THE CATHOLIC UNINVERSITY OF EASTERN AFRICA

CUEA CLS 107

CONSTITUTIONAL LAW II

LECTURE NOTES

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TOPIC 1 INTERPRETING THE CONSTITUTION OF KENYA 2010

Contents

1. What is Constitutional (Statutory) interpretation?

Constitutional (Statutory) interpretation is the process of finding the meaning of the provisions of the Constitution (or legislation) Constitutional interpretation is also referred to as 'construction of the constitution'. Accordingly text writers, case law and, indeed, the CoK 2010, use the term 'construction' and 'interpretation' interchangeably.[1]

2. Why is interpretation necessary?

Sometimes the words of a statute have a plain and straightforward meaning. But in many cases, there is some ambiguity or vagueness in the words of the statute that must be resolved by the court. Many provisions of the constitution have settled meaning and we do not have to go to the judges to interpret them. There are, however, provisions of the constitution especially the Bill of Rights that do not lend themselves to precise measurement. They are couched in open-ended terms and require some form of interpretation. Such provisions call for a value judgment in an area where opinions may differ. The provisions are not self defining and have been and will be objects of judicial interpretation.

3. The Object of Interpretation

The object of all interpretation is to determine what intention is conveyed, either expressly or implied by the language used. To find the meanings of the constitution, judges use various tools and methods of interpretation, values and principles of the constitution.

4. What causes ambiguity in statutes?

Words are imperfect symbols to communicate intent. They are ambiguous and change in meaning over time. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult. Uncertainties may be added to the statute in the course of enactment, such as the need for compromise or catering to special interest groups. The legislature cannot foresee all the situations that a statute may need to apply to and make its intention clear so as to make it applicable to all of them. No legislation unambiguously and specifically addresses all matters. It is therefore for the courts to interpret how legislation should apply in a particular case.

5. Who has the last word on statutory interpretation?

Anybody can interpret the constitution. Article 10 presupposes that the executive legislature and the judiciary constitutional commissions or independent constitutional office holders will be involved in interpreting the constitution. But article 165 gives the courts the last word in determining the meaning of the constitution.

[1] See Article 20(3)(b) 20(4), 259

6. What are the risks involved in statutory interpretation?

The question arises - should the judge confine himself within the four corners of the Act or travel beyond and modify the meaning of the word where an apparent absurdity, hardship or injustice will be caused by applying the literal meaning of law? It is a tenet of statutory construction that the legislature is supreme (assuming constitutionality) when creating law and that the court is merely an interpreter of the law. In practice, by performing the construction the court can make sweeping changes in the operation of the law. Statutory interpretation accordingly comes with certain inherent risks. The risk of subjective interpretation, the risk of conflicting interpretation and the risk of 'judicial law making'

7. How can the risks be managed?

The courts are conscious of the dangers inherent in constitutional interpretation. Accordingly, over time, the courts have grappled with the arduous task of developing a scientific, objective and value- free methodology of interpretation. Such a methodology would limit opportunities for judicial activism through standardized methodology of interpretation. The courts have therefore developed the rules, cannons or maxims of interpretation to guide judges in interpreting and applying legislation. Some of this maxims and cannons, especially the more value laden ones, apply to the constitution only and may be inappropriate for application to ordinary legislation. Most of them were infact developed to assist in the interpretation of ordinary legislation and apply to both ordinary legislation and the constitution. The assumption is that if the judges follow the rules, there is a greater likelihood of objectivity and consistency in interpretation. .

8. Two major approaches

Judges use two broad approaches to interpret the constitution'

- Constitutional interpretation is a wholly discretionary exercise that treats the entire text as capable of many meanings
- Constitutional interpretation is wholly mechanical; the meaning of the constitution is embedded in the constitution itself

Per Owen Fiss

The many methods, theories and principles can be classified into two broad categories

- **Interpretivis**t- Formalistic or strict construction. Restricts interpretation to the text of the constitution. Extrinsic sources seriously discouraged
- **Non-Interpretivist-** goes beyond the text. Heavy reliance on extrinsic sources. Charecterised as the 'living constitution' approach

The court is the final arbiter over the constitution and has a right to determine what the vague provisions mean. Some judicial pronouncements take an extremist approach, Evans Hughes, a former Chief Justice of the United States ones sensationally proclaimed claimed;

> 'We are under a constitution but the constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the constitution'

Other judges take a more cautious approach;

Per Kentridge J in S vs. Zuma & others 1995 (2) SA 642 CC

> 'I am aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral precepts. But it cannot be too strongly stressed that the constitution does not mean whatever we might wish it to mean… if the language used by the law giver is ignored in favour of a general resort to 'values', the result is not interpretation but divination'

The issue is whether courts are permitted to use social policy as an aid to interpretation. Non-Interpretivists insist the law and cannot be divorced from the social political and economic and technological environment within which it operates. But judges do have a duty not to overly politicize the process of interpretation..

Per Mohammed J in Makwanyane (1995 (3) SA 391;

There is a difference between the political role played by the legislature and the legal role played by the judiciary

9. Judicial self-restraint vs judicial-activism

Judicial self-restraint gives more deference to the legislature Judicial activism asserts that the judiciary is designed to be the intermediary between the people and the government in order to keep the government within the limits imposed by the constitution

10. How should we interpret the CoK 2010?

In interpreting the Constitution of Kenya 2010, we need not look further than the provisions of the constitution itself. The constitution unambiguously decrees how it must be interpreted

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory opinion No 2 of 2012 per Mutunga J

> Interpreting the various Articles that are in issue here is the fundamental issue in this Reference. Learned Counsels before us have suggested various methods of interpreting the Constitution that should be adopted by this Court. These methods have been used by various jurisdictions, including some prescriptions arising from Kenyan Courts, both under the repealed and current Constitutions. Fortunately, to interpret the Constitution we need not go further than its specific Articles that give us the necessary guidance into its interpretation. It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles achieve this collective purpose… It is from these articles that the Supreme Court finds its approach to the interpretation of the Constitution. The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution. The obligation upon this Court to uphold this interpretation is provided for in Section 3 of the Supreme Court Act (Act No …of 2011):

11. The constitution decrees a purposive approach

In the Matter of the Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011 [2011] eKLR paragraph 86,

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

Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733,

> Our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution

12. Cannons of construction

Cannons are principles and rules upon which judges proceed for interpreting a statute. These rules and principles came into being through various sources in a course of time. Many of them are based on maxims of Roman Law; some of them reflect the Natural Law, some are laid down by Courts in their decisions and some are the creations of eminent jurists like Maxwell. Canons give common sense guidance to courts in interpreting the meaning of statutes. Proponents of the use of canons argue that the canons constrain judges and limit the ability of the courts to legislate from the bench. Critics argue that the cannons frequently contradict themselves. Accordingly a judge always has a choice between competing canons that leads to different results, so judicial discretion is only hidden through the use of canons, not reduced

There are two types of cannons of statutory interpretation

- Textual cannons
- Substantive cannons

Textual canons are rules of thumb for understanding the words of the text. Some of the canons are still known by their traditional Latin names. Substantive canons instruct the court to favor interpretations that promote certain values or policy results.

13. Textual cannons

- Literal construction
- The golden rule

- The mischief rule
- Ejusdem generis
- Expressio unius est exclusio alterius
- Generalia specialibus non derogant
- Construction ut res magis valeat quam pereat
- Noscitur a sociis ("a word is known by the company it keeps")
- In pari materia ("upon the same matter or subject")
- Reddendo singula singulis ("refers only to the last“)

14. Substantive cannons: Examples from the US

Substantive canons instruct the court to favor interpretations that promote certain values or policy results. We borrow liberally from the jurisprudence from United States of America.

14.1. Charming Betsy canon

National statute must be construed so as not to conflict with international law. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804): "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains..."

14.2. Interpretation in light of fundamental values

Statute does not violate fundamental societal values. See, for example, Holy Trinity Church v. United States,[22] or Coco v The Queen. [1994] HCA 15, (1994) 179 CLR 427, High Court (Australia)] However, legislation that is intended to be consistent with fundamental rights can be overridden by clear and unambiguous language. Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40, (2004) 221 CLR 309 (2 September 2004), High Court (Australia)

14.3. Rule of lenity

In construing an ambiguous criminal statute, the court should resolve the ambiguity in favor of the defendant.[25][26]:296–302 See McNally v. United States, 483 U.S. 350 (1987); See, e.g., Muscarello v. U.S., 524 U.S. 125 (1998) (declining to apply the rule of lenity); Evans v. U.S., 504 U.S. 255 (1992) (Thomas, J., dissenting); Scarborough v. U.S., 431 U.S. 563 (1977) (Stewart, J., dissenting); See United States v. Santos (2008).

14.4. Avoidance of abrogation of state sovereignty

See Gregory v. Ashcroft; 501 U.S. 452 (1991) see also Gonzales v. Oregon 546 U.S. 243 (2006)see also Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003 except where such would deprive the defendant of bedrock, foundational rights that the Federal Government intended to be the minimum floor that the states were not allowed to fall beneath; Dombrowski v Pfister. U.S. 479 (1965)

14.5. 'Indian' canon

National statute must be construed in favor of Native Americans. See Chickasaw Nation v. United States, 534 U.S. 84 (2001): "statutes are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." This canon can be likened to the doctrine of contra proferentem in contract law.

14.6. Deference

Deference canons instruct the court to defer to the interpretation of another institution, such as an administrative agency or Congress. These canons reflect an understanding that the judiciary is not the only branch of government entrusted with constitutional responsibility.

14.7. Deference to Administrative Interpretations (US Chevron deference)

If a statute administered by an agency is ambiguous with respect to the specific issue, the courts will defer to the agency's reasonable interpretation of the statute. This rule of deference was formulated by the United States Supreme Court in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

14.8. Avoidance Canon (Canon of Constitutional Avoidance)

If a statute is susceptible to more than one reasonable construction, courts should choose an interpretation that avoids raising constitutional problems. In the US, this canon has grown stronger in recent history. The traditional avoidance canon required the court to choose a different interpretation only when one interpretation was actually unconstitutional. The modern avoidance canon tells the court to choose a different interpretation when another interpretation merely raises constitutional doubts.[

14.9. Avoiding Absurdity

The legislature did not intend an absurd or manifestly unjust result.[]

14.10. Clear statement rule

When a statute may be interpreted to abridge long-held rights of individuals or states, or make a large policy change, courts will not interpret the statute to make the change unless the legislature clearly stated it. This rule is based on the assumption

that the legislature would not make major changes in a vague or unclear way, and to ensure that voters are able to hold the appropriate legislators responsible for the modification.

Leges posteriores priores contrarias abrogant (Subsequent laws repeal those before enacted to the contrary, aka "Last in Time") .When two statutes conflict, the one enacted last prevails.

15. The primary rule

The first principle of interpretation is the literal or grammatical interpretation which means that the words of an enactment are to be given their ordinary and natural meaning, and if such meaning is clear and unambiguous, effect should be given to a

Connecticut Nat'l Bank v. Germain 112 S. Ct. 1146, 1149 (1992) (US Supreme Court)

> "In interpreting a statute a court should always turn to one cardinal canon before all others. . . .Courts must presume that a legislature says in a statute what it means and means in a statute what it says there…when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

State v. Ogden, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994) (Supreme Court of New Mexico)

: "The principal command of statutory construction is that the court should determine and effectuate the intent of the legislature using the plain language of the statute as the primary indicator of legislative intent."

State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (Supreme Court of New Mexico)

> "The words of a statute . . . should be given their ordinary meaning, absent clear and express legislative intention to the contrary," as long as the ordinary meaning does "not render the statute's application absurd, unreasonable, or unjust."

. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (U.S. Court of Appeals for the Second Circuit)

: "As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case

16. Some presumptions

Statutes may be presumed to incorporate certain components, as Parliament is "presumed" to have intended their inclusion**.** For example:

- Offences defined in criminal statutes are presumed to require mens rea (a guilty intention by the accused),
- A statute is presumed to make no changes in the common law.
- A statute is presumed not to remove an individual's liberty, vested rights, or property
- A statute is presumed not to apply to the Crown.
- A statute is presumed not to apply retrospectively
- A statute is to be interpreted so as to uphold international treaties;
- It is presumed that a statute will be interpreted ejusdem generis, so that words are to be construed in sympathy with their immediate context.

17. Presumption of constitutionality

That there is a presumption of constitutionality of statutes is not in doubt.

Ndyanabo vs. Attorney General [2001] EA 495 CA (T)

> "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

Odunga J in Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR

> In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional. However, the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.

18. The constitution as an integrated whole

Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997) UGCC 3

> Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.

See also Olum v. The Attorney-General of Uganda [2002] E.A. 508 U.S.I.U. v Attorney-General & Another(Majanja J) [2012] eKLR]: Accepted by Odunga J in Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR

> Whereas a holistic interpretation I called for, care must be taken to read into the constitution meanings which are not in the constitution

In Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR, (SC)

> "…But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.".

19. The concept of the living constitution

Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57, the Constitution is a living thing: it adopts and develops to fulfill the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions judicial activism vs judicial self restraint

In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:

> "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."

Richard Nduati Kariuki vs Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356 Nyamu, J

> "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."

Charles Lukeyen Nabori & 9 Others vs. the Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,

> "…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."

20. Determining the constitutionality of ordinary legislation

Courts are frequently called upon to determine the constitutionality of legislation. This is a potentially hazardous task as the legislature frequently considers itself capable of determining the constitutionality of legislation. Indeed understanding Order No 47, the speaker is obliged to determine the constitutionality of all bills presented for debate. The passing of a bill necessarily presupposes that legislature has considered the constitutionality of legislation. Querying the constitutionality of legislation therefore means second guessing the decisions of parliament and are interpreted by parliament as interference by the legislative mandate. Courts are anxious not to be seen as interfering with the work of the other arms of government. Courts are therefore understandably wary of second guessing the decisions of the legislature. Accordingly, the courts have also developed some principles that they follow in determining the constitutionality of legislation.

In the case of Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others NRB HC PET NO 7 OF 2014 [2015] eKLR the court enumerated some guiding principles that constitutional courts use when determining the constitutionality of legislation.

It is now accepted that in interrogating the constitutionality of a provision of a statute or a statute, the starting point is statutory interpretation. There are several principles which have been developed over the years that must be taken into account.

The first guiding principle is that a statute is presumed to be constitutional unless the contrary is proved. This was reiterated in the case of Wyclife Gisebe Nyakina & another v Institute of Human Resource Management & another {Petition No 450 of 2013} [2014] eKLR where Mumbi Ngugi, J, quoting Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers v Kenya Revenue Authority & Others High Court Petition No. 544 of 2013 stated as follows:

> "The principles upon which the court determines the constitutionality of statutes are now well settled. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. In considering whether an enactment is unconstitutional, the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485, Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009 [2010] eKLR, Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)), Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)". (Emphasis added)

The second guiding principle is that the courts are concerned only with the power to enact statutes not with their wisdom. This was well stated in the dissenting decision in U.S v Butler, 297 U.S. 1 [1936], in the U.S Supreme Court where it was observed that:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government." [Emphasis supplied]

Clearly therefore, the primary role of the Court is to interpret the law, as enacted by Parliament, and that entails giving effect to the legislative intent of Parliament. Thus, the Court is not concerned with 'what ought to be' but with 'what is', as exemplified in the Indian Case of Re Application by Bahadur [1986] LRC 545 (Const.), where it was stated:

> "I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown…"

In this regard, the Court in Republic vs The Council of Legal Education [2007] e KLR, cited with approval the Indian Case of Maharashtra State Board of Secondary and Higher Secondary Education and Another v

Kurmarstheth [1985] LRC where it had been found as follows:

> "…It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation…"

The third guiding principle is that the purpose and effect of the statute or provision impugned must be considered in determining the constitutionality or otherwise of a statute. This test was well stated by the Supreme Court of Canada in the case of R. v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, in the following words:

> "I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either unconstitutional purpose or unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced with the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity." (Emphasis added)

The fourth guiding principle is that the court must look at the character of the legislation as a whole.

The fifth guiding principle is that the provision or statute alleged to contravene the constitution must be juxtaposed against the provision(s) of the constitution alleged to be impugned to determine the variance. That is to say, a comparative enquiry must be done to determine whether the statutory provision squares out with the constitutional provision. In the majority decision of the US Supreme Court in U.S v Butler, 297 U.S. 1 [1936], it was held that:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." [Emphasis added]

Finally, within that exercise of seeking to determine the constitutionality of any statutory provision, there is the overarching constitutional obligation to interpret the constitution itself, in accordance with the constitutional construction imperatives stated in Article 259'

21. Criticism

Critics of the use of canons argue that canons impute some sort of "omniscience" to the legislature, suggesting that it is aware of the canons when constructing the laws. In addition, it is argued that the canons give credence to judges who want to construct the law a certain way, imparting a false sense of justification to their otherwise arbitrary process. In a classic article, Karl Llewellyn argued that every canon had a "counter-canon" that would lead to the opposite interpretation of the statutes

22. The constitution of Kenya as a transformative constitution

22.1. Meaning

Karl Klare, Legal Culture and Transformative Constitutionalism, South African Journal of Human Rights, Vol. 14 (1998),

"By transformative constitutionalism I mean 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."

22.2. Distinction

Ulrich Karpen in 'The Constitution of the Federal Republic of Germany' distinguishes between the two "…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."

A transformative constitution is different from the classical constitution which focused primarily on the structure of the state and the powers and functions of key state organs (a primary aim being the separation of powers). In due course many constitutions adopted Bills of Rights, **but on the whole did not concern themselves with the purposes for which state power should be exercised.** A transformative constitution is generally understood as that which seeks to make a break with the previous governance system. It aims not only to change the purposes and structures of the state, but also society. It is value laden, going beyond the state, with emphasis on social and sometimes economic change, **stipulation of principles which guide the exercise of state power, requiring state organs, particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society**. It requires positive initiatives and legislation by the state, and in cases of failure, courts may instruct them to do so and even elaborate what needs to be done. There is **considerable emphasis on the rule of law, defined not in any technical sense, but signifying a new kind of constitutionalism**.

Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLR

> : "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

Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR Odunga J

> The current Constitution of Kenya, 2010, is a product of a long struggle for democracy spanning decades by the people of Kenya. It is therefore partly a response to many years of misrule by a single party dictatorship. One must therefore start from the presumption that the provisions dealing with Kenya's political system were meant inter alia to correct the historical deficiencies that placed the people at the mercy of the executive by usurping the people's sovereignty and giving the executive unchecked power over all other institutions of governance. This was appreciated by the Supreme Court In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion Application No. 2 of 2012, where it held that we ought to take into account the agonized history attending Kenya's constitutional reform. Accordingly, in interpreting the Constitution it important that we do so while keeping in mind what Kenyans intended to achieve by retiring the former Constitution and substituting it with the current Constitution

Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another Constitutional Petition No. 234 OF 2017 [2017] eKLR,

> '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

Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010:

> "A scrutiny of 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." Per Ojwang, JSC

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012

> "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 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."

22.3. Characteristics of a transformative constitution

- Substantive equality
- Justiciable social-economic rights and positive state duties
- Vertical and horizontal application of the Constitution
- The concept of indivisibility and interrelatedness of rights
- Democracy and Participatory Government
- Multiculturalism
- Historical Self-consciousness

22.4. Implication for constitutional interpretation

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012

> 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…In interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. An example of such purposive interpretation of the Constitution has been articulated by the Supreme Court of Canada in R v Big Drug Mart (1985). In paragraph 116 of the ruling, the Court states: The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

23. A history of constitutional interpretation from literal and pedantic to liberal and purposive

Prior to the enactment of the CoK 2010, courts in Kenya oscillated between a literal and purposive interpretation of the constitution. The predominant approach was however literal. More so, when it came to the interpretation of the Bill of Rights; Most courts adopted a retrogressive approach that severely constricted the democratic space. But there were flashes of brilliance that heralded the new dawn that finally came to pass in August 2010.

Githu Muigai 2004, in another look at the problem of constitutional interpretation, EALJ took the position that **t**he courts had adopted an unprincipled eclectic pedantic inconsistent and conservative approach to constitutional interpretation. This, according to Githu, was wrong because the constitution is more of a political charter than a legal document.

In Gibson Kamau Kuria (1985), the court found that rights under the bill of rights were unenforceable because the then Chief Justice had not made rules under section 84 for their enforcement

In Matiba –vs- The Attorney –General Misc. Application No. 666 of 1990 the court found an escape route in technicalities of procedure to throw out a constitutional petition challenging the constitutionality of detention without trial

> "An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularly invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement

The court in El Mann vs Republic 1969 EA 357 infamously held that the constitution is to be construed like any other act of parliament.

But probably the worst of the worst came from a politically correct expatriate judge Norbury Dugdale who decreed in Joseph Maina Mbacha & 3 ors vs. AG (1989) that the enforcement provisions in the bill of Rights were 'as dead as a dodo' because the CJ had not made rules under s 84(6)

Justice Dugdale was at it again in Fotofom vs AG & 3 ors (1993) when he announced that Because of s 16 of the Govt Proceedings Act, Cap 40,an injunction could not issue pursuant to s 84, against the government to prevent a violation of a right under the bill of rights .This was despite the clear wording of s 84 which does not limit the type of orders under that section

An interesting oscillation took place in the context of applications for anticipatory bail under section 84 of the 1969 Constitution

In Samuel Muchiri W'Njuguna vs R HC MSC 710 of 2006 Rawal, Kimaru JJ progressively found that anticipatory bail possible despite not being mentioned in section 84. The two judges had very little support from their more politically correct colleagues. In Daniel M M'Kirimania vs AG HC Msc 998 of 2001 and Peter Mwangi Kahutu vs AG HC CR REV 9 0f 1999 , the courts found that since the right was not mentioned in section 84, it did not exist. In Titus Musyoka vs R HC CR A 142 of 2004 the court found that since the right was not provided for in the CPC, it does not exist!

In Stephen Mureithi vs AG,(1981) the court had no hesitation finding that all public servants hold office at the pleasure of the president.

In John Harun Mwau vs AG (1988) the court found that a citizen could not challenge the action of the state to deny him a passport on the grounds that it denied him his freedom of movement

In Raila Odinga vs AG (1988) it was held that a citizen could be detained without being given reasons for such detention

Gitobu Imanyara vs AG (1991)

The courts had no hesitation in declaring that The provision under s 2A of the 1969 Constitution that Kenya shall be a single party state did not infringe on the freedom of association under s 70(b) and 80

But there were progressive voices. In Felix Marete Njagi vs AG [1987] KLR 690,Shields J. Had this to say about section 84;

> "The Constitution 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 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

In Njoya vs AG(2005) the court rejected the pedantic approach and followed the Tanzanian case of Ndyanabo vs AG of TZ 2001 EA 485 (TZ) in finding that the constitution is not an act of parliament. The court should adopt a broad, liberal, and purposive, construction. The constitution embodies certain values and principles and it is the duty of the court to interpret the constitution in such a manner as to give value to those principles. Samatta CJ in Ndyanabo vs AG of TZ 2001 EA 485 (TZ) had held that The constitution (of Tanzania) is a living instrument having a soul and a consciousness of its own. It must not be crippled with narrow and technical interpretation. It must be construed in tune with the lofty purposes for which it was made. It must be construed liberally and purposively

In Crispus Njogu vs AG,(200) the court rejected the infamous El Mann doctrine and found that the constitution is not an act of parliament it must be interpreted broadly or liberally not in a pedantic way

In the post Moi era, there were no shortage of progressive interpretations that sought to redress previous injustices

Dominic Arony Amolo vs the Attorney General (2003), a sum of Kshs.2.5 million was awarded in the year 2005, for similar violations; The court found that the limitation of actions Act does not apply to constitutional rights litigation. The plaintiff's claim filed in the year 2003 which was more than 20 years after the cause of action arose, was allowed.

Nyamu J. (as he then was), considering a similar suit in the matter of Lt. Col. Peter Ngari Kagume & others vs the Attorney General Constitutional Application No.128 of 2006 and , whereas he did not grant the orders sought, he certainly did not shut the door on any litigant who could sufficiently explain the delay in approaching the court.

> "The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process. ……. In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."

But in Wachira Weheire v Attorney- General [2010] eKLR the court rejected Judge Nyamu's approach and emphatically stated that the limitation of actions act does not apply to actions brought to enforce fundamental rights and freedoms

> We have considered the case Lt. Col. Peter Ngari & Others -Vs- Attorney-General (supra), which was relied upon by the defendant. We note that the Judge did not say that there was a limitation period for filing proceedings to enforce constitutional rights, though he found no justification for the delay in that particular case. We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual, under the Constitution of Kenya. Indeed, Section 3 of the Constitution provides that the Constitution shall have the force of law throughout Kenya, and if any other law is inconsistent with the Constitution, the Constitution shall prevail

Dr. Odhiambo Olel vs the Attorney General, HCCC (Kisumu) No.366 of 1995, a sum of Kshs.12 million was awarded, including exemplary damages of Khs.4 million;

James Njau Wambururu vs the Attorney General (supra), where Kshs.800, 000/= was awarded in;

Rumba Kinuthia vs the Attorney General, HC. Misc. App. No.1408 of 2004, a sum of Kshs.1.5 million was awarded in 2008.

In conclusion, it is safe to say that prior to the enactment of the CoK 2010 (in the Moi era) constitutional interpretation was largely pedantic and restrictive. In the Post-Moi it is largely liberal and purposive but we still have lapses like those of Judge Nyamu

24. Role of the courts

The judiciary is given a key role in the interpretation and shaping of the constitution. It is the ultimate custodian of the constitution. More and more Kenyans are taking advantage of the user friendly enforcement mechanisms in the CoK 2010 to litigate various constitutional issues. The courts have the capacity to either constrict or expand the democratic space through their interpretation of the constitution. The progressive CoK 2010 gives courts considerable latitude in fashioning remedies in constitutional rights litigation.. Courts have the authority and, indeed, the responsibility, whenever called upon to do so to develop the law to give effect to the constitution. Article 259 compels the courts to promote values that underlie an open and democratic society based on human dignity, equality, equity, and freedom—and the spirit, purport and objectives of the Bill of Rights. The constitution must be interpreted to promote its purposes, values and principles (of which there are many, including integrity, equity, social justice, inclusiveness, transparency and accountability), and in a manner that advances the rule of law and human rights, facilitates the development of law and contributes to good governance

Under a transformative Constitution, judges bear the ultimate responsibility to demand that the state must justify itself not only by reference to authority, but by reference to ideas and values. We have, it is said moved from a culture of authority to one of justification. Political realities must now be factored into the process of constitutional interpretation. The is a penumbral grey area where law and politics intersect and mix freely and it is naive to pretend that law can be divorced from politics. The former attorney General Professor Githu Muigai had once warned that the constitution is a political charter and

must be interpreted as such. And the court in Ndyanabo vs AG of Tanzania 2001 EA 485 (TZ) decreed that the constitution is not an act of parliament and can never be interpreted as such.

25. The importance of developing indigenous jurisprudence

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory opinion No 2 of 2012 eKLR Per Mutunga J at paragraph 8.8

The obligation of the Supreme Court is, therefore, to cultivate progressive indigenous jurisprudence in the momentous occasions that present themselves to the Court. By indigenous jurisprudence, I do not mean insular and inward looking. The values of the Kenyan Constitution are anything but. We need to learn from other countries and from scholars like the distinguished Counsel who submitted before us in this Court. My concern, when I emphasize "indigenous is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of our other jurisdictions and courts, however distinguished. This Court and the Judiciary at large has, therefore, a great opportunity to develop a robust, indigenous, patriotic and progressive jurisprudence that will give our country direction in its democratic development.