenya were living in self-contained and self-regulated tribes.⁵ Their settlements along tribal lines were fluid and incorporating and did not pose a challenge for the country because the tribes shared a lot in terms of culture,

² Y Ghai 'Decreeing and establishing a constitutional order: challenges facing Kenya' <http://www.koffiannanfoundation.org> 2.

³ B Daniels *Kenya: between hope and despair, 1963-2011* (2011) 176; BA Ogot et al *The challenges of history and leadership in Africa: the essays of Bethwell Allan Ogot* (2002) 1.

⁴ ES Odhiambo 'Hegemonic enterprises and instrumentalities of survival: ethnicity and democracy in Kenya' (2002) 61 *Journal of African Studies* 223: 223; AK Smith 'Socio-economic development and political democracy: a casual analysis' (1961) 13 *Midwest Journal of Political Science* 95: 96; Ghai (n 2 above) 8, 10-13; R Maxon 'Constitution making in contemporary Kenya: lessons from the twenty first century' (2009) 1 *Kenya Studies Review* 11: in general.

⁵ YP Ghai & JC Ghai *Kenya's constitution: an instrument for change* (2011) 5.

language and religion.⁶ Tribal identity did not exist as such. Even if it did, it was for totally different reasons and not understood in the political way that the colonial settlers led the Africans to believe.⁷ The natives instead understood tribe as natural and unalienable arising out of ancestral values, cultures, myths and languages.⁸ The traditional practices, cultures and beliefs included polygamy, female genital mutilation, rules against women owning or inheriting property and dietary taboos. These varied from tribe to tribe. Despite their cultural differences, all the tribes had the freedom to move freely within the country and were oblivious of the rest of the world around them. Each of the tribes engaged in some form of activity which was partly dictated by the land they occupied. Some tribes practiced agriculture and others were pastoralists or herders. They lived in a somewhat symbiotic relationship thereby resulting to inter-tribal cooperation as well as intermarriages.⁹

Property ownership was communal through kinship which meant that individual ownership or accumulation of wealth was absent.¹⁰ There were abundant resources which further limited conflicts amongst the people. Production was for collective subsistence use and there was very little surplus thereafter.¹¹ Labor was provided for by family and the larger kinship such that there was hardly any difference in wealth possession.¹²

⁶ Ghai & Ghai (ibid).

⁷ M Tamarkin 'Tribal associations, tribal solidarity and tribal chauvinism in a Kenyan town' (1973) 14 *Journal of African History* 257: 257; R Ajulu 'Politicised ethnicity, competitive politics and conflict in Kenya: a historical perspective' (2002) 61 *Journal of African Studies* 251: 252; Ogot *et al* (n 3 above) 234.

⁸ Ghai & Ghai (n 5 above) 5.

⁹ Ghai & Ghai (ibid); J Middleton 'Kenya: administration and changes in African life 1912-1945' in V Harlow & EM Chilver (eds) *History of East Africa* (1982) 333: 333, where Middleton describes the small tribes as living in a world of their own and hardly even aware of the world outside; PO Ndege 'Colonialism and its legacies in Kenya' Paper delivered during the Fulbright-Hays Group project abroad program, 5 July 2009-6 August 2009, Moi University, Eldoret 1.

¹⁰ Ndege (ibid).

¹¹ Ndege (ibid).

¹² Ndege (ibid).

There were very few political structures. Those which existed were mainly decentralized and ethnic, based on locality, age and lineages.¹³ Governments were represented by councils of elders which were organized differently from one community to another. The councils of elders were also used to resolve disputes within the locality through the local customary laws.¹⁴

The onset of colonialism would radically alter all these arrangements and introduce a different system altogether, which would become the basis of modern Kenya.¹⁵

2.2.2 Kenya between 1895 and 1963: The colonial era

Kenya became a colony of the British in 1895, and officially became a British Protectorate in 1920.¹⁶ One of the first activities of the colonial government was to divide the colony into administrative provinces then into districts, divisions and sub-divisions.¹⁷ In order to do so the colonial government passed the East African Order in Council of 1897, the first legislation to be adopted in colonial Kenya.¹⁸ These sociopolitical boundaries were meant to prevent any form of political interactions among the Africans and to facilitate the divide and rule policy in favor of the colonial government.¹⁹ With the administrative boundaries in place, the British then opted for an indirect form of rule through local representatives.²⁰

¹³ C Hornsby *Kenya: a history since independence* (2012) 28; Middleton (n 9 above) 349.

¹⁴ Ghai & Ghai (n 5 above) 5.

¹⁵ Ghai & Ghai (ibid).

¹⁶ CC Wrigley 'Kenya: the patterns of economic life 1902-1945' in V Harlow & EM Chilver (n 9 above) 209: 209; The East African Protectorate was later to be renamed Kenya. S Ndegwa (et al) *History of constitutional making in Kenya* (2012) 2.

¹⁷ Hornsby (n 13 above) 9, 10.

¹⁸ YP Ghai & JPWB Mc Auslan *Public law and political change in Kenya: a study of the legal framework of government from colonial times to the present* (1970) 37.

¹⁹ K Kanyinga 'The legacy of the white highlands: land rights, ethnicity and the post 2007 election violence in Kenya' (July 2009) 27 *Journal of Contemporary African Studies* 325: 328; Ajulu (n 7 above) 252; Middleton (n 9 above) 336.

²⁰ Hornsby (n 13 above) 28; Middleton (n 9 above) 350.

This method of ruling was ideal because the colonial government lacked proper knowledge about Africans and they therefore needed people to administer the colony on their behalf.²¹ The system of indirect rule along politicized boundaries was also used to wrestle African resistance to British rule and make colonial infiltration easier.²² This decision necessitated the repeal of the 1897 Order in Council, which was replaced by another one in 1902. The 1902 Order in Council shifted emphasis from judicial institutions to administration. Administrative powers were vested in the Commissioner, subject to instructions from the imperial government.²³

The chiefs and sub-chiefs who were used by the British were recruited as collaborative agents.²⁴ Although the Africans had retained their own councils or community leaders in addition to the chiefs and sub-chiefs, they all served under provincial and district commissioners, who were British civil servants appointed from the colonial office in London.²⁵ The decisions of these district and provincial commissioners were made in the interest of the British government and not the natives and the local collaborators were used to rubberstamp the illegitimate rule.²⁶ The entire system had been imposed on the African natives without prior consultation with them and had interfered with the sense of unity between the different tribes.²⁷

²¹ Hornsby, (ibid); Middleton (ibid).

²² Ndege (n 9 above) 3; Hornsby (n 13 above) 363; Middleton (n 9 above) 339; M Mamdani *Citizen and subject: Contemporary Africa and post-colonial legacy* (1996) 18.

²³ Ghai & Mc Auslan (n 18 above) 41.

²⁴ Ndege (n 9 above) 3.

²⁵ Ndege (ibid).

²⁶ Ndege (ibid).

²⁷ Ndege (ibid); Hornsby (n 13 above) 27; Middleton (n 9 above) 339; with most of the problems arising from the Kikuyu who were bound by much more than just lineages. They were almost like a land owning unit, which gave them a sense of togetherness.

In 1905 another Order in Council was enacted that saw amongst other things, the creation of two new institutions; the Legislative Council and the Executive Council.²⁸ The Legislative Council was charged with enacting laws and 'expressing public opinion'. The Executive Council was responsible for advising the governor on the application and execution of enactments.²⁹ In addition to these institutions, the provincial administration yielded immense power over the unwilling Africans deriving these powers from laws that had been passed by a legislative council in London, to which Africans were not represented.³⁰ The laws that were enacted were for the benefit of the colonial administration and meant to further suppress the Africans. All these reasons contributed to the natives' resistance against British rule in response to which key institutions including the police force had to be set up. The police force that was set up was an authoritarian and aggressive force and was largely military in nature.³¹ It was yoked to the state and played a very instrumental role in enforcing the colonial rules. It was therefore not an independent institution.³²

Also as a direct result of the administrative boundaries that the colonial government had forced on the natives, alienation of land from the Africans was facilitated.³³ Vast pieces of land were forcefully taken from selected communities who owned the best land in Kenya, including the agricultural communities as well as the pastoral and livestock herders.³⁴ This land came to be known as 'the white highlands' and the Africans were not allowed to hold land in these areas.³⁵ Land alienation was made possible through the introduction of the

²⁸ Ghai & Mc Auslan (n 18 above) 43.

²⁹ PLO Lumumba, MK Mbondenyi & SO Odera *The Constitution of Kenya; contemporary readings* (2014) 18.

³⁰ Ndege (n 9 above) 3.

³¹ Ghai & Ghai (n 5 above) 6; 'From colonial police to democratic police - and back?' *The Star* 31 August 2013 <http://www.the-star.co.ke>; EA Gimode 'The role of the police in Kenya's democratization process' in GR Murunga & S Nasongo *Kenya: the struggle for democracy* (2007) 227: 228.

³² Ghai & Ghai (ibid); Gimode (ibid).

³³ Kanyinga (n 19 above) 328; Hornsby (n 13 above) 26; Wrigley (n 16 above) 212.

³⁴ Middleton (n 9 above) 343.

³⁵ The Crown Lands Ordinance categorised land into land meant for Africans (native reserves) and scheduled land (or white highlands) which was meant for European settlement.

1915 Crown Lands Ordinance which like other unconstitutional laws, enabled illegitimate activities by the colonial government. British settlers held leases for the land that were to last for 999 years, so as to secure their ownership.³⁶ Where compensation was paid to the natives for loss it was very minimal and some communities suffered even more substantial loss of no compensation at all.³⁷ The land policies in effect saw natives reduced from land owners to laborers in their own land. They were forced to work for the white settlers so as to get money to pay the taxes that had been introduced and then later they were forced to live in native reserves.³⁸ There was the introduction of the pass system where the natives had to wear a pass around their necks when travelling outside the African reserves.³⁹

After the First World War in which many Kenyans died, many more white settlers streamed into Kenya thereby causing more congestion to the already congested white highlands.⁴⁰ The renewed British assertion came with harsher conditions for the Africans. Besides forced labor and being restricted to live in African reserves, the labor wages were also reduced.⁴¹ Because of the large number of Britons who came in, more land had to be excised for them, from amongst the natives.⁴² The greatest losers of the land alienation were the Kikuyus who were predominantly farmers.⁴³ The landless were then settled on other tribes' land thus creating a serious scarcity of land, ethnic tensions and conflict.⁴⁴

³⁶ Hornsby (n 13 above) 27; K King 'Education and social change, the impact of technical training in colonial Kenya' in BA Ogot *Historical Association of Kenya* (1974) 149:149.

³⁷ Hornsby (n 13 above) 27; Wrigley (n 16 above) 228. The compensation at the time was at the rate of 2 rupees per acre.

³⁸ Kanyinga (n 19 above) 328; Wrigley (ibid); Middleton (n 9 above) 338.

³⁹ Hornsby (n 13 above) 31. The pass was known as '*kipande*'; A Amsden *International firms and labour in Kenya* (1971) 8.

⁴⁰ Kanyinga (n 19 above) 328; Wrigley (n 16 above) 225.

⁴¹ Middleton (n 9 above) 346-7.

⁴² Kanyinga (n 19 above) 328; Middleton (n 9 above) 356-7.

⁴³ Kanyinga (ibid); Middleton (ibid).

⁴⁴ Hornsby (n 13 above) 31; G Bennett 'Settlers and politics in Kenya', in Harlow & Chilver (n 9 above) 265: 309. Africans were not allowed to plant coffee, which was grown in the white highlands only and exported to Britain. *Kipande* was a card bearing finger prints that all adult males had to carry with them under a new system of native registration; Middleton (n 9 above) 357.

Ethnic jealousy and tribal identities would become even further entrenched as a result of the discriminative colonial policies which favored some ethnic tribes over others for resource allocation and infrastructure development.⁴⁵ The favoritism created ethnic jealousy amongst the different tribes when the less advantaged tribes realized that the structure of the colonial government would not allow them equal access to national resources.⁴⁶ The group of tribes especially those settled along the railway line and in areas that the missionaries had penetrated became extremely developed.⁴⁷ Although the colonialists had introduced a policy which disallowed the Africans from planting cash crops, the groups in these areas produced cash crops and there was a lot more food than they could consume. Any surplus was therefore sold away.⁴⁸ Industries were built along these urban areas and the natives provided labor in the industries.⁴⁹ Because of the difference in economic strengths from the early periods of colonial rule, some tribes emerged as economic giants and continued to have a lot more influence in the politics of the country even after independence thereby creating a class gap between the ethnic tribes of Kenya.⁵⁰

The difference in economic strength within the regions was also as a result of missionary infiltration in the Kenyan colony. This infiltration was supported by the colonial government since African beliefs were regarded as primitive. In order to make Christianity more appealing, the areas where it was present were favored by the colonial government for resource allocation. These were the areas especially around the coast, the highlands and urban towns.⁵¹ The missions generated some profound loyalties amongst the

⁴⁵ WR Ochieng & RM Maxon (eds) *An economic history of Kenya* (1992) 66; Wrigley (n 16 above) 212.

⁴⁶ Ndegwa (n 16 above) 82.

⁴⁷ King (n 36 above) 147; Ochieng & Maxon (n 45 above) 64; Wrigley (n 16 above) 209; Bennett (n 44 above) 266.

⁴⁸ Ochieng & Maxon (ibid).

⁴⁹ Wrigley (n 16 above) 209; King (n 36 above) 149; BA Ogot & WR Ochieng *Decolonization and independence in Kenya: 1940-1993* (1995) 11.

⁵⁰ Ajulu (n 7 above) 254; Middleton (n 9 above) 346.

⁵¹ RW Strayer *The making of mission communities in East Africa* (1978) 2.

communities living in these areas. They in turn took advantage of the loyalty to infiltrate deeper into the protectorate.⁵²

Although the western religion was well received in these areas because of the patronage and allure of resource allocation, Christianity and the practices it advocated for were still met with resistance from some parts of the country. In particular, there was serious opposition generated by the teachings against African customs.⁵³ Attempts to ban cultural practices like female circumcision and polygamy were seriously resisted. Not even the missionaries preaching against the practices as barbaric or the colonial government terming them as repugnant to justice and morality would make the natives change from the practices.⁵⁴ Those who were opposed to the banning of cultural practices instead formed their own African churches.⁵⁵ Those who followed the western laws disowned the African cultures and opted to be subject to British laws. Christianity became a cause for the sharp division between tribes later on, because the missions were particularly active in institutional development such as building of schools and churches and therefore had such power to channel and control economic development.⁵⁶

The work of the missionaries together with policies that had been introduced by the British brought dramatic changes in the traditional economic setup. The policies led to the introduction of capitalist practices mainly for European benefit.⁵⁷ As a result, the indigenous mode of production whereby land and property was communal was replaced

⁵² Strayer (ibid); Ghai (n 2 above) 6.

⁵³ Z Nthamburi 'The beginning and development of Christianity in Kenya: a survey' in the Dictionary of African Christian Biography <http://www.dacb.org>.

⁵⁴ Hornsby (n 13 above) 34; Middleton (n 9 above) 363. The teachings against the practice began in 1906 with the Church of Scotland Mission and the African Inland Church at Kijabe.

⁵⁵ The opposition was heavy amongst the Kikuyu's, who practiced female genital mutilation at the time, which the missionaries preached against as it was seen to be barbaric. Nthamburi (n 53 above); Middleton (n 9 above) 363.

⁵⁶ Strayer (n 51 above) 2.

⁵⁷ Ghai (n 2 above) 7.

with western capitalism.⁵⁸ The small scale industries were replaced with mass production although at a modest level.⁵⁹ Kenya was seen as a market for British exports and the manufacturing industry thrived because of the raw materials available in the colony of Kenya.⁶⁰ From these capitalistic practices stemmed the culture of individual wealth accumulation and competition amongst Africans; a culture that remains deeply rooted to date.⁶¹ The use of coercive power, forced labor, taxes and other ways of making self-production impossible were used to force the capitalist system on the natives.⁶² The colonial government also introduced a money economy to replace the barter trade in Kenya and by the end of the First World War, the Africans had taken to the new trade terms.⁶³

The British and the Asian communities benefited most from this capitalist penetration.⁶⁴ Moreover, the building of the Kenya-Uganda railway was responsible for opening up the transport network for the British and benefiting trade links further.⁶⁵ The settlement of the colonialists and encouragement of British companies into Kenya as well as the settlement of Asian traders in Kenya also played an impact on the economy.⁶⁶ As a result trade developed faster within the districts that were near the railway and where the missionaries also penetrated.⁶⁷

⁵⁸ Ochieng & Maxon (n 45 above) 64; Hornsby (n 13 above) 11.

⁵⁹ Hornsby (ibid); Wrigley (n 16 above) 213.

⁶⁰ Hornsby (ibid); Wrigley (ibid).

⁶¹ Ochieng & Maxon (n 45 above) 64; R Sandbrook *Proletarians and African capitalism, the Kenyan case 1960-1972* (2008) 6.

⁶² Ochieng & Maxon; (ibid); Sandbrook (ibid).

⁶³ Ochieng & Maxon (n 45 above) 64; FA Yieke 'Ethnicity and development in Kenya: lessons from the 2007 general elections' (2011) 3(3) *Kenya Studies Review* 8: 14.

⁶⁴ Yieke (ibid).

⁶⁵ Ochieng & Maxon (n 45 above) 64; Wrigley (n 16 above) 209; Bennett (n 44 above) 266.

⁶⁶ Ochieng & Maxon (ibid); Hornsby (n 13 above) 11; Sandbrook (n 61 above) 6.

⁶⁷ Wrigley (n 16 above) 209; King (n 36 above) 151.

All these factors increasingly agitated the Africans and by the 1950's the pressure for more representation of the natives in government, for return of forcefully alienated land and for independence gained momentum. Organizations were formed by the natives particularly along tribal lines, to fight for their rights. The Kikuyus who were the biggest losers of land alienation formed the Young Kikuyu Association and later the Kikuyu Central Association, to fight for their land. The young Jomo Kenyatta became its General Secretary.⁶⁸ This period was marked by tension in Kenya and eventually the colonial government gave in to the pressure and accepted to have Africans represented in the Legislative Council.⁶⁹ By now there were a number of Kenyans who had pursued education and were assertive in representing the grievances of Africans.⁷⁰ By mid-1950, the number of representatives to the Legislative Council had grown to six from one in 1946.

After the Second World War, there was renewed pressure in the fight against European rule. It was felt that the steps that had been taken to improve the condition of Africans all along were half-hearted and in 1952, a militant independence movement, the Mau Mau movement, made its presence and its demands known.⁷¹ What followed was a sudden outbreak of sabotage and assassinations. The colonial government declared a state of emergency and arrested Kenyatta, who was later charged with organizing the Mau Mau uprising. He was sentenced to seven years in jail from March 1953. But the absence of Kenyatta did not stop the struggle for independence. By 1956, when the worst part of the violence was over, it had claimed thousands of both European and African lives. It became clear that any further attempts to make Kenya a white man's land was destined to fail.⁷² By

⁶⁸ From the early 1930s Kenyatta was very prominent in campaigning for African land rights, access to education, respect for African customs, and the need for representation of Africans in the Legislative Council.

⁶⁹ PLO Lumumba & L Franchesci *The Constitution of Kenya 2010: an introductory commentary* (2010) 28.

⁷⁰ Hornsby (n 13 above) 40; Bennett (n 44 above) 331.

⁷¹ Although the members of the mau mau movement were mainly Kikuyu, to date the meaning of the word mau mau still remains a mystery. It is commonly thought to have stood for *Mzungu Arudi Ulaya, Mwafrika Apate Uhuru* ('The white man, return to Europe so that the black man gets independence').

⁷² Bennett (n 44 above) 331; Ogot & Ochieng (n 49 above) 63.

1957, Britain was exhausted and no longer had the determination to fight a war that it seemed to be losing to determined patriotic insurgents.⁷³ A settlement was arrived at by which the colonialists had to give up racist postures and accommodate African nationalism while supporting the British government's decolonization plan.⁷⁴

During this period and in particular from 1950 onwards, Britain had introduced two Constitutions in Kenya. This was as a direct result of the events of the 1950's. The Lyttleton and Lenox Boyd Constitutions were imposed in 1954 and 1957 respectively. The Constitutions represented attempts by the colonial government to establish a colonial order based on the philosophy of multi racialism whereby political power would be shared amongst the racial groups in Kenya. The predominant role in the executive and legislature would however be taken by the small European community and the majority Africans would have the least influential role.⁷⁵ Africans disagreed with this and continued in their agitation for more representation. Although the Lyttleton Constitution was designed to last until 1960, the colonial secretary made the resolution that resulted in the Lennox Boyd Constitution after failed attempts at negotiations.⁷⁶ One of the major achievements for the Africans under the Constitution was an increase in representation from two to 14.⁷⁷ The first African elections in 1957 produced a group of nationalist legislators who would lead Kenyans to the rejection of multiracialism which resulted in the overthrow of both Constitutions.

By 1960, a new political order was unfolding in Kenya as Africans were increasingly able to influence African policy as Ministers. History was made in that year when the Lancaster House conference held in London gave Africans a majority of seats in the Legislative

⁷³ M Kinyatti *Maumau: a revolution betrayed* (2000) 351.

⁷⁴ Kinyatti (ibid).

⁷⁵ Lumumba, Mbondenyi & Odero (n 29 above) 21.

⁷⁶ Lumumba, Mbondenyi & Odero (ibid).

⁷⁷ Lumumba, Mbondenyi & Odero (ibid).

Council.⁷⁸ Kenya's first African parties were formed to take part in the development of the political process and to facilitate the transfer of power. One of the first major political parties was the Kenya African National Union which was formed by Kenyan political elite.⁷⁹ The party was an alliance of the urbanized and more educated sections of the various indigenous groups amongst the Kikuyu, Luo, Kamba and Luhya.⁸⁰ Because some of the initial preparations for independence were done in Kenyatta's absence, he was elected KANU president while still in detention. He was released in 1962 and received an overwhelming welcome especially from the Kikuyus. The locals believed that Kenyatta had returned so as to break the European rule.

As the race for independence gained momentum, there was anxiety about the future of Kenya from the British government and the colonial government.⁸¹ In 1962 Kenyatta led the Kenyan delegation to London in negotiating for independence and a new constitution. The negotiations touched on matters such as the character of the executive, the composition of the Legislative Council as well as electoral and property safeguards.⁸² In order to straighten things and leave behind a more appropriate framework that would allow the colonial government to avoid further responsibility, the system of power would be modeled around a democratic government through a Westminster style written constitution.⁸³ The notable features of the Westminster constitution is that it provided for a system of regionalism to allow all tribes especially the minorities take part in government.⁸⁴ It also established the post of Prime Minister who was to be appointed by the Governor

⁷⁸ Bennett (n 44 above) 331; Ogot & Odhiambo (n 49 above) 61; Lumumba & Franchesci (n 69 above) 29.

⁷⁹ Hereinafter KANU.

⁸⁰ Ajulu (n 7 above) 225; Odhiambo (n 4 above) 224.

⁸¹ G Muigai 'The judiciary in Kenya and the search for a philosophy of law: The case of constitutional adjudication' in K Kibwana (ed) *Law and the Administration of Justice in Kenya* (1989) 67: 99.

⁸² Ghai & Mc Auslan (n 18 above) 74.

⁸³ Lumumba & Franchesci (n 69 above) 29; Lumumba, Mbondenyi & Odero (n 29 above) 22.

⁸⁴ Lumumba & Franchesci (ibid).

and finally established a bicameral parliament.⁸⁵ This was a sudden shift from the monolithic colonial structures that were suddenly viewed as inappropriate.⁸⁶ The independence Constitution embodied a chapter with a Bill of Rights centered on civil and political rights which sort to protect the abuse of power by the state. New and fragile institutions were provided for in the independence Constitution. These were necessarily liberal, westernized and democratic. Kenya attained independence in December 1963 under this Constitution.

Contrary to the expectations of many Kenyans, the negotiations between the outgoing colonial rulers and the incoming Kenyan elite rulers were to begin a long reign of betrayal for the Kenyan people who expected to be free from a past of injustices and suffering.⁸⁷ The incoming ruling elite had been greatly shaped and influenced by the outgoing colonial power to the disadvantage of Kenyans.⁸⁸ The betrayal created a total lack of trust in the political elite from the Kenyan public. From that early period some of the culture that was carried over even after independence still remains hard to kill, in present day Kenya. In addition to this, the document that Kenyans inherited as a constitution had been negotiated without their involvement, it also lacked moral authority from the people it sort to govern and they did not therefore own it.⁸⁹ These factors contributed to the problems that the country would continue to face even after independence.

⁸⁵ Lumumba & Franchesci (n 69 above) 31. The parliament comprised the House of Representatives and the Senate

⁸⁶ Muigai (n 81 above) 100.

⁸⁷ Ghai & Ghai (n 5 above) 7.

⁸⁸ Ghai & Ghai (ibid).

⁸⁹ Lumumba & Franchesi (n 69 above) 30.

2.2.3 Kenya after independence: Between 1964 and 1992

Following the elections held in 1963, Kenyatta was elected Kenya's first president and his party, KANU won the majority seats. The main opposition KADU would eventually be silenced when the government created a *de facto* one party state by buying out its membership. KADU was officially dissolved in 1964 and its representatives joined KANU. The independence of Kenya was expected to be a defining moment especially for the Mau Mau survivors but the Kenyatta regime failed to deliver the expectations of Kenyans. Decades later it was seen by some of the freedom fighters as a betrayal to the Mau Mau revolution and what the fight for independence stood for.⁹⁰ Kinyatti writes that:

The popular understanding was that the independent Kenyan government would nationalize all the land occupied by the foreign capitalists and divide it amongst the Kenyan poor and landless; that it would ensure full democratic rights of assembly, association and expression....the rich indigenous cultural heritage rooted in our own history, tradition and national experience would be protected from harmful foreign influences and that the majority of [the] African population, having borne the brunt of oppression and been dispossessed by colonialism, would receive preferential, remedial or compensatory considerations in all spheres of Kenya's political and social life.⁹¹

He laments later on that 'it is now common knowledge in our country that this was never to be'.⁹²

One of Kenyatta's shortcomings was that he governed under the shadow of the very British against whom he had fought.⁹³ His government chose to keep the weak and fragile

⁹⁰ Kinyatti (n 73 above) 56-57.

⁹¹ Kinyatti (ibid); Ogot & Ochieng (n 49 above) 85-91 on the expectations of Kenyans.

⁹² Kinyatti (n 73 above) 57.

⁹³ Kinyatti, (ibid).

institutions that had been inherited at independence without any radical changes, even though they were aware of their weaknesses.⁹⁴ This move suited the Europeans, Asians and few Africans who had acquired wealth and investments and who were therefore not interested in changing the status quo, but greatly disappointed the African masses.⁹⁵ Kenyatta adopted a 'forgive and forget' stand on colonialism and largely ruled along pro-western policies.⁹⁶ The development of a free market economy open to foreign investment was particularly criticized by the Africans who had expected the president to take an anti-imperialist stand.⁹⁷ As a result of a sustained status quo, the corruption, lack of accountability, ethnicity and class politics continued to eat up the society.

In order to confound his critics Kenyatta chose to involve other tribes in his administration and not just Kikuyus.⁹⁸ He did this through rewarding patronage. The leaders of other tribes would get key appointments so long as they remained loyal to him.⁹⁹ The move was a political tactic that enabled Kenyatta to maintain a popular base and ethnic support from across Kenya, while maintaining a predominantly Kikuyu inner circle.¹⁰⁰

The Kenyatta regime further took advantage of the fairly progressive independence Constitution to entrench autocracy and personal rule by effecting regrettable changes to the Constitution.¹⁰¹ Kenyatta argued that the only reason he had agreed to the independence Constitution is because Kenya would otherwise not get independence.¹⁰² He

⁹⁴ Hornsby (n 13 above) 6; Ghai (n 2 above) 9.

⁹⁵ MK Mbondenyi & JO Ambani *The new constitutional law of Kenya: principles, government and human rights* (2012) xi.

⁹⁶ Ogot & Ochieng (n 49 above) 96-99.

⁹⁷ JD Barkan 'Kenya: lessons from a flawed election' (1993) 4 *Journal of Democracy* 85: 88; Kinyatti (n 73 above) 58.

⁹⁸ Barkan (ibid).

⁹⁹ Barkan (ibid).

¹⁰⁰ Barkan (ibid).

¹⁰¹ Mbondenyi & Ambani (n 95 above) xii.

¹⁰² Ghai & Ghai (n 5 above) 10.

further termed the constitution as rigid, too expensive and unworkable.¹⁰³ Within no time, in the first amendment to the independence Constitution, the office of the Prime Minister was abolished.¹⁰⁴ The effect of this amendment was that the Prime Minister in effect became the President and exercised a dual role as Head of State and Government and Commander in Chief of the Armed Forces.¹⁰⁵ The significant powers that were vested on the presidency paved way for an autocratic presidency and effectively changed the system of government from parliamentary to presidential.¹⁰⁶

Throughout the negotiations for independence the ruling party KANU had been against the devolved *majimbo* system of government.¹⁰⁷ KANU was saddened because the central government's power was decentralized and restricted and because it viewed this as a ploy between the colonial government and the minority tribes.¹⁰⁸ As a result, the KANU government began by weakening the structure of majimboism.¹⁰⁹ The devolved system of government in the constitution was later completely replaced by a centralized and authoritarian administration.¹¹⁰ The representative parliament yielded ground for a malleable National Assembly and took away the safeguard that had been placed in the independence constitution for self-governance.

Later, in 1966 a further amendment increased the power of the presidency with regard to the civil service by bestowing on him the power to appoint and dismiss Ministers and

¹⁰³ Lumumba & Franchesci (n 69 above) 31.

¹⁰⁴ Act No 28 of 1964.

¹⁰⁵ Act No 28 of 1964, section 8.

¹⁰⁶ Ghai & Ghai (n 5 above) 10. For example, the Constitution Amendment Act No 16 of 1966, which increased powers of the presidency with regard to the civil service; Act No 14 of 1975 which added to the President's prerogative powers; and Act No 5 of 1969 which vested powers in the presidency with respect to the electoral commission.

¹⁰⁷ Majimbo is Kiswahili for regions.

¹⁰⁸ Lumumba & Franchesci (n 69 above) 31.

¹⁰⁹ Act No 38 of 1964.

¹¹⁰ Act No 16 of 1965.

public officers.¹¹¹ Coupled with the power to dissolve and prorogue parliament as and when he wished the presidency became a very powerful organ of state.¹¹² The extreme personalization of power on the presidency further led to repressiveness because there was no mechanism for accountability.¹¹³ The Amendment Act No 14 of 1975 which extended the prerogative of mercy that the President already had was one power that was completely unsupervised. Through this amendment the president had the power to pardon a person found guilty of an election offence. It was to be subjected to immense political abuse so as to save those viewed as politically correct.¹¹⁴ Those in power did not seem disturbed by the amendments. They were more content with the defaced constitution since it served their interests.¹¹⁵

Even though all these injustices continued to happen, Kenya remained relatively stable during Kenyatta's reign.¹¹⁶ This is perhaps because being a new democracy the population was relatively new to the Western concept of democracy and it would therefore take some time to understand and become litigious over their rights.¹¹⁷ Jomo Kenyatta remained in power until 1978 when Daniel Moi, who had been Kenyatta's loyal Vice President, took over as independent Kenya's second president. Moi's 24 year tenure was no better than Kenyatta's and in fact, things moved from bad to worse.

¹¹¹ Act No 16 of 1966. This had prior to that been the authority of the Public Service Commission (PSC). The members of the PSC were presidential appointees.

¹¹² Sections 58 and 59 of the independence Constitution of Kenya.

¹¹³ Ghai (n 2 above) 9.

¹¹⁴ For instance Paul Ngei, a friend of former President Kenyatta, who was found guilty of an election offence.

¹¹⁵ Lumumba, Mbondenyi & Odera (n 29 above) 23.

¹¹⁶ Hornsby (n 13 above) 12.

¹¹⁷ Hornsby (ibid).

At the time when Moi took over power the arithmetic of ethnic and tribal affiliations was extremely important in the power struggle in Kenyan politics.¹¹⁸ A Kalenjin by tribe, Moi was faced with very powerful Kikuyu elite from Kenyatta's inner circle.¹¹⁹ In order to consolidate his power he began to push the Kikuyus out of prominent positions replacing them with people from other so called disadvantaged groups especially from his Kalenjin community.¹²⁰ He diverted the resource allocation and university entry systems in favor of these other regions, especially Rift Valley province which was predominantly Kalenjin.¹²¹

Moi was more rigid and hard on his critics unlike Kenyatta who had been flexible and pragmatic. Moi literally demanded loyalty and gave warnings to his opponents and critics.¹²² Opponents of the regime would be tortured, detained without trial and their political careers would be terminated. The church and institutions of higher learning were not spared and any critics from these quarters also faced the same wrath.¹²³ Afraid of academic critics, the government exerted control over the kind of information that was disseminated in universities thereby creating a draw back on academic freedom.¹²⁴ Generally Moi's tenure thrived on populist rule and he could not take dissent. In order to win the hearts of ordinary Kenyans and a popular following he travelled throughout the country addressing arranged and ad hoc gatherings wherever he went.¹²⁵

¹¹⁸ The Kikuyu are the largest tribe in Kenya, out of 45 other tribes, and at the time they were seen as the greatest enemies of the Kalenjin. Kenyatta was Kikuyu, while Moi was Kalenjin. The tribal re-alignment changed things in the 2013 general elections when the Kikuyu and Kalenjin joined forces and won the elections and Kenya now has a Kikuyu president and a Kalenjin vice president. The opponents were the Luo who aligned themselves with the Kamba.

¹¹⁹ Ajulu (n 7 above) 261.

¹²⁰ Barkan (n 97 above) 88; Ajulu (n 7 above) 263.

¹²¹ Barkan (ibid); Ajulu (ibid).

¹²² Barkan (ibid).

¹²³ Ogot & Ochieng (n 49 above) 198. Amongst those detained at one time is Kenya's current Chief Justice Dr Willy Mutunga.

¹²⁴ Ogot & Ochieng (ibid).

¹²⁵ K Adar & I Munyae 'Human rights abuse in Kenya under Daniel Arap Moi 1978-2001' (2001) 5 *African Studies Quarterly* 1:1.

All through Moi's tenure Kenya continued to hold regular elections that saw Moi elected into office five times out of his populist strategies of leadership.¹²⁶ Even then, these elections were far from fair or democratic.¹²⁷ The queue voting system where voters lined up behind the candidate of their choice was replaced in 1986 with the secret ballot voting system. This new system encouraged electoral rigging which was characteristic of elections during Moi's tenure.¹²⁸ The electoral body was only answerable to the president making it subject to manipulation. Other strategies that were used to undermine free and fair elections included disruption of opposition rallies, manipulation of the voters register and banning print or electronic media that was critical to the regime.¹²⁹

Perhaps the strongest signal of Moi's authoritarian one man state rule was the constitutional amendment that introduced section 2A to the Constitution and effectively turned Kenya to a *de jure* one party state, a status that Kenya kept for ten years under the leadership of Moi.¹³⁰ Although the constitutionality of this amendment was challenged, the court could hear none of it and instead dismissed the applications.¹³¹ The president's consistent justification against multi-party politics was that it would give way to ethnic and tribal politics and destroy national unity.¹³² The amendment was also justified as section 2A was inserted at a time when Kenya was experiencing political tension and instability following the unsuccessful attempted coup of 1982.

In addition to the 1982 amendment, Moi's presidency literally mutilated the independence Constitution so as to justify many undemocratic actions. He did this through hoodwinking

¹²⁶ In 1982, 1987, 1992, 1997 and 2002.

¹²⁷ Hornsby (n 13 above) 12.

¹²⁸ Adar & Munyae (n 125 above) 4.

¹²⁹ Adar & Munyae (n 125 above) 5.

¹³⁰ Constitution of Kenya Amendment Act No 7 of 1982.

¹³¹ *Gitobu Imanyara v AG* Misc. Civil App. No 7 of 1991.

¹³² Barkan (n 97 above) 91.

parliament to pass the amendments. Through these amendments Moi was able to usurp the powers of other institutions rendering the doctrine of separation of powers ineffectual.¹³³ The changes also ensured maximum control of political power.¹³⁴ For instance the security of tenure of constitutional holders was removed through amendments in 1986 and 1988 and not even the opposition could deter Moi.¹³⁵ Instead, he reintroduced detention laws that had been suspended in 1978, allowing for detention without trial so as to deal with any opposition. As a way to avoid accountability he revoked laws that allowed parliament to obtain information from the Office of the President. In effect parliamentary supremacy became subordinated to the presidency.¹³⁶ There were a total of 29 amendments between 1964 and 1990 all of which had the effect of strengthening the presidency at the expense of civil rights.¹³⁷

The Moi regime was not concerned with human rights and was generally marred with allegations of gross human rights violations. The culture within the police force had not changed and the institution was used to enforce the abuse. The judiciary was a rubber stamp of the state and did very little or nothing at all to stop the abuse of human rights. Ethnic cleansing and tribal clashes were instigated by the state to eliminate opposition especially in KANU strongholds.¹³⁸ The state of human rights violations were confirmed by independent investigations done by human rights and international organizations as well as the church.¹³⁹ Despite the pressure mounted on the government by various pro-

¹³³ Adar & Munyae (n 125 above) 2.

¹³⁴ Lumumba & Franchesci (n 69 above) 30.

¹³⁵ Act No 14 of 1986, Act No 4 of 1988.

¹³⁶ Adar & Munyae (n 125 above) 3.

¹³⁷ Adar & Munyae (n 125 above) 4; Lumumba & Franchesci (n 69 above) 41.

¹³⁸ Adar & Munyae (n 125 above) 9.

¹³⁹ Amnesty International, Kenya Annual Report for 1997, (Amnesty International, 1998). Kenya Human Rights Commission, Quarterly Repression Report, October-December 1995. Nairobi: Kenya Human Rights Commission and Kenya Human Rights Commission, Quarterly Repression Report, July-September 1996. Nairobi: Kenya Human Rights Commission, 1996. United Nations, Committee on Economic, Social and

democracy and human rights groups, the regime found a new way of repression by using proxy groups to attack the human rights supporters and the abuse of human rights therefore continued.¹⁴⁰

This did not stop the pressure mounting on the government and by 1990 momentum picked in the quest for a multi-party democracy. The pressure for reforms was also driven by selfish interests from the elite and the middle class who had begun to feel the pinch of the slow pace of economic growth and insecurity over their property and investments.¹⁴¹ So long as the country enjoyed real per capita growth, these middle class urban workers and the elite had no problem acquiescing to Moi's monopolization of power but Moi had failed to please them by some of his policies. Resistance to the single party state came to be known as the struggle for the second liberation and was moved by deep resentment to Moi's way of leadership that had cost the country in terms of economic and political safety.¹⁴² Corruption had reached an all-time highest, involving mostly the president's cronies. It was believed then that a struggle for multi-party politics would lead to constitutionalism and democracy.¹⁴³

By 1991, Moi could no longer contain the pressure. The opposition joined hands and it was clear that they were in control. International donors and human rights organizations joined in the agitation for a multi-party system. When finally western donor organizations announced freeze of aid on Kenya, Moi had no choice but to act. The ruling party KANU

Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C. 12/1993/6, 1993. United States, Kenya: Human Rights Report, 1995. Nairobi: Embassy of the United States of America, 1995.

¹⁴⁰ Adar & Munyae (n 125 above) 11.

¹⁴¹ Barkan (n 97 above) 89.

¹⁴² Barkan (ibid).

¹⁴³ G Kibara 'The state of constitutionalism in Kenya' in B Tusasirwe (ed) *Constitutionalism in East Africa: progress, challenges and prospects in 2003* (2005) 28: 72.

eventually gave in to pressure and in 1991 Section 2A of the Constitution was repealed, paving way for multi-party politics.¹⁴⁴

2.2.4 Kenya after the 'second liberation': Between 1992 and 2010

The end of the single party era was characterized by near euphoric mood as political parties began to form so as to contest in the elections. The date for the elections was to be determined by Moi. On 29 December 1992, Kenya held its first multi-party parliamentary elections in twenty six years and the first ever multi-party presidential elections.¹⁴⁵ The elections were a culmination of the desire by Kenyans for a transformation to democracy and the end of a decade long rule of President Moi. The struggle paid off when multi partism was re-introduced by Act No 12 of 1991 paving way for a series of other significant constitutional amendments. In 1990 for instance, the security of tenure for constitutional officers that had been taken away was restored.¹⁴⁶ Later section IA was introduced to the constitution to further reinforce the repeal of section 2A and amend other articles in the constitution as a direct consequence of the amendment.¹⁴⁷

As the Kenyan experience would however show, democracy and transition is not merely marked by a 'watershed election'. In fact, elections are just one aspect of transformation to democracy.¹⁴⁸ Although the multi-party era was a step closer to democracy, it also did a lot to strengthen the already present ethnic tensions in Kenya. The tribal clashes that were witnessed in 1992 were used by Moi to again drive the point home that multi-party politics was not the answer to Kenya's political problems.¹⁴⁹ For sure, the opposition soon began

¹⁴⁴ Through Act No 12 of 1991.

¹⁴⁵ Barkan (n 97 above) 85.

¹⁴⁶ Act No 2 of 1990.

¹⁴⁷ Act No 10 of 1997.

¹⁴⁸ Barkan (n 97 above) 85.

¹⁴⁹ Barkan (ibid).

to split up due to greed and tribal affiliations. Moi took advantage of the situation to further split them. He used the strategy of purchasing opponents and made it hard for the opposition to organize rallies. Permits were denied, issued late or cancelled at the last minute. Opposition parties were not allowed to campaign in some areas and even had their offices destroyed.¹⁵⁰ Moi took control of the Electoral Commission by appointing a chairman and members who were sympathetic to his administration.¹⁵¹ NGOs were denied accreditation to act as observer groups. Opposition parties were denied registration until the last minute and they were also denied access to the state-owned broadcast media until two weeks to the elections.¹⁵²

In the meantime, amidst all this activity, the early 90s were also characterized by ardent calls for review of the constitution.¹⁵³ People wanted reforms that would end the Moi era and bring Kenya back to constitutional rule, based on social justice, democracy and human rights.¹⁵⁴ They needed a Constitution that would completely overhaul the independence Constitution and transform the society. The pressure heightened when the Citizens for Constitutional Change movement was formed.¹⁵⁵ Numerous other organizations, religious and secular, NGOs and political groups joined the movement in solidarity. A National Constitutional Convention was organized by the Law Society of Kenya, the International Commission of Jurists and the Kenya Human Rights Commission in 1993. The convention came up with a 'Draft Constitution' which was launched in Nairobi's Ufungamano House.¹⁵⁶ The draft formed the basis for extensive consultations.

¹⁵⁰ Barkan (n 97 above) 94.

¹⁵¹ This was former judge, Z Chesoni, who went on to become a Chief Justice, and was at one time declared insolvent.

¹⁵² Barkan (n 97 above) 94.

¹⁵³ Ndegwa et al (n 16 above) 23.

¹⁵⁴ Ghai & Ghai (n 5 above) 12.

¹⁵⁵ Lumumba & Franchesci (n 69 above) 41.

¹⁵⁶ This was the first such initiative and it was dubbed 'the Ufungamano Initiative'.

In 1995, amidst the face of the popular demand for review, the Moi government responded by announcing plans to invite foreign experts to draft a Constitution for consideration by the National Assembly.¹⁵⁷ This proposal was heavily opposed by civil organizations which preferred a people driven process. Two years after a stalemate concerning the proposal, the parliamentary opposition political parties formed their own forum, the Inter Parties Parliamentary Group.¹⁵⁸ They agreed on a number of minimum reforms to the constitution before the 1997 elections. These were meant to allow for free and fair elections before a more comprehensive process was embarked on through the Constitution of Kenya Review Act (1997).¹⁵⁹ It was also the machinery that would drive the substantive constitutional review process. The 1997 Act was however not satisfactory to all parties and was seen by the civil society as another self-serving government mechanism.¹⁶⁰ In the end the minimum reforms were not implemented and the opposition parties were faced with another election in which they failed the test by not staying united.¹⁶¹ The result was another win for Moi in the 1997 general elections. Even though Moi made it for yet another term, that election was a clear signal to him that his regime was over, having garnered only 36% of the total vote.¹⁶²

After the elections, the Constitution of Kenya Review Act as negotiated was amended in 1998 so as to allow for participation but there were even more problems because the political parties could not agree on the process of nominating commissioners. The stalemate resulted to two protagonist groups which resolved to go about the process separately.¹⁶³ The government in the meantime substantially amended the Act once again

¹⁵⁷ Lumumba & Franchesci (n 69 above) 42.

¹⁵⁸ Hereinafter the IPPG.

¹⁵⁹ The establishment of the CKRC was part of their negotiations contained in the IPPG package.

¹⁶⁰ Lumumba & Franchesci (n 69 above) 42.

¹⁶¹ Barkan (n 97 above) 97.

¹⁶² Barkan (n 97 above) 99.

¹⁶³ The Ufungamano Initiative which was backed by religious organisations and organs of the civil society and the parliamentary process backed by KANU and other political parties.

in 2000 and the Constitution of Kenya Review Commission was finally established. The first step of the chair of the commission, Professor Yash Pal Ghai, was to negotiate a merger between the two groups which took place in 2001. Additional commissioners from the negotiations were included into the CKRC. The CKRC began its work in earnest, collecting views from the public culminating to another draft constitution, the CKRC Draft that was published in September 2002 and a constitutional conference was scheduled for October 2002.

The constitutional conference failed to take place after Moi dissolved parliament just before that. This would have the effect of disrupting the constitution making process further because of the 2002 general elections. Having served the maximum two terms as provided under the multi-party constitution, Moi had no choice but to retire paving way to the entry of President Mwai Kibaki whose campaigns had promised Kenyans a new constitution in 100 days of winning the elections.¹⁶⁴ Unfortunately, when the new Kibaki government took over power in 2002, they had lost the zeal for constitutional reforms and the political intrigues between Kibaki and his main opponent Raila Odinga instead took center stage, further slowing down the process. Still, there are those who were focused in the process and in April 2003 the National Constitutional Conference that had been scheduled was convened and thereafter a meeting held in the Bomas of Kenya. There was an overwhelming attendance to the conference which served as a forum for negotiations of the new constitution. Unfortunately, the process again stalled in 2005 because of political differences within the ruling coalition party. A section of the government prepared another draft constitution in 2005 which was subjected to a referendum and subsequently rejected by a majority of Kenyans.¹⁶⁵ After the referendum there was no further visit on the

¹⁶⁴ Lumumba & Franchesci (n 69 above) 45.

¹⁶⁵ The Wako draft of 2005.

issue of constitutional review until the 2007 post-election violence crisis that rocked Kenya, that the nation saw the need to enact the new constitution and with haste.¹⁶⁶

The tragedy that arose following the disputed presidential election results of that year between Kibaki and Raila his main opposition, led to profound effects like never before witnessed in Kenya. The violence left about 1300 people dead and 600,000 others displaced. This would be the turning point for the political class and for Kenyans as a whole. The dialogue reconciliation committee that was established following the violence endorsed constitutional reforms as an inevitable transition measure during the mediation talks.¹⁶⁷ The goodwill towards constitutional review at this period led to the enactment of the Constitution of Kenya Review Act (2008) which established the Committee of Experts to complete the process that the CKRC had begun.¹⁶⁸ The CoE would move in to provide the technical expertise of the constitutional review process. The Constitution of Kenya (Amendment) Act (2008) was also enacted with the aim of entrenching the political agreements reached during the national dialogue committee meeting.

Using all the draft constitutions that were produced after the various constitutional conferences and other views collected from the public the CoE came up with a draft constitution based on agreed principles and singled out the contentious issues. The 2010 Constitution of Kenya was finally officially published on 6 May 2010 and was subjected to a Referendum on 4 August 2010, the second in Kenya's history.¹⁶⁹ At this referendum, Kenyans overwhelmingly voted in favor of the now Constitution of Kenya 2010 which repealed the independence constitution. Before its repeal however, the independence

¹⁶⁶ Ndegwa *et al* (n 16 above) 50.

¹⁶⁷ Agenda 4 of the KNDRC which was established in the mediation process after the post-election violence.

¹⁶⁸ The CoE. Under section 5.

¹⁶⁹ According to the results published by the Interim Independent Electoral Commission <http://www.iiec.or.ke> 68.55% of voters voted in support of the now 2010 Constitution of Kenya while 31.45% voted against it.

constitution had been amended a record thirty eight times as lamented by the High Court thus:

Since independence in 1963 there has been thirty eight amendments to the Constitution...The effect of all these amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts.¹⁷⁰

The referendum vote finally brought the long perilous journey to an end and set the pace for constitutional transformation in Kenya.¹⁷¹ The constitution was promulgated on 27th August, 2010.

2.3 The 2010 Constitution as a catalyst for constitutional transformation

The making of the Constitution of Kenya 2010 echoes the dire need of a nation to overthrow an existing social order and to define a new social, economic, and political order for itself at all costs.¹⁷² The promulgation of the 2010 Constitution after the long struggle has been described as the dawn of a new era and the beginning of a new chapter in Kenya's history.¹⁷³ The Constitution brings renewed hope to Kenyans, promises of better things to come and a future that is radically different from Kenya's past.¹⁷⁴ It is considered as the tool that will guide Kenyans through the transformation of its society to create a re-

¹⁷⁰ *Njoya & Others v Attorney General & 3 Others*, KLR 1 (2004) 298-299.

¹⁷¹ Lumumba & Franchesci (n 69 above) 48.

¹⁷² W Mutunga, keynote remarks on the celebration of 200 years of Norwegian Constitution, University of Nairobi 19 May 2014 1.

¹⁷³ Mbondenyei & Ambani (n 75 above) xv.

¹⁷⁴ Mutunga (n 172 above) 2.

born republic and a second liberation.¹⁷⁵ It has been praised as ‘the most significant achievement in the governance of Kenya since 1963’ because of its glaring differences in value and form with the previous Constitutions.¹⁷⁶ It has also won the support of many as the first truly participatory Constitution for Kenya and one that has been drafted with a historical consciousness of the injustices that the society seeks transformation from.¹⁷⁷ It embodies the dictates and basic tenets of transformation and sets out the values, hopes and aspirations of Kenyans and how to achieve them.¹⁷⁸ It is important to highlight the key transformative aspects of the 2010 Constitution.

To begin with, it is the first time in Kenya’s history that the Constitution starts with an elaborate preamble.¹⁷⁹ This is an important part of the Constitution in that it captures in summary the source, values, principles and objects of the Constitution thereby bringing

¹⁷⁵ Kenya National Integrated Civic Program (hereinafter KNICP) *Understanding the constitution of Kenya* (2012) 2; PT Zeleza ‘The developmental and democratic challenges of post-colonial Kenya’ The James S Coleman Memorial Lecture Series 2010 http://www.escholarship.org/uc/item/3bh758jz_14,18, 20; W Mutunga ‘Elements of progressive jurisprudence in Kenya, a reflection’ Speech delivered at the judges dinner on 31 May 2012 <http://www.judiciary.gov.ke/portal/assets/downloads/speeches> 82; Mugo Kibati ‘Kenya a vision of prosperity for the second republic’ Daily Nation Thursday 28 August 2011 <http://www.dailynation.co.ke>.

¹⁷⁶ CIC Quarterly Report January-March 2011 <http://www.cic.go.ke>.

¹⁷⁷ Lumumba & Franchesci (n 69 above) 48.

¹⁷⁸ KNICP (n 175 above) 3.

¹⁷⁹ The preamble reads:

We, the people of Kenya-

ACKNOWLEDGING the supremacy of the Almighty God of all creation:

HONOURING those who heroically struggled to bring freedom and justice to our land:

PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:

RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations,

COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:

ADOPT, ENACT and give this constitution to ourselves and to our future generations

GOD BLESS KENYA

about reassurance for better times.¹⁸⁰ It also instills trust in a bid to bring the people together.¹⁸¹ In this regard the preamble has been described as ‘the brick and mortar that lays the foundations of constitutional ownership’.¹⁸² The preamble in the 2010 Constitution creates the trust and assurance amongst the Kenyan people because it is inspiring and honors those who fought for Kenya’s independence.¹⁸³ It reflects on Kenya’s historical events as a sure acknowledgment of the need for self-reflection from a historical perspective, and the need to confront the past in readiness for transformation into the future.¹⁸⁴ It further recognizes, acknowledges and celebrates the ethnic, cultural, and religious diversity of Kenyan people as a difference that should be promoted as a source of pride for Kenya.¹⁸⁵ The preamble ends with an expression of ownership and satisfaction of the Kenyan people having taken part in the making of the constitution.¹⁸⁶

Unlike previous constitutions which began by making provisions on the imperial presidency and the other arms of government, the 2010 Constitution instead seizes the earliest opportunity to enunciate the principle of sovereignty of the people and supremacy of the Constitution.¹⁸⁷ In a rather symbolic move, the initial chapters in fact deal with matters directly affecting the people of Kenya and national principles while issues affecting politicians and the arms of government are found in later chapters.¹⁸⁸

¹⁸⁰ Ghai & Ghai (n 5 above) 33; Lumumba & Franchesci (n 69 above) 53.

¹⁸¹ Lumumba & Franchesci (n 69 above) 52.

¹⁸² Lumumba & Franchesci, (ibid).

¹⁸³ Lumumba & Franchesci (n 69 above) 53.

¹⁸⁴ G Budlender ‘Transforming the judiciary: the politics of the judiciary in a democratic South Africa’ (2005) 122 *South African Law Journal* 715: 755.

¹⁸⁵ Lumumba & Franchesci (n 69 above) 54.

¹⁸⁶ Lumumba & Franchesci (ibid).

¹⁸⁷ Article 1, 2.

¹⁸⁸ The 2010 Constitution is arranged as follows, Chapter 1, Sovereignty of the people and supremacy of this constitution, Chapter 2, The Republic, Chapter 3, citizenship, Chapter 4, The bill of rights, Chapter 5, Land and environment, Chapter 6, Leadership and integrity, Chapter 7, representation of the people, Chapter 8, The legislature, Chapter 9, The executive, Chapter 10, The judiciary, Chapter 11, Devolved government, Chapter 12, Public finance, Chapter 13, The public service, Chapter 14, National security, Chapter 15,

The sovereignty of the people of Kenya is expressed in three key elements. Firstly is the element that all sovereign power belongs to the people and therefore that the state is governed through the power of the people.¹⁸⁹ Secondly, the people have a right to exercise their sovereignty either by themselves or to delegate their powers accordingly.¹⁹⁰ Finally, as a result of this element, that all legislative, executive and judicial power has been delegated to the arms of government by the sovereign people at national and county level and must therefore be exercised according to the Constitution as enacted by the people.¹⁹¹ The Constitution is supreme in that it binds all Kenyans and state organs alike and all Kenyans are under an obligation to defend it.¹⁹² The provision is confirmation that no person should be viewed as being above the law, like in the previous regimes.

This spirit of a people centered Constitution and principle of supremacy of the people cuts across the 2010 Constitution in various ways. These include the reservation of powers of constitutional amendments by way of referendum which mechanism is used as a direct exercise of authority.¹⁹³ The power to conduct referendums in issues of national interest will guard against previous experiences of unilateral mutilation of the constitution or constitutional amendments being made for political gain.¹⁹⁴ This is a departure from previous orders where constitutional amendments were politically influenced and were a preserve of parliament and even the presidency.

Commissions and independent offices, Chapter 16, Amendment of this constitution, Chapter 17, General provisions, Chapter 18, Transitional and consequential provisions.

¹⁸⁹ Article 1(1).

¹⁹⁰ Article 1(2).

¹⁹¹ Article 1(3), 1(4).

¹⁹² Article 2(1), 3(1).

¹⁹³ Article 255.

¹⁹⁴ Article 255.

Other direct mechanisms include the right of the people to democratically elect their leaders and a right to recall any Member of Parliament for non-performance.¹⁹⁵ The electorate is also entitled to public participation in the legislative process which includes the right to access Parliamentary sittings.¹⁹⁶ The issue of public participation was discussed in *Moses Munyendo & 908 Others vs Attorney General & Minister for Agriculture*.¹⁹⁷ The petition had arisen out of Parliament passing of two laws; the Crops Act 2012 and the Fisheries and Food Authority Act 2012. The petition was presented by 909 citizens and stakeholders in the agriculture sector, claiming that the statutes were unconstitutional as they had been passed without public participation. The High Court established that relevant stakeholders had been consulted before the enactment of the statutes in question and that their representation was broad enough. The court however emphasized in this decision the need for parliament to use means to facilitate public participation by seeking views from stake holders and the public before enacting laws, as recognition of sovereignty of the Kenyan people which is enshrined in the Constitution. While discussing the place of public participation in the 2010 Constitution Justice Majanja noted that:

Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty. Article 94 vests legislative authority of the people of Kenya in Parliament and Article 118(1) (b) obliges the legislature to "*facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*"¹⁹⁸

¹⁹⁵ Article 104.

¹⁹⁶ Article 118.

¹⁹⁷ Petition No 16 of 2003[2013] eKLR.

¹⁹⁸ (n 197 above) para 16 (italics in the original). The decision also cites some South African decisions including *Doctor's for life International v The Speaker National Assembly and Others* (CCT12/05)[2006] ZACC 11 and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC).

The people also have a right of participation in public finance matters¹⁹⁹ and in the management, protection and conservation of the environment.²⁰⁰

The provision on constitutional supremacy on the other hand is also a departure from the repealed constitution which did not expressly provide for constitutional supremacy. This had the result of conflicting judicial decisions regarding the interpretation of the Constitution and its place as the supreme law of the land.²⁰¹ The Constitution provides four ingredients of the principle of constitutional supremacy. Perhaps the most cardinal attribute is the provision that the Constitution is the supreme law of the land which binds all persons including organs of state.²⁰² Secondly, there is no other source of authority than the Constitution and therefore the authority of the state must be exercised as authorized by the Constitution.²⁰³ The third attribute excludes the Constitution from any contestation before a court of law regarding its validity or legality.²⁰⁴ The attribute salvages situations where courts have in the past decried provisions of the Constitution and even declared them inconsistent with the secular nature of the state.²⁰⁵ The final principle of constitutional supremacy makes it clear that any other law, act or omission that goes contrary to the provisions of the Constitution is null and void to the extent of the inconsistency.²⁰⁶ These four principles are safeguards against the abuse of power and provide the parameters within which state power must be exercised. The express confirmation of constitutional

¹⁹⁹ Article 201.

²⁰⁰ Article 69.

²⁰¹ See for example *R vs El Mann*, where the court held that the constitution should be construed strictly just like any other statute; and *Rev. Timothy Njoya & others vs AG & Others*, [2004] KLR 4788 where the High Court overturned the El Mann decision by holding that the constitution should not be construed like any other ordinary statute but it should be given a wider interpretation.

²⁰² Article 2(1).

²⁰³ Article 2(2).

²⁰⁴ Article 2(3).

²⁰⁵ In *Njoya & 6 Others v Attorney General & 3 others* [2008] 2 KLR, *Jesse Kamau & 25 Others v Attorney General* (2010) eKLR.

²⁰⁶ Article 2(4).

supremacy is a large step towards creating an equal and just society where the rule of law is followed by all persons and where the culture of impunity is resisted.

The 2010 Constitution has also been praised for its comprehensive, transformative and well drafted Bill of Rights. The bill of rights is important in preserving the dignity of individuals and promoting social justice in Kenya.²⁰⁷ This is so considering that the problems of the bill of rights in the repealed constitution were a major reason for the call for constitutional reforms.²⁰⁸ The preceding bill of rights was considered retrogressive and obsolete.²⁰⁹ It provided only for the traditional civil political rights and even then, it was replete with limitations and claw back clauses rendering the enjoyment of those rights peripheral.²¹⁰ The 2010 Constitution has an expansive Bill of Rights that includes social and economic rights.²¹¹ This is crucial in a country like Kenya where majority of the population still cannot access proper housing, health, sanitation and education facilities.²¹² Taking a cue from South African jurisprudence, the drafters of the 2010 Constitution were well aware of the conflicts that the socio-economic rights may create between the judiciary and the executive but also the importance of these rights to the people of Kenya.²¹³

The bill of rights binds both private and state actors.²¹⁴ Unlike in the previous orders where the President was regarded as being above the law, the Constitution affirms the doctrine of the rule of law that every person is subject to the law.²¹⁵ It is therefore a very strong and

²⁰⁷ M Akech 'Institutional reform in the new Constitution of Kenya' A publication of the International Center for Transitional Justice <http://www.ictj.org> 20.

²⁰⁸ Ghai & Ghai (n 5 above) 35.

²⁰⁹ Mbondenyi & Ambani (n 95 above) 169; Chapter V of the repealed Constitution.

²¹⁰ Mbondenyi & Ambani (n 95 above) 170.

²¹¹ Chapter 4 of the 2010 Constitution.

²¹² Ghai & Ghai (n 5 above) 36.

²¹³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 CC para 78.

²¹⁴ Article 20(1).

²¹⁵ Lumumba & Franchesci (n 69 above) 130.

powerful declaration. This provision also confirms, unlike the previous one, that the Bill of Rights is applicable not only in legal relationships between the State and individuals but also in legal relationships between individuals.²¹⁶ The current Constitution opts for a centralized limitation clause as opposed to the characteristic numerous claw back clauses of the yesteryear which had the effect of literally diluting the very rights that it provided for.²¹⁷ The previous constitutions provided room for too many limitations.²¹⁸

In order to ensure maximum enforcement of the bill of rights the 2010 Constitution also provides rare impetus for anyone to approach the the court without having to prove *locus standi*.²¹⁹ This is unlike in the previous order where public interest litigation was limited to a person with direct interest in a matter.²²⁰ In the environmental case of *Wangari Maathai v The Kenya Times Media Trust*²²¹ the High Court dismissed a suit brought by the plaintiff, a member of the public on grounds that she had no standing, since there was no damage or anticipated damage to her. Professor Maathai had filed the case to stop the construction of a multi storey complex at Uhuru Park, which was a public recreational center. Going by the decision, it further meant that where a person was not able to approach the court by himself, he could not access justice. This restrictive right to legal standing has however been replaced with more flexible jurisprudence in later years.²²²

The 2010 Constitution also makes particular emphasis on affirmative action policies in addressing issues of women, older members of society, persons with disability, children, youth and members of minority or marginalized communities who are considered

²¹⁶ *Satrose Ayuma & 11 Others v The Kenya Railways Corporation & 2 Others*, Petition No. 65 of 2010.

²¹⁷ Lumumba & Franchesci (n 69 above) 144.

²¹⁸ Lumumba & Franchesci (ibid).

²¹⁹ Lumumba & Franchesci (n 69 above) 138.

²²⁰ Article 22.

²²¹ Nairobi Civil Case No 5403 of 1989.

²²² See for example *Ruturi & Another v Minister for Finance & Another* 2002 KLR 61.

vulnerable groups from previous historical experiences.²²³ In order to ensure widest possible enjoyment of the rights by these and other Kenyan citizens the Constitution also stipulates the values that should guide the courts in the interpretation of the bill of rights.²²⁴ These values were not present in previous orders.

Chapter five of the 2010 Constitution which deals with land and the environment is aimed at ensuring transformation to a just society by establishing equality and outlining principles and mechanisms of dealing with past injustices involving land.²²⁵ It provides a framework for protection of property rights in a manner that does not entrench past injustices and unfairness. This is in recognition of the illegal and unfair way that land was acquired in Kenya's history. The courts have already shown evidence of upholding these constitutional principles. In the case of *Samson Kiogora Rukungu v Zipporah Gaiti Rukunga* for example, the High Court held that three daughters had a constitutional right to inherit their parents' estate under the current Constitution notwithstanding cultural beliefs.²²⁶ The case had been brought by the objector, Consolata Ntibuka, challenging her brother's decision to evict her from a piece of land left behind by her late father on grounds that she was married.

The repealed Constitution of Kenya had no specific provisions relating to land.²²⁷ This chapter is therefore an acknowledgment of the political sensitivity and cultural complexity of land problems stemming from Kenya's history.²²⁸ Land has always been central to the political and social economic wellbeing of the Kenyan people thereby warranting a specific

²²³ Article 21(3).

²²⁴ Article 20(4), 20(5).

²²⁵ Akech (n 207 above) 15.

²²⁶ [2011] eKLR.

²²⁷ Ghai & Ghai (n 5 above) 76; Lumumba & Franchesci (n 69 above) 267.

²²⁸ Ghai & Ghai (ibid); Lumumba & Franchesci (ibid).

place in the constitution.²²⁹ Amongst the historical injustices that the provisions in the Constitution are aimed at curing is the multiple land law regimes that were developed by the different colonial policies, through instructions for the revision, streamlining and consolidation of land laws in the country.²³⁰ In order to move away from the political executive influence in the management, administration and allocation of land the Constitution provides that land belongs to the people of Kenya collectively and not to the government as was the case in previous orders.²³¹

To ensure that the people exercise their rights over land and that the regulatory framework is strengthened, the Constitution establishes the National Land Commission to exercise authority over land on behalf of the people of Kenya at county and national levels.²³² The commission has already begun its work and has recently established a taskforce to collect views that will be enacted into law, with the main aim of addressing historical injustices on land issues.²³³ This move is an acknowledgment that land reforms first of all require the reconciliation of the people and settlement of these historical disputes once and for all.²³⁴ Although there is still a lot of discretion left to parliament to enact laws on addressing historical injustices, the provision against land holding by non-citizens of Kenya except on leasehold basis is one of the provisions aimed at correcting the illegitimate alienation of land by foreign Europeans.²³⁵ Other laws that parliament enacts must however be in line with the principles of land policy in the Constitution.²³⁶

²²⁹ Lumumba & Franchesci (ibid).

²³⁰ Article 68(a). This has already been done by the enactment of the Land Act (2012) and the Land Registration Act (2012) which provide for a single substantive land law and registration law respectively.

²³¹ Article 61.

²³² Article 67. See also the National Land Commission Act (2012).

²³³ The taskforce on land historical injustices.

²³⁴ Ghai & Ghai (n 5 above) 78.

²³⁵ Article 65.

²³⁶ Article 60.

The next chapter of the Constitution is on leadership and integrity. This follows the key concept that cuts through the constitution, of serving rather than ruling the people.²³⁷ The provisions in this chapter are based on the need for public officers and elected leaders to break away from a past of corruption, mismanagement, misappropriation, nepotism, tribalism, impunity, poor governance and other such vices.²³⁸ These are largely attributed to the absence of an adequate and enforceable code of ethics and normative standards for the public service.²³⁹ These office holders are paid using tax payers contributions and are therefore accountable to the people. There is for the first time, established a threshold on integrity that all appointees to state office must meet.²⁴⁰ Other additional qualifications are also provided for other public officers including judges. Unlike in previous orders, where appointments were shrouded in secrecy and based on cronyism and favoritism, criteria for major public appointments is stated and public appointments are now subject to approval by parliament, a situation that has opened the door for more open and competitive appointments than previously. The appointments are also guided by the requirement for affirmative action policies and this has seen more representation from groups that were previously underrepresented in public office. There has already been active litigation on issues relating to integrity of public leaders.²⁴¹

The doctrine of *trias politica* is well captured in the structure of government in the current Constitution. Although previous constitutions also provided for separation of powers, the same was blurred thereby resulting to a government characterized by abuses and usurpations. In order to move away from past mistakes, the current Constitution provides

²³⁷ Ghai & Ghai (n 5 above) 140.

²³⁸ Lumumba & Franchesci (n 69 above) 298.

²³⁹ B Sihanya 'Constitutional implementation in Kenya 2010-2015, challenges and prospects' <http://www.innovativelawyring.com> 3.

²⁴⁰ Chapter 6: Leadership and Integrity, Leadership and Integrity Act 2012.

²⁴¹ For example in *Evans Nyambega Akuma v Attorney General & 2 others* Petition 513 of 2012; *Charles Omanga & 8 others v Attorney General & another* Petition 29 and 65 of 2014; *Godfrey Mwaki Kimathi & 2 others v Jubilee Alliance Party & 3 others* Petition 102 and 145 of 2015, amongst others.

an elaborate and systematic definition and distribution of state power.²⁴² There is also a move to fundamentally restructure the organs of government by clearly demarcating the roles of each arm and providing different personnel.²⁴³ This as a result sets a firm foundation for the three arms to coexist and find unity of purpose without unnecessary conflict through a supreme constitution.²⁴⁴

Not only does the Constitution establish each of the three arms, it begins by pointing out clear roles for the legislature and principles for the exercise of executive and judicial authority.²⁴⁵ The membership of each of the three arms is specifically set out in order to ensure a total separation of personnel from previous orders. One conspicuous difference is that the president is no longer required to be a member of parliament and in fact is not entitled to hold any other state or public office.²⁴⁶ Another major departure from the previous order is that cabinet secretaries are no longer appointed from members of parliament but are instead appointed as professionals from their respective fields.²⁴⁷

The Constitution also establishes elaborate checks and balances on the executive and legislature with dispersed powers away from the presidency.²⁴⁸ Although the repealed Constitution also prescribed certain measures aimed at achieving checks and balances, these were inefficient because of the immense power that the executive enjoyed over the legislature and judiciary.²⁴⁹ The Constitution conspicuously failed to assert the independence of the judiciary. This not only reduced the judiciary to a vulnerable institution but rendered it unable to exercise checks over the other two institutions. The

²⁴² Chapters 8, 9 and 10 which address the executive, legislature and judiciary respectively.

²⁴³ Sihanya (n 239 above) 2.

²⁴⁴ Lumumba & Franchesci (n 69 above) 361.

²⁴⁵ Article 94-97 on the legislature, article 129 on executive powers and article 159 on the judiciary.

²⁴⁶ Article 131(3).

²⁴⁷ Article 152.

²⁴⁸ Sihanya (n 239 above) 2.

²⁴⁹ Mbondenye & Ambani (n 95 above) 74.

legislative arm was equally disempowered. The power to commence sessions in parliament, dissolve and prorogue parliament lay exclusively with the president and were often used as a weapon to hoodwink parliament.²⁵⁰

In the current order, although the executive still retains final authority on the administration and running of the country, unlike in the previous order, these are now subject to a power of veto exercised by parliament.²⁵¹ Other ways in which the president is made answerable to parliament is by the impeachment provisions and also by the annual speech that the president is required to deliver before parliament.²⁵² Cabinet secretaries on the other hand are also accountable to parliament and may be called upon to answer questions.²⁵³ Parliament for its part is now accountable to the electorate who have a right to recall a member of parliament and also accountable to the executive through the prerogative of presidential assent to bills.²⁵⁴ The judiciary has authority to make pronouncements against both arms of government and there are elaborate provisions to ensure that the judiciary is independent of the legislature and the executive.²⁵⁵

The drafters of the Constitution recognized the emerging argument in contemporary writings for an additional state organ from the traditional three organs.²⁵⁶ This arm, it is suggested, is independent of the other three and may exercise all types of powers.²⁵⁷ While this is a debatable point, the incorporation of commissions and independent offices in the Constitution may spring from historical lessons. In the past the three arms were often

²⁵⁰ Sections 58, 59(1), 59(2) of the repealed Constitution.

²⁵¹ For example appointment of cabinet secretaries, the attorney general and members of the judiciary under articles 155(3) (b), 154(2) (a), 156(2), 157(2).

²⁵² Article 153 on accountability of the executive.

²⁵³ Article 153(3).

²⁵⁴ Article 115, 104.

²⁵⁵ Article 159, 160.

²⁵⁶ Lumumba & Franchesci (n 69 above) 641; Mbondenyi & Ambani (n 95 above) 71.

²⁵⁷ Lumumba & Franchesci (n 69 above) 642.

imputed with corruption, complacency and poor performance. These new constitutional commissions and offices are therefore expected to provide extra checks on the three arms and serve as mechanisms for the public to hold the government accountable.²⁵⁸ The Constitution enshrines a total of ten commissions and instructs parliament to also establish an independent ethics and anti-corruption Commission.²⁵⁹ There are also two independent offices; that of controller of budget and the auditor general.²⁶⁰

It is the introduction of a devolved system of government that has been taunted as perhaps the most fundamental break from the repealed Constitution and one of the main reasons for the tremendous support of the 2010 Constitution.²⁶¹ The arrangement whereby power is now devolved and no longer centralized makes room for citizens' participation in governance and also reduces significantly the causes of bad governance that have been blamed on the centralized form of governance.²⁶² Devolution also seeks to deal with issues of alienation, marginalisation, neglect and discrimination and provides greater security framework.²⁶³

The devolution model in the 2010 Constitution is almost identical to the independence Constitution which had also provided for a bicameral system of governance along the Westminster model.²⁶⁴ Of critical importance is that the short lived devolution in the

²⁵⁸ Lumumba & Franchesci (n 69 above) 641; Akech (n 207 above) 15.

²⁵⁹ Article 248(2). The commissions are the Kenya National Human Rights and Equality Commission, the National Land Commission, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Judicial Service Commission, the Commission on Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission and the National Police Service Commission.

²⁶⁰ Articles 228 and 229.

²⁶¹ Lumumba & Franchesci (n 69 above) 511; Sihanya (n 239 above) 2.

²⁶² Sihanya (ibid).

²⁶³ Akech (n 207 above) 23.

²⁶⁴ Othieno N 'Devolution in Kenya's new Constitution' Constitution Working Paper Series No 4 Society for International Development (SID) 2011) <http://www.sidint.net/doc/Wp>.

independence Constitution lacked political backing and political willpower to implement.²⁶⁵ Without turning a blind eye to the risks brought about by devolution, it is clear that the drafters of the 2010 Constitution were targeting the inequality that has all along existed between the more established tribes and marginalized tribes of Kenya as a way of espousing affirmative action and equal distribution of resources by re introducing provisions for devolution.²⁶⁶ In order to steer the country forward and avoid the political effects that reversed any gains of devolution in the previous order, the drafters of the Constitution provided for the objectives and principles upon which devolution in Kenya should proceed.²⁶⁷

2.4 Constitutional implementation: achievements and challenges so far

Kenya's process of constitutional implementation is still in its early days and it is possibly very early to make any firm conclusions.²⁶⁸ Although the 2010 Constitution provides timelines for legislative enactment, it is also a reality that constitutional implementation is a continuous process that continues even after the specific legislation has been enacted.²⁶⁹ Constitutional implementation has been said to involve eight key processes;²⁷⁰

- i. Interpreting and assigning meaning to specific constitutional provisions,
- ii. Enactment of legislation as provided for in the Fifth schedule of the constitution,
- iii. Alignment of the existing laws to the 2010 Constitution,
- iv. Streamlining existing institutions to uphold and respect the spirit and letter of the 2010 Constitution,

²⁶⁵ Othieno (n 264 above) 9.

²⁶⁶ Othieno (n 264 above) 5; Chapter 11.

²⁶⁷ Article 174.

²⁶⁸ Lumumba & Franchesci (n 69 above) 723.

²⁶⁹ Lumumba & Franchesci (ibid).

²⁷⁰ Sihanya (n 239 above) 2.

- v. Restructuring institutions and organs of government,
- vi. Creation of commissions, institutions, bodies and structures,
- vii. Restructuring the system of government to a devolved system and
- viii. Crafting new policies and reviewing existing policies

Going by the processes mentioned, it is clear that Kenya has made commendable progress in the implementation of the 2010 Constitution. The institutions and committees created under the Constitution have been formerly established and are now operational. These are crucial in reforming previously abusive state institutions, healing the society and establishing a better society by preventing and managing societal conflicts while also enhancing accountability.²⁷¹ The Commission for the Implementation of the Constitution and the Constitutional Implementation Oversight Committee were amongst the first to be established.²⁷² Despite the pitfalls that they have gone through, they have continued to carry out the onerous but commendable task of monitoring, facilitating and overseeing the process of constitutional implementation.²⁷³

Other new commissions that are operational include the National Land Commission, the Salaries and Remuneration Committee, the Commission on Revenue Allocation, the National Security Council and the National Police Service. Several other commissions and institutions that existed in the previous order have been restructured so as to ensure that they are in tandem with the spirit of the 2010 Constitution. Such institutions include the Kenya National Human Rights and Equality Commission, the Independent Ethics and Anti-Corruption Commission, the Public Service Commission, the Judicial Service Commission and the National Police Service. In addition to the commissions, public institutions have

²⁷¹ Akech (n 207 above) 13.

²⁷² Hereinafter the CIC and CIOC. Schedule 6 of the Constitution required that the CIC be set up within ninety days.

²⁷³ The Commissioners were sworn in on 4th January 2011. Their mandate is contained in the Sixth Schedule of the 2010 Constitution.

begun a serious process of transformation and already the changes can be seen with the judiciary, the police force, the lands registry and the public service. The nature of reforms include hiring of more qualified staff and personnel, re-defining policies, enacting legislation to deal with the new structures and expansion of infrastructure.

The Constitution specifies 48 pieces of legislation that need to be enacted so as to give effect to the new Constitution, although there are also statutes that have been left out.²⁷⁴ It also specifies the time frame within which these should be enacted. Most of the legislations have been enacted and still continue to be enacted. A number of statutes will however need to be amended and repealed so as to streamline them in accordance with the values and goals of the 2010 Constitution.

Devolution as envisaged in the Constitution is now a reality in Kenya. The national assembly and county governments are in operation and the relevant legislation has also been put in place. The commission on revenue allocation has already been established to oversee the financial allocation to the county and national governments so as to assist in their functions.

Despite these success records, there have also been significant challenges to the implementation of the transformative Constitution. The CIC confirms that the major challenges that it has so far faced are:

Selective reading and misinterpretation of the constitution by implementing organs, deliberate misinformation to members of the public by some members of both the executive and legislature, a lack of guidance from the office of the Attorney General in the process of implementation of the constitution, political risk and the increasing trend by the

²⁷⁴ Schedule 5.

executive and some members of the legislature to create grey areas regarding interpretation of the constitution.²⁷⁵

It is a matter of great concern when the CIC raises a red flag about statutes that had been approved by the commission and other implementing partners and even forwarded for publication are amended without further reference to the CIC. Some of the Bills had unconstitutional provisions slotted in or omissions from the constitutional requirements. Even when questions were raised about the constitutionality of these Bills, parliament persisted in its blatant disregard of injunctive court orders against passing the laws.²⁷⁶ In some of the laws where no public input was allowed, the politicians contributed to the weakening of laws that were initially meant to raise the bar in public service, public finance and expansion of civil liberties, all for their own benefit.²⁷⁷

Negative politics has been evidenced throughout the implementation process. This has continued to play out when politicians make mistaken and political statements with respect to decisions that have been made by constitutionally mandated offices instead of respecting the verdicts. This especially happens where a decision does not favor a politician or his political interests. They still continue to stand in the way of constitutional implementation when they decide to ignore and act in contravention to the Constitution. Some examples worth mentioning include the continued ignorance of the one third gender principle. The constitutional requirement for at least one third of employees in any public body to represent each gender was aimed at creating equality of citizens and enhancing participated governance especially in favor of women.²⁷⁸ To date, many appointments are still not reflective of this policy and politicians continue to be oblivious to

²⁷⁵ CIC Second Quarterly Report on the implementation of the Constitution (June 2011)
<http://www.cic.org.ke>.

²⁷⁶ Sihanya (n 239 above) 29.

²⁷⁷ 'Too many interests stand in the way of the constitution' *Daily Nation* 23 August 2014.

²⁷⁸ Article 27.

this fact. The membership of the Supreme Court for example is not representative of the gender equality principle, a position that has been unsuccessfully challenged in court.²⁷⁹ Likewise, the composition of parliament and many other public offices is evidence that women are still substantially under represented. The Constitution requires that of the 290 members of the national assembly, not more than two-thirds should be of any one gender.²⁸⁰

Implementation of the Constitution requires cooperation amongst stakeholders. Unfortunately, a history of lack of cooperation and continued wrangles between key implementation institutions and politicians has slowed down the implementation process considerably.²⁸¹ Some of these wrangles are a reflection of inefficiency, partisan interests and the desire to keep to an existing status quo and avoid change. One example of these wrangles is the long standing battle between the CIC, the AG's office, Parliament and the Government Printer. For a long time the CIC has often accused the AG's office of not publishing bills on time and Parliament for not consulting stakeholders before forwarding bills to the national assembly for assent. The wrangles went as far as the CIC and the MPs trading accusations about excessive remuneration enjoyed by each other and the MPs threatening to reduce the allowances of the CIC, a move that almost saw another delay in implementation.

The public as well as the politicians must also deal with the challenge of attitude in the implementation process. Owing to longstanding cultures and attitudes propped by the previous Constitution, the public and politicians still continue to hold certain mind sets that

²⁷⁹ Currently, out of 7 judges only 2 are women and 5 are men. This was challenged in *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another* [2011] eKLR.

²⁸⁰ Article 97, 81.

²⁸¹ Sihanya (n 239 above) 28.

are not helpful in the quest for transformation.²⁸² These anti-reformists are still active in the institutions that are meant to bring about the much needed change. They are keen to protect their connections and ill acquired wealth. It is as a result of the cultural mind-set that the past four years have been marred by incidents of power struggle between various institutions particularly the three organs of government where each organ continues to view the others with suspicion, a situation that is not helpful in the implementation process. Other power wrangles have been witnessed between the county and national governments and between the Senators and Governors especially over financial control rights.²⁸³ There are allegations of the central government trying to fight and choke devolution just like was witnessed in the past.²⁸⁴ There is also a push for a referendum to amend the Constitution by the opposition party and the governors separately, only four years into the new dispensation. This move that has received mixed reactions as to whether the move is aimed at benefiting the public or the politicians.²⁸⁵ The wage bill that has been created by the political class using the legislative arm or simple hoodwinking the Salaries Review Commission is also a major source of financial challenge for the country.

As counties settle, there have been territorial battles over what the county governments should be allowed to control and debate over their autonomy.²⁸⁶ Devolution is also very expensive and it is already proving to be an unbearable burden to Kenyans. The high cost of living driven by high food and energy prices and the high unsustainable wage bill from the public sector is a big challenge to the economy.²⁸⁷

²⁸² CIC 'Implementing Kenya's Constitution: status, achievements and challenges' <http://www.cickenya.org>.

²⁸³ Lumumba & Franchesci (n 69 above) 723.

²⁸⁴ Daily Nation Online <http://www.dailynation.co.ke>.

²⁸⁵ The move is dubbed Okoa Kenya. A similar initiative had begun with the governors at county level to receive more funding from the central government but they seem to have agreed to discuss the issue.

²⁸⁶ Lumumba & Franchesci (n 69 above) 727.

²⁸⁷ Lumumba & Franchesci (n 69 above) 728.

2.5 Conclusion

The purpose of this chapter was to lay a basis for the discussion on transformative constitutionalism by providing a broad overview of the history of Kenya. My starting point is that success in Kenya's process of transformation requires an appreciation and understanding of the historical experiences and colonial legacy.²⁸⁸ The chapter has brought to the fore the injustices of the colonial era in Kenya, which have continued to affect Kenyans to date and from which Kenyans seek to transform. The promulgation of the 2010 Constitution was a huge step in this direction. Distinctions between Kenya's previous constitutions and the 2010 Constitution show that there is a radical departure between the two with the 2010 Constitution containing more progressive provisions. Post the 2010 Constitution there has been new legislation and institutions established as instructed by the Constitution. Although a lot of gain has been experienced, there are still numerous challenges that Kenya must deal with so as to realize optimal change. This historical analysis sets the ground for my argument on the need to re-conceptualize radical change of power, institutions and politics that must benefit all Kenyans.²⁸⁹

²⁸⁸ R Abrahamsen 'African studies and the post-colonial challenge' (2003) 102 *Journal of African Affairs* 189: 190.

²⁸⁹ Zeleza (n 175 above) 10.

CHAPTER THREE

TRANSFORMATIVE CONSTITUTIONALISM AND ITS CHALLENGES

3.1 Introduction

Kenya's history as discussed in the previous chapter echoes the justification and desire for a new constitutional dispensation. While numerous changes have so far been witnessed in the country under the new dispensation, there is still more that needs to be done so as to transform the Kenyan society towards the vision and spirit of the new Constitution. The 2010 Constitution no doubt presents an era that has the potential to be totally different from Kenya's past if well implemented.¹ I argue that one of the ways that Kenya can achieve optimum transformation is by considering a framework of transformative constitutionalism.

The framework of transformative constitutionalism entails a modest suggestion to judges on how to account for transformation under South Africa's post-apartheid Constitution in their work. The suggestion has been taken up by some scholars and has made some impact in South Africa as a tool for constitutional and legal developments.² Part of the fundamental purposes of transformative constitutionalism in South Africa has been and continues to be the need for change and healing of the wounds of past injustices.³ The aspiration for societal transformation is also rooted in building South Africa into a unified and democratic country that espouses social justice in social, economic and political realities and these represent the fundamental goals of transformative constitutionalism.⁴ My aim in this chapter is not only to define transformative constitutionalism. I also analyse whether Kenya can be guided by the

¹ H Varney 'Breathing life into the new constitution; a new constitutional approach to law and policy in Kenya; lessons from South Africa', ICTJ briefing – <http://www.kenyainfor@ictj.org>.

² M Rapatsa 'Transformative constitutionalism in South Africa: 20 years of democracy' (2014) 5 *Mediterranean Journal of Social Sciences* 887: 889.

³ E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) 10 *South African Journal on Human Rights* 31; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351: 352; Rapatsa (n 2 above) 887.

⁴ Rapatsa (ibid).

experiences in South Africa to understand the transformation process in a different way that would bring about significant transformation of the society.

My consideration of Kenya alongside South Africa is based on the fact that the 2010 Constitution leans quite heavily on the expertise of South Africa.⁵ A look at the history of both countries also evidences constitutions that emerged following periods of conflict and historical injustice as a result of colonialism and apartheid.⁶ The structures of the two constitutions are therefore quite similar, especially on questions of sovereignty, supremacy of the constitution, national values, citizenship and the bill of rights.⁷ Although Kenya did not go through a period of formal and institutionalized apartheid as South Africa did, both countries were colonized by the British. The patterns of colonialism bore political, social and economic similarities and so did the structures that the two countries inherited from the colonial government. As a result, both countries struggle to transform from similar issues. Major transformation goals in Kenya and South Africa include land and property ownership reform, the acceptance of a human rights culture, accessibility to justice, equal representation and a say in governance, affirmative action and accountability within government.

In my view, these reasons justify to a reasonable extent the need for a consideration of transformative constitutionalism in Kenya. While there is much that Kenya can gain from this discussion and take advantage of, this will need to be considered within the context

⁵ W Mutunga 'Elements of progressive jurisprudence in Kenya; a reflection' Speech delivered at the judges dinner on 31 May 2012 <http://www.judiciary.gov.ke/portal/assets/downloads/speeches> 83; K Rawal 'Constitutional and judicial reforms; the Kenya experience' Paper presented at the Southern African Chief Justices Forum annual conference, 2 August 2013 <http://www.judiciary.go.ke/speeches> 1; Varney (n 1 above) 4.

⁶A Lombard & G Wairire 'Developmental social work in South Africa and Kenya: some lessons for Africa' April (2010) *The Social Work Practitioner-Researcher* 98: 101; Varney (n 1 above) 5.

⁷ Varney (n 1 above).

and circumstances of the country.⁸ There are other circumstances that should be taken note of that apply to each country in a unique way and which means that even if the consideration for transformative constitutionalism is to be considered in Kenya, it does not imply that the prospects would be similar.

These unique circumstances depend to a large extent on the political organization in both countries. While Kenya opted for a presidential constitutional system in the new dispensation, South Africa has a parliamentary system of governance.⁹ The difference in political organization addresses itself to the mode of distribution of power within the three arms of government. This political structure should also be viewed in terms of the unique national politics in each country. In other words, the adoption of the South African Constitution produced major changes in power structure as evidenced by the first democratic elections, which produced a majority result.¹⁰ There was a major power shift from the apartheid government to a black majority President, when Nelson Mandela won the elections with a landslide majority.¹¹ The political situation in Kenya is still unstable and not much has changed concerning the sharing of power since the elections that preceded the promulgation of the 2010 Constitution.¹² The political dynamics in Kenya are still represented by a government the election of which was deeply contested, against South Africa's ANC government that enjoys much more national support.¹³ The cooperation of politicians is likely to have adverse lessons for Kenya in the way that transformation may be implemented. This may create potential

⁸ Mutunga (n 5 above) 31.

⁹ Varney (n 1 above) 4; MK Mbondeyi & JO Ambani *The new Constitution of Kenya: principles, government and human rights* (2013) 14, 44.

¹⁰ Varney (n 1 above) 4.

¹¹ Varney (ibid).

¹² Varney (ibid).

¹³ Varney (ibid).

challenges in Kenya of pushing for national consensus to drive political and social change.¹⁴

Although the governments in both countries are modelled along a system of devolution, the experiences towards transformation are likely to be different because the devolved governments take on different structures. For instance, while the South African devolution system has two levels of government below the national government, Kenya's system has only one.¹⁵ The composition of each of the levels is also technically different and this may have an impact on their functioning and funding. The effect of devolution on transformation may further depend on the history behind the created boundaries in each of the two countries, noting that both countries remain deeply divided along racial and ethnic grounds.¹⁶

One of the biggest challenges to transformation in South Africa has been the racial differences which continue to create social and economic gaps.¹⁷ Likewise, the colonial system in Kenya is partly to blame for the ethnic rivalry in the country. The administrative boundaries that have been adopted in devolution are the same boundaries there were forced on the Kenyan people at colonialism, thereby entrenching ethnicity. This is a big signal that the politics of ethnicity will continue to affect the pace and value of transformation.¹⁸ In Kenya the political groups are characterised by ethnic loyalty unlike in South Africa, where the African National

¹⁴ Varney (ibid).

¹⁵ Constitution of Kenya, Chapter 11 on Devolved Government. The two levels are the National and County level governments. The 1996 Constitution of South Africa at section 40(1) determines that 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'.

¹⁶ Lombard & Wairire (n 6 above) 102.

¹⁷ S Sibanda 'Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482: 485.

¹⁸ YP Ghai 'Decreeing and establishing a constitutional order: challenges facing Kenya' <http://www.koffiannanfoundation.org> 7, 8.

Congress is a national party and the main opposition, the Democratic Alliance, has national aspirations, although its membership is mainly from the minority groups.¹⁹ This is a situation that would have political consequences in the negotiation and enforcement of the constitutions.

The different economic levels between the two countries will also affect the ability of the governments to meet and enforce the constitutions that they have fully.²⁰ A good example is in the implementation of socio-economic rights, which impose a positive duty on the state to make certain rights accessible. While South Africa is classified as a lower middle income country, Kenya is a low income country.²¹ This is likely to affect the transformation records and service delivery levels in Kenya as compared to South Africa. Such difference may be evident in issues of unemployment, poverty, lack of education and the promotion of socio-economic rights, all of which are pegged to availability of resources.

Therefore, even as I make this suggestion for transformative constitutionalism I do remain conscious to the call by Kenya's Chief Justice that Kenya ought to learn lessons from South Africa in so far as these are relevant to Kenya's circumstances.²²

An appreciation of the framework of transformative constitutionalism requires me to analyse the context against which the concept has been applied in South Africa. I begin the chapter with a contextual analysis of the 1993 and 1996 Constitutions of South Africa. I thereafter engage with various scholars on the meaning and application of transformative constitutionalism in South Africa, beginning with the seminal article by Klare which was written about five years after the enactment of the Interim Constitution

¹⁹ Hereinafter the ANC.

²⁰ Lombard & Wairire (n 6 above) 102.

²¹ Lombard & Wairire (n 6 above) 100.

²² Mutunga (n 5 above) 83.

of South Africa. It is this article that formed the basis of academic discussion of the framework of transformative constitutionalism in South African constitutional discourse.²³ After laying out Klare's jurisprudential grounding and hence his understanding of transformative constitutionalism, I engage with various scholars on their commentaries post Klare.

For ease of analysis I categorise the various reactions into three strands depending on their analysis of Klare's work. I do this because I pre-empt that the suggestion of the framework of transformative constitutionalism in Kenya might be received in similar ways. This classification is a temporary one, for purposes of this discussion. I hope to show that the way different scholars understand the term transformation might affect their understanding of transformative constitutionalism and also influence their choice of metaphorical language to reflect the process. In the first strand of arguments I discuss the commentators who in my view, though not focused on Klare's critical theoretical angle of transformative constitutionalism, have further advanced his work in several ways.²⁴ These scholars agree with the framework of transformative constitutionalism and some of them chose specific topics to further illustrate the arguments put forward by Klare. The second strand is made up of scholars who have also advanced Klare's work further but whose difference with the first category lies in the attention that they give to the critical legal studies roots of Klare.²⁵ While the first

²³ KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146:146.

²⁴ C Albertyn & B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 generally; D Moseneke 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 generally; Langa (n 3 above) generally.

²⁵ AJ Van der Walt 'Dancing with codes; protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258 generally; K Van Marle 'Meeting the world halfway; the limits of legal transformation' (2004) 16 *Florida Journal of International Law* 651 generally; AJ Van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12

group of scholars does not pay particular attention to this, the second group is particularly concerned with expounding on the theoretical discussion that he put forward. The final group consists of scholars who give critical responses to Klare and caution against the critical legal studies approach that he used, or at least the depiction of the framework of transformative constitutionalism in exclusively critical terms.²⁶ Even though I categorise the scholars' ideas in these different strands, I also note that they converge at a common place on specific issues, including the significance of a framework of transformative constitutionalism.

My engagement with transformative constitutionalism also touches on the subject as a paradoxical one. The subject presents a major conflict between the need for change through the idea of transformation and the purpose of social stability through the concept of constitutionalism. Even though described as a controversial subject, I discuss why the controversy exists, mainly differentiated by the different ideas on the potential of law and magnitude of change that is believed capable of being brought about by the framework of transformative constitutionalism. As I engage with the various scholars I also discuss the challenges that the project faces in South Africa as a way to caution Kenya, should the suggestion be accepted.

In the next segment on the contextual analysis of the interim and final constitutions of South Africa, the major concern is the political and constitutional context. A discussion of the judiciary has been deliberately omitted from this chapter and left for the next. This history is important in understanding the idea of transformative constitutionalism as it brings out a distinction between the past and the present constitutional systems.

Fundamina 1 generally; K Van Marle 'Transformative constitutionalism as/and critique' (2009) 20 *Stellenbosch Law Review* 286 generally.

²⁶ M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *Public Law* 155 generally; T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258 (generally).

3.2 A brief contextual analysis of the 1993 and 1996 Constitutions of South Africa

3.2.1 The apartheid era

The roots of apartheid can be traced back to the policies of segregation that were enforced since colonialism to the becoming of a Union in 1910. As a political ideology it is officially associated with the reign of the National Party rule between 1948 and 1994.²⁷ The year 1948 signified South Africa's entry into authoritarianism and racial segregation facilitated by the rule of law.²⁸ It is the year when the Nationalist Party, a home for Afrikaner nationalists, gained power. Following the victory, apartheid became legally recognized when legislation was enacted by the government to classify races into four categories.²⁹

From these early years of segregation and later official apartheid Africans were prevented from claiming any land that contained gold and other minerals, which had been taken away and occupied by the colonialists.³⁰ The mining companies required cheap African labour and a racially divided labour force was created where the whites performed skilled, well-paying jobs and the blacks made low wages in unskilled labour.³¹ The discovery of gold and diamonds quickly gave rise to rapid industrialisation and urbanisation and created the need for cheap labour in other sectors like

²⁷ S Liebenberg *Socio-economic rights: adjudication under a transformative constitution* (2010) 2.

²⁸ Liebenberg (n 27 above) 3; A Okoth *A history of Africa 1915-1995 (vol 2): African nationalism and decolonization process* (2006) 161.

²⁹ Liebenberg (ibid). These racial groups were the black, white, coloured and Indian. Legislation passed to deepen the racial segregation included the Population Registration Act 30 of 1950, Group Areas Act 41 of 1950, Group Areas Act 36 of 1966, Black Local Authorities Act 102 of 1982 and the Black Communities Development Act 4 of 1984 amongst others.

³⁰ T Falola *Key events in African history: a reference guide* (2002) 199.

³¹ Falola (ibid).

agriculture, transportation and catering.³² As the South African economy continued to grow, so did the demand for cheap labour increase. More and more blacks therefore left impoverished rural areas to look for jobs in the cities.³³ Within no time the cities were unable to cope with the influx. Wages were low and housing was poor, leading to many black squatters.³⁴ Generally, the apartheid regime was characterised by everyday racial prejudice as well as a social, economic and political order that promoted white privilege at the expense of the majority black population.³⁵

From the onset it was clear that the organisation of the state was established to serve a demanding emerging bureaucratic authoritarian regime where the interests of the black population would be ignored. State formation developed under the auspices of various colonial institutions which gave the impetus to the development of law.³⁶ The laws were crucial for the British colonial government to gain tight control over the black labour force.³⁷ The Population Registration Act passed soon after the 1948 elections required all citizens to register as black, white or colored.³⁸ There were other apartheid laws that banned mixed marriages, segregated urban areas creating exclusive white zones, and laws that gave arbitrary powers to the Police to facilitate brutality against the blacks.³⁹

³² N Worden *The making of modern South Africa: conquest, apartheid, democracy* (2012) 26; Falola (ibid).

³³ Falola (n 30 above) 201.

³⁴ Falola (ibid).

³⁵ MTK Moerane 'The meaning of transformation of the judiciary in the new South African context' (2005) 120 *South African Law Journal* 708: 709; Okoth (n 28 above) 160-166; Falola (n 30 above) 202.

³⁶ Okoth (n 28 above) 160-166; Falola (n 30 above) 201.

³⁷ Okoth (ibid).

³⁸ The Act was enacted in 1950. Other legislation that were enacted so as to enforce Apartheid include The (1950) Group Areas Act, which barred people of particular races from various urban areas, the (1953) Reservation of Separate Amenities Act, prohibiting people of different races from using the same public amenities, such as drinking fountains, restrooms and other facilities, the (1953) Bantu Education Act, designed to reduce the level of education attainable by black people and the (1956) Mines and Work Act, which formalised racial discrimination in employment.

³⁹ Okoth (n 28 above) 163; Falola (n 30 above) 90.

Although divided on many issues the Whites were united in their emphasis on racial separation for whites' survival.⁴⁰

After South Africa became a Union, the government wanted Black and White people to live separately, so they set certain areas apart for Black people. Before the Union these were rural areas ruled by local chiefs. They came to be called 'Native Locations' and Black South Africans were systematically dispossessed of their land access via the 1913 Land Act to live in these 'Native Locations'. Later, under apartheid (after 1948), when the division and control of the apartheid government became more rigorous, bantustans or the 'homeland' systems were introduced.⁴¹ The idea was that the homelands would be like countries where the Black people could live and vote for their own governments, and would be led by chiefs controlled by the apartheid state. As the White minority state expanded its divide and rule plan of control, there was a homeland for every major Black language in South Africa.⁴² These groups were called nations, and all Black South Africans were made citizens of one of these 'homeland' 'countries', regardless of where they had been born or where they now lived. This resulted in a devastating forced removal of millions of people then considered non-citizens of South Africa.

Blacks were only allowed to leave the Bantustans for white areas to work, and they had to carry passes.⁴³ The black people who were designated as belonging to any such homeland would have their South African citizenship replaced with 'Homeland' citizenship. This way most of the black people in South Africa would have no more legal claims to participate in the South African government.

⁴⁰ Okoth (n 28 above) 160.

⁴¹ K Shillington *Encyclopaedia of African History* Vol 3 (2004) 1443.

⁴² Shillington (ibid).

⁴³ Falola (n 30 above) 202.

The instruments of governmental power were firmly held by the white minority. In particular, white males dominated all the arms of government and blacks had no voting rights.⁴⁴ The Constitution of apartheid South Africa was modeled on the British Westminster Constitution from whom South Africa had inherited most of its governmental institutions.⁴⁵ Parliament was supreme over the judiciary, executive and the legislature.⁴⁶ Courts had no power of substantive judicial review over parliament and were confined to interpreting and applying the law as declared by parliament and limited procedural review power.⁴⁷ Parliament had not included a bill of rights in either the 1961 or 1983 constitutions. What is more, the body of parliament that passed laws during the apartheid regime was unrepresentative. It did not represent the diversity of the people it legislated for and made laws to suppress them even more.⁴⁸ The legislature was not accountable for its actions as it did not face possibility of censorship by way of removal by the people.⁴⁹ This illegitimate parliament that made unjust laws was not concerned with protecting the rights of the majority blacks but advancing

⁴⁴ E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436: 438; H Klug, 'Dyzenhaus; truth reconciliation and the apartheid legal order' (2000) 117(1) *South African Law Journal* 133: 133; H Corder 'Seeking social justice? Judicial independence and responsiveness in a changing South Africa' in PH Russell & DM O'Brien *Judicial independence in the age of democracy: critical perspectives from around the world* (2001) 194:194

⁴⁵ P Langa 'A delicate balance; the place of the judiciary in a constitutional democracy' A paper delivered at a Symposium marking the retirement of Chief Justice Arthur Chaskalson held at Wits Law School, 25 November 2005 2.

⁴⁶ Langa (ibid).

⁴⁷ Section 59 of the 1961 Constitution constitutionalized the exclusion of courts from substantive judicial review. A Gordon & D Bruce 'Transformation and independence of the judiciary in South Africa,' <http://www.csvr.org.za/docs/transition/3.pdf> 12; M Wesson & M Du Plessis 'Fifteen years on: central issues relating to the transformation of the South African judiciary' (2008) 24 *South African Journal of Human Rights* 188: 190; P Labuschagne 'The doctrine of separation of powers and its application in South Africa' (2004) 23 *Politeia* 84: 88.

⁴⁸ Gordon & Bruce (n 47 above) 13; Moerane (n 35 above) 710.

⁴⁹ Moerane (ibid); Labuschagne (n 47 above) 88. Parliamentary supremacy was secured after a series of struggles between the courts and Parliament regarding the removal of black and colored voters from the common voters roll.

apartheid rule.⁵⁰ The minority Afrikaner elite dominated political power, if not – at least not initially - economic power.⁵¹ A dominating executive and legislature and a far from independent judiciary meant that the Westminster type of government provided a weapon for the apartheid government to control the country and manipulate the judiciary and to violate human rights using the legal system.⁵²

The education, economic and labour policies were also discriminatory and in favour of the white minority population. This race division eventually produced a sharp class differentiation and inequality that characterizes South Africa to date.⁵³ There was also sharp differentiation in health care, social security and even recreational facilities. The police force was brutal and could arrest and detain black people without charges so as to scare any opposition.⁵⁴ Political leaders were banned to keep them away from social activity and trade union activities were deliberately sabotaged.

It was during the 1960s that the grip of the apartheid state was strongest but later in the 1970s the state began to lose its grip on apartheid.⁵⁵ The gradual weakening of racial segregation may have been a result of the growth of the black worker movement and the rising tide of black assertion and militancy.⁵⁶ This militancy arose due to the black consciousness movement that gained full expression during the Soweto uprising of 1976.⁵⁷ The exploited and oppressed black population reacted to the regime with

⁵⁰ Gordon & Bruce (n 47 above) 13.

⁵¹ Gordon & Bruce (ibid).

⁵² D Moseneke 'Separation of powers, democratic ethos and judicial function; current developments (2008) 24 *South African Journal on Human Rights* 341: 347.

⁵³ H Marais *South Africa: limits to change: the political economy of transition* (2001) 3.

⁵⁴ Falola (n 30 above) 203.

⁵⁵ Shillington (n 41 above) 1453.

⁵⁶ Shillington (ibid).

⁵⁷ Shillington (ibid).

numerous other protests.⁵⁸ An articulate elite group under the banner of the African National Congress dominated the anti-apartheid struggle.⁵⁹ The black protests were supported by Indians, colored's and pro black elements amongst the minority whites. There was armed struggle and civil unrest. The continued tension and total dissatisfaction also coincided with increasing local and international opposition to apartheid. Apartheid was declared a global political issue, thus creating one of the most successful international and people's campaign.⁶⁰ The international community backed by the United Nations General Assembly imposed economic sanctions on South Africa, thereby increasing the public pressure against apartheid.⁶¹

3.2.2 Constitutional negotiations; the 1993 Constitution

The sustained struggle eventually forced the minority regime to undertake major reforms that led to the end of apartheid.⁶² On 2 February 1990 the then President, F. W. de Klerk announced the unbanning of the ANC and other major black organizations, the unconditional release of Nelson Mandela and other political prisoners.⁶³ This paved way for the negotiations on the transition to democracy in South Africa. A two phase constitutional making process was agreed upon. The first phase entailed the adoption of an interim transitional Constitution based on interim constitution principles that had been agreed upon by a multi-party negotiation process. The process had also agreed upon a formula for an elected assembly that would serve as an interim parliament and draft the interim constitution according to the negotiated

⁵⁸ Falola (n 30 above) 203.

⁵⁹ Hereinafter the ANC

⁶⁰ Shillington (n 41 above) 1457.

⁶¹ A Okoth *A history of Africa: 1855 – 1914* (1988) 185.

⁶² Falola (n 30 above) 331.

⁶³ Other parties that were unbanned were the Pan Africanist Congress (PAC) and South African Communist Party (SACP). Nelson Mandela was released after serving 27 years in prison.

principles.⁶⁴ This constitution would last two years and would provide how the government was to govern after the first post-apartheid elections in 1994.⁶⁵ The second phase in the constitutional making process involved the negotiation and adoption of a final constitution for South Africa by democratically elected members of the Constitutional Assembly.

Multi party negotiations began in 1993 for the interim constitution and the country held its first independent post-apartheid elections on 27 April 1994 under this Constitution.⁶⁶

3.2.3 The 1996 Constitution

Following the 1994 elections the ANC entered into power with a massive parliamentary majority and a mandate to construct a new democratic state.⁶⁷ As the negotiations to the final Constitution began, most political parties released proposals for a constitution for South Africa. The final Constitution would be negotiated and adopted by the Constitutional Assembly comprising of the two houses of the democratically elected parliament pursuant to chapter 5 of the interim Constitution.⁶⁸ In addition, the final Constitution had to comply with the principles that had been set out in the interim Constitution. The Constitution could not come into force until the Constitutional Court had also certified that it had complied with these minimum principles.⁶⁹ In the process of preparing the Constitution, the Constitutional Assembly was guided by a set of

⁶⁴ C Barnes & E de Klerk 'South Africa's multiparty constitutional negotiation process' <http://www.cr.org/sites/default/files/accord> 29.

⁶⁵ Labuschagne (n 47 above) 89.

⁶⁶ The first post-apartheid elections of South Africa were held in April 1994.

⁶⁷ Shillington (n 41 above) 1460.

⁶⁸ Act No 200 of 1993; Barnes & De Klerk (n 64 above) 31.

⁶⁹ Schedule 4 thereof; Barnes & De Klerk (ibid).

values that were based on public participation in the process, accessibility and accountability.⁷⁰

On May 8, 1996, the Constitutional Assembly completed two years of work on the draft of a final Constitution, intended to replace the interim Constitution of 1993. The draft was submitted to the Constitutional Court. In the *First Certification Judgment* delivered on 6 September 1996 the Constitutional Court refused to certify this text identifying a number of provisions that did not comply with the constitutional principles.⁷¹ The Constitutional Assembly therefore reconvened to amend and adopt a new constitutional text. The draft was again submitted to the Constitutional Court for certification. This was done through the *Second Certification Judgment* delivered on 4 December 1996 and after approval it was signed into law on 10th December 1996.⁷² Not only was the 1996 Constitution a complete break from the apartheid Constitution, it was also a product of the largest public participation program in the country with an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly.⁷³

The Constitution of South Africa has been hailed by academics as a transformative document within contemporary constitutional discourse.⁷⁴ This view has been echoed by the Constitutional Court as well as other courts in South Africa.⁷⁵ It differs radically

⁷⁰ Barnes & De Klerk (ibid).

⁷¹ *Certification of the Constitution of the Republic of South Africa, 1996*[1996] ZACC, 26 1996 (4) SA 744, 1996 (10) BCLR 1253 (6 September 1996).

⁷² *Certification of the Amended Text of the Constitution of the Republic of South Africa* [1996] ZACC 24, 1997 (2) SA 97, 1997 (1) BCLR 1 (4 December 1996).

⁷³ Labuschagne (n 47 above) 89.

⁷⁴ Pieterse (n 26 above) 155; Langa (n 3 above) 351; Klare (n 23 above) 146.

⁷⁵ *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 262: 'What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future.'; *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C) par 100: 'Ours is a transformative constitution.'

from all previous orders and seeks to transform the society of South Africa from the injustices brought about by apartheid and to change the legal, political and economic tenets of the society.⁷⁶ This transformation is envisaged in the Constitution's values of redistributing power and resources, achieving equality and eradicating all forms of domination and material disadvantages as well as creating opportunities to enable the people realize their full potential.⁷⁷ The Constitution also mandates the accountability of state power in the exercise of public power and the application of human rights in private relationships.⁷⁸

Unlike the Westminster Constitution, which was based on a system of parliamentary supremacy, the 1996 Constitution of South Africa is now 'the supreme law of the Republic'.⁷⁹ The preamble to the Constitution is historically self-conscious and reaffirms the Constitution's commitment to the transformation of South Africa.⁸⁰ The new Republic of South Africa and the Constitution are founded on the values of human dignity, the achievement of equality, non-racism and non-sexism.⁸¹ The courts have authority to declare any law that is inconsistent with the Constitution as void, to the extent of the inconsistency.⁸² The doctrine of separation of powers is entrenched and the Constitution specifically prohibits other organs of state from interfering with the functioning of the courts.⁸³

Of paramount importance is the justiciable bill of rights contained in the South African Constitution, which guides courts on the limits of government power and the extent of

⁷⁶ Sibanda (n 17 above) 487; Pieterse (n 26 above) 157.

⁷⁷ Albertyn & Goldblatt (n 24 above) 249.

⁷⁸ Pieterse (n 26 above) 156.

⁷⁹ Section 2.

⁸⁰ Klare (n 23 above) 153-155.

⁸¹ Section 1, section 7.

⁸² Section 172(1) (a); Langa (n 45 above) 4.

⁸³ Section 165 (2).

its obligations to the people.⁸⁴ These obligations stretch beyond the traditional civil and political rights to socio-economic rights, including the rights to access housing, health care, food, social services and water.⁸⁵ The socio-economic rights are crucial in helping to deal with the legacies of inequality and lack of social and economic amenities that were created by apartheid.⁸⁶ The Constitution also includes affirmative action provisions aimed at correcting the social, economic and political vulnerabilities.⁸⁷ The bill of rights extends beyond the application of the state and infiltrates to intervene even in the private sphere.⁸⁸ Although the rights may be limited, any attempted limitation should be carefully conceived and must pass the test of being reasonable and justifiable in an open society.⁸⁹

The story of South Africa's constitutional transformation does not stop there. After the passing of the new Constitution there was a realization that the text in the 1996 Constitution alone would not bring about the much desired societal transformation. There was also a realization that the 'post liberal, post authoritarian and transformative' nature of South Africa's constitution called for a radical change in its interpretation, implementation and enforcement so as to advance its values and goals.⁹⁰ The judiciary has been expressed as bearing the ultimate responsibility of making or breaking the Constitution through their role in interpretation and application.⁹¹ It is from this understanding that the discussions on transformative constitutionalism begin.

3.3 What is transformative constitutionalism?

⁸⁴ Chapter 2 on the Bill of Rights.

⁸⁵ Ibid.

⁸⁶ Pieterse (n 26 above) 163.

⁸⁷ Section 9(2).

⁸⁸ Section 8(2), (3).

⁸⁹ Section 36.

⁹⁰ Klare (n 23 above) 156.

⁹¹ Langa (n 3 above) 353.

Transformative constitutionalism is a notion that has been discussed fairly widely in South Africa's constitutional discourse. Its proponents however admit that the subject remains highly contested and difficult to formulate.⁹² Outside of South Africa the framework is not new and has also been explored, although South Africa is arguably one of the most cited examples of transformative constitutionalism within contemporary constitutional discourse.⁹³

Transformative constitutionalism in basic terms implies a framework that is aimed at a substantive change of society.⁹⁴ As such, it derives its presence from the Constitution, guided by the impetus to change from an unjust past to building a democratic nation.⁹⁵ The framework is made up of two distinct concepts; that of transformation and constitutionalism.⁹⁶ It is therefore important to begin by understanding what each of these concepts envisages as this becomes crucial in the understanding of the framework as a whole. *Transformation* generally implies a change in a state of affairs from one that previously existed to something new, although this is not to say that this meaning is one that is universally accepted.⁹⁷ The Black's law dictionary defines transformation as a process of organization and radical changes,⁹⁸ while the free online dictionary describes it as a marked change in appearance or character, which is usually for the better.⁹⁹

⁹² Langa (n 3 above) 351; Sibanda (n 17 above) 488.

⁹³ See for example P Hanafin *Constituting identity: political identity formation and the Constitution in post-independence Ireland* (2001); H Carr & H Caroline 'YL v Birmingham City Council and others, commentary: Morag Mc Dermont judgment' in R Hunter *et al* (eds) *Feminist judgments from theory to practice* (2010) 311: generally.

⁹⁴ Langa (n 3 above) 352.

⁹⁵ Rapatsa (n 2 above) 887.

⁹⁶ Rapatsa (n 2 above) 890.

⁹⁷ Wesson & Du Plessis (n 47 above) 189.

⁹⁸ <http://www.thelawdictionary.org>.

⁹⁹ <http://www.thefreeonlinedictionary.com>.

When defining transformation within legal circles, the constitution always takes center stage. While scholars converge at a point of the need for change, the substance of such change in society is captured in various ways. The idea of change is hence very central to the discussion of transformative constitutionalism but the question that scholars struggle to answer in their works is *just how much change is possible and also desirable?* I revisit this discussion later on when I argue that although it may generally be agreed that the idea of change is constant in transformative constitutionalism, the magnitude of change that is perceived has a role to play in understanding the framework of transformative constitutionalism. This can be seen through the various definitions that have been adopted.

To some scholars the process of transformation implies a 'move from an old to a new legal order',¹⁰⁰ or a 'shift that aims to go beyond mere formal changes and to encompass substantive changes'¹⁰¹ as envisaged in the constitution,¹⁰² or the use of the constitution and the law to transform the political, social, economic and legal practices of society in order to alter the arrangement of society along these lines.¹⁰³ It is also defined as a process of creating change that is almost unimaginable; beyond the ordinary level, which presupposes large scale change¹⁰⁴ and a huge kind of change that goes beyond mere reforms and almost towards, but not quite a revolution.¹⁰⁵ Reading through these and other various definitions of transformation, it is clear that while some scholars are comfortable with mere formal change as sufficient, there are others who

¹⁰⁰ N Baraza 'A manifesto for a modern judiciary' Paper presented at the 7th annual Judges Colloquium, 5 August 2011, 2. Unpublished, on file with author.

¹⁰¹ Van Marle (n 25 above) 652-653.

¹⁰² Baraza (n 100 above) 2.

¹⁰³ Van Marle (n 25 above) 289.

¹⁰⁴ Albertyn & Goldblatt (n 24 above) 249.

¹⁰⁵ Langa (n 3 above) 352; Albertyn & Goldblatt (ibid); *Van Rooyen v S* 2002 8 BCLR 810 (CC) par 50: 'Transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society...'; Van Marle (n 25 above) 652; Klare (n 23 above) 153-155.

insist on bringing out the significance and magnitude of change in the process of transformation.

Drucilla Cornell for instance, describes transformation as a radical change that is meant to restructure a system along social, political and legal lines, thereby completely altering the initial structure of society.¹⁰⁶ She contrasts the process of transformation to an evolution.¹⁰⁷ While evolution also creates some kind of change, the systems still remain intact.¹⁰⁸ Transformation on the other hand refers to a change which makes a significant difference such that a system no longer conforms to its identity, and where even the products, in this case the people in society transform along with the system.¹⁰⁹ Transformation in this case results in change to individual lives, dreams and aspirations.¹¹⁰ To Cornell and other critical scholars, the process of transformation must therefore involve change in all aspects of life; including social, economic, legal and political.¹¹¹ Reaching all these corners of transformation requires more than the rule of law as an agent of transformation and therefore includes other disciplines.¹¹² It also encapsulates a process of complete change of culture and thought by individuals, to begin viewing and understanding things in a different way from the way they did previously.¹¹³

¹⁰⁶ D Cornell *Transformations; recollective imagination and sexual difference* (1993) 1. Although Cornell's book is mainly on feminist theories and the need for transformative interpretation of feminist theories, her understanding of transformation ties up with this discussion.

¹⁰⁷ Cornell (n 106 above) 1.

¹⁰⁸ Cornell (ibid).

¹⁰⁹ Cornell (n 106 above) 2.

¹¹⁰ Cornell (n 106 above) 3; Van Marle (n 25 above) 656-657.

¹¹¹ Van Marle (n 25 above) 288; Langa (n 3 above) 352, 353; Van der Walt (n 25 above) 262, 263; Klare (n 23 above) 159.

¹¹² Van Marle (ibid).

¹¹³ Cornell (n 106 above) 2.

Constitutionalism on the other hand denotes an appropriate system or approach that is applied so as to aid in the transformation process, with the idea of creating an egalitarian and democratic society. Within constitutional discourse it is particularly described as the act of distributing and limiting government powers by laws made by the people, which must be adhered to, obeyed and enforced by the government.¹¹⁴ Constitutions limit government powers by establishing the rule of law, by providing for the separation of powers, by providing for checks and balances and also by participatory governance amongst other means.¹¹⁵ Constitutionalism is associated with a structure that could bring and sustain stability to a legal and political system.

Part of the tension that affects transformative constitutionalism is that it rests on a paradox. Van der Walt discusses the paradox between transformation and constitutionalism and the difficulty of accommodating change in a constitutional democracy.¹¹⁶ He is concerned about the 'apparent contradiction of transformation in a constitutional democracy'.¹¹⁷ This is so because 'transformation implies or even demands change, whereas constitutionalism seems to secure or even entrench stability'.¹¹⁸ It is this paradox that plays out as a constant challenge within transformative constitutionalism and continuously exposes the tension between the hope and desire for change on the one hand and the insistence to tradition and status quo on the other hand.¹¹⁹

My engagement with transformative constitutionalism in South Africa begins with an article that was written in 1996 by the late lawyer and scholar, Etienne Mureinik.¹²⁰ His

¹¹⁴ Mbondenyi & Ambani (n 9 above) 8.

¹¹⁵ Mbondenyi & Ambani (ibid).

¹¹⁶ Van der Walt (n 25 above) 4, 5.

¹¹⁷ Van der Walt (ibid).

¹¹⁸ Van der Walt (ibid).

¹¹⁹ Van der Walt (n 25 above) 5.

¹²⁰ Mureinik (n 3 above) 31.

article deserves mention here because Klare's own article, which I discuss next, not only makes extensive reference to Mureinik but was written as a tribute to him.¹²¹ Mureinik wrote shortly after South Africa had emerged from decades of apartheid under the negotiated 1993 Constitution and so sought to discuss the purpose of the bill of rights as an instrument of change. The beginning of his discussion is the post-amble to the interim Constitution, where the 1993 Constitution had been described as a 'historic bridge'. If indeed the interim Constitution was a historic bridge, like all bridges, Mureinik poses the question whose answer is the focal point of his discussion; *a bridge from where and to where?*¹²²

In answering the question he suggests in his discussion that the interim Constitution was a bridge meant to guide the South African society from a culture of authoritarianism to one of accountability. He writes in this regard:

What the bridge is from is a culture of authority... If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification.¹²³

The culture of authority is representative of the apartheid era, which was characterised by an authoritarian and repressive government and a submissive people. This culture also ensured that what parliament as a supreme body passed as law was obeyed without the need for justification and the state was not held accountable.¹²⁴ The culture of justification that the 1993 Constitution was expected to lead to was a complete contrast to the previous era. The new order represented an era of governmental

¹²¹ Klare (n 23 above) 146.

¹²² Mureinik (n 3 above) 31.

¹²³ Mureinik (n 3 above) 31, 32.

¹²⁴ Mureinik (n 3 above) 32.

accountability for its actions and a community of obedience to the new order based on that accountability and not coercion.¹²⁵

Mureinik then suggests that at the centre of this move to a culture where 'every exercise of power is expected to be justified' is the justiciable bill of rights contained in the 1993 Constitution.¹²⁶ The place of the justiciable bill of rights cannot be underestimated, for it held the foundation of South Africa's political negotiations to democracy, along with other provisions that were included in the Constitution. Not only was it the first bill of rights for South Africa, but it was perhaps the most significant demonstration of the authority of the people to hold the governors to account and therefore to ensure that they successfully enforced the rest of the Constitution.¹²⁷

Having established the significance of the interim bill of rights, Mureinik then pegs the potential of achieving a truly accountable government to the judiciary through its adjudication role. He specifically addresses his paper to judges and by extension lawyers, they being the people 'entrusted with its (the Constitution's) upkeep'.¹²⁸

He begins by noting that the bill of rights in the interim Constitution had been deliberately drafted in an open ended nature. This deliberate decision by the drafters of the Constitution was quite significant in that it would empower judges to apply their individual interpretation. Mureinik opines that such discretion would have allowed judges and lawyers to influence the interpretation of these rights through innovative and purposeful interpretation.¹²⁹ By so doing the adjudication process would then enable any weaknesses within the bill of rights to be addressed. However, Mureinik

¹²⁵ Mureinik (ibid).

¹²⁶ Mureinik (ibid).

¹²⁷ Mureinik (ibid).

¹²⁸ Mureinik (n 3 above) 31.

¹²⁹ Mureinik (n 3 above) 47-48.

expresses fear that the formalistic and conservative legal culture of the South African judiciary may not allow the judiciary to seize the opportunity. Unless the judiciary was properly guided into changing their legal culture, Mureinik felt that they would hamper the journey towards moving away from a system of authoritarianism to accountability in South Africa.¹³⁰

It is Karl Klare's article written in 1998 that introduced transformative constitutionalism in the context of South Africa.¹³¹ Klare defines transformative constitutionalism as a legal, historical and political theory of interpretation and understanding of the South African Constitution, in the following terms:

A long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.¹³²

Klare's conceptualisation is thus based on South Africa being able to explore the potential of the Constitution and to use it to transform the society, free of any violence.¹³³ Further, the basis of his discussion is whether it is possible to admit candidly the role of politics and other moral inclinations in adjudication and still pursue a method of constitutional interpretation that would remain true to the spirit of transformation.¹³⁴

A fundamental agenda of the framework as envisaged by Klare is institutional and normative establishment. Like Mureinik, Klare's paper also focuses on the adjudicative

¹³⁰ Mureinik (n 3 above) 48.

¹³¹ Klare (n 23 above) 146.

¹³² Klare (n 23 above) 150.

¹³³ Klare (ibid).

¹³⁴ Klare (n 23 above) 150.

role of the judiciary. However, he recognises the need for the other two arms of government to be involved in the transformation dialogue.¹³⁵ Their involvement must be through a long term commitment of constitutional enactment from the legislature and enforcement from the executive arm.¹³⁶ Despite this fact, the choice to deal with the adjudicative role of the judiciary in his paper is quite deliberate. Referring to Mureinik's paper and a similar choice of audience, Klare explains:

Adjudication is still worthy of continuing, close attention by legal scholars, for several reasons. The most obvious is that, for better or worse, the negotiated political foundation upon which democratic transition in South Africa rests includes promulgation of a *justiciable* Bill of Rights ... Among types of law-making, adjudication is, or is supposed to be, the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule, and principle. We may therefore legitimately expect constitutional adjudication to innovate and model intellectual and institutional practices appropriate to a culture of justification. Continued attention to adjudication should accordingly illuminate South Africa's steps across the bridge. Adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice.¹³⁷

He therefore does not mean that other institutions are less important, nor does he claim that transformative constitutionalism is a framework limited to legal interpretation or the legal realm. On the contrary, Klare's definition of transformative constitutionalism recognises the place of historical consciousness and a political environment conducive to transformation, depicting these as crucial in the enactment and enforcement of the

¹³⁵ Klare (ibid).

¹³⁶ Klare (ibid); Rapatsa (n 2 above) 890.

¹³⁷ Klare (n 23 above) 147.

transformative constitution.¹³⁸ This multidisciplinary engagement of law and other subjects is a critical element of transformative constitutionalism.

Klare's suggestion of transformative constitutionalism in South Africa relies on his description of the South African Constitution as a post liberal and transformative Constitution.¹³⁹ Since the Constitution neither provides a blue print nor stipulates the exact process that the judiciary would use to achieve social change, Klare therefore suggests an adjudication approach that he finds most suitable in the circumstances.¹⁴⁰ According to him, the radical difference in the constitutional dispensation also requires a change in interpretation. The change would have to be from a traditional liberal interpretive approach to the adoption of a post liberal approach, because of the different character of the Constitution.¹⁴¹ There are several reasons as to why Klare refers to the South African Constitution as a post liberal document. His reasons cover the fact that the Constitution not only seeks to deal with the past injustices of apartheid, but is also forward looking in various ways.¹⁴²

Firstly, the South African Constitution differs from traditional liberal constitutions whose concern is in securing the rights of individuals against the state. Such constitutions are also mainly concerned majorly with securing civil and political rights.¹⁴³ Unlike the traditional liberal approach, the South African Constitution was drafted with the agenda of collective social change, social equality and self-determination.¹⁴⁴ This vision is evidenced in the preamble to the constitution and in the inclusion of socio-economic

¹³⁸ Klare (n 23 above) 150.

¹³⁹ Klare (n 23 above) 151 and Part I on the post liberal Constitution.

¹⁴⁰ Liebenberg (n 27 above) 27.

¹⁴¹ Klare (n 23 above) 153-154.

¹⁴² Liebenberg (n 27 above) 27.

¹⁴³ Klare (n 23 above) 153.

¹⁴⁴ Klare (ibid).

rights in addition to the traditional civil and political rights.¹⁴⁵ By providing for these rights, values and further the institutions necessary, the Constitution guides towards a process of transformation of the South African society as a whole.¹⁴⁶

Secondly, the Constitution of South Africa moves away from the traditional negative restraint placed on government in terms of civil liberty and property rights to positive and affirmative duties on the state to enable the realization of socio-economic rights.¹⁴⁷ Closely related to this is that the bill of rights that is contained in the 1996 Constitution is meant to apply both vertically and horizontally. This essentially means that while the traditional bill of rights imposed duties on the state, the post liberal bill of rights binds not only the state, but also extends to private parties.¹⁴⁸

Moreover, unlike the previous orders where the constitutions were drafted for the majority blacks without the legitimacy of the law making institution, the post liberal Constitution of South Africa is one that is founded on a transparent and participatory system of governance. It is also based on the reality of the people of South Africa being able to hold the state accountable.¹⁴⁹ This is a radical change from the previous apartheid government that was non representative and not accountable to the citizens. Finally Klare describes South Africa's Constitution as one that has been drafted with a historical consciousness of South Africa's past and because of that historical consciousness, contains marked departure from the apartheid constitution.¹⁵⁰

¹⁴⁵ Preamble to the 1996 Constitution, Chapter 2 on the Bill of Rights.

¹⁴⁶ Liebenberg (n 27 above) 29.

¹⁴⁷ Klare (n 23 above) 154.

¹⁴⁸ Klare (n 23 above) 155, Constitution section 8.

¹⁴⁹ Klare (n 23 above) 155.

¹⁵⁰ Klare (ibid).

Based on these reasons, Klare suggests the post liberal approach as the best interpretive approach to the Constitution.¹⁵¹ He favors the approach for several reasons.¹⁵² First is because this approach remains true to the spirit of transformation. It does so by advocating for a complete change in traditional interpretation habits. The transformative habits encourage innovation in interpretation, and change in methodology and mindset of the judiciary to an approach that is based on 'interpretative fidelity'.¹⁵³ The approach is crucial in that it also exposes the realities that are otherwise usually hidden, on the potential and limits of law to bring about transformation.

Klare throws in a word of caution regarding the normative and institutional framework that is expected to steer transformative constitutionalism. According to him, a major challenge that is likely to affect the pace of transformative constitutionalism is the conservative, formal and rigid legal culture of judges and lawyers in South Africa.¹⁵⁴ This serious threat arises from the traditional idea of adjudication in South Africa, where judges, in pursuit of the conservative culture, preferred to take a passive role in interpretation.¹⁵⁵ As far as the judges were concerned, their role had always been very passive in the process of adjudication and that was to look for the intention of parliament and to apply it as it 'was'. The traditional approach was to interpret law in favor of the executive for gains that were not necessarily in line with the transformative vision. This legal culture creates quite a disconnection with the post-apartheid Constitution, which otherwise empowers the judiciary.¹⁵⁶ Like Mureinik, Klare notes that

¹⁵¹ Klare (n 23 above) 152.

¹⁵² Klare (n 23 above) 151, 156. He states: 'I would be quite prepared to contend that the post liberal reading is the *best* interpretation and therefore the one that should guide South African judges and lawyers'.

¹⁵³ Klare (n 23 above) 150.

¹⁵⁴ Klare (n 23 above) 162, 163.

¹⁵⁵ Klare (n 23 above) 152.

¹⁵⁶ Klare (ibid).

the aspirations of transformation are not likely to be achieved if the judiciary still views themselves as constrained in terms of constitutional interpretation. While Klare therefore agrees that the exercise of their duties is constrained by rules on how they must exercise their authority, interpretation of the open ended constitutional provisions remains choice-laden. Regarding the indeterminacy of legal texts, Klare notes the following:

As everyone knows, of course, adjudication runs head-long into the problems of interpretive difficulty and the indeterminacy of legal texts. Legal texts do not self-generate their meanings; they must be *interpreted* through legal work. Legal texts, particularly constitutions, are shot through with apparent and actual gaps¹⁵⁷

The choice that judges make is a reflection of the conflict that will always exist between constraint and freedom. While the open ended text is in actual sense an advantage that allows judges an opportunity for discretion, Klare's worries about the choice of judges. Since most judges in South Africa are schooled in a formal and conservative legal culture, it is likely that they may opt for a conservative and restrictive reading, while insisting that the approach is the only legal one. This would then slow down the pace of transformative.¹⁵⁸ However, a judge who is aware of the need for a different interpretation method may appreciate the inevitability of choice and engage, within reasonable bounds, with judicial freedom, instead of claiming to be absolutely constrained.¹⁵⁹ Such a judge recognizes that s/he will have to consider external sources, but the test is in how they apply themselves to the influences.¹⁶⁰ For Klare, the candid admission of the tension between freedom and constraint is one issue that judges in

¹⁵⁷ Klare (n 23 above) 157.

¹⁵⁸ Klare (n 23 above) 152.

¹⁵⁹ Klare (n 23 above) 158.

¹⁶⁰ Klare (n 23 above) 157, 158.

South Africa will at all times have to deal with, owing to the indeterminacy of the law.¹⁶¹ The judiciary needs to recognize that the post liberal text in the constitution requires new imagination, new reflection about legal method, analysis and reasoning, a new mind set and new methodology.¹⁶² In the next chapter I discuss the issue of legal culture in more detail.

In order to understand Klare's discussion of transformative constitutionalism even better, it is crucial to analyse his jurisprudential and theoretical roots.

3.4 Karl Klare's jurisprudential roots: the Critical Legal Studies

Klare is a prominent member of the Critical Legal Studies movement.¹⁶³ As will be seen here, his views in the paper discussed above are greatly influenced by the themes espoused by the CLS school of thought. This movement originated in the United States of America in the 1970s.¹⁶⁴ It has its roots in American realism, having been founded by a group of American scholars who were dissatisfied about issues relating to traditional American realism.¹⁶⁵ Their idea was to unravel and challenge existing legal institutions. Despite having moved beyond American realism, the CLS does still share some similar tenets with the American realists.¹⁶⁶ The movement has since spread from America to other parts of the world, including South Africa. Adherents of the school share certain themes that can be traced in their works.¹⁶⁷

¹⁶¹ Klare (n 23 above) 157-160.

¹⁶² Klare (n 23 above) 156.

¹⁶³ Hereinafter the CLS. WB le Roux & K van Marle 'Critical legal studies' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 246: 247; D Kairys *The politics of law; a progressive critique* (1998) generally.

¹⁶⁴ G Minda *Postmodern legal movements; law and jurisprudence at century's end* (1995) 106-127; Le Roux & Van Marle (n 163 above) 246; D Meyerson *Jurisprudence* (2011) 217.

¹⁶⁵ Minda (n 164 above) 13-82; Le Roux and Van Marle (ibid); Meyerson (ibid).

¹⁶⁶ Le Roux & Van Marle (ibid); Meyerson (ibid).

¹⁶⁷ C Douzinas & A Gearey *Critical jurisprudence; the political philosophy of justice* (2005) 229-258; Le Roux & Van Marle (n 163 above) 259.

One of the main themes of the CLS movement is its interest in historical contingencies.¹⁶⁸ Although American realists are also concerned about the place of history in law, their historiography is not as developed as that of the CLS movement.¹⁶⁹ It is through this historical consciousness that the CLS movement has the potential of reconstructing present orders and institutions by looking into the injustices of the past.¹⁷⁰ As such, the adherents of CLS such as Klare hold the view that historical self-consciousness of the 1996 Constitution plays a fundamental role in the transformation process in South Africa.¹⁷¹ Likewise, other adherents of Klare's theory also reflect on this significant role of history in various specific topics that they discuss, by using that history to find answers to current transformation issues in South Africa.

The CLS movement places indeterminacy central to the law and legal rules.¹⁷² The indeterminacy thesis emphasises that words which make legal rules are not capable of a stable and pre-ordained meaning and therefore even legal solutions cannot be preordained.¹⁷³ The indeterminacy of law further means that judges have to give meaning to rules and legal provisions because words in statutes cannot by themselves determine cases unless meaning is given to them, in the process of adjudication.¹⁷⁴ This unfortunately is a fact that is not readily admitted by judges, who, according to Klare, see themselves as absolutely constrained when in reality they are not. It is against this reality that Klare argues the need to be candid and acknowledge the realities of indeterminacy so as to then confront the issues that stand in the way of transformative

¹⁶⁸ R Gordon 'Critical legal histories' (1984) 36 *Stanford Law Review* 57: generally; Le Roux & Van Marle (n 163 above) 248.

¹⁶⁹ Minda (n 164 above) 25; Le Roux & Van Marle (ibid).

¹⁷⁰ Le Roux & Van Marle (ibid).

¹⁷¹ Le Roux & Van Marle (ibid).

¹⁷² D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685: generally; Meyerson (n 164 above) 218; Le Roux & Van Marle (n 163 above) 250, 258.

¹⁷³ Kennedy (ibid); Meyerson (ibid).

¹⁷⁴ Meyerson (ibid).

adjudication.¹⁷⁵ It is for the same reason that Klare also calls for a conscious admission of the need for change in legal culture so as to exercise constitutional freedom in judicial interpretation.

As a result of the indeterminacy thesis, adherents of CLS further agree that legal materials and case law are not necessarily fully responsible for the outcomes of legal disputes. Their reality is that judges will have to consult other external sources so as to come up with a decision. Whatever other external factors and values that are considered are also partly responsible for the end results of judgments. As Klare points out, this therefore makes the adjudication process highly subjective.¹⁷⁶ Critics therefore view the idea of legal reasoning as a myth that has been used to catalogue the unpleasant realities of the adjudicative role of judges.¹⁷⁷ Mostly judges will instead choose to conceal the influence of their personal views by using the doctrine of stare decisis and legal rules as a cover up.¹⁷⁸ The adherents of CLS theory instead argue that not only are the precedents relied on by judges a result of external influence, but so too are the legal rules that they apply. If these external factors are also influences to the law itself they then further warn against assuming that the law is a 'stable, uncontroversial, natural and coherent set of rules'.¹⁷⁹ Instead, they advocate for candour in seeing the law for what it really is.

Amongst the external factors that are always at play in influencing the law is politics. The adherents of the CLS theory therefore agree on the difficulty of adhering to a law/politics divide. They choose to instead view the law as inevitably political and because

¹⁷⁵ Klare (n 23 above) 163.

¹⁷⁶ Le Roux & Van Marle (n 163 above) 258.

¹⁷⁷ Klare (n 23 above) 158.

¹⁷⁸ Meyerson (n 164 above) 218; P Gabel 'Rectification in legal reasoning' (1980) 3 *Research in law and sociology* 17: generally. See also Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1984) 62 *Texas Law Review* 1563: generally.

¹⁷⁹ Meyerson (n 164 above) 217.

of the political influence in law and legal institutions, Klare's interpretation of transformative constitutionalism is seen as a collective effort with other political institutions. This stand would also explain why Klare suggests candour in admitting the place of politics in the adjudication process.

The total of all these external values that play a role in the adjudication process whether as a result of education, experiences, personal views, politics and others are evidence that indeed human beings are not free. This is in the sense that they cannot make decisions while detached from social, political or economic constraints. Because human beings are a result of their conditions of life from which judges cannot detach themselves, a change of legal culture within the judiciary is recognised as a process. This is a fact that is admitted by various other adherents of Klare's theoretical approach.

Finally, critics believe that law is in reality a tool that tends to serve the interests of the wealthy and powerful at the expense of the poor and disadvantaged. The politics of law enables legal rules to do this by protecting the wishes of the powerful against the demands of the poor. This discrepancy is illustrated by the contradiction that often occurs behind what the law may provide for and promise to do, vis a vis what it actually does. This theme therefore explains why the CLS adherents in South Africa in the context of transformation and transformative constitutionalism, starting with Klare call for nothing short of a revolutionary and large scale change. This must be the position if the framework of transformative constitutionalism is to be realised, and not mere formal change, which mainstream legal discourse advocates for. The theme also partly explains why the critical scholars I discuss have little faith in the law being able to bring about this kind of change. This is because in reality the law is used to hide the realities

of a contradictory and illegitimate system and to mask the unpleasant realities of social oppression and marginalisation of other perspectives.¹⁸⁰

3.5 Commentaries on transformative constitutionalism post Klare

As earlier stated, my approach in this segment is to characterise the arguments espoused by various scholars into three tentative groups, mainly for ease of analysis. Even though I will be taking this approach to differentiate their arguments, I must first acknowledge that there are other salient ideas of transformative constitutionalism that seem almost agreed across the board. A good point to start is on the South African Constitution which has received wide acclaim as a transformative document.¹⁸¹ Academics generally agree with Klare on the transformative nature of the Constitution. As earlier discussed, the key transformative objective is characterised by the Constitution's founding values, the duty placed on the state to respect, promote and respect rights in the bill of rights, the extension of the bill of rights to private relations, the substantive conception of the right to equality, inclusion of socio-economic rights and the limitation clause in the 1996 Constitution.¹⁸² The transformative nature of the Constitution has equally been echoed by the Constitutional Court in various cases.¹⁸³

¹⁸⁰ Meyerson (n 164 above) 217; D Kennedy *Sexy dressing etc. Essays on the power and politics of cultural identity* (1993) 1-33.

¹⁸¹ Klare (n 23 above) 151; Langa (n 3 above) 352; Van Marle (n 25 above) 651; E van Huyssteen 'The Constitutional Court and the redistribution of power in South Africa: towards transformative constitutionalism' (2000) 59 *Journal of African Studies* 258: 258.

¹⁸² Sibanda (n 17 above) 488; Pieterse (n 26 above) 161-163.

¹⁸³ For example *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 262: 'What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future.' See also *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658(CC) para 157.

It is generally agreed within South African constitutional discourse that the transformative nature of the Constitution is the basis of transformative constitutionalism.¹⁸⁴ It is equally acknowledged that despite various challenges this framework has continued to play a significant role in South Africa's transformation discourse and is therefore a good place to start.¹⁸⁵ Transformation is grounded in the need for change of the South African society into a democratic state based on human dignity, equality and freedom.¹⁸⁶ Central to the change is the realisation of social justice and socio-economic equality. It is this desire for substantive change that encapsulates the main goal of the transformative constitution.¹⁸⁷

While the discussions converge at the need for change, a crucial question that arises is just how deep the change envisaged in transformative constitutionalism is and to what extent the law can be the main vessel for this change. Commentators on Klare's notion differ on this aspect.

Former Constitutional Court justice, Laurie Ackermann presents the extraordinary changes introduced by the interim and the final Constitutions of South Africa as a constitutional revolution.¹⁸⁸ This is in as far as the the two Constitutions vary radically from the previous constitutional order of South Africa. Such a radical change would fit into Hans Kelsen's view of a 'substantive revolution' that entails a radical change in what is regarded as the *Grundnorm*, the foundational value that underpins the Constitution and legal order.¹⁸⁹ Ackermann holds that the South African change could be regarded

¹⁸⁴ Langa (n 3 above) 353.

¹⁸⁵ Langa (ibid).

¹⁸⁶ Van Huyssteen (n 181 above) 258; Van der Walt (n 25 above) 4.

¹⁸⁷ Langa (n 3 above) 352.

¹⁸⁸ LWH Ackermann 'The legal nature of South African constitutional revolution' (2004) 4 *New Zealand Law Review* 633: generally.

¹⁸⁹ Ackermann (ibid), with reference to Hans Kelsen *General Theory of Law and State* (1945) 117.

as a revolution, achieved constitutionally.¹⁹⁰ If the 1996 Constitution of South Africa represents such a radical change in the Grund-norm, it would hence follow that there is the need for a reconceptualization of approach, interpretation and enforcement of the new Grund-norm as suggested in transformative constitutionalism.

In their discussions, supporters of the framework also often make reference to the framework as one that is deeply rooted in a historical consciousness of South Africa's past and the hopes for a futuristic ideal.¹⁹¹ Such an approach presents the need for judges and lawyers, while interpreting the constitution in a transformative manner, to be aware of the way the South African Constitution came into being and the injustices that the post-apartheid constitution of South Africa seeks to remedy.¹⁹²

I now turn to engage with the ideas espoused by the first group of scholars, namely those who follow and support the notion without placing specific emphasis on the critical theoretical and jurisprudential vantage point. Albertyn and Goldblatt are possibly the first scholars in this group, having written in the same year that Klare wrote his article.¹⁹³ Others include Dikgang Moseneke who is a Constitutional Court judge presently and the late Pius Langa, former Chief Justice.¹⁹⁴

Albertyn and Goldblatt use the subject of social equality in South Africa to espouse Klare's discussion. Their choice of this subject is quite significant, being one of the central agendas of transformative constitutionalism within the context of South Africa's

¹⁹⁰ Ackermann (ibid).

¹⁹¹ Van der Walt (n 25 above) 657; E Christiansen 'Transformative constitutionalism in South Africa: creative uses of the constitutional court's authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 576: 576.

¹⁹² *S v Mhulungu & 4 others* [1995] ZACC 4, 1995(3) SA 867 (CC) 1995 (7) BCLR 793 (CC) per Sachs J para 127.

¹⁹³ Albertyn & Goldblatt (n 24 above) 248.

¹⁹⁴ Moseneke (n 24 above) 309; Langa (n 3 above) 351.

apartheid past and also in the new bill of rights.¹⁹⁵ Achieving a society that is founded on equality within the transformation agenda requires radical change, which the two describe as nothing short of 'a complete reconstruction of the state and society, including a redistribution of power and resources'.¹⁹⁶ In their article they examine the development of the Constitutional Court's jurisprudence on equality.

The gist of their argument is a reminder of Klare's concern that the Constitution should be used to drive socio-economic reform and substantive equality. Albertyn and Goldblatt note that the constitutional court's decisions have not been consistent in this respect. This is particularly on the parameters of defining unfairness, limitation and justifiability of the right to equality.¹⁹⁷ They are concerned about the potential dangers of understanding the protection of equality under the Constitution as merely protecting formal equality, which would place a hurdle in the way of achieving the transformative goals of the bill of rights.¹⁹⁸ Their argument indicates support for a historically conscious approach in the interpretation of the right to substantive equality. This approach would be useful in compelling the government to eradicate systemic discrimination perpetuated by past injustices.

Like Albertyn and Goldblatt, Langa also discusses the need for change as a core tenet of transformative constitutionalism.¹⁹⁹ He advocates for transformative constitutionalism as a framework rooted in the epilogue to the interim constitution, aimed at providing change between the unjust past and the future.²⁰⁰ It is inevitable for such revolutionary change to include change in norms and institutions necessary for a democratic nation. The changes include entrenching of civil, political, socio-economic and other pragmatic

¹⁹⁵ Albertyn & Goldblatt (n 24 above) 249.

¹⁹⁶ Albertyn & Goldblatt (ibid).

¹⁹⁷ Albertyn & Goldblatt (n 24 above) 255.

¹⁹⁸ Albertyn & Goldblatt (n 24 above) 260, 355.

¹⁹⁹ Langa (n 3 above) 352.

²⁰⁰ Langa (ibid).

rights and ensuring that the institutions that are charged with the constitutional responsibility act towards safeguarding the realisation of these rights.²⁰¹

Reflecting on the obstacles to transformative constitutionalism, Langa, like Klare and Mureinik makes out a good case for the need to transform the legal culture of the bench in South Africa.²⁰² It is only through a transformative reading of the Constitution that the courts can make the government accountable and therefore facilitate the change from an authoritarian to an accountability-based culture, as postulated by Mureinik.²⁰³ He agrees with Klare that the conservative and formalist approach presents a disconnection from the transformative interpretation of the Constitution, which otherwise requires a substantive mode of reasoning.²⁰⁴ Langa goes further and discusses what he sees as other challenges to transformative constitutionalism in addition to the issue of legal culture.

On the lack of access to justice, Langa notes that most South Africans may not realise the transformative goals of the Constitution because the cost of legal representation remains very high and only a few people can afford it.²⁰⁵ Thus, transformative constitutionalism can only become a useful and effective tool of ensuring equality if the society can access justice, which is currently a major problem.²⁰⁶ On the challenge of legal education, Langa points out the connection between the formal conservative culture of the judiciary and the role of legal education in further entrenching that culture. The traditional legal education, as he describes it was characterised by students being taught the art of rational deduction of legal principles, blindly without having to

²⁰¹ Langa (ibid).

²⁰² Langa (ibid).

²⁰³ Langa (n 3 above) 353.

²⁰⁴ Langa (n 3 above) 357.

²⁰⁵ Langa (ibid).

²⁰⁶ Langa (n 3 above) 355.

question their reasoning.²⁰⁷ What mattered is that the law was as parliament passed it to be. This approach had its roots in the apartheid legal order and as such, Langa views it as a way of continued cultivation of the formalistic and conservative reasoning of lawyers and judges in South Africa. He suggests that legal education must therefore be revised if South Africa is to achieve the goals of transformation.²⁰⁸

On who should take responsibility for the framework, Langa poses a challenge not only to the three arms of government but also to the public. A fundamental issue that may stand in the way of transformation is the racial division in South Africa. Langa notes that the healing and reconciliation that is badly needed for the transformation of the society is a matter that stretches beyond the government. It must be perpetuated by the people of South Africa.²⁰⁹ Langa re-emphasizes that the judiciary alone cannot eradicate the vast disparities in South Africa.²¹⁰ What comes out clearly from his discussion is that transformation is not only about the government delivering services to the people of South Africa, but also about the people of South Africa being able to voice their needs to government and holding the government accountable.

On the same issues, Moseneke also re-emphasises the need for synergy amongst the arms of government in a lecture he delivered at the 4th Bram Fischer Memorial Service. For him, this cooperation must be there, because it is an instruction from the constitution to which all three arms are bound.²¹¹ The three arms must therefore be engaged in a dialogue. He states in this regard:

Implicit in this proposition is that the Constitution enjoins the judiciary to uphold and advance its transformative design. This momentous constitutional imperative binds not

²⁰⁷ Langa (ibid).

²⁰⁸ Langa (n 3 above) 356.

²⁰⁹ Langa (n 3 above) 358.

²¹⁰ Langa (ibid).

²¹¹ Moseneke (n 24 above) 314.

only the judiciary but also all organs of the state. Moreover, the Constitution as supreme law applies to all law and binds all organs of state and the judiciary alike.²¹²

Moseneke's paper is mainly focussed on the role of adjudication in transformative constitutionalism. Like other scholars, he echoes the main purpose of transformation as that of change and healing the nation.²¹³ It is for him a framework that relies on the Constitution and institutions established thereunder to realise a democratic South Africa.²¹⁴ He echoes the fact that sustenance of transformative constitutionalism cannot come about unless the subservient and conservative legal culture of the judiciary is dealt with.²¹⁵ He also notes that, although the South African Constitution contains far reaching provisions, the only way that these can be useful is by the judiciary giving them an interpretation that is creative, substantive and purposeful.²¹⁶ He notes for instance that one of the cardinal features of the Constitution is to enhance government accountability. The Constitution therefore empowers the judiciary to review the actions of the executive through judicial review.²¹⁷ This and other principles of accountability can only work if the courts as an institution are established to safeguard proper interpretation and application of the Constitution.²¹⁸ The inclusion of judicial review as a mechanism of accountability is fundamental in South Africa's history where previous orders did not allow the judiciary to question the actions of the state. However, were the judiciary to fail to seize the opportunity, Moseneke is afraid that the very progressive text in the Constitution would not bear fruit.

²¹² Moseneke (ibid).

²¹³ Moseneke (n 24 above) 315.

²¹⁴ Moseneke (n 24 above) 315, 316.

²¹⁵ Moseneke (n 24 above) 316.

²¹⁶ Moseneke (n 24 above) 316, 317.

²¹⁷ Moseneke (n 24 above) 316.

²¹⁸ Moseneke (ibid).

Moseneke also re-emphasizes a point earlier made by Klare on the need for candid acknowledgment about the influence of extra-legal factors in judicial decision making. He notes that judges need to embrace and understand that the 1996 Constitution allows them to be free from confinement in the quest for creative decision making. By 'reconfiguring the way judges do their work, judges must have a conscious understanding of what is expected of them.²¹⁹ He notes that the intention of the Constitution is to allow judges to look beyond legal consideration to the interrelatedness of subjects so as to restore substantive justice.²²⁰ Because of this radical change from what they have been used to, judges will need to change the culture concerning their passive role in judicial adjudication. Moseneke's argument comes from a point of transformative constitutionalism recognising the reality that judges will need to consider political, historical and other external issues in decision making.²²¹ Further, it is the choice of these extra-legal values that is crucial, so that judges have to make value laden choices based on approaches to judicial interpretation.²²²

This brings me to the second strand of commentaries. Amongst the scholars who fall in this group are Andre' Van der Walt and Karin van Marle. Because of their background in the CLS school of thought, both Van der Walt and Van Marle come out rather strongly on a number of theoretical issues. Their papers generally render a theoretical description of the complexity of transformative constitutionalism. They also articulate the tensions within the framework at a deeper level and also a candid discussion on the limits of law thesis.²²³ I begin by discussing Van Marle – in particular two of her articles.

²¹⁹ Moseneke (n 24 above) 318.

²²⁰ Moseneke (ibid).

²²¹ Moseneke (n 24 above) 317.

²²² Moseneke (ibid).

²²³ Van Marle (n 25 above) 296-297.

The first article was written in 2004, eight years into the new constitutional dispensation.²²⁴ Van Marle's main theme of discussion in the paper is the role of the Constitution and legislation in addressing inequality and discrimination in post-apartheid South Africa. She generally argues that the law is limited in how far it will be able to deal with this problem and to create a transformed society. At the start of her paper Van Marle notes that South Africa had experienced various legal transformation attempts, which were still going on and some of which may not have succeeded as expected.²²⁵ Based on her jurisprudential background, she is candid about some of the failed projects. She does not express worry about them or fear about the challenges of transformative constitutionalism in South Africa.²²⁶ Instead, she sees the need for transformative constitutionalism in that it advocates for candid exposure of the multiplicity of tensions in the framework.²²⁷ Van Marle's reaction would be a reminder of one of the main themes in the CLS school of thought that law does not address every person's interest and is therefore contradictory and in fact unstable.

This paper is also crucial in as far as Van Marle also deals with the question of *just how much change* is envisaged in transformative constitutionalism. Her understanding of transformation within this specific subject is that the change that results from the Constitution's instructions should be substantial equality and not just simply some formal change.²²⁸ This is the background of her discussion on equality and prevention of discrimination in section 9 of the South African Constitution. Her desire to see substantive change means that she is not content with a reading of the section in a formal and conservative way that excludes the external realities of the rights. Such a

²²⁴ See (n 25 above) in particular K Van Marle 'Meeting the world halfway; the limits of legal transformation' (2004) 16 *Florida Journal of International Law* 651: generally.

²²⁵ Van Marle (n 25 above) 651, 652.

²²⁶ Van Marle (ibid).

²²⁷ K Van Marle 'Law's time, particularity and slowness' in W Roux & K Van Marle (ed) *Law, memory and the legacy of apartheid years after AZAPO v President* (2007) 11: 74.

²²⁸ Van Marle (n 25 above) 654.

reading she notes 'would result in a mere continuance of the status quo'.²²⁹ Van Marle engages with the limits of law thesis, specifically referring to the limitations of this statute to bring about the substantial changes as envisaged in transformative constitutionalism. This engagement is crucial in that it exposes the paradoxes that exist in the law, thereby opening up conversation on how to deal with these challenges. Her choice of topic is therefore quite appropriate and is based on the reality that the law would only lead us halfway into the transformation process.

The South African Employment Equity Act that she considers was promulgated pursuant to section 9 of the South African Constitution.²³⁰ Its main purpose is the promotion of equality and protection from discrimination in employment relations.²³¹ The Act, like other statutes enacted pursuant to the 1996 Constitution, was seen as one that would help to bring out substantial change in South Africa. While recognizing the success that has been achieved through the statute, Van Marle regrets some of the limitations of the statute in bringing about substantive change as a result of various reasons.

First, she argues that the law is limited in how far it can transform society, because the reality is that it is selective and therefore marginalizes some parts of the society. According to Van Marle, the law does not have the capacity to deal with every person as an individual. Because of this, Van Marle agrees that although transformation should aim at the kind of change expressed by Cornell it is still hard to achieve such. Cornell's describes transformation as follows:

By transformation I mean change radical enough to so dramatically restructure any system - political, legal, or social - that the 'identity' of the system is itself altered. The

²²⁹ Van Marle (n 25 above) 652.

²³⁰ Act No 55 of 1998.

²³¹ Section 2 declares the purpose of the Act.

second meaning, defined broadly as possible, turns to the question of what kind of individuals we would have to become in order to open ourselves to new worlds.²³²

While such would be an ideal situation, Van Marle notes that legal and other policies based on gender differences hamper the transformation process despite there being express statutes.²³³ She notes in this regard:

Although formal equality and other legislative protections have achieved some gains, most societies still continue to impose and reinforce rigid gender identities upon their citizens.²³⁴

As a result of these policies, the benefits of this law under the statute especially in terms of absolute property rights have mainly been felt amongst black men as compared to black women.²³⁵ In essence this means that the statute presents only a superficial answer to the past and therefore not a radical transformation.²³⁶

She also argues that because the law is narrow and based on largely generalized theories, it does not allow for all of society's aspirations to be captured and addressed.²³⁷ Citing Christodoulidis, Van Marle argues that the law is limited in its potential since it is almost always abstract and is based on theoretical assumptions of both the problems that it seeks to deal with as well as the people that have these problems.²³⁸ Within this specific subject there is an assumption of a general perspective

²³² Van Marle (n 25 above) 656, citing D Cornell *Transformations* (1993) 1.

²³³ Van Marle (ibid).

²³⁴ Van Marle (ibid).

²³⁵ Van Marle (ibid).

²³⁶ Van Marle (n 25 above) 657.

²³⁷ Van Marle (ibid).

²³⁸ Van Marle (ibid).

in a particular class or particular group.²³⁹ In other words law deals with its subjects as an institution, a corporate body or as a designated group.²⁴⁰ The end result is that even the most transformative laws fail to consider and accommodate all individual experiences and aspirations.²⁴¹

Van Marle questions the basis of the definition of a 'designated group' under the Employment Equity Act. This definition includes both white women and black women, which Van Marle feels should not be the case as it assumes them to have similar issues and to be equal, ignoring past and present contexts.²⁴² Van Marle cites Christodoulidis, who also criticizes such generalization of the subjects and conflict that law must deal with in transformation. The basis of their argument is that when dealing with any problem, there is what is entrenched in the law as the perceived and assumed view of the problem arising out of observation and then there is definitely what is also missed out because of the generalization.²⁴³ The generalization results in a superfluous solution, where the problem is only partly tackled, without getting into the details of what has been 'missed out', because it is either too specific or not part of what is generally perceived as the problem.²⁴⁴ Van Marle questions the approach that the Equality Employment Act assumes to deal with the problem of equality in employment without looking deeper into the historical context of the problem in South Africa. She particularly faults the Act for the fact that its solution is based on the stereotypical woman and the issues she is assumed to have.²⁴⁵

²³⁹ Van Marle (n 25 above) 652, 653; also E Christodoulidis 'Constitutional irresolution; law and the framing of civil society' (2003) 9 *European Law Journal* 401: 413.

²⁴⁰ Van Marle (n 25 above) 652; Christodoulidis (ibid).

²⁴¹ Van Marle (n 25 above) 654.

²⁴² Van Marle (n 25 above) 658.

²⁴³ Christodoulidis (n 239 above) 402.

²⁴⁴ Van Marle (n 25 above) 657.

²⁴⁵ Van Marle (n 25 above) 663.

Van Marle therefore argues that an interpretation that seeks to pursue transformative constitutionalism is one that is aware of these limitations of the law. Such an appreciation would then avoid a formalist reading and interpretation of the statute.²⁴⁶ It would also engage deeply with the past and present contexts in adjudication and seek a substantive change of the status quo, thereby getting closer to substantive transformation.²⁴⁷

In another article, written in 2009 she again takes up the question of *how much change* transformation should entail. With respect to this question she points to two tentative possible answers that depend on the jurisprudential vantage points taken. Van Marle suggests that on the one hand, we can identify approaches which view transformation as requiring mere formal change, involving an instrumentalist or functional approach that could result in policy making.²⁴⁸ On the other hand there are approaches requiring a more substantive and radical change.²⁴⁹ The latter could be placed within a critical theory and follow a critical approach to transformative constitutionalism, accepting tenets such as indeterminacy and the fundamental contradiction in the framework.²⁵⁰

Talking of this understanding she states the following:

Let me show some candour from the start: I conceive of the notion of transformative constitutionalism as a critical one... What I mean by transformative constitutionalism as critique, for the moment, is an approach to the Constitution and law in general that is committed to transforming political,

²⁴⁶ Van Marle (n 25 above) 658.

²⁴⁷ Van Marle (ibid).

²⁴⁸ Van Marle (ibid).

²⁴⁹ Van Marle (n 25 above) 652, 653.

²⁵⁰ Van Marle (n 25 above) 294.

social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.²⁵¹

Van Marle supports the idea that the framework of transformative constitutionalism requires an interdisciplinary approach. She reiterates that the transformative constitution of South Africa requires a change in legal culture, which resonates with the transformation spirit. She re-emphasizes Klare's call for the judiciary to be aware of the choices they make in the adjudication process, because of the advantage of indeterminacy in legal texts.²⁵²

The other scholar whose work I wish to use in this strand is AJ van der Walt. I will use two of his articles as illustrations of his reliance on CLS in his interpretation of transformative constitutionalism. The first paper is written in 2001.²⁵³ In this article he focuses on the role of transformative constitutionalism in the transformation of land rights and land policies in South Africa, to create equitable rights amongst blacks and whites. He also discusses the role of metaphors and their place in the transformation process, but this is discussed in the next segment, along with other scholars' use of metaphors.

Van der Walt's central point of discussion in this article is the complexity of transformative constitutionalism in achieving a transformation of land rights in South Africa. The issue of land as has been previously discussed was central to the colonial administration.²⁵⁴ This administration was the origin of the land conflict that continues to haunt the South African society to date. In Van der Walt's view, the well organised

²⁵¹ Van Marle (n 25 above) 288.

²⁵² Van Marle (n 25 above) 290.

²⁵³ 'Dancing with codes; protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258: generally.

²⁵⁴ Section 3.2 of this chapter.

apartheid system of laws was not the only one that was involved in taking away land from the blacks and giving it to the whites. The system imposed unfair land rights through legal codes that were drafted by a legislature, to be interpreted by a judiciary and enforced by an executive such that it became an apartheid ideology.²⁵⁵ In other words, the synergy between the three arms was necessary in the enactment, interpretation and enforcement of the unfair apartheid law.²⁵⁶ This is a fundamental reminder as echoed by other scholars that transformative constitutionalism therefore requires the same co-operation and synergy between the three arms.

Van der Walt specifically engages with the history of land rights. Likewise, he notes that the apartheid system was created not only by political instruments but also by ideological and legal instruments to entrench the land policies. This point becomes crucial in Van der Walt's analysis of the complexity of transformative constitutionalism. He notes that the apartheid land policies were not only intended to affect the history of land ownership in apartheid South Africa. It was modelled so as to have permanent and future effects as a result of the ideology and politics on which the laws and policies were based.²⁵⁷

When the apartheid era came to an end, the non-violent transition envisaged and brought about by the 1996 Constitution would extend to land issues. The transformation of property rights was envisaged in the bill of rights that also protected property rights and gave instructions for land reform.²⁵⁸ Such effective and substantial transformation would have to include the end of segregation and inequality in areas of life including land ownership and property rights.²⁵⁹ While Van der Walt acknowledges

²⁵⁵ Van der Walt (n 253 above) 267.

²⁵⁶ Van der Walt (n 253 above) 268.

²⁵⁷ Van der Walt (n 253 above) 270.

²⁵⁸ Van der Walt (n 253 above) 282, Constitution of South Africa section 25 on property rights.

²⁵⁹ Van der Walt (n 253 above) 279.

that substantial legal reform has gone into the land question, he explores the various means towards land reform, but in each of the options concludes that there may not be substantial transformation. He therefore calls for the acceptance and acknowledgement of the complex issues involved in land and property reform, again noting that his interest is in substantive and not formal transformation.²⁶⁰ Such substantive reform requires breaking the conceptual and rhetorical codes of the past as well as having to weigh between remedying the disadvantaged communities and healing the wounds of the past.²⁶¹

Like other critical legal scholars who engage in discussions on the formal legal attempts at transformation, Van der Walt points out various statutory land reform initiatives that follow the instruction of the 1996 Constitution.²⁶² However, he laments the still uncertain jurisprudence within South African courts in interpreting the statutes so as to move towards substantive justice.²⁶³ While some judges are able to move away from a formal and conservative reading of the law so as to advance the tenets of transformation, not all judges have been able to do so. Moreover, the complexity of land transformation is extended to the social angle. There still exists a confrontational attitude between the current owners of the land and the disposed communities, which tension must also be dealt with for substantial transformation to occur.²⁶⁴

These complex issues would therefore mean that the framework of transforming land policies and laws in South Africa is a more complex problem that will require more than

²⁶⁰ Van der Walt (n 253 above) 286.

²⁶¹ Van der Walt (ibid).

²⁶² Van der Walt (note 253 above) 289. These include the Land Reform (Labour Tenants) Act 3 of 1996, the Communal Property Associations Act 28 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

²⁶³ Van der Walt (n 253 above) 290.

²⁶⁴ Van der Walt (n 253 above) 292.

legislative enactment.²⁶⁵ Even though there is progressive legislation, Van der Walt suggests that the magnitude of the problem has serious challenges that have to be dealt with continuously, as a way of life, and not as a one stop problem.²⁶⁶ Dismantling the socio-economic and political powers will take a lot of effort from the South African society and may perhaps never be achieved.²⁶⁷ Van der Walt therefore acknowledges that the 'ghost' of apartheid laws continues and will continue to affect South Africa despite the law reform from apartheid law to transformation law.²⁶⁸

He ends the paper by suggesting alternative visions of land law jurisprudence, a suggestion that has been captured in previous articles, starting with Klare, for change in legal culture. Van der Walt also invites the society in South Africa to be part of the transformative constitutionalism framework through change in culture. He suggests the need for the society to open up to alternative ways of resolving the land inequality that is not necessarily confrontational so as to break from the impasse.²⁶⁹ This includes doing things in a substantially different way that would see the needs of the disadvantaged, weak and dispossessed black communities handled in a completely different way to begin dealing with issues.²⁷⁰ It is a culture of care which, although possible, requires as agreed upon by other critical legal scholars, a complete revolution of culture and different way of looking at things by the society.

Van der Walt's second article is centrally concerned with the relationship between history and legal culture in the process of transformation.²⁷¹ He particularly uses history

²⁶⁵ Van der Walt (n 253 above) 294.

²⁶⁶ Van der Walt (n 253 above) 297.

²⁶⁷ Van der Walt (ibid).

²⁶⁸ Van der Walt (ibid).

²⁶⁹ Van der Walt (n 253 above) 311.

²⁷⁰ Van der Walt (ibid).

²⁷¹ AJ Van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 1: generally.

to examine the tensions within the transformative constitutionalism framework. The conflicting aspirations and concerns in the framework of transformative constitutionalism are centred on the need for change by the black majority population, against the desire to retain the status quo by the white community.²⁷² Because of the magnitude of change that Van der Walt submits to, he acknowledges that transformative constitutionalism would certainly create an irreconcilable tension.²⁷³ Such tension would be between the fear and uncertainty amongst the whites who stand to lose more control and power, and hope and desire for expeditious change amongst the blacks.²⁷⁴

Van der Walt further argues that these mixed reactions represent the underlying feelings that South Africans had when they negotiated a compromise between the apartheid government and struggle activists.²⁷⁵ The negotiations in the early nineties did not fully and comprehensively address these underlying conflicts. A transformative Constitution and the framework of transformative constitutionalism as suggested by Klare created another tension between the push for change and radical change for that matter, and the pull on the other hand for a stable secure status quo to be maintained in South Africa.²⁷⁶ It is within this context that Van der Walt explores the place of legal culture, which, like the idea of constitutionalism is a major source of stability and resistance to change, and the disconnection with the transformative constitutionalism framework.²⁷⁷

While Van der Walt notes the need for confrontation of the illegal apartheid era through a change in law and legal systems, he also emphasizes the need to look

²⁷² Van der Walt (n 271 above) 4.

²⁷³ Van der Walt (n 271 above) 5.

²⁷⁴ Van der Walt (ibid).

²⁷⁵ Van der Walt (ibid).

²⁷⁶ Van der Walt (n 271 above) 5.

²⁷⁷ Van der Walt (n 271 above) 6.

beyond legislative means.²⁷⁸ Legislative enactments ought to also be accompanied by conceptual interpretative methods.²⁷⁹ In other words, transformative constitutionalism is seen as an effort between the legislature in enacting transformative laws and the judiciary in interpretation of the transformative laws in a legal culture that allows for a revolution of the former system.²⁸⁰ Van der Walt engages widely with the gap between the formal legal culture of the South African judiciary and the lawyers and the need for a more historically conscious reconceptualization of constitutional interpretation. This discussion is explored in the next chapter.

The final strand of works that I discuss represents scholars who could be seen to support the idea or framework of transformative constitutionalism but who are cautious about the extent to which this framework must necessarily be underpinned by the critical theory and critique of liberalism characteristic of Klare's work. While these scholars agree that there is indeed some good in transformative constitutionalism, they mainly argue that this may be compromised if the project has to rely on only one interpretative habit while locking all others out. Pieterse for instance acknowledges the transformative nature of South Africa's post liberal Constitution and the place of transformative constitutionalism in South Africa.²⁸¹ He embraces the complexity of the framework of transformative constitutionalism and the need for a historically conscious approach in dealing with interpretation and enforcement of the constitution.²⁸² In more ways than one, he therefore embraces the idea of the unrealised future ideal as presented by Klare.²⁸³ However, he warns against the danger of a close-centred definition of transformative constitutionalism as advocated by Klare because in his view,

²⁷⁸Van der Walt, (n 271 above) 7.

²⁷⁹ Van der Walt (n 271 above) 7, 10.

²⁸⁰ Van der Walt (n 271 above) 20.

²⁸¹ Pieterse (n 26 above) 156.

²⁸² Pieterse (n 26 above) 157.

²⁸³ Pieterse (ibid).

such a uni-dimensional understanding might limit the potential of transformative constitutionalism.

He states in this regard that:

A uni-dimensional theory of the tenets and objects of transformative constitutionalism runs the risk of self-defeatingly limiting the potential of transformation by insisting that it conform to a particular, preconceived political model and by rigidly dictating firstly that it should achieve particular outcomes, secondly what those outcomes should be and thirdly how they should be accomplished.²⁸⁴

Pieterse does not give an indication of what other methods would be plausible to him, perhaps so as not to fall victim of the same problem he finds with Klare. His analysis of Klare's piece nonetheless presents a crucial development on the transformative constitutionalism thesis, of the need for the accommodation of other interpretive methods which may also further the transformative constitutionalism framework.²⁸⁵

Besides Pieterse, Theunis Roux, writing on the 10th anniversary of Klare's paper also questioned whether Klare's idea of transformative constitutionalism would stand up to critical scrutiny and whether it was indeed time to reconceptualise it.²⁸⁶ Roux's engagement with transformative constitutionalism came at a time when the South African Constitutional Court, often associated with the constitutional transformation in South Africa, had also been sharply criticised for its decisions and its place in South Africa's political system.²⁸⁷ It is against such a volatile background that Roux aims to re-

²⁸⁴ Pieterse (n 26 above) 156.

²⁸⁵ Pieterse (ibid).

²⁸⁶ Roux (n 26 above) 258.

²⁸⁷ Roux (n 26 above) 284.

explore and seeks other alternatives to the transformative constitutionalism framework of Klare.²⁸⁸

Like Pieterse, Roux finds the definition put forward by Klare to be rather exclusive because it requires players in the transformative constitutionalism framework to embrace a particular line of thought and a specific route. Roux disagrees with Klare that in order to achieve the full potential and values of transformation as set out in South Africa's post-apartheid constitution, judges and lawyers must embrace a post liberal reading and interpretation of the constitution and judicial work. While the post liberal approach is a good approach, which finds favour with Klare because of its acknowledgment of law and politics and hence political transparency, it should not be treated as the only one approach.

Roux suggests two other approaches that may be equally valuable to players in adjudication; the Dworkinian 'best interpretation' method and the Hartian positivist method. He argues that it is indeed possible to engage in transformative constitutionalism and to read the Constitution as a transformative document using Ronald Dworkin's approach.²⁸⁹ Dworkin's interpretative method is usually referred to as a moral reading of the Constitution.²⁹⁰ This moral reading proposes that judges, lawyers and citizens should interpret and apply abstract constitutional clauses on the understanding that they invoke moral principles about political decency and justice.²⁹¹ The moral reading therefore brings political morality into the realm of constitutional law.²⁹²

²⁸⁸ Roux (ibid).

²⁸⁹ Roux (n 26 above) 259.

²⁹⁰ R Dworkin 'Moral reading of the Constitution' The New York review of books March 21 1996
<http://www.nybooks.com>.

²⁹¹ Dworkin (ibid).

²⁹² Dworkin (ibid).

The Dworkinian method of constitutional interpretation distinctly differs from the post liberal approach advocated by Klare in several ways.²⁹³ Firstly, Dworkin's method avoids the confrontation between constraint and freedom which critical legal theory grapples with. It does so by providing for adjudicators to decide whose understanding of the moral reading is authoritative.²⁹⁴ This is also important because in effect the indeterminacy of the law is not an issue that arises in this interpretative habit, once it is clear which court's moral views bind the other courts. The other difference is based on the role of politics in constitutional interpretation. Critical legal studies generally take the view that once politics is involved in constitutional interpretation, the interpretation cannot retain its objectivity. This is rejected in Dworkin's view.²⁹⁵ Roux captures the distinction in the following terms:

South African legal culture is formalist, and therefore an approach to adjudication that masks the politics of adjudication would both entrench that culture and fail to do interpretive justice to the Constitution. But Dworkin's theory, as noted already, does not mask the politics of adjudication. Rather, it attempts to show how deciding cases according to the political theory that best interprets the Constitution is sufficiently constraining of judges' discretion to legitimate the exercise of their power.²⁹⁶

This would mean that while in Klare's case a judge would candidly have to come out to admit the repercussions of politics in interpretation, Dworkin's theory would involve embracing an objective reasoning and possibly thinking through the broader issues at stake, including the role of politics, for a moral interpretation.²⁹⁷ Roux argues that if South Africa's Constitution is as post liberal as Klare depicts it to be, it must in essence break away from tradition by accepting other interpretative habits and not just the one

²⁹³ Roux (n 26 above) 260.

²⁹⁴ Dworkin's theory applies in the first place to American judges, of course.

²⁹⁵ Dworkin (n 290 above) 280.

²⁹⁶ Roux (n 26 above) 281.

²⁹⁷ Roux (n 26 above) 282.

suggested by Klare.²⁹⁸ This is especially considering that the Constitution contains deliberate open-ended provisions that may call for judicial discretion in interpretation.²⁹⁹ Perhaps to avoid getting into the same mistake of exclusivity that he terms as misguided, Roux does not offer an opinion into which of these approaches he supports, neither does he attempt to define which should be regarded as superior to all others.³⁰⁰ He concludes that:

Rather than being made to depend on a particular interpretative method, the project of transformative constitutionalism should be open to all participants, subject only to respect for the fundamental tenets of non-violent, democratic, law driven social change'.³⁰¹

He further notes that:

Transformative constitutionalism is an open-ended project of constitutional imagining, experimentation and debate to which all South Africans committed to the ideal of constitutional democracy should be allowed to contribute.³⁰²

Like Pieterse and Roux, Sibanda also embraces the idea of transformative constitutionalism and the significant role that the framework continues to play in South Africa.³⁰³ His doubts on the potential of the framework are based also on the exclusive nature of the framework. He states:

However, in a political and legal community in which the vision of transformation is contested, as demonstrated above, the overriding dependence of transformative

²⁹⁸ Roux (n 26 above) 262.

²⁹⁹ Roux (n 26 above) 265.

³⁰⁰ Roux (n 26 above) 266.

³⁰¹ Roux (n 26 above) 285.

³⁰² Roux (n 26 above) 283.

³⁰³ Sibanda (n 17 above) 487.

constitutionalism on the 'right' kind of interpretation also becomes a pitfall or fatal weakness.³⁰⁴

Other challenges of transformative constitutionalism according to him are also as a result of the liberal tradition in which the 1996 Constitution is embedded vis a vis the insistence on change of legal culture and the social, political arrangements that it has to confront.³⁰⁵ He appears to be amongst those most unsure of the potential of law in transformative constitutionalism, as far as poverty eradication in South Africa is concerned. He laments that despite the promises contained in South Africa's Constitution a lot remains to be done to improve the lives of all citizens in South Africa, whose socio-economic living conditions still remain fundamentally unchanged.³⁰⁶ In more ways than one, this paper sums up the importance of transformative constitutionalism in South Africa and the achievements so far, but at the same time expounds on the fear and reality that the framework is laden with challenges and pitfalls that create doubts on its potential.

As indicated in the introduction of this chapter my sense is that the consideration of the framework of transformative constitutionalism in Kenya might follow a similar path. In other words how people respond to his initial suggestion might depend on their jurisprudential vantage point and their understanding of transformation. The tentative distinction of the South African responses to Klare and the discourse on transformation and transformative constitutionalism could be valuable for the initial consideration and later analysis of the Kenyan discourse on the topic.

³⁰⁴ Sibanda (n 17 above) 492, 493.

³⁰⁵ Sibanda (ibid).

³⁰⁶ Sibanda (n 17 above) 485.

Against the background of these discussions I now revisit the place of metaphors in the transformative constitutionalism discourse, as used by some the scholars whom I have engaged with.

3.6 The place of metaphors in the transformative constitutionalism discussion

The use of metaphors features quite prominently in South Africa's constitutional discourse, to describe the process of transformation.³⁰⁷ Because of the depth in which the subject has been explored, I am limited in terms of time and space from carrying out an in depth analysis of scholars and their use of metaphors. My discussion in this segment is limited to the scholars whose views on transformative constitutionalism I have already discussed.

Once again I begin this discussion against the background of the 1993 Interim Constitution. As a transitional constitution the interim Constitution was fundamental for South Africa. It provided for a major restructuring of government as a result of the abolition of apartheid, it enshrined a bill of rights and also established a Constitutional Court with broad powers. The spirit of transformation already enshrined in the 1993 Constitution was further reflected in the postamble to the Constitution which described it through the imagery of a historical bridge in the following words:

This Constitution provides *a historic bridge* between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and

³⁰⁷ See for example LM du Plessis 'The South African Constitution as memory and promise' in C Villa-Vicencio (ed) (2000) *Transcending a century of injustice* 63: generally; WB Le Roux 'The aesthetic turn in the post-apartheid constitutional rights discourse' *Journal of South-African Law* (2006) 101: generally; K van Marle 'Constitution as archive' in S Veitch (ed) (2007) *Law and the politics of reconciliation* 215: generally.

development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.³⁰⁸

The bridge metaphor immediately caught the attention of many in the legal community including Etienne Mureinik, whose work on the imagery is still well cited. Mureinik expounded on the metaphor in a paper that mainly discussed the role of lawyers and the judiciary in the adjudication of South Africa's new Bill of Rights.³⁰⁹ The foundation language which accompanied the metaphor suggested that the bridge was a secure foundation on which a post-apartheid society would be built. Not much emphasis was originally put on the theoretical discussion of the bridge metaphor; at least not by Mureinik. Despite this, Mureinik's discussions on the bridge become an influential idea in South Africa's subsequent constitutional discourse and resonated with many. Amongst the scholars who engage with Mureinik is AJ Van der Walt who notes that:

This interpretation of the bridge metaphor has become established in constitutional discourse and in popular consciousness as a positive and empowering image for social, political and legal transformation and progress.³¹⁰

Mureinik's analysis of the imagery is centred on there being two vantage points on either side of the bridge. One of these points represents an origin from where the South African society was coming and the other a destination to which they hoped to go.³¹¹ In whatever way that one chooses to describe these vantage points, the critical idea is for judges and lawyers to be aware of this historical and future aspiration of the bridge so as to enable South Africa navigate over it.³¹² According to Mureinik awareness of these two points is demonstrated by the value ridden and purposeful

³⁰⁸ Constitution of the Republic of South Africa, Act 200 of 1993.

³⁰⁹ (n 3 above).

³¹⁰ Van der Walt (n 253 above) 259.

³¹¹ Mureinik (n 3 above) 32.

³¹² Mureinik (n 3 above) 31.

interpretation of the bill of rights. Indeed, this basis of a simile depicting a past and future of South Africa has resonated with other scholars and judges who illustrate the vantage points in other terms. Some of the comparisons that have been used include that of an old versus new South African society,³¹³ a point of betrayal versus a point of hope and promise,³¹⁴ a past versus a future,³¹⁵ the apartheid order on the one end and the transformation order on the other³¹⁶ or by a culture of authority on one end and a culture of accountability on the other.³¹⁷

Although the metaphor was not expressly retained in the final 1996 Constitution, it is still embraced particularly in the preamble.³¹⁸ The preamble recites one of the purposes of the Constitution as being the healing of the divisions of the past and establishing a future based on democratic values, social justice and fundamental human rights.³¹⁹ Likewise, the Constitutional Court and other Courts have recognised this role of South Africa's constitution to transform the society from an unjust past to a hopeful future.³²⁰ In *S v Makwanyane*³²¹ for instance, O'Reagan J in particular emphasizes the need for South Africa to move forward and not backward by looking at the mistakes of the past

³¹³ Klare (n 23 above) 153.

³¹⁴ Langa (n 3 above) 354.

³¹⁵ Langa (ibid).

³¹⁶ AJ Van der Walt 'Reliance and denial in legal histories' a paper presented as part of the University of Pretoria's centenary celebrations on 3 November 2008, <http://www.pulp.ac.za> 109.

³¹⁷ Mureinik (n 3 above) 32.

³¹⁸ Van der Walt (n 25 above) 259. The post-amble, entitled 'National Unity and Reconciliation' provides: 'This Constitution provides *a historic bridge* between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and *development opportunities for all South Africans*, irrespective of colour, race, class, belief or sex' (my emphasis).

³¹⁹ Preamble to the 1996 Constitution.

³²⁰ For example '[The Constitution] is a document that seeks to transform the status quo ante into a new order'. See also *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 262: 'What the Constitution

expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future.'

³²¹ 1995 (6) BCLR 665 (CC).

and not repeating them again in order to move forward.³²² Mohamed DP's judgment in the same matter is also cognizant of this 'past and present' phenomenon. In a portion of the judgment, the judge recognizes the interim Constitution as signaling a 'decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos'.³²³ The importance of historical consciousness in the interpretation of the 1996 Constitution was also reaffirmed by the Constitutional Court in the *First Certification Case*.³²⁴

Given the significance of Mureinik's contribution and his exposition on the imagery, the critical theory proponents were quick to develop on it further. While they accepted the historical consciousness and futuristic ideal created by the bridge, they were concerned about what happens in between the two vantage points. Looking back at the discussion by the CLS members, this is certainly a long period and which some have described as a way of life. It was therefore necessary that this space, period or journey in between illustrates the reality of the complexity of transformative constitutionalism. As such, Van Marle describes the space as one that is precarious, uncomfortable, full of anxiety, broken dreams, action, unsettled and tense.³²⁵ It seems that this is one option; that of using the metaphor and developing it further to capture the unstable complicated period in between.

The second option to the bridge metaphor is that suggested by Van der Walt, which is to do away with the bridge metaphor. He suggests that South Africa 'should reconsider the bridge metaphor and the assumptions accompanying it'.³²⁶ He is uncomfortable

³²² Para 323.

³²³ Para 262.

³²⁴ Para 1.

³²⁵ Van Marle (n 25 above) 298.

³²⁶ Van Marle (n 25 above) 261.

with the use of the metaphor; not because it does not depict the need for transformation but because the change it depicts is not substantive. This is in the sense that the imagery does not capture the complexity and permanence of transformative constitutionalism as represented by the space in between the two points. The bridge instead suggests a more direct and predictable process of transformation. In this regard Van der Walt states that:

In Mureinik's interpretation, the bridge metaphor presupposes a certain linear progression, a journey from one place to another... In this interpretation of the bridge metaphor, the bridge facilitates the crossing of the abyss, not as a goal in itself, but as a necessary stage in realizing the goal, namely movement from one position to the other. Normative social and political values attach to being on one side rather than the other, and to getting from the one side to the other quickly and with minimum upheaval.³²⁷

According to Van der Walt, the bridge metaphor further presupposes a temporary need for the Constitution after which it is no longer useful. This is interpreted by Van der Walt to mean that the end result of transformation is guaranteed after some time. He therefore further states:

This interpretation characterizes the abyss as an unavoidable but temporary problem to be overcome in an otherwise untroubled linear progression, and the bridge as an instrument of escape and liberation, of linear movement from old to new, from inside to outside, much as a rope is an instrument for breaking out of gaol. In this interpretation, the bridge over the abyss is instrumental and temporary - the bridge is an emergency measure that loses its metaphorical and rhetorical significance as soon as the crossing has been made successfully.³²⁸

³²⁷ Van Marle (n 25 above) 259.

³²⁸ Van Marle (ibid).

It does not come as a surprise that Van der Walt is particularly concerned about the image of the bridge metaphor especially against the background of the meaning of transformative constitutionalism earlier discussed. As a supporter of the CLS ideals, anything that does not represent the complexity and uncertainty of transformative constitutionalism is a façade. Likewise, any interpretation that illustrates mere formal and simple change does not also refer to the CLS idea of transformation. Because of its complexity, the proponents of the CLS theory contest any interpretation of the bridge metaphor that portrays transformation as a claim of creating an elusive view of a new society and giving a false impression of utopia.³²⁹

Since the metaphor does not satisfactorily capture the complexity that critical scholars have discussed in the previous section, Van der Walt suggests the use of another metaphor in place of the historic bridge.³³⁰ He suggests that any new metaphor should reflect the social, political and economic complexities that characterize the process. It should portray transformation as a continuous process, more like a way of life, which cannot take place over a period of definite time.³³¹ Since there is no neat line that divides the process, the right metaphor and interpretation should not insinuate old and new states as appears to be the case in the linear progression represented by the metaphor.³³² He states as follows:

In my view, the relationship between apartheid law and transformative law is much more complex and problematic, and we need more sophisticated and nuanced imagery to envision and discuss the articulation between them.³³³

³²⁹ Van Marle (n 25 above) 291; Van der Walt (n 25 above) 259.

³³⁰ Van der Walt (n 25 above) 262.

³³¹ Van Marle (n 25 above) 291.

³³² Van Marle (n 25 above) 292, referring to the failed dream of Brasilia, the Brazilian capital.

³³³ Van der Walt (n 253 above) 262.

The first alternative that he offers is that of a complex long walk through time and space, which he does not explore further.³³⁴ I would assume that in this imagery there would be fear and uncertainty about any destination or whether such destination exists at all. There would be many potential dangers including the danger of death. It is simply a walk that has no guarantees and is at best a risk. While the risks are there, the challenge is in trying to avoid any hazards and in trying to navigate the route properly.

The other suggestion that he makes is an imagery of codes in motion.³³⁵ This expresses the idea that in seeking transformation, there will be challenges which necessitate new options which will sometimes work or fail to work, thereby keeping the codes in motion through re-invention of better ways.³³⁶ This would mean that instead of the two vantage points being stationary, they will always be in motion, to and fro, sometimes in collision. He states that:

The image of apartheid land law and transformative land law as two stationary positions is unsuitable, and I therefore propose a different metaphor for the two forms of jurisprudence—that of dancing, which allows us to compare the apartheid land law and transformation land law as two different dancing codes.³³⁷

A notably different view from Van der Walt and other critical scholars is expressed by Langa who takes issue with critical scholars who had viewed the traditional metaphor of the bridge as misleading.³³⁸ Langa gives his interpretation of the bridge metaphor which illustrates that no matter what metaphor is used, the difference is in how it is interpreted and more importantly, the background against which it is understood.

³³⁴ Van der Walt (ibid).

³³⁵ Van der Walt (ibid).

³³⁶ Van der Walt (ibid).

³³⁷ Van der Walt (n 253 above) 262.

³³⁸ Langa (n 3 above) 353.

Langa suggests that in fact, the metaphor of the bridge is befitting of describing transformative constitutionalism. His view is that the same bridge may be interpreted as a space between an unstable past on one hand and an uncertain future on the other hand.³³⁹ The two vantage points in this case do not have to be neatly separated and stationary and the transformation process would then involve a complex movement from one side of the bridge to the other; back and forth using the bridge.³⁴⁰ The same metaphor, he argues, may therefore indicate the start of transformation which remains vague and possibly the end, which is never achieved.³⁴¹

This conflicting interpretation in the imagery of the bridge is not surprising and is one that can be explained. The fact that Langa is not concerned with the theoretical basis of Klare's work means that he may not be reading the imagery from a purely theoretical point of view. Other scholars like Van der Walt engages with alternative imageries that they interpret as portraying a more complex nature of the transformative constitutionalism framework as they understand the subject from a CLS theoretical basis. Van Marle for instance, also suggests the metaphor of weaving as an appropriate one to signify the tensions that are involved in the framework of transformative constitutionalism.³⁴² This, she suggests, is also a reflection of the continuous attempt to resolve the tension involved.³⁴³

In my view it would seem that the idea of transformative constitutionalism is not necessarily about the imagery that is used but more so *how* the imagery is interpreted, which is actively related to the jurisprudential background of a particular scholar.

³³⁹ Langa (n 3 above) 354.

³⁴⁰ Langa (ibid).

³⁴¹ Langa (ibid).

³⁴² Van Marle (n 25 above) 298.

³⁴³ Van Marle (ibid).

It would be interesting to see if the Kenyan consideration of and developing discourse on transformative constitutionalism will also have features of a reliance on metaphors and imagery as in the South African experience. As said above the imagery is significant for what it reveals about the multiple jurisprudential backgrounds and vantage points.

3.7 The South African experience: thoughts and considerations for Kenya

There are some fundamental thoughts that Kenya may follow from the discussion on transformative constitutionalism within the South African context. A critical point to begin at is whether Kenyans consider the 2010 Constitution as a transformative and post liberal document. Even more expressive is whether the 2010 Constitution can be seen as a constitutional revolution that overthrew the previous legal order. It has already been said that the 2010 Constitution is regarded by many as a transformative document and one that has led to a new Kenya. Like the South African Constitution, the 2010 Constitution presents a radical departure from the order that it replaced. This is discussed in detail in chapter two.

It is necessary that we revisit the depth of transformation that we understand the 2010 Constitution to have, as a starting point to the level of change that Kenya expects. I would suggest that the 2010 Constitution, like the South African Constitution, is not only transformational but in fact representative of a constitutional revolution. A new *grund-norm* in place would therefore require substantive change as has been discussed earlier in this chapter. Such substantive change would include an overhaul of social culture and the way Kenyans view things to a whole new way of thinking. It will require a change in legal culture from the judiciary and a new system of working from the government. This should go a long way in ensuring that transformative

constitutionalism is aimed at serious change and not mere formal change that may end up retaining the status quo in many respects.

Regarding the understanding of transformative constitutionalism, it may perhaps be a good point to begin by identifying the processes involved in the framework; the enactment, interpretation and enforcement of the 2010 Constitution. Going by South Africa's experience, it may be quite limiting to attempt to specify which theory of interpretation ought to be used or which the best is. Instead, whichever approaches are used, should be done by using the 2010 Constitution as a guide, aimed at reaching decisions that create substantive equality. For the very first time, the Constitution is instructional about the guiding factors in its interpretation and these must be the core guide.³⁴⁴

If Kenya is to pursue a framework of transformative constitutionalism all the arms of government must be involved. In the constitutional history of Kenya that I discussed earlier, the arms of government are still characterised by suspicion and competition amongst themselves. There is particularly a culture of seeking to suppress the judiciary as was the case in the colonial era by financial and other means. The judiciary has made a brave attempt at reasserting itself and its independence despite the interference from the other two arms. Meaningful transformation requires for the three arms to cooperate in the enactment, interpretation and enforcement of the 2010 Constitution. Apart from the three arms of state, the public in Kenya must also play a significant role in transformative constitutionalism. There are issues that underlie the process that cannot be resolved by legislation and which require a radical shift in society culture. It means that the entire society has a role to play.

³⁴⁴ Article 159(2).

Finally, the discussion on South Africa and transformative constitutionalism as a possible framework to be followed is only one of various ways that South Africa can apply to optimize the transformation process. My suggestion also follows the same reasoning. Transformative constitutionalism is not the answer that Kenya has been waiting for. I do not suggest that it will lead us to where we want to be. However, I do echo the words of South African scholars that it is a good place to start from. As such, no strict time frame can be placed on it and it must be taken up with the awareness that there are challenges on the way. Transformative constitutionalism brings the realities of transformation to the fore, which also requires sincerity and candour for the Kenyan society to admit and deal with.

3.8 Conclusion

Transformative constitutionalism is a subject that came to the fore in South African constitutional discourse. Although presented as a contested subject, this discussion has found that the difference amongst scholars is not significant enough to wish away the framework. The scholars that I have engaged with generally agree that it is a significant framework whose core idea is the change of society. The differences in understanding emanate from the jurisprudential aspects regarding the magnitude of change that is expected and the potential of the law to achieve such. Despite this contestation, transformative constitutionalism is concerned with a transformative enactment, interpretation and enforcement of the constitution. It is a worthwhile project for Kenya to pursue while aware of the likely challenges and pitfalls. My broad argument in this thesis is that the underlying jurisprudence, understanding of the potential and limits of the law and its role in transformation matters not only on a theoretical level albeit important but also on the impact it could have on adjudication and law in general – this is a true for the Kenyan experience as for South Africa.

CHAPTER FOUR

TRANSFORMATIVE CONSTITUTIONALISM, THE JUDICIARY AND LEGAL CULTURE

4.1 Introduction

This chapter addresses the question of legal culture as a possible stumbling block to a framework of transformative constitutionalism. While the discussion is framed against the South African discourse on legal culture, I seek to address the role of legal culture within the Kenyan judiciary. The chapter addresses the question of within which context Kenya's legal culture developed and what challenges may be faced in pursuing transformative constitutionalism under the current dispensation.

I begin the chapter by analyzing different definitions of the concept of legal culture and the context within which the legal culture in Kenya developed. This requires that I engage in a brief history of the judiciary in Kenya. A discussion of this history not only brings to the fore the underlying legal culture, it also explains other challenges from which the judiciary should transform. Against this background I therefore analyze the role of the 2010 Constitution in trying to address these challenges as a catalyst to judicial transformation as a whole. One of the approaches that Kenya applied to transform the judiciary as a transition to a new dispensation was the vetting of judges and magistrates. This process is discussed due to its relevance in trying to achieve a new judiciary and subsequently a new judicial culture. I also sample some decisions of the courts after the vetting exercise as a way to determine whether the vetting process had any impact on changing the prevailing legal culture.

As with previous chapters, I seek to analyze Kenya's experiences alongside those of South Africa. I engage in the history of South Africa and the background against which the South African legal culture developed. I seek to explore whether there are similarities between the Kenyan and South African benches in terms of legal culture. I also examine how South Africa's judiciary progressed on to a new dispensation under the 1996 Constitution and the impact in terms of legal culture thereafter.

Looking at the two jurisdictions brings out certain obstacles to the change of legal culture which I address in the hope of reflecting on the issue within the Kenyan bench. I end the chapter by a discussion of what the Kenyan bench ought to portray as characteristics of a transformed legal culture.

4.2 What is legal culture?

Various definitions of legal culture have been put forward. While there may be unresolved complexities surrounding the definitions, I pursue the definitions given by scholars that I refer to in my previous chapter. These definitions point towards legal culture in a wide sense as a description of relatively stable patterns of legally oriented behaviors and sensibilities.¹ An enquiry into legal culture tries to understand what lawyers and judges are and why they do what they do in a particular way.² Legal culture therefore tries to explain the characteristics of institutions, values, ideas and mentalities held by judges and lawyers in a particular jurisdiction. It is a significant tool in enabling the characterization of legal systems and in explaining and predicting the effect of law on a particular society. An analysis of legal culture within the context of this thesis therefore has significant theoretical and policy implications because of the relationship between transformation and legal culture.

Klare defines legal culture as the 'professional sensibilities, habits of mind, and intellectual reflexes' that influence professionals and their professional outlook.³ Klare further notes that the legal culture in a particular jurisdiction is bound to influence the

¹ D Nelken 'Using the concept of legal culture' (2004) 29 *Australian Journal of Legal Philosophy* 1: 1.

² Nelken (ibid)

³ KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146: 167.

way that arguments are taken up and the role of politics and ethical commitments by professionals.⁴ To Van der Walt legal culture refers to:

A system of meaning that has crystalized, through centuries of legal development and decades of common law adjudication as well as an intellectual tradition, developed on the basis of mostly unarticulated but widely shared assumptions about the sources, the methods, the authority and the development of law.⁵

Van der Walt in other words equates legal culture to a legal tradition.⁶ This is in so far as legal tradition:

Conceives of the law as a science, the meaning and systems which are established by traditionally accepted and revered sources of law, methods of interpretation, styles of argumentation' and institutional practices.⁷

The longevity and tradition of legal culture is shaped by the deeply entrenched views and attitudes about what the law is and how the law functions.⁸ As a result of these strong views professionals in a particular set up tend to view certain arguments as normal and compelling, even though the same arguments may be seen by others as unconvincing⁹. The way these professionals perceive law and the way they make their interpretations and present arguments is often a result of a particular deeply rooted legal culture.¹⁰ The legal culture is further brought about by socialization within a particular set up, history, legal education and training.¹¹ The culture is therefore so

⁴ Klare, (ibid).

⁵ AJ Van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 1: 5-6.

⁶ Van der Walt (n 5 above) 18.

⁷ Van der Walt (ibid); M Chanock *The making of South African legal culture 1902-1936-fear, favour and prejudice* (2011) 3.

⁸ Van der Walt (n 5 above) 6.

⁹ Van der Walt (ibid).

¹⁰ Van der Walt (n 5 above) 19.

¹¹ Van der Walt (ibid).

much a part of the participants that they are more often than not, conscious of its power over their perceptions, thoughts and beliefs.¹²

This is not to say that legal culture is always a subconscious phenomenon because as argued by mostly adherents of the critical legal studies movement, there is room for judges (and even lawyers) to reexamine their legal culture and change it if it becomes necessary.¹³ Indeed, since legal culture is simply about a choice of tradition, it means that it is capable of being moulded or changed as time or need prescribes. Within the context of this thesis I argue that culture can also be borrowed or transplanted so as to create social change particularly under a new dispensation. The conservativeness and rigidity in accepting the need and time to change creates one of the major stumbling blocks to transformative constitutionalism. This arises because lawyers and judges will often not acknowledge this need for change.¹⁴ Unless experiences present a need for self-reflection and transformation, there is a big risk of getting stuck within a particular legal culture.¹⁵ Unfortunately, the legal community hardly considers that their present legal culture is in fact a matter of choice and a different choice can be made to get out of it.¹⁶

For those who consciously see the need for change and attempt to adopt a different culture, there is always the risk that the new culture may be opposed and resisted especially by the older predominant culture. The resistance is particularly as a result of the discomfort that is always felt in changing to something new and because the new culture and ways of interpretation may be difficult to perceive and defend. The easier

¹² Van der Walt (ibid); P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351: 356.

¹³ Hereinafter CLS movement.

¹⁴ Van der Walt (n 5 above) 19.

¹⁵ Klare (n 3 above) 167; Van der Walt (n 5 above) 16.

¹⁶ Van der Walt (n 5 above) 6.

option out is always to reject the new culture as an invalid way of doing things.¹⁷ Van der Walt in fact warns that if the judges and lawyers are not aware of it, the culture that they have adopted will usually lead to other forms of interpretation being locked out as unacceptable.¹⁸

The mixed attitudes and values of judges and lawyers towards change ends up creating a mixed bench in terms of legal culture. There would be some liberal and progressive judges amidst other judges with a more conservative outlook to constitutional jurisprudence. For the former whose legal culture is likely to have a positive effect on transformation, there might even be a sense of reluctance to exercise constitutional innovation.¹⁹ Coincidentally, in the presence of competing legal cultures like in the instance of a mixed bench and even a mixed bar, each of the cultures is easily evident, because of the way those lawyers and judges in a particular field of socialization will approach arguments and their ideas of how the law works.²⁰

It is almost impossible to discuss transformative constitutionalism without considering the place of legal culture. When Klare defined transformative constitutionalism, he not only envisaged a long term project but one that would be achieved by non-violent means.²¹ One of the most instrumental means by which such revolutionary change would therefore be achieved is through processes grounded in law.²² Given also that one of the approaches to transformative constitutionalism is a long term interpretation of transformative constitutions, Klare poses several questions on the preparedness of the judiciary.

¹⁷ Van der Walt (n 5 above) 18; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *Public Law* 155: 164.

¹⁸ Van der Walt (n 5 above) 18.

¹⁹ Klare (n 3 above) 171.

²⁰ Langa (n 12 above) 356.

²¹ Klare (n 3 above) 150.

²² Klare, (ibid).

Do traditional accounts of legal constraint and the rule-of-law ideal make sense in the new South Africa? Does the rule-of-law ideal imply a depoliticized conception of law inconsistent with the aspiration to develop adjudicative methods that will contribute to egalitarian social change? Or, must we develop a revised, perhaps somewhat more politicized, understanding of the rule of law and adjudication that can consist with and support transformative hopes?²³

The discussions in the previous chapter indicate a clear disconnection between the traditional approaches of the bench and the bar on legal interpretation in addressing radically different needs of tremendously different constitutions. Looking at the history of Kenya (and South Africa too), it is certain that the drafters of the Constitutions intended that both constitutions be drafted and interpreted with a historical consciousness.²⁴ The disconnection with legal tradition arises because the legal culture still present in both countries was shaped before and during the apartheid and colonial eras and is not therefore reflective of the transformation process.²⁵

Likewise, the indeterminacy thesis as earlier pointed out relies substantially on a legal tradition that acknowledges indeterminacy. By the drafters of the South African and Kenyan Constitutions making constitutional provisions open-ended, they invited a more powerful institution of the judiciary consisting of judges who are seen as true to the values of the constitution, to exercise more discretion and creativity in their adjudication role. This becomes a problem where the judiciary does not realize the new approach that they have to take and instead insist on using the approach that they have always used. The 2010 Constitution tries to tackle this challenge by taking an unusually

²³ Klare (ibid).

²⁴ See the preamble to both Constitutions, already referred to. They both acknowledge the historical past and role of the Constitutions in achieving better future.

²⁵ Van der Walt (n 5 above) 19.

instructional role to the judiciary as to the principles that are expected to guide the judiciary in judicial interpretation.²⁶

Article 259 of the Constitution requires the judiciary to interpret the Constitution in a manner that:

- a. Promotes its purposes, values and principles
- b. Advances the fundamental rule of law, human rights and governance
- c. Permits the development of law and
- d. Contributes to good governance

While the guideline is indeed a welcome move, the challenge within the 2010 Constitution and the vision entrenched in judicial adjudication is the extent to which this systematic interpretation habits can be achieved or if they are indeed achievable. The indeterminacy theory means that the Constitution lacks capacity to reach individual interpretation habits. These constitutional provisions also lack the ability to constrain judges in their interpretation or transform the judiciary's style of interpretation to conform to a uniform interpretation. At the very most, all that the 2010 Constitution can do is to give guidelines on interpretation but accept a possibility that laws may not be interpreted as envisaged under a transformation scenario because of the various factors at play.²⁷

Having discussed the magnitude of change that both constitutions envisage, it leaves one with no doubt that the only way that the judiciary can be well prepared for its role is by a change in legal culture. Scholars have warned that unless the judiciary is

²⁶ K Rawal 'Constitutional and judicial reforms; the Kenya experience' paper presented at the Southern African Chief Justices forum annual conference, 2 August 2013 <http://www.judiciary.go.ke/speeches>.

²⁷ SJ Burton 'Reaffirming legal reasoning: the challenge from the left' (1986) 36 *Journal of Legal Education* 358: 360.

prepared to shift cultures from a traditional conservative and formal approach to one that fits into the vision of a transformative constitution, the reality is that even if a Constitution contains a promising text it may end up not delivering on the promises that it aims for.²⁸ The idea of the 'right' interpretation is however a problematic one.²⁹ It is one that is quite subjective and leaves a lot of consideration to judicial discretion in struggling with the 'right interpretation'.³⁰ Being able to adopt the right culture requires a very delicate balance. It is agreed especially amongst contemporary scholars that a legal culture that is over-reliant on personal and political influences is unlikely to lead to the right constitutional interpretation.³¹ At the same time, a legal culture that advocates for complete separation of law from politics is also unrealistic.³² A culture of the overly activist judges is also dangerous to the transformation process as they risk disturbing the societal order.³³ The need to balance out the application of legal culture in adjudication therefore requires a bench and bar that can apply their personal sense of justice in fidelity with the values of the constitution.

At this point I would like to discuss a history of Kenya's judiciary so as to identify the former and still predominant legal culture as well as identify the need for change.

4.3 A history of Kenya's judiciary

Prior to colonialism there were no formal judicial authorities but only informal councils of elders who relied on traditional sanctions of customary law to settle disputes.³⁴ Each

²⁸ S Sibanda 'Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22(3) *Stellenbosch Law Review* 482: 493.

²⁹ Sibanda (ibid).

³⁰ Van der Walt (n 5 above) 11-12.

³¹ Sibanda (n 28 above) 493.

³² Van der Walt (n 5 above) 8 on the difficulty of cleansing land laws and policies from the politics of apartheid.

³³ Langa (n 12 above) 357.

³⁴ J Middleton 'Kenya: administration and changes in African life 1912-1945' in V Harlow & EM Chilver (eds), *History of East Africa* (1982) 333:351.

community had its own council of elders who settled disputes between community members, using the local customary laws. This was the situation until the onset of colonialism when the colonial government set up the initial court system in Kenya.³⁵ The system of courts was based on a dual justice system of segregation between Africans and other court systems.³⁶ Africans were marginalized to native courts which applied traditional dispute resolution methods.³⁷ These African courts were not formally recognized because they were thought of as being repugnant to justice and morality.³⁸ Islamic courts were also established to determine cases between Muslims who were not categorized as natives.³⁹

Alongside these courts were European courts. These were established because the British settlers who came to Kenya were keen on having the same English law that applied to the settlers in other Protectorates applied to them too.⁴⁰ The courts also applied laws that were made by the Europeans for the benefit of imposing their rule on Kenyan Africans.⁴¹ These European courts were staffed by foreign judges and magistrates.⁴² The bar in the European courts was also largely European.⁴³ Judges were appointed from members of the bar in England, Scotland or Ireland.⁴⁴ They were appointed under the East African Order in Council 1897 with advice from the colonial

³⁵ Middleton (ibid).

³⁶ M Mamdani *Citizen and subject: contemporary Africa and the legacy of colonialism* (1996)22. This dual system was used in virtually all countries where the colonial government penetrated.

³⁷ Report by Mars Group available on <http://www.marsgroupkenya.org/judiciary/>; The Judiciary Transformation Framework Report hereinafter JTF (2012 – 2016) <http://www.judiciary.org.ke> 10-11.

³⁸ YP Ghai & JPWB Mc Auslan *Public law and political change in Kenya: a study of the legal framework of government from colonial times to the present* (1970) 125, Mars Group Report (ibid); JTF Report (ibid).

³⁹ Ghai & Mc Auslan (ibid).

⁴⁰ Ghai & Mc Auslan (n 38 above) 125.

⁴¹ Y Ghai & J Ghai *Kenya's Constitution; an instrument for change* (2011) 6; Ghai & JPWB Mc Auslan 'The evolution of public law in East Africa in the 1960s' in Ghai & Mc Auslan (n 38 above) 1: 6.

⁴² Ghai & Mc Auslan, (ibid).

⁴³ W Wahiu 'Independence and accountability of the judiciary in Kenya' in FW Jjuuko (ed) *The independence of the judiciary and the rule of law: strengthening constitutional activism in East Africa* (2005) 107: 108.

⁴⁴ G Muigai 'The judiciary in Kenya and the search for a philosophy of law: The case of constitutional adjudication' in K Kibwana (ed) *Law and the administration of justice in Kenya* (1989) 67: 94.

office and held office at the pleasure of the Crown.⁴⁵ Judges could be removed from office even without investigations and inevitably, this meant that from these early times, the bench largely showed sympathy for the colonial government whether consciously or sub-consciously and was interested in maintaining the status quo.⁴⁶

All through the colonial period, the judiciary lacked impartiality, professionalism and independence.⁴⁷ The entire court system was part of the colonial order and it was important for the courts to support that order.⁴⁸ Lack of separation of powers meant that the judiciary was subdued and could easily be manipulated and threatened by the other two arms.⁴⁹ The native District Officers who performed administrative duties on behalf of the colonial government are also the ones who were tasked with performing magisterial duties in native courts thereby creating conflict between judicial and executive power.⁵⁰ The appointments, removal and financing of judges and the judiciary as an institution were pegged on the ability to please the other two arms of government. The judiciary was literally cash-strapped and could not function effectively because funding was dependent on the executive and legislature.⁵¹ Executive powers were personified by the Governor who enjoyed such wide discretionary powers over the colonial judiciary.⁵² The judiciary fully accepted and endorsed this state of affairs. Courts could not question the illegitimate laws that the legislature passed neither did they question the actions of the state.⁵³ It was not unusual for courts to use 'an act of

⁴⁵Muigai (ibid).

⁴⁶ Muigai (n 44 above) 98.

⁴⁷ Muigai (n 44 above) 95; Ghai & Mc Auslan (n 38 above) 13.

⁴⁸Ghai & Mc Auslan (n 41 above) 147; N Baraza 'A manifesto for a modern judiciary' paper presented at the 7th annual judges colloquium 5 August 2011 <http://www.judiciary.org.ke> 6.

⁴⁹ Muigai (n 44 above) 95; Ghai & Mc Auslan (n 38 above) 13.

⁵⁰ Muigai (ibid); Ghai & Mc Auslan (ibid).

⁵¹ Muigai (ibid); Ghai & Mc Auslan (ibid); W Mutunga, speech on the progress report of the judiciary on his first one hundred and twenty days <http://www.judiciary.go.ke/portal/downloads/speeches> 3.

⁵² Muigai (n 44 above) 95.

⁵³ Muigai (ibid).

state' defense to avoid questioning state authority.⁵⁴ In one such case Lord Denning stated as follows:

The courts rely on the representatives of the crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the crown the courts will not permit it to be challenged.⁵⁵

As the handmaiden of the government, the judiciary was used to oppress the natives and played a role in the loss of native land to the settlers and in ensuring that the natives could not claim from the government.⁵⁶ The judiciary proved extremely useful in suppressing the voice of the Mau Mau freedom fighters.⁵⁷ It was used by the colonial masters to facilitate imprisonment without trials and convictions for treason and sedition.⁵⁸ On numerous occasions the courts were also used to further the interests of the colonial government by allowing the state to violate existing laws and get away with it.⁵⁹

One such example is in *Isaac Wainaina v Muirito wa Indaraga*.⁶⁰ The Plaintiffs claimed ownership to a particular land by virtue of inheritance. They therefore filed an action against the Defendants for trespass. The Court held that the effect of the 1915 Crown Lands Ordinance and the two orders in council which converted the Kenya protectorate into a colony was to take away all land rights from Africans and vest them in the Crown causing all native rights to disappear and the natives hence became tenants of the Crown.

⁵⁴Muigai (ibid).

⁵⁵ (1956) 1 KB 15.

⁵⁶ Ghai & Mc Auslan (n 38 above) 147.

⁵⁷ K Adar & I Munyae 'Human rights abuse in Kenya under Daniel Arap Moi 1978-2001' (2001) 5 *African Studies Quarterly* 1: 12.

⁵⁸Muigai (n 44 above) 97.

⁵⁹ Muigai (ibid).

⁶⁰ (1923) KLR 103.

Another example of passive interpretation was in the case of *Earl of Errol v Commissioner of Income Tax*.⁶¹ The East Africa Court of Appeal held that tax legislation that subjected Africans to pay tax was valid notwithstanding the fact that the Legislative Council that had enacted it was not representative of the African natives.

In October 1952, the judiciary participated in taking away the rights of the natives during the state of emergency that was declared.⁶² The role of the judiciary was to ensure as many convictions as possible and increased death sentences. They were also responsible for down-playing the safeguards of criminal trials.⁶³ Such widespread decisions from the colonial courts meant that the Executive was able to hoodwink the Judiciary and get away with anything and any challenge of executive action proved invariably futile.⁶⁴ This was the state of the courts in most of the colonial period until the late 1950s when the pressure for independence was at its peak. The clamor for independence coincided with pressure to move away from racial divisions in the court system.⁶⁵

Up to the end of 1962, several important reforms took place in the legal system including creation of new posts in African courts, reorganization of new jurisdictions of the courts and training of local personnel to equip them with more knowledge.⁶⁶ Perhaps the most important change in the judicial system was the merging of the dual system into a formal court system.⁶⁷ The whole system of African courts was transferred from the colonial administration to the judiciary and became a responsibility of the

⁶¹ (1940) 7 EACA 389.

⁶² Kenya was put under a state of emergency from October 1952 to December 1959 as a reaction to the Mau Mau rebellion against British rule.

⁶³ Muigai (n 44 above) 98.

⁶⁴ Muigai (n 44 above) 97.

⁶⁵ Ghai & Mc Auslan (n 38 above) 174.

⁶⁶ Ghai & Mc Auslan (n 38 above) 360.

⁶⁷ Ghai & Mc Auslan (n 38 above) 362.

judiciary.⁶⁸ The finance and administrative sides of the system were also transferred to the judiciary.⁶⁹ This would go on to become one of the chief positive reforms in the judicial system.

When Kenya ushered in independence, the structure of the judiciary was inherited almost wholesome.⁷⁰ Like all the other institutions that Kenya inherited, the Judiciary was weak in structure.⁷¹ The Judiciary for its part did not go out of its way to change the status quo because it was still largely made up of foreigners, who literally continued with the colonial culture of oppression, corruption and inefficiency despite there being a new Constitution.⁷² Instead of improving on the weak structures the politicians and leaders decided to leave the structures in place for their own benefit. As a result, since independence and through the Moi and Kenyatta regimes and to some extent, the Kibaki regime, judicial appointments had been influenced by external factors rather than merit and distinction or seniority at the bar.⁷³ Even though the 1963 Constitution established lengthy procedures for removal of judges from office, it perhaps deliberately, had failed to depoliticize the appointment and removal of judges.⁷⁴ A lot of authority was left to the Legislature and the Executive.⁷⁵ Increasingly, the role of the post-colonial courts was to display a court structure that seemed to be objective but in reality it was not present for public benefit.⁷⁶ In fact, courts existed to ensure that no citizen would even succeed in enforcing rights under the Constitution especially against

⁶⁸ Ghai & Mc Auslan (ibid).

⁶⁹ Ghai & Mc Auslan (ibid).

⁷⁰ Muigai (n 44 above) 98.

⁷¹ G Kibara 'The state of constitutionalism in Kenya' in B Tusasirwe (ed) *Constitutionalism in East Africa: progress, challenges and prospects in 2003* (2005), M Mutua 'Justice under siege; the rule of law and judicial subservience in Kenya' (2003) 23 *Human Rights Quarterly* 28: 97.

⁷² Mutua (n 71 above) 101.

⁷³ Quantitative surveys carried out by the International Commission of Jurists ICJ (K) in 2001, the 1998 judiciary's own investigation led by Justice Richard Kwach and eventually the Aaron Ringera Committee of 2003. All these committees echoed the same sentiments as challenges to the judiciary, Mutua (n 71 above) 108.

⁷⁴ Kibara (n 71 above) 70; Ghai & Mc Auslan (n 38 above) 174.

⁷⁵ Wahiu (n 43 above) 133.

⁷⁶ Wahiu (n 43 above) 131.

the state.⁷⁷ It is the same Constitution that was used or abused leading to the massive human rights violations that took place especially in the 1980's and 1990's.⁷⁸ Anyone who dared to challenge the regime was detained without trial or found guilty of offences like treason or sedition.

When it wasn't the government and politicians manipulating the courts, it would be rich businessmen paying bribes to have cases determined in their favor.⁷⁹ The corruption deals were huge. It was impossible to challenge the government for all the gross violations. Judges did nothing on their part as the judiciary plunged into deep rooted evil.⁸⁰ They accepted to be manipulated and misused by claiming legal restraint or denying themselves jurisdiction to hear matters.⁸¹ It is only a handful of these judges who chose to and remained independent, and these are the judges who would help to reshape the face of the judiciary although at a very slow pace.

The period between the advent of multiparty democracy in 1992 and the promulgation of Kenya's current Constitution in 2010 witnessed numerous attempts to restore the credibility of the judiciary.⁸² There was increased pressure from the Law Society of Kenya and other civic organizations. This was the period when the judiciary was struggling to assert itself.⁸³ Some decisions of the courts during this time are a testimony to the struggle and they are indicative of an increase in the decisions that were made in support of the Constitution. The case of *Stanley Munga Githunguri v AG* is one such case.⁸⁴ In this case the accused had been charged with 20 counts against the Exchange Control Regulations. Later the Attorney General decided that he would

⁷⁷ Wahiu (ibid).

⁷⁸ Kibara (n 71 above) 72.

⁷⁹ Kibara (ibid).

⁸⁰ Kibara (ibid).

⁸¹ for instance *Ooko v Republic* HCCC 1159 of 1966.

⁸² Rawal (n 26 above) 4.

⁸³ M Samora, Daily Nation Friday 20 April 2012 DN 2.

⁸⁴ High Court Criminal Application No 1 of 1985.

not prosecute the charges. Nine years after the alleged commission of offences and five years after the decision of the Attorney General not to prosecute, the sitting Attorney General who had come in after two other preceding Attorneys General, purported to reinstate the charges. The High Court held that this was an infringement of the constitutional provisions that required fair hearing within a reasonable time.⁸⁵

Likewise in *Royal Media Services Ltd v Commissioner of Customs and Excise*,⁸⁶ the Plaintiff sued the Commissioner seeking declaratory remedies against goods that has been seized. The Court had to determine whether it had powers to issue an injunction against the government through a Commissioner. The High Court held that the right to property of the Applicant had been infringed as per section 77 of the repealed Constitution and applying its broad powers under section 84(2) of the Constitution the Court granted an injunction against a government body, something that was not common in the submissive judiciary.

Despite these and other decisions that were antigovernment, high levels of corruption were however still rampant as reported in various investigative reports.⁸⁷ Transparency International noted that although political interference of the courts had reduced, the vacuum was being filled by freelance politicians and rich individuals.⁸⁸ Because of this, corruption had gone to an all new level and the judiciary was not willing to take any adverse step especially where politicians were involved.⁸⁹ One such case is the longest running scandal in the Kenyan courts; the infamous Goldenberg scandal that has been before the courts since 1994. In this political scum the Kenyan government is alleged to have subsidized exports of gold in the 1990s far beyond the standard arrangements.

⁸⁵ S 77 (1) of the Constitution.

⁸⁶ High Court Miscellaneous Application 383 of 1995.

⁸⁷ These include reports by Transparency International and ICJ (K) 'The Judiciary in Review 2000 – 2002 (2003).

⁸⁸ Transparency International 'Kenya: Overview of corruption and anti-corruption' available on www.transparency.org 3.

⁸⁹ ICJ (K) (n 87 above)13; Mutua (n 71 above) 116.

The company involved, Goldenberg International, is said to have received billions of shillings in export compensation which was 35% more than their foreign currency earnings, through the Central Bank of Kenya although in reality, little or no gold was exported as alleged. A record number of politicians at the highest levels in the Moi and Kibaki regimes have been implicated in a clear example of courts being used to manipulate and delay the judicial process so as to eventually grant immunity to corruption. To date, the real culprits behind the scam that is estimated to have cost Kenya the equivalent of more than 10% of the country's annual Gross Domestic Product, have never been brought to book.⁹⁰ Numerous applications were filed in the case, and these have been used as delay tactics year after year.

By the 1980's, Kenya was under scrutiny from international donors and human rights organizations that began to demand political reform. It was evident that after the fiercely contested 2007 general elections and post-election violence that broke out thereafter, between the supporters of the president elect and his closest rival, Kenyans had completely lost confidence in the justice system.⁹¹ Most of the victims were not even willing to file their grievances in court.⁹² They were sure that justice would not be served and the majority of Kenyans felt that justice could only be served if the main perpetrators of the violence were tried at The Hague by the International Criminal Court.⁹³ The struggle that finally culminated in the promulgation of the 2010 Constitution was therefore a relief for Kenyans because it could address the issues of transformation that the judiciary so badly needed.

⁹⁰ The scam was an alleged political scandal where the Kenyan government is alleged to have subsidized exports of gold in 1990s. The company involved, Goldenberg International, is said to have received billions of shillings in export compensation although in reality, little or no gold was exported as alleged.

⁹¹ Infortrack Judiciary Perception Survey, September 2012 <http://www.judiciary.go.ke/portal/assess/files/26-27>; Kenya Human Rights Commission (hereinafter KHRC) 'Securing justice: establishing a domestic mechanism for the 2007/8 post-election violence in Kenya' (2013) <http://www.africog.org> 11-12.

⁹² Infortrack survey (ibid); KHRC, (ibid).

⁹³ Hereinafter ICC. Kenya is a signatory to the Rome Statute that established the ICC although there have been developments where Kenya is in the process of pulling out of the statute.

4.4 The 2010 Constitution as the catalyst for judicial transformation

The need for judicial transformation emanates from the various challenges whose origin is in the colonial history. Kenya inherited a judicial system that was built on undemocratic systems, almost untouched.⁹⁴ The challenges of the system were passed on to the African bench by virtue of their training and experiences. The training that the colonial government gave to Kenyans after the court system was unified has had long term key effects to today's judiciary. Unknown to Kenyans, this training was largely flawed and was the beginning of a legal culture that would haunt the Judiciary in many years to come.⁹⁵ It was flawed because the tradition that the British brought to the Kenyan legal system was a conservative, positivist and executive-minded mode of statutory interpretation where the laws that parliament passed were taken without being questioned.⁹⁶ This legal culture, on which the Judiciary was grown, views law as a command from the sovereign and requires that the law should be followed without question because there are sanctions if it is not obeyed.⁹⁷ The Judiciary also continues to be under siege not only from the Executive and the Legislature but also from politicians, who expect the Judiciary to continue in its subservience like it did in the colonial days. The status quo has always been that the Executive holds the sword on behalf of the community and the Legislature commands the purse that affects judicial function.⁹⁸ Such an arrangement means that the Judiciary is always prone to

⁹⁴ C Hornsby *Kenya: a history since independence* (2012) 25; Ghai & Ghai, (n 41 above) 5; Middleton (n 34 above) 5; M Kinyatti *History of resistance in Kenya* (2008) 363; BA Ogot & WR Ochieng 'Decolonisation and independence in Kenya:1940-1993' (1995) xii.

⁹⁵W Mutunga 'Elements of progressive jurisprudence in Kenya' a reflection' speech delivered at judges dinner, 5 May 2012 <http://www.judiciary.go.ke/portal/downloads/speeches> 10.

⁹⁶ Mutunga (ibid).

⁹⁷ For a general discussion on these theories see HLA Hart *The concept of law* 2nd ed (1994); T Hobbes *Leviathan* (1651) Chapters 14-15; J Austin *The province of jurisprudence determined* (1832); I Kant, *The metaphysics of morals, in practical philosophy* (1996) 353,379.

⁹⁸ JB Ojwang *Constitutional development in Kenya: institutional adaptation and social change* (1990) 75.

government and political manipulation.⁹⁹ This culture stands as a major stumbling block today should Kenya embark on a framework of transformative constitutionalism.¹⁰⁰

Numerous instances exist where the Judiciary has been expected to play a submissive role to the other two arms like old times. One case that comes to mind is a ruling in which the High Court ordered warrants of arrest to be issued against Sudan's President Omar al Bashir. The said President was wanted by the ICC for crimes against humanity and since Kenya is a signatory to the Rome statute that establishes the ICC, it is obliged to cooperate with the Court. President al Bashir had visited Kenya as a guest of the State as a result of which the International Commission of Jurists filed the case to compel the Kenya government to issue arrest warrants against him.¹⁰¹ Following the ruling, the Sudan government gave Kenya's envoy 72 hours to leave the country and recalled its Ambassador to Kenya for consultations.¹⁰² In a swift move to do some damage control, the Minister of Foreign Affairs dismissed the Court order saying that 'we do not agree with the ruling of the Court. You cannot arrest a sitting President of a neighboring country regardless of the circumstances, it is an insensitive order'.¹⁰³ He then promised that the Kenya government (and surprisingly not the Sudan government) would appeal against the order.¹⁰⁴ He also pointed out that the Kenya government was not going to arrest the President as ordered by the court.¹⁰⁵ The Executive seemed to be sending a warning to the Judiciary with regard to making decisions that are not politically correct.¹⁰⁶

⁹⁹ Ojwang (ibid).

¹⁰⁰ Baraza (n 48 above) 9.

¹⁰¹ Hereinafter ICJ.

¹⁰² B Otieno & J Ochieng 'Kenya does not intend to arrest Bashir, says Onyonka' The Star, Thursday 1 December 2011, 'Keep off the judiciary, CJ tells Ministers', The Star, Friday 2 December 2011.

¹⁰³ 'Whatever happened to separation of powers and judicial independence', on Mzalendo; eye on Kenyan Parliament <http://www.mzalendo.com>.

¹⁰⁴ Otieno & Ochieng (n 102 above).

¹⁰⁵ Otieno & Ochieng, (ibid).

¹⁰⁶ *International Commission of Jurists (Kenya) v AG & 2 Others*.

There have been other instances where both the Executive and the Legislature have acted in complete disregard of court orders. The Legislative arm of government has made use of its law making power to punish the Judiciary for making unfavourable decisions by reducing the budgetary allocations to the Judiciary and allocating the funds to other sectors.

The drafters of the 2010 Constitution were well aware of the challenges that faced the Judiciary and the need to facilitate the transformation it so badly needed. The Constitution stands out for its radically different provisions regarding the Judiciary, a clear indication of its fierce role in the call for judicial transformation.¹⁰⁷

At the heart of judicial transformation is the need to enhance a culture of judicial independence against a long standing tradition of dependence. In order to facilitate the independence of the Judiciary, the Constitution provides safeguards in a way that no other constitution in the history of the country has done. It unequivocally proclaims that the Judiciary is only subject to the Constitution and the law and not the influence or control of any other person or authority.¹⁰⁸ By this provision the Judiciary is guided in the exercise of judicial authority and protected from the supervision of the Executive and Legislature and other political institutions. The expression of judicial independence also protects the Judiciary in the crucial roles envisaged by the Constitution.¹⁰⁹ The 2010 Constitution also provides immunity for judges for actions done or not done in good faith during the performance of a judicial function.¹¹⁰ The provision takes away the fear of retribution and allows judges a free will in making their decisions. In order to free the Judiciary from the traditional structure where it was yoked to the state, and easily manipulatable, the 2010 Constitution provides clear power parity between the

¹⁰⁷ Rawal (n 26 above) 6.

¹⁰⁸ Article 160(1).

¹⁰⁹ Rawal (n 26 above) 6.

¹¹⁰ Article 159(5).

three arms of government.¹¹¹ Not only has the Constitution separated the institutions, functions and staffing within the three arms, it also provides for stringent checks and balances against any usurpation.

The historical culture where the Executive and Legislative arms directly controlled the judiciary funding has partly been dealt with. As a means to further empower the Judiciary and allow for greater financial autonomy, the Constitution establishes the Judiciary Fund.¹¹² The difference with the older orders is that the Judiciary does not have to rely directly on Parliament each time need arises for its funding. The fund is administered by the Chief Registrar of the judiciary. Upon approval of the judicial financial estimates by the National Assembly, the moneys appropriated for use by the Judiciary are paid into the fund, as a charge on the consolidated fund.¹¹³ The judiciary's budget must however be debated and pass through Parliament for approval again creating a risk of manipulation which is however less than in the previous order.¹¹⁴

As a means of avoiding the appointment system that was initially shrouded in secrecy, the process of judicial appointments has also been altered so as to avoid the political interference and further offer equal opportunities. The qualifications for judges have been enumerated in the Constitution and effectively been made more stringent. The appointment process targets applications from more suitably qualified candidates, which is an expression of the need to empower the Judiciary.¹¹⁵ In order to get more quality appointments to the bench, the pool from which judges are appointed has also been enlarged from the traditional practicing advocates to lawyers in any other relevant sectors.¹¹⁶ The appointment is pegged on judges being able to portray high moral

¹¹¹ Rawal (n 26 above) 6.

¹¹² Article 173.

¹¹³ Article 173(4).

¹¹⁴ (ibid).

¹¹⁵ Article 166

¹¹⁶ (ibid).

character, integrity and impartiality; values that lacked amongst many in the previous orders.¹¹⁷ Unlike the previous dispensations where the Judicial Service Commission indirectly represented the executive wishes, there is substantial reduction of executive presence in the new JSC.¹¹⁸ It is a more representative body and it is hoped that it can change the culture of appointments and removal from the bench.¹¹⁹

The subservience of the bench had been driven for a long time by the black mail of judges losing their jobs at the whim of the Executive. In order to enhance judicial independence further, security of tenure for judges is not left to Parliament to decide any more. It is now entrenched in the Constitution thereby minimizing any manipulation along these lines.¹²⁰ The process of removing a Judge from office has been made more transparent and participative. Any member of the public can petition for removal of a Judge along the provided reasons.¹²¹ The process originates from the JSC to the President, thereby reducing Executive involvement in the removal.¹²²

The Constitution also establishes the Supreme Court as the top most court, from the Court of Appeal in the previous order.¹²³ The Chief Justice serves as the President of the Supreme Court.¹²⁴ The Court of Appeal and High Courts also have their own respective Presidents. This is important in that it disperses power that was initially centered in the office of the CJ.¹²⁵ Such power, coupled with the authority that the Executive had over the appointment of the CJ was a tool to manipulate the judiciary. Under the present order the interviews of CJ and Deputy CJ are conducted in public

¹¹⁷ Article 166.

¹¹⁸ Hereinafter JSC.

¹¹⁹ Article 171(1).

¹²⁰ Article 167.

¹²¹ Article 168.

¹²² (ibid).

¹²³ Article 163(1).

¹²⁴ Hereinafter CJ.

¹²⁵ Article 163 (1) (a), 164 (2), 165 (2).

and the public has an opportunity to take part by providing any information they may have. Appointments are made upon recommendation of the JSC to avoid a candidate being handpicked by the Executive.

Much as the transformation of the judiciary had already been predetermined by the Constitution, there was need for a philosophy and theory of change, a plan and an execution strategy to guide the process of transformation.¹²⁶ This necessitated the adoption of a blueprint document which was the culmination of a consultative process. The JTF was adopted in May 2012.¹²⁷ It sets out a 10-point action plan for transformation, described as the pillars of transformation. These pillars seek to address all the challenges faced by the judiciary from a historical perspective. They are centered around providing access to and expeditious delivery of justice, people-centeredness and public engagement of judicial activities, stakeholder engagement, change of philosophy and culture of the judiciary, leadership and management, organizational structure, growth of jurisprudence and judicial practice, improvement of physical infrastructure, resourcing and value for money and harnessing technology as an enabler for justice.¹²⁸ This framework is quite relevant even in this discussion on legal culture because the change in traditional legal culture must come with institutional and nominal change and not simply individual values and traditions.

While these constitutional provisions and the JTF were a good starting point towards judicial transformation, they were not enough. It was also necessary for the judiciary to confront other past issues so as to restore public confidence that had been lost over

¹²⁶ Rawal (n 26 above) 9.

¹²⁷ (n 37 above).

¹²⁸ Mutunga (n 95 above) 5. The Chief Justice cautioned that the Judiciary was not unveiling a document for transformation of the judiciary but unveiling a way of life for the judiciary. The 10 pillars of transformation are referred to as Key Result Areas (KRA).

the years in the institution.¹²⁹ Public views and consultations between the committee of experts resulted in a constitutional requirement to have judges and magistrates go through a vetting exercise. It was hoped that the vetting process would bring change from the unwanted culture of the colonial and previous benches.

4.5 The judiciary post 2010; the vetting of judges and magistrates

Various proponents of transformative constitutionalism as discussed in chapter three point out the importance of historical consciousness in the drafting, interpretation and enforcement of constitutional provisions. Such historical consciousness is the driving force behind the use of various processes of dealing with past injustices within the bench. Just as South Africa's Truth and Reconciliation Commission had a special hearing on the apartheid judiciary and legal community, Kenya had the Judges and Magistrates Vetting Board to help deal with the past and possibly create a bench made with what Klare and Mureinik refer to as conscientious judges.¹³⁰ Their discussion of the conscientious judge is pertinent in that it further emphasizes that since law and legal principles are indeterminate, it is not possible to state exactly what result a judge ought to give in any particular situation. What matters most is the ability of a judge to be controlled by their inner sense of what is just and faithful to the spirit and meaning of a transformative constitution.¹³¹ In a similar reasoning the Supreme Court refers to the role of the vetting board as that of determining whether the judges were suitable to transit from an old order to a new order.¹³²

¹²⁹ Constitution of Kenya, 2010 Sixth Schedule section 23 provides for the vetting of judges and magistrates to determine their suitability for them to continue serving in the judiciary; Mutunga (n 95 above) 5.

¹³⁰ Hereinafter JMVB.

¹³¹ Klare (n 3 above) 148.

¹³² Supreme Court Petition No 29 of 2014 Paragraph 54.

Transformation like that envisaged in the 2010 Constitution requires the judiciary to jealously protect the provisions, values and spirit of the Constitution, unlike in the old days when it failed to protect the rights of its citizens and to apply the rule of law.¹³³ There was doubt from the Kenyan society that the same judiciary that had been perceived by the public as corrupt and unable to uphold the rule of law would be successful in implementing, interpreting and fostering acceptance of the new Constitution, which was radically different from what they had been used to.¹³⁴ The drafters of the 2010 Constitution were also aware of the challenges of trying to change the culture of a judiciary whose track record was marred by failures to uphold the rule of law for decades. The solution to this dilemma was for Kenyans to insist that the full guarantees of judicial office should not immediately and automatically be granted to incumbent judges.¹³⁵ A compromise had to be made between experiences in Bosnia and Herzegovina, (former) East Germany, and the Czech Republic which had examples of total overhaul of the judiciary.

Taking into account the historical context and need for vetting in Kenya, the 2010 Constitution requires all judges and magistrates who were appointed under the previous dispensation to undergo individual vetting.¹³⁶ The purpose of vetting, as set out in the Constitution, is to determine whether they are suitable to continue serving in accordance with the rule of law, human rights and other values enshrined in the new Constitution.¹³⁷ It was therefore a means of ridding the judiciary of the culture of legal positivism that has dominated the jurisprudence in Kenya since time immemorial and

¹³³Mutunga, (n 51 above)3; B Sihanya 'Constitutional implementation in Kenya, 2010-2015; challenges and prospects' <http://www.innovativelawyering.com> 37; Rawal (n 26 above)1.

¹³⁴ J van Zyl Smit, 'Restoring confidence in the judiciary; Kenya's judicial vetting process, constitutional implementation and the rule of law' http://www.constitutionnet.org/kenyas_judiciary 1.

¹³⁵ Van Zyl (ibid).

¹³⁶ Schedule 6 section 23(1), 'Judicial integrity and the vetting process in Kenya' Amani Papers, UNDP Publication 6 (1) September 2010 <http://www.ke.undp.org/content/dam/kenya/papers/Amani> 1.

¹³⁷ Schedule 6 section 23(1).

bringing in a new breed to the judiciary.¹³⁸ Section 23(1) of the Sixth Schedule to the 2010 Constitution was instructional that:

Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

The vetting process was carried out by a vetting board established and regulated formally by the Vetting of Judges and Magistrates (Amendment) Act.¹³⁹ The membership of the board gave it an independent and professional outlook. The membership was mixed, with some members drawn from Kenya, and some three foreigners, all with wide expertise in various fields in law.¹⁴⁰ The executive and the judiciary in Kenya were not represented in the board.¹⁴¹ In addition, the board was not subject to the direction and control of any person thereby making it free of manipulation from politicians, the Judiciary and other quarters.¹⁴² The process was participative in that the public was asked to submit any information that they had, including complaints, to the board.¹⁴³ The information was looked at and considered

¹³⁸ Baraza (n 48 above) 9.

¹³⁹ Act no 2 of 2011. Hereinafter the JMVB Act.

¹⁴⁰ Section 7 JMVB Act provides for a total of 9 members, 6 of whom shall be Kenyan citizens and 3 non Kenyan citizens

¹⁴¹ The board was chaired by Sharad Rao, a Barrister at Law with many years working experience in Kenya. Mrs Roseline Odede, an Advocate of the High Court of Kenya with over 20 years' experience was the vice chairperson. Other members included Mr. Abdirashid Abdullahi a conflict resolution expert, Mr Justus Muniyithya a former vice chairman of the Law Society of Kenya, Professor Ngotho wa Kariuki, a Kenyan tax specialist and scholar, Meuledi Iseme, a financial management specialist, Chief Justice Georgina Wood, the Chief Justice of the Republic of Ghana, Justice Albi Sachs, a retired judge of the Constitutional Court of South Africa, Justice Frederick Mwela Choma of Zambia and Reuben Chirchir, a manager by training. This information is available in the official website of the board <http://www.jmvp.or.ke>.

¹⁴² Section 9 of the JMVB Act.

¹⁴³ Rule 8 of the JMVB Procedure Regulations 2011.

by the board before being used in the process.¹⁴⁴ The judges also had an opportunity to decide whether they preferred a private or public hearing and were given an opportunity to respond to the allegations against them in person or by way of legal representation.¹⁴⁵ In the end, all the findings of the board were made public.¹⁴⁶

The vetting process began on 23 February 2011 but was interrupted several times by cases filed in court to resist the exercise. Several separate petitions filed by judges who had been dismissed by the JMVB mainly challenging its powers and legality were eventually consolidated. The main reason for the judges challenging the legality of the board is the fact that the law that established the Board had provided that its decisions were not to be challenged in the High Court.¹⁴⁷ The JMVB Act had been established pursuant to the constitutional instructions that:

A removal or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.¹⁴⁸

Issues were also raised as to how far back and how far ahead the JMVB could look, in other words, whether the JMVB could determine the suitability of judicial officers who were in office from the effective date of the Constitution or before the effective date which was 27 August 2010. The petitions also raised issues of multiplicity of institutions referring to the JSC and the JMVB.

¹⁴⁴ (ibid).

¹⁴⁵ JMVB website (n 141 above).

¹⁴⁶ (ibid) for the general procedure and determinations of the board.

¹⁴⁷ JMBV Act section 22(4) which reads: A removal or a process leading to the removal of a magistrate from office under this Act shall not be subject to question in, or review by, any court.

¹⁴⁸ Section 23(2) Sixth Schedule.

These consolidated issues culminated to the decision of the Supreme Court delivered in November 2014.¹⁴⁹ The Supreme Court in my view applied a holistic and historical conscious approach to the constitutional provisions. By looking at the historical context within which the vetting exercise was being carried out the court held that the provisions in the Constitution that ousted the jurisdiction of the High Court to hear appeals or reviews from the vetting board were not unconstitutional.¹⁵⁰ It was the decision of the Court that the laws that seemed to overly protect the jurisdiction of the JMVB were intended to protect the board from political manipulation. The Supreme Court also concluded that the JMVB was at liberty to vet all judges and magistrates who were in office at the effective date, but not those who were not in office then.¹⁵¹ Although the cases had caused substantial delay to the process, the Supreme Court's decision opened the way for the vetting to continue. By the time the board released its eleventh report, on 15 July 2014, it had vetted over 200 judicial officers.¹⁵² Of these, the board had found a total of 32 judicial officers unfit to continue serving.¹⁵³

So far, the process has been largely successful in its quest to restore confidence in the judiciary.¹⁵⁴ It has been hailed by many judges, lawyers and scholars locally and internationally.¹⁵⁵ It also registered huge support from the public as compared to other mechanisms set up for purposes of judicial accountability in the past.¹⁵⁶ Except the

¹⁴⁹ Petition No 13A, 14 and 15 of 2013, *JMVB & 2 Others v Center for Human Rights and Democracy & 11 Others*.

¹⁵⁰ Paragraph 40.

¹⁵¹ Paragraph 53.

¹⁵² Eleventh Announcement of the JMVB <http://www.jmvp.or.ke> 2 at Paragraph 2.

¹⁵³ Eleventh Announcement, (ibid). At the time of this report, the board had a further 215 magistrates and 2 judges to vet as well as 14 review applications to hear and determine before the end of the Board term.

¹⁵⁴ 'Restoring Confidence in the Judiciary'; This is the motto that was adopted by the JMVB, against its objective which was to vet the suitability of judges and magistrates who were in office on the effective date of the 2010 Constitution, on their suitability to continue serving under the new Constitution; JMVB website <http://www.jmvp.or.ke>.

¹⁵⁵ 'International judges hail Kenya's vetting process', *The Star* 5 October 2012 10.

¹⁵⁶G Imende 'Vetting of judges and magistrates in institutional transformation: lessons from Kenya' (unpublished dissertation) available on University of Nairobi digital repository

judges who had to go through the vetting exercise, all other appointments made under the 2010 Constitution have been made transparently with public participation.¹⁵⁷ As a result of these, the Judiciary is today described as the most robust and progressive that it has ever been. Evidence of this is illustrated by the celebrated decisions of the courts that have been termed as innovative and daring, a character that was not present in the traditional judicial system.

Despite these gains critics warn that the vetting of the judges and magistrates should not be taken as an end in itself.¹⁵⁸ It has been suggested that there is need for the vetting process to be a part of a broader reform process if an overhaul of traditional culture is going to be viable.¹⁵⁹ Critics draw attention to an almost similar exercise in 2003 when the government attempted to clean the judiciary. The exercise that came to be known as the 'radical surgery' saw the suspension and removal of more than 100 judicial officers.¹⁶⁰ The outcome of the radical surgery did not create any systematic change.¹⁶¹ The same corruption and manipulation still went on even after the exercise. There was almost no difference between the older and new face of the judiciary. The lesson to be learnt from the radical surgery is that an overhaul of legal tradition requires substantial change not only of the individuals but the institutions. Even if individuals change and the systems still remain intact, not much will have been done to reorganize the culture. Similarly, the current vetting process may still present a danger from some old intact systems because only judicial officers have been vetted. The

<http://www.erepository.uonbi.ac.ke>, Report by Infotrack research and consulting, dated September 2012 where 70% of the respondents interviewed stated that they had confidence in the current CJ and newly appointed judges, with 43% stating that they had confidence in the new judges because of the vetting process. 64% of those interviewed felt that the board was doing a commendable job, 84% of the respondents said that they trust Kenyan courts. The respondents gave the Kenyan courts a rating of 59% in performance of its duties. The report is available online at www.judiciary.go.ke.

¹⁵⁷ As required under article 159.

¹⁵⁸ UNDP report (n 136 above) 5.

¹⁵⁹ UNDP report (ibid).

¹⁶⁰ UNDP report (n 136 above) 6. The Commission was chaired by Retired Justice Aaron Ringera.

¹⁶¹ UNDP report (ibid).

process did not extend to other judicial staff that may also have been in the older regime and may have contributed to the inadequacies of the judiciary.¹⁶² To date, there is still no clear policy on how this would be handled so as to make the change more systematic.¹⁶³

Concern has also been raised over the inability of the board to achieve uniformity in its decisions. Any inconsistencies can only mean that there are judicial officers who were missed out in either group. Some officers may have been declared fit while they were not, and others declared unfit while they were fit. Hence, while the intention was to end up with only judges who share in the transformative vision of the 2010 Constitution, there is a potential challenge that the judiciary is still a mixed culture judiciary.

Several theoretical factors may explain the inconsistencies. To begin with, although each of the members of the JMVB brought into the board a wealth of experience from their different fields, they also came in with their different ideologies, backgrounds, beliefs, assumptions, preferences and views. These would certainly affect the way that they eventually voted in the vetting exercise again bearing in mind the indeterminacy thesis earlier discussed. In any case, the level of detail with which the qualifications were set out was in itself a further challenge.¹⁶⁴ Instead of guiding the board, the list of qualifications may have ended up creating more room for subjectivity and even abuse.¹⁶⁵ The competencies that the board was looking for were almost all based on

¹⁶² UNDP report (ibid).

¹⁶³ UNDP report (ibid).

¹⁶⁴ Imende (n 156 above) 36.

¹⁶⁵ UNDP report (n 136 above) 4, Imende (n 156 above) 36, Under section 18 of the Act, *“the Board shall, in determining the suitability of a judge or magistrate, consider—*

(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior

courts or as a magistrate;

(b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and

diligence;

(c) any pending or concluded criminal cases before a court of law against the judge or magistrate;

subjective perception. These included the requirement of diligence, professional competence, intellectual capacity, integrity and fairness. There was no prescribed matrix

(d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-

Corruption Commission; and

(e) pending complaints or other relevant information received from any person or body, including the -

(i) Law Society of Kenya; Kenya Anti-Corruption Commission; Advocates Disciplinary Committee; Advocates Complaints Commission; Attorney-General; Public Complaints Standing Committee; Kenya National Human Rights and Equality Commission; National Intelligence Service; Police; or Judicial Service Commission.

(2) In considering the matters set out in subsection (1) (a) and (b), the Board shall take into account the following -

(a) professional competence, the elements of which shall include –

intellectual capacity; legal judgment; diligence; substantive and procedural knowledge of the law; organizational and administrative skills; and the ability to work well with a variety of people;

(b) written and oral communication skills, the elements of which shall include - the ability to communicate orally and in writing; the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and effectiveness in communicating orally in a way that will readily be understood and respected by people from all

walks of life;

(c) integrity, the elements of which shall include -

a demonstrable consistent history of honesty and high moral character in professional and personal life; respect for professional duties, arising under the codes of professional and judicial conduct; and ability to understand the need to maintain propriety and the appearance of propriety;

(d) fairness, the elements of which shall include -

a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;

(e) temperament, the elements of which shall include - demonstrable possession of compassion and humility;

history of courtesy and civility in dealing with others; ability to maintain composure under stress; and ability to control anger and maintain calmness and order;

(f) good judgment, including common sense, elements of which shall include a sound balance between abstract

knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve

difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;

(g) legal and life experience, the elements of which shall include - the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field; and demonstrable commitment to public and community service, the elements of which shall include the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular."

against which these competencies could be measured. There was also no prescribed method to determine the relative weight and therefore no scientific method to determine who had passed or failed the vetting.¹⁶⁶ It did not help that the attributes enumerated under the Act were way too many, making it humanly impossible to deal with each and every one of them.¹⁶⁷ In view of the tight schedule and limited resources, and by studying the reports of the board, it is evident that the board has not, in the past, considered the entire criterion on the candidates but only some of the criterion.¹⁶⁸ The problem that would then arise is that a judge may have had some negative attributes but managed to cover these with overwhelming positive attributes and passed through the vetting process and vice versa.

The qualifications as set out expose a major shortcoming of reliance on legal principles that are largely abstract. For avoidance of doubt, I use the term abstract to denote something that does not appear to represent external reality; something that is theoretical.¹⁶⁹ The criteria for qualification of judges and magistrates as enacted for the vetting board was quite unrealistic and unachievable.¹⁷⁰ It is in fact inconceivable to imagine that an individual would possess all the attributes as specified. This is true even for judges who have been looked upon as the best in some of the world's most respected judiciaries.¹⁷¹ This level of optimism may be termed almost as a myth because 'as long as the judicial function is entrusted to men and not automatons, subconscious prejudices and preferences will never be completely removed from the

¹⁶⁶ Imende (n 156 above) 36.

¹⁶⁷ Imende (n 156 above) 37.

¹⁶⁸ Imende (ibid), First to Tenth Announcements of the JMVB.

¹⁶⁹ Oxford online dictionary, <http://www.oxforddictionaries.com>.

¹⁷⁰ EL Muthoni 'Corruption in the Kenyan judiciary; will the vetting of judges and magistrates solve this problem?' Research project paper submitted to the University of Nairobi School of Law in partial fulfilment of the Degree of Master of Laws November 2013, <http://www.uonbi.ac.ke> 103.

¹⁷¹ Imendes (n 156 above) 37; E Heward *Lord Denning*, 2nd ed, (1997)197, writing on Lord Denning who despite being described as one of England's most outspoken judges also had certain weaknesses for instance his racial attributes.

judicial process. They will only be concealed'.¹⁷² It is because of the law's unrealistic expectations that the board found itself time and again having to circumvent some qualities by justifying or allowing excuses to declare a judge fit or unfit.

Indeed, the CJ admits that it is not possible for the judiciary to be cleared of every single blot on its character.¹⁷³ He acknowledges that the vetting process does not guarantee that the judges currently serving in the judiciary are angels.¹⁷⁴ This is a strong statement that would find justification in the fact that some of the personal attributes under consideration are out of the reach of the law.¹⁷⁵ This is either because the attributes are innate, not observable or because standards vary between individuals. The vetting process exposes the boundary of the law to control certain spheres of transformation which are natural and not otherwise controllable because Judges are human beings and even after appointment to the bench, the judges do not shed their humanly qualities.¹⁷⁶

The crucial question therefore is whether the vetting process in Kenya has been successful in turning around the legal tradition and more pertinently the legal culture into one that is able to address the needs of transformative constitutionalism. In order to answer this question it is important to sample a few decisions from the developing jurisprudence of the courts.

¹⁷² LA Kornhauser 'Is judicial independence a useful concept?' In Burbank, SB & Friedman, B (eds) (2002) *Judicial independence at the crossroads; an interdisciplinary approach* 45: 46.

¹⁷³ Mutunga (n 95 above) 5.

¹⁷⁴ Mutunga (n 51 above) 52.

¹⁷⁵ Imende (n 156 above) 46.

¹⁷⁶ J Dugard 'The judicial process; positivism and civil liberty' (1971) 88 *South African Law Journal* 183; 183.

4.6 Decisions of the Courts after the vetting process

To its credit however, after the vetting of a large number of judicial officers, the reforming Judiciary has presided over a number of cases and demonstrated a new attitude, innovation and bravery that has not been known in Kenya's history.¹⁷⁷ There are numerous decisions on the bill of rights, election petitions, public interest litigation and locus standi where the courts seem to have made pronouncements of progressive jurisprudence. There is however still some concern over a number of other judgments where the judiciary has also portrayed restraint and timidity in dealing with issues.¹⁷⁸ This only goes to show that trying to overhaul a legal culture is in itself a process and way of life that will not come instantly especially as the process of judicial appointments is continuous. I would therefore characterize the current bench as a mixed bench which also creates unique challenges for Kenya. As earlier discussed, there is the possibility that new progressive ideas and change in legal culture will be resisted by the bench itself, the bar and even members of the public.

I have in mind the example of the ongoing probe involving Justice Joseph Mbalu Mutava, a High Court judge who was appointed under the 2010 Constitution. The Judge had in a decision made in 2012 ordered all criminal charges against Kamlesh Pattni, the mastermind behind Kenya's biggest corruption case, to be dropped.¹⁷⁹ The Judge in effect quashed the 5.8 billion shillings case that had haunted Kenya's corridors

¹⁷⁷ PLO Lumumba 'Judicial innovation or schizophrenia? A survey of emerging Kenyan jurisprudence' Paper presented at the Law Society of Kenya annual conference at leisure lodge beach & golf resort, Mombasa, held on 14 -15 August 2014.

¹⁷⁸ Lumumba (ibid).

¹⁷⁹ *Republic v Attorney General & 3 others Ex-parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR. The decision has been met with public outcry and the Law Society of Kenya has promised to file an appeal against the ruling because the case involves a lot of money and on public policy grounds should not have been dropped.

of justice for decades.¹⁸⁰ Justice Mutava's order was based on the fact that the case and several other related cases had been filed over twenty years since committal of the act and still had not come to an end, thereby infringing on Pattni's constitutional rights to a fair and speedy trial.¹⁸¹ All this time Pattni had to deal with intrusive media coverage. The Judge noted that it was therefore impossible for Pattni to get a fair trial since in the long period most witnesses had also died and others forgotten their evidence.¹⁸²

In the previous regimes, it was in order and quite normal for trials to go on for an inordinate period of time for political benefits. But the era under the 2010 Constitution was different as it introduced a culture of restoration and reform.¹⁸³ In recognition of the new culture required in judicial interpretation, the Judge lamented that 'being placed at such a risk for an indeterminable period of time with no end in sight must leave the conscience of the drafters of the Constitution shattered'.¹⁸⁴ Yet he was also aware of the tension that faced him; between freedom and constraint in the adjudication of constitutional cases particularly in trying to build a transformative jurisprudence.¹⁸⁵ He noted in this regard that:

It will be foolhardy not to observe that the verdict of this court in the present application is bound to elicit din, clamor and hostility in view of the predispositions by the media and public opinion with regard to the notoriety of the applicant (Pattni).¹⁸⁶

¹⁸⁰ An appeal has since been filed at the Court of Appeal challenging the judge's orders to quash the case. See 'Sh 5.8 billion case against Pattni goes to the Court of Appeal' Daily Nation digital <http://www.nation.co.ke> 23 April 2013.

¹⁸¹ At page 38 Paragraphs 87, 88, 89; 'Judge defiant after clearing Pattni of Goldenberg scam' Business Daily digital <http://www.businessdailyafrica.com> 11 March 2014.

¹⁸² (ibid).

¹⁸³ Van der Walt (n 5 above) 29 writing about the transformation period with respect to land laws and policies in South Africa.

¹⁸⁴ 'Pattni walks to freedom as charges dropped' The Standard 6 May 2013 <http://www.newkenya.co.ke>

¹⁸⁵ Paragraph 81 and 82.

¹⁸⁶ Page 36, Paragraph 91.

Observing that the work of a judge was not for the faint-hearted and preparing himself for what was to come, he stated that 'I am comfortable and well prepared for any reaction'.¹⁸⁷ He then went on to make his finding, based on what he considered to be the policy, value and spirit of the 2010 Constitution.¹⁸⁸ Although I agree with the Judge's reasoning and decision, I do not insist that it is the only plausible way to analyze the judgment. I do however find Justice Mutava's judgment to be progressive, and based on what Klare terms as a post liberal reading required by the new constitutional dispensation.¹⁸⁹ As the judge had correctly predicted, not everyone was going to accept the verdict. It was met with mixed reactions and soon thereafter he was suspended and a tribunal formed to investigate his conduct for alleged impropriety in dealing with the case and other Goldenberg related cases.¹⁹⁰

There have been other cases where in my view the Supreme Court, being the newest creature of the 2010 Constitution, should have served as an example of a different legal culture, but it failed to raise up to the occasion. In *The Matter of the Principle of Gender Representation in the National Assembly and Senate*,¹⁹¹ the Supreme Court was invited to give an advisory opinion on whether article 81(b) as read with articles 27(4), 27(6), 27(8), 96, 97, 98, 177(1) (b), 116 and 125 of the 2010 Constitution required progressive or immediate realization. The issue was centered on the enforcement of the two-thirds gender rule in the new Constitution that would ensure that each gender was represented in Parliament by at least one third number of either gender.¹⁹² The issue for determination was as to whether the articles in the Constitution required the same

¹⁸⁷ Paragraph 91; Business Daily (n 181 above).

¹⁸⁸ As instructed by the Constitution under article 259; Paragraphs 91-93.

¹⁸⁹ Klare (n 3 above) 151-152.

¹⁹⁰ 'Uhuru suspends judge, forms tribunal to investigate him' The Standard digital <http://www.standardmedia.co.ke> 30 May 2013.

¹⁹¹ Supreme Court of Kenya Advisory Opinion App 2 of 2012.

¹⁹² The one third gender rule would specifically benefit women who had in the past been left out of political positions.

to be implemented during the first general elections under the 2010 Constitution, scheduled for 4 March, 2013.¹⁹³

In a majority decision, the Supreme Court reached the decision that the rule was required to be enforced progressively and therefore did not need immediate attention. As expected of judges with a common law training and legal culture, the majority of the judges gave a highly technical judgment on the matter. They went on a purely technical discourse battling with definitions of terms like 'progressive realization of rights',¹⁹⁴ the connotation of the word 'shall',¹⁹⁵ and an analysis of international instruments provisions on progressive realization of rights.¹⁹⁶ Very little consideration in the final decision was given by these judges on the history of the affirmative action policies and the impact that it was intended to have under a new transformative Constitution.

The CJ alone gave a dissenting decision. Upon reading his decision it is quite evident that the Supreme Court was characterized by two extremely different cultures of reasoning in that matter. The CJ's comments on the interpretation of the Constitution are, in my view, a summary of what post liberal, purposeful and progressive interpretation of the Constitution requires. He states that:

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. It is in interpreting the Constitution that our robust, patriotic, progressive and indigenous jurisprudence will be nurtured, grown to maturity,

¹⁹³ Article 81 provides for general principles of the electoral system, article 27 for equality and freedom from discrimination, article 96 for the role of the senate, article 97 membership of the national assembly, article 98 for the membership of the Senate, article 177 for the membership of the County Assembly, article 116 for coming into force of laws and article 125 for the power to call for evidence.

¹⁹⁴ Paragraph 49.

¹⁹⁵ Paragraph 61-62.

¹⁹⁶ Paragraph 49-51.

exported, and becomes a beacon to other progressive national, African, regional, and global jurisprudence. After all, Kenya correctly prides itself as having the most progressive constitution in the world with the most modern Bill of Rights. In my view, this is the development of rich jurisprudence decreed by Section 3 of the Supreme Court Act...that respects Kenya's history and traditions and facilitates its social, economic and political growth.¹⁹⁷

He went on to note that if the transformation goals under the Constitution were going to be achieved, a purposive interpretation in the spirit of the Constitution was necessary. The CJ cited the South African Constitutional Court decision in *S v Zuma*¹⁹⁸, in which the Constitutional Court of South Africa adopted a purposive interpretation to the idea of rights under the Constitution, having regard to the history and usages of the people.¹⁹⁹ He, unlike the other Judges, took the view that the values of the new Constitution and historical context within the issue of discrimination and equality is treated in Kenya would require immediate realization of the two thirds gender rule.²⁰⁰ It was disappointing that the Supreme Court failed to realise on this occasion that it would be setting a bad precedent that will be followed by other courts in realisation of equality for marginalised and vulnerable groups. Consequently the decision of the Supreme Court has also been criticised for failing to insist on the obligation of the state to move expeditiously so as to ensure realisation of the right.²⁰¹ There is no evidence that the majority interrogated the state on the actions it had taken, two years into the promulgation of the Constitution, towards securing gender representation rights. It did not insist on any benchmarks being set by the government. This in effect renders the gender representation provision more of an aspirational goal than an enforceable right

¹⁹⁷ Paragraph 8.2 of the dissenting opinion by CJ Dr Willy Mutunga.

¹⁹⁸ (CCT5/94) (1995).

¹⁹⁹ Paragraph 8.10.

²⁰⁰ Paragraph 11.6 of the dissenting opinion by Justice Mutunga.

²⁰¹ D Ochiel 'Gender rights and wrongs: critique of the Supreme Court decision on the one third gender principle' Paper presented at the Colloquium on Women and the Constitution of Kenya 2010; Challenges and Prospects' October 2013 <http://www.kenyalaw.org>.

that may still remain out of reach of the people it was meant to transform. Instead of breathing life into the constitutional requirement the majority bench opted for an easier path out.

This decision by the majority is painted in particularly bad light when compared to two High Court decisions. In the first case, the High Court was called upon to adjudicate a petition for the enforcement of the right to property and socio economic rights allegedly breached. Regarding the progressive realisation of socio economic rights the High Court boldly pronounced that:

The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet constitutional obligations. Article 21 and 43 require that there should be 'progressive realization' of social economic rights implying that the State must begin to take steps, and I might add, be seen to take steps towards realization of these rights.²⁰²

On a different occasion the High Court also noted that '...three years after the promulgation of the Constitution the right to adequate housing cannot be aspirational and merely speculative'.²⁰³ In this matter the Court ordered the Attorney General to move with speed and establish policies and guidelines to ensure that the right to housing is progressively realized. The Attorney General was further directed to file an affidavit within 90 days 'detailing out existing or planned State Policies and Legal Framework on Forced Evictions' and 'measures towards the realization of the right to accessible and adequate housing and to reasonable sanitation'.²⁰⁴ This decision canvassed the issue of

²⁰² *Mitubell Welfare Society v AG* [2013] eKLR.

²⁰³ *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* [2013] eKLR.

²⁰⁴ (ibid).

illegal evictions carried out by the state in the context of the constitutional right to housing.

These cases prove that the area of interpretation of socio economic rights is one where the courts in Kenya are yet to pronounce themselves although the inclusion of these rights as justiciable rights in the 2010 Constitution mandates a total shift in legal interpretation. From a theoretical point of view, the traditional liberal approach as described by Klare is associated with the view that constitutional values and desires are subjective and individuating, hence the traditional bill of rights that was mainly based on civil and political rights. These are the rights that courts in Kenya have adjudicated on since time immemorial. Socio economic rights however require a post liberal reading that puts the government to task thereby requiring positive duties by the state to secure the rights. Determinations that require such a total shift in culture will possibly take some time.

Likewise, courts are still indecisive about dealing with highly political cases that especially create policy issues. A case in point is one involving the first election date under the new Constitution, where in my view, both the Supreme Court and the High Court shied away from making any decision. The Supreme Court declined to give an advisory opinion interpreting the Constitutional provisions on the date of the first general elections and instead ordered the High Court to deal with the petitions. When the matter came before the High Court, its decision too was inconclusive. The High Court left it to the IEBC to declare the final election date and only gave two possibilities clearly opting to steer clear of any political intrigues. The IEBC set the 4 March 2013 date which was met with mixed reactions and it is only after an appeal was lodged to the Court of Appeal that the Court was firm enough to uphold the date that had been set by the IEBC.

These few examples are a reflection that the Kenyan bench has a long way to go in adopting a legal culture that would work in favor of a framework of transformative constitutionalism. Considerations from the long process and challenges towards cultural change can be taken from the South African judiciary which shares some characteristics with the Kenyan bench. A brief history of the South African judicial system is therefore important at this point.

4.7 A contextual description of the South African judiciary

Apartheid was enforced through an elaborate and sophisticated legal system. The legal system was comprised of privileged white judges who were at the apex of it.²⁰⁵ They shared some similarity in terms of background, their world views, their experiences, positions in society and social circumstances.²⁰⁶ In addition, they were also interested in maintaining the status quo since they were major beneficiaries of the prevailing social and political order.²⁰⁷ By law judges were appointed by the state president pursuant to the provisions of the Supreme Court Act.²⁰⁸ The reality however is that the state president was only a rubber stamp for the Minister of Justice who actually made the appointments.²⁰⁹ Subsequently, the appointments were made on recommendation of the CJ or the Judge President of the relevant division.²¹⁰ The process of identifying suitable candidates was shrouded in secrecy except that they were chosen from senior barristers.²¹¹ The barristers were white and were mainly men. Appointments were made mainly on political grounds so that majority of the judges mirrored individuals who were sympathetic to the political order and willing to support it. Promotions were

²⁰⁵A Gordon & D Bruce 'Transformation and the independence of the judiciary in South Africa' http://www.csvr.org.za/docs/transition/3pdf_; 14, Dugard (n 176 above) 190.

²⁰⁶ (ibid).

²⁰⁷ (ibid).

²⁰⁸ Act 59 of 1959 section 10.

²⁰⁹ M Wesson & M Du Plessis 'Fifteen years on: central issues relating to the transformation of the South African judiciary' (2008) 24 *South African Journal on Human Rights* 188: 190.

²¹⁰ Wesson & Du Plessis (n 209 above) 188.

²¹¹ Wesson & Du Plessis (n 209 above) 190.

largely political too and were given depending on a history of support for the government. Sydney Kentridge describes the status quo then as follows:

Over the past 30 years political factors have been placed above merit not only in appointments to the bench but in promotions to the appeal court.....and it may be said that over the past 30 years a number of judicial appointments have been made which are explicable solely on the ground of the political views and connections of the appointees and on no other conceivable ground.²¹²

This dynamics meant that the apartheid Judiciary was not representative of the population that it served, especially the black majority.²¹³ Regrettably, the bench was robbed of the experience of black judges who may have made a difference given that the majority of the population and possibly majority of the litigants were black.²¹⁴ Black judges could have had shared life experiences and might have been better able to understand the language, culture and behavior of black South Africans.²¹⁵ These demographics contributed largely to the illegitimacy of the apartheid Judiciary.

So organized was the whole system that there even existed formal structural guarantees of judicial independence. For instance, the apartheid Judiciary enjoyed security of tenure and security of salary.²¹⁶ Because of these formal structures the apartheid government insisted that the Judiciary was independent.²¹⁷ The government would continue to make such assertions at all costs because it was well aware that an independent Judiciary was recognized internationally as the cornerstone of any

²¹² S Kentridge 'Telling the truth about law' (1982) *South African Law Journal* 648: 652.

²¹³ Wesson & Du Plessis (n 209 above) 191; Gordon & Bruce (n 205 above) 19.

²¹⁴ MTK Moerane 'The meaning of transformation of the judiciary in the new South African context' (2003)120 *South African Law Journal* 708: 710.

²¹⁵ Moerane (ibid).

²¹⁶ Moerane (ibid); Gordon & Bruce (n 205 above) 11.

²¹⁷ Moerane (ibid); Gordon & Bruce, (ibid).

democracy.²¹⁸ In addition, there are a few times when the Judiciary would render decisions contrary to the wishes of the government. These were used by the state to hide the vulnerability of the Judiciary to manipulation by the apartheid government.²¹⁹

The judicial system was subject to the doctrine of Parliamentary supremacy as entrenched in the 1961 and the 1983 Constitutions of South Africa. Section 34 of the 1961 Constitution particularly read:

No court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament.

Parliament was therefore supreme over the Executive and the Judiciary. Courts had no power of judicial review over Parliament and were confined to interpreting and applying the law as declared by Parliament.²²⁰ The Judiciary therefore played a key role in helping to enforce a pernicious system.²²¹ It was used by the apartheid government to uphold its policies through discriminatory and unjust legislation. The Judiciary was guilty of helping the government to enforce a system of racial exclusion and oppression of the blacks.²²² Instead of commenting on the unjust nature of the laws that they were supposed to interpret and apply, a majority of the Judiciary simply chose to play a passive role.²²³ This was to become the Judiciary's major undoing in its contribution to sustaining the 50 years of apartheid.²²⁴ It also emerged that assignment of cases to

²¹⁸ Gordon & Bruce (ibid).

²¹⁹ Gordon & Bruce (ibid).

²²⁰ Gordon & Bruce (n 205 above) 12; Wesson & Du Plessis (n 209 above) 190.

²²¹ Gordon & Bruce (ibid); Wesson & Du Plessis (ibid); E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436: 436.

²²² Gordon & Bruce (ibid); Wesson & Du Plessis (ibid); E Cameron (ibid); E Cameron 'A single judiciary? Some comments' (2000) *South African Law Journal* 141: 142.

²²³ Wesson & Du Plessis (ibid); Cameron (n 221 above) 437; Gordon & Bruce (n 205 above) 13; Dugard (n 176 above) 182.

²²⁴ Wesson & Du Plessis (ibid); Cameron (ibid); Gordon & Bruce (ibid); Dugard (ibid).

judges was politically motivated. Mostly the judges who were sympathetic to the apartheid government were the ones assigned to hear political cases.²²⁵

There were many occasions where the Judiciary proclaimed their inability to speak against this legislative injustice. They claimed that their hands were tied because their duty was only to interpret laws as passed by Parliament and not to make decisions on the validity of the laws.²²⁶ Their sole responsibility was to look for Parliament's intention, whatever the result of that intention and apply it.²²⁷ These were the views adopted by all judges who came to be known as conservative apartheid judges. They adopted a literal approach, denying them any opportunity for creativity and became defenders of the status quo.²²⁸ The Judiciary was so engrossed in seeking the intention of Parliament that it did not care about applying that intention to advance justice, equality and fairness. A decision by the Appellate Division in 1934 explains the courts approach. In *Sachs v Minister of Justice* the Court unfortunately had the view that:

Parliament may make any encroachment it chooses upon the life, liberty or property or any individual subject to its sway andit is the function of the courts of law to enforce its will.²²⁹

Again, in *Minister of the Interior v Lockhart*, the Appellate Division was faced with a case challenging the validity of a proclamation to divide Durban into group areas.²³⁰ It was alleged that the whites had been given the best areas at the expense of the Indians. The Court had absolutely no problem in enforcing this inequality so long as it could attribute it to Parliament. That Parliament must have foreseen and intended such

²²⁵ Gordon & Bruce (n 205 above) 17.

²²⁶ Gordon & Bruce (n 205 above) 13.

²²⁷ Gordon & Bruce, (ibid).

²²⁸ Wesson & Du Plessis (n 209 above) 200.

²²⁹ 1934 AD 11 at 37.

²³⁰ 1961 AD.

results and so it was the courts duty to simply enforce the resulting injustices. The Court in fact held that Parliament had provided for the inequitable results as implied by the legislation containing the proclamation.

Many academics and lawyers have denied that there is nothing that the Judiciary would have done to shield itself from being used as an instrument by the apartheid government.²³¹ They have jointly expressed the view that given the ambiguity of language used in legislation and the diversity of facts that courts were faced with, the judges did have some degree of authority in interpretation and application of the law.²³² The Judiciary could therefore have acted more often than it did to stop the application of unjust legislation.²³³ In fact, while a larger number of judges felt constrained to apply the apartheid laws, a small number of judges took advantage of any opportunity to declare the language of the statutes as ambiguous so as to apply justice and equality.²³⁴ This small group of celebrated judges would go on to form the cornerstone of South Africa's Judiciary after apartheid.²³⁵

Some of these celebrated judges sat in the Appellate Division, which was the highest court at the time. For instance in 1951 the Court found the Separate Representation of Voters Act²³⁶ to be invalid because Parliament had not followed procedure in passing it.²³⁷ In this and a few other instances where the Court asserted its independence by passing decisions against the apartheid government, the government would react by frustrating the Judiciary.²³⁸ It was common for the government to react by passing explicitly worded legislation that was not open to interpretation so as to destroy the

²³¹ Gordon & Bruce (n 205 above) 13.

²³² Gordon & Bruce (ibid); D Dyzenhaus 'Law as justification; Etienne Mureinik's conception of legal culture' (1998) 14 *South African Journal on Human Rights* 11: 27.

²³³ Gordon & Bruce (ibid); Dyzenhaus (ibid).

²³⁴ Dyzenhaus (n 232 above) 18.

²³⁵ Dyzenhaus (n 232 above) 19.

²³⁶ Whose purpose was to remove coloured voters from the common voters roll.

²³⁷ *Harris v Minister of the Interior* 1952 (2) SA 428 A.

²³⁸ Gordon & Bruce (n 205 above) 11.

benefits of any decisions passed by the courts.²³⁹ In the present *Harris v Minister of the Interior* case, Parliament reacted by passing the High Court of Parliament Act. The Act allowed Parliament to sit and review any decision of the Appellate Court invalidating an Act of Parliament. This Act was also declared invalid by the Appellate Court. It held that the High Court of Parliament was in fact Parliament's sham.²⁴⁰

The apartheid government reacted to this decision by applying policy to directly and deliberately undermine the Judiciary. The government expanded the number of judges from six to 11. An additional five judges who were seen as sympathetic to the government were appointed. All 11 judges were required to sit in cases concerning the validity of an Act of Parliament. The result was that the opposition in the Appellate Division was significantly diluted so as to uphold discriminatory legislation of the apartheid government.²⁴¹

There were other several outspoken opponents of apartheid legislation. Another of the cases where the Judge dared to go against the traditional culture of interpretation was in *Re Dube*.²⁴² The Judge had to determine the validity of a lower Court's decision that a black man, being idle and undesirable should be ordered to leave the city. Justice Didcott set aside the lower Court's order on grounds that the proceedings were contrary to justice. He pointed out that where else there was nothing that the Judiciary could do over what Parliament decided the law to be the law was one thing and different from justice. In the present case he held the law to be that as passed by Parliament but declared it to be unjust law.

²³⁹ Gordon & Bruce (n 205 above) 18.

²⁴⁰ In *Minister of the Interior v Harris* 1952 (4) SA 769 A.

²⁴¹ Gordon & Bruce (n 205 above) 14.

²⁴² 1979 [3] SA 820 [NJ]. Justice Didcott is only one example of a handful of other judges who chose to oppose the apartheid law and stand up for the rule of law.

These immediate examples summarize the kind of judges that Klare defines as conscientious judges in the apartheid era using these words:

A conscientious judge would have been one who both faithfully fulfilled his/her oath of office to carry out apartheid law, yet did so in a way calculated to undermine and nullify it, or at least to mitigate the cruelty of its impact on its victims. That is, a conscientious judge operates within and to some degree authentically accepts legal constraint, yet acts strategically to accomplish freedom and social justice.²⁴³

These examples clearly indicate that throughout this period of apartheid it was up to individual judges to make a choice between pro-executive reasoning and pro-democratic reasoning.²⁴⁴ Within these groups there were different cultures; there are judges who found no fault with apartheid and found no problems enforcing apartheid legislation. There are others who disliked apartheid but were too conservative and lacked creative imagination. Then there are those judges who were unable to avoid the effects of the unjust laws as they were too blinded by the notions about the nature of law.²⁴⁵

By the 1980's, South Africans and especially the black majority had increasingly lost confidence in the Judiciary. The courts were no longer seen as independent institutions or impartial arbiters of justice.²⁴⁶ They were clearly servants of an oppressive government that itself lacked representation and was illegitimate. One of the concerns in the fight for a post-apartheid South Africa was therefore an overhaul of the judicial culture. At the end of decades of apartheid, the Judiciary that South Africa inherited was largely racially and sexually imbalanced, schooled in a system of parliamentary

²⁴³ Klare (n 3 above) 148.

²⁴⁴ DM Davies 'Competing conceptions: pro-executive or pro-democratic judges choose (1987)3 *South African Law Journal* 96: 96.

²⁴⁵ H Klug 'Dyzenhaus Truth, reconciliation and the apartheid legal order' (2000) 117 *South African Law Journal* 133: 133.

²⁴⁶ Moerane (n 214 above) 710; Gordon & Bruce (n 205 above) 19.

supremacy, pro executive minded and guilty of supporting the status quo of an oppressive system.²⁴⁷ These issues needed to be addressed in transforming the judiciary.

4.8 The South African judiciary and progression to democracy

The progression of the judicial system in South Africa was completely different from that of Kenya. One of the first agendas for the new South African government was the establishment of a Truth and Reconciliation Commission. The TRC was set up to review crimes committed during the apartheid regime with the aim of promoting national unity and reconciliation.²⁴⁸ Part of the commission's modus operandi was to receive evidence from institutions on what role they had played in facilitating human rights abuse during the apartheid era.²⁴⁹

Despite the role that the Judiciary had played in supporting the regime, and also despite having been invited to answer specific questions regarding their role and appear at the special hearing of judges and magistrates, all of the judges chose not to appear before the Commission.²⁵⁰ A few judges in the end gave in written submissions.²⁵¹ The absence of the judges in the TRC hearings was conspicuous given that their presence had been viewed as crucial. The Chairman of the Commission viewed both the choices that the judges had made during apartheid and the choice that they had later made not to appear at the hearing as the wrong choices.²⁵² These actions, according to the Chairman, showed that judges 'had not yet changed a

²⁴⁷ Wesson & Du Plessis (n 209 above) 191.

²⁴⁸ Established in 1995 through the Promotion of National Unity and Reconciliation Act no 34 of 1995. Final report of the TRC, Vol 1 Chapter 1 at Paragraph 2, p 48 <http://www.sahistory.org.za/trc-final-report-volume-1>.

²⁴⁹ TRC Report (ibid); Paragraph 39 at p 148.

²⁵⁰ Gordon & Bruce (n 205 above) 29; Dyzenhaus (n 232 above) 29.

²⁵¹ Dyzenhaus (n 232 above) 29.

²⁵² Dyzenhaus (n 232 above) 30.

mindset that properly belonged to the old dispensation'.²⁵³ The disappointment of the Commission was recorded in the following words:

Commission was deeply disappointed that judicial officers (both judges and magistrates) declined to attend the hearing and that their responses took the form of a few written submissions.²⁵⁴

Despite their choice not to attend, in what may be seen as a political bargain, it was agreed that the judges who were serving in the old regime could retain their positions even in the new order so long as they accepted to take a new oath of office under the new Constitution.²⁵⁵ They all complied and despite calls for the judges to resign, the judiciary survived the political transition almost intact, unlike the legislature and the executive who were replaced.²⁵⁶

Arguments in support of the action taken by the negotiators of the democratic transition lie in the volatile history of South Africa's past. They viewed this as a step towards building a reconciliatory atmosphere in South Africa and also felt that the experiences of apartheid could contribute to the building of an independent judiciary based on lessons learnt.²⁵⁷ Arguments were also made in favor of the liberal judges who already had a wealth of experience that could be beneficial in rebuilding South Africa.²⁵⁸

The decision has however been questioned by various lawyers and authors. Critics of the move argue that it was quite unrealistic of the government to expect an instant

²⁵³ Dyzenhaus (n 232 above) 31.

²⁵⁴ Final report of the TRC, Chapter 4 Vol 4 at Paragraph 2.

²⁵⁵ TRC report (ibid).

²⁵⁶ Wesson & Du Plessis (n 209 above) 191.

²⁵⁷ Wesson & Du Plessis (ibid).

²⁵⁸ Wesson & Du Plessis (ibid); Gordon & Bruce (n 205 above) 29.

total change of culture from the bench and to task the same apartheid Judiciary with enforcing the new Constitution which was so radically different, under a radically different legal order.²⁵⁹ Even though the judges took a new oath of office, the oath could not necessarily guarantee compliance and this was a huge risk.²⁶⁰ Moreover, that was a Judiciary that highly lacked legitimacy and was already extensively tarnished and one in which a large part of the population had lost confidence in. To then impose the same judiciary would inevitably always lead to opposition and suspicion especially amongst the blacks. This has always seemed like a very heavy price for the public to pay. Particularly in South Africa with apartheid past, it is important that the public believe in the judges and in the capacity of the system within which those judges operate.²⁶¹ For this reason opponents to the action believe it was important that in the progression to post-apartheid, at the very least, only judges who had a record of upholding the rule of law should have stayed and the sympathizers of the apartheid regime sent home.²⁶² The view has been summarized in the following words:

When judges by their conduct give rise to widespread and serious speculation that they may have allowed themselves to become party to government maneuvers against political opponents.....the same somber questions arise. Can they stay on in office without inflicting irreparable injury upon the high traditions the South African judiciary is frequently said to respect?²⁶³

Having the apartheid judges continue sitting in a new dispensation also created potential danger of what another critic refers to as the politics of memory.²⁶⁴ The danger that is described is the tendency of the post-apartheid bench to 'forget' the

²⁵⁹ Wesson & Du Plessis (ibid).

²⁶⁰ Gordon & Bruce (n 205 above) 29.

²⁶¹ E Cameron (n 221 above) 339.

²⁶² J Hlope 'The role of judges in a transformed South Africa – problems, challenges and prospects' (1995) 112 *South African Law Journal* 22: 24.

²⁶³ Cameron (n 221 above) 343.

²⁶⁴ Hlope (n 262 above) 26.

past and hope that the new institution builders will perform to the high standards expected of them despite the fact that they sit in a mixed bench and will have to rely on judges who served in the apartheid regime.²⁶⁵ This would create tension that may continue to be felt in the 'new' South Africa given the politics of the negotiated transition.²⁶⁶ Within the transformative constitutionalism framework, doubts and controversy abide as to how a change in attitude was to be achieved in a mixed system of apartheid and post-apartheid judges. Opponents agree that an easier solution would have been for the injustices to be revisited and formally recognized instead of simply wishing them away.²⁶⁷

Instead of suspending the apartheid judges, South Africa applied several alternative strategies in dealing with the dilemma. The first strategy was the creation of a Constitutional Court, which binds all courts in South Africa in constitutional issues.²⁶⁸ The Constitutional Court was thought as the safest way to take care of the need for a transformative jurisprudence built on fundamental constitutional values since the Appellate Division was viewed with suspicion for its role in apartheid.²⁶⁹ The judges of the Constitutional Court are judges who did not serve in the apartheid government and even those who had served had a consistent record of pro-human rights decisions.²⁷⁰ The membership of the Court was particularly important as evidenced by the progressive body of case law from the court which has won the Constitutional Court international recognition and respect.²⁷¹ Given the position of the Court in the hierarchy of courts, this progressive jurisprudence has been filtered down to the lower courts.

²⁶⁵ Hlope (ibid).

²⁶⁶ H Klug 'Dyzenhaus: truth reconciliation and the apartheid legal order' (2000) 117(1) *South African Law Journal* 133: 137; Dyzenhaus (n 232 above) 24-27.

²⁶⁷ Klug (n 266 above) 139.

²⁶⁸ Wesson & Du Plessis (n 209 above) 201.

²⁶⁹ Moerane (n 214 above) 713.

²⁷⁰ G Budlender 'Transforming the judiciary: the politics of the judiciary in a democratic South Africa' (2005) 122 *South African Law Journal* 715: 720.

²⁷¹ Section 178.

The second strategy would be through judicial training. It was envisaged that the establishment of the Justice College would facilitate this transformation, as the official training unit of the Department of Justice and Constitutional Development. Finally, change in judicial attitudes continues to be felt through the appointment process introduced in the 1996 Constitution, and the establishment of the JSC.²⁷² One of the key requirements in making appointments to the judiciary is that the JSC must ensure that all candidates are 'transformation candidates' and loyal to the new legal order.²⁷³ The Constitution is instructional that professing allegiance is simply not enough; evidence must be presented in support of the candidate's assertion of commitment to the values of the final Constitution.²⁷⁴ The big concern is whether these strategies have succeeded in dealing with the traditional, formative and conservative legal culture of the apartheid judiciary.

The legal culture in South Africa, at least up to 1994 has been described as conservative in terms of judicial approach, formalistic and technical,²⁷⁵ homogeneous, predictable and conservative.²⁷⁶ Klare notes that American legal culture for example is more flexible, policy-oriented and consequence-oriented.²⁷⁷ For South African lawyers and judges alike, the history and training of parliamentary supremacy and simply having to look at the law as parliament says it should be, then applying it notwithstanding the consequences, led to a culture of having strong faith in the law as being determinate and precise.²⁷⁸ Although there exist some exceptions, judges generally will tend to base

²⁷² (ibid).

²⁷³ (ibid) Moerane (n 214 above) 712; Wesson & Du Plessis (n 209 above) 192.

²⁷⁴ For instance regarding Judge Nkola Motata who was found guilty of drunk driving and thereafter a complaint filed against him for racism by an organization, AfriForum after the incident in 2007.

²⁷⁵ Klare (n 3 above) 167, he differentiates between jurisprudential approach and political outlook in defining conservatism.

²⁷⁶ D Moseneke 'Transformative adjudication (2002) 18(3) *South African Journal on Human Rights* 309: 316.

²⁷⁷ Klare (n 3 above) 168. Although these are highly generalized, there is room for a few exceptions on either side of the divide, he notes.

²⁷⁸ Klare (ibid); Mosoneke (n 276 above) 316.

their decisions on highly technical, structured and rule bound reasoning and a general obedience to the authority.²⁷⁹ American judges on the other hand are more often than not, more open to making judgments based on policy.²⁸⁰

It has been admitted that there still continues to be a disconnection between traditional and transformational legal culture in South Africa and this has seriously slowed down the pace of transformative constitutionalism.²⁸¹ As stated earlier, it is feared that lack of full achievement of the goal of transformation is partly because the vision of the Constitution has been narrowed to a very formalised and legalistic conception of transformation.²⁸² Instead of the South African courts seizing the possibilities created by the Constitution to take South Africa forward in pursuit of a 'social democratic' vision,²⁸³ the courts in some cases have retrogressed and allowed 'traditional legal techniques'²⁸⁴ to prevail in their adjudication. It could be argued that judges in these cases had the option to interpret and apply the Constitutional text in line with the demands of transformation.²⁸⁵ Warnings continue to be made that transformative constitutionalism would only be a viable framework if the Judiciary and the legal community can find and sustain the purposeful interpretation envisaged by the post-apartheid Constitution.²⁸⁶

The South African Judiciary has been particularly reminded that legal transformation and its possible role in bringing about significant change will be stifled if the conservative legal culture remains unchanged.²⁸⁷ Traditional legal culture and resistance to change stands in the way of transformation and may drag the pace of

²⁷⁹Dyzenhaus (n 232 above) 32.

²⁸⁰ Dyzenhaus (ibid).

²⁸¹ Van der Walt (n 5 above) 19.

²⁸² DM Davies 'Competing conceptions: pro-executive or pro-democratic- judges choose' (1987)3 *South African Journal on Human Rights* 96: 96.

²⁸³ Davies (ibid).

²⁸⁴ Davies (n 282 above) 97.

²⁸⁵ Sibanda (n 28 above) 490 commenting on Davies.

²⁸⁶ Sibanda (n 28 above) 493.

²⁸⁷ Van der Walt (n 5 above) 8.

transformation in South Africa.²⁸⁸ Revisiting the challenge, Davies and Klare explore the role that legal culture has played in South Africa's development of progressive jurisprudence and how far the judicial mindset has been transformed 15 years after the 1996 Constitution.²⁸⁹ While they are positive that significant jurisprudential achievement has been made after the 1996 Constitution, they do note however that there are still traces of inbred formalism and conservatives within the Judiciary.²⁹⁰ The picture is a clear prediction from Klare's seminal article written in 1998 as well as others who argue on the difficulty of overturning legal culture and the tension that plays out between tradition and transformation.²⁹¹ Citing several examples, Davies and Klare point out decisions where judges' formalistic and conservative reasoning was well portrayed. In other cases, although the judges articulated interpretive habits that gave effect to the fundamental rights, the same arguments were forgotten and replaced with formalistic reasoning. Such examples are illustrative of the difficulty and hesitation that exists in trying to adopt a new culture. There are also tendencies for some judges to give very minimal attention to the values and spirit of the Constitution when adjudicating, and instead turn to technical arguments.²⁹² Davies and Klare insist once more on the importance of rethinking legal culture so that even where judges have to develop the traditional common law, it must be done within the values, aspirations and spirit of the 1996 Constitution.

²⁸⁸ Klare (n 3 above) 168; Van der Walt (n 5 above) 16.

²⁸⁹ DM Davies & KE Klare 'Transformative constitutionalism and the common and customary law (2010) 26 *South African Journal on Human Rights* 403: 405.

²⁹⁰ Davies & Klare (n 289 above) 408.

²⁹¹ Davies & Klare (n 289 above) 415.

²⁹² In their view the decision in *Carmichele v Ministry of Safety and Security* 2001(4) SA 938 (CC) made substantial contribution to the progressive jurisprudence in South Africa. *Ellis v Viljoen* 2001(4) SA 795 (C); 2001(5) BCLR 487(C), *Jaftha v Schoeman* 2003(10) BCLR 1149 (C) and *Transnet t/a Metrorail v Rail Commuters Action Group* 2003(6) SA 349 (SCA); 2003(12) BCLR 1363(SCA) represent examples of formalistic and conservative reasoning.

4.9 Obstacles to the change of legal culture

The reality is that neither the South African nor the Kenyan Judiciary has made substantive and significant changes in legal culture. As a contribution towards dealing with the challenge of legal culture in Kenya it is important to discuss what could be regarded as the main obstacles to the change of legal culture.

4.9.1 Legal education and training

A majority of the senior judges in Kenya today and also those who have sat in the bench previously are products of traditional legal education. By traditional I mean the early form of legal education whereby students were mainly taught how to deduce legal principles and apply these to a set of facts sometimes using analogy.²⁹³ The legal principles have always been viewed as established, unquestionable and determinate.²⁹⁴ Not much emphasis was put on the analytical argument and questioning these legal principles.²⁹⁵ Although there have been some changes in legal education, the basic script remains the same.

All through the period of colonialism, no institution for law was set up in Kenya.²⁹⁶ This was until 1960 when the British government appointed a committee chaired by Lord Denning to look into the issue of legal training in Kenya and make recommendations for suitable training.²⁹⁷ The recommendations led to the establishment of the first law faculty at the University of Nairobi in 1967. Before then, Kenyans wishing to study law had to study at the University of Dar es Salaam and for those who could afford, in India

²⁹³ Langa (n 12 above) 355.

²⁹⁴ Van der Walt (n 5 above) 18.

²⁹⁵ Baraza (n 48 above) 15; Langa (n 12 above) 356.

²⁹⁶ JB Ojwang & DR Salter 'Legal education in Kenya' (1989) 33 *Journal of African Law* 78: 79.

²⁹⁷ Ojwang & Salter (ibid).

and England. This would make the homegrown legal profession roughly 50 years of age.

Because of its historical background, the training policies in Kenya are borrowed from the British Commonwealth approach in terms of curriculum design, argument and decision.²⁹⁸ Most of the common law training is based on exposing students to formal argumentation and conventional principles.²⁹⁹ This is because common law systems are heavily infused with statutes and precedents.³⁰⁰ From the traditional bar, the training and content of the curriculum did not encourage students to question legal principles but to follow what was written as law. Unlike their counterparts in civil jurisdictions, judges in common law jurisdictions are mainly interested in technicality and principles of law and in applying these to achieve results.³⁰¹ Since the basic principles that every lawyer trained in Kenya follows are similar, the heavy tilt towards statutory interpretation and technicality appears quite normal to the profession. This in the long run contributes to the conservative legal culture as earlier discussed.³⁰²

Of major concern is the fact that the training of advocates in Kenya is still largely based on the curriculum recommendations that were made by the Denning Report.³⁰³ Although most curriculums today include new subject areas in contemporary areas of law, there are still the traditional stories retold annually in law school curriculums. Lecturers teach what they were taught so that generations of law students read and re-read the same authorities. Although there are new text books and written topics may change the basic story remains the same. This legal training not only affects the way

²⁹⁸ GK Hadfield 'The quality of law in civil code and common law regimes; judicial incentives, legal human capital and the evolution of law' March 2006 <http://www.yale.edu/documents/pdf> .

²⁹⁹ Burton (n 27 above) 369.

³⁰⁰ Hadfield (n 298 above) 1-2.

³⁰¹ Hadfield (n 298 above) 3.

³⁰² Van der Walt (n 5 above) 17.

³⁰³ Report of the Committee on Legal Education for Students from Africa, Cmnd. 1255 (1961).

lawyers conceptualize and interpret legal instruments,³⁰⁴ it also affects the way they argue cases before court and the type of evidence they produce to substantiate their arguments, which in turn affects the value of judgments made by the courts.³⁰⁵ The culture from law school continues on to the bench with those lawyers who join the judiciary since Kenya does not have a system of training career judges. Judges have traditionally been picked from senior and experienced advocates although the Constitution has widened the pool for selection.³⁰⁶

Given the high premium that has been placed on transformation in the 2010 Constitution, all law is affected by the obligation to transform the society of Kenya. The value of legal education should therefore be measured against its contribution to new jurisprudence which is in tandem with the transformation process.³⁰⁷ If this is so, all areas of legal research should at least focus on the significant potential to aid in transformation. It is certainly inevitable that in a new constitutional dispensation with radical changes in and out of the profession, the need for legal training to conform has never been greater than it is now.³⁰⁸ Law schools must take their distinctive place in the overall national transformation programs.³⁰⁹ This is through taking up the challenge to train lawyers who fit into the vision that the Constitution has and the goals it hopes to achieve.³¹⁰ Legal education in Kenya must therefore be looked at against the background of transformation.³¹¹

³⁰⁴ Van der Walt (n 5 above) 18.

³⁰⁵ Van der Walt (ibid).

³⁰⁶ See qualifications for judgeship under Chapter 10 of the 2010 Constitution. The basis of qualification is an LLB degree and years of experience thereafter.

³⁰⁷ J Modiri 'Crises in legal education' 2014(3) *Acta Academica* 1.

³⁰⁸PK Mbote 'Legal education in Kenya in crisis' January 2011 <http://www.awcfs.org/new/index.php/commentary>.

³⁰⁹ RA Brand & DW Rist 'The export of legal education; its promise and impact' (2009) 25.

³¹⁰ Brand & Rist (n 309 above) 26.

³¹¹Mbote (n 308 above).

The need for change in legal education is not anything new, going by a commentary in the wake of Kenya's 26th independence anniversary:

To what extent does the prevailing scheme of training provide the special type of lawyering skill called for, in terms of the legal framework for the training of lawyers, the essence of the teaching curriculum, the conduct of training, and the competence and standing of the lawyers so trained by the prevailing context of motion, change and adaptation in society?³¹²

This change requires legal training that is in touch with the current needs of the society.³¹³ In order to prepare law students to adapt to a more progressive way of thinking and approaching legal problems, the training and education must also refocus. There is particular need for students to be taught the importance of questioning the value of legal principles and not simply applying the law because it is a part of authority.³¹⁴ It is also important that law is seen by students as an instrument of social change, so that they may apply it as such, in support of transformative values within the constitution.³¹⁵ They must be able to discard the view that law is a means of exercising authority to oppress, as was historically the case.³¹⁶ Law curriculums must therefore introduce a section in aspects of the courses offered, where students should be taught the transformative values from the Constitution and how they relate to every field of law.³¹⁷ This will in turn produce a change in mind set and legal culture and eventually lead to the desired transformation. Without proper legal education, the battle for transformation may be lost eventually because the constitutional values may not be

³¹² Ojwang & Salter (n 296 above) 79.

³¹³ Brand & Rist (n 309 above) 26; Mbote (n 308 above).

³¹⁴ Langa (n 12 above) 355; also see strategy of the CIC to align the education sector with the values of the 2010 Constitution <http://www.cickenya.org> (resource centre); Burton (n 27 above) 369.

³¹⁵ Langa (n 12 above) 355.

³¹⁶ Langa, (ibid).

³¹⁷ Langa, (ibid).

interpreted to give the outcome intended. For these reasons, transformation should be seen as a partnership between the judiciary, the bar and legal scholars.³¹⁸

Similar views have been expressed about legal education in South Africa and these are therefore relevant even in Kenya. It has been suggested that the situation in South Africa (and I would say the same for Kenya), is that just like legal research, legal education follows a black letter legal approach that does not focus on contextual analysis of wider historical and social content.³¹⁹ Law students learn more of technical approach to law and legal texts and therefore give less focus to philosophical and political questions of law and critical analysis of judgments.³²⁰ This state of legal education is rooted in the historical legal culture that has been carried down through tradition, much like Kenya's scenario.³²¹ The raise in dominance of the same formalism within legal scholarship, overreliance on legal positivism and reduction of law as a technical set of rules by scholars who are also law teachers, is partly part of the reason that legal education in South Africa is expressed to be in a crisis.³²²

Unless scholars and law teachers can change their approach to a general jurisprudence that is more related to broader issues and the relationship between law and other socio, political and economic philosophy, the suggestion is that legal education is likely to remain part of the dominant culture that transformative constitutionalism tries to shed.³²³ The suggestion is that if the aspiration of overhaul of legal culture is to be realized, it must begin with re conceptualizing legal education so as to include a critical sense within the law curriculum and thereby facilitate a new legal culture.³²⁴

³¹⁸ Mutunga (n 95 above) 57.

³¹⁹ Modiri (n 307 above) 6.

³²⁰ Modiri (n 307 above) 4, 5, 6.

³²¹ Modiri (n 307 above) 4.

³²² Modiri (n 307 above) 6.

³²³ Modiri (n 307 above) 8.

³²⁴ Modiri (n 307 above) 8, 9.

4.9.2 Doctrine of stare decisis

Kenya is a Commonwealth country and like other countries that inherited the British legal system, the doctrine of stare decisis is part of the law.³²⁵ The doctrine is based on following past decisions and taking the same course that has been taken previously by higher courts.³²⁶ The effect of the doctrine is to make decisions by a superior court binding on lower courts with the main aim of achieving uniformity, stability, certainty and predictability in legal disputes as well as restraining judges accordingly, within the realm of separation of powers.³²⁷ Stare decisis is also said to confer the advantage of accumulated experience of the past.³²⁸

The complexity of legal interpretation lays an attack on the logic of precedence. The reliance on precedents makes it difficult to change legal culture within the judiciary.³²⁹ Since precedents are a result of judicial law making (or interpretation) activity, this makes them a result also of all the different stimuli in a particular judge's mind including his legal culture while interpreting a legal instrument.³³⁰ The precedents are passed down with all such influences whether positive or negative such that even where a new dimension of interpretation arises, the doctrine of *stare decisis* requires judges to abide by binding precedents.³³¹

Klare makes a comparison between South African and American judges and the way they view precedents in the adjudication process. He points out the reality that

³²⁵ Applicable through the Judicature Act Cap 8 Laws of Kenya.

³²⁶ AE Van Blerk *Introduction to jurisprudence*, Sweet and Maxwell 1536.

³²⁷ Klare & Davies (n 289 above) 438.

³²⁸ Van Blerk (n 326 above) 1537.

³²⁹ E Mensch 'The history of mainstream legal thought, in D Kairy's *The politics of law; A progressive critique* (1998) 1: 34; Botha, 'Rights, limitation and the (im)possibility of self-government in Botha et al *Rights and democracy in a transformative constitution* (2003) 1: 34

³³⁰ Klare (n 3 above) 159.

³³¹ Klare (ibid); H Botha Freedom and constraint in constitutional adjudication' (2004) 20(2) *South Africa Journal on Human Rights* 249: 251.

American scholars who had made the realist turn would be open to accept the role of policy in adjudication and they too would disagree with the logic of precedents. It might be unimaginable for any two cases to have totally identical facts laid against identical background to warrant any two cases to be placed side by side for purposes of interpretation.³³² The main undoing of the stare decisis doctrine in transformative constitutionalism may hence be as far as it constrains judges from maneuvering with the open ended provisions of the constitution so as to create new progressive jurisprudence.³³³ The infinite viability of human situations makes it almost impossible to apply past rules to new and changing situations as they arise even where a judge is persuaded by the constitution because of the rigidity.³³⁴

The chance that judgments from a traditional vein will offer contradiction to a new system partly because of cultural training and exposure of the bench is very real.³³⁵ This creates the difficulty of how to deal with undesirable precedents and how to circumvent these. This is a real danger in Kenya following the vetting of judges and magistrates by the JMVB considering that a number of senior judges who had served for very long periods were found unfit to continue serving. Questions have already been raised concerning their judgments which form the body of precedents in Kenyan courts. The same question has been addressed by the ICJ following a different and earlier purge of judiciary officers where similar jurisprudential issues arose.³³⁶ Although recommendations were made for the CJ to establish a committee to conduct an audit of the decisions, this was never done meaning that the precedents have continued to be used to date although it is also open to lawyers to challenge the validity of the decisions.³³⁷ Similarly, the concern is that courts have already followed and continue to

³³² Mensch (n 329 above) 34.

³³³ Klare & Davies (n 289 above) 438.

³³⁴ Van Blerk (n 326 above) 1536.

³³⁵ Klare & Davies (n 289 above) 458.

³³⁶ How do we treat judgments written by ousted judges? ICJ Judicial Reform issue 2 February 2004.

³³⁷ ICJ report (ibid) 2.

follow laid down precedents of judges proved to be unfit to continue serving, and who had their own legal culture. Some of the judgments may have been inconsistent with the law and now with the vision of the 2010 Constitution.³³⁸ The culture within which they were made may also be different.

The opposing views on the place of precedents within the transformative constitutionalism debate and the need for a new legal culture may be explained from a theoretical angle. It has already been said that legal culture is a concept that insists on following a long established tradition and therefore maintaining the status quo. Likewise, the doctrine of stare decisis is also a rigid one that allows almost no room for discretion. These two present a potential conflict when viewed alongside transformative constitutionalism which commands not only change but substantial change. It is therefore almost expected that there will exist a tension between the need for change and the desire to maintain the existing concepts.

Ironically, the paradox of the doctrine is perhaps the way to stop a disconnected legal culture from being transmitted. This approach as suggested by Klare and Davies is that the application of the stare decisis doctrine is in itself indeterminate.³³⁹ The indeterminacy makes its application more flexible. The crucial point is that judges may have to realize that they do indeed have some room for manoeuvre of legal principles and precedents as opposed to traditional thinking.³⁴⁰ This admission would first of all require a new cultural belief. The room for manoeuvre comes about because for instance, courts of similar jurisdiction do not bind each other in their decisions. Also courts of higher jurisdiction have the room to treat the decision in a lower court as

³³⁸ ICJ report (ibid).

³³⁹ ICJ report (ibid).

³⁴⁰ Van Blerk (n 326 above) 1537.

persuasive and not binding thereby creating room for judges to exercise some form of discretion.³⁴¹

The issue of precedents and the shift in legal culture extends to lawyers as well because it is the lawyers who have to present arguments, evidence and precedents in support of their cases. Mureinik brings out the relationship between conscientious lawyers and conscientious judges. Using the same example, lawyers too must be alive to the need for rethinking the current legal culture so that they can then pursue precedents that allow room for a progressive jurisprudence in Kenya to grow and they must avail such decisions to enable the courts make transformative and progressive decisions.

On the basis of my engagement with the various ideas on legal culture, it is useful to reflect on what a transformed legal culture could entail, for the benefits of Kenya's transformative constitutionalism framework.

4.10 What are the characteristics of a transformed legal culture?

The strong consideration for Kenya is that transformative constitutionalism would only be a viable project if the judiciary and the legal community can find and sustain the purposeful interpretation envisaged by the Constitution.³⁴² If such commitment is not forthcoming, the numerous promises by the Constitution cannot be achieved and transformative constitutionalism would then become an incomplete project.³⁴³

A transformed legal culture for the Kenyan judiciary would be marked by several characteristics. It means a legal culture that has refocused from submission and fear to

³⁴¹ Van Blerk (n 326 above) 1538.

³⁴² Sibanda (n 28 above) 493.

³⁴³ Sibanda (ibid).

one of candor.³⁴⁴ Klare points out the need for candor within the judiciary as a first step towards acknowledgment of the challenges to transformative constitutionalism and more specifically the challenge of legal culture so as to deal with it. A continued culture of repression and denial on the contrary allows judges to continue covering up the anxiety and wish away the complexity of adjudication within a transformation framework, thereby not allowing the challenges to be dealt with.³⁴⁵

The judiciary ought to candidly come out and accept certain truths. As discussed herein, it is important that the institution adopts a tradition that allows it to shake off the feeling of legal constraint. The bench should replace this with the notion that as judges they do in fact have choices in as far as interpretation of the Constitution is concerned and that they can use this discretion to further the values and spirit of the 2010 Constitution.³⁴⁶ This would in some instances require them to act as conscientious judges, as challenged by Klare and Mureinik so that even when they act within a potentially limiting atmosphere, they are able to accept the limitations of legal restraint in their work within a different culture and therefore still manoeuvre and interpret the law strategically to accomplish the values of the constitution.³⁴⁷ This change of culture would above all, be heeding to the instructions of the Constitution that require it to be interpreted in a manner that promotes its purposes, values and principles.³⁴⁸

A reformed legal culture requires judges to change from judicial conservatism that stands in their way of being more generous with innovation in constitutional adjudication as permitted by the text of the Constitution and historical consciousness.³⁴⁹ Such boldness should enable judges to feel comfortable when they have to use their

³⁴⁴ Klare (n 3 above) 165.

³⁴⁵ Klare (ibid).

³⁴⁶ Klare (n 3 above) 160, 161, 162.

³⁴⁷ Klare (n 3 above) 148.

³⁴⁸ Article 259.

³⁴⁹ Klare (n 3 above) 171.

innovation to make decisions that may not be too obvious and which are likely to be questioned by other judges and lawyers for being out of the usual traditional practices.³⁵⁰ The culture of innovation and purposeful judgment will create consequences that may in some ways not be very popular and the judiciary should still be able to take responsibility for its decisions, whether political or economic.³⁵¹

A transformed legal culture will also be characterized by a bench where the tradition of judicial indeterminacy is easily admitted and judges are comfortable to admit that the adjudication process is in reality a site of law making. The new culture would replace the tradition where the judiciary formally and conservatively believes that their only purpose is to interpret law. Once the judiciary embraces their role in adjudication as more active and not merely passive, they would then shed the conservativeness within which they read, apply and interpret constitutional provisions. This requires a more flexible and critical approach where judges acknowledge the indeterminacy of law and legal rules and therefore the possibility that a legal principle may have more than one meaning, and by so realizing, also be conscious to legal culture and other external issues along a socio, economic, cultural and historical setup, in reaching the best possible conclusion from the spirit of the constitution.³⁵²

The Judiciary must be able to shed off the belief in the Judiciary as the least harmful of the organs of state and it is only then that they can take advantage of the historical purpose of empowering the Judiciary. They ought to see the role of the Judiciary as one that extends to making pronouncements that affect the political realm and policy issues in the country where necessary. This therefore means more flexible approaches whereby the Judiciary is not rigidly lost in the separation of powers doctrine at the expense of constitutional values. The Judiciary also needs to adopt a culture where

³⁵⁰ Klare (ibid).

³⁵¹ Klare (n 3 above) 147, 148.

³⁵² Davies & Klare (n 289 above) 408.

decisions are made against a historical context, being the reason and purpose of the 2010 Constitution. By being more aware of the mischief of past injustices, the Judiciary is able to ask questions underlying provisions contained in the present Constitution in order to deal with the injustices of the past.

Transformed legal culture is also marked by a transparent and accountable Judiciary. This means that the Judiciary should be able to account for its decisions and be honest about the influences at play in arriving at decisions, to enable the public comment and question its decisions.³⁵³ This would in turn ensure public confidence in the institution. Of great importance is candor to be able to admit political influences and personal sensibilities in the decision making process.³⁵⁴ This is especially in adjudicating matters that may involve conflict within the other arms of government and decisions of a political nature.

All these qualities are crucial because not only do they bring the politics of law to the fore, they also facilitate democratic and honest discussion of the role of the Judiciary in transformative constitutionalism and play an important role in ensuring a new methodology in approach and interpretation of the transformative provisions of the 2010 Constitution.³⁵⁵ The shift of culture and interpretative habits amongst the Judiciary may provide room for the judiciary to come up with highly competent but also indigenous jurisprudence.³⁵⁶ It will also enable the Judiciary make more conscious decisions and choices when they have to make choices about deploying their legal resources and intellectual energies.³⁵⁷ These are all very crucial in the transformative constitutionalism framework.

³⁵³ Klare (n 3 above) 162; E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994)10 *South African Journal on Human Rights* 31: 32, 38.

³⁵⁴ Klare (n 3 above) 164.

³⁵⁵ Davies & Klare (n 289 above) 412; Klare (n 3 above) 146.

³⁵⁶ Mutunga (n 51 above) 42; Klare (n 3 above) 156.

³⁵⁷ Klare (n 3 above) 163.

4.11 Conclusion

A discussion of Kenya and South Africa's judiciaries shows that both countries generally share similar legal cultures perhaps as a result of their historical past. The culture has been one of formalism, conservatism, suppression of the judiciary and mechanical role that has mainly been pro government. Upon adaptation of the new constitutional orders both countries dealt with the overhaul of this culture in their different way. Evidence shows that the traditional legal culture of the bench in both jurisdictions still remains the predominant culture.

The challenge to legal culture is mainly in the disconnection between the culture and the different culture that is expected of judges by a transformative constitution. The conservative legal culture may result to lack of progressive and value ridden determination despite the legal provisions being present. This will in turn block or slow down the pace of transformation unless it can be dealt with. Much more in terms of legal education and acknowledgment of the need for change has to be done with respect to legal culture.

CHAPTER FIVE

CONCLUSION

5.1 Conclusion

The aim of this thesis is to investigate the framework of transformative constitutionalism, including its jurisprudential and theoretical underpinnings, and to consider its possible value for Kenya in driving the process of transformation in a different direction. Motivating my enquiry is the new constitutional dispensation that Kenya recently ushered in through the 2010 Constitution. Despite the radically different constitution, Kenyans hope for a transformed society has been dashed by socio-economic and political challenges, hardly five years after they overwhelmingly voted for this Constitution. I therefore seek to engage with the framework of transformative constitutionalism, a subject that has not featured in Kenya's constitutional dispensation to see whether a consideration of it may help steer the transformation process in a better course.

The first chapter of the thesis is an introductory chapter setting out the main research problem, assumptions and research questions. In this chapter I also provide a general background to some of the historical processes in Kenya in order to situate the study within the Kenyan context. Chapter two is based on an enquiry into the political and constitutional history of Kenya and the extent to which it has contributed to the need for constitutional transformation in Kenya. In that chapter I also interrogate the ways by which the 2010 Constitution seeks to transform the country from its historical injustices and the progress made so far. This chapter provides the basis to answering the question as to whether this justifies a consideration of transformative constitutionalism.

I work from the premise that Kenya's constitutional history lays the basis for a consideration of transformative constitutionalism. The history brings to the fore numerous injustices whose origin is the colonial era, although the same period also produced structures that continue to play a key role in the post-colonial era. The past injustices echoed the need for change in the country and the promulgation of the 2010

Constitution was a huge step towards that change. There have been legislative enactments and institutional reforms which are still ongoing, as per the instructions of the 2010 Constitution. A lot of gain has been experienced but there are still numerous challenges to the process of transformation in Kenya. This is the basis on which I suggest a consideration of transformative constitutionalism as one of the ways that may help in the optimization of transformation. Historical analysis has not featured prominently in the discussions on transformation in Kenya. In my view the greatest undoing for Kenya would be to continue ignoring or underestimating the historical connection of most of the problems that we wish to transform from. These past experiences are also significant in understanding the circumstances of countries. My consideration of the framework of transformative constitutionalism for Kenya is subject to the similarities and differences between Kenya and South Africa's pasts which shapes the future of both countries and defines the people as a unique people, due to their experiences.

Having laid down a foundation for a consideration of transformative constitutionalism I move to look at the idea of transformative constitutionalism, its definition and development in South Africa and its challenges in chapter three. The scholars that I engage with seem to agree on the need for change as the core reason for transformative constitutionalism. They all agree that transformative constitutionalism is premised on a transformative constitution and that it is a good framework that continues to present positive outcomes in South Africa. It is based on a transformative enactment, interpretation and enforcement of the constitution so as to achieve societal justice in a democratic society. Much of the differences in approaching the idea of transformative constitutionalism are based on the understanding of the process of transformation, the magnitude of change that should result and how that change is achieved. These differences are based in sometimes conflicting political, jurisprudential and theoretical approaches.

While the framework is presented as a potentially useful one for Kenya, it must be considered against the realities of the challenges that are likely to be faced. The major challenge discussed with regard to the adjudicative role is that of a formal conservative legal culture that presents a gap between the transformative role of the Constitution and the legal culture of the judiciary. Unless the judiciary can begin the process of challenging and changing their legal culture, the framework may be slowed down significantly. This of course, firstly entails recognition that the approaches they follow are contingent and culturally constructed and not objective and neutral.

A main concern of the thesis is the role of the judiciary, although it has clearly been pointed out that the judiciary cannot be a lone ranger in the transformation process. The other two arms of government as well as the entire public in Kenya have a role to play, so as to ensure that the transformation goals of the 2010 Constitution are optimized.

In chapter four I engage at a deeper level with the role of the judiciary in transformative constitutionalism and the challenge of legal culture. I seek to answer the question on what legal culture is and how it could obstruct a framework of transformative constitutionalism and ultimately the ideal of transformation through law.

My conclusion for this chapter is that legal culture generally amounts to the understanding and approach of law in terms of argument, sources and ideology. Legal culture varies from one jurisdiction to another although it may also vary within courts and judges in the same jurisdiction. It comes about as a result of education, exposure and experiences. My discussion of the Kenyan and South African judiciaries leads me to the conclusion that both have a largely similar culture, perhaps influenced by their historical past. It is a culture that is characterized by formalism, conservatism, judicial passiveness and submission and a generally pro executive way of looking at things. This

legal culture is a contradiction to the active role that courts are meant to play in transformative constitutionalism. The background against which the culture is set does not allow courts to make creative and value laden decisions in favor of social justice. Unless the legal culture can change, this will slow down or hamper the transformation process.

After four chapters of discussion and engagement with issues on transformative constitutionalism, I have come to the conclusion that there is no final solution to most of the issues that I have raised in this thesis. The research has nonetheless been able to disclose issues that have been suppressed or ignored in the past. By doing so, it is my hope that the ideas, questions and critiques that I have raised should spark further conversation. I make some tentative recommendations in response to the issues that could contribute to the prospects of transformative constitutionalism in Kenya.

5.2 Recommendations

The following are my key tentative recommendations:-

5.2.1 There is need for Kenya to engage at a deeper level with history and historical experiences in the process of transformation

Historical analysis takes a central place in the transformative constitutionalism discussion by scholars across the board in South Africa. This may not be the same case with Kenya. I do recommend that an awareness and confrontation of Kenya's historical experiences is necessary in optimizing the process of transformation in Kenya. This engagement may be reached through:

- i. Scholars from all disciplines and not just the legal field being encouraged to write at a multi-disciplinary level to explore the subject and therefore creating a forum for lawyers, judges and other key players to reflect on issues heavily related to historiography.
- ii. Training of judges and lawyers at law school and in continuing legal education, which should engage lawyers and judges on the place of history and historical analysis in the interpretation and application of the law in a transformative dispensation.
- iii. Although the technical expertise of legal experts in constitution making cannot be denied, constitution making and constitutional implementation should not be left to legal experts and legal advisors only. The constitutional text must be in touch with the social, economic, political and cultural realities. There is need therefore for government and other institutions involved in drafting and implementation of the Constitution to include stakeholders from all areas in order to guide the process in a much more informed manner. This would also ensure that implementation policies are drafted with advice and knowledge on the legal, social, economic, cultural and political front.

5.2.2 There is need for consideration of the framework of transformative constitutionalism in the interpretation and enforcement of the 2010 Constitution

While consensus may not have been built around how far the framework can create potential for change in South Africa, one thing that is agreed upon is its potential to change the society in South Africa to a better society despite the challenges and pitfalls. Kenya may consider the framework and in particular this would need:

- i. More conversation in Kenya on the framework through academic fora. Academics need to write more on the framework as a way to ignite discussion and conversation on the framework. Such an engagement ought to be all inclusive; amongst legal scholars with each other and with other scholars in the social science area, especially in the area of constitutional transformation. Universities, professional bodies and other institutions of higher learning need to provide forums for such multidisciplinary discussions in order to create awareness within the public.
- ii. Judicial training should be reconceptualised and the Judicial Training Institute curriculum ought to expose the bench beyond the traditional aspects of law to the interrogation of transformative constitutionalism and its approach in interpretation and application of law.
- iii. Workshops and seminars ought to be organised for the three arms of government to sensitise them on the role that each of them must play in the success of transformative constitutionalism and the need for a shift in culture so as to create synergy amongst them.
- iv. Workshops and seminars should also be organised by the relevant ministry for members of political parties, politicians, civic organisations, the police and other enforcement agencies and other NGOs that should then extend to the public as a whole, not only to engage with the contents of the 2010 constitution but also to discuss and engage with the requirements on transformative constitutionalism and the need for the Kenyan society to change culture on issues such as corruption and ethnicity, amongst others. The civic education should be continuous and this may be done through entrenching transformation values in education curriculums at university levels.

These measures would address the general need for change in attitude and culture by politicians, lawyers, legal scholars, the judiciary and the Kenyan public as a whole.

5.2.3 There is need for change of legal culture

The success of transformative constitutionalism involves a total change of legal culture by the legal profession and judges to synchronise it with the vision and aspirations of transformative constitutionalism. The change of legal culture may be achieved through:

- i. A total reconceptualization of legal education so as to change the traditional formal approach to interpretation and application of law, legal principles and case law approach. This reconceptualization should go further than changing the substance to changing also the form of curriculums in law schools, to a change in the teaching approach and introducing a critical approach to law teaching that allows students to analyse and question legal principles.
- ii. The legal community in Kenya must be prepared to shed their view of law as a pure science which does not require contamination from other quotas. In particular, the subject of constitutional transformation must be understood as a multi-disciplinary study and the solutions to challenges of transformation should be addressed not purely based on legal enactments but on the basis of social, cultural, political and economic historical facts and experiences.
- iii. A period of training ought to be established for those desirous of joining the bench before they join the judiciary so as to prepare them for a more proactive role in judicial interpretation that is alive to the transformative goals. The training should include a critical approach to judicial interpretation. Thereafter,

continuous training of the judges while at the bench should be ensured. The training should inculcate a different approach from the traditional insistence on formal requirements of judicial interpretation. The continuous training will help judges to eventually shed their traditional legal culture and to take up a legal culture that will help to increase the prospects of judicial transformation. Judicial training should also expose judges to contemporary challenges of judicial transformation and should not just be based on strictly legal issues.

- iv. More academic writing is required of Kenyan scholars and lawyers on the current legal culture within the judiciary and legal profession so as to create a forum for discussion and interrogation of matters related to legal culture.

It is my hope that the Kenyan people will be aware of the prospects and also the challenges and the limitations of the 2010 Constitution in transforming the society. The reality is that challenges abound for the transformation process. These are as a result of a combination of socio-economic and political factors, most of which have their origin in historical experiences. Some of these factors are even beyond legislative sanctions. However, what is possible is for Kenya to make a choice between hopeless optimism, reckless despair and a choice to optimize the gains of the 2010 Constitution.

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