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Transformative Constitutions and Constitutionalism : A New Theory and School of Jurisprudence from the Global South?

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Abstract

The article seeks to interrogate, historicize, and problematize what transformative constitutions and their attendant constitutionalism/jurisprudence are. Some of the critical elements of transformative constitutions are analyzed as well as the development of the jurisprudence that is emerging from these constitutions. In the quest for an answer to the question posed, which is the title of the article, Kenya is used as a case-study. Kenya has had a transformative constitution since it was promulgated on 27 August 2010. Its core elements/pillars of transformation are highlighted in this article. Kenya's experience with the implementation of this Constitution, particularly with regard to the development of jurisprudence to reflect the objectives and vision of the Constitution will assist in answering the question examined in the article. The question itself is of interest to both the Global South and Global North in the ongoing process of reverse learning.[1] The analysis is therefore linked to the global context in the quest for political transformation of which the making of constitutions is an integral part.

I Introduction

A South African scholar,[2] and a former Chief Justice of South Africa,[3] respectively, have defined what it is, and written about transformative constitution and constitutionalism in South Africa in a way that is relevant to this article. Transformative constitutions and their jurisprudence/constitutionalism collectively capture the idea of fundamental societal change through the instrumentality of law, especially the law of the constitution.[4] The role of law in social transformation has a long genealogy when posed and answered as a question about

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[1] Cesar Rodriguez-Garavito, *Law and Society in Latin America: A New Map* (New York: Routledge, 2015), 8-9.

[2] See K.E. Klare, "Legal Culture and Transformative Constitutionalism", (1998) 14:1 South African J on Human Rights 146.

[3] Pius Langa, "Transformative Constitutionalism", (2006) 17:3 Stellenbosch L Rev 351.

[4] Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (South Africa: JUTA, 2010), at 24-25.

whether law and the courts can advance, stagnate or impede transformation and revolution.[5] This question, once the source of serious and continuous jurisprudential debates, has acquired a consensus that law, indeed, has a role to play in societal transformation and revolution. This multi-disciplinary consensus is shared by lawyers, economists, policy makers, politicians, international organizations, and think tanks.

In gaining traction, the new phenomenon of transformative constitutionalism[6] has both enriched and transformed the way we see constitutions. Underpinning the very idea of a transformative constitution (such as those of India, Colombia, South Africa, Ecuador, Venezuela, Bolivia, and Kenya) is the idea that the constitutional superstructure is embedded in a theory that it will be an instrument for the transformation of society rather than a historical, economic, and socio-political pact to preserve the *status quo*.[7]

As the discussion on the elements of transformative constitution and constitutionalism will show, transformative constitutions depend fundamentally on how political leadership implement it. Thus the intellectual, ideological, social, cultural, spiritual, and political position of leadership is important. Political leadership can either consolidate the main pillars of the constitution whilst rescuing its weaknesses; or destroy, overthrow and/or systematically subvert it over time. In terms of the development of jurisprudence, the idea of transformative judicial politics under a constitution that is transformative is also important. Social struggles even within the judiciary and outside it impact the objectives of transformative constitutions either negatively or positively. Ultimately, the core question to be interrogated is whether transformative constitutions, under the implementation of a radical transformative political leadership, can be the basis for a society that rescues the limitations of transformative constitutions. In other words,

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[5] In my doctoral thesis, *Relational Contract Outside National Jurisdiction (1993), Doctor of Jurisprudence Thesis at Osgoode Hall Law School, York University, Toronto*, I attempt to problematize the various schools of jurisprudence, including the Marxist Theory of State and Law.

[6] Willy Mutunga, "Human Rights States and Societies: A Reflection from Kenya" (2015) 2:1 The Transnational Human Rights 63. *See note 15 for its recent version.*

[7] See for example Gargarella, Roberto, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford: Oxford University Press, 2013); Gargarella, R, Pilar Domingo, and Theunis Roux, eds. *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (Aldershot: Ashgate, 2006); César Rodriguez-Garavito & Diana Rodriguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in Global South* (New York: Cambridge University Press, 2015); and Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).

are these constitutions continuities of radical struggles,[8] 'small revolutions'[9] that herald better societies? Such questions are important in the context of our world where the search for a paradigm that will liberate the world from forces that dominate, exploit, and oppress most global citizens remain ongoing.

The role of constitutions and the law as an instrument of transformation; the agency for developing transformative constitutionalism (judicial officers, the bar, the public and organic intellectuals from various disciplines, traditional systems, and religions); as well as its politics and ideology continues to engage debates, interrogations, and demystifications. With the resurrection of radical Pan Africanism, the question of a progressive Pan Africanist jurisprudence for the liberation of Africa is being discussed in the academy, Pan African institutions, civil society and in various social movements.[10] With the effort to make transformative constitutions in Africa and the Global South advance unabated, all the elements below anchor the quest for transformative constitutions and constitutionalism.

II The Kenyan 2010 Transformative Constitution: Elements/Pillars of its Transformation of Kenya

(a) Broad Objective and Purpose[11]

In 2010, the Kenyan people decreed that the colonial, postcolonial, and neoliberal status quo was unacceptable and unsustainable. In fundamentally changing their society they resolved to reconstitute and reconfigure the Kenyan state from its former vertical, imperial, authoritarian,

[8] Walter Rodney, "The African Revolution" in *Urgent Tasks [Sojourner Truth Organization, Chicago] 12* (1981) 5. On page 8 Rodney writes: "…, it is worth pointing out that a perception of links and continuity between popular resistance over a long period of time is not something unique to an African nationalist historian. This is the approach adopted by Vietnamese scholars, by progressive Philippine scholars, and by Cuban scholars."

[9] Samir Amin, *The World We Wish to See: Revolutionary Objectives in the Twenty-First Century* (New York: Monthly Review Press, 2008) at 17.

[10] Note 66: Lecture in Accra, Ghana.

[11] See Yash Pal Ghai, "Constitutions and Constitutionalism: The Fate of the 2010 Constitution," in Godwin R. Murunga, Duncan Okello and Anders Sjörgren, eds, *Kenya: The Struggle for a New Constitutional Order* (London: Zed Books, 2014), ch 6. On page 127 Yash Pal Ghai conceives the Kenyan Constitution as "a revolutionary constitution but no revolution." The discussion on objectives is one about the basic structure of the Constitution. In my opinion the ingredients of the basic structure of the 2010 Constitution of Kenya are broad and all-encompassing reflecting the great commitment by Kenyans to fundamentally restructure the status quo of their society. See *infra, note 19, the BBI decision.*

and unaccountable ogre to an accountable, horizontal, decentralized, democratized, and responsive state.[12] Under the new Constitution, the vision of nationhood is premised on a number of core norms, which include: a sovereign state;[13] national unity; political integration and diversity; democratization and decentralization of the Executive arm; devolution of power; popular sovereignty[14] (in which the state and its public service are servants and not masters of the people); integrity in public leadership; a Bill of Rights that provides for socio-economic rights to reinforce the civil and political rights (thereby reinforcing the whole gamut of human rights to radically address the status quo and signal the creation of a human rights state and society);[15] and finally, undoing the status quo in land (that has been the country's Achilles heel) to anchor Kenya's economic and democratic development.

(b) Specific Elements/Pillars

(i) Independent and Resourced Institutions

The building of institutions is one of the great pillars of the Constitution. Indeed, strong institutions are part of the basis for the transformation of Kenya. Such institutions are a necessity born out of history of the imperial presidency since independence. Through constitutional amendments since independence the imperial presidency became the center of authoritarianism. The 2010 Constitution creates core institutions to defang the state and neuter the imperial

[12] There is no doubt the 2010 Constitution seeks to reform the colonial and neocolonial state in its exercise of political power and in its distribution of land and natural resources. Its key institutions, particularly finance and the machinery of violence, are held accountable under the Constitution. Devolution democratizes and decentralizes the state and its political power right to the grassroots. Such counties as Makueni that are beacons of progressive implementation of the Constitution bear these facts out. So, if this Constitution is implemented, part of the outcome of the political struggles is it could decolonize the state, and thereafter lay basis for a transformative state depending on the ideological and political nature of the political leadership that is implementing it. Such leadership's vision would be reflected in all institutions including the Judiciary. At that stage we could envision the transformative state developing into a revolutionary one to birth the kind of society the country would need.

[13] I do not intend the two concepts, namely, sovereign state and popular sovereignty, to have a tension here. Kenya is not a sovereign state. Nor is popular sovereignty embedded in our ideology and politics because of the elite politics of division. I believe both concepts are aspirational as well as part of what we are struggling for as we think freedom and emancipation. It is important, however, to bear in mind that sovereignty, like nationalism, has a class content. If this class content is hidden, then we do not interrogate and problematize in whose interest we praise sovereignty. In the case of Kenya, sovereignty has to historicized, interrogated and demystified within the struggles against the imperialism of the West and East that is propped by its class alliance with the Kenyan elite/comprador bourgeoisie. I thank Professor Okafor Obiora for raising this issue when he read the earlier drafts of this article.

[14] The 2010 Constitution has many provisions that that decree the centrality or primacy of the sovereignty of the Kenyan people. See the short discussion on this aspect below on pages 5-6

[15] Willy Mutunga, "Human Rights States and Societies: A Reflection from Kenya" in Eunice N. Sahle,ed, *Human Rights in Africa: Contemporary Debates and Struggles* (New York: Palgrave Macmillan, 2019) 19.

presidency. Its norms and institutions are meant to prevent the resurrection of the executive dictatorship. These institutions include county governments; constitutional commissions that provide checks and balances as well as independence and principles of inter-dependence between state organs; financial institutions that are transparent and accountable, particularly the Treasury and state security apparatuses; and institutions set up to guarantee equitable distribution of land and other national resources.

(ii) History of Kenya's Past Struggles

The 2010 Constitution also reflects the vision of those compatriots who struggled and fought against domination, exploitation, and oppression by British colonialists. History records their invocation of discourses of reform, revolution, human rights, social justice, patriotism, freedom, nationhood, among others that the 2010 Constitution decrees.[16]

(iii) The Sovereignty, Supremacy, and Centrality of Kenyan People

The sovereignty of the Kenyan people becomes supreme and central[17] in the implementation of the Constitution. Executive, legislative, and judicial authorities are derived from the people. The 2010 Constitution provides for national values and principles of governance. They include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human

[16] Preamble to the 2010 Kenyan Constitution; Maina wa Kinyatti, *History of Resistance in Kenya, 1884-2002* (New York: Mau Mau Research Centre, 2008); Shiraz Durrani, *Pio Gama Pinto: Kenya's Unsung Martyr* (Nairobi: Vita Books, 2018); Shiraz Durrani, *Kenya's War of Independence: Mau Mau and Its Legacy of Resistance to Colonialism and Imperialism, 1948-1990* (Nairobi: Vita Books, 2018); Julie MacArthur, *Dedan Kimathi on Trial: Colonial Justice and the Popular Memory in Kenya's Mau Mau Rebellion* (Athens: Ohio University Press, 2017);

[17] There can be no doubt in the provisions of the 2010 Constitution about the centrality and supremacy of the Kenyan people in its implementation. See the Preamble, Articles 1, 3, 7, 10, 11, Chapter 4, Articles 22 (1) and 258 (1) (on Public Interest Litigation which is a robust constitutional expression on the participation of the people in checking the subversion of the Constitution by the Executive, Parliament, Judiciary, all commissions and state institutions, and the citizens themselves); Articles 22 (2) and 258 (2) decree robust sovereignty of the Kenyan people and institutions and organizations. The citizens can be the basis of building progressive public interest jurisprudence in the protection of the Bill of Rights and the Constitution itself; Articles 91, 94, 129, 159, Chapter 15 on Commissions: One of their objectives is "to protect the sovereignty of the people."; Articles 255-257 (the people's sovereignty reigns supreme in matters of amending the Constitution; and Article 259 provides for the development of a theory of interpreting the Constitution that is pro-people, decolonized, de-imperialized, de-racialized, de-ethnicized, gender just, patriotic, rich (robust) indigenous, transformative, and progressive. Indeed, this theory has to be cognizant of the people's economic, social, cultural, spiritual, and political struggles that underpin the word and spirit of the Constitution.

rights, non-discrimination and protection of the marginalized, popular participation in politics, integrity, transparency and accountability, and sustainable development. The fundamental values that ungird all these values and principles are human dignity,[18] inclusiveness, equity, equality, non-discrimination, democracy, protection of the marginalized, and participation of the people. Our democracy and the participation of the people are both fundamental pillars of our development. The courts have ruled on what participation of the people entails.[19] This jurisprudence of the participation of the people in development has called for robust involvement on the basis that the people think and know of their material needs. The courts have demanded full disclosures of critical information and knowledge on development projects. The "sweetheart deals" of our corrupt elite are being subjected to this participation of the people. Coupled with devolution of political power and equitable distribution of resources, the ordinary people have begun to benefit from the results of devolved political and state power to the grassroots. This participation of the people is also integrated in what we call below "Without the Law Jurisprudence."

There can be no doubt in the provisions of the 2010 Constitution about the centrality of the Kenyan people in its implementation. It is this centrality and supremacy that provides the various

[18] Horace Campbell, "Reconstruction, Transformation, and the Unification of the Peoples of Africa in the 21st Century: Rekindling the Pan African Spirit of Kwame Nkrumah" an Inaugural Lecture, Kwame Nkrumah Chair in African Studies, 2017, pages 1- 2 and 24. "Pan Africanism from the outset has been concerned with human dignity and the concept of dignity has gone through many iterations from the period of enslavement, to the period of partitioning and colonialism, the period of apartheid and neocolonialism to the current period when corporations have given themselves the right to patent life forms. In the era of the information revolution and genetic engineering, cyborgs, robotics, the solar revolution and artificial intelligence, the question of what or who is a human and the dignity of the human person has been reopened. The bio-political questions that are arising in this century of bio-economy challenge all of humanity, but more so the African and indigenous persons who have been threatened with genocidal violence in past periods of 'scientific' advancements in Western 'development' paradigms." pages 1-2.

[19] *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others* (2015), Petition No. 14 of 2014, eKLR (Supreme Court of Kenya at Nairobi). The landmark 5 Judge decision of the High Court of Kenya in *David Ndii & Others vs the Attorney-General and Others* delivered on 13 May, 2021 goes further than the Supreme Court in its clarity on the participation of the people as part of their sovereign will under the Constitution. This landmark decision has been praised by renowned Indian and Kenyan constitutional law professors: Upendra Baxi,""Hooks", "Pillar" and "Foundations" of Constitutionalism: Basic Structure in Kenyan Jurisprudence", *India Legal* (21 May 2021), online: <https://www.indialegallive.com/column-news/hooks-pillars-and-foundations-of-constitutionalism-basic-stature-in-kenyan-jurisprudence/>; Gautam Bhatia, "Notes From a Foreign Field: An Instant Classic-The Kenyan High Court's BBI Judgement", *Indian Constitutional Law and Philosophy* (14 May 2021), online:< https://indconlawphil.wordpress.com/2021/05/14/notes-from-a-foreign-field-an-instant-classic-the-kenyan-high-courts-bbi-judgment/>;Makau Mutua, "Kenya and the BBI Five", *VerfBlog* (11 June 2021), online: <https://verfassungsblog.de/kenya-and-the-bbi-five>; Ambreena Manji, "The BBI Judgment and the Invention of Kenya", *VerfbBlog* (22 May 2021), online: < https://verfassungsblog.de/the-bbi-judgment-and-the-invention-of-kenya/>

entry points for robust public interest litigation (PIL) which is also known as "strategic impact litigation". This litigation is provided for in the Constitution under the Articles 22 and 258 of the Constitution. It is one of the great pillars of participation of the people in the struggle for the implementation of the Constitution and its transformation.[20]

(iv) Integration of Formal African Justice Systems with the Transformed Informal Colonial Justice System

As a pathway to a decolonized judicial system, Article 159(2) of the Constitution has restored "traditional dispute resolution mechanisms" with constitutional limitations. 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 the Constitution or any written law. The colonial repugnancy clause finds its way back but in a decolonized constitution. Justice and morality cannot any more refer to British injustice and immorality that was part of our colonial history.

The fact is, we live in a country where courts are not the only forums for the administration of justice. Indeed, only 5% of Kenyans have access to the formal courts. The other 95% access other forums for the administration of justice. Access to justice must encompass both formal and informal justice systems. Traditional dispute resolution mechanisms keep these institutions as free as possible from lawyers, "their law" and the "law system of the capital."[21] The development of the "Without the law" jurisprudence is a critical nugget in our jurisprudence.

[20] See Marion Muringe Ogeto & Waikwa Wanyoike, "Judiciary and Public Interest Litigation in Protecting the Right of Assembly in Kenya", in *Policing Protests in Kenya* (Nairobi: Centre for Human Rights and Policy Studies, 2019) 55. PIL has its challenges and limitations: insufficient funding for the many tasks that have to be undertaken because of the forces bent on subverting the constitution; Bar association not doing much; lack of clarity in the role of amici curiae and interested parties; weak solidarities between PIL organizations and social movements and the citizens generally; few citizens taking up PIL on their own; PIL being used by national and foreign interests in their economic disputes; dearth of public intellectuals in PIL; and above failure by the state, its institutions, and the ruling class to commit to a culture of obeying court orders, a subversion of the Constitution and the rule of law.

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

"Without the law" jurisprudence should become the people's jurisprudence capturing their sovereignty as well as signaling the devolution of political and state power to the grassroots.

It is critical to observe that since traditional dispute resolution mechanisms will be conducted in the various national languages of the various communities in Kenya, the collective outcomes of such ventures can only enrich our progressive jurisprudence, breathe life into the implementation of the Constitution as well as strengthen our diversity and democracy. This linguistic approach to traditional dispute resolution will also help in the translations that have to be undertaken of the Constitution. The approach will thereby enrich the languages of the community through new vocabulary that is borrowed from around the globe that will be reflected in the Constitution. I believe our other national language, Kiswahili, will be enriched making it a worthwhile project to translate the Constitution from its Kiswahili version to the national languages. These experiences and outcomes, it is suggested, will have their comparative niche in the world.

As we seek the integration of formal judicial systems inherited from colonialism with traditional justice systems, the overriding objective should be access to justice to all. We must, therefore, envisage an African Judiciary out of this integration. Such imagination will entail an African Law School, its curriculum and faculty (what role will the traditional lawyers and judges play in the creation of the African Judiciary) to reinforce the development of the jurisprudence envisaged here. Such approach will extend the trajectories of pro-people jurisprudence that will build the people's confidence in the Judiciary.

Wa Thiong'o emphasizes the importance of African languages when he observes that "We want African languages to become bridgeheads to continental African unity and Pan-African unity."[22] To recall our colonial and imperialistic past Wa Thiong'o states that, "…it hath ever been the use of the conqueror to despise the language of the conquered and to force [her] him by all means to learn [hers] his."[23] The language of the conqueror becomes the language of power which the majority do not have access to. It becomes a marker of both inclusion and exclusion. In the case

[22] Ngugi wa Thiong'o, "The Language of Justice in Africa" (Speech delievered in Lusaka, Zambia, 13 September 2013), p 13.
[23] *Ibid* at p 7.

of Kenya, the Constitution is not accessible to majority of Kenyan people because it is in English and Kiswahili. Having the Constitution in the national languages is critical in enriching our jurisprudence. I have found in our cultures values that trump the so-called modern values.[24] The participation of the people in all the affairs of their society will also require the development of African languages.

(v) Integration of International and Regional Law as part of the Law of Kenya under the 2010 Constitution

The Constitution took a bold step and provided that "[t]he general rules of international law shall form part of the law of Kenya" and "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[25] In the context of international law, in our quest to be developers and shapers of international law, we have robustly relied on the TWAIL (Third World Approaches to International Law) movement. Some Kenyan scholars in the diaspora are prominent members of this movement.[26] There are distinguished third world scholars in this movement as well.[27] Mutua writing on "What is TWAIL?" states:

> The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces, and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination, not resistance and liberation. This broad dialectic of

[24] For example, our inherited judicial culture reflected in the structures of courts, judicial address and dress are trumped by the traditional judicial cultures in all three aspects. In the Judiciary Transformation Framework 2012-2016 judicial Cultural Revolution was undertaken to spearhead our struggle against colonial judicial culture. See also Willy Mutunga, "Dressing and Addressing the Judiciary: Reflections on the History and Politics of Judicial Attire and Dress" (2014) 20 *Buffalo Human Rights L Rev* 125 and republished in Eunice N Sahle, ed, *Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Developments and Dilemmas* (New York: Palgrave/Macmillan, 2017), 131-166; See also John S Mbiti, *African Religions and Philosophy* (Nairobi: East African Educational Publishers, 2011) at 1-5. Religion and worship as used in the constitutional provisions include traditional African religions that have also constitutional enforcement under Article 159 (2) (c).

[25] Article 2(5) and (6) of the Constitution.

[26] Professors Makau Mutua, James Gathii, and Joel Ngugi. Professor Obiora Chinedu Okafor from Nigeria is also one of these eminent public international law intellectuals who do TWAIL.

[27] See James Thuo Gathii, "*TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography"* (2011) 3:1 Trade L & Development 26.

> opposition to international law is defined and referred to here as Third World Approaches to International Law (TWAIL).[28]

Mutua argues that "TWAIL is both a political and an intellectual movement"[29] whose members are "united in their broad opposition to the unjust global order."[30] TWAIL seeks to both deconstruct and reconstruct international law as a tool and device for the liberation of the discipline and discourse from the imperialism of the West and East. TWAIL does not end at the point of protest. It seeks a better tomorrow not just for the Global South but the Global North. TWAIL scholars are, therefore, not just protest scholars. They are part of political movement to resist the imperialism of the West and East. The demystification, deconstruction, decolonization, and de-imperialization of international law is an important ingredient in the development of Pan-African jurisprudence for the liberation of Kenya, Africa, the Global North and South. This need for the Third World Interpretation of international law is extremely important in the context of the current struggles over intellectual property rights and the rules that are being fashioned in the digital era in the context of the World Trade Organization.[31]

(vi) New Judiciary32 and Transformative judicial politics under the 2010 Constitution

Upendra Baxi (a distinguished Indian radical scholar who is also a progressive organic intellectual) argues that all judges are *active* but not all judges are *activist.*[33] He makes the following distinction:

> An active judge regards herself, as it were, a trustee of state regime power and authority. Accordingly she usually defers to the executive and legislature; shuns appearance of policy making; supports patriarchy and other forms of violent

[28] American Society of International Law, "What is TWAIL?" (The American Society of International Law Proceedings of the 94th Annual Meeting, Washington, DC, 5-8 April 2000) at p 31. "It is therefore important to realize that today's Third World scholars and political actors stand on the shoulders of Bandung and the Group of 77, among other important milestones of the Third World challenge to European hegemony", at page 32.

[29] *Ibid*

[30] *Ibid*

[31] Yash Tandon, *Trade is War: The West's War Against the World* (London: OR Books, 2015).

[32] The New Judiciary under the Constitution comprises: 1) new judicial officers recruited after the promulgation of the Constitution on 27 August where the process of recruitment outlaws the colonial and postcolonial ones before the promulgation; 2) judicial officers serving when the Constitution was promulgated are subjected to rigorous vetting as to their suitability to serve in the New Judiciary. The vetting was done by Judges and Magistrates Vetting Board that had a comprehensive criteria on suitability including integrity, competence, temperance, judicial laziness among others.

[33] Upendra Baxi, "The Avatars of Indian Judicial Activism: Exploration in the Geographies of [In] Justice," in S K Vermaand Kusum Kumar, eds, *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press, 2000) 156.

> exclusion; and overall 'stability' over 'change.' In contrast an *activist* judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially disadvantaged, dispossessed, and deprived. She does not regard adjudicatory power as repository of the reason of state; she constantly reworks the distinction between the *legal* and *political* sovereign, in ways that legitimate judicial action as an articulator of the popular sovereign. This opposition implies at least one irreducible characteristic of activist adjudication: namely, that a judge remains possessed of *inherent* powers to mould the greater good of the society as a whole.[34]

This, indeed, is a context of demystifying decisional independence of judicial officers as well the institutional independence of Judiciary as a whole. I believe that active judges in Baxi's categorization are also *activist* for the status quo while the *activist* judges in his categorization are very active against the *status quo*. Given societal responsibilities that Baxi correctly imposes on them, they surely must work very hard by refusing to be legal centric in their approaches. These are contradictory processes because society is comprised of conflicting interests. There are, therefore, political struggles in the Judiciary itself based on each judicial officer's intellectual, ideological, political, social, and cultural position. Judicial officers should stop deluding themselves that they are not doing politics. Whether their politics emerges from their judgments or their extra-judicial scholarly writings and speeches, judicial officers have consigned the Judiciary to what Baxi calls "an institutional *political actor*."[35]

Baxi writes:

> I believe it is time to take stock and say what judges regard as unsayable: that the Supreme Court [of India] is a centre of political power. I believe that the recognition of this fact, howsoever belated, is worthwhile as it would be conducive to the clarification of the political role of the Court. And such a recognition will impel us to ask more relevant questions as to what kind of political role the Court ought to play in a changing India.[36]

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[34] *Ibid at 166.* Is the term "activism" really the appropriate one for the kinds of liberatory concerns we are engaging here? In our quest to change colonial judicial culture pertaining to dress and address we talked of Cultural Revolution. We knew it was not that but a form of judicial activism necessary in a trajectory of transformation that could be a basis of fundamental revolutionary change going forward. We were also aware of the limitations of this jurisprudence given the lack of progressive political leadership in the country. This analysis also signals class struggles within the Judiciary itself in quest for either progressive or regressive implementation of transformative constitutions. The judicial class struggles are part of the class struggles in the Kenyan society itself.

[35] Upendra Baxi, "Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies" (2014) 14 Macquarie L J 3 at 10.

[36] Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Company, 1980), at 5.

In his book, Onyango-Oloka[37] quotes Bagwati CJ of the Supreme Court of India as saying that the "Indian Constitution is a document of social revolution…[t]he Judiciary has therefore a socio-economic destination and a creative function."[38] Within the title of Oloka-Onyango's book, *When Courts Do Politics: Public Interest Law and Litigation in East Africa*,[39] are two express questions, namely, "Do courts do politics?" and "when do they do politics?" He answers these questions in the affirmative as seen in the title of the sixth chapter of his book: "At the Pinnacle of Politics: Deciding a Presidential Election."[40] I agree with him. Courts do politics and do politics all the time.

In election petitions, including the presidential election petition cases, judiciaries and judicial officers come face to face with the politics of the elites and their political successions. In the case of Kenya, the two decisions on the two presidential election petitions in 2017[41] resulted in the Supreme Court being attacked brutally by the two factions of the elite political parties. These attacks have not abated. One thing is very clear though. By deciding against both elite factions in both petitions the Supreme Court, in my view, signaled its independence. It also made a clear statement that it will uphold the Constitution without regard to the pressures the factions will impose on it.

How the Supreme Court sustains this position will be critical to the development of jurisprudence, its independence, the independence of the entire judiciary, and judicial politics going forward. As the apex court, the Supreme Court will have to give leadership on judicial politics so that the Judiciary ceases, once and for all, to be perceived as an appendage of the two arms of government, particularly the executive. The Supreme Court will also have to give leadership against all the pressures and influences that can compromise the institutional and

[37] *Infra. Note 39*
[38] *Ibid* at *p. 94*
[39] Oloka-Onyango's book, *When Courts Do Politics: Public Interest Law and Litigation in East Africa* (Cambridge Scholars Publishing, 2017
[40] *Ibid* at *216*
[41] *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* (2017), Presidential Petition 1 of 2017, eKLR (Supreme Court of Kenya at Nairobi); and *John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* (2017), Petitions 2 & 4 Consolidated, eKLR (Supreme Court of Kenya at Nairobi); See also, *"Will the Kenya Elite ever Grow Up?", The Star* (15 September 2017), online: https://www.the-star-co-ke/news/2017/09/15/mutunga-opens-up-on-supreme-court-rulings-in-2017_1636257

decisional independence of the Judiciary and its judicial officers. Indeed, the Kenyan judiciary is at a crossroads. It either accepts its historical trajectory of a captured institution by the pressures and influences or becomes the major voice of the vision of the Constitution and the aspirations of the Kenyan people reflected in that vision.

In the case of Kenya, my view has been that the Constitution is *activist* and I believe our judges and other judicial officers are all expected to be *activist in their quest to implement an activist Constitution.* Indeed, the Constitution's political vision is not wholly liberal but has some radical ingredients of social democracy and socialism as the ingredients of its objective and purpose. The Kenyan Constitution has a vision for the institutional independence of the Judiciary and the decisional independence of judicial officers. This vision is found in the provisions on qualifications for appointment, the recruitment process, the chapter on integrity and leadership, and the constitutional decree that judicial power is derived from the people. Judicial independence is for all people.

Judicial officers should constantly and consistently ask themselves in whose interests the independence of judiciary is for. They should also accept they have differing visions of this independence on the basis of their differing intellectual, ideological, political, social, and cultural positions. This is the essence of Baxi's contribution to this issue. As such, independence of the judiciary is a contested terrain among the judicial officers that gives rise to its own political struggles. This also means that after judicial officers' struggle against the various pressures inimical to their independence (executive, parliament, corporate, civil society, cartels, ethnic communities, religion, region, family, relatives, and friends)[42] to achieve their individual independence, a further struggle ensues that is addressed to the question: "in whose interest this independence is exercised?"

[42] All judicial officers are constantly reminded of their roots and are accountable to people of their roots and their compatriots. Of course, they have a choice not to reflect this accountability in their jurisprudence and in their politics. My experience as a judge clearly shows these pressures weighing heavily on any judge. I do not think there is a judicial officer who is immune from these pressures. A Pan-African judicial officer will face regional, continental and global pressures in an equal measure.

I believe the political cause that we are calling upon the Judiciaries to perform goes beyond judicial activism and encompasses political activism itself. I have addressed this issue in a Lecture I gave to the Law Society of Malawi.[43] I expressed the view that if the ruling elites in Africa, political parties, the bureaucratic elite, the military, the church and even international capital have had their say in decisively but ruinously shaping Africa's governance and development trajectory in the years past, it would appear that the natural evolution of Africa's constitutional and political order has created this historical moment for the Judiciary to have its turn and say in determining Africa's democratic path. It is an opportunity for the Judiciary, acting as an agent for societal transformation, to fortify Africa's democracy, rule of law and accountability, and, to markedly improve on the governance record of other state institutions and actors that have, sometimes unconstitutionally, intervened in electoral processes. The Judiciary has a historic obligation to acquit itself well and earn public respect as the last frontier or custodian of Africa's democratic development. It is the Judiciary's tryst with Africa's democratic and developmental destiny.

The Judiciary, then, is the last frontier between a united, democratic, and peaceful Africa and a violent, unstable, conflict-wracked Africa. If the judiciary fails, then very ripe conditions for conflict, military coups, and hegemonic international interventions that may even acquire a regional character - and which may lead ineluctably and inexorably to the dismemberment of African states – may be created. That is why the Judiciary and judges need to take their work seriously, recognize that they are institutional political actors with a capacity to put Africa on the right path.[44] Hence the words of Nyerere on the role of judges in preserving democracy, are quite apt:

> Unless judges perform their work properly, none of the objectives of a democratic society can be met[45.]

[43] Willy Mutunga, "Africa's Electoral Condition: The Judiciary as an Institutional and Political Actor for Democracies in Transition" (Keynote address delivered at the Malawi Law Society Annual Conference, Nkopola, Mangochi, Malawi, 23 February 2019). Also carried by The Africanists, 18 March 2019, online: https://theafricanists.info.

[44] It is in the public domain that one of the former Presidents of the Constitutional Court of Colombia ran for the Presidency of Colombia and was second in the election. It is believed that in part the confidence the Colombians had in the Constitutional Court and its pro-people jurisprudence could have helped. I believe this precedent should repeated in other countries. Judges have ideological and political positions, can build and nurture progressive political parties and play robust roles in the search for alternative political leaderships in Global South.

[45] Julius Nyerere, *Freedom and Socialism* (Dares Salaam, Nairobi, London, New York: Oxford University Press,1968) 110.

The Judiciary and the Bar are judicial twins joined at the hip. The independence of the bar is as important as the independence of the Judiciary. The role I have given the Judiciary is premised on a bar that shuns politics of division in favor of politics of democracy and humanity. The bar must help in the development of jurisprudence and democracy that is envisioned here. The Judiciary, the bar, and public intellectuals in all disciplines in the academy are collectively the crucible for progressive Pan African Jurisprudence that can liberate Africa.[46] But the Bar needs to be professional and guide their clients properly.

(vii) The New Judiciary: Independence of the Judiciary and Judicial Integrity

Independence of the Judiciary is a fundamental pillar of judicial integrity. Let me give you the modern traditional definition of the principle. Judicial independence has been at the core of the world's democratic and constitutional evolution. The principles of 'separation of powers' and 'checks and balances' principles that govern inter-branch relations within the state, and of which judicial independence is a conceptual derivative, have been the holy grail of modern liberal nation state for centuries now. Lee and Campbell[47] define judicial independence as the principle that focuses on the creation of an environment in which the Judiciary can perform its judicial function as one of the three branches of government without being subject to any form of duress, pressure or influence from any person or other institutions, in particular the other branches of government.

Modern transformative constitutions go deeper than this traditional liberal definition by demystifying the duress, pressure or influence. Modern transformative constitutions do this by providing the requisite qualifications for judicial officers, and the process of their recruitment. Robust public participation has become a key requirement in the recruitment of judges. In the case of Kenya all judicial officers are appointed by the Judicial Service Commission (JSC). In the cases of the recruitment and appointment of the Chief Justice and Deputy Chief Justice, the

[46] Willy Mutunga, "PanAfrican Jurisprudence for the Liberation of Africa" (Lecture delivered at the Institute of African Studies, University of Ghana, Accra, 27 June 2018) [The Lecture is on the Website of the Institute.]
[47] H P Lee and Enid Campbell, *The Australian Judiciary,* 2nd ed (Cambridge University Press, 2012) at 7.

JSC sends to the President the name of the candidate for each position for vetting by Parliament. In the JSC the Executive is represented by the Attorney General and the Head of the Public Service Commission. Under the Constitution the President appoints two other commissioners (a woman and a man) who are vetted by Parliament.

In theory, the two commissioners are supposed to represent the public, not the Presidency. The practice has invariably shown that the two internalize their appointment as representatives of the President. Whatever other views the President may have on the recruitment of judicial officers, the President sends them to the JSC for consideration, including the JSC giving the affected candidates due process to respond to such views. The President under the Constitution does not, therefore, appoint judges, but participates in the process of their recruitment. It is the JSC that ultimately appoints, and the President has no choice but to swear them into office.[48] For judges

[48] A five-judge bench of the High Court in *Law Society of Kenya v Attorney General & 2 others [2016] eKLR;* See also Petition 36 of 2019, *Adrian Kamotho Njenga v Hon the Attorney General and 3 interested parties*. The three interested parties were the Judicial Service Commission, the Chief Justice and the President of the Supreme Court, and the Law Society of Kenya. This 3 judge bench of the High Court followed the decision of five-judge Bench of the High Court including an impressive array of foreign decisions in support of its decision.
The question has now arisen about what is to be done if the President refuses to swear in judges recruited by the JSC. See *Law Society of Kenya v Attorney General and 3 others* (2019), Petition No. E327 of 2020, *eKLR* in which the President had refused to appoint and gazette the election of Judge Mohammed Warsame as the JSC representative for the Court of Appeal. Among the orders given by Judge Chacha Mwita was order iii: "A declaration is hereby issued that the 1st interested party [Judge Warsame], having been duly elected Commissioner of the Judicial Service Commission as required by the constitution and law, and the President having failed to appoint him in violation of mandatory timelines set by section 15(2)(b) of the Judicial Service Act, the 1st interested party be and is hereby deemed to have been appointed and is at liberty to take his position as a Commissioner of the Judicial Service Commission, representing Judges of the Court of Appeal." I do not think "appointment" includes swearing in as a duty or authority of the President. That is merely traditional. Swearing is a requirement of Article 74 of the Constitution which merely provides that all state officers must subscribe to the oath of office in the Third Schedule. This Article does not say it should be before the President. Article 141 provides that the President must be sworn in before the Chief Justice. Article 148 (4) says the Deputy President must be sworn in before the Chief Justice. Article 152 (4) (a) provides that the Cabinet Secretaries must be sworn in before the President. The Speakers of Parliament swear in members of the respective houses. For all other state officers the Constitution is silent. The Chief Justice swears in other state officers besides the President and the Deputy President. Neither the Constitution nor the Judicial Service Act provides for who swears in the Chief Justice. The tradition and practice is the President does. These practices as part of the transition between the two Constitutions are rescued by Section 3 of the Supreme Court Act in line with the vision of the 2010 Constitution. While the route of contempt of court by the President is not open under the Constitution (because of its criminal sanctions) and the unlikelihood of any Member of Parliament bringing an impeachment motion, is the only route not the one-off extending Judge Mwita's decision to this particular disobedience by the President? Such orders can be sought including an order that the Chief Justice swears in the Judges and allocates duties to them. An order could be also made that they be paid from the Consolidated Fund. This cause of action would be in line with the supremacy of the will of the people and a confirmation that the Judiciary will enforce its orders under the Constitution. The struggle that will ensue between the two arms of government will then be taken to the courts of public opinion as the only site of that struggle. I do not see the Executive winning such a struggle.

of the Court of Appeal, the High Court, and judicial officers of the courts below the superior courts, the JSC recruits them. The President swears in the judges of superior courts while the Chief Justice swears in the magistrates and Kadhis who head the other subordinate courts.

The Kenya Constitution also provides for financial independence of the Judiciary from both the Executive and Parliament.[49] The Judiciary Fund is created under the Constitution. Parliament has come up with a draft legislation to implement this constitutional provision. It also has a draft legislation on the retirement benefits of judges. The retirement benefits of the Chief Justice and the Deputy Chief Justice are covered by a statute that is operational.[50] Financial independence of the Judiciary is critical given its colonial and postcolonial history. Until the 2010 Constitution, the Judiciary was in reality and perception an appendage of the Executive. Giving it financial independence from the other two arms under the Constitution therefore signaled the crucial policy often forgotten that the resources of the country do not belong to the Executive and Parliament. Indeed, the Constitution has provisions that hold these two arms, and the Judiciary, to account for the resources they hold in trust for the Kenyan people.

The disciplining of judicial officers[51] while observing the principle of the security of tenure, is the task of an independent JSC. Apart from the members of the JSC already noted above the JSC is chaired by the Chief Justice. The Judges of the Supreme Court elect their representative to the JSC. The Court of Appeal also elects their representative to the JSC. A judge of the High Court and a Magistrate (both man and woman respectively) are elected by the Kenya Magistrates and Judges Association to sit in the JSC. The Law Society of Kenya elects a woman and a man to

[49] Indeed, the values of equity and equality in Article 10 of the Constitution and the centrality of the will of the people in the Constitution end the colonial and neocolonial myth that both the Executive and Parliament own the national resources and can distribute them at their respective whims. The people own the resources and their equitable distribution. Nowhere in the Constitution have the Kenyan people given the Executive and Parliament to starve the Judiciary and other institutions of the resources of the people. One hopes, going forward, that the Judiciary will develop a progressive jurisprudence on national resources, including land, particularly land that has not become a commodity (community land).

[50] *The Retirement Benefits (Deputy President and Designated Offices) Act* 2015, Kenya Gazette Supplement No. 88 (Acts no.8).

[51] Article 168 of the Constitution states that a judge of a superior court may be removed from office only on the grounds of inability to perform the functions of the office arising from mental or physical incapacity; a breach of conduct prescribed for judges of the superior courts by an Act of Parliament; bankruptcy; incompetence or gross misconduct or misbehaviour. Magistrates face disciplinary action on these aspects as well.

represent it in the JSC. Such a broad representation at the JSC is meant to guarantee its independence, accountability, transparence, and fairness in its work.

Cardinal to the independence of the Judiciary is the integrity of the judicial officers themselves. No judicial officer or staff should ever think of soliciting and or accepting a bribe. The JSC seeks the participation of the public in their decisions on the suitability of individuals who apply for those positions. The JSC also seeks integrity reports from the Law Society of Kenya, the Kenya Revenue Authority, the Director of Criminal Investigations, the Universities (to confirm the candidates have paid their university loans), the corporate sector (if the candidates have worked in the sector), and National Intelligence Service. The JSC has a limited but growing capacity to conduct its own integrity inquiries. We found at the JSC, when I served as Chief Justice, that it was dangerous to rely on unchallenged reports from the departments of the state without verifying them. In cases where these integrity reports were negative about the integrity of a candidate, we always gave the candidate a chance to respond to the reports. In the case of serving judicial officers who sought promotion, we always perused their personal files in our custody to find out if they ever had integrity issues.

There are other pressures, duress, and influences that are invariably ignored in assessing the independence of the judiciary. These are insidious and invisible influences outside the traditional ones from the other arms of government. These include the seduction of political and judicial power; families and friends; vested corporate and civil society interests; and the international community – a euphemism for economic, social, cultural, and political foreign interests. For judicial officers and staff, independence of the judiciary is a cause they should be ready to die for. It is their expression of patriotism and alternative politics for the Motherland.

I believe that the independence of the Judiciary, and the decisional independence of the individual judicial officers is about the integrity of the judicial officers. I believe the fundamental pillar for this integrity is the ideological and political positions of judicial officers. Building people's confidence in the Judiciary and the judicial officers depends on the integrity of the institution and its judicial officers and staff. A judicial officer or staff will be seen and perceived to be a woman or man of integrity if the authors of the pressures, duress, and influence narrated

herein, know that the judicial officer or staff cannot be manipulated or compromised in their respective integrity. These forces should also know that the judicial officer or staff cannot be manipulated or compromised in their respective integrity by the enemies of those forces. Whatever decision she or he makes, therefore, will be critiqued or supported based on real and perceived honesty of the judicial officer or staff. Where judicial decisions are invariably seen and judged through various divisive lens of our people, clearly the integrity of the judicial officer is of monumental judicial and political importance. It gives judicial officers a great moral authority to speak to societal issues that impact transformation.[52]

(viii) The New Jurisprudence Under the 2010 Constitution

This categorization of the development of Kenya's robust (rich),[53] decolonized,[54] de-imperialized,[55] de-racialized,[56] de-ethnicized,[57] gender just,[58]patriotic,[59] progressive,[60] indigenous,[61] pro-people,[62] and transformative[63] jurisprudence is derived from the interpretation of specific provisions, the entirety of the 2010 Constitution,[64] and the provisions of the Supreme Court Act, 2011.[65]

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[52] See the experience of the Kenyan Judiciary in Willy Mutunga, "Eradicating Corruption in Judiciaries under Transformative Constitutions: Reflections from Kenya," (Lecture delivered to International Anti-Corruption Academy (IACA), Vienna, Austria, 4 July 2019).

[53] See Section 3 of the *Supreme Court Act, 2011*.

[54] See Article 20 of the *Constitution.*

[55] From the discussion on integration of international and regional laws.

[56] See Article 27 of the *Constitution.*

[57] See Articles 27 and 91 of the *Constitution.*

[58] See Article 27 of the *Constitution.*

[59] Article 10 of the *Constitution.*

[60] Articulated in the element of the theory of interpreting the 2010 Constitution, below pages 19-21

[61] *Supra* note 53.

[62] This categorization is based on the sovereignty, supremacy, and centrality of the Kenyan people under the Constitution which is discussed herein. The relevant articles have been given in *Supra* note *17* See Lin Chun's article "Mass Line" in Christian Sorace, Ivan Francheschini and Nicholas Lobere, eds, *Afterlives of Chinese Communism* (Acton, Australia: ANU Press & Verso, 2019) at 121. While states, parties, and ruling groups constitute themselves into the people and not their representatives, there is in this article great analysis on how real participation of the people can be achieved in the sharing of political power. Makueni county in Kenya has robustly experimented our own "mass line." There's in practice a democratic integration of bottom-top and top-bottom in the participation of the people.

[63] The entire tenor, purpose, and vision of the Constitution in transforming its security, economy, land, equitable distribution of resources, leadership and integrity, a modern Bill of Rights, decentralizing and democratizing the imperial executive, creating checks and balances, building strong institutions, and the provision of national values and principles that can impact state and nation building.

[64] The Preamble and Articles 1, 2(5) and (6), 10, 20 (3) (a) and (b), 20(4), 159(2), 258, 259, particularly sub-Articles 1, 2 and 3 all anchored under the supremacy and centrality of the Kenyan people in the Constitution. See *op.cit.* Note 17 for this supremacy and centrality.

[65] *Supra* note 53.

The development of jurisprudence under transformative constitutions tests the commitment of judges and other judicial officers to the supremacy of the constitution and the rule of law, and the respective loyalty to their Oaths of Office. This commitment and loyalty is the transformative politics of a transformative constitution. My writings,[66] my dissenting and concurring decisions[67] as well as my contribution while on the bench reflect the development of this jurisprudence.

(ix) The 2010 Constitution sets out its own theory of interpretation

The Kenyan 2010 Constitution is unusual in setting out a theory of its interpretation.[68] What is this theory? I believe it is a theory that shuns staunch positivism and thus is not legal-centric. It accepts judges make law. By invoking non-legal phenomena in its interpretation, it decrees the "judiciary as an institutional political actor."[69] It is a theory that is a merger of paradigms and

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[66] Willy Mutunga, "The 2010 Constitution of Kenya and Its Interpretation: Reflections from the Supreme Court Decisions" (2015) 1:6 Southern African Legal Information Institute, online: < http://www.safii.org/za/journals/SPECJU/2015/6.pdf>*;* "Pan-African Jurisprudence for the Liberation of Africa" (Lecture delivered at the Institute of African Studies, University of Ghana, , Legon, Accra, 27 June 2018)*;* Willy Mutunga, "Human Rights States and Societies: A Reflection from Kenya" (2015) 2:1 *The Transnational Human Rights Rev* 63. *See also, supra* note *7;* Willy Mutunga, "Africa's Electoral Condition: The Judiciary as an Institutional and Political Actor for Democracies in Transition" (Keynote address delivered at the Malawi Law Society Annual Conference, Nkopola, Mangochi, Malawi, 23 February 2019*)*; "Kenya's Constitution 2010: A Reflection of its History and Implications for the Future" (Public Lecture delivered at Kabarak University, Nakuru County, Kenya, 21 November 2018)*;* "The Many Accents of Law, Language, and Justice" (the 4th Neville Alexander Lecture, Nairobi, 23 August 2018); "Politics, the Media and Independence of the Judiciary: A Personal Footnote" (Lecture delivered at the 4th Annual ACME on Politics and the Media, Kampala, Uganda, 8 November 2017); "Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution" (Delivered at the 2017 Lameck Goma Annual Lecture, Lusaka, Zambia, 27 July 2017); "Devolution: The Politics and Jurisprudence of Equitable Distribution of National Resources", (Lecture delivered at the British Institute of East Africa, Nairobi,18 February 2017); "Transforming Judiciaries in the Global South*"* (Keynote Address delivered at the Annual General Conference of the Nigerian Bar Association, International Conference Centre, Africa Hall, Abuja, 23 August 2015); Willy Mutunga, *"*The 2010 Constitution of Kenya. Its Vision of a New Bench-Bar Relationship" in Yash Pal Ghai & Jill Cottrell Ghai, eds, *The Legal Profession and the New Constitutional Order in Kenya* (Nairobi: Strathmore University Press, 2014) 59; Willy Mutunga, "Dressing and Addressing the Judiciary: Reflecting on the History and Politics of Judicial Attire and Address"(2014) 20:1 Buffalo Human Rights L Rev 102; Republished in Eunice N, Sahle, ed, *Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Developments and Dilemmas* (New York: Palgrave/Macmillan, 2017), 131-166.

[67] *Re the Speaker of the Senate & Another v Attorney General & 4 Others* (2013), Advisory Opinion No 2 of 2013, eKLR (Supreme Court) at paras 155-157; and other cases discussed in articles referred to *ibid;*

[68] Willy Mutunga, "The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions" (2015), 29:1 Speculum Juris 1.

[69] Baxi , *supra* note 35 at 10.

that problematizes, interrogates, historicizes all paradigms in building a radical democratic content that is transformative of state and society. It is a theory that values and understands both multi-disciplinary and interdisciplinary approaches[70] to the implementation of the Constitution. This theory is neither insular nor inward looking and seeks its place in global comparative jurisprudence; and seeks equality of participation, development, and influence. It seeks to reinforce those strengths in foreign jurisprudence that fit Kenyan needs (the criterion for determining those needs is based on the discussion of values, vision, objectives, purposes, and Bill of Rights). It denies resort by judicial officers to the common law canons of interpreting statutes and constitutions that allow judicial officers, in so doing, to routinely reflect their intellectual, ideological, and political biases.[71] In the same vein the Kenya Parliament, in enacting the Supreme Court Act, 2011 has in the provisions of section 3 reinforced this aspect of the constitutional pre-occupation in its theory of interpretation. That section urges judicial officers to take account of non-legal phenomena (such as Kenya's historical,[72] social, economic, cultural, religious, theological, philosophical, technological, and political contexts) in interpreting the constitution.

There is no doubt that this theory of the interpretation of the Constitution reflects judicial politics as is anchored on the centrality and supremacy of the Kenyan people in the transformation of their country. The Judiciary, therefore, finds itself daily at a crossroads: Does it support the status

[70] See Karim Hirji, *Under-Education in Africa: From Colonialism to Neoliberalism* (Daraja Press, 2019), at 155.

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

[72] To give an example of what is expected of the Judiciary is to track down the historical roots of the doctrine of freedom of contract, its mitigation by the doctrine of fundamental breach through the judicial activism of conservative British judges like Lord Denning. These judges clearly saw the economic, social, and political consequences of glorifying the unmitigated doctrine freedom of contract. See Willy Mutunga, "Commercial Law and Development in Kenya" (1980) 8 Int'l *J of the Sociology of L* 1. The period of mitigation coupled with the decolonization of our jurisprudence will have to consider the so-called fourth or digital revolution (surveillance capitalism and AI) which has clawed back to attributes of the doctrine of freedom of contract to its industrial revolution's roots! Standard form contracts are the hallmark of neoliberalism and agreeing to terms of many apps online cannot be a negotiated contract. Collective bargaining is dead in Kenya, and I believe elsewhere around the globe. Collective bargaining was a great mitigation of the doctrine of freedom of contract on behalf of organized workers. Under AI and other forms of robotic capitalism the doctrine of freedom of contract will reign supreme. This doctrine has been fundamental in the development of capitalist relations since the industrial revolution. History records resistance against it by courts, unions, and states. We need to think through our resistance to robotic capitalism.

quo that the Constitution seeks to transform or the will of the people that is the vision of the Constitution? This is how the Judiciary in its role as an institutional political actor is caught up in the class struggles within itself and within the Kenyan society broadly.[73]

(x) The contested paradigmatic terrain under the 2010 Constitution

Karl Marx's *Preface to a Contribution to the Critique of Political Economy* teaches us as follows: "The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure…The mode of production of material life conditions the social, political and intellectual life process in general."[74] Engels wrote that:

> [t]he economic situation is the basis, but various elements of the superstructure…political forms of the class struggle and its results, to wit: constitutions established by the victorious class after successful battle etc juridical forms, and even reflexes of all actual struggle in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas…also exercise their influence upon the cause of historical struggles and in many cases preponderate in determining their form. There is an interaction of all these elements…[75]

Engels intervention is authority for two facts: that Constitutions and Law have a class content; and that the superstructure does not merely conform to the economic base passively.[76] This must be borne in mind in so far as this analysis did not grasp the importance of race and racism in the superstructure of capitalism. As C.L.R James had noted, "[t]he race question is subsidiary to the

[73] The two blueprints on the transformation of the Judiciary (Judiciary Transformation Framework, 2012-2016 and Sustaining Judiciary Transformation, 2017-2021) have reflected the class struggles between the conservative judicial elite and progressive judicial elite, the latter reinforced by judicial staff. Equitable distribution of resources in the Judiciary has been critical as the conservative judicial elite before the 2010 Constitution controlled over 60% of the resources (pertaining to loans for housing, cars; insurance; per diems; travel; inequitable salary disparities; and training) and foresaw judicial politics that was anti-people and for the ruling Kenyan elite. This made the judiciary an appendage of the Kenyan elite and their politics and ideology. The 2010 Constitution gave birth to other class antagonism that still continue.

[74] Karl Marx and Frederick Engels, *Selected Works in One-Volume* (London: Lawrence and Wishart, 1998), reprinted in Ghai, Luckham, and Synder, *The Political Economy of Law* (Delhi: OUP, 1987) at 40.

[75] *Ibid* at 41.

[76] Samir Amin, *Only People Make Their Own History: Writings on Capitalism, Imperialism, and Revolution* (New York, Monthly Review Press, 2019). At page 23,1 he writes:"Dialectic relation of infrastructure [base] and superstructure is also proper to society and has no equivalent to nature. This relation is not unilateral. The superstructure is not the reflection of the needs of the infrastructure. If this was the case, society would always be alienated, and it would not be possible to see how it could succeed in liberating itself."

class question in politics, and to think of imperialism in terms of race is disastrous. But to neglect the racial factor as merely incidental is an error only less grave than to make it fundamental."[77]

Antonio Gramsci (the Italian school teacher, jailed for ten years in fascist Mussolini's jail) developed the theory of the organic intellectual as "the intellectual who, through his [her] analyses, [her] his visions becomes an indispensable auxiliary of social movements".[78] He moved the focus from economic relations in society and discussed the essence of politics, culture and ideology. His analysis has given the whole debate on base and superstructure a different dynamic. His construct of "ideological hegemony" bears his creativity. In this construct, the super-structural features like law, religion, education, racism, mass culture assume a new role; their role is to reinforce class domination so that this domination is not based solely on the state's control and use of the machinery of violence.

Let me pause here and remind ourselves that I have in this issue of base and superstructure so far only quoted European revolutionary thinkers. There are, indeed, many in the African scholarly tradition who were (or are) great revolutionary thinkers and Marxists. I need not take a roll call on all of them here, but let me mention Angela Davis, Micere Mugo, Sylvia Tamale, Walter Rodney, Issa Shivji, Karim Hirji, Yash Tandon, Dani Nabudere, Samir Amin, Ngugi wa Thiong'o, Wamba dia Wamba, Dorothy Roberts, Horace Campbell, among many others.

Issues of base and superstructure need creative and undogmatic re-analyses given the changing contexts and circumstance of the world. It should be argued that the dialectical relationship between the base and superstructure will need creativity, innovation, and lack of dogma in the varying economic, political, social, ideological, cultural, and intellectual contexts without losing sight of the original revolutionary messages and expected revolutionary outcomes. Samir Amin could not have said it better:

> According to this perspective, it seems to me necessary to think of renewal of a creative Marxism. Marx has never been more useful and necessary in order to understand and transform the world than he is today. Being Marxist in this spirit is to begin with Marx and not stop with him, or Lenin or Mao, as conceived and

[77] C. l. R James, *The Black Jacobins*, 2nd ed (Secker & Warburg Ltd, 1963) at p. 283.
[78] Jean Ziegler's Foreword in Yash Tandon, *Trade is War: The West's War Against the World* (New York/London: OR Books, 2015) at xx-xxi.

> practiced by the historical Marxists of the previous century. It is to render unto Marx that which is owed to him: the intelligence to begin a modern critical thinking, a critique of capitalist reality and a critique of its political, ideological and cultural representations. A creative Marxism must pursue the goal of enriching this critical thinking *par excellence.* It must not fear to integrate all the input of reflection, in all areas, including those which have wrongly been considered to be "foreign" by the dogmas of historical Marxisms of the past.[79]

While still on the issue of relations between base and superstructure, the constitution and law are part of the superstructure as is politics. The base determines the long movement of history. Most African states were governed by laws that did not recognize Africans as citizens. In my view these vital aspects of the superstructure are significant forces in the short to immediate term. I would add, however, that they play *either a progressive or a retrogressive role* depending on the way they are used to fight the base (in our day and age imperialism) or reinforce it. Whether these aspects play a progressive role, whether they have transformative potential depends on who uses them and how; and also depends on the quality of political leadership and authentic opposition in all countries. Judicial leadership is integrated in such leadership. I believe progressive forces in the Judiciary can use the constitution and law in moving society towards fundamental transformation. They will do that by developing progressive jurisprudence out of the constitution and the law, accepting that judicial officers do politics, and that their institution, the judiciary, is an institutional political actor. They will also have to be conscious of the limitations of the Constitution and the law that still has its basis in the capitalist system under imperialism.[80]

I am not fetishizing the 2010 Constitution of Kenya. No constitution, indeed, should be fetishized. Indeed, the 2010 Constitution needs to be unmade by the masses of the Kenya people from below.

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[79] Samir Amin, *Long Road to Socialism: Distinguished Nyerere Lecture, 2010* (Dar es Salaam: Mkuki na Nyota, 2011) at 24-25. Mao Zedong also called for the application of Marxism-Leninism creatively. See also, Matthew Galway, "Permanent Revolution" in Christian Sorace, Ivan Francheschini and Nicholas Lobere, eds, *Afterlives of Chinese Communism* (Acton, Australia: ANU Press & Verso, 2019)181 at 185. See also, Willy Mutunga, "The Revolutionary Spirit of Amin Lives", *Pambazuka News Voices for Freedom and* Justice (24 August, 2018), online: < https://.Pambazuka.org/Pambazuka-news-special-issue-celebrating-life-and-legacy-Samir-Amin>**.** 8

[80] Roberto Gargarella, *Latin American Constitutionalism 1820-2010: The Engine Room of the Constitution* (New York: OUP, 2013): "…the limits set by the past, the difficulties in overcoming them, and the need to continue to address the issue today." at page x.

On the 10th anniversary of 2010 Constitution, Issa Shivji, the revolutionary socialist Tanzanian law Professor gave a keynote address in a Webinar in which second edition of my book was launched.[81] The title of his keynote address was "Do Constitutions Matter? The dilemma of a radical lawyer." Shivji's opening paragraph of his keynote address had this reflection:

> Constitutions don't make revolutions. Revolutions make constitutions. No constitution envisages its own death for that is what a revolution entails. But constitutions matter. Some of the finest constitutions have been erected on ugly socio-economic formations wrought with extreme inequalities and inequities. South Africa and Kenya are examples. But constitutions do matter. Constitutions rarely herald fundamental transformations. They are the product of major transformations to consolidate the new status quo. Yet constitutions do matter. Why do constitutions matter? Why do we need constitutions?

Shivji, in his keynote, sought to address radical lawyers – the "sincere, well-intentioned and self-sacrificing lawyers who are motivated by their passion for social justice and fight for the rights, dignity and livelihoods of the working people." He instructs radical lawyers that "a constitution is as much a political document as it is a legal document. It is a power map." He also adds that a constitution is an ideological document. He pleads with radical lawyers "to recognize the limits of bourgeois law and constitutions." He argues that while a constitution is a terrain of struggle its implementation entails going beyond that assertion to identify the sites of struggle. And in transformative constitutions which have rights as abstract demands, these can be made political demands for the right to live with dignity and the right to decent livelihood. Demands should be made of the state for commons (land, water, under-ground and over ground natural resources, education, health and sanitation, housing, energy, communications and finance) to be de-commodified and de-privatized. "In other words, for the working people to reclaim the commons and liberate themselves from the clutches of monopoly finance capital assisted by our comprador states."

Shivji's uses and limitations of transformative constitutions dovetails to the discussion of 'ordinary revolutions' by Samir Amin. In his book[82] (at page 17) he writes:

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[81] Willy Mutunga, *Constitution Making from the Middle: Civil Society and Transitional Politics in Kenya, 1992-1997*, 2nd ed (Nairobi: Strathmore University Press, 2020).

[82] Samir Amin,*The Word We Wish to See: Revolutionary Objectives in the Twenty-First Century* (New York: Monthly Review Press, 2008).

> The 'great revolutions' are distinguished by the fact that they project themselves far in front of the present, towards the future, in opposition to the others (the 'ordinary revolutions') which are content to respond to the necessity for transformation that are on the agenda of the moment.[83]

I believe Shivji's address challenges us to debate, historicize, and problematize the viability of 'ordinary revolutions' as paths to the 'great revolutions." I have argued that it depends on the political leadership (and its political party) that undertakes that task. Transformative constitutions, however progressive, will never be implemented by our comprador bourgeoise in our Global South. Our experience in Kenya confirms this. The comprador bourgeoisie in Kenya has fought tooth and nail to clawback the fundamental pillars of our progressive constitution. We also witness robust resistance to this project of the comprador bourgeoisie. The resistance by social movements and radical political parties under the banner of "respect, protect, and uphold the Constitution/Tekeleza na Kuilinda Katiba" are about the development of alternative political leadership that will implement the strengths of the Constitution and be one to audit its weaknesses for future amendments.[84]

Shivji sees constitutions as products of major transformations to consolidate the status quo. There is also another side to this coin. If they consolidate the status quo through concessions and mitigation of the evils of the status quo (as history records this does happen) is this a great opportunity for radical political leaderships and their radical political parties, backed by radical and revolutionary movements of the people, to use these concessions subversively as a basis of further moments toward 'great revolution?' I have always found Rosa Luxemburg's brilliant essay[85] insightful in this regard.

So, the 2010 Constitution matters because we are locked up in struggle during the last 10 years of its implementation. It allows us to organize and mobilize in the sites that Shivji identifies. It is

[83] Samir Amin identifies "great revolutions" to include the French Revolution, the Bolshevik Revolution, the Chinese Revolution, Cuban Revolution, and the Vietnamese Revolution.

[84] Such movements as Kongomano la Mageuzi Movement, Linda Katiba Movement, social justice centres, artist, gay, and environmental movements are at the centre of this resistance. So are the radical political parties Ukweli Party, Communist Party of Kenya, and United Green Movement.

[85] "Reform or Revolution" in Helen Scott, ed, *The Essential Rosa Luxemburg* (Chicago: Haymarket books, 2008) at 41-104.

the one that has breathed life into robust public interest litigation in the constitutional and legal struggles. It has allowed us to make a clarion call for the contestation of political power that is different and alternative to that of the comprador bourgeoisie. It matters because it is the basis of various struggles by the youth and women that it has decreed. In providing for devolution, it matters because it has captured the imagination of Kenyans that land and natural resources, and political power, can be equitably shared in a better democratic society. It allows us to debate how our new politics should be organized, how to build integrity in the various leaderships of our society. It matters because its implementation will usher in further struggles for an even better society.

(xi) Social Class Struggles in Constitution-Making

In the case of constitution-making in Kenya there was robust public participation. Although led by liberal and progressive middle-class groups (lawyers, human rights activists, progressive clergy, and opposition politicians) the process was consultative and the drafts reflected the integrity of what the Kenyan people wanted in their overall economic, social, and cultural developments; and the fulfillment of the promise of democracy.[86] The class struggles occurred among elite (intra-class struggles), the middle classes, and the working class. The consensus reached reflected class concessions made in a status quo that was unacceptable and unsustainable. Although the 2010 Constitution addressed issues of governance, social, justice, national values, gender, equitable distribution of resources it still left intact capitalistic relations of production (including in international law) pertaining to the protection of private property (national and foreign). It did, however, bring class antagonisms to the surface as the implementation of the Constitution started and continued.

There was the issue of whether the Kenyan elite could implement a progressive social democratic constitution raising sharply the issue of the development of alternative political leadership.[87] There remains the issue whether in the hands of progressive alternative political

[86] Mutunga, *supra* note *82.*; See also Constitution of Kenya Review Commission, "The Final Report on the Constitution Commission of Kenya" (11 October 2010), online: *Katiba Institute* http://www.katibainstitute.org/Archives/images/CKRC;.

[87] Professor Kivutha Kibwana, the Governor of the Makueni County that is a beacon of progressive implementation of the Constitution, used the metaphor of the birth of a beautiful baby to describe the birth of the 2010 Constitution

leadership, be it progressive, radical or revolutionary, the implementation will lay a firm foundation for fundamental transformation out of the grasp of capitalism and imperialism. I see this as involving the mobilization and organization of the Kenyan people around the centrality of their will in the Constitution and struggles against the limitations of the Constitution in the quest to build a socialist society. All these questions are located and reflected in various arenas of struggle, the Judiciary being one of them.

(xii) The Constitution is not Insular but operates within the Context of a World System

The jurisprudence that is developed and its attendant judicial politics operates within the context of current world systems undergirding the entire planet. Transformative constitutions and constitutionalism also operate within these world systems, the imperialism of the West and the East. The transformation of the planet is entwined with these transformations that come from the Global South.[88] In my view, transformative constitutions and constitutionalism provide a terrain of struggle that interrogates, historicizes, problematizes, and debates other schools of jurisprudence. These transformative constitutions and constitutionalism, I argue, have their own unique and enriching niche in those developments.

of Kenya. He went on to say it was tragic that we handed over the baby to a Kenyan elite that traffics in babies and baby parts to oversee the baby's upbringing! The current Kenyan elite cannot implement the Constitution. Indeed, it has been involved in destroying the major pillars of the Constitution. The good news is that we continue to resist continuously and consistently these unpatriotic machinations by this ruling class.

[88] Hirji, *supra* note 70 at pages 253-254: "The fundamental root of the major problems people everywhere face is neoliberal, imperial capitalism, a system characterized by corporate domination of the economy and society, a vast wealth gap between those at the top and the broad majority, the division of the world between affluent and poverty-stricken nations, a plutocratic or symbolic form of democracy and, of recent, trends toward fascism. Integral to them are imperialistic conduct by the rich nations and entrenchment of social and economic dependency in the poor nations…The transformative strategy has to [be] systemic, namely, to organize to overturn, nationally and globally, the capitalist, imperial domination and work towards attaining a society based on social and economic equality, grassroots democracy, social justice, mutual trust and cooperation, full accountability and total non-violence. In its place, we need to strive for a society based on respect for the dignity and rights of all minority and majority groups. And their struggles ought to be integrated within the overall transformative strategy. It is not a question of fighting capitalism first and then dealing with racism but of the recognizing the two problems as sides of the same coin and confronting both simultaneously…The struggles against capitalism and imperialism need a broad based united front of the commoners, the working people, the exploited and the disadvantaged, that is, the 99% who presently are divided into disparate groups and subgroups. The process of attaining a peaceful, just coalition between these groups and the majority should be a democratic, consultative process based on mutual respect."

Let me begin with Eric Hobsbawm's conclusion that "Our world risks both explosion and implosion. It must change."[89] For centuries the world has debated the content and consequences of this change. In the last quarter of the 20th Century the Cold War ended, the Soviet Empire collapsed, and neoliberalism did not fare well and continues to fare badly after the financial meltdown of 2007-2008 that shook the notion that neoliberalism was the end of history. So, the paradigms of neoliberalism (imperialism of the West and East), socialism, and communism, still robustly engage our intellectualism, ideology, politics, and economics; our social, cultural, ecological, and spiritual humanities. When operational the World Social Forum was convinced since its inception that a new world was possible. The Forum invoked radical paradigms in its mobilization, organization, and its broad radical intellectual pursuits.[90]

At some point, particularly after the collapse of the Soviet Union, radical social democracy anchored in the paradigms of human rights and social justice, was viewed as the basis of debating fundamental restructuring of societies. Quickly we found the limitations of these paradigms. Revolutionary change rather reformist transformation, the latter in effect reinforcing the status quo, has never been discarded in these debates. For example, is it possible to argue that such transformation can be a basis of revolutionary change? These debates have their long historical roots that have rich sources.[91] The broad consensus to this question is clearly in the affirmative.

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[89] Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (New York: Vintage Books, 1996), at 585.

[90] Tom Mertes, *A Movement of Movements: Is Another World Really Possible?* (New York: Verso, 2004). See also, Samir Amin, *The Long Revolution of the Global South: Towards a New Anti-Imperialist International* (New York: Monthly Review Press, 2019), ch 7 and Manifesto of the World Forum for Alternatives at pages 433-36.

[91] See for example, Samir Amin, *Long Road to Socialism: Distinguished Nyerere Lecturer, 2010* (Dar es Salaam: Mkuki na Nyota, 2011); Samir Amin, *Russia and the Long Transition from Capitalism to Socialism* (New York: Monthly Review Press, 2016); Yash Tandon, *Trade is War: The West's War Against the World* (London: OR Books, 2015); Tariq Ali, *The Dilemmas of Lenin: Terrorism, War, Empire, Love, Revolution* (London: Verso, 2017); Eric Hobsbawm, *How to Change the World: Tales of Marx, and Marxism* (London: Abacus, 2012); Paul D'Amato, *The Meaning of Marxism* (Chicago: Haymarket Books, 2014): Walter Rodney, *The Russian Revolution: A view from the Third World*, ed by Jessee Benjamin and Robin D.G. Kelley (London: Verso, 2018); Rosa Luxemburg, "Reform or Revolution" in Hellen Scott,ed, *The Essential Rosa Luxemburg* (Chicago: Haymarket Books, 2008) 41; Tamas Krausz, *Reconstructing Lenin: An Intellectual Biography* (New York: Monthly Review Press, 2015); Sorace, Fracheschini & Loubere, *Afterlives of Chinese Communism*, *supra* note 62; Dani Nabudere, *A Critique of the Political Economy of Social Imperialism (mimeo)* (Hensinghor, Denmark, 1989); and Albert Einstein, "Why Socialism?" (May 1949/May 1998) *Monthly Rev*,. Einstein wrote: "I am convinced there is *one* way to eliminate these grave evils [of capitalism], namely through the establishment of a socialist economy, accompanied by an educational system which would be oriented toward social goals. In such an economy, the means of production are

III Conclusion: Do we have a new Theory and School of Jurisprudence from the Global South?

Let this debate begin. Ultimately, I see in this theory, this school of jurisprudence (and its various ingredients reflecting a merger of progressive, radical, and revolutionary paradigms discussed here, and that can be invoked by social movements and political parties[92]) developing under transformative constitutions, as our contribution from the Global South. It is a theory, a school of jurisprudence, we need to export into all discussions that continue in search of how constitutions, the law, and the judiciaries could be instruments of transformation and revolution.

Under transformative constitutions, judiciaries, Judicial officers and their jurisprudence (that owes its content from the judicial officers, the bar associations, public and organic intellectuals, other disciplines whose various ingredients have been discussed) are not devoid of ideology and politics. Judicial officers do politics under such constitutions. They know that these transformative constitutions laid down ideologies and politics in societies. The constitutions and law are instruments of change. The Judiciaries are institutional political actors. Clearly judiciaries and their judicial officers participate in struggles for either social reform or reformism (the latter being the mitigation of the existing status quo) through the development of jurisprudence. In the case of Kenya, which is the pivotal case study in answering the question posed in the title to this article, the Judiciary and judicial officers are in practice involved in either social reform or reformism. The former could form a basis for the struggles to a society envisaged below.

Transformation, change or revolution is, therefore, fundamentally a political problem borne out of systems that ruling political classes create. A system that puts property and profits before the

owned by society itself and are utilized in a planned fashion. A planned economy, which adjusts production to the needs of the community, would distribute the work to be done by among all those able to work and would guarantee a livelihood to every man, woman, and child. The education of the individual, in addition to promoting his own innate abilities, would attempt to develop in him a sense of responsibility for his fellow men in place of the glorification of power and success in our present society." P 7, Einstein warned that a planned economy was not yet socialism; that the centralization of political and economy power in the bureaucracy could make it a class for itself and endanger the rights of the individual. The former Soviet Union fell into this trap.

[92] Radical social movements and radical leftist political parties (UKWELI Party is a radical social democratic party; United Green Movement is supports ecologically safe environment; the Communist Party of Kenya (CPK) is ideologically on the left of the first two but finds in the 2010 Constitution firm bases for its mobilization and organization of the masses of the Kenyan people. All these parties find in the Constitution *great sites* for developing new politics and building a basis for alternative political leadership in Kenya.)

people, as indeed, the capitalist system can never be bereft of inhuman inequalities, poverty, and the denial of material needs of the majority. The existing self-claimed socialist systems also face similar problems within their systems because they do not operate outside the current imperialist systems. This is the reason there exists today consistent and continuous debates the world over about what will replace the current unacceptable and unsustainable global status quo. I believe that global citizens must seek to build a free, just, humane, peaceful, non-militaristic, non-violent, non-racist, non-ethnic, gender just, non-sexist, equitable, ecologically safe, and a prosperous democratic socialist society on the planet. This global socialist commonwealth can only be realized through solidarity struggles of global citizens[93] under their revolutionary political leadership in the South and North.[94] Samir Amin has given us a pathway to this global socialist commonwealth.[95]

[93] One of Africa's organic and public revolutionary intellectuals Karim Hirji has placed this responsibility of the shoulders of the African youth in the following words: "African liberation has to be founded on three basic principles: socialism, regional cooperation and regional self-reliance. Instead of being mired in seeking solutions within the confines of the current neoliberal system, African youth must have bold dreams and think in terms of fundamental transformation. That was the vision of the radicals of the earlier era, and it is a vision that the youth of today must adopt…The technological capacity to resolve all the critical problems facing humanity have been present at least for half century. But it is the strangle-hold of the rich and the powerful classes and nations over the state, politics, media, thought process that have prevented that capacity from being utilized." *Supra* note 70 at page 241. Yash Tandon emphasizes the role a "vanguard party that can mobilize the people to bury their internal (religious, regional, sectarian) differences to fight the Euro-American Empire and its local agents." in "The common people of Sudan at a strategic crossroad", *Pambazuka News* (24 April, 2019), online: <www.pambazuka.org>. One needs to add within that Empire Japan. And not forget China as an emerging Empire.

[94] Paul Robeson, "…the time seems long past when people can afford to think exclusively in terms of national units.."quoted in Gerald Horne & Paul Robeson, *The Artist as Revolutionary* (London: Pluto Press, 2016) at 52.

[95] Sorace, Francheschini & Loubere, *supra* note 62. This book has a rich discussion on the legacy, and lessons of the Chinese socialism and communism. Discussions on socialist law, permanent revolution, world revolution, political leadership, where political power resides, and who are the people in whose name revolution is waged are illuminating. See also the last written words of Amin in Samir Amin & Firoze Manji, "Toward the Formation of a Transnational Alliance of Working and Oppressed Peoples" (July-August, 2019) 71:3 *Monthly Rev* 120. These 6 pages discuss contemporary imperialism and its current state. The Transnational Alliance of Working and Oppressed Peoples of the World evolves as planetary political organization that must struggle against contemporary imperialism. This alliance must consolidate the gains of the World Social Forum, rescue its weaknesses. Within this global solidarity national and regional chapters of the Alliance will clarify their intellectual, ideological, and political roles as required by the Alliance. See also Karim Hirji, s*upra* note 70.