

# THE 2010 CONSTITUTION AS A VALUE LADEN CONSTITUTION; APPLICATION OF THE TELEOLOGICAL CONSTITUTIONAL INTERPRETATION

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Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary<sup>1</sup>

## Introduction

The constitution is not an empty shell, a constitution is not an empty tin, it is not an empty bottle, and it is filled by the aspirations of the people<sup>2</sup> who gave it to themselves the constitution<sup>3</sup>. As appreciated in

*Lerionka Ole Ntutu*<sup>4</sup> :

“Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are **“amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation.”**<sup>5</sup>

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<sup>1</sup>Yash Ghai, the distinguished professor and constitutional law scholar, unpublished mimeograph, Nairobi 2014.

<sup>2</sup> In *S v Makwanyane 1995 3 SA (CC) para 262* Mohamed J referred to a supreme constitution in the following ringing tones:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspiration ally egalitarian ethos, expressly articulated in the Constitution.

<sup>3</sup> Majanja J has reinstated this fact in *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others [2012] eKLR*, at para (45) that ;

**While I agree with counsel for the 3<sup>rd</sup> respondent that the values contained in Article 10 of the Constitution may not be of themselves justiciable, it must be remembered that a Constitution devoid of values and principles is like an empty tin. These values are what give real meaning to the dry letter of the law and provide a vision of the kind of society we would all like to build. They must be given full effect by every person and authority at all times.**

<sup>4</sup> In *the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452*:

<sup>5</sup> . Similarly in *Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006*, it was held that:

In the words of **Mahomed, Ag. JA** in Namibian case of *S v Acheson*<sup>6</sup> that:

“The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”

A constitution usually reflects the values that a people hold dear and wish to live by. Some of these values will reflect the country's own history and experience. Others are widely recognized as positive forces in most if not all countries' constitutional arrangements.<sup>7</sup> When interpreting the constitution, values are eccentric, by this I mean and give more emphasis on teleological interpretation. By teleological interpretation, I mean an approach which “aspires in the interpretation of individual constitutional (and statutory) provisions, to realize the ‘scheme of values’ on which the constitutional order is premised”<sup>8</sup> What holds this broadly conceived teleological interpretation together is the presumption of a coherent set of values in the legal system<sup>9</sup> The teleological theory is often described as a value-coherent, value-orientated or a value-activating method of interpretation. **Dugard**, who advocated support for a value-orientated method of interpretation – describes this as a ‘realist-cum-value-oriented approach’<sup>10</sup>, some commenters have referred to teleological approach of interpretation as purpose orientation or purposive interpretation, they assert that “Purpose-orientation (teleological approach) in its pure form implies that the underlying purpose and spirit of the constitutional text decides what the norm contains, regardless of

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**“...the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”**

<sup>6</sup> 1991 (2) SA 805 (Nm HC) at 813

<sup>7</sup> THE CONSTITUTION: ITS PURPOSES AND UNDERLYING VALUES

<sup>8</sup> Du Plessis L “*Interpretation*” in S Wolman & M Bishop (Ed) *Constitutional Law of South Africa* 2 Ed (OS 2008) 32-1-32-193.

<sup>9</sup> On coherence cf. SOBEK, T. *Pravni myšleni*. Praha, Plzeň: Aleš Čeněk, 2011, p. 91 ff.

<sup>10</sup> Dugard *Human Rights and the South African Legal Order* at 400. Dugard asserts that even though the realists and those who belong to the school of natural law are seen as irreconciliation enemies, the two schools do in fact have much in common. He quotes Harry W Jones in this regard: ‘In leeway situations, the positive law is not a command but, at most, an authorization of alternative decisions. The choice between alternatives, the selection of the path to be pursued, cannot but be influenced by the decision – makers *ought to be*. Legal realism, with its emphasis on the inevitability of choice and discretion in the life of the law, casts its vote – though for very different reasons – with the tradition of natural law, and against Austin and the positivists, on the old issue of the complete analytical separateness of the law that *is* from the law that *ought to be*.’

what the text actually says.<sup>11</sup> ‘It has been argued that “legal interpretation, especially in the human rights arena, is a value-laden activity that should not be cloaked by the pretence of value neutrality”.<sup>12</sup>

The method of teleological interpretation may be defined as the method of interpretation used by courts, when they interpret legislative provisions in the light of the purpose, values, legal, social and economical goals these provisions aim to achieve. It is also considered to be the method of interpretation utilized most by the European Court of Justice (ECJ).<sup>13</sup> Denning LJ in *Buchanan and Co v. Babco IJmited*<sup>14</sup> explained the principle as follows:

"They adopt a method which they call in English strange words - at any rate they were strange to me - the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?<sup>15</sup>

In Kenya, teleological interpretation was referred to by Ringera J (as he then was) to the effect that;

[I]t is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution is called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution.<sup>16</sup>

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<sup>11</sup> Jens, *ibid*

<sup>12</sup> Scott C “*The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights*” (1989) 27 *Osgoode Hall Law Journal* 769 778.

<sup>13</sup> Oreste Pollicino: “*Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*”, Part One/Two, *German Law Journal*, vol. 5 no. 3 (2004) p. 289, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=402>, last visited 22/10/2017

<sup>14</sup> [1977]QB208

<sup>15</sup> *ibid* at 213

<sup>16</sup> *Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004)

## THE 2010 CONSTITUTION AS A VALUE LADEN CONSTITUTION

The constitution is value based, it is value oriented, starting from our preamble, our preamble recognizes the country's aspirations and values<sup>17</sup>, it provides that;

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.<sup>18</sup>

The view is echoed by **Lenaola, J**<sup>19</sup>, in which he expressed himself on public participation as follows;

“The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. ”

Being value-laden, the Constitution has been described by the Supreme Court as transformative in nature because it is aimed at engineering society in a particular desired direction. In *Speaker of the Senate*, the Court observed that

‘[u]nlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.’<sup>20</sup>

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<sup>17</sup> The Supreme Court in *Speaker Of The Senate & Another V Hon. Attorney-General & Another & 3 Others* [2013] eKLR, *Advisory Opinion Reference 2 of 2013* at Para observed thus:

‘[51] Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on –“*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*” And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.’

<sup>18</sup> 2010 constitution, preamble para 6

<sup>19</sup> *Nairobi Metropolitan Psv Saccos Union Limited & 25; Others vs. County of Nairobi Government & 3 Others* [2013] eKLR

<sup>20</sup>*Speaker of the Senate* para 51.

Through this transformative approach, the values are intended to achieve ‘desirable goals of governance consistent with dominant perceptions of legitimacy’.<sup>21</sup> The Court observed that although these values are set out in the Preamble to the Constitution which describes them as essential, they are fleshed out in Article 10, Chapter Four on the Bill of rights, and Chapter Eleven on devolved government.<sup>22</sup> Quoting Klare, the Court viewed the values as part of transformative constitutionalism, which is defined as:

[A] Long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.<sup>23</sup>

In *Richard Nduati Kariuki*<sup>24</sup>, the High Court held that the Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future. Constitutional Theory, the Court held, has set various models of interpreting constitutional tests i.e. Historical, textual, structural, doctrinal, ethical and prudential. The Constitution formalizes the historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. Ordinarily the value content of law relates to the purpose or underlying basis of that law. Such judgment is based on the views and values of the people that make the law and those who the law regulates.

Our courts have observed in various cases that our constitution is a value laden or value oriented instead of a structural one; the distinction between the two was made by Ulrich Karpen in *The Constitution of the Federal Republic of Germany* thus:

“...the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.”

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<sup>21</sup>Speaker of the Senate para 52.

<sup>22</sup>Speaker of the Senate para 51.

<sup>23</sup>Klare K ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 147.

<sup>24</sup> *Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 of 2006* (HCK) [2006] 2 KLR 356

Our courts have held as follows;

In *Republic v Cabinet Secretary*<sup>25</sup>, the court was of the view that unlike our retired constitution, which was structural, ours is now value laden;

**In my view, Article 10 of the Constitution is one of the Articles that make a paradigm shift between the retired Constitution and the Constitution of Kenya 2010 - a value-oriented Constitution as opposed to a structural one. Its interpretation and application must not therefore be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in Article 10 of the Constitution. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality** <sup>26</sup>(emphasis added)

The court went on to hold that; In my view the value system in which our Constitution is structured is steeped in our history and this value system was a reaction to the historical deficiencies that rendered the system of governance under the retired Constitution inadequate to meet the expectations of the people of the Republic of Kenya.

In the case of *Community Advocacy*<sup>27</sup> the Court in relation to public appointments stated,

**“27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favoritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of ‘jobs for the boys’ era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.”** <sup>28</sup>

This view was reiterated by Majanja J (as he then was) in *COFEK*<sup>29</sup> that;

These values and principles provide a foundation upon which Kenyans have determined that our democratic state shall be build; they are the intestinal fluid which nourishes the bill of rights and the Constitution. Thus when making appointments to public office, every selecting, appointing and nominating authority must take into account these values and principles<sup>30</sup>.

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<sup>25</sup> *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another* [2017] eKLR

<sup>26</sup> *Ibid* at para 86

<sup>27</sup> *Community Advocacy and Awareness Trust and Others v Attorney General* Nairobi Petition No 243 of 2011 (Unreported),

<sup>28</sup> *Ibid* at para 73

<sup>29</sup> *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others* [2012] eKLR,

<sup>30</sup> *Ibid* at 42

Our constitution is said to be an embodiment of values and aspirations<sup>31</sup>

Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an Organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality

Indeed our constitution is value based, unlike our retired constitution which is described in the following terms,

The current constitution does not tell us what the constitution is about: it is dry as old bones. It does not even have a preamble (the only constitution that we know which does not). The PC has an inspiring preamble: it acknowledges the sovereignty of the people to give us the constitution; it salutes our heroes; expresses pride in our ethnic and other forms of diversity and commitment to national unity; and recognizes essential values by which we want to organize the behavior of the state and of ourselves: human rights, equality, social justice, democracy and the rule of law— above all the wellbeing of individuals, families and communities. An important chapter sets out the framework for resolving land issues which have deeply troubled the country. It aims to restore land taken illegally from communities or the state to them and institute sensible social and economic policies for the use of land. The PC reiterates these values in Article 10 (2) making clear that they are legally binding (particularly on the state). They appear elsewhere too, in sections on institutions or policies (as for example that of parliamentarians and public officials). But more importantly, they appear in the Bill of Rights which provides an elaborate vision of Kenya and Kenyans. Another approach taken in the PC is the necessity of national integration which can only be achieved by fair and inclusive policies. There is almost nothing of the vision in the current constitution. It cannot inspire us! It is perhaps not surprising that judgments by our courts seldom refer to national values and goals in the interpretation of the constitution or laws. The PC specifies that those who are responsible for interpreting them should do so in ways that enhance the achievement of these goals<sup>32</sup>.

Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an Organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of

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<sup>31</sup> The court held in, *Pharmaceutical Society of Kenya v National Assembly & 3 others [2017]* eKLR at para 97 that; **Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an Organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality**

<sup>32</sup> Yash ghai's 74 pages analysis of the proposed constitution

individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality<sup>33</sup>

In Germany, The German Federal Constitutional Court in *Luth Decision BVerfGE*<sup>34</sup> noted as follows:

“But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”

The foregoing position was aptly summarised by the South African Constitutional Court in *Carmichele*<sup>35</sup> in the following terms:

“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: ‘The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.’ The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”

The 2010 constitution can correctly be described as a value-laden Constitution as it embodies an objective, normative value system. Its design has foundational provisions which set out the values, objects and principles of the Constitution,<sup>36</sup> it lays down values not only the government structures<sup>37</sup>

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<sup>33</sup> *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another* [2017] eKLR at para 32

<sup>34</sup> 7, 198 I. Senate (1 BvR 400/51)

<sup>35</sup> *Carmichele vs. Minister of Safety and Security* (CCT 48/00) 2001 SA 938 (CC)

<sup>36</sup> For instance, the Preamble to the Constitution provides for the essential values of governance which the Kenyan people aspired to: Article 1 for the value of the sovereignty of the people; Article 2 for that of the supremacy of the Constitution; and Article 10 for the values and principles of governance, including sharing and devolution of power.

<sup>37</sup> Reflecting on the essential character of the new Constitution [in *Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa* HCCC No. 190 of 2010], Ojwang J has remarked that:

‘I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary.’



## APPLICATION OF THE TELEOLOGICAL CONSTITUTIONAL INTERPRETATION

Constitutional interpretation must occur 'in the light of the values which underlie the Constitution',<sup>38</sup> that it must be situated 'against the backdrop of the values of South African society';<sup>39</sup> and that it must be tested against 'the values we find inherent in or worthy of pursuing in this society, which has only recently embarked on the road to democracy.'<sup>40</sup> To paraphrase the decision in *Trusted Society of Human Rights Alliance*<sup>41</sup>, where the court held that,

Kenyans were very clear in their intentions when they entrenched Article 10 in the Constitution. In our view, they were singularly desirous of cleaning up our politics and governance structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 10 be enforced in the spirit in which they included it in the Constitution. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the said provisions should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must defer to Article 10 of the Constitution.

In South Africa, **Henk Botha**<sup>42</sup>, states that 'the Constitution is a repository of values' (at 233) and goes on to identify the following values in the constitutional text: national unity; limited government; liberty and equality; and pluralism. **AJ van der Walt**<sup>43</sup> who echoes those 'constitutional values', and concludes that 'the Constitution must be interpreted in terms of values which take the past into account, but in doing so it

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<sup>38</sup> *S v Williams* 1995 (3) SA 632 (CC) at para 37, 644D, per Langa J. See also the statements of Langa J in *S v Makwanyane* 1995 (3) SA 391 (CC) para 222 at 480D ('Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion') and para 224 at 481B ('the values we need to uphold')...

<sup>39</sup> *S v Williams* 1995 (3) SA 632 (CC) para 59 650D, per Langa J.

<sup>40</sup> *Ibid* at para 50 648C-D, per Langa J

<sup>41</sup> *Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others* Petition No. 229 of 2012, a view which is shared by Majanja J in *Samura Engineering Limited & Others v Kenya Revenue Authority* Nairobi Petition No. 54 of 2011 (Unreported) that, "**the values contained in Article 10 must at all times permeate its functions and activities which it is mandated to carry out by statute.**"

<sup>42</sup> 'The values and principles underlying the 1993 Constitution' (1994) 9 SAPL 233

<sup>43</sup> 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) 11 SAJHR 169 at 191-192

looks towards the future, towards reconstruction and reconciliation in an "open and democratic society based upon freedom and equality"<sup>44</sup>

In *Speaker of the Senate* the Supreme Court thus concluded that in interpreting the Constitution, the court 'must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; [and] the vision and ideals reflected in the Constitution'.<sup>45</sup> In

*Communications Commission of Kenya* the Supreme Court regarded the Kenyan Constitution as one of the '[t]ransformative constitutions [which] are new social contracts that are committed to fundamental transformations in societies'.<sup>46</sup> Such a constitution provides 'a legal framework required for the fundamental transformation required that expects a solid commitment from the society's ruling classes'.<sup>47</sup>

Under such a Constitution the 'judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law'.<sup>48</sup> A transformative 'constitution cannot be interpreted as a legal-centric letter and text'; rather, its interpretation must consider other sources that are 'not solely reflective of *jural phenomena*'.<sup>49</sup> When interpreting the constitution, a court seek to promote the values of the constitution as per art 249 of the 2010 constitution<sup>50</sup>

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<sup>44</sup> In *Republic v Council of Legal Education Ex-parte Naira Oguta* [2016] eKLR, the court expressed the view at para 69 that

**. In my view, it is because of this that our transformative Constitution provides in Article that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. . The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach**

<sup>45</sup>*Speaker of the Senate* para 49. See also *Community Advocacy and Awareness Trust and others v Attorney General and others* Petition 243 of 2011(unreported) para 78, where the High Court stated that the values 'provide a foundation upon which Kenyans have determined that our democratic state shall be build; they are the intestinal fluid which nourishes the bill of rights and the Constitution'.

<sup>46</sup>*Communications Commission of Kenya* para 377.

<sup>47</sup>*Communications Commission of Kenya* para 377.

<sup>48</sup>*Communications Commission of Kenya* para 377.

<sup>49</sup>*Gatirau Peter Munya* para 232 (emphasis in original).

<sup>50</sup> Supreme Court in *The Matter of the Principle of Gender Representation In the National Assembly and the Senate, SC Advisory Opinion* No. 2 of 2012 where it was held that:

**"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and**

Because the values are at the center of our constitution<sup>51</sup> the court has recognized the fact that;

The current Constitution is transformative. The challenge of constitutional interpretation is to define and give life and substance to values and broad principles enunciated in the Constitution in an ever-changing society by application of a principled theory of constitutional interpretation as articulated in article 259.<sup>52</sup>

The Kenyan courts have pushed for teleological interpretation of the constitution in various cases. In *Pharmaceutical Society of Kenya*<sup>53</sup> the court held that;

What the above provisions mean is that in the interpretation of the Constitution the Court must do so in a manner that advances the values and principles of the Constitution. Since ours is a constitutional democracy the authorities handed down in systems that practice parliamentary supremacy are not necessarily relevant to our constitutional set up. Therefore in applying authorities emanating from such systems, care must be taken to ensure that such decisions conform to our transformative constitutional framework Our Constitution is therefore not just structurally based but is a value-oriented Constitution. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach

In *Peter Solomon Gichira*<sup>54</sup> the court echoed the same view in the sense that

It is important in determining this petition to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The Court is therefore required in the

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**statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."**

<sup>51</sup> Ojwang J (as he then was) has in underscoring the nature of the 2010 Constitution remarked in *Joseph Kimani Gathungu v Attorney General & 5 others* [2010] eKLR, Constitution Reference 12 of 2010:

'A scrutiny of the several Constitutions Kenya has had since Independence shows that, whereas the earlier ones were designed as little more than a **regulatory formula** for State affairs, the Constitution of **2010** is dominated by a "**social orientation**", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.'

<sup>52</sup> *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR

<sup>53</sup> *Pharmaceutical Society of Kenya v National Assembly & 3 others* [2017] eKLR at para 95-99

<sup>54</sup> *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another* [2017] eKLR at para 37

performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach

*In Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno*<sup>55</sup> the court a good narrative in the sense that

. Before dealing with the issues raised in these proceedings, it is important in my view to emphasize and appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, I am proud to say, is a transformative Constitution. This must be so because it is provided in Article 10 that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. Our Constitution, therefore is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and inter alia Article 10 of the Constitution. Value oriented constitutions are concerned with intensely human and humane aspirations of personality, conscience and freedom while the structure-oriented ones are concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements. See **Ulrich Karpen** in *The Constitution of the Federal Republic of Germany*<sup>56</sup>.

While in *SAMURA ENGINEERING LIMITED*<sup>57</sup> the court reemphasized the need of interpreting the constitution in a way that promotes its values, he aptly puts it that;

It is important to note that reference to the preliminary matters or general provisions relating to the Bill of Rights set out in Part 1 of Chapter 4 apply to the interpretation of the Bill of Rights. Similarly the values set of in Article 10(2) are by virtue of Article 10(1) applicable to the court in handling the task of applying and interpreting the Constitution. The Court is also required to apply the provisions of Article 259 of the Constitution. Article 259(1) provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. I am alive to these principles and cases that enunciate them (See *Centre for Rights and Awareness & Others v Attorney General* Nairobi Petition No. 16 of 2011 (Unreported) and *Harun Mwau v The Attorney General & Others* Nairobi Petition No. 146 of 2011 (Unreported)).

The same is echoed in the South Africa constitutional court<sup>58</sup> to the effect that;

The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms to the fundamental values or principles of the Constitution

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<sup>55</sup> *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno & another* [2017] eKLR

<sup>56</sup> *Ibid* at para 117

<sup>57</sup> in *SAMURA ENGINEERING LIMITED & 10 others v KENYA REVENUE AUTHORITY* [2012] eKLR at para 57

<sup>58</sup> *Froneman J in Matiso v Commanding Officer, Port Elizabeth Prison 1994 (4) SA 592 (SE) 597G-H:*

The Constitution must be interpreted so that it gives clear expression to the values the Constitution intends to nurture for the future.<sup>59</sup>

**Sachs J** explained the teleological dimension of constitutional interpretation that<sup>60</sup> :

The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct ... We should not engage in purely formal or academic analysis, nor simply restrict ourselves to *ad hoc* technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and circumstances of the particular case.

In *Katiba Institute*, the high court held that

Article 259 of the Constitution on the other hand enjoins this court to interpret the Constitution in a manner that (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance. Read together with Article 10 on guiding national values and principles, a firm basis for purposive interpretation of the Constitution has been laid<sup>61</sup>

The high court has also reiterated the principle that a constitution should be interpreted in a manner that promotes its values , in the case of *Isaac Ngugi v Nairobi Hospital & 3 Others*,<sup>62</sup> the Court had this to say:-

“[25] I take the positions that from the history of the country and the events leading up to the promulgation of the Constitution leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of the Constitution being infused into the lives of ordinary Kenyans through application of the Bill of Rights to private relationships where necessary

Similarly **Odunga J** has held that<sup>63</sup>;

Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. 62. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of

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<sup>59</sup> *Qozoleni v Minister of Law and Order*.

<sup>60</sup> *Coetzee v The Government of the Republic of South*

<sup>61</sup> *Katiba Institute & another v Attorney General & another [2017]* eKLR at para 42

<sup>62</sup> Nairobi Petition No. 407 of 2012 {2013} eKLR,

<sup>63</sup> *George Bala v Attorney General [2017]* eKLR at para 57

South Africa, as ‘a transformative instrument’ is the key instrument to bring about a better and more just society”.

On the same point, the court has also held .in *Centre for Rights Education and Awareness*<sup>64</sup> that

The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions

Values, whether or not they emanate from within the Constitution, therefore play a determining role in constitutional interpretation<sup>65</sup>. **Chaskalson P**, in general terms, referred approvingly to an approach which "gives expression to the underlying values of the Constitution"<sup>66</sup>. As Cockrell discusses at great length<sup>67</sup>, the South African Constitutional Court has in fact become pre-occupied with "values"<sup>68</sup> and is attempting to articulate a theory of constitutional interpretation which gives meaning to the values which underlie the Constitution text<sup>69</sup> The value-based interpretive models emphasise the value-laden nature of constitutional review - they requires the

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<sup>64</sup> *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR

<sup>65</sup> Adrians Janet Hofmeyr, *CONSTITUTIONAL INTERPRETATION UNDER THE NEW SOUTH AFRICAN ORDER* A J 1998

<sup>66</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 9. Chaskalson P referred approvingly to the dictum of Kentridge AJ in *S v Zuma* 1995 (4) BCLR 401 (CC) (at para 17), but he reversed the emphasis to place it on the need to give expression to the underlying values of the Constitution.

<sup>67</sup> Cockrell, *A 'Rainbow Jurisprudence'* (1996) 12 SAJHR 1.

<sup>68</sup> Cockrell refers to the Constitutional Court as being "fixated with the role of Values" (at 7) and its "pre-occupation with the role of Values" (at 9) and its "obsession ... with the role of Values" (at 10). Not all the judges are as devoted to the subject of values - for example, Kentridge AJ makes very little reference to values in his judgments in *S v Zuma*, *Du Plessis v De Klerk*, *Mhlungu*, and even *S v Makwanyane* (although he does discuss "evolving standards of decency" as an indicator of values).

<sup>69</sup> Cockrell makes a distinction between what he calls the "formal" and the "substantive" visions of law, and argues that the Court's frequent use of the word "values" throughout their judgments reveals a paradigm shift of enormous proportions from the former vision to the latter (at 3). Cockrell clearly favours the substantive approach to constitutional interpretation, but feels that the formal approach (a formalistic application of 'rules') is still suitable for non-value- laden texts (for example, tax law) (at 4).

Courts to “excavate and give expression to the values which underpin particular constitutional guarantees”<sup>70</sup>

## **CONCLUSION**

In *Dorothy N Muchungu v Speaker of the County Government of Embu and others*, the High Court observed that the duty of the courts ‘is to interpret the Constitution in a manner that does not defeat its evident purpose, values and principles’.<sup>71</sup> Both Articles 159 and 259 expressly provide that the Constitution must be interpreted in a manner that promotes and protects the values, purposes and principles embodied in the Constitution.<sup>72</sup>

Similarly, in *Charles Lukeyen Nabori*<sup>73</sup> **Rawal, J** (as she then was) held that

Our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, and values and on political, cultural, social and economic situations. Its dynamics and relevance is rooted in these values. Cut off from these factors it would become redundant and irrelevant. The Constitution is not a skeleton of dry bones without life and spirit. The least it is expected to have and which cannot be denied is the spirit of its framers. The Court should not limit the ambit of public interest or agree to confine it only to past definitions or categories since our Constitution inspires us to give public interest the widest leverage and to uphold it. It follows that a wrong action or decision does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a Constitutional Petition.

The ECTHR has held that, “it must ensure that its interpretation is consistent with the “general spirit of the Convention, as an instrument designed to maintain and promote the ideals and values of a democratic society”.<sup>74</sup> The South African Constitution openly recognizes the important role of values in interpretation. The values which should be relied on have been made explicit in the Constitution. It is not coincidental that the Constitution begins with a statement of values upon which the Republic of South

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<sup>70</sup> Kentridge and Spitz at 11-23.

<sup>71</sup>[2014] eKLR (*Dorothy N Muchungu*) para 47.

<sup>72</sup> Arts 159(2) (e) and 259(1) (a).

<sup>73</sup> *Charles Lukeyen Nabori & 9 Others vs. the Hon. Attorney General & 3 Others Nairobi HCCP NO. 466 of 2006 (HCK) [2007] KLR 331*

<sup>74</sup> *Kjeldsen, Busk Madsen and Pedersen* Judgment 7 December 1976 (Application no. 5096/71; 5920/72; 5926/72), § 53.

Africa is founded<sup>75</sup>. These values include human dignity<sup>76</sup>, equality (with specific reference to sexism and racialism), the promotion of human rights and freedoms, the rule of law, and the accountability, responsiveness and openness of the government

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<sup>75</sup>Megan Elizabeth *Donald* *Advancing the constitutional goal of social justice through a teleological interpretation of key concepts in the environmental rights in section 24*

<sup>76</sup> In *Dawood and Another v Minister of Home Affairs*<sup>76</sup> O'Regan J affirmed this role: Human dignity [...] informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights<sup>76</sup>