POLITICAL JURISPRUDENCE OR NEUTRAL PRINCIPLES

ANOTHER LOOK AT THE PROBLEM OF CONSTITUTIONAL INTERPRETATION

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Introduction

What is the Constitution? Is the Constitution written, living, or both? How should the Constitution be interpreted? Constitutional interpretation is one of the more difficult tasks that the judiciary is called upon to perform.[1] Firstly, the fact that the Constitution is both a political charter and a legal document makes its interpretation a matter of great political significance, and sometimes controversy. Secondly, the courts' interpretation of the Constitution by way of judicial review is equally controversial as it is essentially countermajoritarian. A non-elected body reviewing and possibly overruling the express enactments and actions of the elected representatives of the people would raise the issue of legitimacy. Thirdly, however defined, the Constitution is an intricate web of text, values, doctrine, and institutional practice. It lends itself to different interpretations by different, equally well-meaning people.[2] Fourthly, the Constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance.[3] Fifthly, at times, the Constitution is vague or imprecise or has glaring lacunae and the courts are called upon to provide the unwritten part.[4]

Axiomatically, a consistent methodology of constitutional interpretation based on sound constitutional theory is absolutely essential for the legitimacy of a constitutional democracy. Without a coherent and principled approach to the interpretation of the Constitution, constantly changing and conflicting interpretations undermine its legal authority and political significance. Yet, there is probably no area in which constitutional lawyers have greater disagreement than this one. The reason is not hard to find. In every constitutional democracy there is an inherent tension between democracy and constitutionalism, one championing popular will and the other championing limits on the power of popular government. Thus while democratic theory is concerned with how the system chooses the political leadership and formulates public policy, constitutionalism

is concerned with placing institutional limitations to curb governmental power beyond those provided by the ordinary democratic process.[5] The interpretation of the Constitution invariably involves reconciling the two, and the search for the proper canons of constitutional construction involves the formulation of a theory of the Constitution that recognises and seeks to reconcile these conflicting values. As a consequence, the legal theories that justify Constitutional interpretation while clothed in technical garb have an essentially *political* character. Yet most constitutional lawyers are uncomfortable with the notion that a strictly judicial process should be influenced by politics. Herein lies the problem.

In Kenya, while the jurisprudence on the interpretation of ordinary legislation has developed significantly over the last forty years, the same cannot be said of constitutional interpretation. The interpretation of the Constitution has been largely unprincipled, *ad hoc*, eclectic, vague, pedantic, inconsistent, contradictory and confusing. The courts and the lawyers who argue before them have failed to develop a consistent set of canons of constitutional interpretation to be used in the *proper* interpretation of the Constitution.[6]

This paper presents three basic arguments. Firstly: that without a coherent and principled approach to the interpretation of the Constitution, constantly changing and conflicting interpretations undermine its legal authority and political significance. Secondly: that the jurisprudence of constitutional interpretation in Kenya is essentially a political jurisprudence, hinged on the personal preferences of judges and responses to 'public' pressure. Thirdly: that in order to develop a serious constitutional jurisprudence in Kenya, lawyers and judges must seek to reconcile the *legal-technical* function of the judiciary with its *political assumptions.* In order to do so they need a better understanding of constitutional theory. But what then, one may ask, is constitutional theory? In this paper, constitutional theory refers to the sum total of ideas of some historical standing, as to what the Constitution *is* or *ought* to be. Some of the ideas appear in the written document itself, others find specific definition in the application of constitutional law, and still others remain more or less general and provide the inspiration for national policy.[7]

The Problem of Constitutional Interpretation

Of all the claims that the law makes, the most ambitious of all is the claim to neutrality, impartiality and objectivity. At the best of times this claim is tenuous. It is even more so in the arena of constitutional law. This is because no other branch of law is as closely affiliated to and influenced by politics. Because what the Constitution means has profound political significance, the various forms of constitutional argument that *rationalize* constitutional choices are necessarily politically inspired.[8] This notwithstanding, the search for neutral principles by which to interpret the Constitution has a long and distinguished history.[9]

Many judges and academics seek to justify a certain view of the Constitution as the objectively correct one. They do so by creating the illusion of technical precision and predictability in the common law tradition, while actually expressing a political preference.[10] The more they claim objectivity, the more politically compromised (albeit subconsciously) they actually are. Yet, one would have thought that reference to liberal and conservative judges, which is commonplace in the common law tradition, would be an acknowledgement that the process of interpretation of law is not mechanical but involves personal preferences.[11]

The truth is that consciously, but in most cases unconsciously, individual lawyers internalise a worldview of what the Constitution constitutes or ought to constitute, and on that basis they erect a theory of interpretation of the Constitution that best accords with their view. Precisely because law has by its very nature an *open-textured* quality, the possibility of *reading into the law* personal political preferences always exists.[12] George Braden captured this argument as follows:

> [T]here is no objectivity in Constitutional law because there are no absolutes. Every constitutional question involves a weighing of competing values. Some of these values are held by virtually everyone, others by fewer people. Supreme Court Justices likewise hold values. The more widely held the values in society, the more likely the Supreme Court will hold them; the more controversial the values, the more likely the Supreme Court is to be divided over them.[13]

How then do we explain the fact that lawyers across the political and professional divide continue to insist that their interpretation of the Constitution is objective and free from value judgements? The answer lies in the methodology of constitutional interpretation and the nature of constitutional argumentation.

Typologies of Constitutional Argumentation

While acknowledging the difficulty of formulating all-embracing canons of constitutional interpretation, most constitutional lawyers would agree that there is a clear and necessary distinction between *legitimate* and *illegitimate* interpretation. In order to establish the distinction between the two, it is necessary to isolate two things. First is the technical argumentation that justifies constitutional decisions. Second is the stated goal or objective of constitutional decisions. Technical arguments go to explain the *legal basis* of rationalising a constitutional decision, e.g. the intention of the drafters. The objective declares the policy goal sought to be achieved by the decision, e.g. to enhance democracy and political accountability.

American constitutional lawyer Phillip Bobbitt has identified six different arguments that lawyers often use in justifying constitutional interpretation: the historical argument, the textual argument, the doc-

trinal argument, the prudential argument, the structural argument and the ethical argument.[14]

The Historical Argument

The historical argument is sometimes referred to as originalism or the original intent doctrine. Its basic argument is that a proper interpretation of the Constitution is like the interpretation of any other historical document; it must be preceded by a serious examination of the intention of the drafters and of the people who adopted the Constitution in the first place.[15] It is contended that the correct question to ask when faced with the challenge of interpreting the Constitution is what the intention of the drafters was. The attitudes and assumptions when the Constitution, or a provision of it, was adopted are therefore not only relevant but also decisive in determining what the Constitution means today. In a way, the historical argument invites the lawyer to engage in imaginative legal anthropology.[16] The historical argument purports to draw legitimacy from the social contract that the Constitution is supposed to have captured from its inception. Not surprisingly, it has a powerful basis for its appeal in its claim to retain fidelity to the document that was negotiated and agreed upon at inception. Its attempt to freeze meaning within a historical context is, however, fraught with danger. It is very difficult, if not impossible to give words the same meaning across different generations and circumstances. For example, the Constitution often provides general concepts, such as equal opportunity or due process, but leaves each generation to fix the particular conception of each provision.[17] Moreover, establishing the original intent of the drafters does not help to solve the problem of how one claim is to be reconciled with another competing claim.

The Textual Argument

Virtually all arguments of constitutional interpretation are textualist to the extent that they purport to explain what the document means. As a separate approach however, textualism claims to find meaning in the plain words of the document through a straightforward uncontroversial reading of words and phrases.[18] In a sense, the textual argument is a refutation of the historical argument to the extent that the former emphasizes the need to give constitutional interpretation meaning contemporary to the time of interpretation. No need is found to have collateral sources to interpret the text. Textualists are therefore readers; their principle tools are dictionaries and grammar. The process is not unlike translating from one language to another.[19] But as the textual argument emphasizes contemporary meaning, it provides a way in which contemporary ideas and values can be read into the Constitution, thereby creating, its proponents contend, some form of enduring social contract.[20]

One of the major limitations of the textual argument, however, is the fact that the text cannot possibly capture the whole meaning of the Constitution. There is much in the Constitution as indeed in any

law that is unwritten and, therefore, inferred or assumed. Experience teaches that in hard cases, much of the law is implicit, not explicit. For example, the constitutional limitations on the power of the legislature to amend the Constitution is partly expressed in the amendment provision, but the true scope of application can only be inferred from the totality of the constitutional order.[21] The second problem arises from the fact that the interpretation of the Constitution does not ordinarily pose difficulties in explaining what plain words mean but in settling the language of discourse.

The Doctrinal Argument

The basic doctrinal argument is that the text does not exhaust the meaning of the Constitution. It is contended that the interpretation given to the Constitution over time and which has become part of the political culture is as much part of the Constitution as the basic text itself.[22] The doctrinal argument searches for past interpretation as it relates to specific problems and tries to organise it into a coherent and systematic doctrine. Doctrinalists, therefore, argue that the correct interpretation of the Constitution must proceed upon some rational basis predicated on some neutral principles of general application such as rules, principles or standards. Their reasoning proceeds on the basis that there is a purpose for which a provision or the entire Constitution is deemed to serve and no interpretation can assume the Constitution to be static. They advocate both constitutional continuity and change.

The advocates of the doctrinal argument seek to preserve the r*ule of* law in the sense of being able to have rules of sufficient neutrality and generality to discourage *ad hoc* or legislative decisions, thereby reinforcing the integrity of the judicial process.[23] Herbert Wechsler has stated this position very empathetically:

> [I] put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgement on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case before them. But must they not on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?[24]

Doctrinal arguments have both an ethical and a jurisprudential appeal. They assume that the judicial process is manned by dispassionate and disinterested judges who reach their decisions by a process of doctrine applied to reason as opposed to whim and caprice, thereby ensuring the impartiality of the interpretation process.

Critics of the doctrinal argument accuse it of many ills. Some argue it distracts attention from the primacy of the text by centring on the commentary on the text. Others say that it disguises preferences

of policy by its appeal to formalism. Yet others argue that it reinforces the legal status quo by inhibiting personal discretion.[25] Not even its worst critics can deny that doctrinalism allows flexibility in confronting new problems by building on past interpretations and *reasoning* through analogy.[26]

The Prudential Argument

The prudential argument is a constitutional argument that is actuated by the political and economic circumstances surrounding a decision.[27] The argument assumes the need for *balancing* competing interests at times represented by competing *texts* in the Constitution. Where two texts exist with no guidance as to how to prioritise them, the issue becomes one of *prudence* based on a cost-benefit analysis such as balancing the necessity of the act against its cost.[28] If, for example, a national emergency exists, prudentialists would be willing to ignore even the plainest constitutional constraints if in their judgement, the national interest demanded so. In numerous situations therefore, the prudential argument is invoked to support conclusions not expressly mandated by the Constitution but which, it is argued, are dictated by the institutional consequence of deciding one way or the other.[29] Some judges therefore find it more prudent to deny themselves the jurisdiction to entertain certain matters rather than get embroiled in choices between competing policy options.

The Structural Argument

The structural argument proceeds on the basis that the Constitution sets up certain structures in a way that ordains a special manner of relationships between the institutions in place. The proponents of the structural argument are inspired by what they perceive as the logic and coherence of the constitutional arrangement, rather than by reference to specific parts of the Constitution.[30] From given structural relations, the proponents of this argument infer certain constitutional rules. For example, the centrality of the electorate in the constitutional process, the co-existence between the central and local governments and the relationship between the three arms of government. As regards constitutional amendments, structuralists proceed on the basis that there are *basic* and fundamental structures of the Constitution that cannot be changed under the guise of amendment. They are, therefore, willing to hold an amendment unconstitutional if it seeks to change or alter the basic structure of the Constitution.[31]

The Ethical Argument

By ethical argument is meant the type of argument that appeals to the *ethos* of the polity in which the constitutional decision is to be made. It is not a moral argument.[32] A good example of a case in which the ethical argument was prominent is that of *Meyer v. Nebraska*.[33] The Supreme Court was confronted by an appeal from a Nebraska schoolteacher convicted under a statute that made it illegal to teach a foreign language to any pupil not yet in the

eighth grade. Justice McReynolds in purporting to define liberty had recourse to the various manifestations of the American ethos as follows:

> [W]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship god according to the dictates of his own conscience, and generally to enjoy those privileges long established at common law as essential to the orderly pursuit of happiness by free men.[34]

The ethical argument therefore seeks to appeal to the defining characteristics of the people and their society. The appeal is not a moral appeal as much as it is an appeal to tradition, that is to "who we are" and "what our values are".

Bobbit argues that:

> [E]thical arguments are not moral arguments. Ethical constitutional arguments do not claim that a particular solution is right or wrong in any sense larger than that the solution comports with the sort of people we are and the means we have chosen to solve political and customary constitutional problems.[35]

The ethical argument therefore serves an important function in locating the legitimacy of constitutional adjudication in the expectations of the people.

The Problem of Political Jurisprudence

The controversial nature of constitutional disputes notwithstanding, there is consensus among constitutional lawyers that the courts ought to arrive at decisions that are not influenced by the value choices of individual judges. Most would also agree that it is equally undesirable that the courts should issue *per curiam* decisions which merely state the result without an explanation as to how and why the decision was made. Ideally decisions must canvass all the relevant issues and address possible objections by persons of a different persuasion. How is this to be achieved?

Some constitutional lawyers have argued that it is possible for courts to arrive at reasoned decisions in individual cases derived from general principles.[36] They argue that in order to do so, it is necessary for the courts to apply neutral principles, which neutral principles or standards are to be discovered by the judges through a process of collective reasoning.[37] The judge should not be preoccupied with the results of a decision but with the long-term viability of the standard applied. The judge must be neutral in terms of having no predisposition towards any political or social results. His or her commitment should be to reason and consistency. In many respects, these lawyers are committed to the common law paradigm by which the judge's job is to discover the law. They are opposed to the courts becoming 'naked power organs' as opposed to being 'courts of law'.[38] In evaluating their thesis, it is important to remember that their original concern was how to protect the role of the courts in constitutional adjudication, in the face of

an onslaught by those who thought the courts had become too political. These jurisprudes thought that the legitimacy of the judiciary would be enhanced if the courts abstained from making decisions that did not rest on neutral principles. Unfortunately, their search for an apolitical judiciary tended to re-affirm the political nature of the adjudication process.

Critics of neutral principles contend that that model of adjudication fails to acknowledge the fact that real constitutional controversies generate 'difficult cases' in which the applicable law is not readily ascertainable, and which necessitates judges balancing competing interests by making value choices.[39] They also contend that the neutrality of a judge can only exist where he has a re-established hierarchy of values or social goals and a re-established standard of relevance.[40]

There can be no doubt that the truth lies somewhere in between. We shall return to this aspect later.

Constitutional Interpretation in Kenya

In Kenya there have been two broad trends in the interpretation of the Constitution. These are the conservative tradition, which also includes a subversive variant and the liberal tradition. Ironically, while both traditions have an incompatible jurisprudence, the nature of the legal argumentation that supports their conclusions is the same. Their canons of constitutional interpretation are result-oriented. They seek a purposeful interpretation of the Constitution. But both traditions do not have equal influence on the jurisprudence of constitutional interpretation. E.

The dominant judicial culture in Kenya is conservative. The judiciary perceives its role as the maintenance of the *status quo,* which is postulated as providing political stability and continuity, without which the Republic, it is assumed, would be plunged into chaos and anarchy. While the average judge will assess the political consequences of any decision he is required to make, he will vehemently deny that the legal process is political.[41] The judicial process is presented as value-neutral, and capable of delivering blind *justice.* An idealised and mythical decision-making model is depicted in which the law on a particular issue is pre-existing, clear, predictable and available to any one with reasonable legal skills.[42] The facts relevant to the disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth emerges. The result in a particular case is determined by a rather routine application of the law to the facts, and except for the occasional bad judge, any reasonably competent judge will reach the correct decision.[43]

The assumptions that underpin the dominant judicial culture have a number of problems. First, the argument that it is possible and indeed desirable for the judiciary to ignore political and social is-

sues whether in the interpretation of statutes or in the application of precedent is self-delusion.[44] Moreover, the myth of judicial neutrality and objectivity perpetuates the belief that it is possible to expunge values from the process of judicial adjudication without ever acknowledging their existence. This myth has no basis in fact and poses a real danger to the rule of law.[45] Second, the basic vice of this judicial culture lies in the fact that it allows judges to conceal value choices or inarticulate premises in their decisions behind seemingly objective legal forms, and in so doing legitimates purely political decisions. For its practitioners, the real advantage lies in the fact that one can make serious political choices and still wear the mask of neutrality.

In the area of constitutional law, the Constitution is depicted as being separate from and above politics. Constitutional disputes are abstracted from their political basis and sought to be resolved by some technical application of rules in a sterile and pedantic fashion.[46] The preferred method of constitutional interpretation is in favour of both a strict construction and judicial restraint.[47]

The Politics of Constitutional Adjudication

Where the judiciary is committed to maintaining the *status quo* it becomes "[m]ore executive than the executive".[48] It views its role as upholding the powers of government in the face of any challenge, in order to ensure stability of the political order. In justifying the abdication of its constitutional responsibilities, the judiciary usually has several strategies whose purpose is either to divest itself of jurisdiction or to deny the applicant *locus standi*.[49] To achieve this end, the courts attempt to dispose most matters at an interlocutory stage at the point of *preliminary objections.* In addition, they adopt a methodology of construction that is both narrow and pedantic.[50] Where this does not yield the desired results the courts are then compelled to ignore clear and binding precedent.[51] In some cases the courts subvert not only the spirit but the letter of the Constitution.[52]

In these circumstances, a student of constitutional law has the unenviable task of determining what the court's interpretation of any provision of the Constitution is likely to be. The case law that emerges does not lend itself to serious scrutiny in terms of its underlying philosophy because more often than not there is none.[53]

Of Objective Standards and Neutral Principles

While theoretically committed to objective standards of adjudication, the dominant judicial culture achieves political goals by manipulating technical rules. The case of *Kamau Kuria v. The Attorney-General*[54] offers an excellent example of this approach. In this case, counsel for the plaintiff sought to have a constitutional court set up to hear and determine the issue of whether the impounding of the applicant's passport abridged his right

to travel to and from Kenya in the manner protected by the Constitution. Chief Justice Miller, in an unprecedented act of judicial ingenuity, ruled that Section 84 of the Constitution was inoperative since no rules had been made thereunder and as such jurisdiction could not be invoked through the said Section. This decision was cited as authority to reach the same conclusion by Dugdale J. in the case of *Maina Mbacha and Two Others v. The Attorney-General.*[55] The applicants in this case sought to have a Resident Magistrate's Court restrained by way of prohibition from continuing to hear a case against them because that would infringe their fundamental rights as set out under Sections 72, 77, 79 and 82 of the Constitution. Justice Dugdale did not entertain any arguments as to jurisdiction. In a novel method of judicial decision-making, he read a pre-typed ruling during the mention of the case, holding that Section 84 of the Constitution was inoperative and dismissed the application. Attempts to have this ruling reviewed were also dismissed.

Both *Kamau Kuria* and ***Maina Mbacha*** show the inherent danger in a formal commitment to objective standards without a concomitant application of the same. A reading of both cases shows that the courts started from the position that they did not wish to hear the substance of the complaint; they then proceeded to look for a technical reason to dismiss the cases without hearing them.

The situation is not any better when the court decides to hear the merits of a case. Two other cases illustrate this point. In *Sam Karuga Wandai v Daniel Arap Moi*[56] the court was called upon to determine a number of constitutional issues relating to the powers vested in the presidency. The case arose out of the following facts. After the 1997 elections the then President-elect had failed to appoint a Vice-President. He had also proceeded to create 27 ministries and appoint ministers to the same. The applicant argued that the failure to appoint a Vice-President was a serious neglect of constitutional duty and rendered the Cabinet incomplete as a Vice-President was expressly required by Section 17 of the Constitution. He also argued that the ministries as constituted having not been sanctioned by Parliament as mandated by Section 16 of the Constitution were illegal. An application was made by the respondent to strike out the motion on the grounds that by virtue of Section 14 of the Constitution, the President enjoyed immunity from all civil proceedings. Relying on the decision in *Jean Njeri Kamau and Another v. The Electoral Commission and Daniel Arap Moi*[57] the court held that it had no jurisdiction to summon the President to court other than in an election petition questioning his election.

In both cases the court's decision appeared highly controversial. In *Jean Njeri Kamau*, the court failed to make a distinction between immunity from suit of the President in civil and criminal matters, which is envisaged by Section 14, and constitutional actions to compel performance of his constitutional duties as

President. While purporting to determine the case on some objective legal standard, the court was endorsing the notion of a President being above the law.

In the case of *James Aggrey Orengo v. Daniel Toroitich Arap Moi*[58] an important constitutional issue came up for determination. Mr Orengo, an opposition Member of Parliament, contended that Mr Moi, who had been declared winner of the 1992 Presidential elections by the Electoral Commission of Kenya, could not have been validly elected as he had already served two terms as President and a further term was prohibited by Section 9(2) of the Constitution. The amendment of the Constitution in 1992 had a new provision in Section 9 which provided that 'no person shall be elected to hold office as President for more than two terms'.[59] This clause had been worded in an ambiguous manner in that no exemption was provided for the serving President. At the hearing, it was common ground that the respondent had previously been elected President in 1979, 1983 and 1988. The real question for determination was whether the amendment was retrospective or only prospective.

In a lengthy judgement, the court arrived at the conclusion that the application of the controversial clause was prospective, not retroactive. The court argued that, had Parliament intended the Section to apply retroactively, it would have said so.

The court's construction of the Section was highly controversial. The Section was clear and unambiguous. It employed the word 'shall' intending the provision to be mandatory. As previously presidential terms were unlimited, logically, the mischief that Parliament intended to cure was to limit presidential terms and eliminate the possibility that a President could hold office for more than two five-year terms. Ironically, the court started by denying that there was any mischief to be cured; this would have betrayed the court's unpreparedness to deal with the basic lexicon of statutory interpretation! But perhaps more disturbing was the court's reversal of the necessary presumption in the circumstances. Had Parliament intended to save the incumbent holder of the office of President from the new provision it would have said so expressly. That it declined to do so in its wisdom must mean that the provision was intended to apply to everyone. The purported application of an objective standard had achieved a very specific political goal!

Political Jurisprudence

The fact that the judiciary in a number of cases arrives at the correct answer in the Dworkinian sense is not in itself justification for lack of a consistent and coherent jurisprudence on the interpretation of the Constitution.[60] Nothing illustrates this more than an analysis of a number of cases in which the courts have in the view of most commentators retained fidelity to the Constitution.

The case of *Stanley Munga Githunguri v. The Attorney-General*[61] is probably one of the most celebrated constitutional cases in Kenya. The issue that arose for adju-

dication was whether the Attorney-General could institute criminal proceedings against a citizen despite the lapse of eight years and despite repeated assurances that the matter had been put to rest.[62] The case turned on the interpretation of Section 26 (3) of the Constitution of Kenya which empowers the Attorney-General to commence and terminate criminal proceedings at his sole discretion. The court held that the Attorney-General's powers were not absolute but were to be exercised reasonably, with due regard to the rights of the accused person. Reading the unanimous decision of the constitutional court, Madan C J stated:

> [W]e also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights. The people know and believe that destroy the rule of law (sic) and you destroy justice (sic), thereby also destroying the society. Justice of any other kind would be as shocking as the crime itself. The ideals of justice keep people buoyant. *The courts of justice must reflect the opinion of the people.*[63] (emphasis by the author).

The real *ratio* of the case, that the Attorney-General's constitutional powers of prosecution are subject to judicial review, is uncontroversial. Most constitutional lawyers would agree with the conclusion subject to the facts of each individual case. What is worthy of note is the reasoning that appears to have informed the decision. At one level, the case appears to have been decided on the principle that constitutional construction ought to accord with social expectations. Professor Bobbit might call this an ethical argument. At another level there is an implicit acknowledgement that the Constitution contains a hierarchy of values and that where a conflict emerges, the values enshrined in the bill of rights ought to override other constitutional values.[64] Bobbit might call this a structural argument. But other than the broad policy goal, does the court's decision rest on sound doctrine that can be applied consistently in resolving subsequent disputes? I submit not. Does the court's decision offer to provide principles that resolve the apparent conflict between the power of the Attorney-General to prosecute without interference from any authority, and the court's obligation to ensure that all action by public officials accords with the Constitution? I submit not.

The limits of the precedent value of the ***Gĩthunguri case*** became apparent in the latter case of *Stephen Mwai Gachiengo & Another v. Republic.*[65] While the case raised precisely the same issue relating to the scope of the Attorney-General's power to prosecute a criminal suspect, neither counsel nor the court derived any inspiration from the ***Githunguri case***; indeed there was no mention of the case. In deciding that the Kenya Anti-Corruption Authority (KACA) could not competently prosecute offences under the Penal Code, the court stated:

> [F]rom the foregoing, it is crystal clear that Section 10 and Section 11B of

> Cap 65 are 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 offends the Constitution. By alienating powers conferred upon him by the Constitution the Attorney-General was being escapist and is a mark (sic) of abdication of responsibilities bestowed on him by the Constitution. He should not have abdicated his duty to render the desired legal advice. The powers of the Commissioner of Police have been curtailed by Section 10 and Section 3B(5) of Cap 65. That is unconstitutional. The provisions of Section 3 of the Constitution are quite clear in that, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. KACA is not a department in the office of the Attorney-General. It is a body incorporate. The powers conferred on it by Section 11B(1) strip it of any semblance of independence. Acting by or against KACA can be in reference to the Government's Proceedings Act Cap 40 of the Laws of Kenya. 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, we find and hold that, the provisions establishing KACA are in conflict and inconsistent with the Constitution.

This laboured reasoning of the court, which purported to be based on the principle of constitutional supremacy, in fact offends that very principle; because the legislative power of Parliament is not to be qualified except where it expressly offends the Constitution. Section 26 of the Constitution does not prohibit Parliament from conferring authority on any body to prosecute subject to the direction of the Attorney-General. But what was the court's specific doctrinal basis for the decision in the *Gachiengo case*? Beyond the casual reference to an alleged conflict between statute and the Constitution, there was none.

Another instance in which the court arrived at the right answer without establishing the basis of principle is the equally celebrated case of *Felix Njage Marete v. The Attorney-General.*[66] The Plaintiff was a technical assistant in the Ministry of Agriculture and Livestock Development. On 15th December 1982, the District Development Officer purported to dismiss him. The plaintiff immediately objected to the alleged dismissal but, that notwithstanding, the Permanent Secretary of the said Ministry, on 25th January 1983, informed him that he had been suspended. He was not to leave his duty station without permission nor was he to receive any salary during the period of his suspension. From January 1983 to August 1985 he was without pay and work. In December 1986 he commenced an action in the High Court praying for a declaration that he had been subjected to inhuman and degrading treatment contrary to Section 74(1) of the Constitution and was, therefore, entitled to damages under Section 84(1) of the Constitution. Shield J. had no hesitation in granting the orders as prayed. He went further and pointed out that had he been

invited to hold that the Plaintiff had been held in servitude contrary to Section 73 of the Constitution, he would have done so. In awarding KShs. 100,000 as general damages for violation of constitutional rights, Shields J. declared that:

> [T]he Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in Section 84. Both Section 74 and Section 84 are similar to the provisions of other commonwealth Constitutions. It might be thought that the newly independent states who in their Constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.[67]

Justice Shields correctly found on the facts before him that the Plaintiff had been subjected to inhuman and degrading treatment. But what does his reference to "pious platitudes" mean? Would Bobbit find in them an ethical or other argument? What is the doctrinal value of this decision? What does it tell us as to how to construct a jurisprudence of human dignity? I submit, not much.

In the case of *George Juma & Others v. The Attorney-General*[68] the constitutional court ruled that accused persons were, by virtue of Sections 70 and 77 of the Constitution, entitled to receive from the prosecution all the necessary witness statements and exhibits. The court stated that:

> [W]e believe that the framers of our Constitution intended the expression 'facilities' in this section to be understood in its ordinary everyday meaning, free from any technicality and artificial bendings of the word.

Is this an interpretation inspired by originalism or textualism or both? Whatever the position may be, what does the case decide on the specific issue of the latitude of discovery in criminal cases? What standards are lower courts to apply? None were provided. None can be yielded by the decision.

In ***ex parte*** *Kipng'eno Arap Ngeny*[69] the High Court was asked to disallow a pending criminal case on the basis that the Attorney-General had acted improperly. In granting the orders sought, the Court rationalised the constitutional basis of its jurisdiction as follows:

> [T]he foundation of our democracy is based on our Constitution and the rule of law. The Constitution establishes the Government with powers and responsibility. It guarantees the freedom and rights of the individual. The Constitution devolves power between the executive, the legislature and the judiciary. All three have been endowed with power which must be exercised in accordance with the Constitution. That is the essence of our democracy and system of Government. The Constitution has determined the need for collective activity and has maintained the importance of the individual within our society. It has given the individual freedom and tempered his needs with the collective or public good. In these circumstances, there has been created a conflict between the individual and society. It is, in a

> way, not an unnecessary conflict: whereas the individual forms the society it has been necessary to espouse the needs of the society. The individual is important to the society as the society is important to his individuality. It is from the society that the individual receives protection and support. For this, the society in turn requires the individual to give something back: it is a *quid pro quo* relationship for the good of the individual, the society and all. The judiciary, in this respect, has been important in the resolution of the conflict and is expected to perform a balancing act between the interests of individuals amongst themselves and those between the individual and the society - the State: our country, Kenya. To do that, the judiciary has been called upon to uphold the rule of law for which necessary power has been given. A hierarchy has been created in the judicial system and within a check and control system installed so that the judiciary ensures the balancing of interests both within itself and without. The check and control system creates more conflicts – again necessary conflicts which must be resolved by subtle balancing. That is what was presented before us in this case. We were asked in this case to check the power of the Attorney-General to prosecute criminal offences and to ensure that it is employed and exercised according to the Constitution and with responsibility.

Notwithstanding the tortuous explication on the correlation of democracy and constitutionalism, the court rightly arrived at the conclusion that constitutional disputes require a balancing of competing values and claims. But, does the court endeavour to lay down the principles upon which this balancing is to be done? Perhaps the most ambitious formulation of the principles of constitutional interpretation was made by Visram J in *Royal Media v. Telkom*,[70] where he stated:

> [C]onstitutional interpretation must take into account, apart from its express provisions, the status of development in society, political and economic realities and the aspirations of the people as a whole. The Constitution, as a tool for effecting government in the society must realize those needs for the people.

But what does the judge's formula entail? How is it to be applied from case to case? These questions remain largely unanswered.

Conclusion

The jurisprudence of constitutional interpretation in Kenya is in dire need of rejuvenation. There is need for the courts to move beyond making perfunctory comments as to the general goals for which the Constitution exists to the formulation of ambiguous standards for application in similar disputes. Both conservative and liberal jurists must strive to reconcile the *goals* with the *methods*. In formulating principles of constitutional construction, cognisance must be taken of the fact that both the pro-neutral principles and anti-neutral principles agree on some fundamentals: firstly, that the judicial role is a political role and therefore the judiciary is a political actor within our democracy: secondly, that complex constitutional dis-

putes invariably involve 'balancing' competing claims, and this invites value choices; thirdly, that reasoned judicial decisions are good for the integrity of the judiciary and for the legitimacy of the constitutional interpretation process.

There is a middle ground between those who want a neutral rules-objective jurisprudence and those who want a more political results-oriented jurisprudence. The middle ground lies in the judiciary acknowledging and developing a system of values in a rational and consistent manner. These values can only be developed on the basis of an urgent theory of the Constitution. The challenge for our scholars is to contribute to the refinement of this theory.

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Notes

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6. Muigai, G., "The Judiciary in Kenya and the Search for a Philosophy of Law," (1991) *Journal of Human Rights Law*, p.1.
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13. Supra note 9, at p. 594.
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15. See Nelson, W., "History and Neutrality in Constitutional Adjudication," (1986) Vol. 72 *Vanderbilt Law Review,* p. 23 an

Powell, J., "The Original Understanding of Original Intent," (1985) Vol. 98 *Harvard Law Review*, p. 885

16. See for example Gibson, A., "The Legacy and Authority of the Founders," (1994) Vol. 56 *Review of Politics,* pp. 550-571.
17. Dworkin, R., *The Jurisprudence of Richard Nixon,* A newspaper article published in the New York Times and quoted in Bobbit, P., Constitutional Fate, supra note 14.
18. Supra note 1 at p. 386.
19. See Eisgruber, C., "Justice and the Text: Rethinking the Constitutional Relation between Principle and Prudence," (1933) Vol. 43 *Duke Law Journal*, p. 1.
20. *Supra* note 14 at pp. 25– 38.
21. Rapaczynski, A., "The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation," (1988) Vol. 64 *Chicago Kent Law Review,* pp. 177–191.
22. Supra note 1 at p. 394.
23. Ibid., pp. 39-58.
24. Wechsler, H., "Towards Neutral Principles of Constitutional Law," (1959) Vol. 73 *Harvard Law Review,* pp. 1-24.
25. See for example, Miller, A., and Howell, R., "The Myth of Neutrality in Constitutional Adjudication," (1960) Vol. 27 *University of Chicago Law Review,* p. 661.
26. Supra note 1 at p. 394.
27. Supra note 14 at p. 61.
28. Supra note 14 at pp. 59-73.
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33. 262 US 390 (1923).
34. Ibid., p. 399.
35. Supra note 14 at p. 94..
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37. *Ibid.*, p. 12.
38. Shapiro, M., "The Supreme Court and Constitutional Adjudication," (1963) *George Washington Law Review,* p. 587
39. *Supra* note 25 at p. 661.
40. *Supra* note 38 at p. 594.
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45. Quoted in Dugald, J., "The Judicial Process, Positivism And Civil Liberty," (1971) 88 *South Africa Law Journal,* p. 49.
45. See purported justification for this approach by Newbold, C., "The Role of the Judge as a Policy Maker," (1969) 2 *East African Law Review,* pp. 120-133
46. See the case law discussed in Muigai, G., *Constitutional Amendments and the Constitutional Amendment Process in Kenya* (Unpublished Doctor of Philosophy (Ph.D) Dissertation, Faculty of Law, University of Nairobi, Nairobi, 2001), chapter five.

47. Lord Atkin in *Liversidge-v Anderson* (1942) A. C. 206.
48. See the cases of *Kamau Kuria v. the Attorney-General* Misc. Case 550 of 1988 (Nairobi Law Monthly Vol. 15 1989) and *Maina Mbacha v. The Attorney-General* Misc. Civil Application 356 of 1989. For a commentary see Kuria, G. K., and Vasquez, A., "Judges and Human Rights: The Kenyan Experience,"(1991) *Journal of African Law*, p.142, and Inoti, K., "The Reluctant Guard: The High Court and the Decline of Constitutional Remedies in Kenya," *Nairobi Law Monthly,* (Nairobi) July 1991, pp. 17-26.
49. For example the High Court of Kenya in the case of *Stanley Njindo Matiba v. The Attorney-General* Misc.Civil Application Number 666 of 1990 ruled that an application under Section 84 of the Constitution had to identify specific as opposed to general provisions of the bill of rights which had been infringed.
50. This judicial attitude in Kenya was perfected by Mr. Justice Dugdale who wreaked havoc on the jurisprudence of Constitutional interpretation. See Inoti, K., supra note 49, p. 11.
51. See for example, *Anarita Karimi v. The Attorney-General* (1979) K. L. R. 154, *James Keffa Wagara and Rumba Kinuthia v. John Anguka and Ngaruro Gitahi* H.C.C.C. 724 of 1988 (unreported) and *Mathew Ondenyo Nyarimbari v. David Onyancha & Another* H.C.C.C. 1528 of 1988 (unreported).
52. *Wangari Mathaai v. Kenya Times Media Trust Ltd* H.C.C.C. 5504 of 1988. See also *Charles Rubia ex parte The Principal Immigration Officer* H.C.C.C. 5404 of 1989 where Dugdale J. refused to grant leave for application of orders of prohibition on the basis that no case had been made out and while conceding that at that stage no case need be made out as the evaluation of the evidence is for the trial court. This tradition is still the dominant tradition in the Kenya judiciary. See the cases discussed in Kuria, G.K., "Litigating Kenya's Bill of Rights" in Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa* (Nairobi, East Africa Law Society, 1977), pp. 67-128.
54. Misc. Civil Application 550 of 1988, 15 Nairobi Law Monthly (March/April) 1989.
55. Misc. Civil Application. 356 of 1989. See Vol. 17 Nairobi Law Monthly p.13
56. Misc. Application 140 of 1998.
57. Misc. Application 193 of 1998. In this case the applicants sought to question the President's nomination of women into Parliament under the Constitution of Kenya (Amendment) Act, number 7 of 1997.
58. Election Petition case number 8 of 1993
59. Constitution of Kenya (Amendment Act) number 6 of 1992.
53. See *Fernandez v. Kericho Liquor Licensing Court* (1968) E.A. 640; *Wandwa v. City Council of Nairobi* (1968) E.A. 406; *New Kakuzi Sisal Estate Ltd. v. The Attorney-General* (1971) K.H.C.D; *Haridas Chaganlal v. Kericho Urban Council* (1965) E.A. 640; *Meshnuar Jacob Samuel v. Commissioner of Lands* Land Acquisition Appeal No. 2 of 1986; *Mugaa M'ampwii v. G.N. Kariuki* H.C.C.C. 556 of 1981; *Leljo Meghji Patel v. Karsa Prenji* (1976) K.L.R. 112; *Richard Kimani v. Nathan Kahara* HCCC 39 of 1985; *Margaret Magiri Ngui v. Republic* (1978) K. L. R. 105.
54. High Court Misc. Application No. 279 of 1985.
55. This litigation has an interesting history. At the first instance a constitutional court set up under Section 67(1) of the Constitution determined the matter in favour of the applicant and 'hoped' that the Attorney-General would not proceed with the prosecution. The Attorney-General

failed to terminate the proceedings and the applicant applied for an order of prohibition. The High Court (Aluoch and Schofield JJ.) failed to reach a unanimous decision and the Chief Justice constituted a new court..

56. *Supra* note 61 at p. 7. Emphasis added.
57. For example Section 77(1) of the Constitution guarantees criminal trials without delay, which overrides the Attorney-General's discretion to prosecute at any time under Section 26(a) of the Constitution. See however *John Harun Mwau v. Republic* Nyeri Court of Appeal Case 128 of 1983 where it was held that it was not inhuman and degrading treatment for the Attorney-General to re-open proceedings after entering a *nolle prosequi*.
58. High Court Misc. Application number 302 of 2000.
59. Misc. Civil Case number 668 of 1986
60. Supra note 66 at p.5.
61. Misc. Criminal Appeal No. 345 of 2001
62. Misc. Civil Application No. 406 of 2001
63. (2001) 1 E A, 210.