

**THE DOCTRINE OF IMPLIED JURISPRUDENCE AND THE ROLE IT HAS
PLAYED IN ADJUDICATION OF CONSTITUTIONAL CASES IN KENYA**

BY

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
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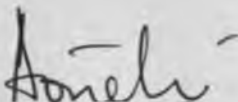
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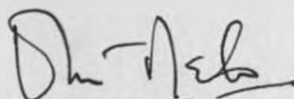
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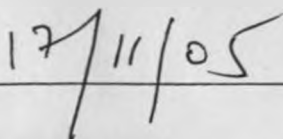


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ABBREVIATIONS

C. J.	Chief Justice
U. S. A.	United States of America
U. K.	United Kingdom
A. G.	Attorney General
J. A.	Judge of Appeal
N. I. V.	New International Version
J. R.	Judicial Review
S. A.	South Africa
U. G.	Uganda

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- *Dudgeon Vs. the United kingdom* [1981] ALLER 149
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- The Constitution of Kenya Review Act No. 3 A of 2000
- The Criminal Procedure Code Chapter 75 Laws of Kenya
- The Economic Crimes Act No. 3 of 2003
- The Magistrate's Act Chapter 10 Laws of Kenya
- The Penal Code Chapter 63 Laws of Kenya
- The Public Officers Ethics Act No.4 of 2003

CONSTITUTIONS

- The Constitution of India 1947 (As amended)
- The Constitution of Kenya
- The Constitution of South Africa
- The Constitution of Uganda
- The Constitution of United States of America.

BILLS

- The National Health Bill [2004]

OTHERS

- The Bomas Draft Constitution of Kenya 15th March 2004

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I would like to express my deep gratitude to the READER of this thesis Dr PLO-Lumumba who made very useful comments which were invaluable in crystallizing the arguments presented here and I also wish to acknowledge my considerable intellectual debt to Mrs. Pamela Ager the Chairperson of the oral presentation panel for her counsel and patience in shaping and rescheduling the presentation of the ideas in this thesis.

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DEDICATION

This thesis dedicated to my wife Alice, Children Gloria, Dennis and Bishop it is also dedicated to the memory of my Father in-law and Mother in-law Mr. Wilfred Mogoia and Mama Hellen Kwamboka Mogoia and my grandmother Ruth Mokeira Mabwoga wonderful personalities who inspired us to study hard and finally all those compatriots who paid the ultimate price towards agitation for a new Constitutional dispensation in Kenya.

ABSTRACT

This study explored the myths, principles and policies that guide judges whenever they are confronted with hard cases where the constitution is silent. Special attention has been paid to the various circumstances and reasoning that guide Judges giving different perspectives. A broad methodology of past, present and future perspectives was used to collate views from the respondents. Particular emphasis was given to various contexts like the economic, political, social, cultural and environmental considerations which have influence on judicial officers in the adjudication of difficult cases.

The findings in this study indicate that judges in Kenya are overworked, and lack basic equipments like computers and research Assistants to facilitate and enhance their capacity to read and develop the law in broader context and understanding to give meaning to issues that are not immediately apparent in the law. Lack or scarcity of these tools complicates their capacity to develop the law to reflect new perspectives that have emerged since the constitution was first promulgated. This needs skills of patience, perseverance and an appreciation of the living law that is normally not written anywhere.

The study also reveals that there is a direct correlation between the level of exposure and enlightenment and the efficiency and competency of judicial officers in terms of appreciating issues in the right perspective and context but where the judicial officers were in constant fear and apprehension of political interference this undermined their full potential to develop the law through well reasoned judicial pronouncements. It was not surprising that a combination of factors including the history of the constitutional text under consideration play a major influence in informing judicial officers in the adjudication of hard cases.

Chapter overview

Chapter one deals with the evolution of the doctrine of implied jurisprudence, the principles that have been developed to guide purposive interpretation of Constitutional cases, a critique of original intent, the meaning of Constitutional silence, jurisprudential

values that inform the doctrine, parallels from ancient cases, characteristics of the doctrine of implied jurisprudence.

Chapter two analyses the global character of the doctrine of implied jurisprudence, the influence it has had on trans-national jurisprudence.

Chapter three analyzes how the Courts in Kenya have applied the doctrine of implied jurisprudence in adjudication of constitutional cases, and the analysis and discussion of the research findings.

Chapter Four deals with conclusions and recommendations.

INTRODUCTION AND STATEMENT OF THE PROBLEM

1.0 Introduction and Background

The doctrine of implied jurisprudence means that although the law is consistent and ascertainable, there are certain situations when the law is silent and/or inadequate to sufficiently deal with controversial cases. In such situations the Judges resort to giving the existing law broad and purposive interpretation or they create new law through legislation by implying the law from the tacit provisions of the constitution. Courts in most jurisdictions have been faced with the dilemma of adjudicating controversial cases where the constitution is silent and the judges have to base their decisions on some legal principle or broadening the existing constitution to try and address the legal lacuna.¹

In *Commissioner of Income Tax Vs. Menon*² the Court of Appeal held *inter alia* that there cannot be a right of appeal to the Court of Appeal except that which is conferred by statute. A right of appeal cannot arise by mere implication or by inference.

In *Githunguri Vs. The Republic*³ the applicant had been charged with four counts of offences under the Exchange Control Act (Cap 113) laws of Kenya. The Attorney General decided not to proceed with the case but later changed his mind to prosecute the applicant with the same offences. In a reference to the High Court it was held in part:

“Notwithstanding the powers conferred upon the Attorney General by section 26(3) of the Constitution, the High Court has an inherent power and duty to secure fair treatment for all persons who are brought before it or a subordinate court and to prevent an abuse of the process of the court”

During my interviews, Justice J.B.Ojwang stated that: where there is a legal vacuum, “Always a genuine and methodical factual account leads to judicial perceptions on right and wrong. From that foundation, the expansive web of the common law and equity will not fail to generate useful directions. The judge must then reason inductively and evolve guiding principles, which then lead to the creation of new laws in the common law

¹ Gavin W. Anderson, *Constitutional Rights After Globalization*, (2005), Hart Publishing Oxford, P. 67.

² [1985] KLR P.104.

³ *Ibid.*, P. 91-92.

mould.” For instance, Courts in Canada have recognized the doctrine of implied jurisprudence by holding that the Courts have power to fill the gaps in the express terms of the Constitutional texts. The express provisions of the Constitution elaborate the underlying, principles that may shape future Constitutional arguments that culminate in the filling of the gaps in the express terms of the Constitutional text and that such findings give rise to substantive legal obligations that are binding upon the Courts and the government.⁴

Firstly, in certain circumstances, Judges are faced with very difficult cases where there is no law, custom, convention or tradition, which lays the guidelines on how to adjudicate controversial and politically sensitive cases. Yet they have sworn to defend, protect and preserve the constitution. In a situation where there is a legal gap, then the Judges resort to the doctrine of implied jurisprudence. They imply the law from the existing text. They broaden the law by looking beyond constitutional text.

Secondly, the law and particularly the Constitution is very rigid and needs two thirds majority to amend it becomes very difficult where the constitution is not clear or silent and judges have an obligation to create new law by broadening the inadequate constitutional text through purposive interpretation of the law.

Thirdly, Judges sometimes come across very controversial and politically sensitive Constitutional cases where there is no clear Constitutional guideline on how to adjudicate contentious issues.

Fourthly, Judges take an oath of office to defend, protect and uphold the Constitution the paradox arises when they are compelled to depart from the same law that they have sworn to protect and uphold and in some incidences they create new law or they are forced to declare the same law ultra vires the constitution. The judicial attitude in Kenya is proactive and sometimes has given effect to constitutional provisions to enforce basic human rights as demonstrated by *Adan Keynan Wehliye Vs. The Republic*⁵ where the

⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 The Court opined that the preamble, the Constitution and amendments to it have to be read as a unified whole.

⁵ Criminal Case No. 223 of 2003.

accused applicant moved the Court under sections 70(a); 72 (3) (b); 72 (5); 77 (1); 81 (1) and 84 of the Constitution of Kenya and Rule of 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001;

The applicant sought, the following prayers:

1. The instrument of nolle prosequi dated 10th may 2004 be declared invalid, null and void and of no legal consequence;
2. The Respondent do proceed with the prosecution of the accused/applicant in the manner provided for by the law until the determination of the criminal proceedings by the trial court.
3. The Respondent do pay the accused/applicant the costs occasioned by this application in any event.

The applicant submitted that the courts have a responsibility to ensure that the criminal justice is not abused. He relied on the case of *Crispus Karanja Njogu Vs. The Attorney General*⁶ which held as follows:-

“Thus, rightly contended; this court is the sole constitutional entity vested with the responsibilities, rather than the Attorney General, of ensuring that criminal justice system is not abused or used oppressively. This court does, for instance, by inquiring whether the power of entering a Nolle prosequi vested in the Attorney general has been exercised in accordance with this Constitution or any other law... so that, under our Constitution, the exercise of such powers of the Attorney General with respect to the entering of A Nolle prosequi can be questioned by the Court ... the power of the Attorney General under Section 26 (3) of the Constitution are subject to the jurisdiction of the Courts by virtue of Section 123 (8) of the Constitution. Where therefore the exercise of the discretion to enter Nolle prosequi does not meet the test of constitutionality by virtue of Section 123 (8) of the Constitution then the Nolle Prosequi so entered will be deemed and declared, unconstitutional.”

Two issues needed to be determined by the Court: Firstly, whether the Director of Public Prosecution is an officer with properly delegated legal powers to sign a Nolle Prosequi; and secondly whether entry of the Nolle Prosequi will contravene the applicant's constitutional rights. The Court was of the view that the Constitution does not provide the

⁶ Criminal Application No. 39 of 2000.

manner in which the President is to exercise the power under Section 24 of the Constitution in creating and abolishing constitutional offices; it follows therefore that it is not necessary for the President to gazette such a creation of a public office although gazettelement would be desirable.

The power to institute and undertake criminal proceedings against any person to take over and continue any criminal proceedings and discontinue at any stage before judgment is bestowed upon the Attorney General, under Section 26 of The Constitution. This power is vested in Attorney General to the exclusion of any other person. The power to enter a nolle prosequi is given to the Attorney General under Section 82 of the Criminal Procedure Code. Under Section 83 of the Criminal Procedure Code the Attorney General is empowered to delegate his powers under that Act. The officer to whom he may delegate are named thereof and absent in that list is the Director of Public Prosecutions.⁷ It therefore follows and we so find that the power to enter nolle prosequi is not delegatable to the Director of Public Prosecutions; and that prohibition in Section 83 of Cap 75 is not assisted by Section 38 (1) Cap 2 because the very Act, Cap 75, which gives the Attorney General power to enter nolle prosequi does not recognize the office of the Director of Public Prosecutions⁸. Section 83 has to be amended to make this possible and the nolle prosequi purporting to be signed by the Director of Public Prosecutions is in our view invalid on this ground as well.⁹ The Court quoted further:

“...under our constitution the responsibility to ensure that the criminal justice system is neither abused nor used to achieve oppressive result, and that an accused receives secure protection of the law, lies squarely with the costs all the time and it ought never to be addicted to the Executive through the Attorney General.”¹⁰

The Court invoked its inherent power and declared that the nolle prosequi dated 10th May, 2004 was invalid, oppressive, unreasonable and capricious and thereby null and void and of no legal consequence.

⁷ Ibid. P. 10.

⁸ Ibid. P. 11.

⁹ Ibid. P. 12.

¹⁰ Supra Note 6.

1.1.1 The Significance of the Study

The main purpose of this study was to appreciate the role of jurisprudence in adjudication of constitutional cases that arouse moral and religious passions; touches on matters of life and death; and when the issue affects an individual's fundamental rights of choice. As Joseph Bidden, U.S. Senator who was the chairman of Judicial Committee during Justice Robert Bork's nomination deliberations stated:

“My rights are not derived from any government ... My rights are there because I exist. They were given to me and each of our fellow citizens by our creator and they represent the essence of human dignity.”¹¹

The doctrine of implied jurisprudence applies where the Constitution, Statute or Regulations are silent about an issue that is being adjudicated upon and the Court resorts to implying the meaning of words by employing a broad and purposive interpretation of constitutional text in order to resolve the issues under consideration. The doctrine of implied jurisprudence enables judges to create new law where there is a legal lacuna and therefore protect rights that are not expressly provided for by the constitution. It empowers judges to address issues that were never contemplated by the constitution making it indeed, a living document that confronts new issues. It also exposes judicial officers to decisions from other jurisdictions giving them different perspectives from global contexts and paradigms that are constantly changing.

1.1.2 The Statement of the Problem

The overarching question in this thesis was to inquire about the principles, policies and ideas that inform the Judges when they adjudicate Constitutional cases that raise controversial social, cultural, political and economic issues where explicit constitutional text is not adequate. The constitution is larger than text and therefore it inspires certain rigid convictions. Judges are sometimes faced with very difficult cases, which are politically controversial. This situation is compounded by the limitations of the wording of Constitutional text that may not have contemplated such dilemmas. Judges have sworn to protect, defend and uphold the Constitution but sometimes they are forced to

¹¹ Joseph Bidden's Opening Speech to the Senate Summer 1989 (unpublished).

alter or change the very document they have sworn to protect, defend and uphold. Where the law is vague judges use discretion to fill the legal gaps.

The Judiciary in Kenya has made landmark rulings in Constitutional interpretations as shown by *Okunda Vs. Republic*¹², *Githunguri Vs. Republic*¹³ and *Rev. Njoya and 8 Others Vs. the AG*¹⁴ among other judicial decisions which illustrate how the court navigated through controversial concepts like constituent power, referendum and sovereignty, which have no express provisions in the Constitution yet the constitutional court construed them from the words Republic among others.

The office of a Judge is an office of trust. He/she is expected to be “above politics” and independent of political or other pressures or public opinion in reaching their decisions.

They are expected to be neutral umpires, deciding each case upon its merits and according to the law that applies to those facts.

According to former Chief Justice of Kenya Justice Madan C.B justice of any kind other than that contemplated by the constitution may erode public confidence on the judiciary.¹⁵ Indeed, the society has a lot of expectations from the Judges who have enormous duty of resolving conflicts and disputes and in the process they create new norms, which are binding to all the citizenry. This is illustrated by *Samuel D. N. Okello VS. The Republic*¹⁶ the applicant applied for judicial review arguing that the Constitution of Kenya has, vide Section 65(2) thereof, bestowed upon the High Court jurisdiction to supervise any civil or criminal proceedings before a subordinate court or a court martial, and to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.

The facts giving rise to this motion are simple. On the 22nd February, 2000 the applicant and the interested parties were charged before the Chief Magistrate Nairobi in Criminal Case No. 399 of 2000. The applicant was charged in counts 1 and 2 with Abuse of office

¹² [1970]EA 375.

¹³ [1985] KLR 308.

¹⁴ Miscellaneous Application No. 82 of 2004.

¹⁵ Miscellaneous Application No. 271 of 1985.

¹⁶ Criminal Application No. 426 of 2001.

contrary to Section 101 (1) Penal Code. They were then jointly charged in counts 5 with Conspiracy to Defraud contrary to Section 317 of the Penal Code. These charges were preferred against them by Kenya Anti-Corruption Authority (KACA).

The only issue for the Court's determination was whether "mention' of a criminal case, as may be ordered from time to time in the course of a trial, is part of proceedings.¹⁷

The Honourable Chief Justice is required under Section 65 (3) of the Constitution, to make rules with respect to the practice and procedure of the High Court in relation to this supervisory, jurisdiction and authority. However, the Chief Justice has not promulgated these constitutional rules. The Court held in part, the fact that no such rules of practice and procedure may have been made, does not remove the High Court's supervisory jurisdiction which is inherent and necessary for the ends of justice or to prevent abuse of the process of the court. The Court concluded as follows:

"It is our considered view that constitutional provisions ought to be interpreted broadly and liberally, and not in a pedantic way. Constitutional provisions must be read to give values and aspiration of the people. The court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."¹⁸

Justice A.G.A. Etyang concluded: "I am satisfied that the values and aspirations of the applicant and the interested parties must be given meaning, by invoking the supervisory jurisdiction and authority as enacted in Section 65(2) of the Constitution notwithstanding that the Chief Justice may not have made rules of practice and procedure as required under Section 65(3) thereof."¹⁹

He proceeded to state that: The statutory basis for mentions of criminal cases during proceedings is Section 205 (1) of the Criminal Procedure Code. Pursuant to the provisions of this subsection a court has authority, before or during the hearing of a cause, to adjourn the hearing to a certain time and place to be then appointed and stated in the presence of the parties or their respective advocates. When such a hearing is

¹⁷ Ibid., P. 3.

¹⁸ Ibid., P. 4.

¹⁹ Ibid., P. 11.

adjourned, a court may admit an accused to bail or bond, with or without sureties, conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned or remand him into prison custody. Provided that no such adjournment shall be for more than 30 days when an accused has been admitted to bail or bond, and for not more than fifteen clear days when he is committed to prison.

In other jurisdictions, Courts have applied broad and purposive interpretation where the Constitution is silent about an issue under adjudication. For instance in the United States of America in the decision on *Roe Vs. Wade*,²⁰ there was no legislative act, which declared that during the first six months of pregnancy, a state law could deny a woman's right to abortion but the Court created the right to procure an abortion through the doctrine of implied jurisprudence.

The Supreme Court of the United States resorted to implied jurisprudence in the case of *McCulloch Vs. Maryland*.²¹ The brief facts of this case were that the State of Maryland attempted to levy a state tax on a branch of National Bank, which had been created by congress at the suggestion of Alexander Hamilton, secretary of the Treasury in President Washington's government John Marshal, the third Chief Justice of United States Supreme Court reasoned thus: Firstly, that Maryland's tax law was unconstitutional since Congress has the implied power to make all laws "necessary and proper".

Secondly, Marshall invoked the supremacy clause which stated that any law passed by Congress is superior to a state law that conflicts with it. Such a state law becomes unconstitutional.

Lastly, the court asserted its authority that it has the final determination on what the law is which has survived the test of time to date. In relying on the doctrine of implied jurisprudence; the Judges have developed and formulated certain Constitutional Principles namely original intent, textualism, precedent, logical, prudentialism and structuralism, which guide them in interpreting the Constitution.

²⁰ 410 US 113 [1973].

²¹ 17 US 316 [1819].

1.2 Theoretical Framework

This study was informed by legal realism, Natural school and the positive schools of jurisprudence. Legal realism is one of the most significant developments in legal theory which was greatly influenced by American Pragmatism of the 1920's and Scandinavian realism which have distaste for formalism, deduction and abstractions, in this sense legal realists saw the law as a tool for implementing social policy. Legal realism is traced to Roscoe Pound of the sociological school of jurisprudence who sought to switch the focus of juristic analysis from doctrine to the social effect of legal rules.²²

Pound proposed a more result oriented norm for judicial decisions instead of relying upon mechanical deduction from pre-ordained premises, Judges must be mindful that their decision is the just outcome in ordinary, lay person understanding. Judges should therefore have a wide appreciation of political science, economics, sociology, medicine and traditions of a given people to comprehend the impact of their decisions to society.²³

Karl N. Llewellyn a pioneer legal realist has outlined five broad areas where realists agree and we use them to illustrate our conceptualization of theory and practice and the interplay between both notions.²⁴

- i) Insistence upon the reality of legal change and judicial creation of law;
- ii) The conception of law as a means to achieve social ends, to be evaluated in its purposes and effects;
- iii) An emphasis upon the rapidity of social change and thus the need for constant updating of laws;
- iv) Tentative adoption of the theory of rationalization after the fact for the study of opinions; and
- v) Insistence on the necessity to discover the effects of law and to evaluate it in terms of its effects.

²² Abbreviated History of legal realism and perspectives, @emoglen.law.Columbia.edu.

²³ Ibid.

²⁴ Ibid.

Rudolf Von Jhering saw law as a formal system of rules but as a prime method of ordering society.²⁵ Society is dominated by competing interests which left unresolved will lead to conflicts, chaos and anarchy. Hence the Judge has not only to group the technical principles of law but bring to it a genuine understanding of the underlying sociological implications of the legal rules with which he operates and how this could be used to harmonize, rather than provoke or exacerbate conflict²⁶.

The Judge needs to know not just positive law but also the normative inner order of rules to today's living law. Lack of this may result in a disregard or glossing over of the living law so that mere knowledge of positive rules may give an entirely false or misleading picture of the actual social ordering.²⁷ This view is reinforced by Professor Northrop who remarked:

“To be sure, there are lawyers, Judges and even law professors who tell us that they have no legal philosophy. In law, as in other things we shall find that the only difference between a person ‘without a philosophy’ and someone with a philosophy is that the latter knows what his/her philosophy is, and is therefore more able to make clear and justify the premises that are implicit in his statement of the fact of his/her experience and his/her judgments about those facts.”²⁸

Most judges in Kenya lack doctrinal coherence in adjudication of politically sensitive cases and this may be partly attributed to legal pluralism and ideological orientations between liberal and conservative attitudes within the judiciary and to a lesser extent divisions on narrow parochial ethnic lines.

The net consequence of these divisions is that there is tension and mutual mistrust among the officers. This has tended to undermine the concept of peerage sharing and exchange of ideas in a brotherhood or sisterhood friendly environment and a case in point is

²⁵ Lloyd Dennis, The Idea of Law: Penguin Books [1981] P. 207.

²⁶ *Ibid.*, P. 208.

²⁷ *Ibid.*, P. 212.

²⁸ *Ibid.* P. 213 for more on this see his book, The complexity of Legal and Ethical experience, [1959] P. 6.

October, 2001 when the Court of Appeal exploded and Justices Tunoi and Shah engaged in an altercation against each other with Justice Otieno Kwach²⁹.

1.3 Literature Review

There is no agreement among scholars on the doctrine of implied jurisprudence. Opinion is divided on how far a Judge should go in liberally interpreting the Constitution and this diversity of opinion about the doctrine was reflected even by our key informants.³⁰

Professor Herbert Wechsler in his article "*Toward Neutral Principles of Constitutional Law*"³¹ has argued for the case of neutral interpretation of the Constitution without adulterating original intent. The Courts have also protected and guaranteed political structures as elucidated by Herbert Jacob who argues that the Courts do not operate in a vacuum and it follows that they cannot ignore the political and economic realities of the day.³²

Justice John Noonan, of the United States, a prolific author and scholar who studied extensively³³ about common law, canon law and natural law has argued that it is within their constitutional mandate for judges to imply the law from existing text where the constitution is silent.³⁴

Professor H.W.O Okoth-Ogendo has argued about the paradox of constitutions without constitutionalism where he has opined that constitutions in Africa have failed to regulate the exercise of power which has led to both dilemma and a paradox in African constitutional jurisprudence.³⁵ The dilemma is whether to abandon the study of constitutions altogether on the ground that no body of constitutional law or principles of constitutionalism appears to be developing, although State elites have failed to internalize

²⁹ The Sunday Standard 12th October 2001.

³⁰ Justice John Mwera of the High Court in Mombasa sought clarification on the meaning of implied jurisprudence and we offered the explanation.

³¹ *Harvard Law Review*, 73 [1959].

³² *Justice in America*, 3rd Edition (Boston: Little Brown and Company, [1978], P. 4-6.

³³ For more see, *Balance* at: // with Christ. /org/abortion htn 16/june04/1.

³⁴ For more see, *Reason in the Balance* at: //with Christ. Org. /abortion htn 16/ June 04/1. also see Extensive writings in the case against naturalism in science, law: Education by Berkley Law Professor Phillip E. Johnson P. 133- 139.

³⁵ H.W.O. Okoth-Ogendo *Constitutions without Constitutionalism: Reflections on an African Political Paradox* in Twain M. and Tushnet M. (2003) *Comparative Constitutional Law* New York P.226.

the constitution.³⁶ Indeed, after the Court made its judicial pronouncement, in the *Njoya and Another Vs. The Attorney General*³⁷ Professor Okoth-Ogendo gave a well reasoned critique on the ruling, calling it an amazing piece of political correctness and he concluded that if parliament would amend one Section of the Constitution, then logically it can amend all.³⁸ He has further argued that the state in African context lack the requisite capacity to respect the Constitution and in the process enhance the tenets of Constitutionalism.³⁹ Thomas Emerson, one of the leading scholars on the freedoms guaranteed in the First Amendment to the United States Constitution has identified four major jurisprudential controversies which characterize litigation on freedom of speech.⁴⁰ The values underlying the Amendment include the following:

- a) Freedom of expression is essential as a means of assuring individual self-fulfillment. Suppression of belief, opinion or other expression is an affront to the dignity of human beings. Moreover, each person as a member of society has a right to share in the common decisions that affect him or her. To cut off the search for truth, or the expression of it, is to elevate society and the state to a despotic command over the individual members of society and to place each under the arbitrary control of others.

- b) Freedom of expression is an essential process for advancing knowledge and discovering truth. Knowledge and the search for the truth are promoted by a consideration of all alternatives. Discussion must be kept open no matter how true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious an opinion appears to be; for the unaccepted opinion may be true or partially true and, even if wholly false, its presentation and open discussion compel a re-thinking and re-testing of the accepted opinion.

³⁶ *Ibid.*

³⁷ High Court Misc. Civil Application No. 82 of 2004.

³⁸ *The East Africa Standard*, Nairobi, 7th April 2004, P.7.

³⁹ H.W.O. Okoth-Ogendo, in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley, (Eds.) *Constitutionalism and Democracy: Transitions in the Contemporary World*, New York: Oxford University Press, (1993) P. 66.

⁴⁰ Thomas Emerson, *The System of Freedom of Expression*, New York Random House (1971) P. 6-7.

- c) Freedom of expression provides for participation in decision-making by all members of society. This is particularly significant for political decisions. It promotes the establishment of a deliberative democracy, and helps nurture the culture of democracy.
- d) Freedom of expression is a method for achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy disputes and necessary consensus. Suppression of discussion makes a rational judgment impossible, substituting force for reason; the exercise of power for justification. The process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions even where they disagree, if they follow upon a rational open decision-making process.

Another leading scholar Ronald Dworkin argues that in Constitutional interpretation, these values can be reduced to two justificatory grounds for the underlying values that inform the First Amendment and hence the Constitutional protection of freedom of speech.⁴¹ Dworkin argues that the freedom of speech improves the quality of government as it encourages free and unfettered flow of information.⁴² He concludes that freedom of speech “is an essential and constitutive feature of a just political society where the government treats all its adult members except those that are legally incompetent, as responsible moral agents.”⁴³

Professor Steven D. Smith has criticized Judges for failing to come up with a consistent way of interpreting the Constitution. He argues that the Judges have failed to articulate and consistently apply clear standards for determining the meaning of freedom of religion and the corresponding limits placed on governmental power embodied in the establishment and free legislative effect.⁴⁴ Professor Smith concludes that the Judges

⁴¹ Ronald Dworkin, The Coming Battles Over Free Speech, New York Review of Books, 11 June 1992 P. 53.

⁴² *Ibid.*, P.53.

⁴³ *Ibid.*, P.57.

⁴⁴ Smith D. Steven, (1996) Foreordained Failure: The Quest For A Constitutional Principle of Religious Freedom: New York: Oxford University Press P.21.

have been asking wrong questions and given caress answers to serious Constitutional issues.⁴⁵

Professor Kivutha Kibwana has argued that Constitutional issues are hard to bargain or adjudicate upon particularly during peace time.⁴⁶ He concluded that constitutional issues reflect the aspirations; traditions and values of the Peoples' will and should therefore be taken seriously than ordinary Statute.

Dr PLO-Lumumba a leading Constitutional scholar has argued that to get the proper meaning, context and broader perspectives of Constitutional text there is need to trace the historical background of that text.⁴⁷

Professor Yash Ghai a respected Constitutional law scholar has given a critical analysis of the decision in *Re: Constitution of Kenya, Njoya Vs. AG*⁴⁸ He argues that there is no point in the structure of the Courts' reasoning that does not fall apart at the first touch.⁴⁹ He proceeded to state that Kenyan Judges have in the past all too often taken a narrow and legalistic approach to the interpretation of the Constitution.⁵⁰ In his opinion, a liberal and purposive approach in reading the Constitution does not give the Judges a totally free hand to read into a Constitution what they would like to find there, nor to disregard what is there.

The starting point must be the words of the Constitution, and a purposive approach is to be used where there is some lack of clarity about the words. Hence, Judges who take broad and purposive approaches must do so with caution, conscious that they are not given special insight into the purposes of a Constitution.⁵¹ Essentially what Ringera says is that the people have the power to make a Constitution, and that power still exists

⁴⁵ Ibid., P. 22.

⁴⁶ Kivutha Kibwana appealing to Kenyans to join hands to usher in a new Constitution, he argues that a new Constitutional dispensation creates a new framework which sends unsettling feelings to most players as reported in, *The Standard*, Nairobi, May 16th 2005.

⁴⁷ Lumumba-PLO (2004) unpublished paper presented at a workshop in Nairobi on The interpretation of the Mandate of the Constitution of Kenya Review Commission.

⁴⁸ *High Court Misc. Civil Application No. 82 of 2004.*

⁴⁹ Yash Ghai's Critique on the Ringera Ruling dated 7th April 2004 P. 3.

⁵⁰ Ibid., P. 3.

⁵¹ Ibid., P. 3.

although there is an existing Constitution-in other word the power is not fully expressed in the Constitution, even though it does have provisions about amendment. He states that it may be all right for political Scientists to recognize the existence of extra-Constitutional constituent power, but for Judges it is dangerous ground. A Judge is put where he or she is in order to interpret and administer the law, and presumably that, and nothing else, is the expertise the Judge Offers society.⁵²

The Judge is a non-elected, fundamentally non-accountable officer who has sworn to uphold the Constitution and the law. If the Judge begins to apply the constituent power of the people, then he or she is stepping into essentially non-legal territory. He concludes that Judges should be very careful about deciding that the people retain power over and above the Constitution. The Judges themselves owe their position to the Constitution, including the question of security of tenure, so important for judicial independence. But if the people retain the power to do away with the Constitution, they may presumably retain the power to do away with the Judges as well!⁵³

In terms of case law, literature review has been informed by the following cases:

*Olmstead Vs. United States (1928)*⁵⁴ The right to privacy protects the right to home life, private communications and the prohibition of unlawful entry and search. The Court has analyzed the details of constitutional silence in *Olmstead Vs. United States* where Brandeis J declared thus:

“The protection guaranteed by the (4th and 5th) Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the most valued by civilized men.”⁵⁵

He went on to conclude that:

⁵² Ibid . P. 4

⁵³ Ibid., P. 4

⁵⁴ (1928) 277 US 438.

⁵⁵ Ibid., P. 478.

“The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.”⁵⁶

Golak Nath Vs. State of Punjab⁵⁷ The Nehru government wanted to pass a Constitutional amendment purportedly to restrict a fundamental right, to property. The government did not consider that there was any provision to pay market-related compensation in the case of expropriation of property but the Court took a different view and Judge Subba Raj’s declared *inter alia*:

“No authority created under the Constitution is supreme ... and all the authorities function under the supreme law of the land. The rule of law under the Constitution has a glorious content ... having regard to the past history of our country, [the Constitution] could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State. It, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of the State as the sentinel of the said rights.”⁵⁸

Kesavananda Vs. State of Kerala⁵⁹ In *Kesavananda*, the Legislature sought by way of a two-thirds majority in both houses of parliament to amend the Constitutional provision dealing with property and the Court by a majority of seven to six held that although fundamental and basic features of the Constitution could not be amended, the right to property was not such a basic feature. The minority opinion said thus:

“Human freedoms are lost gradually, imperceptibly and their destruction is generally followed by authoritarian rule. That is what history has taught us. The struggle between liberty and power is eternal. Vigilance is the price that we, like every other democratic society, have to pay to safeguard the democratic values enshrined in our Constitution.”⁶⁰

The majority view adopted a different view of democracy and stated as follows:

“Democracy proceeds on the basic assumption that representatives of the people in parliament will reflect the will of the people and that they will not exercise their powers to betray the people or abuse the trust and confidence reposed in them by the people ... The Constitution has not set up a government of Judges in this country. It has confined the duty of determining paramount norms to

⁵⁶ *Ibid.*, P. 479.

⁵⁷ [1967] AIR SC 1643.

⁵⁸ *Ibid.*, P. 1655.

⁵⁹ [1973] AIR SC 1461.

⁶⁰ *Ibid.*, P. 1629.

parliament alone. Courts are permitted to make limited value choices within the parameters of the Constitutional value choices.”⁶¹

Attorney General of the Republic of Botswana vs. Unity Dow⁶² In 1984 the applicant, Unity Dow married Peter Nathan Dow, an American citizen. The couple established a home in Botswana for 13 years, and had three children. According to sections 4, 5, and 13 of the Citizenship (Amendment) Act of 1984, *a person is considered to be a citizen of Botswana if at the time of his or her birth; his or her father was a citizen. A child born to a citizen mother and an alien father therefore acquired citizenship only if born outside wedlock.* The applicant challenged the law as discriminatory; arguing that such treatment relegated women’s legal status to that of a child and that sections 4, 5 and 13 of the act were contravening section 7 of the Constitution, which prohibits degrading treatment towards persons. In a landmark ruling the Court held inter alia that:

“The sections of the act which denied citizenship rights to children born to a citizen mother married to a foreign father are unconstitutional.”⁶³

Under the law that was annulled, the children as a consequence of their minority were registered as part of their father’s residence permit. If the father failed to renew his permit, the children would be obliged to leave Botswana. Moreover, as aliens, the children could not enjoy citizenship benefits, such as free university education.⁶⁴

Marbury Vs. Madison⁶⁵ The third US Chief Justice, John Marshal helped shape the doctrine of implied jurisprudence. During his tenure, only members of the ruling Federalist Party were appointed to the Supreme Court and they held office for life so long as they were of “good behaviour.”⁶⁶ But things changed dramatically when the Republicans won the elections in 1800 and President Jefferson realized that whereas they controlled the Presidency and Congress, the Federalists Party still controlled the

⁶¹ Ibid., P. 1937 and 2008.

⁶² Botswana Court of Appeal, [1994] (6) BCLR 1.

⁶³ Ibid., P.1.

⁶⁴ Ibid., P.6.

⁶⁵ 1 Cranch 137 [1803].

⁶⁶ See, Article III of the United States Constitution.

judiciary.⁶⁷ President Adams had filled some of the judicial vacancies but a number of Commissions had not been delivered to the appointees, William Marbury was one of the persons whose Commission had not been delivered and he sued the Secretary of State James Madison to force him to deliver his commission as justice of the Peace. The new Chief Justice understood that if the Court issued Marbury writ of mandamus to force Madison to deliver the commission to Marbury, the Jefferson administration would ignore it, and thus significantly weaken the authority of the Courts.⁶⁸ On the other hand if the Court denied the writ, it would appear that the Justices feared the executive. Marshall sorted out the dilemma by declaring that Madison should have delivered the commission to Marbury, but then held that the Section of the Judiciary Act of 1793 that gave the Supreme Court the power to issue the writs of *Mandamus* exceeded the authority allotted the Court under Article III of the Constitution, and was therefore null and void.

The critical importance of the Marbury decision is the realization that the Supreme Court, had authority to declare acts of Congress and by implication acts of the President, unconstitutional if they exceeded the powers granted by the Constitution. Even more, important, the Supreme Court became the final arbiter of the Constitution, the final authority on what the document meant.

1.4 Hypothesis

The main hypothesis of this study was that in the adjudication of politically controversial cases Judges in Kenya are informed by legal pluralism, principles and policies that are outside the purview of positive law. Where judges find a constitutional or legal vacuum, they resort to legal pluralism, principles, discretion and policies in the adjudication of cases. This study confirmed that Legal language does not satisfy every possible complex idea.

The main hypothesis assumed that:

- a) Judges are informed by legal pluralism in deciding difficult cases.
- b) Political considerations inform Judges in deciding politically controversial cases.
- c) Economic considerations influence Judges in deciding difficult cases.

⁶⁷ Supra Note 65.

⁶⁸ Ibid.

- d) Traditions, norms, values and practices inform Judges in deciding difficult cases.
- e) Mood swings, breakfast myths, social orientations and attitudes inform Judges in deciding difficult cases.
- f) Education, Class and professional orientations influence Judges in deciding difficult cases
- g) Religious beliefs inform Judges in deciding difficult cases.

1.5 Scope and Limitation of this study

The scope of this study was delineated to its application and usage in Kenya. However, analysis of its application in other jurisdictions like the United States of America, India, the United Kingdom and South Africa was considered. The methodology followed in this study includes past and present perspectives, actors and structures, women's law and human rights approaches. The information analyzed in this thesis was obtained through women's law as the wider methodology whereby Judges who had been picked randomly were given questionnaires which were self administered and/or engaged in an iterative process where data, theory, and the lived realities⁶⁹ of the respondents (Judges) were constantly engaged in discussions and in the process a lot of insights were brought out on how Judges decide difficult cases which are politically controversial.

The other methodology that was used was the actors and structures, which analyzed the interplay between human beings and structures like the Courts, the State machineries like the police, the prisons department among others.⁷⁰ This was particularly important since Judges do not operate in a vacuum; they operate with State Counsels, Prison Warders and the Police.⁷¹ The last methodology used was the human rights perspectives approach. In this case, wherever Judges are confronted with difficult cases where the law is not expressly providing for a particular right, they have a statutory duty and constitutional

⁶⁹ Bentzon, A. *et al.* (1998). Pursuing Grounded Theory in Law: Tano Aschehoug Oslo. P. 18.

⁷⁰ *Ibid.*, P. 101-105.

⁷¹ Key Informant Justice J.A. Osiemo of the High Court in Nairobi stated that it was practically impossible for a case to start without the presence of a State Counsel.

mandate to imply the right through broad and purposive interpretation of the Constitution.⁷²

It took two months to interview, observe and receive back the questionnaires that had been mailed to the respondents. The data was collected using questionnaires which were mailed to the respondents on one hand and in-depth discussions with the other respondents on adjudication of difficult cases on the other. Personal observations and analysis of selected decided cases gave deep insights and understanding of the concept of implied jurisprudence. The main area of focus was in Nairobi although other areas like Kitale, Mombasa and Machakos were also covered.

I interviewed and/or discussed the pertinent issues with nine Judges who became my key informants in relation to answering the overarching questions. Some Judges responded by comments to the issues raised in the questionnaire and gave insights on their lived experiences in deciding difficult cases. Others opted to share their experiences in adjudication of difficult cases in an iterative way.

⁷² Gavin W. A., Constitutional Rights after Globalization HART Publishers (2005). P.118.

CHAPTER ONE: The Meaning and characteristics of the doctrine of implied Jurisprudence

1.0 Introduction

This Chapter traces the meaning and origins of the doctrine of implied jurisprudence, and its main characteristics as a principle of Law. It also examines under what circumstances Judges apply legal pluralism, discretion, principles and policies in adjudication of difficult cases. It reviews the various approaches to legal reasoning in adjudication of politically sensitive cases.⁷³

The doctrine of implied jurisprudence derives its juridical character from the Constitution, statute or judicial precedent.⁷⁴ What is the law is not sometimes clear and it's the duty of the Judge to try to discover it.⁷⁵ Judicial decisions enforce existing political rights but there is always a theoretical possibility of a tie, a dead heat, between competing sets of principles when all relevant considerations have been taken into account. In hard cases where a Judge has exhausted the law before it yields a decision, the Judge has no option but to make new law to deal with the new problem.⁷⁶

Where Judges are compelled to legislate due to prevailing circumstances, then they have to resort to legal pluralism and policies that are of high utility to the general welfare of the community or that policy which appeal to the majority of the people.⁷⁷

The doctrine of implied jurisprudence relies upon wide, broad and purposeful interpretation Courts have given to the Constitution, statutes and precedent.⁷⁸ But if judicial officers and the public are preoccupied with an attitude of reverence, criticism

⁷³ *Lawrence Vs. Texas 539 US 538 [2003]* where the court held "...that the drafters of the Constitution knew times can blind us to certain truths and later generations can only oppress. As the nation endures persons in every generation can invoke its principles in their own search for greater freedom."

⁷⁴ Dworkin R., *Contemporary Jurisprudence*. Edited by Marshall Cohen (Duckworth) P. 106.

⁷⁵ *Ibid.*, P. 162.

⁷⁶ *Ibid.*, P. 162.

⁷⁷ *Ibid.*, P. 163.

⁷⁸ *The Economist* February 28th, (1987) P. 21.

and confusion about what the Constitution is, then it means the interpretation of the Constitution will be restricted therefore defeating the spirit of the doctrine of implied jurisprudence.⁷⁹

1.1 The meaning of the Doctrine of implied jurisprudence

Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law.⁸⁰ The society expects judges to come up with well reasoned decisions but the difficult question to determine is what constitutes good reasons if there is no statutory authority or any existing precedent to guide them.⁸¹ What happens when the law appears to have gaps? Can the judge turn to non legal sources? Are there legal sources to which he can go when he appears to run out of rules? To what sort of standards other than rules, may judges appeal? Is it legitimate for them to invoke teleological consideration, goals or policies? Or should they confine themselves to the deontological, to rights and principals? Is there a right answer and is that answer to be found embedded in the law?⁸² Doctrine is a legal principle that is widely adhered to and respected.

The doctrine of implied Jurisprudence was sparked at by Chief Justice Marshal in 1803 when he decided that Courts could strike down legislation that did not accord with the Constitution.⁸³

Chief Justice Earl Warren broadened the doctrine to outlaw segregation in schools, struck down statutes that restricted voting enhanced human rights and the right to privacy⁸⁴ and paved way to declare some ant-abortion statutes unconstitutional.⁸⁵

⁷⁹ Ibid., P. 20

⁸⁰ M.D.A. Freeman, Lloyds Introduction to Jurisprudence (7th Edition) 2001 P. 3

⁸¹ Ibid.

⁸² Ibid., P. 3.

⁸³ Supra Note 65

⁸⁴ *Griswold Vs. Connecticut* (1965) 381 US 479.

⁸⁵ The Economist February 28 1987 P. 21.

The pertinent question that needs answers is to what extent Judges should depart from the Constitution's words when interpreting it.⁸⁶

1.2 The problem with Original Intent:

Justice Robert Bork, a conservative has argued that Judges should never look into themselves whenever they are confronted with a difficult case.⁸⁷

“Original Intent” aims to rein in the power of Judges to dispense rights. One may never find a right to privacy expressed in so many words in the Constitution; therefore it cannot exist.⁸⁸ Indeed, it is not possible to include that the intent of the 14th amendment, passed after the Civil War, was to do anything other than to offer equal protection to blacks; therefore it cannot, on its own afford that protection to women.⁸⁹

The purpose of original intent is to limit the Judges from legislation therefore preserving the doctrine of separation of powers.⁹⁰ By the same token, limiting the power of Judges to strike down state (and not just federal) laws does no more than reassert federalism.⁹¹

The principle of original intent has vexed the minds of many Constitutional lawyers.⁹² On one level the doctrine of original intent suggests that the interpreter must forget what might have been learnt from the events which transpired between the creation of the text and the present, limiting its scope to what the framers thought about the Constitution. For instance their intention can be drawn from the preamble to the American Constitution which reflects the mood of Thomas Jefferson:

“Having by our late labours and hazards made it appear to the world how high a rate we value our just freedom; we do now hold ourselves bound in mutual duty to each other to take the best care we can for the future.”⁹³

⁸⁶ Ibid., P. 21.

⁸⁷ Ibid., P. 21.

⁸⁸ Ibid., P. 21.

⁸⁹ Ibid., P. 21.

⁹⁰ Ibid., P. 21.

⁹¹ Ibid., P. 21.

⁹² Davis Dennis, *et al.* Fundamental Rights in the Constitution Commentary and Cases Juta and Co. Ltd [1997] P. 8.

⁹³ Ibid., P. 20.

However, Original intent is an inadequate theory of Constitutional interpretation. How can people or Judges know what the framers meant? Whose Opinions (Judges, the Citizenry or political class) among them are to count most? Did the framers intend that their intentions should govern the way the Constitution was to be read or understood in the future? Does the Constitution have capacity to accommodate new and emerging issues? The U.S. framers never intended an air force; does that mean that the U.S. Air Force is unconstitutional?⁹⁴

The wording of the Constitution is very concise, and a lot of meaning is packed into its simple phrases. The Constitution is considered a living document because its meaning has been interpreted and reinterpreted over the years in the light of changed conditions.⁹⁵ However, it is good to appreciate that sometimes original intent may be clear but morally outrageous⁹⁶. Indeed, some original framers ardently believed in slavery and the innate inferiority of women and Constitutions world over have outgrown the intentions of the people who wrote them.⁹⁷

1.2.1 A critique of Original Intent

The first ideal of the American declaration of independence stated *inter alia*;

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights that among these are life liberty and the pursuit of happiness.”⁹⁸

The drafters used the word equal in a relative sense connoting equal treatment under the law.⁹⁹ The use of the word “men” means women were left out and for 150 years women were considered not equal nor could they vote.¹⁰⁰ Indeed, black people and American Indians were held in slavery. Hence we can argue that the Original American Constitution had discriminative values of race and slavery which undermined the rights

⁹⁴ Ibid., P. 21.

⁹⁵ Fred R. Harris, America's Democracy, (1989) New York P. 49.

⁹⁶ Ibid., P. 50.

⁹⁷ [Htt://www.sfasu.edu/polisci/Abel/ConstitutionalLawII/Constitutional Interpretation](http://www.sfasu.edu/polisci/Abel/ConstitutionalLawII/Constitutional%20Interpretation) P.6

⁹⁸ Fred R. Harris Supra Note 95 P. 9.

⁹⁹ Ibid., P. 11.

¹⁰⁰ Ibid., P. 11.

of other human beings.¹⁰¹ It follows that a Judge who believed in slavery could not enforce rights brought by slaves.¹⁰² Conversely, a Judge who abhorred slavery could resolve many difficult cases against slaves in their favour.¹⁰³

Professor Dworkin concludes that;

“When authoritative legal sources leave an issue genuinely in doubt, I think a Judge properly decides in accordance with firm convictions of moral rightness and social welfare that command wide support, even if these convictions are at variance with theory that would best justify existing legal standards.¹⁰⁴

Alternative intellectual discourse is emerging grounded in a new dynamism between rights Constitutionalism, globalization and legal pluralism. The new challenges pose paradigmatic transition which alters our perception about who the key Constitutional actors are removing Courts and lawyers from any preordained position.¹⁰⁵ The consequence of modernity is that local events are shaped by happenings occurring miles away and the drafters of the Constitution may never have contemplated this interconnection.¹⁰⁶

Original intent is in most cases a mask to protect the national incumbent government from judicial scrutiny and let politicians and civil servants do what they want.¹⁰⁷

Original intent envisaged a democratic document, but this might lead to an absurdity where the majority does what they want.¹⁰⁸ Although the American Constitution provides for federalism; the federal government continues to encroach on spheres that are exclusively the domain of the state like drugs and pornography.¹⁰⁹ The framer’s never

¹⁰¹ Marshal Cohen in Ronald Dworkin and Contemporary Jurisprudence: (Duckworth) P. 111.

¹⁰² Ibid., P. 111.

¹⁰³ Ibid., P. 112.

¹⁰⁴ Ibid., P. 112.

¹⁰⁵ Gavin W. Anderson, Constitutional Rights After Globalization, (2005), Hart Publishing Oxford, P. 12.

¹⁰⁶ Ibid., P. 18-19.

¹⁰⁷ The Economist Feb.28 1987 P. 21.

¹⁰⁸ Ibid., P. 22.

¹⁰⁹ Ibid., P. 22.

intended that the President could be allowed to ride rough shod over the will of congress through misuse of veto power.¹¹⁰

The doctrine ignores individual rights against the state as a limit on government.¹¹¹

1.3 Other principles of Constitutional Interpretation

Over a period of time, Judges have developed principles of interpretation that have been accepted in most jurisdictions of the common law, civil law and Roman Dutch law. These principles include the following:

Textualism,¹¹² or Literalism, Plain Words approach, ordinary meanings of Words- this approach does not look any further than the words of the Constitution itself; it doesn't try to infer any intended meanings. A pure textualist, or literalist, approach looks for key phrases like "Congress shall make no law... abridging the freedom of speech and finds that no law means no law. Reading the Constitution literally is also called strict construction. Other strands of textualism try to understand what the words would have meant to the people at the time they were written for instance *Okunda Vs. The Republic* held that the East African Community Treaty was any other law within the meaning of Section (3) of the Constitution and to the extent that the inconsistency it was null and void.

Textual analysis was present in *Coy Vs. Iowa* (1988) which struck down a system in which child witness could testify behind a screen. The leading proponents of textualism are Justice Scalia and Justice Rehnquist who has stated:

"The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they live ... Where the framers of the Constitution had used general language, they [gave] latitude to those who would later interpret

¹¹⁰ Ibid., P. 22.

¹¹¹ Ibid., P. 22.

¹¹² Mark Twain: Article on the Jurisprudence of Constitutional Interpretation <http://Faculty.ncwc.edu/toconnor/410/41lect02.htm> P. 2. accessed on May 2005.

the instrument to make that language applicable to cases that the framers might not have foreseen.”¹¹³

Precedent¹¹⁴ also known as Stare decisis, look at previously decided cases- this is the doctrine of stare decisis (let the decision stand) which means that the Supreme Court or Court of Appeal in other Jurisdictions looks at its own past decisions. Professor Ronald Dworkin has argued that in coming to the decision in *Brown vs. Board of Education*, the Supreme Court was informed by the fact that the Constitution guarantees a right against official racial discrimination and lists three possible justifications that helped the Court map out its contours. These are¹¹⁵: the suspect classifications approach, which views racial prejudice as a special case of the requirement not to treat people differently on some irrational basis; the banned categories approach, which prevents any governmental reliance on racial grounds; and the banned sources approach, which rules out collective decisions which are motivated by prejudice against a particular group. Dworkin posits that his theory is not an abstract rule-based theory, but a dynamic one which can adapt to changing societal attitudes by endorsing either the banned categories or banned sources approach as consistent, in 1954, when Brown was decided and such ethical attitudes were widespread in the community.¹¹⁶

Logical,¹¹⁷ is Mathematical, put words into logic formulas – this is the approach that justices ought to engage in informal reasoning, usually in the form of a syllogism, a type of logic which draws a conclusion from a major and minor premise. Critics claim that minor premises are often faulty and lead to invalid conclusions.

Prudentialism¹¹⁸ or doctrinal, is appropriate for adversary process –this is common and is found throughout the Court system. It focuses justiciability, if appropriate for adversary process. Professor Sanford Levinson of the University of Texas has argued that the standard argument for gun control is, of course, that gun control would save many lives,

¹¹³ William H Rehnquist, *The Notion of a living Constitution*. (1976) Texas Law Review 693 at 694.).

¹¹⁴ Ibid., P. 2.

¹¹⁵ Ronald Dworkin, *Law's Empire*. (London, Fontana, 1986) P. 382-4.

¹¹⁶ Ibid., P. 387.

¹¹⁷ Ibid., P. 3.

¹¹⁸ Ibid., P. 3.

leading to a policy argument: the Constitution ought not to protect something with extraordinary social costs.¹¹⁹

Structuralism,¹²⁰ is inspirational, it maintains social order and posits that the Constitution is a “living document” which looks at each and every case as unique, and is more concerned with remedy making than rule making. More case specific than philosophical, this method usually results in a balancing test, matching the powers of government on one side and the rights of individuals on the other side.¹²¹

1.3.1 Characteristics of the doctrine of implied jurisprudence

The Constitution is the basic Law that defines the structure and organization of the Government. In the context of sources, Constitutional law is based on a Constitution or Constitutional provision.¹²²

The Tenth Amendment to the U.S. Constitution provides:

“The powers not delegated to the United States by the Constitution, or prohibited by it to the states, are reserved to the states respectively or to the people”.

In interpreting this express provision in the Constitution, the US Supreme Court turned to the doctrine of Constitutional silence. The Court held that the federal government not only possesses the express “implied” powers as are necessary to carry out the stated powers but also that state laws that contradict this principle give way to the federal Constitution exercising those implied powers.¹²³

¹¹⁹ Professor Levinson on The 2nd Amendment in The Women’s Firearm Network at <http://www.womenshooters.com/wfn/levison.html>.

¹²⁰ *Ibid.*, P. 3.

¹²¹ *Roe Vs. Wade* 410 US 113 (1973).

¹²² Fred R. Harris Supra Note 95 P. 468.

¹²³ *McCulloch Vs. Maryland*, 17 U.S. 316 [1819].

The Supreme Court has maintained that the “Tenth Amendment states but a truism that all is retained which has not been surrendered”¹²⁴. In effect the tenth Amendment does not add or take anything away from the other provisions of the US Constitution.

The drafters of the Constitution were informed by the prevailing political and economical circumstances. They would never envisage every situation or occurrences in life. Hence the Constitution cannot possibly provide for everything, that is why it is considered a living document since its meaning has been interpreted and reinterpreted over the years to reflect the changed circumstances.¹²⁵ Justice Loud D. Brandies one of the greatest American Judges has observed:

“Our Constitution is not a straight Jacket. It is a living organism. As such it is capable of growth, of expansion and adoption to new conditions”¹²⁶

The Constitution is larger than the text, the Canadian Constitution Act (1982) lists a series of other texts imbued with Constitutional status and the Canadian Supreme Court has accepted that the broader Constitution includes custom and tradition.¹²⁷

The doctrine of implied jurisprudence is universal and has promoted global coherence in legal reasoning across legal systems and within the various branches and disciplines of law. It has promoted rights like the right to privacy and freedom of speech among others. It has shown that explicit constitutional text is not adequate or the only source of constitutional norms, and that the tacit or implicit constitution is equally important in the adjudication of cases. Implied jurisprudence has informed other doctrines like due process, rule of law and implied rights. It has enhanced the use of legal pluralism as a Meta theory in limiting the powers of state in modern constitutionalism.

It matters not who is looking at it, whether it is University Professors, Law students, Legislators or Judges, they all concede that “the Constitution” goes beyond the text

¹²⁴ *United States Vs. Darby*, 312 U.S. 100 [1941].

¹²⁵ Fred R. Harris, *Supra* Note 95 P. 49.

¹²⁶ *Ibid.*, P. 51.

¹²⁷ Walter F Murphy, on *Civil Law Common Law, and Constitutional Democracy Louisiana Law Review*, Vol.52 Sept. 1991. Number 1 P. 114.

document to include interpretations, practices, traditions and “original understanding” conveniently used to connote a reference to the founders.¹²⁸ The Constitution therefore becomes a living document or “away of life” an “understanding” though a constant process of Constitution creation disguised, even to its operations, as interpretation or administration.¹²⁹

In essence, the letters of the Constitution, by themselves, are neither enabling nor constraining. For Constitutional provisions to be meaningfully and effectively operative there must be an institutional and cultural apparatus which is partially created by the Constitution to implement, enforce and safeguard the Constitution.¹³⁰ Further, an independent judiciary with Judges dedicated to legal reasoning is an important ingredient in the development of the doctrine of implied jurisprudence.¹³¹

It takes the wit and innovativeness of a Judge to open the law and go beyond the Constitutional text whose sole purpose is not to enshrine any democratic or otherwise, beyond fidelity to its provisions.¹³²

The test might not be all-inclusive because not all existing Legal issues and traditions may be conceptualised at the time of writing the Constitution.¹³³ Indeed, there may be fundamental disagreement over the form and content of certain issues and consensus is impossible. For instance, “Jews” of assorted national, cultural and linguistic backgrounds, professing a variety of religions, including atheism and holding widely differing opinions about a Jewish state have immigrated to live in Arab and Sabres land hence the Court has to interpret the law according to these societal dynamics.¹³⁴

¹²⁸ Ibid., P. 115, he asks practical and philosophical questions arguing that in both law and life we use different criteria to establish what something means and that current meanings are based on experience but bearing “family resemblances” to original meaning he gives the instance of what “dead” means medically, legally, spiritually etc.

¹²⁹ Ibid., P. 116.

¹³⁰ Boli John, Constitutionalism & the Rule of Law, Perspectives. Vol. 2 No. 1 P. 3.

¹³¹ Ibid., P. 3.

¹³² Walter F. Murphy Supra note 127 P. 118.

¹³³ Ibid., P. 121.

¹³⁴ Ibid., P. 122.

Constitutional critics may argue that the present generations have no right to bind future generations by our particular beliefs in the society's goals and objectives, which keep on changing.¹³⁵ Constitutional text may in broader context and perspective be used to infer tacit realities beyond the text. In addition to this there is need for an intelligent population that can litigate and develop the law in the process or protest whenever the Constitution is under threat from the legislature, judiciary or executive. It is easier to have the Constitution, but it is quite another thing to convene the entire population to live and act the Constitution; people take along time to internalise issues.¹³⁶

It follows that Constitutional text, is so intimately welded with the national existence itself that the two have become inseparable.¹³⁷ The meaning of any document depends on how it is constructed; no language is so copious as to supply words and phrases for every complex idea...when almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.¹³⁸

The doctrine of implied jurisprudence is legitimatised by virtue of Constitutional, statutory and judicial practices.¹³⁹ The Constitution per se is a source and measure of legitimacy having originated from the people's will and conscience. However, to confer legitimacy the process must be legitimate. And what confers legitimacy varies from culture to culture and time to time within any single culture.¹⁴⁰ It's an acknowledged fact that every society has its own special ideals, traditions, customs and values and living law which cannot be imposed on any other society.¹⁴¹

¹³⁵ Ibid., P. 124.

¹³⁶ Ibid., P. 125.

¹³⁷ Ibid., P. 127.

¹³⁸ Ibid., P. 127- James Madison in, The Federalist, No. 37 arguing that the written word has a clear and a permanent meaning and no Judge at any should surrender "... rather than rely on the shifting; day to-day standards of fairness of individual Judges".

¹³⁹ Ibid., P. 130.

¹⁴⁰ Ibid., P. 130.

¹⁴¹ Ibid., P. 130.

The Judges expand the law to take care of the past present and future taking account of the underlying values and customs that have survived the test of time.¹⁴²

The judiciary is a non-majoritarian institution, whose guiding lights are neither popularly chosen nor even expected to express or implement the will of the people. Rather, its legitimacy rests on notions of honesty and fairness and most importantly, on popular perception of the judicial process.¹⁴³

Through an independent judiciary the law is depicted as separate from-and 'above'-politics, economics, culture and the values or preferences of Judges.¹⁴⁴ This sacrosanct character of the law is accomplished and ensured through the attributes of the decision-making process, including judicial subservience to the Constitution, statutes and precedent; the quasi-scientific, objective nature of legal analysis, and the technical expertise of Judges and lawyers.¹⁴⁵

These legal attributes have evolved certain standard practices that have acquired legal recognition:¹⁴⁶

- (a) That the law on a particular issue is pre-existing, clear, predictable and available to anyone with reasonable legal skill;
- (b) That the facts relevant to disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth will emerge.
- (c) That the result in a particular case is determined by a rather routine application of the law to the facts; and

¹⁴² Ibid., P. 131.

¹⁴³ David Kairys, (2003). The politics of Law: A progressive Critique, (Basic Books) (3rd Ed.) New York, P. 31.

¹⁴⁴ Ibid. P. 68, the author gives a detailed critique of modern judicial responses to innovative jurisprudential thinking outside traditional jurisprudence.

¹⁴⁵ Ibid., P. 79 analysis of, changing judicial trends to incorporate emerging trends in modern jurisprudence

¹⁴⁶ Ibid., P. 82.

(d) That except for occasional bad judicial officers/lawyers, any reasonable or competent person will arrive at a fair and correct decision.

In *Martin Vs. Hunter's Lessee*¹⁴⁷ the Supreme Court held that it had implied powers to overrule decisions of State Courts in cases involving federal questions. The doctrine of implied jurisprudence was expanded further in the case of *McCulloch vs. Maryland*.¹⁴⁸ The majority opinion of the Supreme Court held that a conflicting state legislative act must give way to an act of congress that is in accord with the Constitution. The Court went further to state that Congress not only possesses the powers expressly stated in the Constitution but also has such implied powers as are necessary and proper to carry them out.

Judicial officers have sworn to protect and uphold the Constitution. However, in rare circumstances they are compelled to dismantle and/or disregard the very Constitution they have sworn to protect. Indeed within the core of legal rules, ordinary linguistic practice may adequately guide the judicial interpreter¹⁴⁹. Hence, rule application is generally simple, often syllogistic and deductive.¹⁵⁰ Beyond this core of settled meaning lie a penumbra; questions resolvable not by any canonical wording but only by reference to their background justifications, often disclosed in legislative history.

It follows that where neither rules nor their background justifications yield a clear answer to difficult disputes, the Judge must exercise discretion, positivists hold.¹⁵¹ The Judge must fill the gap by making new law.¹⁵² Dworkin has argued that law is a seamless system with its own autonomy. It provides one correct answer to any cases, difficult or

¹⁴⁷ *Martin VS. Hunter's Lessee*, 1 Wheaton 304 [1816].

¹⁴⁸ *McCulloch Vs. Maryland*, 4 Wheaton 316 [1819].

¹⁴⁹ Professor Mark J Osiel; Dialogue with Dictators: Judicial Resistance in Argentina and Brazil/American Bar Foundation, [1995] P. 492.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Professor Ronald Dworkin views judicial discretion in hard cases as consisting of the effort to uncover and assess the relative weight of competing principles already present within the Legal materials binding on the Judge (Naturalist view)

not, by application of its rules, precedents, principles and spirit.¹⁵³ He views law as a gapless legal universe in which there is always a correct answer.¹⁵⁴

Positivist scholars like Ronald Dworkin are not in agreement on how a Judge should fill such gaps wherever they appear. Some believe that since law is the command of the sovereign and the people sovereign within a Democratic Republic, the Judge should make new law in light of what elected representatives would do if confronting a legal or Constitutional gap.¹⁵⁵

Some positivists have contended that Judges should look to “Critical morality” what is justice is not necessarily just? Critical morality becomes the best fall back position in hard cases when legislative intention on the matter is not easily discernible from the historical record.¹⁵⁶ This approach to judicial gap filling is more appropriate in legal systems like the American, that have sought to incorporate general moral principles into positive law through statutory and Constitutional provisions especially invoking them (e.g. “due process”) through longstanding acceptance of Judicial rule revision in light of social changes.¹⁵⁷

Positivist leaning scholars like Herbert L.A.Hart argue that rules are open-textured and judges fill in the gaps left by rules by using their discretion and conclude that there is an inherent, or conceptual, connection between law and morality.¹⁵⁸ Hart argues that language is indeterminate and legal rules are composed of words which aim to communicate the required standards of behaviour. Nevertheless, words are always problematic and imprecise.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Mark J. Osiel Supra Note 149 P. 492.

¹⁵⁶ Ibid., P. 492.

¹⁵⁷ Ibid., P. 492.

¹⁵⁸ Ibid., P. 501.

On the other hand, naturalist leaning scholars like Thomas Aquinas believe that no rule can be legally binding unless it is also morally defensible.¹⁵⁹ They reason that if a substantial portion of society's authoritative rules are inconsistent with the demands of morality. The society could be justifiably said to be lacking a "legal system".¹⁶⁰

Secondly, naturalist Judges believe that in deciding hard cases, it is common practice and socially desirable to look beyond a rule's wording and the specific intention of its authors, to more general moral principles imbedded in the fabric of the legal doctrine.¹⁶¹

In Constitutional cases, Judges are compelled to weigh all the competing principles in light of the factual configuration before the Court, rather than the syllogistic application of pre-existing rules, combined with periodic exercises of discretionary lawmaking.¹⁶² It is instructive to note that rules apply in an all-or-nothing fashion, whereas principles do not.¹⁶³

According to natural school of thought, the law contains an "inner morality", irrespective of the substantive duties it imposes. However, a moral principle becomes a legal principle when it passes the "threshold test" of "fit" and offers a consistent explanation of existing cases and authorities.¹⁶⁴ If and when Judges violate this procedural morality systematically, the law can reach "pitch of wickedness such that a legal system ceases to be capable of being a source of legal rights and duties."¹⁶⁵ At that point, the Judicial Oath to apply the law becomes unintelligible, and the conscientious Judge is disabled from honoring it.¹⁶⁶

¹⁵⁹ Ibid., P. 501.

¹⁶⁰ Ibid., P. 501.

¹⁶¹ Ibid., P. 501.

¹⁶² Ibid., P. 501.

¹⁶³ Ibid., P. 501.

¹⁶⁴ Ibid., P. 502.

¹⁶⁵ Ibid., P. 502.

¹⁶⁶ Ibid., P. 502.

In jurisprudential terms, whenever a Judge is confronted with a legal void or by profoundly unjust “law”, he declares the law to be invalid and that it should not be enforced by a Judge or obeyed by a citizen.¹⁶⁷

Ronald Dworkin has argued that Judges are also informed by “law as integrity” in his thesis he posits that if properly interpreted, doctrinal materials can lead Judges to right answers in every case.¹⁶⁸ He argues that adjudication is essentially an interpretive function and states that a Judge’s own convictions about justice or wise policy are constrained in (their) overall interpretive judgment.¹⁶⁹ According to him, Judges cannot avoid, and indeed regard law as written by a single author, meaning ‘the community personified’, and which expresses ‘a coherent conception of justice and fairness.’¹⁷⁰ Thus, principles are the means whereby adjudication performs its interpretive function: they crystallise the best justification of past decisions, and are the resources Judges employ in ensuring coherence within the narrative of law.¹⁷¹

This theoretical difficulties suggest that Constitutional dilemmas: Firstly, if the theories are formulated in too general terms, this will invite a choice between two competing values, and open up the scope for reasonable Judges to disagree about requirements of the Constitution; however, if the theory is so specific as to remove any judicial discretion, then it is nothing more than the bare a priori assertion of the theorist’s ideology.¹⁷²

Secondly, it is not clear that even more specific theories would inexorably guide Judges to the same result: hence Constitutional theories must be tested in the context of actual adjudication.¹⁷³ It follows that adjudication is better explained in terms of the variety of real pressures and motivations affecting Judges-manifested in the form of asymmetrical

¹⁶⁷ Ibid., P. 502.

¹⁶⁸ Ronald Dworkin, *Law’s Empire* (London. Fontana, 1986) P. 226

¹⁶⁹ Ibid., P. 380.

¹⁷⁰ Ibid., P. 225.

¹⁷¹ Ibid., P. 225.

¹⁷² Gavin Anderson, *Supra Note 1* P. 67.

¹⁷³ Ibid., P. 67.

social and legal relations, thus Constitutional theory is unable to furnish Judges with the means to elaborate a principled jurisprudence that maintains doctrinal coherence.¹⁷⁴

This raises a critical question on whether Constitutional theory, by operating on a general plane, possesses the wherewithal to settle definitively every Constitutional controversy.¹⁷⁵ The challenge then becomes whether legal pluralism's claim that Judges are not only law creating subjects, but that they give a range of doctrinal answers to the same Constitutional issue.¹⁷⁶ Hence, even when we agree that Judges are acting in good faith 'to interpret and deploy legal rules as the argumentative resources ...for their decisions, the disordering influences articulated above does not lead to a coherent rule-based model of adjudication.¹⁷⁷ Thus, some Judges will deploy different argumentative styles in the same case (giving contrary results), sometimes their decisions will be affected by tactical concessions in exchanges with their colleagues, and at other times informed by implicit value-choices—or all three at once¹⁷⁸. This combination of factors affects judicial decision making and tend to refute the idea that Judges, as a collectivity, are motivated by the search for overarching Constitutional principle.¹⁷⁹

It follows that in controversial Constitutional cases a Judge does not resort to the words of others, the drafters of the rules he interprets. Instead, resort is had to the policies and principles at issue, these are flushed out in the open, where they are scrutinized and their evil aims exposed.¹⁸⁰ It follows that when naturalist Judges are faced with controversial cases, they appeal to values that they take to be intrinsic to the rule of law.¹⁸¹ They assume that law presupposes certain values, ones on which Judges can draw to resist oppression even when those values are not enshrined in positive law.¹⁸² In this context,

¹⁷⁴ Ibid., P. 67.

¹⁷⁵ Ibid., P. 68.

¹⁷⁶ Ibid., P. 68.

¹⁷⁷ Ibid., P. 73.

¹⁷⁸ Ibid., P. 73.

¹⁷⁹ Ibid., P. 73.

¹⁸⁰ Mark J. Osiel., *Supra* Note 149 P. 502.

¹⁸¹ Ibid., P. 502.

¹⁸² Ibid., P. 503.

judicial fidelity to the correct view of law will necessarily produce good Judicial decisions even in cases where pertinent positive law is either lacking or is wicked.¹⁸³

Indeed, any reasoning in theory of law must fit the facts because “the life of the law has not been logic: it has been experience”¹⁸⁴ In fact it is futile to attempt to define jurisprudence since laws develop according to needs not the logical implications or definitions.¹⁸⁵

Our assumption on the doctrine of implied jurisprudence is premised on the prior knowledge of the problem of deciding hard cases.¹⁸⁶

It follows that natural law school of thought encourages the Judge to conduct a moral inspection in reaching his or her results and his conception of morality is likely to be powerfully influenced by that prevailing within his or her profession, place and time.¹⁸⁷

Legal realism has profound influence on judicial officers in the United States of America. Realists believe that authoritative legal sources do not necessarily constrain a Judge’s decision making process.¹⁸⁸ The dilemma Judge’s face is that such sources do not compel a single right answer in complex disputes. In most incidences, legal rules, directly applicable to the facts, are either altogether absent or present in such number and variety as to ensure that competent Judges will reach competing results.¹⁸⁹ Hence, recourse to underlying policies and principles is not necessarily a cure. Remember, a “policy” establishes a goal to be reached, generally an improvement in some economic, political or social feature of the community.¹⁹⁰

¹⁸³ Ibid., P. 503.

¹⁸⁴ Dias R.W.M (1985), *Jurisprudence*: Butterworth’s London, P. 10.

¹⁸⁵ Ibid., P. 10, arguments by Sir Ivor Jennings “the task which many writers on Jurisprudence attempt to fulfill in defining law is a futile one.”

¹⁸⁶ Ibid., P. 11.

¹⁸⁷ Mark J. Osiel Supra Note 149 P. 503.

¹⁸⁸ Ibid., P. 504.

¹⁸⁹ Ibid., P. 504.

¹⁹⁰ Dworkin Ronald, [1978], *Taking Rights seriously Cambridge*: Harvard University Press; P. 22-28 and 71- 80.

Further more, principles and policies are subject to the individual perceptions and prejudices, for instance, if the Judge is a positivist, he can find a fact of positive law supporting whatever conclusion he wishes to reach.¹⁹¹ If he is a naturalist, he can discover a moral principle embedded in the law that allows the same.¹⁹² If he is an avowed realist, he can unearth a social policy that justifies his desired result.¹⁹³

In this context, the realists have offered guidance to Judges in deciding hard cases by way of their affinity for kindred versions of pragmatism, utilitarianism and sociological jurisprudence.¹⁹⁴ This form of reasoning has counseled judicial attention to consequences of their decisions on societal welfare and, hence, to the evolving doctrine of implied jurisprudence.

This thesis has postulated that Judges do not operate in a vacuum they are part and parcel of the socio – economic and political environment. In view of this inherent predicament, and the actual social and political terrain in which Judges have to maneuver, what theory informs them is not easily discernible.¹⁹⁵

In analyzing the concept of adjudication, it is good to appreciate the reality that Judges sometimes act for a variety of reasons.¹⁹⁶ For example, lower Court Judges may be motivated in a particular judgment by a genuine belief that they are following legitimate precedent, or to avoid criticism by fellow Judges or the legal fraternity in general or to avoid being overturned on appeal, and for Court of Appeal Judges fear of the reaction from the executive, legislature and the public¹⁹⁷ from a social context if the issues are emotive.

For example Marxists may argue that law is a “super structural” phenomenon that is mysteriously governed and determined by an underlying “base” of economic relations

¹⁹¹ Mark J. Osiel *Supra* Note 149 P. 505.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, P. 506.

¹⁹⁵ *Ibid.*, P. 509.

¹⁹⁶ Gavin Anderson, *Supra* Note 1 P. 57.

¹⁹⁷ *Ibid.*, P. 57.

and/or instrumentally controlled by the ruling elite or class.¹⁹⁸ However, the law is not simply an armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as it is constituted, shapes as well as it is shaped.¹⁹⁹ Indeed, the law consist, of people-made decisions and doctrines, and the thought processes and modes of reconciling conflicting considerations of these people (Judges) are not mystical, inevitable, or very different from the rest of ours.²⁰⁰

It follows that Judges are not robots that are - or need to be - mysteriously or conspiratorially controlled.²⁰¹ Rather, they, like the rest of us, form values and prioritize conflicting considerations based on their experience, socialization, political perspective, self – perceptions, hopes, fears, and a variety of other factors.²⁰²

In this context their reasoning is not random or arbitrary; their particular backgrounds, socialization, and experiences i.e. the law schools they attended and the level of practice of law by counsel, play an important role resulting in a patterning, a constituency, in the ways they categorize, approach and resolve difficult social, economic and political conflicts.²⁰³

In highly politicized society like the USA²⁰⁴, Judges cannot divorce themselves from politics. Their thinking and perceptions are patterned by the dominant values in the society. In the circumstances, Judges find themselves confirming legal rationalizations for their choices or adopt whatever seems easiest or least controversial, which often involves ignoring or distorting contrary arguments, authorities, facts or social realities.²⁰⁵

¹⁹⁸ David Kairys: (2003), The Politics of Law: A Progressive Critique, (New York) P. 7.

¹⁹⁹ *Ibid.*, P. 7.

²⁰⁰ *Ibid.*, P. 7.

²⁰¹ *Ibid.*, P. 7.

²⁰² *Ibid.*, P. 7.

²⁰³ *Ibid.*, P. 7.

²⁰⁴ United States Department of Labor, Office of Administrative Law Judges, www.oali.dol.gov in adjudicating on Longshore and Harbor Worker's Compensation Act April 16th, 2002 (2002 Revision) Witness testimony P. 2-4.

²⁰⁵ David Kairys: *Supra* Note 143 P. 9.

Judges are mostly influenced by the prevalent culture in their daily lives, their associations, their self – perceptions, and the world around them.²⁰⁶ They sometimes feel constraints such as a moral hesitance to do what they think is expected of them, or as a fear that doing the right thing might be embarrassing to them or to the Courts or the institutions.²⁰⁷ Many times the decisions the Judges make have little or nothing to do with the law or the dictates of logic of any underlying social or economic system.²⁰⁸

The important role Judges play in interpreting the law was underscored by Justice Jackson who stated:

“With all its defects, delays and inconveniences ...unless the Executive be under the law, and that the law is made by parliamentary deliberations...such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up.”²⁰⁹

Some scholars might question the rationale of applying rigid clauses reasoning that the dead hand of those provisions need not have bound the living.²¹⁰ A Judge therefore becomes an independent umpire who gives sober consideration and reweighs competing values. The Constitution, therefore becomes good for all times and not just for some times, it resists to pressure and stands the test of time.²¹¹

Globalization has tremendous influence on Judges. The world has become a village, judicial decisions by the supreme Courts in South Africa, India, Germany, and U.S.A can be accessed world wide through Internet almost instantaneously.²¹² Some Judges are informed by European and American thought and experience. These countries’ legal philosophy was informed by great philosophers like Aristotle, Cicero, Montesquieu, Locke, Hume, Kant and Weber among other thinkers.²¹³

²⁰⁶ Ibid., P. 9.

²⁰⁷ Ibid., P. 9.

²⁰⁸ Ibid., P. 9.

²⁰⁹ William W. V. Alstyn: The Idea of Constitution as Hard Law: [1987] 2 Journal of legal education P. 183.

²¹⁰ Ibid., P. 183.

²¹¹ Ibid., P. 183.

²¹² Muna Ndulo. The Democratic State in Africa. The Challenges of Institutional Building Black Law Journal 1998 P. 8-9.

²¹³ Bruce Ackerman, Constitutional Politics/Constitutional Law: 99 Yale Law Journal 453.

Regrettably, Judges have not built up a genuinely distinctive pattern of Constitutional thought and practice on how to handle Constitutional and other politically sensitive cases.²¹⁴ Chief justice Hughes once argued that justices cannot strictly look upon rules of article five in a legalistic way instead; he declared that the central issues in the *Kansans* case raised “political questions” most appropriately resolved by the political branches, not by Judges²¹⁵ who are conscious of their duty and fidelity to the law.²¹⁶ For the first time in 150 years, the Court was admitting that Constitutional text has to be viewed in light of its best interpretation of their underlying principles and giving them normal judicial effect to these textual interpretations.²¹⁷ The pertinent question is whether Judges will continue to remain deaf to the voices of their Constitutional past or not.²¹⁸

When confronted with a controversial case, a Judge may, evade it or decide to resolve it.²¹⁹ It is always a good thing to breathe new life into the living Constitution instead of giving it a restricted view.²²⁰ For instance, it would be erroneous to assume that the equality protection clause would never have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a combining of the two races upon terms unsatisfactory to either.²²¹ On whether or not Judges should legislate where there is no law, Lord Reid had this to say:

“There was a time when it was almost indecent to suggest that Judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s “cave there is hidden the common law all its splendor and that on a Judge’s appointment there descends on him knowledge of magic words open ... Bad decisions are given when the Judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more ... so we must accept the facts that for better or for worse Judges do make law, and tackle the question how do they approach their task and how should they approach it ...”²²²

²¹⁴ *Ibid.*, P. 454.

²¹⁵ *Ibid.*, P. 455.

²¹⁶ *Ibid.*, P. 494.

²¹⁷ *Ibid.*, P. 497.

²¹⁸ *Ibid.*, P. 498.

²¹⁹ *Ibid.*, P. 516.

²²⁰ *Ibid.*, P. 531.

²²¹ *Ibid.*, P. 531.

²²² Lord Reid, *The Judge as Law maker*, [1972] London P. 7.

1.3.2 Parallels from the ancient decision in the Bible by King Solomon

Controversial cases have always appeared from antiquity. It may be a social, political or cultural issue that is emotive in nature or raises issues that are deeply entrenched in the society. It is in this historical context that we discuss the prostitute's case as indicated hereunder:

This case in the bible was decided by King Solomon and illustrates the dilemmas judicial officers face in deciding hard cases.²²³ To appreciate it fully, it's replicated verbatim. Now two prostitutes came to the King and stood before him. One of them said, "My Lord, this woman and I live in the same house. I had a baby while she was there with me. The third day after my child was born; this woman also had a baby. We were alone; there was no-one in the house but the two of us.

"During the night this woman's son died because she lay on him. So she got up in the middle of the night and took my son from my side while I your servant was asleep. She put him by her breast and put her dead son by my breast. The next morning, I got up to nurse my son – and he was dead! But when I looked at him closely in the morning light, I saw that it wasn't the son I had borne."

The other woman said, "No! The living one is my son; the dead one is yours." But the first one insisted "But the dead one is yours; the living one is mine." And so they argued before the king.

The king said, "Bring me a sword." So they brought a sword for the king. He then gave an order: "Cut the living child in two and give half to one and half to the other."

²²³ Holy Bible, New International Version (N.I. V.)^{1st} Kings 3:16-28

The woman whose son was alive was filled with compassion for her son and said to the King, "Please my Lord, and give her the living baby! Don't kill him!"

But the other said, "Neither I nor you shall have him. Cut him into two!" Then the King gave his ruling: "Give the living baby to first woman. Do not kill him; she is his mother." When all Israel heard the verdict the King had given, they held the King in awe, because they saw that he had wisdom from God to administer justice.

This was a very difficult case but King Solomon made a ruling that was applauded in the whole of Israel as fair and just although it was not premised on any law, rule, precedent or practice.

It is instructive to note that most western values of liberalism have been informed by Mosaic and Christian values and practices as the main underpinning principles of modern civilization.²²⁴

1.4 How Judges use discretion in deciding difficult cases

Law and rules connote similar meaning in Common Law, Civil Law and Roman- Dutch Law jurisdictions. Rules connote straight lines and law enjoys considerable degree of universality. Hence, decisions according to the law run in a predictable, straight path. Conversely, discretion invokes an image of unpredictable tangents. The discretionary line curves and weaves; its course depends on who is drawing it.²²⁵

The pertinent questions that arise include: what is the relationship between law as following rules and the discretionary power to depart from the straight and narrow? H. L. A. Hart has developed an entire theory of law on the basis of distinction between primary and secondary rules. Primary rules, such as the rules of criminal and tort Law, impose rights and duties directly on citizens; secondary rules provide the means of incorporation, contract making, legislation and adjudication that generate the primary rights and

²²⁴ Kenya Gazette Supplement No. 63 of 2005 the preamble to the Proposed Constitution recognizes God

²²⁵ George Fletcher P, (1996), Basic Concepts of Legal Thought: Oxford University Press,(Oxford) P.43.

duties.²²⁶ For instance, the primary rule of contract law is that the seller must deliver certain goods of certain kind and grade and on a certain price.²²⁷

Hart distinguishes between primary rules enacted by a legislative body and rules that establish a legislative body, define its competence, and specify the procedure for enacting a Law.²²⁸ The secondary rules of legislation resemble the rules for making contracts. They empower people to change their legal relationships. A contract changes a legal relationship by generating new primary rights and duties. Legislation also changes legal relationship by imposing new duties on individuals to conform their conduct to statute.²²⁹ Judging is a difficult exercise as it requires sensitivity to the possibility of interpreting a rule broadly or narrowly, applying it as in analogous cases or recognizing an exception in view of the special circumstances of the case.²³⁰ A Judge's personality has a powerful influence on the growth and development of the law.

H.L.A Hart has tried to solve the problem between rules and decisions by distinguishing between the clear or core cases of wale's applications and the penumbra of "open texture" that surrounds the core.²³¹ When a case arises in a rule "open texture", there is nothing a Judge can do but make "a choice" or "exercise discretion" in fashioning the best solution under the circumstances.²³²

Hart relies on the example of municipal ordinance forbidding "taking Vehicles into the city park".²³³ The problem arises when deciding what a vehicle is. A motor driven car or moped clearly is baby carriages and roller skates are problematic. The Judge hearing the case will have to reflect upon the point of the statute before deciding whether the rule is violated.²³⁴

²²⁶ Ibid., P. 44.

²²⁷ Ibid., P. 44.

²²⁸ Ibid., P. 44.

²²⁹ Ibid., P. 44.

²³⁰ Ibid., P. 48.

²³¹ Ibid., P. 48.

²³² Ibid., P. 48.

²³³ Ibid., P. 48.

²³⁴ Ibid., P. 49 in *School Board of Nassau County Vs. Arline* the US Supreme Court had to decide whether

In unravelling this apparent ambiguity, how should the Courts decide whether someone stricken with tuberculosis qualities is handicapped? In a wider sense, Judges have to bring to bear their wisdom or discretion in interpreting the law. The Judge has to choose the best means suited to the circumstances of the case.²³⁵ Discretionary decisions unlike decisions on the law are not subjected to appeal no matter how wrong or unreasonable they are.²³⁶

In reality, Judges end up deciding cases according to the best available arguments.²³⁷ However, this does not give the Judge a *tabula rasa* or discretion is not a prerogative because judicial decisions should both be under the law and expressive of the Judges good Judgement.²³⁸

In jurisprudence, (politics Greek – polis) is dirty whereas policies (Greek – politicus) is clean.²³⁹ Modern jurisprudence is shifting emphasis from politics to policies i.e. deterrence in criminal law, risk distribution in the law of torts, and promoting trade in the law of commercial transactions.²⁴⁰

Professor Dworkin has contended that a duty to find the correct result displaces a Judge's discretion.²⁴¹ He argues that however difficult an intellectual inquiry, the duty to find the truth renders an inquiry non-discretionary. When the issues are ascertained like guilt or innocence, the decision is not a matter of choice or discretion.²⁴² Dworkin proceeds to argue that an ideal Court would not try to figure out how the framers would have answered a particular Constitutional issue; it would develop and apply "a full political theory that justifies the Constitution as a whole."²⁴³

suffering from tuberculosis was a handicap within the meaning of Federal Rehabilitation Act of [1973].

²³⁵ Ibid., P. 49.

²³⁶ Ibid., P. 50.

²³⁷ Ibid., P. 52.

²³⁸ Ibid., P. 52.

²³⁹ Ibid., P. 52.

²⁴⁰ Ibid., P. 52.

²⁴¹ Ibid., P. 55.

²⁴² Ibid., P. 56.

²⁴³ Dworkin Ronald, Contemporary Jurisprudence, Edited by Marshall Cohen (Duckworth) P. 106.

It can plausibly be argued that Judges, because of their training and the manner in which contentious information is presented in the Legal process and better able to decide whether behaviour accords with accepted standards than to weigh instrumental justifications cast in terms of future consequences.²⁴⁴

Professor Dworkin has argued that sometimes we use the term in a different weak sense, to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official. In a stronger sense “discretion” is used to connote that an official is simply not bound by standards set by the authority in question.²⁴⁵

Judges invoke discretion in cases which they are legally entitled to decide and in which no one correct decision is determined by standards of law.²⁴⁶ When referring to such standards in their Judgements the Court quite clearly do so not because they are part of the law but because the law makes it its business to recognise and give support to a certain extent, to standards of other organisation communities or individuals.²⁴⁷

In coming to various conclusions, the Courts give various reasons to justify their decisions for all intents and purposes these reasons justify their decisions. It follows that these reasons become part of the law and are in one way or another reflection of the prevalent attitudes in that community.²⁴⁸

In situations where the Judges are interpreting principles, rules or norms which are in a language that is vague, then discretion comes in to fill the gaps to enable the Courts render Judgement. Judges give weight to rules which are precise and easily ascertained unlike principles which are relative and therefore warranting judicial interventions through discretion.²⁴⁹

²⁴⁴ Ibid., P. 108.

²⁴⁵ Ibid., P. 73.

²⁴⁶ Ibid., P. 74.

²⁴⁷ Ibid., P. 74.

²⁴⁸ Ibid., P. 74.

²⁴⁹ Ibid., P. 75.

In essence, legal principles do not exclude judicial discretion; they presuppose its existence and direct and guide it. We have also seen that discretion does not allow Judges to act arbitrarily. The Judges are still bound by their oath of office of fidelity to the law. Even in situations where discretion is not limited or guided in any specific direction the Courts are still legally bound to act as they think is best according to their beliefs and values.²⁵⁰ If they do not, and if they give arbitrary Judgement by tossing a coin, for example, they violate a legal duty.

A Judge must always invoke some general reasons he has no discretion when the reasons are dictated by law. He has discretion when the law required him to act on reasons which he thinks are correct, instead of imposing its own standards. When discretion is denied the law dictates which standards should be applied by all the Judges. When discretion is allowed each Judge is entitled to follow different reasons but he must believe that they are the best. Without checks and balances by the law, discretion is synonymous with arbitrariness, whim and caprice.²⁵¹

Unlike laws and rules which are enacted by the legislature or administrative authorities, principles can be made into law or lose their legal status through judicial precedent. Principles cannot be made into law by a single Judgement; they evolve rather like a custom and are binding only if they have considerable authoritative support in a line of Judgement which counts as authority for their existence. All has to be shown is that they underlie a series of Court's decisions that they were in fact a reason operating in a series of cases.²⁵²

1.4.1 How principles and policies guide Judges in deciding difficult cases

In difficult cases, Judges typically attempt to implement the values reflected in the legal system.²⁵³ Ordinarily s/he will be unable to distinguish his/her own personal views of the

²⁵⁰ Ibid., P. 76.

²⁵¹ Ibid., P. 77.

²⁵² Ibid., P. 77.

²⁵³ Ibid., P. 112.

right result in difficult cases from the view s/he believes is to be had from considerations of legal values. But a Judge is often warranted in drawing from non legal sources to resolve issues of moral rightness and social welfare, and sometimes these may outweigh what s/he thinks are the contrary implications of a fine weighing of all “legal” values.²⁵⁴ When existing Legal standards point in one direction and the Judges’ sense of moral rightness and social welfare in another, what factors are relevant to deciding which course to take?

Ultimately, cases not covered by the law might nevertheless be decided according to law, since they could be decided by reference to the conception of justice on which the rules are based.²⁵⁵ Judges, lawyers and legal scholars assume that statutes and cases rest on a coherent conception of justice. They should assume that underlying the established rules are certain general principles which may be un-stated but which are nevertheless apart of the existing law.²⁵⁶ The law is, on this account not just along list of established rules, but a body of rules together with a wider conception of justice that they embody.

According to Professor Dworkin, arguments of principle “justify a political decision by showing that the decision respects or secures some individual or group right.”²⁵⁷ It follows that arguments of policy justify a political decision by showing that the decision advances or projects some collective goal of the community as a whole.²⁵⁸ Indeed, policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account.²⁵⁹

The grey side of this postulate is that arguments of principle do not often rest “on assumptions about the nature and intensity of the different demands and concerns

²⁵⁴ Ibid., P. 112.

²⁵⁵ Simmonds, N.E (1986) Central Issues in Jurisprudence: Justice, Law and Rights. Sweet & Maxwell (London) P. 7 see also P. 97-99.

²⁵⁶ Ibid., P. 115-117.

²⁵⁷ Dworkin R. *Supra* Note 168 P. 88.

²⁵⁸ Ibid., P. 88.

²⁵⁹ Ibid., P. 88.

distributed throughout the community”, and a Judge “insulated from the demands of the political majority” may be better placed to evaluate the opposing arguments and the person who loses in such a case on the basis of principle has no complaint of unfair surprise.²⁶⁰

It is instructive to note that principles are consistent and they obligate Judges to decide similar cases alike and to base particular decisions on reasons they would be willing to apply to other cases that the reasons cover. On the contrary, decisions based on policy may require consistency. For instance, policy on unequal distribution or a subsidy to an aircraft manufacture need not be generalised to all companies or firms.²⁶¹

From the forgoing arguments, we have seen that law is a principle instrument through which society seeks to exercise its control and social change. In this context, “every legal system” stands in a close relationship to the ideas, aims, and purposes of society. Law reflects intellectual, social, economic and political climate of its time. It also reflects the particular ideas, ideals, and ideologies which are part of the distinct. “Legal Culture” Justice Oliver Wendell Holmes once stated:²⁶²

“The life of law has not been logic: it has been experience. The fact, necessities of time, the preference moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which the Judges share with their fellow-men have had a good deal more to do with the syllogism in determining the rules by which men/women should be governed.”

The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.²⁶³ Law and rules therefore become abstract terms and any scholar or Judge is at liberty to infer the reasonable meaning of law as:

“A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the Courts if its authority is challenged...”²⁶⁴

²⁶⁰ Ibid., P. 89.

²⁶¹ Ibid., P. 89.

²⁶² Steven Vago, Law and Society, Saint Louis University Prentice – Hall [1981] P.1.

²⁶³ Ibid., P. 7.

²⁶⁴ Ibid., P. 157.

Professor Malinowski has concluded that:

“The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force, based... upon mutual dependence and realised in the equivalent arrangement of reciprocal services...”²⁶⁵

Dworkin has tried to argue that Judges must only consider arguments of principle and not arguments of policy.²⁶⁶ Decisions based on policy must meet minimum criteria:²⁶⁷

- a) They must be rational;
- b) They must not violate independent rights;
- c) They must not be used as a cover for discrimination against weak or unpopular groups;
- d) They must not impose excessive burdens on particular sections of the community.

Dworkin’s proposition suffers from one inherent weakness. It assumes that when Courts decide a case under statute, it is enforcing whatever policy the statute embodies. Dworkin assumes that the law is a seamless web, every part of which is connected to every other part – any policy that is part of the justification for any statute becomes relevant to the decision of all legal questions, including common-law questions.²⁶⁸ Hence, in reality the distinction between principle and policy is very minimal.

In conclusion, we have noted that Dworkin is right when he states that:

“Principle is a principle of law if it figures in the soundest theory that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question.”²⁶⁹

Whenever, a Judge is confronted with a difficult Constitutional Case, he must first develop a “full political theory that justifies the Constitution as a whole.”²⁷⁰ in situations

²⁶⁵ Ibid., P. 7.

²⁶⁶ Dworkin R. Supra Note 243 P. 132.

²⁶⁷ Ibid., 133.

²⁶⁸ Ibid., P. 40.

²⁶⁹ Ibid., P. 11.

²⁷⁰ Ibid., P. 11.

where several political theories satisfy this test, he must refer to other Constitutional rules and settled practises under the rules to select the theory that “provides a smother fit with the Constitutional scheme as a whole, such theory takes account of the shape of a complex set of principles and policies that justify that scheme of government,” and by reference to which he is now able to decide the difficult Constitutional issues in the case before him.²⁷¹ The same process seems to apply in cases involving statutes and the common law. The Judge has to “construct a scheme of abstract and concrete principles that provide a coherent justification for all common law precedents and, so far as these are to be justified on principle, Constitutional and statutory provisions as well.”²⁷² It follows that Judges play a more important role than legislators in broadening and expanding the law where there is none.

1.5 Legal reasoning and Coherence in deciding difficult cases

Legal reasoning in judicial deliberations is highly technical and institutionalized. The scope of this thesis does not allow us to explore every detail of legal reasoning. The subject of legal reasoning appears to occupy the more practical end of the spectrum of jurisprudential theorising.²⁷³ Surely if anything matters in our attempts to understand law, it matters how Judges do and/or should decide cases, and that we have an account which adequately explains and can perhaps be used to guide their activities. History of legal philosophy abounds with many and various attempts to address these issues and others which have been viewed as falling within the ambit of legal reasoning. Is legal reasoning an activity which is exclusive to the adjudicative institutions of legal systems or is any reasoning about the law to be regarded as legal reasoning, no matter where or by whom it is undertaken?²⁷⁴ Does legal reasoning take on a special character when it is undertaken in Courts and by Judges? Are there special methods or modes of reasoning which are unique to or at least distinctive of the law, or is legal reasoning just like reasoning in any

²⁷¹ Ibid., P. 11.

²⁷² Ibid., P. 11.

²⁷³ Professor Julie. Dickson, Interpretation and Coherence in Legal Reasoning. The Stanford Encyclopedia of Philosophy, (Fall 2005 Edition), P. 4.

²⁷⁴ Ibid., P. 4.

other sphere of human activity, distinctive only in the subject matter to which it is applied?²⁷⁵

Throughout, this thesis focuses upon the role which interpretation and coherence play within legal reasoning, and the reasons why these concepts are regarded by some as being distinctive of reasoning about the law²⁷⁶.

It follows that this thesis will be incomplete without an appreciation of logical reasoning in difficult cases.²⁷⁷ We are particularly interested in the concept of Legal reasoning and its relationship with valid law and the various constraints that undermine this concept.

Legal reasoning has assumed universal application. The principle of formal justice demands the observance of “ a rule which lays down the obligation to treat in a certain way all persons who belong to a given category”²⁷⁸ it is a standard requirement that the legal Judgement follows logically from the rule. However, it could be erroneous to assume that legal justification consist solely in deduction from given norms. Hence, sometimes in more complex cases, Judges are forced to draw inferences which cannot be inferred from any statute.²⁷⁹ The Court is compelled to look for external justifications outside statute to justify their decisions.²⁸⁰

External justifications may be classified into six categories: The first task of a theory of external justification is logical analysis of the argument forms brought together by different view points.²⁸¹ Argument forms variously presuppose statements about particular facts, about individual actions, motives of agents, events or states of affairs.²⁸²

²⁷⁵ Ibid., P. 4.

²⁷⁶ Ibid., P. 5.

²⁷⁷ Wroble Wski J., Legal Syllogism and Rationality of Judicial Decisions (Brussels) [1974] P. 220.

²⁷⁸ Ibid., P. 222.

²⁷⁹ Ibid., P. 228.

²⁸⁰ Ibid., P. 230.

²⁸¹ Ibid., P. 232.

²⁸² Ibid., P. 232.

The statements may be informed by different fields of knowledge such as economics, sociology, psychology, medicine, linguistics or culture.²⁸³ Empirical knowledge is critical to legal reasoning since in most legal disputes it is the appreciation of facts which plays a decisive role.²⁸⁴

1.6 Conclusion

We have demonstrated that arguments which give expression to a link with actual words of the law, or the will of the historical Legislator, take precedence over other arguments, unless rational grounds can be cited for granting precedence to the other arguments.²⁸⁵

We have also shown that determination of the relative weight of different arguments must conform to weighting rules. Such rules are given purposive interpretation with the contexts of certain branches of law.²⁸⁶

In a word, we have realised that although the canons do not offer a guarantee of finding one right answer... with a relatively high degree of certainty, they are nevertheless more than mere instruments for secondary legitimating of a decision which can be reached and justified in alternative ways.²⁸⁷

This Chapter has explored the evolution of the doctrine of implied jurisprudence and how it has developed its distinct characteristics like due process, rule of law, right to privacy, and : “the Jurisprudence of Original Intent” all of which have no express provision in the Constitution. When the law is inadequate, the Courts resort to legal pluralism, principles; issues and policies outside the realm of Law and the role legal reasoning has played in the adjudication of cases.

²⁸³ *Ibid.*, P. 232.

²⁸⁴ *Ibid.*, P. 233.

²⁸⁵ *Ibid.*, P. 248.

²⁸⁶ *Ibid.*, P. 249.

²⁸⁷ *Ibid.*, P. 250.

CHAPTER TWO: The Trans-National character of the doctrine of implied jurisprudence

2.0 Introduction

This Chapter deals with the various dimensions and manifestations the doctrine of implied jurisprudence has assumed in different countries and jurisdictions. It traces the principles it has created which have gained universal application through the doctrine of trans-national jurisprudence. It also analyses the various approaches employed by judges in the adjudication of politically controversial cases.

2.1 The Universality of the doctrine of implied jurisprudence²⁸⁸

As we have seen in the preceding sections; the judicial profession is a noble one, demanding learning and scholarship in the law and legal rules, knowledge of social and economic conditions, intimate understanding of human nature, deep and profound sensitivity to and compassion for human suffering, and capacity for converting the rhetoric of human rights into reality.²⁸⁹

Judges must innovate, change and become a continuing vehicle for adopting law to justice. Judges must, while interpreting the Constitution and the law, constantly remind themselves that their interpretations must carry out the great purpose and end of the law, namely, justice, which is a fundamental imperative under the Constitution of every country.²⁹⁰

The Constitution and the law are universal concepts and unless they are interpreted purposefully to give meaning to people's interests, then the people will lose respect for the law, and the credibility of the judicial process will be seriously eroded.²⁹¹

²⁸⁸ Ronald Dworkin *Supra* Note 168 in chapter 7.

²⁸⁹ Bhagwati P.N. C. J. *The Courtroom as Temple of Justice*, (a paper given to Supreme Court justices of Guatemala at the Judicial School May, 2004 P. 23

²⁹⁰ *Ibid.*, P. 24.

²⁹¹ *Githunguri Vs. R. Misc. Appeal No. 271 of 1985* & Justice Madan opined that people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights. "The people know and believe that to destroy the rule of law is to destroy justice, thereby also destroying the society. Justice

The Constitution is the yardstick and the beacon against which ordinary law and other rules and regulations are tested.²⁹² The Constitution is the parent and supreme law of the land in most countries and any law that is not consistent with it is void to the extent of the inconsistency.²⁹³

The Constitutional Court of South Africa has applied implied jurisprudence to enforce the Bill of rights to Juristic persons.²⁹⁴ The Court stated:

“Many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect must be afforded to the media which are often owned or controlled by juristic persons...the text of Section 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a Court in determining “whether a particular right is available to such person or not”²⁹⁵

The Court continued:

“When interpreting any legislation, and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights”²⁹⁶

The rationale behind these general provisions is that the Constitution and statutory interpretation must positively promote universal values like the Bill of Rights unless a contrary intention is established. Indeed, the articulation of women rights as part of International human rights law has more to do with the doctrine of implied jurisprudence.²⁹⁷ Human rights have become universal in their scope and application

of any other kind would be as shocking as the crime itself.”

²⁹² Dr. Waal *et al.* The Bill of Rights Handbook, 3rd Edition Kenwyn Juta & Co. [2000] P. 32.

²⁹³ The Constitution of Kenya, (2001) Revised (1998) Section (3).

²⁹⁴ Ex parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of Republic of South Africa. [1996] (4) SA 444 (cc).

²⁹⁵ Ibid. at paragraph 57 however, the Court took note that the nature of some fundamental rights prevents them from benefiting juristic persons. The rights to life and physical integrity, for example, cannot claim protection of the right to life or the right not to be tortured simply because these rights protect aspects of human existence which a company does not possess. But a company can enjoy the right to equality (Sec. 8), privacy (Sec. 14) freedom of expression (Sec. 16) freedom of association (Sec. 18) Property rights (Sec. 25) etc.

²⁹⁶ Section 39 (2) of the South African Constitution [1996].

²⁹⁷ Dr. Radhika Coomaraswamy: Reinventing International Law: Women's rights as Human Rights Commonwealth Law Bulletin. July and October, (1997) P. 1250.

through purposeful interpretation of the Law by the Courts. It is an acknowledged fact that human rights and their postulates such as equal dignity of human beings resonate in all the cultural traditions of the world.²⁹⁸

In this context, there is sufficient basis to apply them in every cultural tradition of the World.²⁹⁹ Thus, the Courts have always held that human rights discourse has resonance in the everyday experiences of individuals.³⁰⁰ This explains why human rights have developed so dynamically and have become used by so many different groups throughout the world, having been informed by diverse spiritual and cultural experiences.³⁰¹

The Courts have revolutionalized women's rights issues and catapulted them into mainstream human rights through broad and purposeful interpretation of the Law.³⁰² By its very nature, jurisprudence is a discipline whose province has been determined from time to time. But for our thesis, the delimitation of our topic is limited to the issue of implied jurisprudence.

Sociological jurisprudence helps the doctrine to move away from strict rules of law (formalism) and explaining how the rules actually work the Courts attempt to isolate and define the role Law plays in society.³⁰³

Judges informed by sociological jurisprudence look at the society as a whole, and sees law as one institution used by society to help that society fulfil the needs and aspirations of individuals.³⁰⁴ For Roscoe Pound, Law is a form of social engineering, producing a balance between weighted interests - Judges balance these interests in their decisions, using "jural postulates" to attach appropriate weight to the interests in times of conflict.³⁰⁵ In Britain, Judges are informed by Constitutional conventions which connote rules and

²⁹⁸ Ibid., P. 1251.

²⁹⁹ Ibid., P. 1251.

³⁰⁰ Ibid., P. 1251.

³⁰¹ Ibid., P. 1251.

³⁰² Ibid., P. 1252 and 1260.

³⁰³ Rowel Genn, Jurisprudence and Legal Theory op. cit. P. 70

³⁰⁴ Ibid., P. 70.

³⁰⁵ Ibid., P. 71.

practices that are not to be found in the formal sources of law but which are nevertheless habitually obeyed and generally regarded as binding.³⁰⁶

Further, the Courts in England are obligated to apply Community Law. The Courts give effect to community law even if it's incompatible with the national law of a state including the Constitution.³⁰⁷ The Courts have recognised the doctrine of primacy and supremacy of European Community law.³⁰⁸

The upshot of this argument is that the doctrine has received universal application in both civil and common law jurisdictions.

2.2.1 The trans-national character of implied jurisprudence

The doctrine of trans-national jurisprudence is viewed in contradistinction with the doctrine of nationalist jurisprudence' Professor Harold Hongju Koh, Dean of Law at Yale University, has stated:³⁰⁹

“... (T)he last supreme Court Term confirms that two distinct approaches now uncomfortably coexist within our supreme Court's global Jurisprudence.³¹⁰

The first is a 'nationalist jurisprudence' exemplified by the opinions of justices Scalia and Clarence Thomas. That jurisprudence is characterised by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to community or international law as meaningful constraints on national prerogatives this line of cases largely refuses to look beyond US national interests when assessing the legality of extra territorial action as illustrated hereunder:

“[It] dismiss(es) treaty or customary International Law rules as meaningful constraints upon US actions ... when advised of foreign legal precedents, these Judges' decisions have treated them as irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty.”³¹¹

³⁰⁶ Prof. Panel J. Introduction, Basic principles of the Constitution of the United Kingdom 1990 Vol. 8 (2) London P. 29 Paragraph. 19.

³⁰⁷ Ibid., P. 33 paragraph 23.

³⁰⁸ Ibid., paragraph 24.

³⁰⁹ Harold Hongju Koh, International Journal of Constitutional Law 556 [2004].

³¹⁰ Harold Hongju Koh, American exceptionalism 55 Stanford Law Review 1479 at 1513- 1515.

³¹¹ *Foster Vs. Florida* 537 US 9990, 99n (2002) Thomas J. concurring in denial of certiorari “[T] his

International Law is being applied in areas of pollution, genocide, trade, racial and gender discrimination. This concept of trans-national jurisprudence has gained impetus and intellectual boost by the Hon. Justice Michael Kirby (AC) CMG (Australia) and Judge Luzuus Wildhaber, President of the European Court of Human Rights.³¹² In most jurisdictions, Judges have long utilised universally recognised principles of international law to inform themselves in the performance and discharge of their own municipal duties.³¹³ Hence, Judges resort to decisions in other jurisdictions in resolving any ambiguities in their own Constitutional or statutory texts.³¹⁴

It is now trite law in most final Courts of the World that their judicial decisions are increasingly a dialogue between international law and Constitutional law, recognising the fact that, in this century the two systems of law must live and work together. This is best illustrated by the dissenting opinion of Justice Stephen Breyer who stated:

“Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own... but their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent government entity”³¹⁵

The former Chief Justice Rehnquist of the USA has stated:

“But now that Constitutional law is solidly grounded in so many countries, it is time that the United States Courts begin looking to the decisions of other Constitutional Courts to aid in their own deliberative process.”³¹⁶

In 2002, there was a watershed case in the USA which invoked the doctrine of trans-national jurisprudence.³¹⁷ The question that arose was whether it was contrary to the provisions of the Eighth Amendment of the United States Constitution, forbidding cruel

Court... should not impose foreign moods, fads or fashions on Americans”}.

³¹² *Dietrich The Queen* [1992] 177 CLR 292 at 305, 353-360.

³¹³ *Chung chi Cheung Vs. the King* [1939] AC 160 at 167-168, it is now standard practice for most Courts to apply the Bangalore principles on the Domestic application of the International Human Rights Norms.

³¹⁴ Professor Hilary Charlesworth, Madeleine Chaim, Devika Hovell and Professor George Williams: *Sydney Law Review*, [2003] 423 at 461-463.

³¹⁵ *Printz Vs. The United States* 521 US 898 at 921 n. 11, 977 [1977].

³¹⁶ W.H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989) reprinted in P. Kirchhof and D.P. Connors (Eds.) *German and its Basic Law*, 411 at 412.

³¹⁷ *Atkins Vs. Virginia*, 536 US 304 [2002]; 70 USLW4585.

and unusual punishments, to execute a convicted prisoner with established mental retardation. The Court took note of the fact that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”³¹⁸

This doctrine has gained currency and recognition throughout the Globe. Justice Ruth Bader Ginsburg has raised a pertinent question;

“[W]e’re part of the world and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbour to the North, Canada, has the European union, South Africa and they have all approved this kind of, they call it positive discrimination ... [t]hey have rejected what you recited as the ills that follow this. Should we shut that from our view at all or should we consider what Judges in other places have said on this subject?”³¹⁹

Justice Ginsburg concluded her opinion by stating:

“[t]he Court’s observation that race-conscious programs must have a logical end point’ accords with the international understanding of the... affirmative action”.³²⁰

Justices have embraced the concept of trans-national jurisprudence without any apologies. The Supreme Court of the United States cited with approval the decision of the European Court of Human Rights.³²¹ Justice Kennedy reading the Court’s decision stated:

“To the extent *Bowers* relied on values we share with a wider civilisation, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon V. the United Kingdom* ..., *Modinos Vs. Cyprus* ..., [and] *Norris V. Ireland* ... other countries too have taken action consistent with an affirmation of the adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries...”³²²

³¹⁸ *Ibid.*, P. 4589.

³¹⁹ *Gratz Vs. Bollinger* 123 s ct.2411.

³²⁰ *Grutter Vs. Bollinger* 539 US 306 at 344 [2003]; 123 Sec. 2325 at 2347.

³²¹ *Lawrence Vs. Texas* 539 US 558 [2003]; 123 Sec. 2435-at 2472.

³²² *Dudgeon Vs. The United Kingdom* [1981]4EHRR 149.

This strand of Trans-nationalist jurisprudence, has received favourable comments from Justices Breyer and Ginsburg, Justice Jay and Justice Marshal, who appreciate the law of other nations and are comfortable navigating by it.³²³

The Guantanamo Bay cases appreciated the concept of trans-national jurisprudence.³²⁴

It is natural and legally inevitable that, the doctrine has gained currency in the area of human rights, politics, economics, technology and trade among other areas.

In conclusion, Justice Kennedy stated:

“... The drafters never presumed to have insight of everything. The new times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles, in their own search for greater freedom.”³²⁵

We have seen in this section that Judges who are knowledgeable about what the law is are comfortable in handling any legal issue across the legal systems. Hence, the coherence and incoherence of the law depends heavily on our knowledge of the content of the existing legal norms and their effects in application. There is simply a huge amount of law that even so-called experts are not aware of, and their knowledge of the practical effects of existing legal norms may be even sketchier.³²⁶

This means that our impressions about the law are informed by our experience of the limited areas we do know. In any case, it may well be impossible for any one person or group of persons to develop a global justification and reconciliation of legal materials or a comprehensive understanding of the law's effects. Because we cannot conceive of the legal system as a totality, and because we cannot hope to subject all of the legal system to the most searching analysis, we must fall back on assumptions about the coherence of the

³²³ 539US 558 [2003]; 123 Sec. 1435 at 1483 For more on this, see Professor Harold Koh's analysis that justices Anthony Kennedy and Sandra Day O'Connor, lean towards Tran nationalist leanings Supra Note 310.

³²⁴ *Hamdi Vs. Rumsfeld* 72 USLW 4607 [2004]; *Rumsfeld Vs. Padilla* 72 USLW 4584 [2004]; *Rasul Vs. Bush* 72 USLW 4596 [2004]; etc.

³²⁵ *Lawrence Vs. Texas* op. cit. P. 1483.

³²⁶ Freeman, M.D.A. *Lloyds Introduction to Jurisprudence*, London Sweet and Maxwell (2001) P. 1304.

legal system based on our limited experiences and our existing ideological commitments.³²⁷

2.2.2 *Roe Vs. Wade* ³²⁸

This is a landmark case that declared a woman's right to terminate pregnancy as part of the rights envisaged by the fourteenth amendment. It was a critical case because of the ideological controversy it had raised between pro-life and pro-choice activists. The Supreme Court was also divided between liberal and conservative learning justices. This case together with *Doe vs. Bolton*³²⁹ affected so many lives and political backlash that it has still aroused debate three decades later.³³⁰ The judicial decision in *Roe vs. Wade* legalised abortion.³³¹ The brief facts were that Jane Roe (pseudonym) was unmarried pregnant woman who desired an abortion in Texas, where all abortions were forbidden "except for the purpose of saving the life of the mother." This was a class action suit.

Mary Doe on the other Hand was a married citizen of Georgia who had three children and was pregnant again, because of her poverty and mental instability, two of her children were in foster homes and one had been placed for adoption. She had been a mental hospital patient and had been advised that having another baby would damage her health more than having an abortion would. Georgia law permitted abortions only for Georgia residents, and in a credited hospital, upon the decision of three licensed physicians and a hospital staff abortion committee that either:³³²

1. Continued pregnancy would endanger the pregnant woman's life or "seriously and permanently" injure her health;

³²⁷ *Ibid.*, P. 1304.

³²⁸ 410 U. S. 113 [1973].

³²⁹ 410 U. S. 179 [1973].

³³⁰ *Times magazine* 29th Nov. 2004 P. 16 some conservatives are lobbying the Supreme Court to overturn it its decision in *Roe Vs. Wade*.

³³¹ There was powerful lobbying by Women's Rights groups as NOW and National Women's Political. Caucus The case marked a dramatic break with a century. old tradition of harsh punishment of Abortion this aroused very strong feelings on both sides of the controversy.

³³² Leslie Friedman Goldstern, *The Constitutional Rights of women: cases in Law and Social change* New Ed. [1998] P. 336.

2. The foetus would “very likely be born with a grave, permanent, and irremediable mental or physical defect”, or
3. The pregnancy resulted from rape or incest,

Unfortunately, by the time the Supreme Court pronounced its decision on January 1973, both women had naturally given birth, Justice Blackmun stated:

“...The general rule is that an actual controversy must exist at stages of appellate or certiorari review, ... But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive beyond the trial stage and appellate review will be effectively denied. Our law should not be that rigid ...”³³³

In delivering the opinion of the Court Justice Blackmun had this to say;

“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s religious training, one’s attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to colour one’s thinking and conclusions about abortion.”³³⁴

The Court’s chronology of events was highlighted as the following:

- a) Ancient attitudes: Abortion was practised in Greek times as well as in Roman Era;³³⁵ if abortion was ever prosecuted it was based on the concept of a violation of the father’s right to his offspring.
- b) The Hippocratic Oath: the ethical guide of the medical profession that has withstood the test of time. Most Greeks approved abortion.³³⁶ This background

³³³ *Roe Vs. Wade* 410 U.S.A. 113 at 125.

³³⁴ *Ibid.*, P. 127.

³³⁵ Ricci J, *The geology of Gynaecology* (2nd Ed. 1950) pages 52, 84 and 113.

³³⁶ Plato Republic Vs. 461, see also Aristotle, politics, Vol. VII, 1335b125 for the Pythagoreans, however it Was a matter of dogma? For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being This is the Pythagorean Ethic.

enables us to understand, in historical context, along accepted and revered statement of medical ethics.

- c) The Common Law: this is the traditional law of Court precedents in the Anglo-American legal system. It is undisputed that at common law, abortion performed before “Quickening” the first recognizable movement of the foetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy – was not an indictable offence... Christian theology and the cannon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, (but) there was otherwise little agreement about the precise time of formation or animation. The foetus was actually regarded as part of the mother and its destruction, therefore, was not homicide.

Article 40 of the “Uniform Abortion Act” defined abortion as the termination of human pregnancy with an intention other than produce a live birth or to remove a death foetus.³³⁷

The Constitutional void or vacuum that the Court had to grapple with was the fact that the Constitution does not explicitly mention any right of privacy. But a line of Court decisions dating back to (1891) the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution though not expressly provided for.³³⁸

The Court argued that the right of privacy as envisaged in the fourteenth Amendment or in the Ninth Amendment is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.³³⁹

The Court felt that maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated

³³⁷ Ibid., P. 341.

³³⁸ Ibid., P. 342.

³³⁹ Ibid., P. 343.

with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases additional difficulties include the stigma of unwed motherhood.³⁴⁰

The Court concluded that the right of personal privacy includes the abortion decision, but the right is subject to some limitations like state interests to protection of health, medical standards, and prenatal life.³⁴¹

The Court took note that the Constitution does not define the word “person” in so many words. Section 1 of the fourteenth Amendment contains three references to “person” the first, in defining “citizens,” speaks of “persons born or naturalised in the United States.” The handicap is that in all the instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. The Court was persuaded to conclude that the word “person” does not include the unborn.³⁴² In the words of Justice Harlan:

“[T]he full scope of the liberty guaranteed by the Due process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the... taking of property, the freedom of speech press and religion and so on. It is a rational continuum which broadly speaking, includes freedom from all substantial arbitrary impositions purposeless restraints...”³⁴³

Justice Frankfurter concurring stated:

“Great concepts like... “Liberty”...was purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact and the statesmen who found this nation knew too well that only a stagnant society remains unchanged.”³⁴⁴

The right of individual married or single to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

³⁴⁰ Ibid., P. 343.

³⁴¹ Ibid., P. 344.

³⁴² Ibid., P. 345.

³⁴³ Ibid., P. 351.

³⁴⁴ *National mutual Ins. co .Vs .Tidewater Transfer co.*, 337 U.582, at 646 [dissenting opinion].

“That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. “Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private schools.”³⁴⁵

It does not take a genius to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.³⁴⁶ Justice Rehnquist dissented by stating that it was wrong in deciding such a hypothetical lawsuit, the Court departs from the long standing admonition that it should never “formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied.”³⁴⁷

The decision has been applied worldwide but there is no evidence that women necessarily procure abortion because majority cannot afford it anyway. The case informed the Canadian Supreme Court in *R v Morgentaler*³⁴⁸ where Wilson J in her judgment stated:

“I believe... that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that a woman’s capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not in my view, just a matter of interfering with her right to liberty in the sense...of her right to personal autonomy in decision making; it is a direct interference with her physical “person” as well. She is truly being treated as a means-a means to an end which she does but over which she has no control.”³⁴⁹

The other implication of the decision is that if abortion is justified on narrow grounds of privacy then it may result to many poor women having the right in abstract without adequate access to the facilities required for the implementation of such right.³⁵⁰ Law is

³⁴⁵ *Pierce Vs. Society of Sisters* 351 F. supp. 224, 227 (conn. 1972).

³⁴⁶ Leslie F. Goldstein op. cit. P. 354.

³⁴⁷ *Ibid.*, P. 356.

³⁴⁸ *R. Vs. Morgentaler* (1988) 44 DLR (4th) 385

³⁴⁹ *Ibid* P. 492.

³⁵⁰ Ruth Ginsberg, Sex Equality and the Constitution: The State of the Art. (1992) 14 Women’s Rights

not self implementing and judicial pronouncements *per se* do not change women's lives unless there is concerted effort by all the other stakeholders to realise this objective. However, since the decision was pronounced, anew level of awareness has emerged whereby women actively express their sexuality; sex is no longer tied to marriage, or to motherhood; within marriage, motherhood can be delayed or avoided altogether; motherhood does not necessarily imply marriage.³⁵¹

It is instructive to note that following decision in *Roe Vs. Wade Hospitals* in the USA broadly refused to carry out abortions and twelve years after the ruling only seventeen percent of public hospitals were providing abortion services³⁵² the practical consequence of the decision is that it privatised abortion, with private clinics filling the gap left by public hospitals which provide 87 percent of all abortions.³⁵³ So in essence, access is limited to financial capabilities which are beyond the reach of majority of the women.

2.2.3 *Estelle T. Griswold Et Al (Appellants,) Vs. State Of Connecticut*³⁵⁴

Summary of Facts

A Connecticut statute made the use of contraceptives a criminal offence. The Executive and medical directors of the Planned Parenthood league of Connecticut were convicted in the circuit Court for the sixth circuit in New Haven, Connecticut, on a charge of having violated the statute as accessories by giving information, instruction, and advice to married persons as to how to use contraceptives as a means of preventing conception. The Appellate Division of the circuit Court affirmed the conviction as did the Supreme Court of Connecticut. On appeal to the Supreme Court it was held:

1. The defendants had standing to attack the statute, and

Law Reporter, P. 361.

³⁵¹ Gavin W. A., Constitutional Rights After Globalisation HART Publishing (2005) P. 88.

³⁵² *Ibid.*, P. 89.

³⁵³ *Ibid.*, P. 90.

³⁵⁴ 381 US 479, 14 led 510, 85 Sec. 1678.

2. The statute was invalid as an unconstitutional invasion of the right of privacy of married persons.

The Court opined that the association of people is not mentioned in the Constitution or in the Bill of rights. The right to educate a child in a school of the parent's choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the first Amendment has been construed to include certain of those rights.³⁵⁵ Hence, the right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.³⁵⁶ Associations in this context are a form of expression of opinions; and while it is not expressly included in the first Amendment its existence is necessary in making the express guarantees fully meaningful.³⁵⁷

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.³⁵⁸

Justice Goldberg the Chief Justice and Justice Brennan concurring concluded that the concept of liberty is not so restricted and that it embraces the right of marital privacy thought that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment.³⁵⁹

³⁵⁵ *Ibid.*, P. 513.

³⁵⁶ *Martin Vs. Struthers*, 319 US 141, 143, 87 led 1313, 1316, 63 Sec. 862.

³⁵⁷ *Griswold Vs. Connecticut* Supra Note 354 P. 514.

³⁵⁸ *Poe Vs. Ullman*, 367 US 497, 1003-1007, 81 Sec. 1752 (dissenting opinion).

³⁵⁹ Justice Stewart dissenting at P. 542 where he stated that "He can find no... general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

The Supreme Court stated many years ago that due process clause protects those liberties that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental”³⁶⁰

Indeed, Constitutional clauses should be given effect to all words used in it. From the words of the Ninth Amendment which states inter alia “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people?”³⁶¹

It follows that in determining which rights are fundamental; Judges are not left at large to decide cases in light of their personal and private notions. Rather they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] as to be ranked as fundamental.”³⁶²

Nothing illustrates this issue better than the words of Justice Douglas who stated:

“I agree fully with the Court that applying these tests, the right of privacy is so fundamental and emanates “from the totality of the Constitutional scheme under which we live”³⁶³

Through this case, the Court had accession to articulate the doctrine of implied jurisprudence. Justice Black’s views summarised the void in the Constitution. He said (dissenting):

“The Court talks about a “Constitutional “right of privacy” as though there is some Constitutional provision or provisions forbidding any law ever to be passed which might abridge the “privacy” of individuals. But there is not.³⁶⁴ There are, of course, guarantees in certain specific Constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities... but I think it belittles that Amendment to talk about it as though it protects nothing but “privacy.”³⁶⁵

He continued:

³⁶⁰ *Snyder Vs. Massachusetts*, 291 US 97, 105, 78 led 674, 677, 54 Sec. 330, 990 ALR 575.

³⁶¹ *Griswold Vs. Connecticut* Supra 354 P. 519.

³⁶² *Ibid.*, P. 520.

³⁶³ *Ibid.*, P. 521.

³⁶⁴ *Ibid.*, P. 529.

³⁶⁵ *Ibid.*, P. 530.

“Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to Courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous... I do not believe that we are granted power by the Due process clause or any other Constitutionality by our believe the legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of “civilized standards of conduct”³⁶⁶

In dissenting Justice Stewart concluded with a rhetorical question:

“What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy “created by several fundamental Constitutional guarantees.” With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court”

This case declared that the right to marital privacy was older than the Bill of Rights and even older than political parties and older than the American School System.³⁶⁷ Soon the doctrine in the *Griswold* case was extended beyond the marital context when the Court stated thus:

“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁶⁸

Professor Laurence Tribe has described the jurisprudence in *Griswold* and *Eisenstadt* as follows:

“The Constitutional principle of “individual autonomy” affirmed in these cases ... protected not procreation, but the individual’s right of decision about procreation. In each case, the Court protected the decision to engage in sex without bearing or begetting a child. These holdings thus mandated heightened scrutiny not of state restrictions on procreative sex, but of restrictions and recreational or expressional sex-sex solely as a facet of associational intimacy-whether between spouses, or between unmarried lovers.”³⁶⁹

³⁶⁶ Ibid., P. 532.

³⁶⁷ Ibid., P. 486.

³⁶⁸ *Eisenstadt vs. Baird* (1972) 405 US 438 P. 453.

³⁶⁹ Laurence H. Tribe, American Constitutional Law, (2nd edition) Mineola New York Foundation Press 1988 P. 1423.

In conclusion the emerging trend is that abortion cases have become the “show piece of Comparative Constitutional Law”.³⁷⁰

2.2.4 *Carl Zeiss Stiftung Vs. Rayner & Keeler Ltd. (No. 2)*³⁷¹

The brief facts were that in 1891 there was established at Jena, in the Grand Duchy of Saxe-Wimar, the Carl – Zeiss – Stiftung (“the foundation”) an organisation with industrial, scientific and charitable objects. Under its Constitution the legal domicile of the Foundation was to be Jena, a special board was created to administer the scheme and in case of the cessation of the special board in consequence of political changes in the state, the representation of the foundation, and its statutory administration, were to be made over to the department of state, which with regard to the University, occupied that its seat was in Thuringia. In 1918 the Grand Duchy was abolished and Jena became part of the “land” of Thuringia.³⁷²

In 1949 there was set up in the Russian –administered zone of Germany, the Germany Democratic Republic, and the Court in the present case proceeded on the basis that the land of Thuringia continued to exist until 1952, when under decree of the Germany Democratic Republic it was divided into small areas Jena and Gere respectively.

In 1955 English Solicitors sued and obtained a writ against the defendants to restrain them (inter alia) from passing off optical and glass instruments with reference to the name “Carl Zeiss-stiftung” or “Carl Zeiss” or Zeiss”. Cross J. dismissed the application and on appeal it was upheld. In a decision of the Privy Council, it was held:³⁷³

1. That although the Germany Democratic Republic is not recognised by her Majesty’s Government, its acts should be recognised by the English Courts as lawful, not as the acts of a sovereign state, but acts done by a subordinate body which the U.S.S.R.

³⁷⁰ Gavin W. Anderson Supra Note 1 P. 86.

³⁷¹ [1967], *AC Privy Council* P. 853.

³⁷² *Ibid.*, P. 853.

³⁷³ *Ibid.*, P. 855.

set up to act on its behalf, since a de jure governing body cannot disclaim responsibility for the acts of subordinate bodies set up by it.

2. That the decision of the West German Courts does not fulfil the requirements for the application of the doctrine of issue estoppels and accordingly has not made the subject-matter of the present issue *resjudicature*, so that the defendant solicitors are not stopped from contending that they have authority to bring the action in the name of the foundation.
3. That questions relating to the Constitution of a foreign corporation should be decided according to the law of the place where it is incorporated and since, on the evidence, every Court in Eastern Zone of Germany would hold the council Gera was the special board of the foundation, the Courts of another jurisdiction are debarred from deciding the question in any other way.

It was submitted that in the case of the construction of a document the local law is found by considering how the local Courts would interpret it.³⁷⁴ In construing a foreign contract one must give it the sense which the parties would have understood it to have and to do that one must go to the foreign law.³⁷⁵ It matters not what is the reality on the ground so long as Courts are operating in a country, the law of it can be ascertained, even if no government at all is recognised by her majesty's Government, and it is to that law that one goes to understand what the parties meant.³⁷⁶

Eight jurisprudential issues were identified for determination but there was no clear law to guide the Court and resort had to be implied jurisprudence.

The first position was to determine whether it is an established rule of Constitutional law that it is the sovereign's prerogative to act as the representative of the nation in international affairs.

³⁷⁴ Ibid., P. 681.

³⁷⁵ Ibid., P. 681.

³⁷⁶ Ibid., P. 681.

The second proposition was that on such matters the views of the sovereign, given through the executive, are decisive. The Courts will take judicial notice of the attitude of the executive and, when any doubt exists, will seek information from the executive, and that information is conclusive.

Thirdly, that these principles are founded on sound Constitutional principles that the Queen will speak with one voice through the executive and Judges.³⁷⁷

Fourthly, that the Courts cannot ignore the Constitutional origins of sound practical policy besides legal questions, treaty obligations and political consequences of Court decisions.³⁷⁸

Fifthly, that in retrospect, when a non- recognised state becomes recognized state, the English Courts are bound to treat acts of the government as valid, with retroactive effect. Further that, the judiciary is dependent on the crown and in effect the act of recognition compels the Courts to apply a different setoff laws from that which they would otherwise apply.³⁷⁹

Lord Reid acknowledged the issues raised by this case were complex and difficult comprising 1,500 pages of affidavits, cross-examination and documents.³⁸⁰

This case raised a difficult jurisprudential issue on whether the English Courts would recognise the legislative and other acts of the Germany Democratic Republic which operated in the Russian Zone of Germany, having regard to the fact that the government had not granted any de jure or de facto recognition to that Republic or Its Government.³⁸¹

Lord Wilberforce agreed that the case raised difficult questions on several legal issues

³⁷⁷ Ibid. P. 866.

³⁷⁸ Ibid. P. 866.

³⁷⁹ Ibid. P. 867.

³⁸⁰ Ibid. P. 899.

³⁸¹ Ibid. P. 940, Lord Upjohn's Powerful argument on res judicata

including the doctrine of *Resjudicata*. Prima facie, preference should be given to the impressions the first tribunal made in addressing the case.³⁸²

2.2.5 The Nuremberg Judgement and its jurisprudential significance

This case raised several and difficult jurisprudential issues. The brief background of this case was that while the Second World War was still being fought, statements were made on behalf of the Allies to the effect that those German officers and men and members of the Nazi party who had taken part in atrocities and War Crimes would have been tried for their offences after they were captured.³⁸³

On August 8, 1945 an Agreement was signed in London by France, Great Britain, the Soviet Union and the United States of America providing for the trial of major war criminals of the European Axis whose offences had no particular geographical location. To this agreement, there was a charter establishing the Military Tribunal to try these criminals. Article 6 of the charter defined the war crimes as:

- a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of International treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- b) War Crimes: namely, violations of the laws or customs of war ...;
- c) Crimes against humanity: namely, murder extermination, enslavement deportation; and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

³⁸² Ibid., P. 975.

³⁸³ The International Military Tribunal, Nuremberg, (1946 Cmd 6964; 41 A .J. IL 1947, P.172.

There was a proviso that “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”³⁸⁴

The tribunal noted that:

“... War Crimes were committed on a vast scale, never before seen in the history of war... There can be no doubt that the majority of them arose from the Nazi conception of “total war” with which the aggressive wars were waged. In this context, the moral ideas underlying the conventions which seek to make more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war... War Crimes were committed when and whenever the Fuehrer and his close associates thought them to be advantageous.”³⁸⁵

The charter gave the tribunal a lot of leeway to include organizations.³⁸⁶

The tribunal concluded that the charges the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. The consequences... affect the whole world.³⁸⁷

To initiate a war of aggression, therefore is not only an international crime; it is also the supreme International Crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.³⁸⁸

According to Professor Richard Falk, the Nuremberg judgment led to the birth of the World Citizens Tribunal.³⁸⁹

The Nuremberg jurisprudence is still important because it informs the ideas behind moves toward humane global governance based on the principles of global justice:³⁹⁰

³⁸⁴ Ibid., 172 particularly Article 18) of the Charter

³⁸⁵ Supra Note 383.

³⁸⁶ Article (10) of the Charter makes it clear that the declaration of criminality against an accused organization is final, and cannot be changed in any subsequent criminal proceeding against a member of that organization ... The tribunal held that the group must be bound together and organized for a common purpose.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Richard Falk on, World Peace, 24th June 2005 at www.truthout.org/docs 2005.

³⁹⁰ Ibid., P. 5.

- the spread of democracy, and especially the rise of global civil society and of global social movements in the area of environment, human rights, women, and peace;
- the increased support for human rights by civil society actors and governments around the world;
- the attention given to the remembrance and partial erasure of historic grievances toward indigenous peoples on all continents, toward the victims of forced labor, including so-called "comfort women" during World War II, toward the descendants of slavery; and most of all, to the revival of Nuremberg ideas about criminal accountability, challenging impunity-the Chilean dictator Pinochet was indicted by Spain and detained by Britain; the UN established tribunals to prosecute those responsible for ethnic cleansing and crimes against humanity in former Yugoslavia and for genocide in Rwanda; and over the objections of the leading states, the ICC was brought into existence due to the active coalition of hundreds of NGOs working together with dozens of governments dedicated to establish a framework for international criminal trials.³⁹¹

Courts in Asia have resorted to the doctrine of implied jurisprudence to enforce rights that are not expressly provided for under law. Chief Justice Cooke of Australia has argued that:

"It is arguable that some common law rights may go so deep that even parliament cannot be accepted by the Courts to have destroyed them."³⁹²

Hence for any legal system to survive and grow, it's depended upon the powers wielded by Judges and upon their common sense accepted of the Legal and political setting in which they operate.³⁹³

³⁹¹ *Ibid.*, P. 5.

³⁹² Article by, The Hon. Justice MD Kirby, AC CMG, Commonwealth Law Bulletin (CLB) Jan. & April 1998 P. 499.

³⁹³ *Ibid.* P. 505.

Where the Constitution, statute is ambiguous and common law is silent or obscure, the judicial decision-maker resorts to international law for guidance.³⁹⁴

In Australian Capital Television Pty Ltd V. The Commonwealth³⁹⁵ the Court held *inter alia* that:

“...Where fundamental rights are not expressly provided for in the Constitution; the Court can always infer them from the language or structure of the instrument.”

The Supreme Court of India has analysed the “basic structure or framework” of the Constitution in Golaknath Vs. State of Punjab AIR³⁹⁶ where it held that:

“...the power to amend the Indian Constitution under Article 368 was not unfettered, although wide, the power did not include the power to abrogate the Constitution itself or to alter its basic structure or framework. That implication was derived in part from history, in part from the structure of the Constitution itself and in part from a judicial conception as to the very role of Constitution. Thus, the secular and republican character of the Indian Constitution and the faculty of judicial review are generally accepted as being within the “basic structure or framework” which cannot be altered.”³⁹⁷

It's evident that the Constitution of India is based on many Liberal and progressive values which are spread all over the Constitution. Some of these are explicit and some implicit. The preamble to the Constitution recognises *inter alia* ideals of democracy, secularism, justice, liberty, equality and fraternity.³⁹⁸

The Supreme Courts of India has held that the right to life means something more than mere survival or animal existence. It would include the right to live with human dignity. It would include all those aspects of life, which makes a man, or woman's life meaningful, complete and worth living.³⁹⁹

³⁹⁴ Ibid., P. 506.

³⁹⁵ [1992] 177 CLR 106; see also, Nationwide News, (1992) 177 CLR 1.

³⁹⁶ [1967] Sc. 163; see also Kasavananda Bharati Vs. State of Kerala AR 1973) Sc 1461 and Indira Gandhi Vs. Raj Narain AR 1975 SC 2299 which expounds on the debate on the Amendment of the Indian Constitution.

³⁹⁷ C.L.B. op. cit. P. 509.

³⁹⁸ Dr. Subhash C. Jain, Indian Perspectives Commonwealth Law Bulletin, Spring (1999) P. 125.

³⁹⁹ Ibid., P. 126.

Further, the right to personal liberty has been construed by the Supreme Court of India to, include a number of rights which are not otherwise enumerated in the Constitution, such as the right to travel abroad and to return to India, the right of a prisoner to a speedy trial, and the right to free Legal aid in a criminal trial.⁴⁰⁰

Many of these complaints have been taken by the Supreme Court *suo moto* on the basis of press reports about the violations of the rights of the citizen addressed by individuals or associations acting *pro bono publico*.

2.3 Conclusion

These cases illustrate the need for conceptual understanding of the role of the Constitution within the legal system in particular, and within the politics of democracy in general, as well as of the political theory which informs the Constitution.⁴⁰¹ The Indian Supreme Court rulings demonstrate that the Constitution cannot be read clause by clause nor can any clause be interpreted without the understanding of the framework of the instrument.⁴⁰² In interpreting a Constitutional instrument Courts have to strike a balance between allowing democratic process of an elected parliament to take its natural course while ensuring that the framework of values as contained in the instrument continue to form the broad context within which social, political and economic activity take place.⁴⁰³ The cases illustrate the fact that the Constitution is not simply a legal shopping list. It represents a special form of speech, a means of reconstituting a society in the light of what is considered it should be and a Judge cannot just mechanically declare what the text is; but has to look at all the underpinning considerations that inform the text.⁴⁰⁴

⁴⁰⁰ Ibid., P. 126.

⁴⁰¹ Davis Dennis, Cheadle Halton and Hayson Nicholas, Fundamental Rights in the Constitution: Commentary and Cases. (SA) Juta and Company Ltd 1997 P.11.

⁴⁰² Ibid., P. 11.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid., P. 17.

CHAPTER THREE: The application of the doctrine of Implied Jurisprudence in Kenyan Courts

3.0 Introduction

This Chapter uses selected cases to illustrate how Judges in Kenya have applied the doctrine of implied jurisprudence in adjudicating difficult cases. This is analysed against the background of the Constitutional Court decision in *Njoya and others vs. The Attorney General* where the Court made a finding about the issue of constituent power and referendum although there is no Constitutional basis for such a finding; *Mwai Kibaki vs. Daniel Moi* which created the principle of personal service in Election Petitions; The case of *Stephen Mwai Gachiengo Vs. The Attorney General* which held *inter alia* that a judge cannot be a prosecutor at the same time and declared the Kenya Ant-Corruption Authority illegal; *Roy Richard Eliema Vs. The Republic* which declared that any prosecution carried by a police officer below the rank of Inspector was illegal; *George Ngodhe Juma and others vs. The Attorney General* which declared the constitutional right of accused persons to be supplied with statements to prepare their defence; *Jaramogi Oginga Odinga and others Vs. The Electoral Commission of Kenya* and *Kamlesh Pattni Vs. The Attorney General* among other cases to illustrate the conceptual framework and legal basis of this thesis.

3.1. *Mwai Kibaki Vs. Daniel Toroitich Arap Moi*⁴⁰⁵

This was an appeal from the High Court of Kenya Justice O’Kubasu, Justice Mbogholi Msagha and Justice Ole Keiwua JJ dated 22nd July, 1999. The appeals involved persons of no mean status in society and raised critical issues to the Jurisprudence of our legal system as we have hitherto understood it to be.⁴⁰⁶

The appellant was the leader of official opposition; the respondent was the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya. The third

⁴⁰⁵ *Civil Appeal No. 172 of 1999* as consolidated with *civil appeal No. 173 of 1999, Mwai Kibaki Vs. S.M. Kivuthu and the Electoral Commission of Kenya.*

⁴⁰⁶ *Ibid.*, P. 1.

respondent in Civil Suit No. 173 is the Electoral Commission of Kenya a body created by section 41 of the Constitution.

The appellant filed a petition pursuant to Section 44 of the Constitution challenging the validity of the 1st Respondent's election as the President of Kenya. The respondent raised a preliminary objection on a point of law arguing;

- i) "that the petition be struck out on the ground that the same was not served on the 1st Respondent within 28 days after the date of the publication of the result of the presidential election in the gazette or at all; and

In the notice of motion and supporting affidavit, the Respondent averred that he had not been served personally with the petition in this case, within 28 days after the date of the said publication as required by the law.⁴⁰⁷ The learned Judges of the Superior Court acceded to the motion by the respondents and struck out the appellants' petition.⁴⁰⁸

Some of the ten grounds of appeal were as follows:

1. The High Court over-ruled the Court of Appeal.
2. The High Court flouted the principles of precedent and the doctrine of *stare decisis*.
3. The High Court has no power to determine the decision, reasoning or words of the Court of appeal Judgements.
4. The High Court was bound by the Court of appeal decisions.

The basic substance gleaned from these grounds of appeal is whether:

- i. The High Court has no power to over rule the Court of appeal;
- ii. The High Court has no Jurisdiction to flout the first principles of precedent and *stare decisis*; and
- iii. The High Court, while it has the right and indeed the duty to critically examine the decisions of the Court of appeal, it's obliged to follow those decisions unless

⁴⁰⁷ See Section 20 (i) of the National Assembly and Presidential Elections Act, (Cap 7) Laws of Kenya.

⁴⁰⁸ *Mwai Kibaki Vs. Daniel arap Moi* Supra Note 405 P. 7.

they can be distinguished from the case under review on some other principles of law like *obiter dictum*.⁴⁰⁹

The Court approved the opinion of Lord Hail sham in Rooks Vs. Barnard⁴¹⁰ where he stated:

“Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of Legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law”.⁴¹¹

The Court expressed the view that:

“The result of the election was published in a special issue of the Kenya Gazette dated 6th January, 1998 and for the purposes of section 20(1) (a) of the Act twenty eight days allowed for presentation and service of petitions started to run on 7th January, 1998. So anyone who wished to present a petition had to do so and also have it served on or before 3rd February, 1998, ⁴¹²

“In my view it is a fallacious contention to aver that only the Act was amended but the rules remained intact, for if it were so the legislative intent would have been devoid of concept of purpose and would have reduced the amendment to futility...”⁴¹³

The Court defined “*ratio decidendi*” as

“... The enunciation of the reason of the principle upon which question before a Court has been decided is alone binding as a precedent. This underlying principle is called the *ratio decidendi*, namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. What

⁴⁰⁹ Ibid., P. 9.

⁴¹⁰ [1964] 1 ALL ER 367 [1964] AC 1129.

⁴¹¹ In exceptional circumstances, the Court of appeal should feel free to depart from their decisions- see *Dodhia V. National Grindlays Bank* (1970) E.A. 195. It appears that Section 20 (i) (a) of the Act; Rule 14 has become irrelevant as it is in conflict with the section. The Court was of the view that where there is a conflict between a statute and the rule then; “rules must be read together with their relevant Act; they cannot repeal or contradict the express provisions in the Act from which they derive their authority” If the Act is plain, the rules must be interpreted so as to be reconciled with it.

⁴¹² Ibid., P. 20.

⁴¹³ Ibid., P. 21.

constitutes the binding precedent is the ratio decidendi and this is almost always to be ascertained by analysis of the material facts of the case for judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration.”⁴¹⁴

It follows that to reconcile the two provisions, one has to modify the application of rule 14(1) and we do not know that a Court is entitled to modify the provision of a written enactment, whether it be a statute or subsidiary legislation.⁴¹⁵ The Court concluded that the Act and the rules both form a complete regime and other legislation or rules can only be applicable to election petitions if they are made applicable by the Act itself or the rules.

This case raised many jurisprudential issues among them:

- (a) Can the High Court overrule the Court of Appeal?
- (b) In exceptional circumstances, can the High Court deviate from the doctrine of stare decisis?

The case was politically sensitive because it had the potential to nullify a Presidential election.⁴¹⁶ Section 10 (4) of the Constitution states:

“Where the High Court determines under Section 44 that the President has not been validly elected as President for any reason other than that he has not been validly elected as a member of the National Assembly or that the seat in the Assembly of the President has become vacant, he shall cease to hold office as President.”⁴¹⁷

The plain words of section 44(1) states as follows:

“The High Court shall have jurisdiction to hear and determine any question whether-

- (a) A person has been validly elected as a member of the National Assembly; or

⁴¹⁴ Ibid., P. 24.

⁴¹⁵ Ibid., P. 28.

⁴¹⁶ See Section 10 (2) of the Constitution which allows the High Court to determine whether the President was validly elected as President.

⁴¹⁷ See also Section (11) Sub-section (4).

(b) The seat in the National Assembly of a member thereof has become vacant. ...”

Ordinarily, the provisions of Section 11(4) and Section 44(1) are irreconcilable. Whereas Section 11(4) envisages the High Court determining the validity of the election of a President for any other reason, Section 44(1) (b) limits this reason to the seat in the National Assembly of a member thereof (read President) has become vacant. It is regrettable the Court never addressed this apparent contradiction between these two provisions. It appears Section (44) has no mechanism on how the validity of a Presidential election could be challenged except in the context of a Member of Parliament or where the Speaker declares a seat in parliament vacant as envisaged by Section (44) (3) (a).

3.2 *Rev. Dr. Timothy M. Njoya & Others Vs. The Attorney General And Others*⁴¹⁸

Facts and Background

The brief facts of this case were that in 1997, the Government of Kenya yielded to persistent and, at times, violent pressure by the political opposition, the civil society, the church and social movements for comprehensive changes to the Constitution. The Government Published a Bill to facilitate the people of Kenya to participate in the process of Constitutional reform. That Bill was enacted as the Constitution of Kenya Review Commission Act of 1997. It was subsequently amended four times as a result of negotiations by interested stakeholders with a view to making the process all inclusive and “people driven”. The end result was the Constitution of Kenya Review Act, Cap, 3A, of the laws of Kenya (the Act)⁴¹⁹.

Section 3 of the Act set out the object and purpose of Constitutional Review as to secure among other provisions therein:-

⁴¹⁸ *Misc. Civil Application No. 82 of 2004 (OS)(unreported case).*

⁴¹⁹ *Ibid.*, Ringera J’s judgment P. 2.

- a) guarantee peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- b) establish a free and democratic system of Government that enshrines good governance, Constitutionalism, the rule of law, human rights and gender equity;
- c) recognising and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the People of Kenya;
- d) promoting the people's participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;

The C.K.R.C. did fulfil its mandate and organised constituency Constitutional forums and facilitated numerous other fora at which all persons who were so minded gave their views on the review process; it collected and collated the views of Kenyans and compiled a report together with a summary of its recommendations for discussion and adoption by the N.C.C.(National Constitutional Conference), it afforded opportunity for intense public discussion and critique of the said report, and it prepared a draft Bill for debate and adoption by the N.C.C.

The Commission also convened the ⁴²⁰N.C.C. which was nicknamed "Bomas" Conference. By an originating summons dated 27th January, 2004 and amended on 17th February 2004 which was expressed to be taken out under Sections 1A, 3, 47, 84 and 123 of the Constitution and 3A of the Civil Procedure Act, Rev. Dr. Timothy Njoya, Munir M. Mazrui, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O. Ochieng, Muchemi Gitahi and Ndung'u Wainaina (the applicants) sought from the Court nineteen orders among them were the following:-

1. That, a declaration to be and is hereby issued declaring that Section 26(7) and 27(1) (b) of the Constitution of Kenya Review Act transgresses, dilutes and vitiates the constituent power of the People of Kenya including the applicants

⁴²⁰ Ibid., P. 9.

to adopt a new Constitution which is embodied in Section 3 of the Constitution of Kenya Review Act.

2. That, a declaration be and is hereby issued declaring that Section 28(3) and (4) of the Constitution of Kenya Review Act is inconsistent with Section 47 of the Constitution and therefore null and void.
3. That, a declaration be and is hereby issued declaring that the Constitution gives every person in Kenya an equal right to review the Constitution which rights embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum.
4. That, a declaration be and is hereby issued declaring that the Constitution of Kenya Review Act (Cap. 3A) or the rules made under Section 34 thereof do not confer sovereign power, privileges, immunities or authority upon the National Constitutional Conference⁴²¹.

The said orders were sought on the grounds among others:-

- a) Whereas Parliament enacted the Constitution of Kenya Review Act Cap.3 A of the laws of Kenya to provide an institutional mechanism and framework for the people of Kenya to exercise their constituent power to make and adopt a new Constitution, the said Act is fraught with weaknesses, contradictions and ambiguities that impede the realization of that noble goal.
- b) The effects of Sections 26(7) and 27(1) of the Act is to neuter, marginalise and alienate the views of Kenyan People not captured in the draft Constitutional Bill prepared by the second respondent.
- c) The National Constitutional Conference does not have powers or mandate to fragment and balkanize the Republic of Kenya into ethnic mini-states since the

⁴²¹ Ibid., P. 14.

applicants and other Kenyans did not express views on the model of devolution proposed by the National Constitutional Conference. Moreover, even if the national Conference had power to carry out the said fragmentation of the Kenyan nation, which is denied by the applicants, the decision as to which regions each Kenyan wishes to live in can only be made by direct consultation of the applicants and other Kenyans⁴²².

- d) The intolerance towards views other than those contained in the draft Bill to amend the Constitution and the unwillingness by the NCC to discuss any other interpretation of the views submitted to the second respondent have, contrary to the said principles in the Third Schedule of the Act, destroyed confidence and trust in the review process on the part of the applicants and other Kenyans who believe the draft Bill presently being debated at Bomas is not a good reflection of the views given by the Kenyan People...⁴²³

The finding of the Court on the issues that called for answers

Justice Kubo's words summarises the nature of the case. "This is an important case without a precedent in our jurisdiction; I therefore, consider it to be in the interests of the development of our jurisprudence to address the issues before this Court in a fair amount of detail."⁴²⁴ The learned Judge then expanded the concept of liberal interpretation *visa Vis* restricted interpretation. He quoted *Keshavana Menon Vs state of Bombay*.⁴²⁵ Where the Indian Supreme Court held:

"An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view"

On the issue of constituent power, Kubo J. concluded that:

⁴²² Ibid., P. 18.

⁴²³ Ibid., P. 18.

⁴²⁴ Ibid., Kubo J. P. 2.

⁴²⁵ [1951] SCR 228.

“It is not expressly provided for in the Constitution of Kenya or any other Kenyan law but it is an inherent power...”⁴²⁶

The learned Judge acknowledged that there is no provision for referendum in our Constitution... Jowith’s Dictionary of English Law defines it as ... “a direct vote of electors upon a particular matter...”⁴²⁷

The learned Judge felt that if Kenyans want referendum as a mandatory right, it has, to be provided for expressly. He felt that the Court is ill-equipped to determine their wishes as this could be tantamount to venturing into the legislative process, which is not its field of operation.⁴²⁸

On the issue of amendment the learned Judge concluded that “it is legitimate to interpret parliament’s alteration power under section 47 to mean that:

“If parliament can alter one provision, it can alter more; and if it can alter more it can alter all”⁴²⁹

The Judge applied a liberal and purposeful interpretation and concluded that section 47 of the Constitution of Kenya does limit the power of parliament to amend or repeal the Constitution and replace it with a new Constitution.⁴³⁰

In a departure, from a restricted interpretation Ringera J. invoked the doctrine of implied Jurisprudence and created a referendum where there was none; a constituent power although there was none in the Constitution.⁴³¹

Justice Ringera quoted Samatta C. J. with approval who had reasoned that:⁴³²

⁴²⁶ *Rev. Njoya and Others Vs. The Attorney General and others* Supra Note 418 also see Kubo J. P. 30.

⁴²⁷ *Ibid.*, P. 31.

⁴²⁸ *Ibid.*, P. 31.

⁴²⁹ *Ibid.*, P. 55.

⁴³⁰ *Ibid.*, P. 56.

⁴³¹ *Ibid.*, Ringera J. P. 24.

⁴³² *Ndyanabo Vs. Attorney General*, [2001], 2 E. A. 485, P. 493.

“A timorous and unimaginative exercise of the Judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document... fundamental rights have to be interpreted in a broad and liberal manner, thereby jealousy protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail...”

The learned Judge proceeded to identify certain Constitutional values and principles that are sacrosanct. He stated:

“The Constitution is the supreme law of the land; it is a living document with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleological to give effect to those values and principles ...”

The values were listed as follows:

- a) Constitutionalism-This value betokens a limited government subject to the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, and none is supreme.
- b) The Constitution is supreme: all other laws bow to the Constitution; all state organs derive their very existence from the Constitution.
- c) Equality of all citizens; - The principle of non discrimination.
- d) The doctrine of separation of powers.
- e) Enjoyment of fundamental rights and freedoms.
- f) It is a living document.

On the issue of constituent power of the people Justice Ringera stated that this is a primordial power, the ultimate mark of a people’s sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the government, and the powers involved in governing.⁴³³

Our Constitutional text has no provision for constituent power. But Justice Ringera in his creative and innovative mind created a legal by-pass by arguing that when a Court

⁴³³ See B. O. Nwabweze, Presidentialism in Commonwealth Africa. L. Hurst & Co. 1974 P. 392.

looks at the supremacy of the Constitution it should bear in mind that the text therefore is a manifestation of the constituent authority of the people.⁴³⁴

This was indeed a difficult case as expressed in the learned Judge's words;

"...I confess that no aspect of this case has so taxed my mind as the constituent power... I am relieved to have come to definite conclusions"⁴³⁵

He then proceeded to state his conclusion:

"With respect to the Judicial status of the concept of constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory."⁴³⁶

Secondly, there must be an appreciation and recognition that the sovereignty of the people necessarily betokens' that they have a constituent power – the power to constitute and/or reconstitute... Their framework of government, that power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualized by the Constitution and, of course, it need not be."⁴³⁷

Hence, it follows that constituent power reposes in the people themselves and this has a juridical status within the Constitution of Kenya and is not an extra-Constitutional notion without import in Constitutional adjudication.⁴³⁸ He then concluded that all Kenyans have a Constitutional right to a referendum on the proposed Constitution.⁴³⁹

The decision of Kubo J. has been viewed as the correct approach of interpretation by some scholars.⁴⁴⁰ In Ghai's opinion, Ringera J. and Kasango Ag J.'s decision which was the majority decision and therefore binding lacked any philosophical or legal basis and

⁴³⁴ *Rev. Njoya Vs. The Attorney General* Supra Note 418 also See Ringera J. P. 39.

⁴³⁵ *Ibid.*, P. 40

⁴³⁶ *Ibid.*, P. 40.

⁴³⁷ *Ibid.*, P. 41.

⁴³⁸ *Ibid.*, P. 42.

⁴³⁹ *Ibid.*, P. 47.

⁴⁴⁰ See Professor Yash P. Ghai's critique Supra Note 49 P. 1.

was abstracted from the realities of the Kenyan situation, contrary to general principles and practice of Constitution making, and were devoid of any Constitutional or political theory.⁴⁴¹ There is lack of doctrinal coherence between the values that informed Ringera J. on the concept of constituent power which he argues is derived from the national sovereignty allegedly because the sovereignty of the Republic can be equated with the sovereignty of the people; that the sovereignty of the people is superior to the Constitution- because it is the basis of the Constitution so cannot be given by it; and the Constitution recognises the constituent power of the people:

- a) By establishing Kenya's sovereign republic
- b) By providing that Kenya is a multi-party democracy
- c) By providing for amendment in section 47.⁴⁴² The majority decision applied two contradictory approaches it was broad in interpreting some issues and narrow to others.⁴⁴³ For instance, it is a well known historical fact that the Kenya Constitution was not made by Kenyans and therefore lacks a true constitutive act of the people it was more an act of the colonial power with a few politicians and that it has been mutilated by successful governments and does not necessarily embody the will of the people.⁴⁴⁴ The Court rejected the argument against the NCC: that it did not give equal representation to all parts of the country on technical grounds that the applicants had not shown how they were particularly affected. The Court adopted a narrow view of standing yet it had taken a liberal and broad approach to issues like the Constituent power.⁴⁴⁵ This apparent contradiction shows doctrinal incoherence by the Court.

⁴⁴¹ Ibid., P. 1.

⁴⁴² Ibid., P. 2.

⁴⁴³ Ibid., P. 3.

⁴⁴⁴ Ibid., P. 5.

⁴⁴⁵ Ibid., P. 10.

3.3 *Stephen Mwai Gachiengo & Albert Muthee Kahuria Vs. The Republic*⁴⁴⁶

This was a Constitutional reference pursuant to section 67 (1) of the Constitution of Kenya. The applicants had been charged with nine counts and four charges respectively of abuse of office contrary to Section 101 of the Penal Code Cap. 63 (Laws of Kenya). The applicants framed four issues for determination by the Constitutional Court the issues were:

- (a) Whether it is unconstitutional and contrary to the Principle of separation of powers for Kenya Anti-Corruption Authority to be headed by a High Court Judge.
- (b) Whether such leadership compromises the accused's right to a fair trial before an impartial Court under Section 77 (1) of the Constitution.
- (c) Whether the Attorney General's consent to prosecute was valid under the Constitution.
- (d) Whether the provisions establishing KACA were in conflict with the Constitution and especially Section 26 thereof

The Court made a finding that the fact that KACA was headed by a Judge of the High Court did not in any way compromise the duty of the Courts to dispense justice to all parties who appear before them irrespective of their class in society. Judicial officers take an oath to discharge their duties without fear or favour. We accordingly find the applicants' arguments on the issue spurious and misplaced.⁴⁴⁷ The Court continued:

"When Section 11B was inserted into Cap. 65 the provisions of the Constitution remained unamended. Under Section 26 of the Constitution the Attorney General is the principal legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings against any person and

⁴⁴⁶ *High Court Miscellaneous Civil Application No. 302 of 2000.*

⁴⁴⁷ *Ibid.*, P. 4.

take over or discontinue criminal proceedings instituted or undertaken by any person or authority. Under Section 26(4) the Attorney General may require the Commissioner of Police to investigate a matter as relates to any offence. Section 11B (4) of Cap. 65 stipulate that in the performance of their functions the members of KACA shall have all the powers of Police....⁴⁴⁸

The Court declared that Sections 10 and 11B of Cap. 65 were in direct conflict with Section 26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney General in relation to prosecution, the exercise of powers under Section 11B of Cap. 65 offend the Constitution.⁴⁴⁹ The Court proceeded to conclude that the existence of KACA undermines the powers and authority of both the Attorney General and the Commissioner of Police as conferred on them by the Constitution. Consequently the Court found that the provisions establishing KACA were in conflict and inconsistent with the Constitution.⁴⁵⁰

The Court never espoused any doctrinal coherence in terms of its' interpretation of Section 77 (which protects the right to fair trial) and Section 26 (which provides for the Attorney General's prosecutorial powers). Under the former, the Court held that judicial officers take oath to act without fear or favour whereas on the latter they found that Sections 10 and 11B were inconsistent with Section 26 of the Constitution yet this allegedly offending provisions breathed their lives from Section 26 of the Constitution.⁴⁵¹ The Court ignored the fact that the law allows the Attorney General⁴⁵² to appoint public prosecutors and all KACA prosecutors had been duly appointed by the Attorney General.

Indeed, several other bodies engage in criminal prosecutions without necessarily offending Section 26 of the Constitution.⁴⁵³ The Judges concluded that Section 10 & 11 B

⁴⁴⁸ Ibid., P. 8.

⁴⁴⁹ Ibid., P. 8.

⁴⁵⁰ Ibid., P. 9.

⁴⁵¹ Ibid., See arguments at P. 4 and 8 respectively.

⁴⁵² See Section 85 of the Criminal Procedure Code (CPC) Cap 75 Laws of Kenya.

⁴⁵³ See the Kenya Railways Corporation Act (Cap. 397) Laws of Kenya Section 78(1) which vests prosecutorial powers in an authorized officer; the Income Tax Act (CAP.470), Sections 114 and 117 which vests prosecutorial powers in the Commissioner of Income Tax or officers authorized by him; the Immigration Act (Cap.172), Section 16 which empowers an Immigration Officer to conduct

of Cap. 65 were in direct conflict with Section 26 of the Constitution and actually lashed at the A.G. for purporting to alienate powers conferred to him by the Constitution and accused him of being escapist and/or abdicating his Constitutional responsibility. It appears the Court was influenced by the political considerations prevalent then in the context of the case of Cabinet Minister Kipng'eno arap Ng'eny which was still pending and the easier way out of the political quagmire was to kill KACA which was apparently embarrassing the Government by pressing corruption charges against Ngeny.⁴⁵⁴

3.4.0 *Professor Julius Meme And Another Vs. The Republic*⁴⁵⁵

Background and Facts

The Applicant, who was the first accused in Anti-Corruption Case No. 22 of 2003 went to Court by Originating Summons filed under Sections 67(1) and 84 of the Constitution and the procedure set out under the Protection of Fundamental Rights and Freedoms of the Individual (Constitutional Practice and Procedure) Rules, 2001. The Applicant sought the Court to determine eight questions having a bearing on the interpretation of the Constitution of Kenya. These questions were as follows:-

- (a) Whether the so-called "Anti-Corruption Court" is a Court known to law and whether the same has been duly established by law in accordance with the provisions of the Constitution;
- (b) Whether the Magistrate serving at the Anti-Corruption Court is a Magistrate known to law, and whether the trial Magistrate can try the matter in the context of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003);
- (c) Whether the accused is likely to be denied "the presumption of innocence" secured by Section 77(2)(a) of the Constitution;

prosecutions in subordinate Court.

⁴⁵⁴ See *Republic Vs. Kipngeno arap Ngeny Criminal Case No. 997/2000*.

⁴⁵⁵ *Miscellaneous Criminal Application No. 495 of 2003*.

- (d) Whether having regard to all of the matter, the first accused is likely to be denied a fair trial by an independent and impartial Court established by law, and whether the charges against the first accused are against the principles of natural justice;
- (e) Whether the prosecutor is established by law to prosecute this matter, and whether Section 26 of the Constitution has been breached or is likely to be breached, to the detriment of the first accused;
- (f) Whether the Ant-Corruption and Economic Crimes Act(Act No. 3 of 2003) is unconstitutional in form and application;

The background to this case was that on 15th August 2001 the Government issued directives for the formation, within the Police Department, of an Ant-Corruption Unit. On 13th September 2001 the Commissioner of Police acted on these directives by announcing the establishment of the Ant-Corruption Police Unit.⁴⁵⁶The function of the Ant-Corruption Police Unit was stated as:

“To investigate all corruption and corruption related offences either at their own initiative and/or as directed by the Attorney General and/or the Commissioner of Police.⁴⁵⁷”

On 26th March, 2003 the Applicant was required by the Anti-Corruption Police Unit (ACPU) to make a formal statement regarding the loss of the sum of Kenya shillings 51 million, which belonged to Kenyatta National Hospital where he was the Director between 1992 and 1998, which money was invested in Euro Bank, a bank which became insolvent. The Applicant recorded a statement and was subsequently charged with abuse of office contrary to Section 101(1) of the Penal Code⁴⁵⁸.

The Court expressed the view that there was no conflict between the provisions of Section 5(1) of Act No. 3 of 2003, which section is concerned to achieve efficiency in the

⁴⁵⁶ Ibid., P. 10.

⁴⁵⁷ Ibid., P. 10.

⁴⁵⁸ Ibid., P. 11.

process of taking evidence in relation to charges of corruption, and Section 27 of the Constitution which relates to the President's dispensation of mercy for persons already bearing the brunt of punishment meted out by the Courts.⁴⁵⁹ The Court further expressed the view that in advancing a Constitutional argument, should not be so broadly aimed to lend itself to the Court's concurrence; firstly because counsel has to prosecute the case only on the basis of the specific grievances of his/her client; secondly because the legislative mandate of Parliament, which is clearly spelt out in Section 30 of the Constitution, ought in principle to be given fulfilment, of course, subject to the Constitutional document itself, and thirdly, because the fulfilment of Parliament's legislative mandate necessarily entails the establishment of new institutions of implementation, such as the Kenya Anti-Corruption Commission and the parallel support structures within the Courts and the Police.⁴⁶⁰ The Court expressed the opinion that attacks on the new ant-corruption laws was a manifestation of a new operative Constitutional norm becoming a forum for resolving conflicts between new and old values which erect to safeguard accrued property and the Court had to adjudicate such issues with open minds.⁴⁶¹

The Court dismissed all the issues raised arguing that they lacked merit as illustrated by two of the holdings as summarised hereunder:

1. On issue number one they held that the term "Anti-Corruption Court" is only a label, to describe a division in the Magistrates' Court system lawfully established by the Chief Justice, by virtue of powers conferred upon him by the Magistrates' Court Act (Cap.10), Section 13(2). There is entirely no inconsistency between the set-up of the Ant-Corruption Court and the provisions of the Constitution.⁴⁶²
2. On issue No. three on whether the accused was likely to be denied the presumption of innocence secured by Section 77(2)(a) of the Constitution, the Court found this

⁴⁵⁹ Ibid., P. 45.

⁴⁶⁰ Ibid., P. 49.

⁴⁶¹ Ibid., P. 56.

⁴⁶² Ibid., P. 97.

unfounded, as trials at the Anti-Corruption Court are regulated by all the rules of procedure and evidence, and guided by normal judicial practice as obtains in all Courts forming part of the judicial system.⁴⁶³

The Constitutional Court in *Meme Vs. the Republic*⁴⁶⁴ disagreed with the Gachiengo ruling and stated as follows:

“The plain meaning of section 26(3) (b) and (c) is, in our view, that some person or authority other than the Attorney General could very well, and quite lawfully, undertake prosecutions; save that such action will always remain subject to the control of the Attorney General. It becomes plain... that the Gachiengo case rested on a misconception, both in terms of construction and of principle; and with utmost respect; we would depart from the position taken by the learned Judges in that case. We believe we are fortified in this preference by the basic meaning to be derived from section 26(4) of the Constitution...”⁴⁶⁵

The Court departed from the Gachiengo jurisprudence that prosecutions is the preserve of the Attorney General and opened up the law by holding that other bodies can lawfully prosecute without offending the Constitution.⁴⁶⁶ The Court held in part that anyone alleging breach of fundamental rights and freedoms envisaged in Sections 70-83 (inclusive) of the Constitution must state his/her case with sufficient particularity.⁴⁶⁷ The Court applied broad principles of interpretation and expanded the law by holding that there was nothing in the Constitution or the ordinary law to lend credence to the hypothesis that the investigation of crime is necessarily the exclusive responsibility of the Police force.⁴⁶⁸

The dilemma arises when the Constitutional Court comes up with two irreconcilable decisions which still form part of the laws of our country. Perhaps the only rational explanation for this approach and reasoning is political correctness whereby the judicial officers were influenced by political considerations rather than legal principles.

⁴⁶³ Ibid.. P. 98.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.. P. 83.

⁴⁶⁶ Ibid.. P. 78.

⁴⁶⁷ Ibid.. P. 74.

⁴⁶⁸ Ibid.. P. 84.

3.5 *William Kipruto Birir arap Chelashaw Vs. The Republic*⁴⁶⁹

The issue for consideration by the Constitutional court was whether or not an accused person who has a case pending before a trial Magistrate can directly make an application for Constitutional interpretation of his rights to a fair trial under Section 77 (1) of the Constitution during pendency of his case in the Lower Court. The Court made an interpretation on the procedure to be followed in making such an application under Legal Notice No. 133 of 2001. In the incidences where there is a case pending before a magistrate the Applicant must make the application before the Trial court which upon hearing the application shall refer the matter to the High Court for determination.

The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) Practice and Procedure Rules, 2001 are abundantly clear on the procedure to be followed in the applicant's circumstances. He has not done so and is in violation of the very rules governing the mounting of Constitutional references under Section 84 of the Constitution.⁴⁷⁰ The Court concluded thus:

“ In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”⁴⁷¹

Not only is this binding authority on the High Court, it does also make good sense. Procedural rules are not made for fun but for a purpose. They ought to be followed and it is incumbent upon anyone deviating from them to show good cause for the deviation. The applicant lost his application on a procedural technicality.

⁴⁶⁹ Misc. Criminal Application No. 693 of 2003.

⁴⁷⁰ *Ibid.*, P. 12.

⁴⁷¹ *Ibid.*

3.6 *Kamlesh Mansukhlal Damji Pattni Vs. Attorney General and others*⁴⁷²

The applicant had sought a stay order for proceedings in the lower Court but the High Court in dismissing the application stated in part:

“Mr. Pattni’s strategy has raised a severe impediment to the normal functioning of the prosecutorial process in the Magistrate’s Court entrusted with the trial of cases of corruption. Insofar as Mr. Pattni has not ended up prosecuting his judicial Review case in the High Court, and in particular considering that he has claimed cover of the stay Order against subordinate Court proceedings issued *ex parte* on 24th December, 2003 the trial process in the magistrate’s Court has been brought to a standstill”

The Court proceeded:

“I have carefully listened to both counsel, I have formed the clear impression that the first application to be heard is the Notice of motion dated 20th February, 2004 by which the Office of the Attorney General seeks to set aside the Orders of this Court made *ex parte* on 24th December, 2003. The later applications, including those by Mr. Pattni, turn on those orders. Therefore, those Orders must be examined first; and it is on this basis that the very possibility of pursuing constitutional rights issues would be founded”.⁴⁷³

In dismissing Pattni’s application the Court ordered as follows:

“The *ex parte* Order made in favour of Mr. Pattni on 24th December, 2003 granting him stay on the Nairobi Chief Magistrate’s Anti-Corruption Court Case No. 66 of 2003 until the determination of the substantive application, be and is hereby set aside. The conduct of the Nairobi Chief Magistrate’s Anti-Corruption Court Case No. 66 of 2003 shall proceed normally and, within the framework of that trial, Mr. Pattini will be accorded all protection as provided under the law.”

3.7 *Roy Richard Eliema and another Vs. Republic*⁴⁷⁴

Roy Richard Eliema the first appellant, and Vincent Joseph Kessy, the second appellant were tried and convicted on four counts of robbery with violence contrary to Section 296 (2) of the Penal Code by a Senior Resident Magistrate at Voi and upon conviction each of them was sentenced to serve death in the manner authorized by the law. They appealed to

⁴⁷² Misc. Civil App. No. 1618 of 2003.

⁴⁷³ *Ibid.*, P. 14.

⁴⁷⁴ Criminal Appeal No. 67 of 2002.

the Court of Appeal on points of law having lost their first appeal to the superior Court on two issues:

1. That the entire trial was a mistrial because the learned trial magistrate erred in law and misdirected herself in permitting the conduct of the prosecution of the case against the appellants to be conducted by corporal Kamotho, an unauthorized person contrary to Section 85(2) of the Criminal Procedure Code. A grave failure of justice arose because the second appellant's alibi was not examined at all by the incompetent prosecutor and further due to incompetent prosecutor, for the question of jurisdiction of the court was not examined at all. Further, the incompetent prosecutor failed to understand the law relating to negotiable instruments and in specific, travelers cheques. Also, the incompetent prosecutor failed to appreciate Section 70 of the Evidence Act. The learned Judges of the High Court erred in law in failing to consider prosecutorial competence and the ensuing mistrial.
2. That the entire trial was mistrial and incompetent and void ab initio as against the Penal Code because the learned trial Magistrate erred in law and in fact in granting herself jurisdiction to hear his case contrary to Section 5 of the Penal Code whereas the facts revealed that the Kenya Courts had no jurisdictions in that the appellants were Tanzanian Nationals charged with committing a crime outside of the boundaries of the Republic of Kenya against persons not shown to be Kenyan Citizens traveling in a Somalia vehicle outside of Kenya. The learned Judges of the High Court erred in law in failing to consider jurisdictions and the ensuing mistrial."

The Court of Appeal held that:

"The provisions of Section 85(2) of the Code are that to be appointed a public prosecutor, one must be either an advocate of the High Court or a person employed in the public service. In the case of a person employed in the public service, that person ought to be a police officer not below the rank of an Assistant Inspector of Police...In Kenya, we think, and we must hold that for a criminal trial to be validly

conducted within the provision of the Constitution and the Code, there must a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial court, for if it does so there would be a serious risk of the court losing impartiality and that would violate the provisions of Section 77 (1) of the Constitution. For one to be appointed as a public prosecutor by the Attorney-General one must be either an advocate of the High Court of Kenya or a person a police officer not below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside.”⁴⁷⁵

3.8 *Vitu Limited Vs. The Attorney General and Others*⁴⁷⁶

This was an application for revision to the High Court on whether police can investigate a private bank account with a warrant issued by the presiding magistrate, the court reasoned thus:

“I hold that the Bank has a duty and a right to refuse to comply with a general warrant which purports to authorize a person to indiscriminately look at, copy or sift through or take possession of information or documents or look through the Bankers books and related documents of other persons or entries not subject to a genuine investigation resulting from a valid complaint of an offence being about to be committed or having been committed”

The Court made the following declarations:

1. The Evidence Act only operates within judicial proceedings and not outside judicial proceedings;
2. An affidavit without statement of facts is not valid or capable of moving the court;
3. Where there is a dispute or a complaint of an offence relating to the operation of an account upon proof may authorize copies of the account opening documents;
4. Account opening documents are not part of Bankers books or document as envisaged by Section 180 (1) of the Evidence Act Cap 80 Laws of Kenya;

⁴⁷⁵ Ibid., P. 11.

⁴⁷⁶ Misc. Criminal Application No. 475 of 2004

5. A limited liability company cannot have mens rea.

The warrant issued under the Chief Magistrate's Court Criminal Case 465 of 2004 was quashed. The court expressed its view that it is imperative for the investigating agencies to shun the old practices and learn to practice the modern methods of conducting investigations due to the fact that any application for a warrant before a Judge or Magistrate must have and be supported by a full disclosure, facts proof and specific for a warrant to issue.

3.9 George Ngodhe Juma and Others Versus The Attorney-General⁴⁷⁷

This was a reference that raised a constitutional issue on whether a person facing criminal charges before a court of competent jurisdiction can request pre-trial disclosure of the prosecution witnesses' statements – the accused requesting copies of statements from potential witnesses for the prosecution on the ground, basically, that he requires disclosure of such information for the protection of his rights. It is a question which is at the center of the constitutional doctrine of the fundamental right to the protection of the law secured by, among other things, being afforded a fair hearing within a reasonable time by an independent and impartial court established by law, being given adequate time and facilities for the preparation of one's defense, and being afforded facilities to examine witnesses against one, in a criminal case.

The Court further reasoned that:

“It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with fundamental principles of justice and due process of law of which a party has had reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford, and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis for the adverse view of him and for the judgment, a right to argue that a decision be made in accordance with the

⁴⁷⁷ Misc. Criminal Application No. 345 of 2001.

law and evidence. The adjective “fair” describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done it is imperative to weigh the interests of the parties alike for both, and make an estimate of what is reciprocally just. The processing and hearing or trial of a case must be free from prejudice, favouritism, and self-interest; and the Court must be detached, unbiased, even handed, just disinterested, balanced, upright and square.”

The Court identified the qualities of impartiality and honesty has having the following minimum elements present. It must be one:

1. Where the accused’s legal rights are safeguard and respected by law;
2. Where a Lawyer of the accused’s choice looks after his defence unhindered;
3. Where there is compulsory attendance of witnesses, if need be;
4. Where allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one’s defence;
5. Where in an accused persons’ witnesses, himself, or his lawyer are not intimidated or obstructed in any improper manner;
6. Where in no undue advantages taken by the Prosecutor or anyone else, by reason of technicality or employment of a statute as an engine of injustice;
7. Where witnesses are permitted to testify under rules of Court within proper bounds of judicial discretion, and under the law governing testimony of witnesses;
8. Where litigation is open, justice done, and justice seen to be done by those who have eyes to see, free from secrecy, mystery and mystique.

3.10 *Jaramogi Oginga Odinga And Others Vs. The Electoral Commission*^{47B}

This was an application for a temporary injunction. The applicants’ Jaramogi Oginga Odinga, Gitobu Imanyara and Hassan Kadir were the Chairman, Secretary General and treasurer respectively, of the political party known as Forum For the Restoration of

^{47B} Civil Case No. 5936 of 1992.

Democracy – Kenya. They filed a suit against the Electoral Commission seeking, *inter alia*.

- (1) A declaration that the purported rectification by the Attorney –General by Legal notice No. 276 of 1992 of 23rd October, 1992 of Section 13 (3) (b) (1) of the National Assembly and Presidential election Act (Cap 7) is and has at all times been null and void and of no effect.
- (2) A declaration that the specification of times by the Electoral Commission in Gazette Notice. No 4887 of 1992 of 3rd November 1992 in paragraph (b) and (c) thereof are and have at all times been null and void and of no effect.
- (3) An order to restrain the Electoral Commission from acting or acting any further in reliance on the said specification in line with the, said Gazette Notice until the determination of the suit.

Early in 1992, parliament enacted the Election Laws (Amendments) Act, 1992. Section 6 of that Act amended Section 13 (3) (b) of the National Assembly and Presidential Election Act to read as follows:-

“Every writ shall be delivered to the Director of Election who shall, within 10 days after receiving it-

(b) Cause to be published in the Gazette a notice in the prescribed form, which shall specify-

- (1) The day or days upon which each political party shall nominate candidates to contest parliamentary election in accordance with its constitution or rules which shall not be less than twenty one days after the date of publication of such Notice.”

The Attorney-General issued the order contained in legal notice No. 276 of 23rd October, 1992 in exercise of the powers conferred upon him by Section 13 of the Revision of Laws Act. The section reads as follows:

“The Attorney General may by Order in Gazette rectify any clerical or printing error appearing in the Laws of Kenya, or rectify in a manner not in consisted with the powers of Revision conferred by this Act any other error so appearing”

It is manifestly clear from the wording of the above section that the Attorney – General can only rectify a law where there is:

- (i) a clerical error,
- (ii) a printing error, or
- (iii) in a manner not inconsistent with the power of revision conferred upon him by the Act, which effectively means powers conferred by Sect. 8.

Mr. Nowrojee, learned counsel for the applicants, submitted that the notion of an error within the meaning of the Revision of Law Act, presupposes an error in the transcription of something already in existence clearly in my view it cannot have reference to a non-existing thing. Justice Mbaluto’s words capture the reasoning of the Court, he stated:

“I have had a chance to look at the Bill presented before Parliament for enactment of the Election Laws Amendment, Act 1992 and particularly Section 6 thereof, and I can see not a single difference whatsoever between the Bill as presented to Parliament and the Act. There was therefore no printing or clerical error in the preparation of the Act either during or after its passage by Parliament. Since on the face of it, there is no “error” clerical or printing, in the word “less” appearing in Section 13(3) (b) (i) of Cap 7 which required rectification under Section 13 of the Revision of Laws Act and no evidence has been adduced to show what error was being rectified. I must take it there was in fact no such error and that the purported rectification was sneaked in mischievously for purposes other than those stated in the said Order”.

In any event, Section 8 (4) of the Revision of Laws Act makes it clear that in exercising the powers conferred by Section 8, the Attorney –General has no power to make any changes in the substances of the law. It provides:-

“Nothing, in this section shall empower the Attorney-General to make any alteration or amendment in the substance of any Law.”

Justice Mbaluto stated that:

“The rectification being complained of by the applicant effected very substantial changes to the Election Laws. As I have said above, it reduced the number of days political parties have to nominate candidates to zero. It also altered what people thought was a safeguard to political parties against being caught by surprise, into a meaningless and worthless piece of provision in the National Assembly and Presidential Elections Act. The objects of the Revision of Law Act was not to enable the Attorney-General to effect such an illegal amendment, and I am convinced that the order he made under Legal Notice No. 276 of 23rd October, 1992 was in excess of the powers conferred by Section 13 of the Revision of Laws Act. The purported rectification was therefore null and void and of no effect.”

His Lordship concluded that:

“Government servants who by virtue of the Government Proceedings Act should have been sued through the Attorney General. That in my view is too legalistic a point to take in a matter of such a grave importance to the country and I will not entertain it. In any event since its institution, the new Electoral Commission under Mr. Justice Chesoni has been preaching to the country the gospel that it is independent of the government and that it does not receive any instructions from the Government in the discharge of its functions. That is indeed how it should be. It may of course be that there is a lacuna in the laws that are required to formalize the Electoral Commission’s independence and separation from the Government so that it can be in a position to sue or to be sued without having to involve the Attorney-General but whatever the position, the Electoral Commission cannot have it both ways- one day independent of the Government and on other part of the Government. That is clearly untenable.”

The gist of this argument was that by using the formal amending provisions of the Revision of the Law Act to effect a change or alteration in substantive legislation so that it operates to the prejudice of one or more political parties by not affording them adequate time to arrange for the nomination of candidates, the Attorney-General’s action can only be construed to have been a misuse if not an abuse of the powers conferred upon his office. In my view that was clearly illegal.

3.11 Discussion of the Research Findings

Although some judges were uncomfortable and over-sensitive to responding to issues pertaining to the judiciary, others were very helpful in providing explanations on how they adjudicate controversial cases that attract public attention. Indeed some of the judges were very brave and answered most issues generated by my discussion on how they adjudicate cases where the law is silent or the Constitution is not clear. Others wrote to me asking what exactly is meant by the doctrine of implied jurisprudence. Others engaged me in serious discussions about adjudication of difficult cases. Whereas, others just filled the questionnaires and mailed them back to me for analysis. Finally, I made important personal observations on how Judges decide controversial cases.

1. My first assumption was that **“Judges are informed by underlying factors other than the Law in deciding difficult cases.”** This assumption survived the test of scrutiny as most respondents and key informants agreed that issues of ethics, religion, culture and tradition have some persuasive bearing in determining certain issues in judicial proceedings.⁴⁷⁹
2. My second assumption was that **“Political considerations inform Judges in deciding hard cases”** This assumption almost collapsed except for the cases of *Kipng'eno arap Ngeny Vs. the Republic*, and *the Gachiengo Vs. the Republic* and *Reverend Timothy Njoya and Others Vs. the Attorney general*. It was observed that the Gachiengo case which was used to declare the Kenya Anti- Corruption Authority (KACA) unconstitutional, was influenced politically because the authorities that be were disappointed that Kipngeno Arap Ngeny, then a Cabinet Minister, had been taken to Court by KACA and the easier option to frustrate the war against corruption was simply to kill KACA which is what the Court did. In the Njoya case it was very difficult to separate the Court's judicial pronouncements and the views of the Minister for justice and Constitutional Affairs. The fact that the Head

⁴⁷⁹ My key informants gave the example of *Wambui Otieno Vs Umir Kager clan* where culture swayed the final decision of the Court on the burial place.

of State made an appeal for calm on Television live even before the Judges had finished pronouncing the Judgement is a clear illustration of political interference.⁴⁸⁰

3. My third assumption was that **“Economic consideration influence Judges in deciding difficult cases”**

Most respondents observed that only in very exceptional circumstances would they be influenced by economic considerations unless, their decisions are likely to cause economic hardship to the public or likely to damage the national economy. Hence, this assumption failed the test of time.

4. My fourth assumption was that **“Traditions, norms, values and practices inform Judges in hard cases.”** This assumption survived the test of time by virtue of an observation I made while conducting my research at Machakos High Court where I observed that in three years a judicial official could hardly decide a case and my key informants attributed this to fear of superstition. Most respondents observed that some Judges fear witchcraft and sometimes delay their findings or never decide at all giving flimsy excuses until they are transferred from the station. It is instructive to note that this practice only affected one judicial official largely influenced by traditions, norms, values and practices.⁴⁸¹ Hence, there is need for further research to ascertain the veracity and extent to which superstition affect the performance of judicial officials. Financial and time constraints did not allow me to corroborate these findings further.

5. My fifth assumption was that **“Mood swings attitudes and social orientation informs Judges in deciding difficult cases.”** This assumption

⁴⁸⁰ The Standard, Nairobi, 7th April 2004 P. 7.

⁴⁸¹ It was observed that one of the judicial officials would not decide cases in Eastern province because either way they did not want to antagonize any of the parties who apparently believed in superstition

survived because most respondents were in agreement that where the Judges are suffering from any disruptive behaviour from friends and relatives or colleagues it tends to affect their overall performance.⁴⁸² It was further observed that what a Judge had for breakfast had tremendous influence on his or her mood for the rest of the day thereby likely to influence how he decides cases.

6. My sixth assumption was that “**Religious beliefs inform Judges in deciding hard cases.**” This assumption was confirmed because most judicial officers cannot totally divorce themselves from their religious beliefs and practices⁴⁸³.
7. My final assumption was that “**Education, Class and professional training influences Judges in deciding hard cases.**” This assumption never made it as all the key respondents dismissed it arguing that the qualifications of Judges are largely standard and universal in Kenya in particular and even the globe generally. Indeed, they were unanimous that class influence in Kenya is negligible and therefore of little or no impact whatsoever in adjudication of cases.
8. **Emerging Issues:** The research encountered some difficulties like attitude by some judicial officers who insisted they were too busy to grant interviews, others appeared suspicious of the idea or concept of engaging in answering academic questions.
9. **Filling Voids:** most respondents stated that wherever they encounter legal vacuums they are informed by the following in trying to fill the gaps:

⁴⁸² My key respondents gave the altercation between Court of Appeal peers in 2001 which actually affected their final decision.

⁴⁸³ My key informants concurred that Islamic, Hindu, Christian and to a rare extent tradition informs their values although it does not necessarily impact on their final decisions.

- (a) Facts which tell the story and show the direction between right and wrong
- (b) The common law
- (c) Equity
- (d) Synthesis
- (e) Fundamental reasoning
- (f) Development of new principles

10 Challenges facing Judges

- a. Limited numbers of Judges as compared to the cases available for adjudication.
- b. Judges hear cases from 9.am to 5.pm virtually non-stop in addition to other administrative roles like attending conferences and seminars. There is no time for research and broadening of legal notions and concepts.
- c. Lack of research Assistants to help Judges in research on new insights to the law.
- d. Many Advocates who canvas cases are ill-prepared; so the Judges miss out on essential material and in-put to enable them take into account all legal questions and enhance their own understanding through focused inquiries on the particular issues under determination.

3.12 Conclusion

This Chapter has demonstrated how Judges have invoked various principles of interpretation to resolve difficult cases. If the Court finds the language is ambiguous, the common law itself is silent or obscure, or some Constitutional gap, they may, in proper cases, resolve the ambiguity to fill the gap by reference to the fundamental principles, many of them now found in the developing jurisprudence of international human rights. They may do this so long as that jurisprudence is not inconsistent with established legal authority or legal principles.

The findings section shows that High Court Judges in Kenya are overworked and they lack adequate facilities to enable them execute their constitutional mandate properly.

From the foregoing, it is appropriate to say that judicial officers in Kenya are confronted with a plethora of problems like lack of equipment and other support staff like research assistants who could help alleviate the work load and therefore enhance their effectiveness in deliberations and adjudication of cases.

The concept of globalization is re-defining issues like the state; it shows that political power is not an exclusive preserve of the state. There is need to rethink our approaches to issues and the doctrine of implied jurisprudence offers innovative ways to interpret the Constitution purposively to achieve the spirit and the letter of the law⁴⁸⁴.

⁴⁸⁴ Gavin W.A., *Supra* Note 1 P. 22.

CHAPTER FOUR: Recommendations and Conclusion

4.0 The Strengths of the doctrine

During the interviews some informants confessed ignorance of the concept and notion of the doctrine of implied jurisprudence. Others felt that jurisprudence is the fundamental reason, philosophy or doctrine behind the immediate legal forms, so if it is implied, that means the fundamental premise of the legal expression is concealed in the mind of the Judge; and therefore it is an inscrutable one. In this context an unarticulated ideology must be assumed to be the main factor guiding the Judge.⁴⁸⁵ This doctrine has gained wide acceptance and application in Legal systems.

The doctrine has demonstrated that Constitutions are much more than Law.⁴⁸⁶ Actual reality shows that a legal system controls a wide network of human relations; it inevitably interacts with the broader culture, sometimes shaping it, sometimes shaped by it.⁴⁸⁷ Owing to this embedded nature of law, Judges have used the doctrine to embrace certain values that have assumed universal application.⁴⁸⁸ The Judges sometimes deviate from principles and become more flexible and responsive and supple pragmatism over tight logic, which might lead to injustice.⁴⁸⁹

In practice, Judges have come to the stuck reality that it's practically impossible to construct a Constitution insulated from all outside pressures and capable of protecting the polity's fundamental values from the intemperate judgment of all public officials.⁴⁹⁰ It has helped to develop and expand the Law relating to children and women rights.⁴⁹¹

⁴⁸⁵ Key informant during my interview Lady Justice Wanjiru Karanja of the High Court Kitale

⁴⁸⁶ Walter F. Murphy; *Supra* Note 127 P. 92.

⁴⁸⁷ *Ibid.*, P. 93.

⁴⁸⁸ *Ibid.*, P. 93.

⁴⁸⁹ *Ibid.*, P. 96.

⁴⁹⁰ *Ibid.*, P. 111.

⁴⁹¹ Commonwealth Law Bulletin, Vol. 23 Numbers 1 and 2, January and April 1997 P. 568.

4.1 Weaknesses of the doctrine of implied jurisprudence

History has demonstrated that Judges are mortal beings who make wrong Judgements and one wonders who is supposed to monitor them whenever they make mistakes.⁴⁹²

Doctrinal inconsistency, there is a clash of different political ideas specifically between the dichotomy between public and private realm i.e. the Judge's views about wise public policy, or their views on philosophical and ideological orientations.⁴⁹³ In problematic cases it can go either way, therefore inhibiting the right even more.⁴⁹⁴ Courts can be swayed by the complexities of social life in society like Internal Legal Pluralism that reflects different political values where the Court is less troubled about issues like disposition of testamentary property than it is about the sale of public property tainted in racist restrictions.⁴⁹⁵

Some judgments lack coherence to proximity to the core values, some of the principles adopted by Judges are not readily reconcilable and sometimes these contradictory Judgements embody a range of disordering influences which militate against coherence in adjudication.⁴⁹⁶

Court orders are not self-executing, the Court has institutional limitation to effect change, and elected branches of government have more impact because they can legislate or articulate the concerns at policy level.⁴⁹⁷

Legislation obligates the state to give funding to effect certain changes but the Court order is declaratory and it takes someone else to enforce and a combination of factors to achieve results like change of heart of the political leadership and changing the prevalent social cultural attitudes.⁴⁹⁸

⁴⁹² Walter F. Murphy, *Supra* Note 127 P. 98.

⁴⁹³ Schauer, F., Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour, (2000) 68 University of Cincinnati Law Review at 619-620.

⁴⁹⁴ *Brown Vs. Board of Education of Topeka*, 343 US 483, (1954) where a Constitutional right had been limited by the direct action of a government agency.

⁴⁹⁵ *Shelley Vs. Kraemer* 334 US 1(1948).

⁴⁹⁶ Gavin, W.A. *Supra* Note 1 P. 74.

⁴⁹⁷ *Ibid.*, P. 81.

⁴⁹⁸ *Ibid.*, P. 79-80.

Court based strategies may marginalise other groups by undermining their ability to escape from their disadvantaged position.⁴⁹⁹ Indeed, some Court pronouncements make contentious issues to go underground or appear less prominent but still persist.⁵⁰⁰

The assumption to the interpretative question, that Constitutional doctrine forms a coherent and autonomous system of rules has been found wanting against a theoretically and empirically grounded account of the disordering forces at play in adjudication of cases.⁵⁰¹

It is also erroneous to assume that Constitutional litigation works as a tool for social engineering in light of the complexities of the inter-normative social world. There is need for further interrogation of interpretative approaches to Constitutional law against internal legal pluralist hypothesis that modalities of adjudication militate against achieving coherence in practice.⁵⁰² This appreciation of the existence of legal pluralism may pave way for alternative views about Constitutional law, which will bring on board a better understanding of innovative jurisprudence in the realm of rights in this age of globalization.⁵⁰³

Adjudication has political dimensions and Judges cannot avoid, and are indeed are obliged to invoke considerations of political theory in deciding cases. As Dworkin has argued, it is not only about argument but also about what these goals should be.⁵⁰⁴ Judges are not neutral of ideological orientations. They have certain perceptions on class, race, and sex. These prejudices tend to compromise their objectivity, expertise and fairness.⁵⁰⁵

⁴⁹⁹ Nan, C.J., Adding Salt to the Wound: Affirmative Action and Critical Race Theory (1993/4) 12 Law and Inequality 553, P. 556.

⁵⁰⁰ Stephen C.H., The Limits of Law The Ironic Legacy of Title VI of the 1964 Civil Rights Act (Baltimore and London, Johns Hopkins University Press, 1995 P. 36.

⁵⁰¹ Gavin, W.A., *Supra* Note 1 P. 95.

⁵⁰² *Ibid.*, P. 95.

⁵⁰³ *Ibid.*, P. 58.

⁵⁰⁴ Kennedy D., A critique of Adjudication, (Cambridge, MA, Harvard University Press, 1997) p. 120-121.

⁵⁰⁵ David Kairys; *Supra* Note 143 P. 9.

Latin America has acquired notoriety, as the graveyard of Constitutionalism. It is the Judges who enforced evil laws in Argentina, Brazil and Peru.⁵¹⁶ It is Judges who legitimised authoritarian regimes.⁵¹⁷ It is not always the case that the Judges' conceptualisation of public policies is in tandem with public interest.⁵¹⁸ Some members of the highest Court suffer from moral misperception, inattention, or unconscientiousness.⁵⁰⁹

In certain jurisdictions where the judiciary is not independent; the Judges are easily manipulated through colleagues, friends, relatives, personal views, values or prejudices. Where this happens, the doctrine is misapplied and distorted to the detriment of the Law.

4.2 The role of Constitutional Lawyers in enhancing the doctrine.

In most jurisdictions, the Courts have to be moved by parties. Only in very rare cases do Courts apply the doctrine of *suo moto*.

For along time, the policy of separate schools for blacks and whites on the Constitutional basis that they were "separate but equal" which was given judicial recognition in *Plessey Vs. Ferguson*.⁵¹⁰ However it took the Constitutional skills of Thurgood Marshall in *Brown Vs. Board of education*⁵¹¹ to overturn this erroneous decision. There was every room for pessimism when Brown was first argued. The arguments were advanced to nine white men; there was strong judicial precedent against them; and the Republican Party was in office during the re-argument of the case with all the party's conservative tendencies. Against all these odds, Thurgood Marshall's arguments prevailed with a unanimous Supreme Court outlawing segregated schools and firmly establishing the doctrine of equal justice under the law.⁵¹²

⁵⁰⁶ Mark J. Osiel; *Supra* Note 149 P. 488.

⁵⁰⁷ *Ibid.*, P. 488.

⁵⁰⁸ *Ibid.*, P. 507.

⁵⁰⁹ *Ibid.*, P. 550.

⁵¹⁰ 163 US 537 [1896].

⁵¹¹ 347 US 483 [1954].

⁵¹² *Commonwealth Law Bulletin* Volume 27, No. 2, 2001, P. 1232.

Properly skilled Constitutional Lawyers and jurists have helped expand the Constitution so that laws that interfere with personal liberty have been repealed on account of being unjust, unreasonable and unfair.⁵¹³ Constitutional Lawyers have to be persons of outstanding integrity and ability. Lawyers with general hands off attitude on matters relating with the Constitution will not help the law to grow.⁵¹⁴

In jurisdictions where lawyers emphasize legal positivism to the effect that total value is placed on written law as enacted by parliamentary statutes accompanied by judicial belief that changes of any kind are best left to the parliament to effect,⁵¹⁵ it is difficult for the doctrine of implied jurisprudence to be applied.

Perseverance is an important factor to any Constitutional Lawyer who wants to help the Court to decide a difficult case. An argument may not find favour with one panel of Judges but may be accepted by another. Similarly, an argument rejected in one era may be well received in another era by a new set of Judges.⁵¹⁶

In the Indian experience, two cases illustrate this point. Article 21 of the Indian Constitution provides in part that no person may be deprived of life and liberty except in accordance with the procedure established by Law.⁵¹⁷

The words "except in accordance with procedure established by law" were given broad meaning in *A.K Gopalan Vs. State of Madras*.⁵¹⁸ The Gopalan case was a legal cause celebre. The arguments advanced by Mr. MK Nambyar, Senior advocate, were that a literalist reading of Article 21 would defeat Constitutional safeguards envisaged in the concept of due process.⁵¹⁹

⁵¹³ Ibid., P. 1233.

⁵¹⁴ Ibid., P. 1233.

⁵¹⁵ Ibid., P. 1234.

⁵¹⁶ Ibid., P. 1234.

⁵¹⁷ Indian Constitution 1947 Article 21.

⁵¹⁸ 1956 SCR 88.

⁵¹⁹ CLB Vol. 27, No. 2 2001 P. 1235.

Although Nambyar's dynamic arguments were rejected by the Supreme Court, they were later accepted by the same Court in the case of *Maneka Gandhi Vs. Union of India*.⁵²⁰

The Court observed:

"It is one of the greatest achievements of Mr MK Nambyar that all his arguments advanced in the *Gapalan* case were subsequently accepted by the Honourable Supreme Court as valid, and as is evidenced by this he made a great contribution to Constitutional history through his research and arguments in this case."⁵²¹

The other Constitutional Lawyer that has made a difference is NA Phalkivala who put a strong argument that fundamental rights given to the people by the Constitution was supreme and that parliament had no power to a bridge those rights whatsoever.⁵²² The argument succeeded, and the Supreme Court in a historic Judgement delivered in April 1973 held that parliament's power of amendment does not include the power to abrogate the Constitution.⁵²³

Later, a Judge of the Supreme Court of India had this to say about lawyer Phalkivala:

"Never before in the history of the Court has there been a performance like that with his passionate plea for human freedom and irrefutable logic, he convinced the Court that the earlier *Kesavananda Bharati* case Judgement should not be reversed"⁵²⁴

This is the type of commitment and perseverance to Constitutional Principles that a Constitutional Lawyer must possess in order to discharge his/her tasks appropriately. A Constitutional Lawyer must be highly innovative to achieve excellent results.

The lawyer must possess and observe:

- a) A thorough familiarity with the Constitution and Constitutionalism.
- b) Ability to formulate attractive arguments from a Constitutional perspective.
- c) Computer skills to access Internet and intranet information on the case.
- d) Ability to grasp novel ideas about Constitutions from other countries.

⁵²⁰ AIR 1978 SC 597.

⁵²¹ For more on this, see JB Dadachanji, landmarks published in supreme but not in fallible: essays in, *Honour of the Supreme Court of India*, (Ed.) BN Kirpal *et. al.* (OUP Delhi at 471.

⁵²² CLB vol. 27 op. cit. P. 1236.

⁵²³ *Ibid.*, P. 1236.

⁵²⁴ *Ibid.*, P. 1236.

e) Ability to apply International Instruments to local contexts without constrains.

A thorough familiarity with the Constitution calls for not merely understanding its provisions, but appreciating the essential principles underpinning the Constitution.⁵²⁵

It is instructive to note that the words “separation of powers” or “checks and balances” are not found anywhere in most Constitutions yet good Constitutional lawyers have been able to formulate arguments to support the existence of these concepts.⁵²⁶ Thurgood Marshall one of the most imminent jurists of modern times has argued that a good lawyer has to faithfully “use the Constitution the way Moses used the Ten Commandments”⁵²⁷

In the case of *Olga Jellis Vs. Bombay Municipal Corporation*⁵²⁸ where the Bombay Municipal Corporation wanted to evict pavement dwellers without providing alternative accommodation the Court held:

“The sweep of the right to life conferred in Article 21 is wide and far reaching than the Constitutional text ... An equally important fact of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.”

A Constitutional Lawyer must have a proper grasp of information technology to enable him/her access to good practices from the latest legal and Constitutional authorities in the Globe at his/her fingertips.

4.3 Recommendations

a) Constitutional

Judges who are appointed to the bench should have a proper appreciation of the constitution. Issues that touch on the constitution are very sensitive and judicial officers

⁵²⁵ Ibid., P. 1237.

⁵²⁶ Ibid., P. 1238.

⁵²⁷ Ibid., P. 1238.

⁵²⁸ AIR 1986 SC 180.

without sound legal skills will find it difficult to give effect to the words of the constitution.

Jurisprudence is the fundamental reason, philosophy or doctrine behind the immediate legal forms. So if it is implied, that means the fundamental premise of legal expression is concealed in the mind of the judge; and therefore the expressed law is an inscrutable one. In that case an unarticulated ideology must be assumed to be the main factor guiding the judge.

Constitutions are now largely standard documents all over the world. Structurally and in terms of context, constitutions reflect the aspirations of the people and Judges should be alive to this reality when interpreting the law.

b) Statutory

Judges should have a greater appreciation of statute law, the common law, equity, legal pluralism. Further, Judges should have the requisite skills of listening to the facts and synthesising of all the facts through fundamental reasoning in developing new principles.

Judges must decide cases coming before them. They do not have to legislate; by analyzing the facts and the residual law, they find their bearings and determine the legal principles to govern the case they are dealing with.

Parliamentary debates on bills that eventually become law should be enhanced to produce quality laws that are devoid of ambiguities and incomplete expressions.

c) Policy Issues

Judges need to have lawyers permanently attached to them to help in researching the law and other issues relevant to the facts in issue; to enable them to take into account all legal questions canvassed by counsel, and to enhance their own understanding through focused inquiries on particular issues.

There is need to computerize all operations of the judiciary so that even proceedings are recorded verbatim by the stenographer so that Judges can concentrate on appreciating issues as they are presented as opposed to the current system where they spend most of their time taking notes therefore missing crucial issues in the proceedings.

Proper remuneration of Judges to enable them concentrate in developing the law through proper adjudication of cases than fighting financial anxiety which tends to affect their thinking and reasoning.

Continuous legal training on the developments in other jurisdictions with a view to exposing judges to trans-national jurisprudence which will give them a better appreciation of globalization and its effect on the Constitution and Constitutionalism

The Courts can use the doctrine of implied jurisprudence to enforce fundamental rights and freedoms and more particularly utilize the reciprocal disciplines like medicine whose opinions are critical in giving scientific opinions that have a bearing on Constitutional rights of women on whether or not they can terminate a pregnancy.⁵²⁹

The Courts should take into account underlying considerations and invincible background norms, customs and traditions like race, tribe, and other broader societal attitudes that shape peoples' lives and freedoms.⁵³⁰

Judges have to appreciate the fact that law has capacity to grow and adopt its own identity, different from what was originally intended, and acquire greater substantive content and scope than the framers may have intended.⁵³¹

It is not easy to explain difficult cases in liberal legalistic terms of collective judicial search for an overarching Constitutional principle; however, if we adopt theoretical insights of internal legal pluralism, then explaining the twists and vagaries of

⁵²⁹ Gavin, W.A., *Supra* Note 1 P. 88.

⁵³⁰ *Ibid.*, P. 88.

⁵³¹ Stephen D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (New York : Oxford University Press) 1995 P. 21 - 22.

adjudication is not so hard after all since it is just a practice that remains exceedingly complex.⁵³²

Courts are Constitutional actors and they should not be viewed or treated as something a part from the Constitution. Indeed, in other jurisdictions the Courts have broadened the rights through the doctrine of implied jurisprudence to confer rights and benefits on corporate litigants⁵³³

d) Donor Support

The judiciary may realize its full potential if it attracts donor funds to provide basic equipments like lap tops to all judges to enhance their efficiency among other things.

e) The Citizenry

The constitution may be a perfect document, the law may be adequate but if the citizens are not enlightened enough about their rights or if they do not litigate then the law cannot develop through adjudication of cases in Court.

4.4 Conclusion

This thesis has given us a broader and wider understanding that for Judges, Magistrates, the academia and students to understand the law in proper context and perspective, then in addition to understanding the text of the Constitution, statute or convention and its intention, one has to have insight into the law's effects and/or consequences upon the society and individuals.⁵³⁴ This discourse on the doctrine of implied jurisprudence has opened our perspectives and perceptions about the role of jurisprudence in either restricting or opening up the law. The scope or limitations of the proper appreciation of this concepts depends on level of education, earlier socialization, peer orientation, and an

⁵³² Gavin W.A., *Supra* Note 1 P. 77.

⁵³³ *RJR-MacDonald Inc. Vs. Attorney General of Canada et al* (1995) 127 DLR. (4th) 1. where the Supreme Court of Canada has interpreted the Charter broadly to overturn a statutory ban on the advertising of Cigarettes.

⁵³⁴ Dahl S. T, *Women's Law: An Introduction to Feminist Jurisprudence* Norwegian University Press, [1987] P. 12.

understanding of the philosophical , historical and Constitutional underpinnings of that society.

The Law affects different people differently in the same Society and it is incumbent upon Judicial Officers to take cognizance of a whole range of issues including those not immediately discernible from legal text⁵³⁵

The Doctrine of implied Jurisprudence has been particularly useful in expanding the scope and application of the enforcement of Women Rights.⁵³⁶ Law is an arena where change is slow, if Courts were to leave some wrongs to persist just because there is a legal lacuna, the Judicial Officers have to appreciate that Legislation in some situations “runs a head” of development in society, and there could be a gap between the factual reality in society and the legal rule.⁵³⁷

The doctrine can help the Courts to check and prevent unfair legal provisions and draconian administrative practices or other social and economic barriers that inhibit enforcement of fundamental rights of the individuals particularly women.⁵³⁸

Modern Jurisprudence is now moving away from the traditional text and Legislative intent to evaluating law on the basis of its effects as a collective whole manifested throughout the entire process of legislation, interpretation and application of the interplay between law and real life in society⁵³⁹ *visa-vis* policy considerations, customs and public opinion where necessary.⁵⁴⁰ Indeed, it is the task of Jurisprudence to give a logical, coherent account of the system of law as guidance to practitioners and users about what is to be considered valid law.⁵⁴¹

⁵³⁵ Ibid., P. 13.

⁵³⁶ Ibid., P. 13.

⁵³⁷ Ibid., P. 14.

⁵³⁸ Ibid., P. 51.

⁵³⁹ Ibid., P. 52.

⁵⁴⁰ Anne Hellum: University of Oslo Article (1990) Legal Advice as a Research Method: The case for Women's Law in Norway and its Relevancy for women and law in Southern Africa Research Project. Harare WLSA Working Paper No.2.

⁵⁴¹ Bentzon W. Agnate: Law in context and Legal Education: Women's Law as a model.

Some scholars like Professor Herman Belz have argued that Jurisprudence has opened a Pandora's Box of uncertainty and created confusion in Constitutional Jurisprudence in Irish Constitutional Law.⁵⁴²

The doctrine helps to open new perspectives and avenues of the Law. The Supreme Court of the United States has held that same-sex harassment was subject to the same standards as any opposite-sex sexual harassment claim.⁵⁴³ In this case, the words of the statute were restrictive Title VII of the Civil Rights Act of 1964 states that: "it shall be unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, sex or national origin," but justice Scalia noted that the words had to be given broad interpretation to include sexual harassment of any kind that meets the spirit of statutory requirements.

To avoid convoluted Jurisprudence, the Courts have always taken into account the underpinning philosophical and historical reasons behind Legislation. In the Law of defamation recent Jurisprudence shows that the Courts have created a body of "positive" Jurisprudence whereby they balance one's reputation but demonstrating an increased willingness to protect freedom of expression in a democratic and free society.⁵⁴⁴ Where Judges have a belief in the value of democracy, they resort to the International, Commonwealth, Regional and USA Court decisions.⁵⁴⁵ – "freedom of expression... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress"⁵⁴⁶

Anecdotal evidence shows that for Courtesy purposes most Justices tend to coalesce on the Chief Justice's thinking.⁵⁴⁷ Sir Owen Dixon's strict Legalism has argued that

⁵⁴² Herman Belz: A living Constitution or fundamental Law? Www. Constitution org/cont/belz/lcfl to hotm.

⁵⁴³ *Joseph Oncele Vs. Sundowner Offshore Services, Incorporated et al*; 66 U.S.L.W. 4172 [1998].

⁵⁴⁴ Bonnie Harvard, Human Rights Journal Vol. 13 Spring 2000 P. 20.

⁵⁴⁵ *Ibid.*, P. 20.

⁵⁴⁶ *Ibid.*, P. 21.

⁵⁴⁷ Justice Michael Kirby AC- Inaugural Speech, 26th Nov. 2004, Sydney, August P. 2.

Constitutional interpretation is “an exercise in judicial policy which calls for an assessment of a variety of factors in which Judges balance the need for continuity, consistency and predictability against the competing needs for Justice, flexibility and rationality”.⁵⁴⁸

Judges have to admit that the Constitution is a house of many rooms. One has to appreciate its text and structure in order to draw or discern proper Constitutional implications.⁵⁴⁹ Use of previous authorities, the doctrines associated with them, the use of history and the purpose of that particular Constitutional provision are critical in resolving the difficult issues.

The attitude of mind is another powerful influence Judges have to reckon that Globalization has had tremendous influence on how we do trade, legal systems and political opinion. Australian Courts have recognized new equitable rights although they do not exist under law this includes title to land for indigenous people; protection from unfair prosecution for accused persons, flowing from the right to liberty, clause of action for those seeking redress for moral wrongs and a higher level of protection of women and environmental rights.⁵⁵⁰

The Constitution is the framework for government so it cannot be interpreted like any ordinary statute.⁵⁵¹

Open minded Judge’s have Constitutionalised the law of defamation-“free speech cases” the Australian Court has given effect to an implied Constitutional freedom of political communication as a limitation on legislative and executive power. Mason C.J. argued that the implication of representative government from the text and structure of the Constitution, a necessary incident of which was a freedom of communication between the people on government and political matters.⁵⁵²

⁵⁴⁸ Anthony Mason, The use and Abuse of precedent,” [1988]4, Australian bar Review 93 P. 111.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

⁵⁵¹ Saunders, Future Prospects for the Australian Constitution, [2003] P. 212 – 221.

⁵⁵² Hon. Justice Michael Kirby AC. Inaugural speech, Supra Note 547 P. 11.

In the *Theophanous* case,⁵⁵³ Deane J. stated that the authority of the Constitution derived from the sovereignty of the people and the people's continuing acquiescence to it, the invention of the framers was irrelevant. The Constitution must be construed as "a living force, representing the will and intentions of all contemporary Australians, both women and men, and not as a lifeless declaration of the will and intention of men long since dead"⁵⁵⁴

The doctrine has demonstrated that Parliament is not an all-knowing institution; it is just like any other normal institutions like the judiciary and the executive and therefore predisposed to making mistakes. Regrettably, parliament is the only institution that is empowered by the Constitution to change public policy issues through Legislation. Owing to the busy parliamentary calendar coupled by the busy schedule of members of parliament as ministers, assistant ministers, attending to official, parliamentary, or committee meetings and conferences abroad; attending to the public and social commitments erodes their capacity to engage in enlightened research little wonder, sometimes laws are passed without adequate scrutiny.

Parliamentary debates are often characterized with emotions and physical confrontations which almost always tend to obscure the real issues.⁵⁵⁵

Bills are sometimes sponsored by competing special interest groups like Kenya Bankers Association (Banking Act) Kenya Insurers Association (Insurance Act) who tend to have particular agendas which they want articulated and/or passed into legislation. This tends to undermine the objectivity and responsiveness of the legislation at implementation stage.

Conflict of interest whereby stake holders with vested interests either compromise the legislators or lobby for the Bill to reflect their special interests.⁵⁵⁶

⁵⁵³ *Ibid.*, P.12.

⁵⁵⁴ *Theophanous Vs. the Herald and Weekly Times*, [1994] 182 CRR 104 P. 173.

⁵⁵⁵ The National Health Bill (2004) debate attracted more controversy than substance.

⁵⁵⁶ The Tobacco Bill whereby members were taken to Mombasa with a daily allowance of Ksh. 20,000.

Law makers have a propensity to make bad laws because of several reasons among them:

- a) The law-makers become “law shy” and tend to avoid clear, principled and decisive legislation.
- b) They participate in Legislation in fear of offending some one, somewhere, somehow.
- c) The resulting legislation adopts vague language, leaving gaping voids in the process.
- d) Promised possibilities and prospects of further change or amendment if the law is unworkable.

Parliament does not operate in a vacuum and for law to have a modicum of respect; it must reflect the opinions of the people it is going to affect. There is need to create the office of civilian overseer to check the legislative vacuum and fill the gaps.⁵⁵⁷

The role of the overseer is to protect the public interest in the proper functioning of democratic institutions of the judiciary, legislature and the citizenry and the executive.⁵⁵⁸ However, lack of legislative clarity and thoroughness is more the norm than the exception for enabling legislation that can survive the test of time.

Always a genuine and methodical factual account leads to judicial perceptions on right and wrong. From that foundation, the expansive web of the common law and equity will not fail to generate useful directions. The Judge must then reason inductively and evolve guiding principles, which then lead to the creation of new laws in the common law mould.⁵⁵⁹

⁵⁵⁷ Marin Andrin, *Ombudsman National Defense and Canadian forces*, 2004 P.2.

⁵⁵⁸ *Sanita+* Ann publication: 1966 Jan-Feb. 27 125-134.

⁵⁵⁹ Key informant and respected jurist Justice J.B. Ojwang of the High Court Nairobi.

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