**University of Fort Hare**

**Inaugural Distinguished Lecture Series**

**October 16, 2014**

**The 2010 Constitution of Kenya and its Interpretation: *Reflections from the Supreme Court Decisions***

Willy Mutunga[[1]](#footnote-1)

Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya’s judiciary.

Professor Yash Pal Ghai

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

Professor James Gathii

We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of a constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law.

*S v Makwanyane 1995(3) SA (CC) Para 156.*

**Introduction:**

In 2010 Kenya created a new modern transformative[[2]](#footnote-2) constitution that replaced both the 1969 Constitution and the past Colonial Constitution in 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.

**The Vision of the Constitution of Kenya**

**Background:**

The making of the Kenyan 2010 Constitution is a story of ordinary citizens striving *and succeeding* to overthrow the existing social order and to define a new social, economic, cultural, and political order for themselves. Some have spoken of the new Constitution as representing a second independence.

There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence.

**Its Overall Objective and Purpose:**

In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: reconstitution or reconfiguration of a Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution; a vision of nationhood premised on national unity and political integration, while respecting diversity; provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state and society in Kenya; mitigating the status quo in land that has been the country’s Achilles heel in its economic and democratic development; among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution.

**The Role of the Judiciary in the Implementation of the Transformative Constitution**

***The Vision of the New Judiciary under the Constitution***

***The Old Judiciary***

Let me reflect briefly on the nature of the judiciary of which all Kenyans are a part. We are the heirs, albeit by what you might think of as a bastard route, to a tradition that gives a very powerful place to the judiciary: the common law system. It is a flawed inheritance because it came to us via the colonial route. The common law as applied in Kenya, at least to the indigenous inhabitants, as in the colonies generally, was shorn of many of its positive elements. During the Colonial era we were not allowed freedom of speech, assembly or association. Our judiciary was not independent, but was essentially a civil service, beholden to the colonial administration and very rarely minded to stand up to it. Indeed, administrative officers took many judicial decisions. There was no separation of powers. And institutions of the people that they trusted were undermined or even destroyed. Indeed the common law was a tool of imperialism. Patrick McAuslan, upon whose book with Yash Ghai[[3]](#footnote-3) most lawyers of Kenya cut their constitutional teeth, wrote satirically (plagiarising the late nineteenth century poet, Hilaire Beloc[[4]](#footnote-4)) “Whatever happens, we have got the common law, and they have not”. We can recall the trial of Jomo Kenyatta: a masterful display of juristic theatre in which the apparent adherence to the rule of law substantively entrenched the illegitimate political system in power at the time.[[5]](#footnote-5) Colonial mind-sets persisted, in the executive, the legislature and, unfortunately, even in the judiciary, even after independence. We continued to yearn for the rule of law.

By the rule of law, I do not mean the sort of mechanical jurisprudence we saw in cases like the Kapenguria trials. It was mechanical jurisprudence that led the High Court in independent Kenya to reach an apparently technically sound decision that the election of a sitting President could not be challenged because the losing opponent had not achieved the pragmatically impossible task of serving the relevant legal documents directly upon the sitting President.[[6]](#footnote-6) Again it was this purely mechanical jurisprudence that fuelled the decision of a High Court that the former section 84 of the independence Constitution (that mandated the enforcement of Bill of Rights) rendered the entire Bill of Rights inoperative because the Chief Justice had not made rules on enforcement as he was obligated by the self-same Constitution to do.[[7]](#footnote-7)

***The New Judiciary, the New Rule of Law, the Decolonizing Jurisprudence***

It is perhaps remarkable, and indeed, a paradox that, although disappointment with the judiciary was at least as great among the common Kenyan as frustration with politicians, it is also true that they chose to place their faith in the institution of the new judiciary in implementing the new Constitution.

They did this by promulgating a Constitution that provides for the appointing of women and men of integrity by an independent and broadly representative Judicial Service Commission; by providing for institutional and decisional independence of the Judiciary and the judicial officers respectively; through the vetting of judges and magistrates who served before August 27, 2010 by a Board which had a broad criteria upon which to determine the suitability of these judicial officers; and by setting up the Judiciary Fund to signal financial independence of the Judiciary; and finally and above all by setting an apex court, the Supreme Court that would act as the final protector and custodian of the supremacy of the Constitution. By vetting the old judicial officers and by recruiting new judicial officers on a transparent manner that called for public participation the new Constitution created a new Judiciary.

It is time for the judiciary of Kenya to rise to the occasion, and shake off the last traces of the colonial legacy. As I see it, this involves a number of strands or approaches.

There must be no doubt in the minds of Kenyans, or of us, about our impartiality and integrity. No suspicion that we defer to the executive[[8]](#footnote-8), bend the law to suit our long term associates or their clients, or would dream of accepting any sort of bribe.

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

Thirdly, we in Kenya have been the inheritors of not only the common law but of English Court procedures. While English Court procedures have over time been made simpler, some archaic terminology has been done away with, case management has been firmer, and ADR has been much more used, in Kenya we still have cases that are heard in driblets. We need radical changes in judicial policies, judicial culture, and end of judicial impunity and laziness.

Fourthly, I see in the Constitution, especially Article 159 (2), a mandate for us to carry out reforms tailored to Kenya’s needs, and aimed at doing away with these colonial and neo-colonial inefficiencies and injustices.

Fifthly, what I want to emphasise here is the need to develop new, not only highly competent but also indigenous jurisprudence. I link this last adjective to the Constitution’s value of patriotism. I conceive that it requires the judge to develop the law in a way that responds to the needs of the people, and to the national interest. I call this robust (rich), patriotic, indigenous, and patriotic jurisprudence as decreed by the Constitution and also by the Supreme Court Act of Kenya.[[9]](#footnote-9) Above all, it requires a commitment to the Constitution and to the achievement of its values and vision.[[10]](#footnote-10)

Sixthly, few people now maintain the myth that judges in the common law system do not make law. Our Constitution tears away the last shreds of that perhaps comforting illusion, especially in the context of human rights, when it provides under Article 20 (3) (a) that “a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom”. As I read it, it means that if an existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop that rule so that it does comply. And it is matched (in Article 20(3)(b), which follows) by an obligation to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. This is an obligation, not to rewrite a statute, but to read it in a way that is Bill of Rights compliant if at all possible. I would urge that it is not just the Bill of Rights that should be used as the touchstone of legal appropriateness but also the Constitution more generally. The Constitution says no less.

**Elements of Robust (rich), Indigenous, Patriotic, and Progressive Jurisprudence**

The elements of this decolonizing jurisprudence would include the six strands and approaches discussed above, would shun mechanical jurisprudence, but would also reflect the following ingredients:

The decolonizing jurisprudence of social justice does not mean being insular and inward looking. The values of the Kenyan Constitution are anything but. We can and should learn from other countries. My concern, when I emphasize “indigenous” is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of other jurisdictions and courts, however, distinguished. And, indeed, the quality of our progressive jurisprudence whould command respect in these distinguished jurisdictions. After all our constitution is the most progressive in the world.

* While developing and growing our jurisprudence Commonwealth andinternational jurisprudence will continue to be pivotal, the Judiciary will have to avoid mechanistic approaches to precedent. It will not be appropriate to reach out and pick a precedent from India one day, Australia another, South Africa another, the US another, just because they seem to suit the immediate purpose. Each of those precedents will have its place in the jurisprudence of its own country. A negative side of a mechanistic approach to precedent is that it tends to produce a mind-set: “If we have not done it before, why should we do it now?” The Constitution does not countenance that approach.

**Our approach**

Our jurisprudence must seek to reinforce those strengths in foreign jurisprudence that fit our needs while at the same time rescuing the weaknesses of such jurisprudence so that ours is ultimately enriched as decreed by the Supreme Court Act.

The task of growing such jurisprudence involves a partnership between other judiciaries, the profession and scholars. I hope that the bar, too, will respond to the challenge. Standards of advocacy need to improve, the overall quality of written and oral submissions needs to improve. We have so far found the jurisdictions of India, South Africa and Colombia to be great partners as our respective constitutions are similar in many respects. Besides, decolonizing jurisprudence requires South-South collaboration and collective reflection.

We are trying to move away from excessively detailed written submissions. This makes sense only if the judges read the written submissions in advance. And do so with a critical eye, prepared to interrogate the arguments of counsel. And prepared also to put forward alternative ideas. It is a questionable practice to come up with ideas and authorities in the privacy of Judges’ chambers when writing a judgment, if counsel had no chance to put forward argument on those ideas and authorities. The very purpose of written submissions is to try to prevent that happening by enabling the judge to be well prepared in advance. If the judge is well prepared, he or she is in a much stronger position to criticise counsel for not being prepared. In this way the bench can help encourage higher standards of advocacy. And in the long run, this will also speed up the work of the court and help to clear the backlog.

We are trying to make this task easier for you by enhancing the quality and quantity of legal materials available to the bench by appointing legal researchers. It will be a learning experience for judges as well as legal researchers to work out how the cause of justice can best be served by this innovation. We are confident that this offers an opportunity to make major strides in the quality of the jurisprudence in the courts of Kenya.

I want also to add that these major strides in the quality of jurisprudence in our courts can be amplified if we improved our collegiality and ability to co-educate each other so that the decisions coming out of our courts will reflect the collective intellect of the Judiciary distilled through the common law method as well as through regular discourses and learning by judicial officers. To be a good judge must involve continuous training and learning and regular informal discourses among judges.

The Judiciary Training Institute (JTI) must become our institution of higher learning, the nerve centre of our progressive jurisprudence. JTI will co-ordinate our academic networks, our networks with progressive jurisdictions, our training by scholars and judges, starting with our own great scholars and judges. In our training to breathe life into our constitution our jurisprudence cannot be legal-centric; it must place a critical emphasis on multi-disciplinary approaches and expertise.

Now that law reporting is regular under the able leadership of National Council on Law Reporting the Supreme Court has also established a program of researching the “lost jurisprudence” during the years when reporting did not exist. I am confident there will emerge gems and nuggets of progressive jurisprudence from that search.

Let us hope that the community of scholars responds to the challenge equally. The quality and quantity of Kenyan legal literature is disappointing. We need high quality commentary on the Constitution, and on our laws. And we need high quality commentary on our judgments. We must not be over-sensitive to criticism. No one learns anything if they are not criticised. There are some small shoots of revival in legal writing. Let us hope they thrive and multiply.

Article 159(2)(e) says that the courts must protect and promote the purposes and principles of the Constitution. I have sought to establish such framework for purposive interpretation in two Supreme Court matters.[[11]](#footnote-11)

The Constitution took a bold step and provides that “The general rules of international law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.[[12]](#footnote-12) Thus Kenya seems to have become a monist state rather than dualist as in the common law tradition and Kenya’s history.

The implications of this will have to be worked out over time, as cases come before the courts. Even in the past, Kenyan judges have not ignored international law. They have often quoted the Bangalore Principles on Domestic Application of International Human Rights Norms.[[13]](#footnote-13)

Now, however, the courts have greater freedom. Many issues will have to be resolved. Indeed, we now have great opportunity to be not only the users of international law, but also its producers, developers and shapers.

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

The 2010 Constitution constitutionalizes public interest litigation which in India was judicially created. See Articles 22(2) and 258(2). Our path has been smoothed: we do not have to strive to establish our role as guarantor of the supremacy of the Constitution, or of the rights of the downtrodden. We are indeed clearly mandated to fulfil these roles.

Our appointment process is precisely designed to give us independence of the executive and the legislature so that we can if necessary “force other institutions of governance to do what they are supposed to do”. We can only pray that we have the moral stature, the legal skills and the courage to do what we are directed to do.

Finally, Article 159 (2) of the Constitution has restored “traditional dispute resolution mechanisms” with constitutional limitations.[[14]](#footnote-14) We live in our country where courts are not the only forums for administration of justice. Traditional dispute resolution mechanisms keep these institutions as free as possible from lawyers, ‘their law,’ and the ‘law system of the capital.’[[15]](#footnote-15) The development of the “Without the Law” jurisprudence will be a critical nugget in our progressive jurisprudence.

**Reflections from the Supreme Court Decisions**

Long before the Supreme Court pronounced itself on the issue of interpreting the Constitution several of my colleagues at the Supreme Court and I had, in various fora, stated as follows: that the Constitution is a transformative Charter of Good Governance;[[16]](#footnote-16) that the Supreme Court in guaranteeing the supremacy of the Constitution must implement transformative constitutionalism;[[17]](#footnote-17)that our progressive and transformative Constitution, if implemented, would put Kenya in a social democratic trajectory, under a human rights state[[18]](#footnote-18), signalling equitable distribution of resources, sustainable development and prosperity[[19]](#footnote-19); and that to implement our Constitution our jurisprudence must reflect social justice.[[20]](#footnote-20)

In our first case that sought our Advisory Opinion, the case of *Re Interim Independent Election Commission [2011]eKLR, para [86]* we pronounced ourselves thus:

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

In the same case we problematized in the interpretation of the Constitution the combination of rules on one hand, with values and principles, on the other by pointing in paragraph 49 to “*an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.”* Future development will no doubt clarify such a dichotomy as the integration of both prescribed norms, values, principles, purposes, and policy enriches the theory of interpreting our Constitution. The content derived from historical, economic, social, and cultural contexts that we are commanded by Section 3 of the Supreme Court to consider will invariably bring about this integration and fusion without subverting either the prescribed norm or the non-legal phenomena.

It is unusual for a constitution to be as pre-occupied by the question, scope, methodology of its own interpretation as Kenya’s 2010 Constitution. The Kenya Constitution is also unusual in setting out a theory of interpretation. In the same vein the Kenyan Parliament, in enacting the Supreme Court Act 2011, (Supreme Court Act) has in the provisions of Section 3 of that Act reinforced this aspect of constitutional pre-occupation in its theory of interpretation. The Constitution and the Supreme Court Act both set out a theory of our interpretation of the Constitution.[[21]](#footnote-21)

Article 259 of the Constitution provides:

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

(a) promotes its purposes, values and principles;

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

(c) permits development of the law; and

(d) contributes to good governance.

…

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

Section 3 of the Supreme Court Act provides:

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

a. …

b. …

1. develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth;
2. enable important constitutional and legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.

Under Article 163(7) of the Constitution **all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court**. Thus, this theory of the interpretation of the Constitution will bind all courts, other than the Supreme Court. It will also undergird various streams and strands of our jurisprudence that reflect the holistic interpretation of the Constitution.

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

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

As the eminent retired Chief Justice of Israel, Aharon Barak has observed, “…one who interprets a single clause of the constitution interprets the entire constitution.”[[22]](#footnote-22)

In ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others***, *Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR*, I had the occasion to revisit this theory of the interpretation of the Constitution in my Concurring Opinion. I stated as follows (paragraphs 155-157):

***“[155] In both my respective dissenting and concurring opinions,*** *In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012****; and*** *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012****, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.***

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

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

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

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

In a recent appeal[[23]](#footnote-23) in my concurring opinion I related this theory of interpreting the Constitution to electoral jurisprudence thus:

Electoral jurisprudence as one of the strands or streams of our jurisprudence must also reflect this theory of the interpretation of the Constitution. The Constitution is the constant north as clearly stated in our finding in this appeal that ***“…the Elections Act, and the Regulations thereunder, are the normative derivatives of the principles embodied in…the Constitution, and in interpreting them, a court of law cannot disengage from the Constitution.”*** (*Infra* at paragraph 243.)

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

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

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

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

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

***“[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.”***

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

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

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

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

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

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

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

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

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

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

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

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

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

**[379]** It is clear that sustainable development under the Constitution has the following *collective* pillars: the sovereignty of the Kenyan people; gender equity and equality; nationhood; unity in diversity; equitable distribution of political power and **resources**; the whole gamut of rights; social justice; political leadership and civil service that has integrity; electoral system that has integrity; strong institutions rather than individuals; an independent Judiciary, and fundamental changes in land. Public participation is the cornerstone of sustainable development and it is so provided in the Constitution.

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

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

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

**Conclusion**

**A transformative Constitution and its attendant transformative constitutionalism are both about change from a status quo that is neither acceptable nor sustainable.** Transformative constitutions are not revolutionary, but transformative and mitigating. **Transformative constitutionalism is anchored by progressive jurisprudence from the judiciary. This jurisprudence is not insular. It is the basis of African, South-South, and global collaboration. It is a jurisprudence that allows us to be producers, developers and shapers of international law. At the economic, social, cultural and political levels transformative constitutions and constitutionalism aimed at change that can put a nation in a social democratic trajectory and a basis of democratic sustainable development. What are the challenges to this vision?** What are the national and global trajectories within which transformative constitutions, the new rule of law, decolonized progressive jurisprudence are to be viewed, analysed, problematized, and historicized?

We begin with Eric Hobsbawm conclusion that “Our world risks both explosion and implosion. It must change.”[[24]](#footnote-24) Since the end of the Cold War debates have raged on the subject of this change. The paradigms of neo-liberalism, socialism and communism still engage us. The World Social Forum has been convinced since its inception that a new world is possible by invoking radical paradigms, but mainly human rights and social justice paradigms. Radical social democracy is seen as a basis for debating change although revolutionary change rather than transformation has never been discarded from these debates. It is possible to argue that such mitigation and transformation can be the basis of revolutionary change.

As we envision progressive African jurisprudence based on our transformative constitutions, what is also called the gospel according to the Africans, we cannot forget that Africa is still dominated, exploited and oppressed. We cannot forget that our political elites have hardly formulated an economic, political, and ideological template that reflects African interests in the context of global imperialism. The Africans though are revisiting the ideas of our patriots as shown recently by two publications.[[25]](#footnote-25)

We may wonder of what use are these thoughts in African judiciaries that struggle to transform their institutions for all their citizens. Given the inherent limitations of implementing transformative constitutions are aspirations enough? Given that African elites invariably lack the political will to support transformation how is judicial transformation to be aligned to challenges that such lack of political will pose?

These and other ideas and question must engage our judiciaries that are embracing multi-disciplinary approaches in their work. There is no doubt in my mind that academia must play a critical role in nurturing these ideas in the African judiciaries. Many of our judiciaries are building judiciary institutes as centres of higher learning that have robust academic networks. Judiciaries are also engaged academics as *amici curiae* in disputes that require serious re-education of the judiciaries.

Here I may be preaching to the converted. I have read three documents that you sent to me.[[26]](#footnote-26) Your role as a University in these questions must but help the judiciary to transform. In our case the Supreme Court continues to benefit from distinguished professors who I have acknowledged in this Distinguished Lecture.

Ultimately, we must concede that the project of transformation is fundamentally a political project. In countries where the transformation of the judiciary has irreversible support from the political elites much progress can be quickly made. We should, therefore, interrogate the limitations that face the various judiciaries.

1. **Dr. Willy Mutunga is the Chief Justice of the Republic of Kenya and the President of the Supreme Court of Kenya. A major part of my remarks are taken from a speech I gave to Judges and guests of the Kenyan Judiciary on the occasion of the launching the Judiciary Transformation Framework on May 31, 2012. That speech has been published in the Socialist Lawyer: Magazine of the Haldane Society of Socialist Lawyers. Number 65. 2013, 20. The journey of my thoughts since then and now reflected in this Distinguished Lecture owes a great debt of intellectual, ideological and political gratitude to the following mentors and friends: Professors Jill Ghai, Yash Ghai, Sylvia Tamale, Joel Ngugi, James Gathii, Joe Oloka-Onyango, Issa Shivji, Makau Mutua, Obiora Okafor, Yash Tandon, David Bilchitz, Albie Sachs, Roger Van Zwanenberg, and Shermit Lamba.** [↑](#footnote-ref-1)
2. As Karl Klare states, “Transformative constitutionalism connotes an enterprise of inducing large-scale social change and through non-violent political processes grounded in law.” R.Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 SAJHR 146-188 at 150. Such transformative constitutions as the ones of India, South Africa, and Colombia reflect this vision of transformation. If revolution is to take place it will be in part on the basis of the implementation of these transformative constitutions. [↑](#footnote-ref-2)
3. Ghai, Y. & McAuslan, P., *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present,* Oxford University Press, (1970). [↑](#footnote-ref-3)
4. “Whatever happens, we have got

   The Maxim gun, and they have not.” See, Beloc, H., *The Modern Traveler:- 1898, Cornell University Library, (2009).* [↑](#footnote-ref-4)
5. My trusted colleague, Professor Obiora Okafor of Osgoode Hall Law School (Canada) was kind enough to provide the following comment:

   “What happened to Jomo Kenyatta and the ‘Kapenguria Six’ in the colonial courts was, in reality ’the rule BY law’ and NOT “the rule OF law. I guess that I have always had some sympathies with Lon Fuller’s notion of an internal morality of law that renders certain kinds of legality so beyond the pale as not even to qualify ‘as legality.’ I think my point here ties into your well-argued notion of a mechanical jurisprudence.” [↑](#footnote-ref-5)
6. Election Petition No 1of 1998, *Kibaki v Moi & 2 others* (No 2) (2008) 2 KLR (EP) 308 [↑](#footnote-ref-6)
7. This practice was endemic under the reign of CJ Cecil Miller (1986-1989) and championed vigorously by Justice Norbury Dugdale. See, Vaquez, ‘Is the Kenyan Bill of Rights Enforceable after 4th July 1989?’, in 2: *Nairobi Law Monthly* (1990), p. 7-8. Also see, Ghai Y., “The Kenyan Bill of Rights: Theory and Practice,” in Alston, P., (Ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives,* Oxford University Press, (2000), p 221-222. [↑](#footnote-ref-7)
8. The independence of the Judiciary is threatened by other forces besides the Executive. Parliament’s powers have been strengthened. Forces from corporate, civil society, political parties, and legal and illegal cartels remain extremely powerful. Forces that divide Kenyans, namely ethnicity, region, religion, race, gender, generation, clan and class, and occupation are reflected in the Judiciary itself. Community, family, and friends are forces that cannot be underestimated. [↑](#footnote-ref-8)
9. Section 3. [↑](#footnote-ref-9)
10. See the Constitution of Kenya 2010: the Preamble, Articles 2(4), 10, 20(3), 20(4), 22,23,24, 25,159, 191(5) and 259. These articles decree how the Constitution is to be interpreted and, indeed, under Article 10(1) (b) any law. And, “any law” would include, in my view, rules of common law, as well as statute. [↑](#footnote-ref-10)
11. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion of the Supreme Court (Reference No 2 of 2012; In the Matter of Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 others (Petition N0 4 of 2012).* [↑](#footnote-ref-11)
12. Art. 2 (5) and (6). [↑](#footnote-ref-12)
13. Principles 7,8 [↑](#footnote-ref-13)
14. Under Article 159(3) of the Constitution traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results to outcomes that are repugnant to justice and morality; or (c) is inconsistent with this Constitution or any written law. [↑](#footnote-ref-14)
15. Arthurs, H., *Without the Law: Administrative Justice and Legal Pluralism in the Nineteenth-Century England,* University of Toronto Press (1985) at p.10.Several passages found between p. 1-12 and p. 188-214 are extremely useful in the development of the “Without the Law” Jurisprudence. [↑](#footnote-ref-15)
16. Professor Justice Ojwang [↑](#footnote-ref-16)
17. Judges Tunoi and Mohammed, relying approvingly on Justice Pius Langa’s article, Transformative Constitutionalism, STELL LR 2006 3, 351. [↑](#footnote-ref-17)
18. A variety of a radical liberal democratic with radical social democratic content [↑](#footnote-ref-18)
19. Mutunga, CJ and President of the Supreme Court of Kenya [↑](#footnote-ref-19)
20. Judge Wanjala [↑](#footnote-ref-20)
21. Professor Yash Ghai in an unpublished article has stated that “Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenya Constitution sets, through the judiciary, its barricades against the destruction of its values and the weakening of its institutions by forces external to itself. Such is the responsibility of Kenya’s judiciary.” [↑](#footnote-ref-21)
22. Aharon Barak, The Judge in a Democracy (Princeton: Princeton University Press, 2006) 308. [↑](#footnote-ref-22)
23. **The Munya Case** [↑](#footnote-ref-23)
24. A History of the World, 1914-1991: The Age of Extremes (New York: Vintage Books, 1996), page 585 [↑](#footnote-ref-24)
25. Eds; Corley, Fallon and Cox, Silence Would be Treason: The Last Writings of Ken Saro-Wiwa (Dakar: CODESRIA, 2013) and Eds; Manji & Fletcher Jr, Claim No Easy Victories: The Legacy of Amilcar Cabral (Dakar: CODESRIA and Daraja Press, 2013). [↑](#footnote-ref-25)
26. Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State; An evaluation of the comments/submissions made in relation to the Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State; and Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the Transformation of Society [↑](#footnote-ref-26)